# The Voice Of The Child In High Conflict Divorce:

## Systemic, Developmental, and Practical Considerations



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32 Daniel Webster Highway, Suite 17

Merrimack, New Hampshire USA 03054

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## Abstract

The United Nations Convention On The Rights Of The Child ("Convention") mandates that the child be given the opportunity to have her voice heard in all matters that bear upon her well-being and that her thoughts and feelings, thus obtained, should be considered by the court as a function of her age, maturity, and larger best interests. The present paper examines this mandate in light of conflicting research regarding whether soliciting the child's voice serves her best interests and those family systems dynamics which are known to corrupt the child's voice. These include the child's chameleon-like efforts to fit into her immediate emotional environment, the pressures associated with recency and the proximal parent, role and boundary corruption in the form of adultification, parentification, infantilization and alienation. These dynamics and the foundational question of the child's maturity are discussed in terms of attachment security, yielding seven specific recommendations regarding the forensic evaluator's effort to hear the voice of the child.

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> " … 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."
>
> Justice J. Williams, 1999

> " 'You are the one who makes the decisions, and I need to be heard so people may understand how I feel or what I need. Listen to me, since no one else will, and try to understand where I'm coming from. Maybe I am a child, but I'm not dumb; I know right from wrong. I need to know that you will make the right decisions for me, so that I can live life the way it's supposed to be.' "
>
> A child's plea
>
> as quoted in Khoury, 2010

In the days when children were seen and not heard, post-divorce custodial assignments were foregone conclusions determined by a parent's gender or one of a succession of generic rubrics. For centuries, children were simply their father's possessions, like so many horses or plows (e.g., Mason, 1994). With the start of the Industrial Revolution, children were newly understood to need the unique and exclusive succor that only a mother could provide (e.g., Artis, 2004).

As the idea of gender equality emerged over the course of the twentieth century, post-divorce custodial assignments gradually became a function of pre-divorce parenting responsibilities. Thus, one popular heuristic assigned post-divorce care exclusively to the child's pre-separation primary caregiver (Buehler & Gerard, 1995). Another allocated post-divorce parenting responsibilities proportionate to the parents' respective pre-separation caregiving contributions (American Law Institute, 2002). A third simply placed the child in the care of the parent believed least likely to do harm (Goldstein et al., 1999).

The idea that post-divorce parenting rights and responsibilities should be determined at least in part in response to the child's idiosyncratic needs is new to the last quarter century and coincident with the near universal adoption of the Best Interests of the Child Standard (BICS). Indeed, the BICS is specifically invoked in Article 3 of the United Nations Convention On The Rights Of Children (1989; "Convention") as foundation for the expectation that its' one hundred and ninety four signatories,

> "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."

Much as a mandate calling for inclusion of the child in matters concerning her[1] own welfare may appeal to our twenty-first century, rights-based ethos, in practice it raises a host of legal, developmental, systemic, and practical concerns (e.g., Birnbaum & Bala, 2010a; Bessner, 2002; Bryant, 2008; Crossman et al., 2002; Smart, 2002; Williams, 1999; Wolman & Taylor, 2010). Among these, the present paper addresses the single question which has been described as

[1] For the ease of discussion, the generic child is referred to as female. Certainly this discussion is inclusive of children of both genders.

prerequisite to all others, that is, "…whether the child is capable of forming his or her own views." (Martinson, 2010 in *B.J.G.* v. *D.L.G.,* 2010 YKSC 44).[2]

**The value of soliciting the child's voice.** The Convention is surely the most widely endorsed policy calling for children's inclusion in legal processes bearing on their future, but it is by no means alone. In the United States, the Uniform Marriage and Divorce Act (UMDA; National Conference of Commissioners on Uniform State Laws, 1971) requires consideration of "the wishes of the child as to his custodian."[3,4] In Great Britain, the Children's Act (1989) calls for deference to, "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)."

Practice standards governing the conduct of custody evaluations endorse a similar expectation:

> "Evaluators shall consider the stated wishes and concerns of each child as these relate to the allocation of parental rights and responsibilities if the child is of sufficient developmental maturity to independently express informed views." (Association of Family and Conciliation Courts, 2006; standard 5.8[a])[5]

These and comparable guidelines have been established in the belief that a child's opportunity to be heard serves her best interests to the degree that it communicates a "sense of inclusion and empowerment" (Davies 2004). One recent Canadian ruling summarizes, stating that,

[2] Acknowledging Jaffe, Ashebourne & Mamo's (2010, p.141) common sense reminder that, "The notion that children's views have to be 'independent' of those of their parents is unrealistic and defies the whole notion of parenting."

[3] Section 404(a) of the UMDA provides that the court may interview the child in chambers to solicit her wishes with regard to custody and as to visitation. The court can allow counsel to be present at the interview. A record of the interview must be made and retained as part of the record in the case so as to be available upon appeal.

[4] Elrod & Spector (2002),find that all but five of the United States call for the trial court's consideration of the child's wishes among the variables that will determine custody.

[5] The American Psychological Association's (2009) custody evaluation standards are notably silent on this subject.

> "When children are actively involved in problem solving and given recognition that their ideas are important and are being heard, they are empowered and their confidence and self esteem grow. They feel that they have been treated with dignity. In addition, children's participation in the decision making process correlates positively with their ability to adapt to a newly reconfigured family." (B.J.G. v. D.L.G., 2010 YKSC 44)

Conversely, the Court has stated that,

> "There are indications in empirical studies that *not* listening to what children have to say during divorce processes has had unintended negative effects. As a result of their exclusion, children complain about feeling isolated and lonely during the divorce process and many older children express anger and frustration about being left out." (L.E.G. v. A.*G*., 2002 BCSC 1455; emphasis added).[6]

Judicial opinion notwithstanding, in fact, mental health professionals have been slow to reach consensus regarding the balance of potential harm and benefit to the child invited to speak to her own future custody. Many professionals take the position that, "…asking a child about his or her wishes regarding custody will gravely affect that child" (Crosby-Currie, 1996, p. 291) or increase the "…risk of children being manipulated or pressured by parents" (Warshak, 2003).

> "For a child to be placed in a position of making such a choice is to inherently make him/her guilty of disloyalty to the parent he/she does not choose; this constitutes an existential betrayal of a critical biological tie." (Kaslow & Schwartz, 1987)

[6] See also Keough (2002, p. 371): "Children that are excluded from custody access decision-making generally feel alienated, angry and fearful."

Drawn into the fray, these children are generally believed to be at high risk for feelings of disloyalty, guilt and anger (Rosen, 1977). Elsewhere, I have described this dilemma as,

> "… 'Sophie's Choice' in reverse, the kind of impossible dilemma which can traumatize a child who is already burdened with the powerful emotions which accompany any family's break-up (Garber & Landerman, 2006).

By contrast, recent publications more vocally espouse a cautious alternative, referring to the conventional wisdom as, "[a] long held myth that harm will come to those children who participate in the legal system by sharing their thoughts and feelings about custodial placement" (Gould and Martindale, 2009, p.303; see also: Bridge, 2010; Parkinson, Cashmore & Single, 2005; Kelly, 2007; Leibmann & Maden, 2010; Nasmith, 1992; Parkinson, Cashmore & Parkinson, 2008; Saywirz, Comparo & Romanoff, 2010). These authors generally support the idea that the child's best interests are served by being heard, even if the child's contribution may not be heavily weighted in the court's final determination (Crossman et al., 2002; Smith, Taylor & Trapp, 2003).[7]

Unfortunately, very little empirical data informs this debate to date. Among these, Wolman and Taylor (1991, p. 414) report that, "…certain aspects of the experience may actually contribute to the child's development of adaptive coping mechanisms." The children who participated in this study are said to have experienced inclusion in the custody determination process as positive and validating. The experience is reported to have diminished their guilt and anxiety, improved their self-image, and, "foster[ed] the articulation of interpersonal boundaries between parent and contested child."

[7] At the extreme is Kandel's (1994) solution: "[when] fit parental custodians … cannot agree on the child's custody, the choice of children six years old and older should be legally dispositive as to their custody."

One (unpublished) study looked retrospectively at the long term consequences of inclusion in the custody determination process. Among the adult-children interviewed, those who were involved in their own post-divorce custodial placement,

> "… identified a multitude of conflicts and disappointments that were not identified by participants who did not express their preference, however, those who expressed their preference were able to secure a positive relationship with both their parents in the future. The majority of participants who were not involved in their own custody determination lost contact with their non-custodial parent after the divorce" (Rahabi, 1999).[8]

Litigating parents seem to agree. An Australian survey of custody litigants found that a majority supported the idea of including their children in the decision making process. Among the minority who did not, the chief concern was that the process would cause the children harm, perhaps by requiring that they choose between their parents (Cashmore & Parkinson, 2008).

**The emergence of the child's voice.** Clearly, references to the child's "voice" and "views" are euphemisms. Neither vocal apparatus nor vision are necessary to have thoughts and feelings, wishes and fears related to one's own future care. Although this discussion assumes that the children in question are physically healthy,[9] the forensic examiner will sometimes need to enlist the assistance of relevant experts and creative accommodations so as to overcome a child's particular sensory, cognitive and/or psychological impediments in order to hear her "voice."



[8] As provocative as this observation may be, the study fails to adequately explain cause and effect. While it may be that when children are not involved in the custodial determination process they tend to lose touch with a non-custodial parent, it is at least equally likely that evaluators tend not to solicit the voices of children who have a parent who is not likely to be involved in the child's post-divorce care.

[9] "Healthy" in this context refers to intact developmental and cognitive functioning. I would be very cautious applying these general observations to certain populations, including children with mental retardation, abuse, neglect and other trauma histories, and those with certain differences attributable to genetic anomalies, pre- and peri-natal compromise, and toxic (including maternal substance abuse) exposure.

Any parent or student of development knows that every child has a unique voice from the time that they are born. Long before rudimentary language is acquired, idiosyncratic preferences are evident in facial expressions, non-verbal utterances, avoidance and approach behaviors. Above and beyond certain innate predispositions (e.g., sweet versus sour) and those that might be associated with temperamental differences (Chess & Thomas, 2002), experience teaches each of us what feels good and what hurts, what causes distress and what relieves it, shaping our feelings, thoughts, behaviors and expectations.

In the specific case of a child's relationship with a caregiver, experiences accumulate over time to create an internal working model (IWM; Bowlby 1969, 1973). The IWM is a dynamic agglomeration of one's experience of a specific caregiver's sensitive and responsive care which allows the child to create expectations about that caregiver's future care. Although there's no reason to believe that the toddler explicitly thinks through these expectations in words, if she did, it might sound like, 'Daddy made me feel better last time so I predict that he will this time, too.'

Thus, by at least twelve to eighteen months of age, the healthy toddler expresses opinions about her caregivers through her behavior, if not her words (cf., Ramsay, 1983).[10] In the terms of attachment theory (Ainsworth, 1989; Sroufe et al., 2005), a child is said to have a *secure* attachment to a caregiver when she behaves as if she expects that caregiver to be sensitive and responsive to her needs. By contrast, a child is said to have an *insecure* attachment when she

[10] "The Convention acknowledges that children can and do form views from a very early age and refers to children's 'evolving capacity' for decision-making" United Nations (undated) "Fact Sheet" available at http://www.unicef.org/crc/files/Right-to-Participation.pdf

behaves as if she expects that a specific caregiver will be cold and aloof (*insecure-avoidant*) or overpowering and clingy (*insecure- resistant*) in response to her needs.[11]

The quality of a child's attachment to a specific caregiver is generally observed to be stable across development and highly predictive of later functioning, all other things being equal (Sroufe et al., 2005). However, family law professionals know firsthand that upheaval is more the rule than the exception among children whose parents bring their custody battles before the courts. The experience of co-parental conflict, separation and divorce, the loss of some caregivers and the introduction of others, changes of schedules and homes, changes of peer groups and schools, and –perhaps most powerfully- triangulation into parents' conflicts, all predictably disrupt attachment security (e.g., Bowlby, 1969, 1973).

**Factors confounding the child's voice.** This is the stage upon which the forensic evaluation is briefly played out, the context in which the examiner solicits the child's voice. No matter her age, this child has likely lost all sense of normalcy and stability. The future is uncertain. She may be anxious and depressed, angry and fearful and regressed. She is not functioning at her developmental best.

Add to this intra-psychic picture those co-occurring systemic processes so common among high conflict families. These are the real and perceived push-pull dynamics inevitably associated with the breakdown of old alliances and the struggle to create new ones, forces likely to both disrupt the child's world and confound her voice. These include:

1. **Chameleon-like responses associated with proximity and recency.** Many children who migrate between highly conflicted caregivers adapt by changing their colors to fit the emotional environment. These children quickly learn to read their parents' feelings and

[11] Readers unfamiliar with attachment theory are directed to Willemsen & Marcel (undated) "Attachment 101 for Attorneys" available at http://www.psychology.sunysb.edu/attachment/online/attachment101.pdf.

respond in kind. Thus, the chameleon-child subjugates her voice to that of the proximal parent in a desperate effort to maintain love, particularly in light of her observation that conflict ends love (e.g., Brady et al., 1999; Garber, 2008; Kass, undated).

Tragically, the emotionally fragile parent-cum-custody litigant hears this echo and mistakes it as independent validation fueling his or her continuing conflict with the child's other parent. To illustrate:

> "[Father] is in fact hiding behind the expressed views of his children and such views are clearly parroting his own assessment of the mother, which he has shared with them … These children do not want to disappoint him or risk his rejection, so their response is not surprising. He must create an environment where the children will feel that, by having a relationship with their mother, they are not betraying their father. He has been unable to do this" (Ampuero v. Ampuero, 2006 ONCJ 595)

Smart (2002, p. 312) quotes a 16 year old girl involved in her parents' custody litigation stating,

> "You sort of change, depending what house you're at. I don't know about other people, but I find that I'm a different person at a different house. 'Cause the different environment and . . . my parents react differently to different things. It is difficult to explain. So I adapt to my environment, I suppose. I mean, my core personality doesn't change, I suppose. But the way I behave does…"

The forensic examiner faces the dilemma of determining whether the child's voice in interview is her own. With no prior experience with the child against which to compare her responses, interviewed in an unfamiliar and anxiety-filled environment by a stranger, newly

arrived after a long car ride in the company of one parent, attuned to that parent's implicit presence in a near-by waiting room, and anticipating the long ride back home ("so … what did you two talk about?"), this is a child under pressure.[12]

Add to this the demand characteristics of the interview itself –anxiety about the nature, limits and potential impact of her words, confusion associated with unfamiliar language, a wish to please the examiner who is seen as powerful (Kwock & Winer, 1986)- and the pressure intensifies exponentially. This may be nowhere more obvious than when judges conduct *in camera* interviews (Gould & Martindate, 2007), an increasingly common phenomenon in some jurisdictions (Birnbaum & Bala, 2010a).[13,14]

2. **Scripting, coaching, bribes and threats.** Above and beyond the implicit influences of a parent's proximity and recency and the pressures associated with interview, the forensic examiner must be alert to corruption of the child's voice caused by a parent's direct instruction, promises and threats. Some parents will explicitly script and rehearse the child's words as if practicing lines for a role in a play. Others will promise rewards or threaten punishments depending upon the child's performance in interview.

To illustrate:

> "While it was proper for the court to consider the wishes of the children, whom she interviewed in chambers, we think the chancellor's opinion itself reflects that

[12] Noting that,, "… some amount of pressure is inevitable in any child custody consideration" Mahoney v. Mahoney, 354 PA.Super. 585, 512 A.2d 694, 697 (1986))

[13] "The practice of interviewing children in Chambers is not an ideal way to ascertain a child's wishes. The interview is conducted in an intimidating environment by a person unskilled in asking questions and interpreting the answers of children. In the relatively short time those interviews take, it is difficult to investigate with sufficient depth and subtlety those perceptions of a child which explain, justify or represent the child's wishes. Moreover, the interview may be perceived as a violation of the judge's role as an impartial trier of fact who does not enter the adversarial arena. The impartiality may also be compromised by the judge assuming the role of inquisitor in questioning children." Abella & L'Heureux Dubé, (1983). For the opposing position, see Fernando (2008).

[14] Whether and how "taint" hearings may come to be used in these circumstances is yet to be seen (cf., State v. Michaels, 642 A. 2d 1372 - NJ: Supreme Court 1994; Underwager & Wakefield, 1997).

> she was overly impressed by the interview with them. The children had been in the mother's care and it was obvious that they had been counseled, in the language of the opinion, 'in her own interest'" (Wallis v. Wallis, 200 A. 2d 164 - Md: Court of Appeals 1964).

As further examples, consider what comes of the voice of the 12 and 14 year old siblings whose mother, "… told the oldest son that she was considering suicide if she lost custody of the two boys" (Jordana v. Corley, 220 N.W.2d 515, North Dakota, 1974) or the five year old whose father, "…did all he could to make access difficult and to persuade Mark, by means of bribing him with toys and promised outings, not to visit his mother" (Drapak v. Drapak, 1986 688, SK Q.B.).

3. **Role corruption.** When parents separate, roles and boundaries are necessarily renegotiated. The child who is prematurely promoted to serve as a parent's ally (adultification) or caregiver (parentification), or whose regressed state is fostered to fulfill a parent's need to feel needed (infantilization) has had her voice corrupted by the needs of an enmeshed parent (e.g., Garber, in press; Gardner, 2006; Johnston, Walters & Olesen, 2005; Minuchin, 1985). The court recognized these dynamics in the case of 10 year old "M":

> "[The evaluator] concluded that M was 'enmeshed' with her mother and consequently hypersensitive to her mother's needs … She said that in this enmeshed relationship, Ms. A. projects her own issues onto M. and has difficulty distinguishing her own feelings and issues from those of M." (A.A. v. S.N.A., 2007 BCSC 594)

Adultified and parentified children pose a unique conundrum for the forensic evaluator. Conscripted into the adult world, these children quickly develop a veneer of social sophistication

which is easily mistaken for maturity, particularly in the context of a single hit-and-run interview. Consider, for example, this judge's observation:

> "I had the opportunity to observe and listen to him. He appears fit and is well groomed and properly dressed. He is well spoken and presents a quiet, but very pleasant manner. He did not appear uncomfortable in the presence of adults, nor did he appear intimidated by the court setting. He displayed considerable maturity and I was much impressed by him." (Johns v. Hinkson, 1996, SK Q.B.)

Upon closer examination, the adultified or parentified child's firm handshake, unrelenting eye contact and impressive vocabulary will prove to be a façade beneath which hides a needy, scared and confused child. A particularly insightful judge described this well in another case:

> "There was considerable evidence that the boys present very well outwardly. They are achieving in school and do have some friends and activities. They appear as well rounded and appropriate to the observer. I find that this represents an outward shell that they have developed to please and protect their mother. It is a shallow guise. These boys have serious problems under their brave exteriors. … I find that the boys' wishes are not based on a full appreciation of their options. Their stated wishes represent their desire to please their mother." (J.W. v. D.W., 2005 NSSF 2)

Burton (2002) illustrates further, quoting a parentified child's voice:

> "Starlight, star bright, first star I see tonight, I wish I may and wish I might have the dream I dream tonight: Please let me be a child with no worries or cares. Let my Mom and Dad realize that my job is theirs."

Role corruption is commonly seen within the aligned dyad as the complement to (and perhaps even one among the causes of) the child's rejection of the other parent. Together, the dynamics of role corruption, estrangement[15] (Drozd & Olesen, 2004) and alienation have recently begun to be recognized as a constellation or "hybrid" dynamic common among high conflict, post-divorce litigants (Friedlander & Walters, 2010).

4. **Alienation.** For all of the theoretical debate, litigation time, expense, and emotional upheaval that have been associated with this concept (e.g., Bala et al., 2010; Fidler & Bala, 2010; Bow, Gould & Flens, 2009; Fidler et al., 2008; Gardner, 2004; Kelly & Johnston, 2001), alienation is nothing more than a necessary and natural relationship dynamic (Garber, 2004). It is a tool which groups use to communicate who is "in" and who is "out" at every level of social organization, from playground cliques to international relations (Sherif, 2001).

In the context of contested custody litigation, an angry, self-serving parent can use this tool as a weapon with which to undermine the quality of a child's relationship with her other parent. When Parent A's unwarranted negative words and actions about Parent B cause their child to become disproportionately insecure with Parent B, she is said to have been alienated. As a result, she may become irrationally resistant to or rejecting of Parent B.

As case in point:

> "… the respondent moved into the same block on the same street as the petitioner and increased his hold on the children, using them as pawns to deliver notes, demanding that the petitioner reconcile with him or that she was an unfit mother and a prostitute … His aim was to promote with the children the idea that the

[15] "A court dealing with the allegation that a child appears 'alienated' must consider whether the child's fear or rejection of the access parent is "reasonable" or "justified", for example, because of child abuse. Even if there is no immediate threat to the child's safety, a child may have very negative feelings towards a parent who has been an abusive spouse" (Catholic Children's Aid Society of Toronto v. H.(L.D.), 2008 ONCJ 783)

> separation and the termination of their family relationship was the sole and personal responsibility of the petitioner. His actions verged on stalking of the petitioner and promoted the parental alienation of the petitioner by the children." (B.S.P. v. D.G.P., 2008 SKQB 63)

Unlike the chameleon-child, the alienated child's voice is likely to be steadfast and resolute even if her reasons for rejecting one parent in favor of the other are rote, disproportionate and incongruent with her emotions. Whether or not she has been adultified or parentified, scripted, threatened or bribed by the aligned parent, her position is likely to be unshakable.

**Age, maturity and the voice of the "mature minor."** Across jurisdictions, the law commonly asserts that as children become older and/or more mature,[16] their wishes and opinions deserve greater weight. Unfortunately, it is not at all clear whether this standard presumes that age and maturity free the child from those pressures which had earlier corrupted her voice, or that, with age and maturity, those pressures are presumed to have become so ingrained that they must finally be recognized as indistinguishable from the child's voice.

The former hypothesis –that age and/or maturity allow the child to discover her voice amidst the cacophony of family pressures- would predict a flood of recantation, rescission, and associated custody changes (with or without the court's involvement) among the children of high conflict parents sometime in later adolescence. With the emergence of sufficient maturity, teenagers whose voices had previously been confounded by chameleon-like adaptations, the pressures of proximity, recency, bribes and threats, role corruption and/or alienation, would newly become able to speak out in their own behalf.

[16] "Age is often a proxy for competence and maturity" (Saywitz et al., 2010, p. 546; see also Begley, 1994).

No such effect has been noted.

Nevertheless, the law continues to suggest that the natural course of development gradually imparts a degree of autonomy deserving of more adult-like participation in the legal process. This idea is commonly framed as a matter of intellectual and cognitive growth. For example: "[t]he thrust of [Article 12 of the Convention] is to ensure that children are capable in the sense that they have the cognitive capacity to form their own views and to communicate them" (Martinson, 2010 in *B.J.G.* v. *D.L.G.*, 2010 YKSC 44).

Indeed, formal operational thinking typically emerges sometime in the later adolescent years, a developmental shift characterized by a new capacity for abstraction, the ability to think beyond me-here-now, and a greater grasp of the shades of gray that exist between black and white alternatives (Arlin, 1975; Piaget, 1983; Webb, 1974). These skills may enable children as young as 12 to demonstrate adult-like decision making in hypothetical situations (Caufman & Steinberg, 2000; Schlam & Wood, 2000).[17] However, decision making in real life proves to be another matter entirely.

In real life, "emotional and cognitive factors interact to influence decision making" (Cauffman et al, 2010, p. 193). That is, when the anxiety associated with potentially life altering choices enters the formula, no one acts their mature best. Thus,

> "Adolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures … [and are] less likely to recognize the risks inherent in the various choices they face or to consider the long-term,

[17] "Evidence indicates that children over the age of 14 are virtually indistinguishable from adults in their decision making capacities; that children in the age range 10-12 years show major similarities with older age groups; and even the decisions of younger children tend to be congruent with decisions of more mature decision-makers, even though they tend to be less able to provide arguments for their decisions." (Office of the Minister for Children and Youth Affairs, 2010, p. 60)

> and not merely the immediate, consequences of their legal decisions. ” (Grisso et al., 2003 p. 357)

This reasoning has been heard in the courts with regard to the child's voice in custody decisions:

> "… adolescents' brains, as we understand them, are under construction. That's why we see more risk-taking behaviour in adolescents. That's why we see impulse control problems. That's why we see judgment problems with adolescents ... Adolescents don't necessarily make the best decisions. So it strikes me as particularly interesting that somehow they're afforded and by some feel that they should be making these big, huge decisions about severing ties with a parent." (B. Fidler, Ph.D., as quoted in S.G.B. v. S.J.L., 2010 ONSC 3717)

In fact, a child's early establishment of and continuing access to secure attachment relationships will predict her capacity to speak in her own best interests better than any other developmental milestone or measure, including intelligence and the achievement of formal operational thinking (Benzies & Mychasiuk, 2009; Blum et al., 2002; Criss et al., 2002; Glendinning, 1998; Masten et al., 1999; Sroufe et al., 2005). This is particularly well illustrated in longitudinal studies of resilience in response to stress. Emphasizing the protective value of secure attachment experiences throughout development, Sroufe et al., (2005, p. 226), summarize, stating,

> "Children with histories of early positive care and early histories of competence are significantly less likely to evince problem behavior in the face of stress than those with unsupportive histories."

By this standard, the child who enjoyed a secure relationship with at least one parent before the adult conflict erupted and -building on this foundation- has the benefit of at least one healthy emotional anchor outside the home as the drama unfolds (e.g., a grandparent, neighbor, coach, clergyperson or therapist; Rutter, 2000, 2006) may yet be able to find her voice.

> "If self-esteem and trust are established early, children may be more resilient in the face of environmental stress. They may show poor adaptation during an overwhelming crisis, but when the crisis has passed and the environment is positive again, they may respond more quickly" (Sroufe, 1978, p. 56)

This child's experience stands in support of the law's implicit assertion that with age and maturity, her voice is deserving of greater weight. Her relatively healthy foundation and continuing extra-familial supports may give her the emotional strength to put her new-found adolescent cognitive skills to good use. Late in adolescence, she may finally be able to see through the pressures that had previously clouded her vision to speak out in her own best interests.

And the child who has known nothing but her parents' intractable conflict? She may be doubly damned: The relationships that should have conferred upon her a degree of resilience to stress are themselves the stressors which demand a resilience that she does not possess. Her native intelligence, genetic predispositions, temperament and physical attributes together with her preparation for interview might make an excellent first impression. Formal operational thinking may allow her to speak broadly about hypothetical what-if's and could-be's. Her chameleon-like compliance, experience of adultification or parentification may have taught her the social skills of a person many years her senior, but don't be misled. She may qualify in many

people's eyes as a "mature minor,"[18] but when it comes to managing her intimate relationships she speaks with the voice of a ventriloquist's dummy.

The court recognizes this with regard to alienation:

> "With respect to the children's views and preferences, where they can be ascertained, the difficulty in an alienation case is determining who … is really speaking through the child's words, and whose views the child is really presenting." (S.P. v. P.B.D., 2007, ON S.C.)

It is this child whose experience makes the second hypothesis credible, that is, that with age and maturity those pressures which corrupt the child's voice become so ingrained as to be indistinguishable from her own. The impact,

> "… becomes extreme in alienated children of 12 years old and older. These children, Dr. Fidler testified, can internalize the effects of alienation to the point where even the alienating parent could not get the child to visit the alienated parent. The child creates its own reasons to dislike or hate the alienated parent – ones which are not real." (A.G.L. v. K. B. D., 2009 ON S.C.)

In response, the court will sometimes acknowledge its helplessness:



[18] "The mature minor rule is problematic. It involves a judge assessing the minor's developmental maturity and capacity for rational, voluntary decision making. This determination is made on a case-by-case basis and is often subjective, as there are no clear procedures for evaluating a minor's decision-making ability." (Canter, 2005, p. 536). Yates & Pliner (1988) found that attorneys conferred "mature minor" status on teenage girls seeking abortions on the basis of the following variables (in descending order of importance): General personality and appearance" (49.2%); Knowledge of the choices and associated risks (42%); Apparent "innate intelligence" (32.2%); Life and work experience (24.7%); Emancipated status or plans (20.4%); Ability to plan for future (19%); Level of education (13.6%); Extent to which minor had consulted with others regarding major life decisions (5.2%).

> "[The evaluator] recommended against any change in custody or further counseling intervention because it would not likely produce any change in the child's entrenched views, given the time that had passed, the results of extensive professional intervention and counseling already undertaken, and the campaign that had been waged against the father." (S.P. v. P.B.D., 2007 ON S.C.)[19]

Or perhaps more pragmatically,

> "A child's views and preferences are not necessarily in that child's best interest. Having said that, the simple fact is that, the older a child is, the more difficult it is to move them (and have them remain there) against their wishes. Simply put, they will ' vote with their feet'" (Collison v. Neely, 2009 ONCJ 758).[20]

**Conclusions and recommendations.** The United Nations Convention On The Rights Of The Child has codified society's emerging recognition that children deserve to be heard in matters concerning their own well-being. In fact, there is no question that every child has a unique voice born of the interaction of nature and nurture. At issue are the developmental, systemic and practical considerations relevant to soliciting the child's voice in the context of contested custody litigation.

Unfortunately, science's voice in these matters has often been as clouded and ambiguous as that of the children whom we seek to serve. The complex dynamics at every level of consideration -among developmental variables within the child, between individuals who compose the family, and between the family, the community within which it functions, and the courts- are confusing in and of themselves. Add to this the confounds attributable to differences of terminology and methods specific to the disparate professions that share an interest in these

[19] See also C. C. v. M. S., 2005 QC C.S.
[20] See also Thomson v. Thomson, 2002 BCSC 271; D.L.G. v. R.A.G., 2010 BCSC 244

questions –clinical, developmental, and social psychologists; social workers and child protection workers; attorneys, child advocates, forensic evaluators and judges- variation in the law by jurisdiction, country and continent, and the limitations associated with the effort to study people who are both combatants in and victims of their own private war. Thus, it is no surprise that,

> "…we know relatively little about how children who are involved in the process think about it, and how those who are not involved feel about their exclusion. There is a clear need for research about the short and long term effects on children of different types of involvement and non-involvement in the disputes that most profoundly affect them" (Bala et al., 2005)

Still, for all of these confounds and limitations, theory, research and case law converge to suggest a number of important –if still tentative- conclusions. In summary:

1. It is both ethically impingent upon the forensic evaluator and in the child's best interests that she be given the opportunity to contribute to the process which will ultimately determine her future custody. In accepting this task, the evaluator must communicate to the child in a manner suited to her needs that her thoughts and wishes are welcome, but not required and, if offered, that her voice will become just one ingredient in the larger recipe with which these decisions will be made. As a corollary, every effort must be made to reassure the child that she is not being asked to choose between her parents.[21]

2. The forensic evaluator must recognize and account for children's natural chameleon-like responses both to the implicit pressures of interview and to those of the proximal parent. The forensic evaluator must furthermore be familiar with the three interwoven "hybrid"

[21] "The child's right to be heard in any proceeding in which her custody is at stake should not be construed as a right to decide but as the right to have her views seriously considered. Such a right to be heard recognizes the child's personhood and dignity, and it ensures that information of potentially unique significance will reach the court. (Atwood, 2003 p. 663)

dynamics that can confound the voice of child triangulated onto her parents' intractable conflicts: role corruption, estrangement and alienation. In that these dynamics cannot be adequately recognized in individual interview with the child (Garber, in press), the professional is therefore prepared to evaluate the family's relevant subsystems (e.g., mother and child; father and child) toward the goal of understanding whether and how the roles and boundaries within the changing family may be corrupting the child's voice.

3. In recommending the weight that might be assigned to a child's voice (or in determining the extent to which the child's voice has been corrupted by others), the forensic evaluator is careful not to be misled by a child's superficial (e.g., social, physical, verbal, cognitive) maturity. This requires that the evaluator account for the child's emotional maturity – her resilience in the face of stress- as may be suggested, in part, by her historical opportunity to enjoy secure attachment relationships within the family prior to the onset of the adult conflict and by her ability to maintain healthy extra-familial emotional anchors despite the parents' conflict. As a corollary, the voice of the child who has never enjoyed secure attachment relationships must be understood for its particular vulnerability to systemic confounds regardless of age and independent of superficial suggestions of maturity.

4. Together, these conditions require that the forensic evaluator be (a) expert in child development and family dynamics and particularly familiar with the mutually compatible ("hybrid") triad of role corruption, estrangement and alienation; (b) skilled interviewing children and families (AFCC, 2006, standard 9.1; Gould & Martindale, 2009; Smart, 2002), (c) familiar with relevant laws, statutes and rulings, (d) prepared to provide the child with a developmentally appropriate understanding of the process, the limits of confidentiality or privilege, if any, and the weight that the court is likely to give to her wishes, and (e) prepared to utilize methods that invite

the child's contribution without leading and which solicit the full range of the child's thoughts and feelings (e.g., Garber, 2007).

5. These conditions determine that the child's voice can be neither adequately solicited nor assigned its realistic weight as a result of a single interview. Instead, the child (a) must be interviewed at least once accompanied by each parent, (b) may be least subject to confounds when the interviewer travels to see her in a familiar environment rather than in any circumstance that requires that she travel in the company of either parent to the interview, and (c) must be approached in a manner that does not suggest that the repetition across interviews means that her first responses were incorrect or unacceptable (e.g., Gould & Martindale, 2007; Crossman et al., 2002).[22]

6. Thus, it is reasonable to recommend that the child's voice cannot be adequately solicited simply by interviewing the child in any combination of circumstances. Instead, child interviews are best embedded within the larger process of a comprehensive family systems evaluation (Gould & Martindale, 2007; Rohrbaugh, 2008), acknowledging that important concerns about cost, timing, evaluator qualifications, due process, and the dispositive value of the resulting recommendations remain to be settled (Birnbaum & Bala, 2010; O'Connell, 2009; Tippins & Wittman, 2005). A comprehensive family evaluation of this nature must, furthermore, consider the history and present status of the child's attachment relationships.[23]

7. These conditions most pointedly suggest that properly soliciting the voice of the child in contested custody matters falls well beyond the expertise and practical constraints of

[22] Its my practice to conveniently "forget" or "lose" my notes at the second interview to stumble through the process once again with elaborate apologies.

[23] I have argued elsewhere for inclusion of attachment measures in custody evaluation processes (Garber, 2009; see also Radin, 1984).

most judicial officers (Tapp, 2006),[24] concerns about due process notwithstanding (House, 1998; Lombard, 1983).



[24] Noting that Birnbaum and Bala (2010) take the opposite position: "More judicial interviewing of children would improve decision-making and outcomes for children, and better respect their rights." See also Jones (1984).

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