

Including the Voices of Children of Separation and Divorce in the Legal System

Proefschrift

ter verkrijging van de graad van doctor aan Tilburg University
op gezag van de rector magnificus, prof. dr. Ph. Eijlander, in
het openbaar te verdedigen ten overstaan van een door het
college voor promoties aangewezen commissie in de Ruth
First zaal van de Universiteit op

maandag 11 november 2013 om 14.15 uur

door

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geboren op 8 maart 1962 te Port Arthur, Canada

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INCLUDING THE VOICES OF CHILDREN OF SEPARATION AND DIVORCE IN THE LEGAL SYSTEM



Lorri A. Yasenik

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ABSTRACT

Children and youth (18 years and younger) of separation and divorce have historically been excluded as participants in legal decision-making that will ultimately affect the rest of their lives. Including children in the context of family law is referred to as promoting “the voice of the child.” More emphasis has been placed on including children’s voices in separation and divorce since Canada ratified the United Nations Convention of the Rights of the Child in 1991. This was the first legal step taken to view children as rights-bearing individuals internationally. Since this time there has been greater emphasis on children having more input related to legal decisions that affect their lives. This study sought to understand how and in what ways children’s lawyers and children’s therapists gather and promote children’s voices to the court. A total of 22 participants (11 lawyers and 11 therapists) engaged in open-ended conversations/interviews both individually and in groups. Using a grounded theory research approach, theoretical categories were created and were presented, describing the stories told by both groups. Dialogues with participants highlighted the complexity of presenting the voice of the child to the court due to legal process barriers and late timing of inclusion of children. Although applicable to the broader Canadian legal system, the study focuses on specific practice traditions and peculiarities from the viewpoints of lawyers and therapists in Calgary. This study proposes changes to the current legal process as a way to decrease the adversarial approach to divorce and include children earlier in the process. It includes a presentation of factors lawyers and therapists consider when meeting with children to gain their

input for inclusion in court.

ACKNOWLEDGEMENTS

I want to thank my good friend Liz Oscroft who set me straight when I was running in circles trying to find a University program from which to complete a Ph.D. She is the first to be mentioned as she sat quietly listening to my dilemmas about entering different programs I had researched and applied to. I had a number of acceptances to start in schools both in Canada and Europe. None of the programs were quite right for varying reasons. I bemoaned the fact that I might never move forward with my life-long goal of completing a Ph.D. She waited until I stopped talking and asked if I was finished? I confirmed I was and she said, "Well, I have a program suggestion for you that I was thinking of applying to and I think it would be perfect for you." She suggested I stop turning in circles and announced that a workshop would be held in Calgary on Social Construction in the coming months. She suggested I look into attending and she would come with me. Liz changed her mind and did not come with me. I however decided to forge ahead without her. And that was it; my introduction to the Taos-Tilburg program started there. Liz you are dear friend who came to me in just the right moment.

This brings me to the next turn in the road. I met Dan Wulff, Sally St. George and Sheila McNamee at the Social Construction Workshop in Calgary. I decided at this workshop that the Taos-Tilburg program was the right choice for me. I felt so fortunate to have Dan Wulff with an "eagle-eye for details" for my thesis advisor. His dry humor, wisdom and straightforward manner helped me get through this process. Thank you Dan for always being available. As I continued

to work long work-weeks throughout the Ph.D. process, you were always able to meet at off-hour work times. Without your generosity of weekend and weeknight meetings, I am not sure I would have made it through. I will always remember a comment you made after some complaints I make about my workload – “What did you think – it was for free?” I laughed and kept this in mind. This Ph.D. was definitely “not for free.”

My good fortune continued with the amazing relationship that I formed with my neighbor Beth Chetner. Beth, without you I would not have finished this process in such a timely way. I could not believe my good luck when you came over to my house to take a look at what I was doing. You immediately understood my process and volunteered your own time to help with the cutting and organizing of hundreds of codes. Your consultation and editing assistance for this dissertation was invaluable. You immediately lifted my feelings of isolation. Thank you for everything you did for me and all support and the important talks we had along the way.

At one point I realized I needed a creative team to assist me in designing the visuals for this dissertation. A few short conversations later two amazing women came forward with representations to describe the data and to display a proposal for a new legal process. Thank you so much Sally Garen and Deb Clay! Individually you both took ideas and brought them to life in a way that I could not have done alone.

I have a wonderful friendship circle that supports me emotionally along each path I take. I want to thank my great friends in Canmore, Alberta for always being interested in

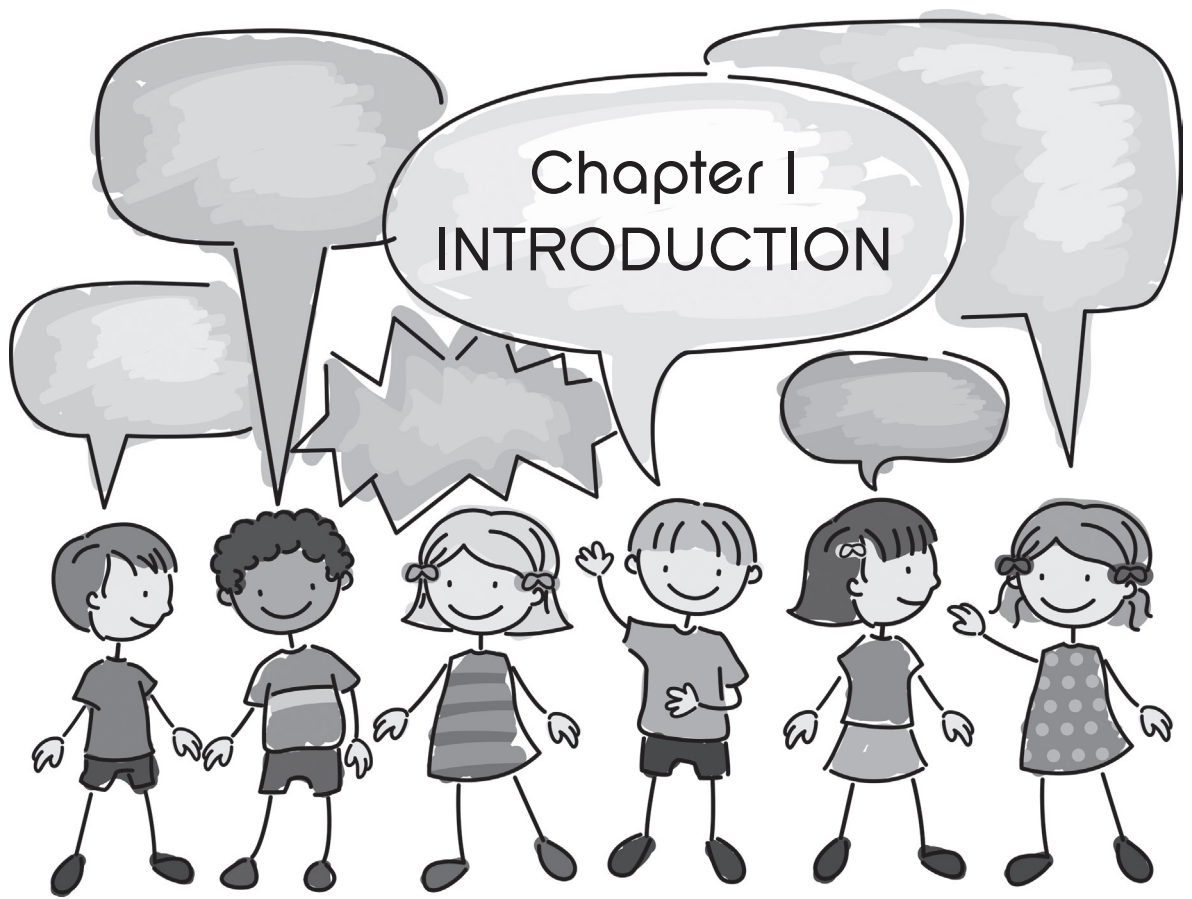
was in the process. Thank you to my dear friend April who coached me along and reminded me “chunk it” - just do one piece at a time.

I deeply appreciate the time and effort all the lawyers and therapists took to assist me to complete this dissertation. Many of you are colleagues I work with everyday. What a pleasure it was to be able to talk to you about your work and your ideas. Your wisdom as two distinct but connected professional groups taught me more than I was expecting to learn. Thank you for your wisdom and local expertise. You are role models and leaders in the field of separation and divorce.

Last, but not least, I could not have put any more hours into my workweek without the help of my husband, Tom Bartley. You picked up all the responsibilities to do with our home life. Your influence and calm nature kept me sane when I felt like I could not continue. You and Laura are my foundation. Laura watched quietly as I worked most weekends for the past few years. Laura, you were always a support and accepted my goal of completing this endeavor without question. My world is a richer place for having both of you in it. Your love and support means everything to me and I want to thank you for endlessly being there and believing in me.

DEDICATION

This dissertation is dedicated to the many children I have worked with whose parents were going through a divorce. I have always marveled at children's wisdom and strength. Regardless of their parents' negative feelings for each other, I have heard the stories of love they have for both their parents. I will always look for more effective ways to ensure their voices are heard.



Chapter I
INTRODUCTION

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INTRODUCTION

“Please hear what I am not saying”

I am interested in the multiple voices of the child and particularly, the voices of children of separation and divorce. How do children represent their thoughts and feelings and do they hold their thoughts and feelings separate from the adults who also influence their security and survival? How do those representing children understand and present these views? Can we disentangle the views in order to adequately provide direction to those who must make decisions on children’s behalf? Do children need protection from emotional harm if their expressed views differ from those of their parents?

Children’s stories about their lives are rich and varied, often symbolically and metaphorically presented using both verbal and non-verbal forms of communication. Peeks (1989) notes the word metaphor is related to the Latin word metaphora and the Greek word metapherin which means “to transfer”.

Children reveal their experiences from the contexts of their cultural and familial surroundings, providing aspects of their co-constructed realities. Younger children are more likely to express themselves through a variety of play mediums such as sandplay, puppets, doll house, art, clay, storytelling and dramatic play. Sometimes the play will be accompanied by verbalizations, and other times not. Through the use of symbols and play objects children invite us to be a part of their perceived interactions between others, interactions between themselves and others and/or experiences they have had. A child’s experiences are then interpreted by

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therapists through these symbols and objects (Levy, 1938; Terr, 2007). Interpretations are meanings the therapist has come to understand through interaction with the child and through observation of the child's play activity. This becomes a shared engagement as the therapist attempts to check the child's messages and meanings of the messages with the child. The child may show and name specific figures and actions that represent people and relationships (or parts of relationships) in his/her daily life. A child may show or tell a story in a way that allows her/him to interface with the story and gain a sense of relational being within the story – perhaps to manage conflict. Gergen (2009) notes, “It is not only through relations that we come to resist conflicting impulses and to see coherence. It is also within our relationships that we acquire the means of defending against conflict” (p. 141).

Jennifer's Story

Jennifer, a 10-year-old girl sat down in front of the sand-play shelves where hundreds of symbols were lined up. She reached over and picked up a mesh-looking item and began to give it shape. She pulled its edges until she created a round sphere and placed it in the sandtray. She then pulled out a small figure of a girl and placed it inside the sphere. There, she said, “That is me and I am trapped in this cage and can't breathe because they cannot stop arguing over me.” She then chose two cats and placed them close by, looking in. “These are my cats and they are just watching what is happening. They are my friends and they know what is going on.” Jennifer later placed characters around the cage

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and identified them as her mother, father, and stepmother. She said, pointing at the two female figures, "If I had one wish, I wish these two could be friends." Jennifer later noted that she wished she could spend more time at her father's home, but her mother hated her stepmother.

Children's Communication

Jennifer was able to use both verbal and non-verbal forms of communication to metaphorically express her ideas. Through play young children or children with less advanced language abilities will often show what they are feeling versus tell what they are feeling. The function of 'showing' is represented in a series of play sequences each linked to the other in a storyboard fashion, albeit, not always in a traditional linear educational fashion used for teaching the sequencing of ideas. Sometimes the characters chosen are literal-like representations such as using mother, father and child figures and miniature house settings and other times the child will use objects, non-human characters or animals to tell her/his story. Children's use of symbols and metaphors tend to be either quite close to their literal experiences or quite distant. The literalness is related to using language to identify "this is me and this is my dad" while the more distant metaphors utilize either third person references or stories of "the bear and the fox" for example. Both ways of communicating may tell a similar story about the relational world of the child but the non-literal form of expression will require an interpretation by a therapist or an assessor if required to provide information to a court process regarding the child's viewpoint. There is no way for the therapist to be separate from the process, rather

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the therapist's interpretations and ideas are part of providing feedback. Feedback ends up being co-constructed between the child and the therapist. Based on the interactions with the child, the child therapist will put forth interpretations of what the child believes or understands about her/his situation.

Drucker (1994) notes:



Symbolization and metaphorizing are taken as alternative terms for a particular phenomenon: A metaphor here is understood to be the embodiment of a notion in form, casting of experience from one domain to another. This is a much broader use of the term than one would find in a linguistic discussion of metaphor as a figure of speech. (p. 66)

Peeks (1989) further examines the difference between literary metaphors and behavioral metaphors. Literary metaphorical examples will include clarification of an idea or series of ideas using words and descriptions whereas behavioral metaphors (behavioral actions) will provide a window into the social context of the child's world. The behavioral metaphor is viewed by Peeks (1989) as the child's symptomatic behavior that represents or communicates a social context problem. The behavioral metaphor is then understood as the transference of meaning about the problem through behavior (crying, aggressive actions, withdrawal etc.). There is no way to provide a "true" meaning as is often asked for by legal decision-makers, but verbal and behavioral metaphors will provide more information about the child in relation to his/her family. Various interpretations of meanings may then be

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considered. This way of viewing metaphor is not unlike the ideas presented by Chelsey, Gillet and Wagner (2008) in that young children will express themselves with symbols and action in play without accompanying verbalizations but the symbolic play is viewed as a metaphor with much to “say” about something without saying it. Social and relational information is observed by the therapist. Using Peek’s theory of behavioral metaphor, the therapist may also be interpreting behaviors of the child such as physical refusal to go to a parent’s home, and other expressions such as temper tantrums upon transitions between parent homes.

In Jennifer’s case, her father secured a Court Order so that she could attend counseling. He noted that the conflict between he and Jennifer’s mother was ongoing and contentious; he was concerned about Jennifer’s level of anxiety. In his opinion, she wanted to please both her parents and he was unsure of how she felt about her current schedule of every second weekend and one day in the week with him. Sometimes the schedule was changed by Jennifer’s mother and therefore decreased the time he could spend with her. He was interested in possible ways that this situation could be made easier for Jennifer. Later, at a lawyer-assisted mediation, the parents wanted to hear about how Jennifer felt. The problem intrinsic to this invitation is related to how Jennifer might be concerned about avoiding getting into “trouble” with one or both of her parents for expressing her views. She may be attempting to manage her relationships by shaping her responses to inquiries as to her viewpoints on her relationships with her parents.

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Complexities in Gaining Children's Views

The issue of confidentiality is an ongoing dilemma for anyone working with children. Children both literally and metaphorically represent and say important things about their lives and how they think things could or should be. Many times their views are in opposition to what a caregiver/parent believes or wishes. Parents pay for their children to be heard by third parties and at the same time are by law able to gain access to their children's files upon request. How much should be shared with parents and others is the question. Adults automatically have control of their privacy and can release information about themselves or their points-of-view at their discretion. Children do not. They must rely on the therapist or third party to manage the degree of privacy for them. Each professional must then make critical decisions on behalf of a young person and consider multiple factors when to others.

Legislation of Inclusion of Children

Children and youth (18 years and younger) of separation and divorce have historically not been participants in the decision-making that will ultimately affect the rest of their lives. They have been viewed as vulnerable and lacking the capacity to contribute their thoughts and feelings in a way that does not place them at risk. Birnbaum (2009) notes that including children in the context of family law is referred to as promoting "the voice of the child." Primarily the child's voice is presented by proxies such as therapists, lawyers and parents and not the child directly. More emphasis has been placed on

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the question of including children's voices in separation and divorce since Canada ratified the United Nations Convention of the Rights of the Child in 1991 (UNCRC). This was the first legal step taken to view children as rights-bearing individuals internationally. Since this time there has been greater emphasis on children having more input related to legal decisions that affect their lives. Of interest is the point that adults are mostly responsible for providing children's input which allows the adult to be in a position of accepting, dismissing or distorting children's views. Additionally, adults are given responsibility to identify and act on the best interests of children. The adult may or may not get the best interests of a given child "right" which would be one more way a child's views are not heard.

Article 12 of the UNCRC states that:

1. 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.

Article 3 requires states to act in the best interests of children:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

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administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In Canada in 1998, a further development was presented through the Special Joint Committee on Child Custody and Access. In this document, a recommendation was made that children have the opportunity to “be heard when parenting decisions affecting them are being made” and to “express their views about the separation or divorce to skilled professionals whose duty it would be to make those views known to any Judge, assessor, or mediator making or facilitating a shared parenting determination” (Parliament of Canada, 1998).

Best Interest of the Child

The Special Joint Committee also provided a defining list of best interest criteria for consideration when meeting with children. There has been much discussion since the release of this document amongst separation and divorce practitioners as to how best to accomplish the recommendations of inclusion of children’s views while using best interests of the child criteria.

Semple (2010b) notes best interests of the child criteria tend to be held “as the golden thread running through the Canadian law of custody and access” (p. 290). Even though a list of criteria exists for use by those providing information back to the court, the discussions ensue about how to make use of the factors for consideration.

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Mnookin (1975) suggests that:



...deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the Judge be principally concerned with the child's happiness, or with the child's spiritual and religious training? Should the Judge be concerned with the economic productivity of the child when he grows up? Are the primary values in life warm interpersonal relationships or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly. (p. 260)

Others have critiqued methodology and bemoaned the lack of scientific research in forensic mental health. The methodological difficulties make operational best interests criteria hard to define (Bala & Saunders, 2003; Bolocofsky, 1989; Grisso, 1986; Kushner, 2006). Jameson, Ehrenburg, and Hunter (1997) after reviewing the best interest criteria, designed a "best interests of the child questionnaire" in an attempt to provide a framework for assessment. Although helpful in providing guidance, Kushner (2006) notes the controversy continues: "One cannot help but query if this aim for consistency may neglect to identify, not only the unique needs of the children involved, but also their opinion pertaining to their desires and needs" (p. 81).

The interest in the duty to represent children's views and pass those views on to third parties goes beyond the various political demands made by public policies to give children a

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role and voice in decisions affecting their lives (Thomas & O’Kane, 1998). Smart (2002) reflects on the complication of acknowledging children as having the right to have a voice in legal matters that affect their lives and states that there are problems with resolving the competing demands of child “welfare and participation” (p. 308).

She also notes that:



...starting to treat children seriously poses many challenges to adults as well as to legal systems. There is, for example, the fear that listening to children will become a kind of token process, a box that needs to be ticked rather than genuine consultation. (p. 307)

Furthermore, Smart (2002) notes if we are really finding ways to hear the child, it will become harder to find solutions because children’s accounts (like adult accounts) change over time and with their day-to-day experiences. Although adults regularly change their views, more legitimacy is given to views of adults than to views of children. Although well-meaning, the true participation of children will alter the whole current process and it will not, in Smart’s opinion, make the process “easier or fairer” (p. 309). From a social constructionist point-of-view, providing what a child thinks or feels is more of an active process than a passive one. It is a collaborative experience whereby an adult and child have a shared experience together and the adult brings forward what she/he heard that was significant to the child. The challenge is to negotiate the structures and principles upon which we accomplish the goal of including children. The challenge with these

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negotiations is that there are many competing parties involved with differing vested interests.

Multiple Helpers

Child therapists, assessors, mediators, parenting coordinators and children's legal counsel may all be working with families at various points in the separation and divorce process. Each of these professionals must decide how they will hear the child and then what they will do with the accounts they gather. There are many decision-making points in this process, yet there is little guidance in the literature related to developmentally sensitive approaches to gaining the voice of children and youth of separation and divorce and providing the information back to the systems in useful ways. The changeability of accounts (because family and relationships are not static) is just one difficulty to consider and to not acknowledge changeability is only one potential pitfall.

Mediators mostly work with families before court applications are made and may or may not interview children for their input. The role of the mediator is to provide a "without prejudice" service (one that is not on-record, but private to the parties involved) to families so they may talk in private and come to their own decisions about how to re-organize their family functioning and parenting after separation. The mediator will operate as a neutral party to assist the parents to create a plan in writing that they can adopt during separation and divorce (Lande & Herman, 2004). Mediators with an expertise or background in working with children may be more apt to choose to intermittently include children in the process

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while others without this background may not. There are some mediation programs that are “child-inclusive”, such as in New Zealand, Australia and Canada. In 2007, Family Justice Services Centre in British Columbia, Canada began a pilot project for child-inclusive mediation in a number of their Family Justice Centres across BC (Family Relations Act Review, 2007; Goldson, 2006).

Parenting coordinators are usually involved with families who remain in high conflict after separation and divorce and need help in managing and complying with their parenting plans and various court orders. The parenting coordinator may have a decision-making role (if there is a consent order in place to allow for this action) and when parents cannot agree the parenting coordinator can assist families to move forward and provide a decision for them via an arbitration process. This is a quasi-judicial role and is a “with prejudice” process (on record) whereby all matters discussed are not private and become part of the on-going record of evidence (Coates, Deutsch, Starnes, Sullivan, & Sydlík, 2004). Like mediators, though, parenting coordinators may or may not choose to meet with children for their input. They, too, will decide based on their comfort level with working with children and whether they prefer to hear about the child’s wishes through, for instance, a child therapist. Neither the mediator nor the parenting coordinator is compelled to provide the voice of the child (child’s interests and wishes) back to the court unless specified in a court order.

The child therapist and assessor roles differ from the above roles, however. There is often an order made by the court to

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gain the child's voice via the child therapist. In this case the child therapist must provide information back to the court that will also include best interests of the child information. The assessors (who are mostly involved by way of court order) who are assessing the parents' functioning, current family dynamics, and parent/child relationships in order to make recommendations to the court for follow-up are also compelled to include the voice of the child in combination with what is considered to be the best interests of the child. These two professionals are actively communicating with the court to assist the court in further decision-making.

Children's legal counsel are also often assigned to represent children during the time when families are seeking legal intervention for decision-making. Typically children's counsel is expected to provide to the court the voice of the child especially if legal counsel is in the role of advocate (Bessner, 2002).

Birnbaum (2009) has identified in her literature review that information on approaches to gaining the voice of the child is primarily noted during a litigation process, but most decisions are made outside of courtrooms. Little is known about how children are included in earlier stages of the divorce process. There is also a lack of published information related to the "what and how" of including children's voices once the legal process is initiated. Mediators (Mantle, 2001; Saposnek, 2004) note that there is little written about the systematic ways those working with families of separation and divorce approach child-inclusiveness. It is clear that two main professional groups gather and promote the voice of the child

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for inclusion in legal proceedings, but are there consistent ways each go about gathering this information? How do therapists' and lawyers' different roles influence how they each go about gaining the voice of the child? How do their roles influence what they are focusing on when gaining the child's voice? There is reference to interviewing children – but there is little detail as to what this activity entails and how it is managed. Are there consistent methods that have gone unreported in the literature? Birnbaum (2009) also found after reviewing the literature that there was global agreement about the importance of including children's voices, but what the best approach to having their voices heard and when their voices should be heard remained unclear. Smart (2002) says, "Moreover, there are problems of how to hear what is being said and then what to do with the diversity of accounts" (p. 307).

Research Question

What factors do therapists and children's lawyers consider important when gathering and constructing the child's voice for inclusion in court proceedings and how do they do it? My research interest lies here.

What Draws Me to this Work?

I have been working with children and families for more than 20 years and I now primarily find myself working in the area of separation and divorce. I have been asked and court ordered to be involved in hundreds of cases related to children of separation and divorce, both in the capacity of counselor and assessor. The specific issues include reunification between

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a child and parent, counseling for the child with and without access to third parties, gaining the child's opinion or voice related to her/his parent contact schedule, assessing family dynamics regarding best interest of the child criteria, providing assessment feedback related to mobility of a parent, and bilateral parenting assessments including children and child emotional and functional assessments.

I began my career working with children and families who experienced trauma (sexual, physical, emotional and/ or spiritual). I later became interested in helping families in conflict and became a Registered Family Mediator. Not unlike the approaches taken by the Public Conversations Project (Gergen & Gergen, 2004), I was interested in helping divided families find a shared vision related to their children while avoiding the court system. In Pre-Mediation sessions, the focus would be on what parents intended to have happen immediately, and in the future, and how they could approach one another differently. The parent task was to separate as a couple and come together again in a way that would reduce their anger towards one another and focus their attention on parenting their children. This work with parents increased my interest in work with divorced families and work with the children in the family.

In my experience, one general comment regarding children of separation and divorce (with the possible exception of ongoing child abuse and family violence) is that children want to maintain a relationship with both their parents after family separation. Negative family outcomes are more often related

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to adult issues that interrupt the child's ability to continue with normative relationships with one or both of their parents. The tragedy of this is that family life is altered and it is difficult to gain the voice of the child who cannot independently care for him/her self without at least one parent. Parent issues make it much more difficult to gain input from the child. The child is influenced by parent roles, unskilled parenting, attachment and relational issues, historical divorce trauma experienced by one of the parents when they were young, etc.

Families and Divorce

Family is socially constructed, embedded in traditions and rituals resulting in unique configurations of ways of being, and children are part of this construction. Meanings are developed between family members and not within each individual member. The view of family being relationally driven is what peaks my interest in this study. When the family changes and a separation occurs, a reconstructed meaning of family and the relationships among members also appears to emerge. Wallerstein and Kelly (1980) found that many parents avoided conversations about family changes post-separation and that children needed a developmentally sensitive way to construct their new understandings of the ways in which their families worked. Garrity and Baris (1994) note that children in order to manage or maintain their relationships with each parent may begin to tell each parent what the parent would like to hear. Warshak (2003) makes a further point that new familial relational constructions may emerge due to a recent crisis rather than from the full history and context of the relationships between the child and each parent. Atypical, yet frightening,

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outbursts may occur at the time of separation followed by the absence of a parent. Past love and comfort between members of the family can be erased quickly and replaced with fear and lack of trust. Wallerstein and Kelly (1980) observed during family conflict that children's relationships were quickly shifting and "transient." The newly constructed relational meanings are often in conflict with the original narrative(s) of the family.

Provision of information about the changes in family, and more often about the changes in individuals, is often required (if not court ordered) by legal authorities. The problem with this is those providing this information must interface with highly traditional positivist and post-positivist paradigms (traditional constructions of validity, rigor, internal validity, external validity, reliability and objectivity) (Denzin & Lincoln, 1994) based on the pre-conceived rules of the court of law and the search for one truth. Even when experts provide different accounts of a child's input the court seeks to identify the "true" input. This is when the reputation of the expert may influence the "most correct" input even though there can be no certainty of the expert's account.

Interfacing with the Legal System

The legal system is a community built on individualism with a divisive adversarial infrastructure. It is based on a defense model and not a collaborative model. The problem is further exacerbated when the legal community becomes part of the reconstruction of meaning of family members' previous relational experiences with one another. Some children are asked to tell their story or their "truth" many times in many

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ways to legal counsel and others. The discussions held by counsel with children may not be without leading questions and summary statements. Because social meanings are fluid, children's narratives can shift to accommodate their relationship with legal counsel and the lawyer's views of how they view the family or with a child therapist and her/his ways of viewing family. A new narrative may be created that is more reflective of the relationship with the children's lawyer than it is of the previous relationship with family members. This can also be true of the therapist/child relationship. Essentially, in addition to family relationships, lawyer and therapist relationships may be added as factors for consideration.

In the legal model, the family system is divided up; each person is assigned a person who represents him/her and advocates for him/her. Each parent has a lawyer and each child may also have children's counsel. Each person could also have a third party helper involved such as a therapist. There may at times be three to five lawyers and just as many counselors involved with a given family. Those involved do not usually openly collaborate due to client privilege and confidentiality. Each "helper figure" in the process hears the story of the individual with whom he/she works with and then reflects, records, and sometimes joins or elaborates with the person. Together they form newly constructed stories to present to a decision-maker (Judge) based on the presented "truth" of the individual. The stories represented by the helpers tend to be thinner and more fragile because they have been dissected into parts and the values and meanings once held between family members are difficult, if not

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impossible, to represent. The traditions of the legal system are based in a one truth, win-lose template. The problem is the legal solutions that are sought are in theory related to how to help the family reorganize post-separation and attempt to answer questions regarding interrelatedness and relationships between family members.

The above accepted paradigm or model of intervention in family law has experienced relative recent interruption with two main movements that follow a different model of working with separating and divorcing families:

1) Family Mediation where families work with an impartial professional to negotiate a mutually agreeable way to divide assets and parent into the future (Brownstone, 2009; Emery, Mathews, & Wyer, 1991; Kelly & Gigy, 1989; Pearson & Thonenes, 1988), and 2) Collaborative Law where lawyers work in a non-confrontational way and negotiate all the family matters (often together in four-way meetings) without going to court (Brownstone, 2009; Murphy, 2004). Brownstone (2009), a well-known Canadian Family Court Judge, instructs parties that going to court to solve family issues post-separation is simply a damaging and destructive way to solve parental disputes because the court system is based on “winning.” The problem is that parents end up as hostile adversaries on opposite sides while they should be on the same team for the sake of their children.

Some Judges are speaking out. This is atypical but significant. They are recommending and ordering parents to alternative dispute services and urging them to work together as part of a settlement team, rather than working against each

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other. The alternative dispute resolution movement appears to signify the unhappiness with the traditional divisive model, and this dissatisfaction is coming from both the families and some legal system representatives. As noted by Kuhn (1970), “Paradigms gain their status because they are more successful than their competitors in solving a few problems that the group of practitioners has come to recognize as acute” (p. 23). These new collaborative paradigms are in the early stages of making a significant change to the longstanding legal traditions. Unfortunately, the problem still exists that legal and clinical practitioners are currently caught in the crosscurrents of change. Children are still asked to provide their individual thoughts and opinions and the veracity of their accounts continue to be evaluated by the traditional legal means.

Terry's Story

Eleven-year-old Terry was the older of two children. His parents were in a cold war with each other and with each transition to the other parent's home, he was never sure what to expect. Would he be in trouble? Would he have to report the details of his time at the other parent's home? If he did, would the inquiring parent be angry if he had had fun? Terry decided not to talk. He came into the office and did many things that demonstrated his world and the ways he was choosing to show me his world. The strong emerging theme in the work with Terry was hockey. Hockey themes emerged in each and every drawing, sand scene, story, and clay activity. The drawing of his house was a large hockey arena,

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the sand scene was of hockey players and him winning hockey, the stories were of hockey and the politics of the hockey world and his clay figures were of hockey awards, hockey players and feeling states related to the highs and lows of winning and losing hockey. Terry felt he played hockey well and he seemed to find comfort and a feeling of confidence in this activity.

All in all, a new word emerged after entering Terry's world—he had “hockey-fied” everything. This child appeared safely protected in all his gear, and he seemed to find a way to “be” that was tolerable and acceptable to him – even if it was all related to his involvement in hockey.

Although there may be many ways to make meaning about Terry's play activity, a number of factors assisted me to understand Terry's hockey-fied world as one of need for focus outside of family at that time – perhaps to take refuge from family conflict and to find some solace in something he did well and belonged to in another context. In my work with children and adolescents, the relational focus is central (Terry and me, Terry and family, Terry and others in his world). Throughout our time together, Terry was largely involved in telling me about himself in relation to others. Terry did not express much joy or happiness during the time spent in his sessions and his body language and facial expressions were constricted and sad. His body appeared heavy and he often noted exhaustion near the end of the session. Terry requested I not speak to either parent because it would only make things worse. I did not view Terry as being coached by his parents, rather it appeared that Terry tried to keep himself separate

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from the war that existed between his parents. Separation and isolation from family members was presented in many ways during the times Terry met with me.

On a rare occasion, Terry directly noted he wished his parents would stop being so mean to one another. His family members (parents and sister) were missing from all of the pictures and sand scenes except for one (although he did not name the figures as family members). It was near to the end of one of the last sessions and Terry had set up a hockey scene in the sandtray. The unusual part of the scene was that instead of using two hockey player figures for each hockey net, he used an adult male figure and an adult female figure and placed them in each net facing one another. When the hockey scene was set, he noted the crowds were displeased, and they had become “very angry” and he proceeded to move the “goalies into the middle” and dumped baskets full of figures on top of the two goalies. He then suddenly ended the session (in a distressed manner) and claimed he would not return to counseling.

In my studies of children’s play-based therapeutic work over many years, it appears that children present as more or less able to directly identify or share relational issues, concerns and conflicts. As a social constructionist, I would refer to this as “multiple and conflicting potentials for what pass as good and evil” (Gergen, 2009b, p. 140). The social constructionist view would not identify inherent defenses, rather it would see the child as living with incoherence and when incoherence is scorned in relationships, it can become problematic.

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The social constructionist might say “Let us replace the concept of repression with suppression. In this sense, what is often called ‘inner conflict’ is the private participation in public conflict-actual or imagined. We are participating in multiple, conflicting relationships, but without full bodily engagement” (Gergen, 2009b, p. 141). I can understand Terry’s responses from this point-of-view. In the meantime, Terry has a relational issue that he is not able to address with the people who are most important to him. In my work with children I use a framework for what I call soft interpretation which includes generating potential hypotheses for understanding the child’s play or verbalizations. These understandings are driven not by a specific theorist, but primarily through collaboration with the child. I further consider the context of the family circumstances and the child and family relational dynamics.

My Professional Influences

The following reflections are derived from a number of theoretical points-of-view. My training and background lies in many different approaches and theories including both directive and non-directive approaches to child and play therapy and family therapy. I am not committed to a singular way of understanding children and families, but those who are supervised by me or know me personally would describe me as non-diagnostic, strength-based, and a strong advocate for people. I consider myself an integrative play therapist who draws on ideas from many of the following theories: Rogerian or child-centered play therapy, Jungian principles of play therapy, Gestalt play therapy, Narrative play therapy, Systemic play therapy, Adlerian play therapy and expressive art and

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play therapies combined. I have also had plenty of exposure to Freudian ways of viewing people and children. Anna Freud was one of the early pioneers to document child and play therapy process and activity. But what does all of this mean? It means that I draw on many ways of being with, thinking about and relating to children and families. Each person I am with changes and influences me in some relational way. I would not say that I have ever claimed a single or particular language in counseling (as the above theorists do). I would also say that it has become evident to me that I identify my practice as having an underlying social constructionist influence.

Janice's Story

Janice claimed she hated her father and that he was "stupid." She noted she did not have to be nice to him because he did not deserve it. When asked what her other parent thought about what she said about her father, Janice stated, "she agrees." Janice's and her mother's views were inexplicably intertwined. Janice was a verbally bright 14-year-old. Janice and her younger nine-year-old sister had each been assigned a lawyer of their own and Janice noted that even her lawyer thought she should be able to see her father when and if she wanted to. Janice noted she wanted to limit her time spent with her father right now "because she was busy." Janice could not come up with any significant reason for her shift in relationship with her father other than she thought her mother needed her more right now and that she felt more comfortable at her mother's home. She claimed she sometimes wished for a better relationship with her father, but that she would need

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help from me to relay messages to her father about what she needed from him. At the time of a case consultation with legal counsel, Janice was having regular visits with her lawyer, but not with her father. The lawyer later intervened and noted that Janice no longer trusted me as the therapist and that she would not likely be continuing in counseling. The lawyers further noted Janice's sister was also not going to attend. There was no reason provided. When this was questioned, the lawyer noted she would have to follow her client's direction.

Was this shift child-initiated or was my relationship with the children re-scripted through a divisive legal approach to supporting children (or both)? The ambivalent voices of the child are missed while the voice of the child gets constructed and reported without an anchor to the larger family, community or social context.

All of the stories of children I have included to this point are captured to demonstrate the influences of others (parents, therapists and legal representatives). These stories will be evaluated by a Judge if I am ordered to provide information about the children and their thoughts and wishes. Can children represent their thoughts and wishes "as separate" to those with whom they are socially and emotionally connected? Each child will be verbal to an extent, but he/she will certainly not express an independent personal truth separate from caregivers and others. Terry's story is imbedded in symbols and metaphor and provides a number of representations of how he is currently involved in and views his social and familial world. Janice provided a series of verbally

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complex stories filled with ambivalence, conflict and anxiety. Of course these brief excerpts are only a sample of what the children presented. My task and the task of others working with children like Terry and Janice is to understand and present the children's voice(s) to third parties who will ultimately participate in making decisions on their behalf.

The Traditional Legal System Demands Re: The Proper Story

I am very interested in how others in my position find ways to be child-inclusive and manage a legal system that values individual views and reinforces divisive processes. Children's voices and the construction of their meanings appear to be driven by many competing factors. There are rights-based, interest-based factors and factors related to providing a forum for active participation and a demand for children to have access to information (legal and divorce process). Other factors include focusing on the needs of children early on in the parental separation process and providing them with a role in the decision-making process. Factors related to limiting children's input include competing issues between the need to protect children while hearing their wishes and the potential of parental manipulation and possible loyalty conflicts for the children. There is an overall lack of understanding by the professionals as to the context of the wishes children express and there is the potential of children experiencing great disappointment after sharing their thoughts and feelings as their input can further negatively affect the family dynamic outcome (Birnbaum, 2009). Additionally, it is known that

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children who make outright rejection claims towards one of their parents due to alienation, typically secretly long for a relationship with that parent and to have more contact with that parent (Baker, 2005, 2007; Clawar & Rivlin, 1991).

The modernist approaches to therapy and assessment are reinforced with children of separation and divorce because there is a strong pull to fit into the traditional legal expectation of presenting one “truth.”

References to the lack of rigorous scientific methods and research about the effects of different conditions and relationships regarding children of divorce are highlighted in the literature (Bala & Saunders, 2003; Bolocofsky, 1989; Grisso, 1986). Smart (2002) points out that we need to be prepared to acknowledge that “people stand in different relationships to one another, have access to different resources, and regard different things as important” (p. 309). She further notes that it is not likely to gain one truth or one story because the parent and child accounts are fluid and change over time as new experiences and life transitions occur.

The narrative of the family breakdown describes the relational story of the family post-separation – but how can the pre-family breakdown relational story also get told? The Judge is interested in the various accounts of the parties because he/she must weigh the information in order to make decisions about best-interests criteria and the criteria directly relates to relational matters pre-separation (as well as post-separation). The dilemma for the court appears to be the lack

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of a way to balance an inter-relational understanding with the mandate to hear from children as independent rights-bearing individuals (as defined by the UNCRC). Making matters more complicated, how can those working with children represent their relational stories and encourage the court to actually hear them in the varied ways in which children and youth share these stories?

There is a Western tradition of reporting and by doing so, telling a proper story. Gergen (2009a) reviewed the Western standards for constructing an acceptable narrative which includes four criteria: 1) a valued end point, 2) events relevant to the end point, 3) ordering of events, and 4) causal linkages. This traditional view of acceptable narrative criteria is worth exploring as it relates to children of divorce. Firstly, does the child establish a specific point from which to tell her/his story? This would be essential if the stories are to be valued by the traditional standards of the legal system. The child would have to build the entire narrative around a single point. Next, the child would have to establish an end point and tell about parts of the story that are relevant and connected to the end point. The child would then have to tell her/his story in an ordered fashion, most typically in a linear way sequenced by time. Of course to follow this, the child should also provide an explanation or indication of causality. The explanation is typically expected to be provided in a verbal narrative and other input such as narrative embedded in metaphor does not carry the same weight related to literal truth. A typical question asked by the legal system is what did the child say versus what did the child demonstrate or represent? This expectation is the same for both adults and children, and although chil-

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dren are capable of perceiving and encoding events accurately, they may have more difficulty effectively communicating their experiences into verbal translations thereby telling their stories (Perry, 1992).

So, what happens when those working with children are asked to provide the child's voice to third parties? Practitioners must rely on the child's various ways of accounting for her/his experience, thoughts, and needs and report back to others in the most logical way possible.

Co-Constructing Memory

The legal system is concerned about the veracity of narrative accounts - "what" people remember is typically questioned. We of course do not remember everything experienced, but it is thought that emotions are connected to memory and that the more emotional arousal that is associated with an experience, the more likely a person will pay attention, encode the experience and recall it later. In a normative way many caregivers engage in various degrees of memory talk with their children that also increases the emotional understanding, self-regulation and recall about the self and other. Memory talk is a process of mutual co-construction of personal, social and family narratives and is related to the development of autobiographical memory. Parents/caregivers become partners in elaborating narratives about past experiences (Grey, 2002; Kotre, 1995; McGuigan & Salmon, 2004; Nelson, 1992; Wolf, 1993). This happens through caregivers discussing their child's memories with him/her and connecting details (emotional, behavioral and factual) of the happenings with their children. The above theorists suggest

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that this process begins at around age two and half when the child is beginning to form the autobiographical self and continues throughout childhood. The more a caregiver engages in this process with his/her child, the more cohesive his/her memory system appears to be and meaning-making occurs.

Middleton and Edwards (1990a) refer to “remembering together” (p. 7) a process of reminiscing for instance, over family photographs or other shared social stories where a range of strong emotions may have been present such as a birthday party, wedding or funeral. Middleton and Edwards view this process as participants getting together and reinterpreting past events and later the re-construction may be drawn on as a way to remember those events again in the future. Children, on their own would not come to the same meanings without the action of joint recall and, as Middleton and Edwards refer to, a “distributed cognitive activity” (p. 7). Middleton and Edwards (1990b) discussed a study of family conversations they did in 1988 where they observed the detailed responses of parents as guides to children’s memory and representations of past events as they talked about their family photographs.



These conversations were used by parents as opportunities for marking past events as significant, recalling children’s reactions and relationships, cuing the children to remember them, providing descriptions in terms of which those rememberings could be couched and providing all sorts of contextual reminiscences, prompted by the pictures, but of things and events not

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included within them. (p. 39)

Essentially, if the practices of conversational remembering between parents and children is occasional, and the parents engage in the conversations as part of increasing a child's sense of identity, social relationship understanding and a child's sense of their development, this can be viewed as assisting the child's construction of a family history or family identity.

Problems can arise however, if caregivers use the very same process of memory talk or conversational remembering with their children to negatively re-construct previous positive family experiences and their accompanied meanings post-separation and divorce. The younger the child, the more vulnerable he/she may be to having the meaning of self and family experiences re-organized by a caregiver. It is identified in cases of separation and divorce that a parent's anger and feelings of rejection may cause him/her to want their child to hold a similar re-constructed view as he/she holds. In the more extreme cases, children may shift to completely reject a parent with whom they previously had a positive relationship. Siegel (1999) notes that behaviors such as repeated questioning with accompanying emotional intensity and general interrogation of an individual may shift the memory system due to it being socially embedded with the potential of being affected by suggestibility. He also points to the difficulty of some memories as being non-experienced, but deeply felt as if they were real. In all cases where there is conflict or abuse it is important for the third party professional to use corroboration and not only external, but internal (child's

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representations of his/her internal world) so that the implicit and explicit memory is compared.

Chrissy's Story

Eight-year-old Chrissy was referred to therapy in order to gain an understanding of how she felt about her relationship with her father. According to her mother, Chrissy was refusing to see her father and viewed him as someone she deeply disliked and feared. Her mother claimed that the very thought of having to see her father would initiate a sudden illness and there were times she noted she would have to take her to the hospital. Chrissy's mother also disliked the father and noted that he "betrayed us." She further explained that he really wanted nothing to do with Chrissy and her younger sister and would sometimes make promises to enter their lives and then retreat again. She at one point said she supported the children to have a relationship with their father as long as they wanted to have one. She noted she did not stand in their way. Chrissy's mother also did not believe there was a role for Chrissy's father and that they were now much better off without him. She said that Chrissy would also get sick to her stomach a couple of nights before counseling and that she later became quite violent by yelling and screaming and wishing she was dead. Chrissy's mother said she would usually talk to her daughter before counseling to try to prepare her. She said Chrissy was very afraid of attending and was particularly afraid of me. The mother claimed that it was not right that the children's father had made this happen by asking for a court order for counseling.

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What was observed in therapy was a little girl who described a positive early relationship with her father through drawing some positive memory pictures of when her family was still together. She appeared to have a sense (albeit briefly presented) of the family break-down problem as lying between her parents and later drew them arguing while she and her sister tried not to listen.

Chrissy provided talk bubbles above the figures' heads in her drawings and the child figures tried to provide appropriate messages to the parents. She was calm and engaged during counseling and appeared happy to express herself. She noted that she might want to see her father, but the last visit when her parents fought in front of her and her sister was scary and she did not want that to occur again because in the end the police were involved. At the end of the session, I talked to Chrissy's mother in a general way. I let her know that Chrissy did not seem to be afraid in session and there seemed to be some opening regarding her feelings about her father. Chrissy's mother was upset with this feedback and said that Chrissy was lying and when she got home after sessions, Chrissy shared an entirely different story.

The next session, Chrissy's mother brought three pictures apparently drawn by Chrissy while at home. One picture was of her father hanging from a tree and being cut up by a knife with words on it like "go away"; another picture depicted her father drowning with sharks attacking and eating him with the words "I hate you" written on the page and the third picture was of me hanging from a tree saying "I am scared of you

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and I do not want to come to counseling anymore and I never want to see my dad again.”

Chrissy adamantly told the author that her pictures told about her real feelings and she was firm and articulate about never wanting to see her father again. Memories of early happy family times were still accessible to Chrissy, but the newly co-constructed re-constructed meaning of the current family circumstances appeared to be all that she was able to express to outside professionals.

In therapy and assessments we look for corroboration both internally and externally. The implicit memories and explicit memories were available, but there was little corroboration related to her memories that could provide a consistent story that was owned by Chrissy. The corroboration process also included observations of the less affected and more innocent comments made by her younger sister who continued to miss her father and in spite of what appeared to be overwhelming pressure to adopt her mother's interpretation of the father. The power of Chrissy's mother's pain was overwhelming and the mother's meaning of the family dominated Chrissy's way of thinking about the situation.

This was the father's second attempt to gain an understanding of the impact of the divorce on his children. He also desperately wanted to maintain a relationship with them but did not have a way to do this without third party assistance because the mother would become upset and intervene. Returning to what Gergen (2009a) said about constructing acceptable narrative standards, gaining the proper story as

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required by the legal system becomes more and more difficult to imagine. It is simply not a straightforward intervention with a few interviews which result mostly in a reliable, coherent or consistent narrative outcome.

Near to the end of working with Chrissy, she presented as shut down and unmoving from a position of aggressive anger towards her father. No interventions with her mother were effective. “How does the child feel?” and “What does the child think?” are common questions asked by third parties. In a concrete way, the child begins to take on an unwavering response set about her family and her relationships within the family. If Chrissy is assigned children’s counsel at this point in the process, she will likely never see her father again due to the required role of the lawyer to follow his/her client’s direction and to act as the child’s advocate. Also, the pictures of her father and her therapist “hanging from a tree” could be used as evidence of a failed therapeutic relationship and confirmation that the father was likely harmful to Chrissy.

Why Include the Child's Voice Now? How Did We Get Here?

The answers to these questions appear to be related to the social construction of knowledge (Coltrane & Adams, 2003). Political, ideological and scientific logic all appear to contribute to the ways we view family and family values. Cott (2000) refers to marriage as having been historically associated (in the United States) with social order and patriotic duty. Marriage was viewed as the way to ensure law and order and minimize chaos – it reinforced traditions and

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morality. During the 19th century a reform of women's roles, their power in family and in society was underway. Women's identities emerged from under law that had historically held them as existing only in association with their husbands. The Married Women's Property Acts became more prevalent and women began to leave marriages and successfully live independent of their spouses. This movement appeared to be in response to previous oppression. A collective definition and understanding of the problem of oppression and lines of power had emerged. To get a divorce, however there was a need to prove fault and therefore parties had to have grounds to exit the marriage whereby one would be guilty and one innocent. Lakoff (2002), a cognitive and linguistic scientist, noted it was expected to find intense divisive world views when social change was on the horizon and moral boundaries and deviation from order are at the centre of the discussions. There is an unconscious blending of morality and politics and that the common conceptualization of a nation is to view it as "family." Lakoff (2002) and Coltrane and Adams (2003) describe a metaphor of power and morality and relate it to hierarchy of relationships as follows: "God has moral responsibility for the well-being of people, people have the moral responsibility for the well-being of nature, adults have the moral responsibility for the well-being of children and men have moral responsibility for the well-being of women" (p. 364). If a change in moral power lines shift, the social meanings shift and there tends to be a social backlash. In part an argument for social stability to avoid shaking the nation emerges.

The 19th century invited a review of change in the power

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between men and women through the work of the women's movement to liberalize women and bring into focus women's rights. With this movement came support for oppressed women to have the right to divorce. This change brought with it opposition to divorce in the name of social order, but to no avail.

The social meaning of children also changed during the 18th and early 19th centuries. Historically children were viewed as basically born evil and parents were expected to save their children's souls by way of strict discipline. The children were viewed as economic assets and as offering future contributions to family. Later the view of inherent evilness in children dissipated and during the 19th century children were viewed as morally malleable and it was up to their parents to provide moral teachings and guidance. Fathers were previously responsible for moral and spiritual teaching of children and they tended to continue to argue for the role of shaping the child in the appropriate way. Fathers in early years of divorce were deemed the more appropriate parent with whom the children should remain.

Tender Years Doctrine

Another shift took place with the Victorian thought that men and women had different roles (separate spheres) with the mothers being identified as primary nurturers leading to an ideology of intensive mothering (Hays, 1996). This is in part where the "tender years doctrine" originated and led to the practice of the mother always being granted custody in divorce, unless she was deemed unfit or at fault for a

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marriage breakdown. During the later part of the 19th century children began to be viewed as economically worthless but emotionally priceless (Zelizer, 1985). Children were no longer fought over as an economic asset, rather the value of the child was now an emotional asset (as children were now seen as potential victims) to be “protected” by the better parent. The fight over custody of children moved to who would offer the better care and protection of the child.

The view of children as vulnerable and as potential victims of their family situations as well as of their environments was unfolding during the 1900’s (child abuse, missing children, daycare molestations, cult activities, etc.) and replaced the notion that children were economically valuable for families as assets for future family work roles (Coltrane & Adams, 2003).

Social science studies ballooned and provided many reinforcing theories about the importance of the mother and child relationship. More and more power began to be assigned to the importance of the relationship with mother. This was particularly strong after World War II when Bowlby (1953) researched war orphans deprived of contact with their mothers. The early research on attachment and its importance related to the psychological well-being of the child was emphasized. Children were viewed as potentially at risk or potentially victimized by factors in their environments and in their families.

Lacey (1992) noted that a new social agenda became apparent whereby social activists began to view children as the new victims of divorce. With a view of children as victims

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the full attention turned to them. There is a current cultural focus on the emotional well-being of the child. With significant attention on children of divorce, how they think and feel about their lives has also been questioned. Furthermore, how will we get this information and how do we gather the voice(s) of the child so he/she will be heard without further victimizing him/her? Placing children in the middle of the battle between their parents (primary relationships) puts them at greater risk emotionally.

The Social Construction of Divorce

The social constructionist approach to defining family and divorce is based on the collective definition. From a social construction paradigm, Goode and Ben-Yehuda (1994) point out that an accepted definition will come from various groups that have a significant interest in the issues along with resources and credibility to promote their points-of-view thereby contributing to the definition of the problem or the issue. Special interest groups tend to influence the meanings and outcomes of various social problems. The concept of societal consensus is raised by Gusfield (1996) who notes an absence of controversy allows for an issue to be framed as a social problem. In other words, if there is no dispute or alternative points-of-view other than something is a problem; it becomes socially accepted as a problem. What appears to allow the cultural shift from viewing the child as relatively emotionally meaningless in the 18th and early 19th centuries to emotionally priceless in the middle 19th century forward is a societal consensus of the child as victim and a socially agreed upon value that we should protect the

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emotional well-being of the child. Therefore, although there is some controversy regarding divorce outcome and the impact on children, there is a greater consensus that children should not be victimized and that we have a duty to protect them. It would be a difficult argument to make that there are times when it is reasonable to place children at risk or in pain (particularly at the hands of their parents) therefore there is no group stating this as a proposed platform.

Best (1990) gave examples of how child abuse was presented as a social issue and because the issue lacked a clear adversarial group a consensus formed between 1970, when few people identified child abuse as a problem, to 1990, where nine out of ten people viewed child abuse as a serious problem. Other than lacking a strong opposing argument, claims by groups move forward because they have grounds, warrants and conclusions (Best, 1990; Coltrane & Hickman, 1992). Grounds lay down the assumptions for the problem, and warrants justify the conclusions. Warrants represent the bridge between grounds and conclusions. A socially constructed understanding of divorce is then rendered. Regarding divorce, examples of warrants that contribute to the ways in which society views the inherent divorce problems are as follows: children never recover from the negative effects of divorce, divorcing parties are selfish and lack commitment, divorce causes poverty for single mothers and children, no-fault legislation increased the divorce rate, and ideas about gender equality are noted as the explanations for negative family outcome after divorce (Blankenhorn, 1995; Coltrane & Adams, 2003; Doherty, 1997; Fagan & Rector, 2000; Popenoe, 1996; Wallerstein, Lewis & Blakeslee,

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2000).

Once a social and political problem has been defined, solutions are generated by interest groups and so-called experts and those solutions become easily socially accepted. Outcomes such as pro-marriage programs and moral family advocacy groups and refusing divorce “for the sake of the children” end up gaining in popularity and support (Coltrane & Adams, 2003). More realistically, divorce and the reasons for divorce are complex. The conflicting views on warrants in the literature demonstrate this point (Kelly & Emery, 2003). Emery (2003) and Heatherington (2003) also provide alternative ways to seeing divorcing families as they do not use the same lens that researchers such as Wallerstein et al. (2000) have regarding parents of divorce being self-centered, seeking self-gratification and generally as “abandoning” of their children. Coltrane and Adams (2003) recommend an alternative to discouraging divorce and suggest those working with families going through separation and re-organization help them to find a “more humane divorce that minimizes pain and disturbance to all involved, particularly the children, even while recognizing the necessity of divorce in a culture such as our own” (p. 371).

Children as Victims and Children's Rights

The focus on children as victims of divorce brought forth a number of social and political discussions and actions including the emergence of children's rights. During the 1970s, legal and non-legal professionals began to advocate the idea that children are autonomous individuals who have the right to be acknowledged and respected. During 1975

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there were numerous references made to children's rights as related to juveniles accused of crimes and their right to counsel and to cross-examine witnesses as well as basic human rights such as the right to be healthy, wanted and receive continuous loving care.

The UNCRC describes the rights of the child in economic, social and cultural political spheres. This document has now been ratified by over 200 countries. The rights of the child document provides both provisions to allow young people autonomy to make decisions for themselves and also keeps to the notion that children lack the capacity to care for themselves and that they require the protection of adults to support their overall growth and development. The overriding principle in the area of children's rights is that the child must have the capacity and maturity in place to make decisions that significantly impact his/her life. Although this statement may seem like it is generally acceptable, it means that generalized age limits for degree of inclusion are not imposed and that each child must be viewed individually. This is where expertise related to child development, personality development, temperament, attachment, family dynamics, relationship theories or relational being, resilience and overall mental health knowledge is critical to ascertain the answer to the child's capacity and maturity. Even if the professional speaking to the matter of inclusion of a child at a particular age does not adhere to individual psychologies, he/she will be asked by the court to draw on these areas to assist the court to understand the particular child and family. At this time those requesting to include a child's voice can decide if a child has the capacity to do so without following a significant frame-

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work. For the most part, lawyers have been assigned decision-making power without the accompanying mental health training and background necessary to draw on to be able to answer to a Judge “why” they make the types of inclusion/exclusion recommendations they do.

Child Liberalists and Child Protectionists

The emergence of promoting children’s rights involved two main models of thinking: the liberalist and child protectionist models. The liberalist/self-determination notion (Farson, 1974; Holt, 1974) supports the idea that to be liberalized the child must have absolute autonomy to make decisions as to what is best for her/him. Inclusion in this thinking is that children should have the right to choose their own education, be free from corporal punishment, have sexual freedom, and have the right to choose where they live. The liberalists will also advocate that children have the right to economic freedom, the right to vote and the right to the same access to adult information that adults have. Rodham (1973) argues that since children have interests independent of their parents they cannot be represented by anyone but themselves. This group adheres to a Western cultural understanding of the importance of the self with the significance of relationship as secondary. From a social constructionist point-of-view the liberalists follow a “bounded being” conceptualization. The bounded being view is to understand the self as “fundamentally independent” of others and follows an individualist tradition (Gergen, 2009b).

The child protectionists acknowledge that because children

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have different physical and mental capabilities as compared to adults, children require protection. The protectionist will adhere to the idea that children are dependent, vulnerable, at risk of abuse and are at varying degrees of being able to hold an opinion separate to that of their caregivers and other adults. The protectionists lean in the direction of “relational being” and tend to be more inclusive of the idea ... “we will find that we are not selves apart, but even in our solitude profoundly inter-knit” (Gergen, 2009b, p. 70). The argument between these groups appears to be related to adult models of law and a fairly recent shift in thinking about children as chattel versus having independent rights. There is no current coherent or standard way for courts to manage children as rights-bearing individuals.

The UNCRC has incorporated both the liberalist and protectionist views of children’s rights by noting that children have the right to be free from poverty, have adequate health care, proper education, adequate housing and nutrition, and are to be free from sexual and physical abuse. Inherent in these rights is the notion that children do not provide for themselves and require help and guidance from adults (Wald, 1986). At the same time as noting children inherently require protection, the children’s bill of rights also includes provisions that give young people the ability to make decisions for themselves in the areas of medical decisions, legal counsel, religious freedom, and the right to information and privacy. Article 12 notes that children shall be assured the right to express their views in all matters that affect them and that the weight given to the child’s views shall be in accordance with the age and maturity of the child. Inherent in this directive is

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that the child must be capable of forming his/her views which leads to the point that someone needs to decide if the child is actually capable and if so, what weight shall the decision-makers give the child's voice? The issue of weighing decisions is a judicial responsibility.

What are the Challenges to the Child's Participation in Legal Family Matters?

According to the literature, the child's age, stage of development, individual qualities of personality and temperament all play a role in the challenge of the child's participation in legal matters related to him/her. Additionally, children are part of a family system that has collective, multiple meanings. The emphasis on the use of individual psychology constructs is very strong however, and children, understood as relational beings are easily sidestepped in favor of more individualized ways of viewing the child. We know that children are not actually independent beings and require protection according to the UNCRC document.

The voice of the child is never in isolation from his/her relationships with others and particularly caregivers. If we travel down the road of individuality, we may misinterpret the voice of the child and the construction of the meanings of what children say. Issues such as alliance with a caregiver or fear of a caregiver or familiarity with one caregiver over another will all influence the "voices" of the child. Voices may be contradictory or demonstrate ambivalence. It is in the grey zones that the child may actually be heard and then represented. Even children who have experienced abuse at

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the hands of one of their parents may have also had a special relationship with this person. Managing the complexity of what the child is saying requires skill and a framework for analysis. What is the framework? Are people using the same or similar frameworks to bring information forward? Taking a verbatim account after one or two child interviews may not be enough.

Children's Lawyers and Therapists

Two main helper roles appear to offer the interpretation of the voice of the child to the court: children's lawyers and child and family therapists. The third helper may be the Judge who, at her/his discretion meets with the child directly ("in camera" interview). The challenge is that legally and clinically-trained professionals are bound to different sets of approaches and ways of working with and ways of viewing children and families. If children are to provide their input through children's legal counsel and/or through their therapist, their views are likely to be presented in different ways. For instance, the legal approach is highly individualistic with a focus on individual rights and more often follows the traditional advocacy role assumed by lawyers for adults. The ways in which children are approached will likely be through more adult models, primarily through interview and discussion.

The approaches of the child therapist and/or assessor focus on the balance between the individual rights (providing the opinions of children) and how the individual child may get his/her needs better met in the context of others. Therapist roles include the view of the child as vulnerable and in need of

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others to survive. Therefore, the approach will reflect a protectionist focus. Additionally, the child therapist may use child-centered and non-directive play and expressive arts approaches to gaining the voice of the child including recording observations of non-verbal metaphor through various play-based and art-making mediums. In the non-directive approach, the child leads the way, chooses what he/she wishes to do. The therapist observes the play and does not direct the activity; rather, she follows the child's direction and uses facilitative reflections (Landreth, 1993). This approach may be combined with more directive, structured activities. The child's views are then relayed to the court by the clinician.

Another challenge for gaining the voice of the child is related to children's access to children's counsel or to a child therapist. The child may have the right to have her/his thoughts and feelings represented, but how does she/he gain access to the service needed? For the most part, an adult must initiate services for the child. The adults initiating services include child protective services, parents' lawyers, Judges, parenting coordinators/arbitrators, mediators, or one of the parents directly. Children can call and make their own referral to children's counsel, but this requires having the right information and the ability to take action on their own behalf. With dependence being part of the child's reality, independent action requires specific skills, knowledge and cognitive ability. To access a service means the child will need support from somewhere to do so.

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Family Groups Splintered Post Separation

Managing family matters in a courtroom is a big challenge. Brownstone (2009), an Ontario family court Judge, says it best:



Everyone who works in family law, including Judges, agrees on two things: family court is not good for families, and litigation is not good for children. The emotional carnage resulting from family litigation and its' impact on unfortunate children of warring parents, cannot be overstated. (p. 3)

Judges are faced with information coming from multiple parties who originally constituted a family group and who now put forth historical claims of wrong-doing and various degrees of victimization via their family lawyers. A family system is then divided into pieces with slivers of information provided about one another to the Judge. This divided picture becomes a challenge to decision-makers as they must sift through the pieces of information and create some form of a coherent story from which to base their decisions.

The Roles of Children's Lawyers

To challenge things further, there are three roles a child's lawyer can take: advocate, guardian ad litem (litigation guardian), and amicus curiae. This being so, the role of legal representation for children changes the approach that children's legal counsel takes. Amicus curiae means friend of the court and in this role the lawyer would take an

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impartial, neutral position regarding litigation outcome. The amicus curiae assists the court by providing relevant evidence that might not otherwise be provided by the parents. This information assists the court to make decisions in the best interests of the child. The amicus curiae will not argue in favor of a child's position, rather the role is to provide his or her assessment of the situation based on supporting evidence gathered through child experts, school consultation, medical consultation, etc. Additional roles may include helping the child in understanding the legal process and to ease his/her distress, seeking other services and resources for the child, encouraging parties to settle out of court, encouraging parents to focus on best interests of the child and to protect the child from over-assessment.

The guardian ad litem is responsible to provide information related to the best interests of the child back to the court. The litigation guardian's role is to provide evidence to ensure the protection of the best interests of the child. The child's preferences may be considered, but the litigation guardian may choose not to present the child's views if those views are contrary to the child's best interests and the views of the lawyer. In this case the litigation guardian's assessment may override the child's views. It is important when assuming this role that the lawyer does not blend the role of advocate and litigation guardian. Also, if a child is able to speak on his/her own behalf, the argument is why should the guardian be the best interest decision-maker over the Judge?

The traditional client advocate role is one where the lawyer does not evaluate the positions or views their child clients

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hold, rather they can examine witnesses, present reports and cross-examine witnesses. These activities add to the child's views (what the child tells the lawyer). The advocate can do what is possible to do with adult clients and that is they can provide options or various choices regarding a course of action to their client, but in the end they must follow the child's instruction. The role is to represent the client's point-of-view and ensure her/his individual rights are protected. The advocate will also ensure solicitor/client privilege and this can include withholding information shared by the child about abuse. If the child asks for the information disclosed to remain with counsel, counsel is not actually compelled to disclose information that may place a child at risk.

There are, however, provisions made to disclose information related to abuse if the advocate feels the need to do so. The reason not to disclose would primarily be related to protecting the solicitor/client relationship. It is further argued that the lawyer may withhold information from others if he/she is aware of a disclosure by a child and the child has not provided consent for sharing this information because the child might lose faith in the legal system if sharing occurs without consent (Bessner, 2002). If an advocate is concerned about the risk to the child, he/she may protect his/her client relationship by encouraging the child to disclose to a third party who will have to, by law, report to child and family protection services.

Best Interests versus Advocacy

Best interests of the child criteria (Parliament of Canada,

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1998) include twelve areas of consideration for professionals providing feedback to the court for decision-making related to children. It is the “best interest” criteria that upholds the notion that children are not fully functioning as individuals who can live independent of a family or caregiver system and who do not hold individualized thoughts without having been influenced by those around them. Of course this notion could also apply to adults. The items listed as best interest criteria are all related to providing information about relationships and relational being (not purposefully coming from a social constructionist way of thinking, but nevertheless could be representative of this focus). I say this because the best interest criteria asks those using it to consider many variables that may contribute to the ways of viewing children as socially embedded in their families, communities and cultures. The criteria allow for the child’s views and preferences to be presented, but requires a larger context in which to place the views including such things as relational issues related to caregivers, history of relationships, ability of caregivers, cultural issues and the child’s emotional, physical and psychological developmental needs (as related to self and other). The best interest guidelines are not viewed by the advocate of the child’s voice as a pure form of hearing directly from the child. The challenge of this thinking is that the child may provide very direct, black and white views and preferences during an interview and what is then reported is the verbatim of the child to the court. The views sound plausible and highly believable but may be without context.

The role of the child in the family system is critical when hearing the child’s voice(s). The child may protectively hold one

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parent's view of the other parent and report this as his/her own. If the child were truly an independent person, the need to protect a parent's view or to align with a parent would not be as necessary. Individuation and self-sufficiency without counting on the parent support would be in place and the child would not have to contend with potential withdrawal of love and care. The child must first protect their relationships as related to his/her survival and if one of the caregivers demands more from the child to comply with the parent's needs, to survive emotionally or psychologically, the child may have to join.

The difficulty with family separation and divorce matters is that many cases that go to trial are not about abuse by a parent or risk related to the actual care provided by one of the parents. Many other factors that contribute to high conflict between the adult parties may be at play, and we need to take into account how children are affected by their parents and other systemic variables such as court procedures and rules during the separation process. If the voice of the child is requested there are two ways it is typically delivered: 1) through (generally) midpoint clinical evaluation of the individual and systemic factors affecting the child in relation to best interest criteria, and/or 2) through a legal advocate interview that provides the verbatim of the child's views and preferences without using an interpretive or evaluative framework. Presumably, the court would be interested in both of these presentations related to the child in order to make the most informed decision.

A reasonable role for the children's lawyer to take is that of

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advocate because it does not require the depth of psychological and clinical knowledge of child development, systems theory, evaluation procedures or clinical interventions to gain both verbal and non-verbal views and perspectives from the child. The lawyer would avoid the criticism of needing to gain more knowledge about child and family matters and could still do what the liberalist supporters recommend by providing the direct (verbatim) views of the child to the court.

Protection of Children's Rights or Not?

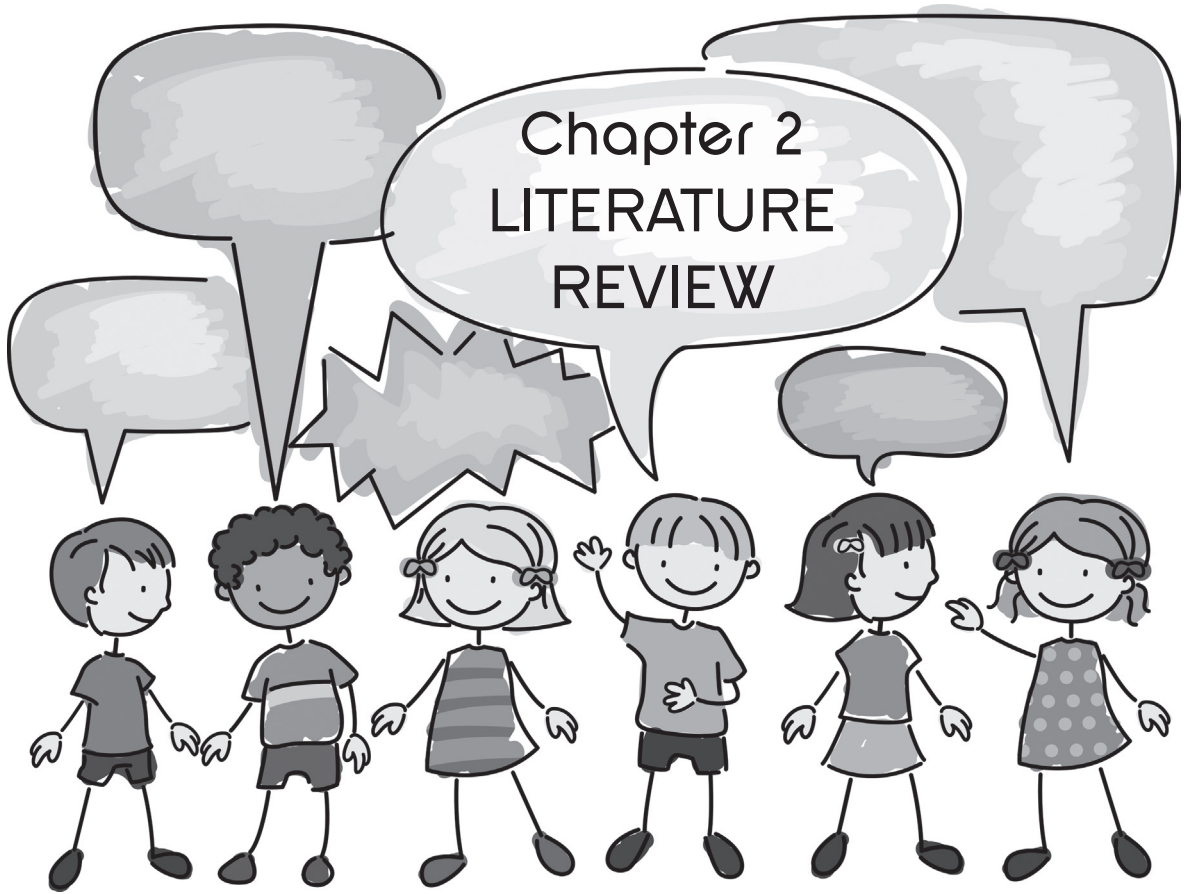
The very argument for gaining the voice(s) of children and youth as rights-bearing individuals can also be used in other situations to diminish their legal protection. For example, the law protects children and youth from having a choice to marry, signing a binding contract, refusing medical treatment and committing a crime. Minors are protected from legal responsibility in these matters because of their presumed lack of capacity (Atwood, 2003). This important factor must be held in order to adhere to the part of the UNCRC which asserts that children and youth also need protection. The difficulty with the involvement and input from various systems (parents, child and family specialists, child development experts, divorce researchers, lawyers, mediators and the court) is that the ways in which each group sees children and youth can be used to support one point-of-view but could also be used in another way to support a completely different point-of-view such as the "evidence of rational decision-making among minors justifies greater culpability" (Atwood, p. 659). The danger here is that the court and other third parties are attempting to streamline a way to include

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children and youth in divorce proceedings while protecting them at the same time. As each profession holds a different piece of the puzzle, lack of coordinated effort can lead to the disservice of children.

If children and youth are viewed as having no age guideline for their input, and there is no system in place for the court (independently) to evaluate a child's expressed underlying reasons for his/her input, then how will the child's input be used in a meaningful way? The "age limit" issue for a child to provide his/her opinion is discussed in the literature and there is no consensus about "a proper age" because there are contradictory theories about the developing child and factors related to age and stage of development. The literature is so confused that it both recommends hearing from very young yet "mature" children while at the same time for older youth provides information about the adolescent brain that continues to be under construction until into the early 20's (Atwood, 2003). There is an argument for the regular use of gaining the voice of the child through court-appointed custody evaluators, mental health experts, guardians ad litem or counsel for the child. Each of these professionals comes from a different educational/disciplinary background and focus

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LITERATURE REVIEW

“Voices of the child: How do you hear them through the roar of the storm?”

Children's Rights

Children are rights-bearing individuals and the courts have an obligation to hear their views in legal matters that relate to them. All children and youth until 18 years of age are to be given the opportunity to be heard and judicial officers have the responsibility to ensure this happens. Since the United Nations Convention on the Rights of the Child (UN Convention Articles, 2006) was adopted by the UN General Assembly on November 20, 1989, children are to be acknowledged as people who have the right to express their views in accordance with their age and maturity. Since the UNCRC, there has been significant effort to sort out how to achieve the goal of inclusion of children's views in a meaningful way. There are a number of UN articles that directly relate to family separation and divorce including Articles 3(1), 5, 8(3), 12(1), and 18(1), and of these the most widely quoted is Article 12 (Bessner, 2002; Birnbaum, 2009; Cashmore & Parkinson, 2007; Family Relations Act Review, 2007; Landsdown, 2001; Mantle, 2006; Semple, 2010b; Taylor, Tapp & Henaghan, 2007). There are a few significant factors and theoretical influences that have contributed to the claim that children have a right to a voice and that adults need to find a way to hear their voices. In addition to the UNCRC, sociocultural the-

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ory and the studies on childhood have shaped the idea of children as citizens with the inherent right to participate in social and political life (Graham & Fitzgerald, 2010; James & Prout, 1997; Mayall, 1994; Smart, Neale & Wade, 2001; Smith, Taylor & Gollop, 2000; Taylor, Tapp & Henagahn, 2007). Historically, children were not considered active participants in cultural life rather they were defined through theories of socialization in families and schools and by biological and psychological theories. Taylor et al. (2007) reports that during the 1970's ethnographic research changed the traditional socialization studies approach and was responsible for the study of children as people and as independent and interactive "agents." More details about children's subjective experiences in childhood emerged and highlighted the fact that children were not simply passive victims, rather they were social actors with their own views and thoughts. The view of children is described by Qvortrup (1994) as "human beings rather than humans becoming" (p.4). Childhood is no longer viewed as a phase that occurs before adulthood with adulthood being the end goal. This way of thinking about childhood shifted the research focus away from deficit models to strength-based models. Research began to include children rather than to study them as distant subjects and included their voices as legitimate, articulate and insightful. Children previously defined as victims of separation and divorce was challenged during the 1990's. Children began to share widely diverse accounts of their family experiences, coping abilities, acceptance and satisfaction of their various circumstances (Smart, 2002). It was discovered that children were actively involved in the negotiation and re-negotiation of their family relationships. They were not simply passive recipients

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of the social changes they faced. The expanded view of childhood also provided a broader consideration of the different ways individual children feel and think about issues such as transition, custody arrangements, relationships with family members, etc. It was no longer possible to provide a one-size fits all guideline to divorce. James and Prout (1997) noted that from the child's point-of-view the social construction of childhood consisted of childhood as a social and cultural phenomenon rather than a universal concept. It was important to recognize children's experiences of understanding childhood without adult interpretations stifling these views. There appeared to be a new paradigm for childhood studies that changed the ways we understand children's lives. The sociology of childhood began "the establishment of childhood as a separate empirical topic in both sociology and social anthropology" (James & Prout, 1996, p. 41). The studies of how children live in different settings and across social environments and the consideration of ethnicity, age, gender, health and economic status tended to replace the typical socialization studies of children. This movement opened the window to a less child-silenced adult-centered view of childhood.

There were other influences related to sociocultural theories about child development that emerged that changed the ways we understand children's abilities. Vygotsky (1978) a Russian psychologist thought of child development as occurring through social contexts. He viewed children's varied developmental abilities as affected by interactions with other people, culture, language, institutions and history. Piaget (1977), the well-known Swiss psychologist proposed that child

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development was more age/stage related and that children progressed through sequential stages of cognitive development. Piaget (1977) became criticized for his theory because it tended to underestimate the child's abilities. His studies were criticized because it was thought that he set the child up not to succeed at various tasks, thereby establishing the child was incompetent. Piaget's theory related to internal individual development constructs that occurred in the child's head. This notion collided with Vygotsky (1978) in that he viewed the social processes (social interaction and shared activities) as leading development. Piaget (1977) did not emphasize the impact of others such as caregivers and others as influencing developmental processes. Vygotsky (1978) referred to the zone of proximal development (ZPD) to explain intelligence. He did not support the traditional notion of assessment for intelligence as in his opinion it did not take into account the child's potential development. He believed that independent performance did not really indicate a child's real potential, rather if the child was assisted by a skilled helper, the child's capacities would greatly increase. In his written description about the zone of proximal development, Vygotsky (1978) notes the ZPD is: ... "the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem-solving under adult guidance or in collaboration with more capable peers" (p. 86). The other concept inherent in the ZPD is referred to by Vygotsky (1978) as scaffolding. Learning occurs during interactional support and guidance with a person who has more skills and understanding than the child. It is the child's movement from observer to participant that assists in gaining

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mastery over a task. A joint construction takes place and the understanding and knowledge building becomes a reciprocal partnership. For new activities, an adult may take the lead in scaffolding the parts of the activity, and gradually over time, the child takes a greater role and responsibility in the activity or task. The learning is adjusted in a sensitive way over time and later the adult and child become increasingly equal in the accomplishment of the task.

What does the notion of children's rights, the UNCRC and children's studies have to do with the voice of the child topic? Freeman (1998) thought there was some common ground between these political and social forces in that children are now viewed as people and not property, or as objects of social concern and are now participants versus problems in social processes. Smith (2002) explored sociocultural theory and children's participation rights. She was supportive of Vygotsky's theory of child development and thought that it contributed to the children's rights and children's overall participation in topics that affect them. The scaffolding concept was of importance because it allowed for children who have not typically been heard to be assisted in their ability to formulate and share their views. The theory of scaffolding assists in the meaning making process in that skilled helpers in family law matters may be able to assist in the mediation of the child's functioning by adding pictures, props or by providing age appropriate education thereby increasing his/her input and voice.

Taylor et al. (2007) presented an integrated model including the sociology of childhood, sociocultural theory and the

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UNCRC. They charted both the participation by children and the role of others in mediating the child's level of functioning in relation to the above three headings. Regarding participation, the sociology of childhood holds that children are now viewed as social actors and are active participants and citizens in family and community life. Regarding socio-cultural theory and participation, the view is that development emerges from participation in social and cultural contexts. In relation to the UNCRC and participation, article 12 gives all children the right to participate and express their views about proceedings that will affect them and they can express their views directly or through a representative that is chosen for them.

The model reviewed the role of others in mediating the child's process and highlighted that in the literature on the sociology of childhood, new ways of understanding and theorizing childhood has emerged viewing children as legitimate and valued contributors to family and community life with their own subjective perspectives. There is also an obligation to listen to children's views and take them into account. Regarding sociocultural theory and the role of others in mediating a child's functioning, the concept of scaffolding by others more skilled, increases the balance of power between the child and the adult and provides increased competence so that the child may later perform unaided. The UNCRC acknowledges that children are interdependent with family members and views children's rights in the context of parental and extended family and community responsibilities. Meaningful participation is now more possible if we can focus on the significance of children's participation and the roles

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others can take to assist in scaffolding the child's abilities to their maximum potential.

The Child's Voice in Separation and Divorce: The Pros and Cons

The literature reflects a common warning of inclusion of children in legal matters as tokenism and refers to the need to avoid watered down versions of the voice of the child. The child's voice is often referred to as child inclusiveness, child participation, meaningful participation, active participation, providing input and views, the child's wishes, etc. (Atwood, 2003; Cashmore, 2003; Cook-Sather, 2007; Davis & Hill, 2006; Henaghan, 2005; James, 2007; Kushner, 2006; Smart, 2002; & Thomas & O'Kane, 2000). Birnbaum (2009), in her review of the literature on those in support of hearing from children during separation and divorce found reasoning was related to approximately seven areas including rights-based and interest-based considerations, considerations of the desire of children to be active participants, consideration that participation was linked to a broader policy perspective, participation positively correlated to adaption in family post separation and divorce, direct participation provides the most direct summary of children's needs, children's participation provides children with a sense of responsibility, improved parent-child relationships and there are therapeutic benefits to families when they include children in the mediation process (Atwood, 2003; Brennan, 2002; Butler, Scanlon, Robinson, Douglas, & Murch, 2002; Goldson, 2006; James & Gilbert, 2000; Landsdown

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2005; Neale, 2002; Pryor & Emery, 2004; Smith & Gollop, 2001; Smart, Neale & Wade, 2001; Sposnek, 1989; McIntosh, 2003). There are many reported reasons for including children in the process.

Research-based programs related to child-inclusive mediation in Australia and New Zealand have demonstrated some positive benefits of separating families (Goldson, 2006; McIntosh, 2000, 2003, 2005, 2006, 2007; and McIntosh & Deacon-Wood, 2003). McIntosh (2007) with others has evaluated the Australian model of evidence-based practice model of child-inclusive mediation. The types of intervention included child focused mediations where the mediator assisted the family with child development information in order to help them to make a suitable parenting plan and the other mediation style was both child-focused and child-inclusive whereby the child was directly involved in speaking to a child specialist in addition to the child-focused mediation. The specialist in the second style of intervention assessed the parent/child relationships and assessed the child's separation experience. The information gathered was relayed to the parents by the child specialist. The comparative study looked at outcomes over 12 months and 142 families (364 children) were involved. Although both groups had high levels of poor parent communication and overall conflict and the children were reportedly experiencing high levels of distress, outcomes were that both the child-focused and combination child-focused and child-inclusive interventions both experienced a reduction in conflict one year after the intervention. The child-inclusive intervention appeared to positively effect the child/father relationships. Children

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reported feeling closer to their fathers, fathers were more emotionally available to their children and the fathers presented with more alliance with the mothers and more satisfaction with the parenting plan even if there was less time with the children than the mothers had with the children.

Goldson (2006) conducted a qualitative study of 17 families and 26 children between the ages of 6-18 engaged in a New Zealand child-inclusive mediation program. The mediators met with children individually, parents individually and then met with the children and parents together. The children were aware of what was discussed with the parents regarding their parenting plans and the children were able to contribute their thoughts and ideas to the process. The findings showed the children wanted to be involved, wanted to contribute to the restructuring of their family plans and the children and parents reported a reduction in their overall conflict. The parents were more aware of how their children were being impacted and the children found it easier to cope and adapt post-separation. The studies identify reasons to include children in the decision-making processes when mediators are involved.

There are also those who are concerned about including children in decision-making during and after separation and divorce. The very rationale for inclusion of children may not always yield the positive outcomes desired – even with mediators. Emery (2003) states “after conducting less than a dozen cases where I included children in the mediation process in order to promote their best interests, I started excluding children for the very same reasons” (p. 623). The point made by Emery was that he found himself placing the

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children in the middle of parents in conflict and he felt that he placed the responsibility for complicated decisions on to the children. He further notes that when no one knows what to do (parents, lawyers, the guardian ad litem, the mediator and the Judge) the pressure of hearing the voice of the child is increased and subtly or not so subtly the messages is “tell us what to do.”

When reviewing the point-of -view of “rights of the child” there are competing issues. Smart (2003) notes that in England and Wales there have been difficulties listening to children in private law related to divorce and separation because the principles of child welfare and participation can collide. Even with the direction of the Children Act of 1989 and its emphasis on gaining the wishes and feelings of children, strategies for including children in legal procedures are lacking. Atwood (2003) also expresses that there are competing goals of protection from emotional harm and protection of litigants’ due process when gaining the voice of the child. There are many adult agendas in motion when examining rights-based actions and decisions. There is a gap between principle and practice of participation (Graham & Fitzgerald, 2010). Is children’s participation matched by evidence of positive change for children? This question is at the center of the debate.

Davis and Hill (2006) refer to the process of gaining the child’s input as adult-led and not effective in that there is little action taken related to what children want. Morgan (2005) shares this thought and claims there are various groups and initiatives that are meant to gain the voice of the child, but few

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actually provide meaningful feedback to the system after their involvement. There is much irony in the current conditions of inclusion of children in legal, social and political matters.

Graham and Fitzgerald (2010) note:



Paradoxically, then, just at the time we are witnessing increasing numbers of government and non-government organizations (in education, family law, health, community services, research institutes and so on) laying claim to value participation, we are simultaneously querying whether 'listening to children's voices' guarantees any benefits for children, and whether public or private decision-making outcomes are shaped or impacted as a result of children's participation. (p. 345)

There are those who believe that children of separation and divorce are in untenable positions. The argument against placing children in the foreground with their parents is that children's voices may be distorted by their parents' influence. Pressure to take sides and manipulation by one or both parents are of concern to those in the field. Children's voices can be lost or modified by what they think each parent would like to hear (Garrity & Baris, 1994) or by an atypical, frightening isolated incident that leaves a significant imprint on the child's thoughts and feelings about a parent who was previously viewed as loving (Warshak, 2003). Some children will align with a parent that is feared (Clawar & Rivlin, 1991; Gardner, 1998) while others may engage in caring for an ailing parent or a parent who is viewed by the child as needy or victim-like (Hetherington & Kelly, 2002). The other

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concern is that children's views do not always represent what is best for them and their attitudes are temporary and fluctuating (Smart, 2002; Wallerstein & Kelly, 1980). Kagan (1999) identified three main ways parents influence children including direct interaction, identification and transmission of family stories. These are both direct and indirect influences and can be woven into the child's fluid views.

There is some research indicating a lack of benefit for involving children in child-inclusive mediation. The contradictions include when there is known or potential mental illness experienced by one or both parents, extreme parent stress levels to the point that parents cannot receive feedback, and in extreme parent conflict situations when children do not wish to be interviewed or heard (Garwood, 1990; Goldson, 2006; Kelly & Emery, 2003; McIntosh, 2000, 2007). Some children are concerned about creating more conflict or are worried about a parent retaliating in anger which drives their desire not to participate (Brown, 1996; Drapkin & Bienfield, 1985). Overall, studies from various countries indicate a low level of consultation and participation in family law related to custody and access (Birnbaum & Bala, 2010; Butler et al., 2002; Parkinson & Cashmore, 2007; Smart et al., 2001; Smith et al., 2003).

Who Hears the Voice of the Child?

Participation of children in legal family matters is complicated. There are a number of alternative dispute resolution (ADR) processes that may include children but an automatic opportunity for children to provide input is not in place.

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Parents or other decision-makers will either invite children into a process or order them into a process. Although the enlightenment rationale (children will raise the awareness of decision-makers about their needs, preferences) (Warshak, 2003), and the empowerment rationale (children will gain from participating in decisions that affect their lives (Kelly, 2001; Wallerstein & Blakeslee, 1989) are principles that are written about in the literature, albeit they are not practiced as a matter of course.

Mediation is one process in which children could be involved where parents are involved with a neutral third party in a closed (without prejudice) environment to create an agreement about parenting matters. The process fosters cooperation and it is non-adversarial (Folberg, 1983; Folberg, Milne, & Salem, 2004). The mediator may or may not speak to children during the meetings with the parents. The research indicates that children's involvement with this process has been quite limited and children were only directly involved in four to 47 percent of all completed mediations across public and private sectors, the United States, United Kingdom and Australia (Saposnek, 2004). More recently there has been more activity related to including children (Goldson, 2006, Ministry of the Attorney General, British Columbia, 2007). The ongoing debate still stems from taking a children's rights point-of-view versus a protectionist point-of-view.

Child-inclusive mediation does include children either by the mediator interviewing the child or by using a child specialist to provide information to the mediation process (Gamache, 2005). There may be different points of entry for children

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including the beginning of mediation, for clarification during mediation or at the end when the parents are ready to share their parenting plan. There are also government funded mediation programs that have been initiated as child-inclusive (McIntosh, 2007 & Ministry of Attorney General, British Columbia, 2007).

Children may also be invited to meet with parenting coordinators who are quasi-judicial, mental health, mediation-trained individuals who work with high conflict families that have difficulty communicating and following a parenting plan or making decisions. The parenting coordinator may enter a number of roles including facilitating, educating, informal assessing, coaching, mediating and arbitrating. The comfort level of the parenting coordinator as related to interviewing children would be one factor considered if a child were to be directly involved with the parenting coordinator. Parenting coordinators may also make use of a child specialist to include the voice of the child (AFCC Task Force on Parenting Coordination, 2003; Coates, Deutsch, Starnes, Sullivan, & Sydlik, 2004).

Child custody and access evaluators are able to meet with children in order to gain their input as well, but typically their interaction is limited to interviews and parent/child observations. The problem with the context of child custody evaluators is that the role primarily falls within the adversarial framework and usually focuses on facilitating a settlement between parents (Bala, 2004; Johnston & Roseby, 1997). The assessments are either done privately or by way of public funding and in either case, the children's voice is

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tucked in with best interests criteria and may, as others have said before, get watered down by this focus. There are many adult agendas at play during assessments in particular and competing values and interests can interrupt the voice of the child (Clark & Percy-Smith, 2006).

Child specialists are neutral third parties with a background in a mental health profession with expertise in working with children and families. Child specialists can be used as assistants to bring forward the voice of the child to a collaborative law team (which could include collaborative lawyers and parents). Collaborative law lawyers sign an agreement with the parties not to go to court. It is an ADR approach that is lawyer-facilitated and interest-based. It is a collaborative approach to solve issues outside of court. If the parents cannot proceed collaboratively, the lawyers will withdraw and the parties will have to find new litigation lawyers (Gamache, 2005). The specialist could also be involved by court order to provide information to the Judge about the child's wishes and best interests where no custody access evaluation is necessary. Judges have been noted as feeling more comfortable with appointing a custody/access evaluator or a mental health expert when attempting to include the child's point-of-view (Atwood, 2003). There is little written about the specific use and effectiveness of child specialists related to bringing forward the voice of the child. Birnbaum (2009) makes mention of the Office of the Children's Lawyer and the unique relationship between a child specialist and the child's counsel. Children's counsel acts as advocate and a clinical assistant to the process will provide feedback to the court with a broader context included. Child

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specialists may be called upon to provide information about the child and this will be heard in combination with children's legal counsel.

Judges are also involved in gaining the voice of the child through one-on-one direct interviews. Many Judges are concerned about direct involvement with children because they worry about placing children in the middle of parental disputes. They are also concerned about their expertise in the area of interviewing children and they do not wish to go against due process related to the rules of court (Atwood, 2003; Bala, Talwar & Harris, 2005; Bessner, 2002; Raitt, 2007). In Atwood's study (2003), 110 questionnaires were sent to Arizona State Judges and 50 questionnaires went to tribal court Judges of whom 60 responded. Of interest in this study was the results related to differences in the ways Judges ascertained children's preferences. There a general commitment to protecting children, but they reported differences in how to achieve the goal of being child inclusive. Overall, there were some Judges who did in camera (one-on-one) interviews and some who never conducted these interviews (taped or not). Most of the Judges said that their decision to interview a child was case specific depending on the child's circumstances. About two-thirds of the respondents used mental health professionals for ascertaining children's wishes. About the same number of Judges used party (parents or other involved in the child's life) testimony. As a conclusion to the study, it was noted that Judges would have little ability to understand the practical or emotional impact on a child related to a custody or access order without inclusion of the child's perspective.

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What Does the Literature Say about What Children Say?

Children have been telling researchers what they want after their parents separate. A British study conducted by Butler, Scanlon, Robinson, Douglas, and Murch (2002) interviewed 104 children between the ages of seven and fifteen who had been through family separation. Four main messages emerged from the children interviewed including: 1) the children wanted to know what was happening at the time of their parents' separation; 2) they wanted someone to gain their input about their living arrangements; 3) most of the children wanted to continue to have relationships with both parents; and 4) most of the children wanted to spend equal time with each parent. Other studies indicated similar outcomes (Dunn & Deckard, 2001; Hawthorne, Jesop, Priyor, & Richards, 2003; Smart & Neale, 2000; Timms, 2003). Additionally the study highlighted that what children said was they often felt powerless and in-the-middle of their parents' agendas, they felt guilty about expressing what they wanted when their parents held conflicting opinions to one another, they felt isolated and had to partake in confusing arrangements for contact with each parent with little regard made to their own activities, they did not feel they saw their siblings and stepsiblings enough, and they thought there was no where to go if they had witnessed domestic violence. Additionally, some teens felt torn loyalties when their parents were divorced more than once and some teens left home earlier than planned.

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Smart (2002) reported on qualitative research about children's lives from their own perspectives. Through conducting in-depth interviews (in conversation form using open-ended questions), use of vignettes (hypothetical scenarios where children were asked what would you do if..."), drawing methods, timelines and tick charts, rich data were derived providing insight into children's real, everyday lives. A number of areas of importance to how their day-to-day lives were lived emerged when examining the data and including narratives about physical space (including living spaces, adjustments, organizing possessions etc.), emotional space (the emotional zones between the two parent homes, transitions between two emotional landscapes), psychological spaces (distance between themselves and their parents, seeing their parents as individuals and distinguishing their parents more, etc.), and issues related to time (time took on a new dimension, equal sharing of time, time apart, time to oneself, time and hurting and time and sharing). In addition to these critical areas of concern for children, most of them noted they did not want to be forced to make choices, they needed time to settle in to new arrangements, wanted to understand what was happening and they wanted flexibility.

Fitzgerald (2009) and Graham and Fitzgerald (2006) drew a number of key themes from their research data related to children and family law decision-making. The question was "what do children say participation is"? The researchers sought the views of young people and identified five themes children said they wanted: 1) to be respected as persons in their own right and seriously considered, 2) opportunities for

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participation based upon genuine efforts to change, 3) access to information to allow them to make informed decisions and cope with decisions that were being made, 4) to differentiate their participation in decision-making from responsibility for the decision itself, and 5) to avoid individual claims - rather they saw it as being discussions with others and identified interdependence in the experience of delivering their views. Other authors and researchers have found similar outcomes (Butler, Scanlon, Robinson, Cashmore & O'Brien, 2001; Douglas & Murch, 2002; Neale, 2004; Stafford, Laybourn, Hill & Walker 2003; Taylor, 2006).

In their recent comparative research on children's experiences with family justice professionals and Judges, Birnbaum, Bala, and Cyr (2011) heard from 29 children (14 females and 15 males) about their involvement and its meaning to them. The majority of the children (22 out of 29) were in the sole custody of their mother, three were in shared custody and four were in the sole custody of their father. At the time of their experiences of involvement in the legal process, the children were between 4-12 years of age. The longest time since involvement in the process was 5 years. The authors focused on children who have been interviewed by Judges, represented by child lawyers and/or met with a mental health professional in Ontario (Canada) or Ohio (U.S.A.). A number of thematic results emerged including:

- 1) how the children found out about the plans for their care;
- 2) the level of their involvement in developing these plans;
- 3) whether they felt "heard" by different family justice professionals who spoke to them; and,
- 4) what did they find helpful or

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not about their involvement with those professionals. (pp. 5-6)

The outcomes to the above themes were that the majority of children were not consulted about their living arrangements by anyone. It was reported that adults made the decisions about their involvement and children were generally told they had to meet with “their lawyer” or a mental health professional. Adults primarily making decisions in the process are also reported by Semple (2010b) in his study of possible forms of evidence in custody/access cases that require adjudication in Canada. The children said they wanted to be asked whether they wanted to participate in decision-making and many wanted to be heard and to be a part of the decision-making process. Children’s expressed views and preferences may change and be affected by who brought the child to the meeting, etc. Children reported that even though they had an interview with a mental health professional or a lawyer, many also wanted to talk to a Judge. This is not unlike what Cashmore and Parkinson (2008) found in that the children wanted to be heard by someone they knew could make a final decision. Even when the children in the Birnbaum et al. study did not get what they wanted, they still thought it was important to have been heard by a Judge and would ask to do it again. This was yet another example of what children might want.

The children’s advice to professionals about hearing them was to be patient, provide lots of details, be gentle, do check-ins every six months, try to understand what is going on and believe the child, remember that it’s not the child’s decision, but Judges should hear what children say and be open-minded to what a child says (don’t be biased). The end result

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is that it is important to give children a way to express themselves in a safe, neutral and non-judgmental way. There are many ways children are involved in the family justice process and the concern is that children may be harmed by being placed in the middle of the process. Birnbaum et al. (2011) note that if parents are in conflict enough to use the legal system for a remedy, the children are also very likely to already be in the middle of their parents' conflict. Gaining the voice of the child (from the child's point-of-view) does not necessarily make their position in conflict worse, rather children can provide an important perspective (Smart, Wade, & Neale, 1999).

How and What Do Legal and Mental Health Professionals Consider in Accessing the Voice of the Child?

Birnbaum (2009) outlined the varied ways that children are involved in family law decision-making. She included five areas of inclusion in contested custody and access cases: 1) direct evidence from the child as a witness in court or in the Judge's chambers; 2) indirect evidence related by a parent or other witness through hearsay (including a videotape or audiotape); 3) the evidence of a mental health professional after having conducted a custody access assessment; 4) written statements from a child in the form of a letter or affidavit; and 5) child legal representation. The literature points to some decision-making guidelines for child participation. Hart (1998) provides an eight-step model that incrementally involves higher levels of participation by

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children. The highest involvement is related to children being fully involved in setting agendas and putting forth information in an advisory fashion to the adults involved. At the lowest end of the participation ladder, children follow what the adults say. Hart's ladder of participation is, however, designed to include children in community projects and may not be easily transferable to other uses such as children's hearings and other forms of legal involvement (Murray & Hallett, 2010). Shier (2001) also describes a number of entry points to participation in a similar way to Hart (1998). Sinclair (2004) identified four dimensions of potential involvement including active engagement in participation (sharing between adults and children), actual decision-making in family (without public service involvement), participation activity (consultation, youth forums, advisory groups, etc.), and consideration of the child who is to be involved (age, gender, culture, ability, etc.). These models address various entry points to participation.

If the child has been invited (or sent) to a professional to provide his/her input, what methods are used to gain his/her contributions? One primary method reported is the interview. Social work has developed significant expertise in direct work with children in the child protection field (Brandon, Schofield, & Trinder, 1998; Kadushin & Kadushin, 1997; Kohli, Dutton, & Raymond, 1997; Morgan, 1995; Sainsbury, 1994; Waterhouse & McGhee, 2002). Australian authors Wilson and Powell (2001) have developed professional interview guidelines for children. Zwiers and Morrissette (1999) developed a comprehensive guide for counselors and included information related to child and professional variables,

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effective use of language, special needs considerations, ethics, research interviews and diagnostic clinical interviews. Kortessluoma, Hentinen and Nikkonen (2003) discussed conducting a qualitative child interview related to pain. These authors identified methodological considerations for interviewing children and looked at factors that influenced data gathering and strategies to deal with these influences. As one outcome to their work, they noted surprisingly little guidance available on conversational methods involving children. While there appears to be some general guidelines to interviewing children from various professional points-of-view, Mantle et al. (2006) report limited information in the literature about those interviewing children for family law matters. Research on interviews by Judges (Atwood, 2003; Cashmore & Parkinson, 2007; Kearney, 1997) and ways to view child development and childhood can be found in the literature (Graham & Fitzgerald, 2010; James, James & McNamee (2003); Landsdown, 2005). In her research and review of forensic interviews with children, Walker (2002) found seven specific strategies to increase the likelihood that an interview will be developmentally appropriate: 1) use active rather than passive voice; 2) avoid negatives and double negatives; 3) include only one query per question; 4) use simple words; 5) use simple phrases; 6) use the child's terms; 7) be alert to any signals the child is having difficulty comprehending questions asked.

Kelly (2012) is one of the leaders in the divorce field and she has recently developed "The Structured Child Interview" for children of divorce who are ages seven to seventeen. The interview consists of the following six phases: 1) Review of

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process, child's participation, interviewer's role and confidentiality; 2) Establish rapport; 3) Obtain focused information about separation, conflict, parents, current situation; 4) Elicit and integrate child's narrative (views, ideas, observations, maturity, sense of the child); 5) Review information with the child for accuracy; 6) Provide feedback to parents. In each of the above phases, Kelly outlines a number of questions or areas of consideration for the interviewer to use when meeting with a child. She also makes note that there are very few reasons not to include children through an interview including: parents are already in agreement about parenting, child is highly anxious or opposes being involved, child is too young (and is an only child and is less than six-years-old), there is evidence of parent mental illness or child abuse, and the parents are opposed to obtaining the child's views.

Mantle et al. (2006) found a few commonalities amongst practitioners interviewing children. There was a focus on children's competence with which followed a range of interview and observation techniques, the child's age, and consideration of the wider context including purpose and procedure. They further identified a range of questions to help identify main phases of the interview: 1) Where should the interview take place and who should be present? 2) How is confidentiality ensured, what are the limits to confidentiality and how will this be explained to the child? 3) What purpose shall play serve and how 'free' or guided should it be? 4) What form should questions take and what information are they expected to produce? 5) What techniques and aids are used for interviewing children of

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different ages and competencies? 6) How will the interview be concluded? 7) How will information be recorded, analyzed, evaluated and made use of? Mantle et al. also examined children's autonomy and parental influence when interviewing children. Four key considerations included relational points of reference (practitioners looked for ways to include direct observation of the parent-child interaction), signs of coaching, signs of brainwashing (from either or both parents), and influence by siblings. The ways interviewers attempted to prevent influence were to set expectations (with the parents and the children) and to establish trust and rapport with the child. Detection of influence appeared though the child acting like an appendage to a parent, full rejection of a parent, the child shuts down and refuses to participate and by interviewer checking out (over time) what the child has said (supportive and conflicting evidence). The interviewers responded to identified influence by at times challenging the parents. In the end, depending on the child, not all practitioners used interviewing as a method, rather they engaged in play using games or toys or for very young children and observations of the parent/child relationship.

Regarding the question of age and competence, Hart (1998) follows the evolving capacities notion about child development and identifies that children up to three are not able to really understand the perspective of others and lack significant decision-making capacity. Children from age three to 11 are increasingly able to recognize that people have different perspectives and gradually during that period acquire the ability to see another's point-of-view. Generally by age 11 children begin to be able to understand a third-person

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perspective and appreciate that people have mixed feelings about things and by adolescence, young people can reflect on what is good for society and develop a legal or moral perspective. Tapp and Melton's (1983) research indicated that confidence in one's own ability to make choices is an independent predictor of competence. The more opportunity for decision-making that is given to children, the better they seem to be at exercising informed choices. Further regarding developmental principles, Landsdown (2005) notes that although Piaget's (1977) developmental theory that described a series of discrete stages has been largely discredited, there are some general phases of development that cannot easily be argued against.

The legacy that is left related to assumptions about Piaget's theories are:



Childhood is a universal process, adulthood has a normative status, goals of development are universal, deviation from the norm indicates risk for the child and childhood is an extended period of dependence in which children are passive recipients of adult protection, training, wisdom and guidance, rather than contributors to their social environments.
(Landsdown, 2005, p. 10)

There is some argument in the literature about specific age and competency. One argument is derived from neuroscience where findings show full development of the frontal lobes of the brain (which serve as centers for executive behavior, critical thinking and judgment) does not occur until

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after 18 years of age which may affect decision-making functioning in adolescence (Lexcen & Reppucci, 1998). Although the neurobiology may be reliable, the decision-making competence related to age is arguable. Bartholomew (1996) reports in his research that the differences between adults and young people for preparedness to be influenced by short-term goals and changeability in views, does not, appear to impact decision-making competence. Although historically age has been a marker for discussion of inclusion of the voice of the child, there is currently no firm age identified for inclusion in legal decision-making matters. The age of 12 has been discussed and rationalized as a reasonable age for a child to have direct participation (Bernstein, 1993). At this time there is no age gauge for capacity to partake in legal decision-making processes. The capacity to understand and communicate is thought to be evaluated on an individual basis rather than by set age standards (Atwood, 2003; Bessner, 2002). Bessner (2002) further noted that the sole yardstick for assessing the child's capacity to instruct legal counsel is his/her ability to communicate preferences, wishes or views. It would appear from this statement that if a child can speak coherently (for his/her age), the child can therefore instruct counsel.

Regarding cognitive competence the older the child the greater the scope of overall ability for decision-making authority and the more weight regarding preferences is given by adults (Warshak, 2003). Older children are less suggestible (although not immune to suggestibility) and are less likely to have difficulty with memory accuracy (Ceci & Bruck, 1993; Foley & Johnson, 1985). Older children can be

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vulnerable to outside influences and can also fully reject the view of someone else and make choices primarily to oppose another's preference (Steinberg & Cauffman, 1996). The discussion of age and capacity is related to when a child should be invited into a decision-making process.

Graham and Fitzgerald (2010) propose a dialogic approach to children's participation. Their focus is not on the traditional interview, rather they draw on the insights of critical hermeneutics (Gadamer, 1979; Kogler, 1999).

Graham and Fitzgerald (2010) note,



we interpret conversation to be dialogic in nature as it implies that understanding is not simply reached by producing our conversation partner's intent or meaning, but rather on producing shared mutual meanings. In other words dialogue is productive rather than reproductive. (p. 351)

Three principles lead the way in this work and include the need to ontologically consider the nature of dialogue itself, a requirement to take the self-understanding of children seriously, and approaching children's participation as a dialogical encounter presupposes an ethical dimension of respecting their views, perspectives and assumptions. The conclusion of the discussion about the dialogic approach is that it is another way to engage with the growing movement of children's participation in providing their views. It is more than listening to children's voices, as the approach is relationship-based and is oriented towards the child's self-understanding,

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individual agency, and the self-understanding of the adults involved. Cook-Sather (2007) views this approach as a conceptual bridge or translation between how we interpret and render ourselves and how we can work with children to do the same in a participatory context. Komulainen (2007) adds to the conversation by asking about voice as individual property or as a product of social interaction. He states “Whatever part children’s communication competencies play in encounters with researchers, they are ultimately constructed and interpreted by adults. For this reason, I suggest that researchers ought not to impose a voice on a child, but should instead think critically about what the idea of “voice may comprise” (p. 23).

Warshak (2003) identifies the value of supplementing the individual voice of the child with the collective voices of children. He admits that the group voices do not satisfy an individual child’s wishes, there are some potential benefits for supplementing the child’s individual voice with the perspectives of other children. His rationales include: the collective voice bypasses the problem of the child being used as mouthpiece for one parent’s views, the collective voices may substitute for children who are unable or unwilling to speak for themselves, collective voices from research can call attention to important aspects of a child’s experience that might not easily be articulated by an individual child, and collective voices can assist decision-makers in anticipating the likely future impact of decisions.

Inclusion of younger children’s voices requires special consideration. Punch (2002) examined the methodological

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differences between research with adults and research with children and noted the ways of seeing children affect ways of listening to children. Punch notes that an ethnographical approach would be suitable to use by an adult researcher if they wanted to minimize a power differentiation. Methods would still be adapted according to the child's ability and the researcher may use pictures, diagrams, and drawings.

Lahikainen, Kirmanen, Kraav and Merle (2003) compared two interview methods (semi-structured and picture-aided) with children aged 5-6 years in Finland and Estonia. They found the picture-aided interviews allowed the children more freedom to express their concerns about emotionally sensitive matters, especially when the children were referring to intimate, close relationships with and between others. As previously noted above, Smart (2002) also adapted her work to accommodate younger children by using vignettes, drawing methods, tic boxes and open-ended interviews that invited narrative responses. Johnston and Roseby (1997) outlined many other strategies for use with young children including feeling faces, puppets, mask-making, role plays, talk shows, and identity shields. Many of these materials are play-based and used by those trained in child therapy and assessment. Johnston and Campbell (1988) also presented a number of specific activities for gaining input from younger children. They described a play-based interview process using "talking doctors" and doll figures to provide a metaphorical way for children to engage in showing and telling about their own experiences. Two doll-houses are also part of the necessary materials, so that children may project their own stories of their two homes into the play. Projective story-telling cards depicting a number of different parent-

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child relationships are also used to assist children to express their thoughts and feelings. Johnston and Campbell provide children with an age-appropriate explanation of custody and access arrangements and invite children into a dialogue in relation arrangements in their lives. Play space is provided for indirect play activities as the authors have found that indirectly acting out feelings and conflicts in fantasy play is more tolerable to the child. Drawing and painting opportunities are also made available. The authors engage in both direct and indirect activities with children of separation and divorce.

Best Interests of the Child: What is this About?

Best interest is a legal concept and as Semple (2010b) puts it, it is the “golden thread” that runs its way through Canadian law related to custody and access. It is more than a Canadian concept, however, as it dates back to 1701 in England (Peacock, 1982). The best interest standard was made a guide for making child custody decisions in the twentieth century. Before this time, courts provided fathers with child custody regardless of the needs of the child (Marafiotte, 1985). Financial care ability, the father’s entitlement to the benefit of the child’s services, the father’s ability to train the child (Lyman & Roberts, 1985) and children being viewed as property all contributed to this decision-making. Roth (1977) points out that these social beliefs were related to ancient Roman laws where fathers could sell or condemn their child to death. By 1817 in England, the doctrine *parens patriae* was instituted and the Crown could then defend the rights of those who had no other protection, children being part of this group

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as they could not defend themselves against their parents. Another shift occurred with the Talford Act passed in England in 1839 where mothers were granted modest legal rights of access to and custody of very young children. Canadian legislation on child custody was not in place yet, therefore, Canada deferred to the English legislation. Age of the child in custody and access has early roots as the Custody of Infants Act was passed in 1855 where the upper age of the child for granting maternal custody was set at 12 years. This differed from the English system that set the age limit at seven years. Pearson and Thoennes (1998) reported a change in the 19th century based on the innocent party of the marital breakdown concept. Mothers became widely thought of as falling into this category and the maternal preference standard resulted in mothers being granted custody more than they had ever been. This shift set in motion the well-known “tender years” doctrine and mothers were viewed as the natural caregivers of children and fathers had to prove mothers of children as unfit (Blackhouse, 1981). The tender years doctrine has continued on as a factor in custody and access decision-making, but it is now balanced with the emergence of another shift related to the best interest of the child during the late 1970s and early 1980s (LaFave, 1989). The best interest standard was adopted in the early 1950s and peaked by the 1980s. Of interest is the fact that the 1968 Divorce Act of Canada does not refer to best interests, but the reformed 1986 Divorce Act does explicitly mention best interests. Regarding the Canadian provinces, Ontario was the first province to refer to best interests in its legislation and all other Canadian provinces followed thereafter.

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Throughout most of the world, the prevailing best interest standard is used in custody and access related cases. The UNCRC reinforces that the best interest of the child shall be a primary consideration in Article Three and has been ratified by over 200 countries (Bessner, 2002). But what does it mean? The best interests standard has been widely criticized for being vague, value driven, lacking uniform criteria and allowing for too much judicial discretion (Semple, 2010b; Thomas & O’Kane, 1998; Warshak, 2007). The critics of best interest standards say that it encourages litigation vs. negotiation because the judicial outcome is too difficult to predict (Jellum, 2004). The criteria is too ambiguous and invites attacks related to parenting and as Warshak points out there are “broad character assassinations rather than a focus on one or more discrete factors” (p. 120). Because the best interest standard lacks specificity, gender biases and value judgments based on alignment with personal values and ways of understanding life end up leading decision-making (Polikoff, 1982). Emery, Otto, and O’Donohue (2005) claim there is no objective guidelines or basis for use to predict which custody arrangements will best serve a child’s best interests.

Best interests of the child in relation to matters of custody and access is a contradiction in the family law system (Semple, 2010b). The reason for this is custody usually means the right to make decisions on behalf of a child and to have care and control of a child, while access is the right to communicate with a child and obtain information about a child. In Canada, custody and access law is governed by the federal Divorce

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Act. If parents separate and make an application for divorce, the matters are governed by the Divorce Act. The law instructs that any dispute related to parenting shall follow the best interests of the child standard. Semple (2010b) points out the glaring fact that there is no reference to parents in the best interests phrase and therefore parental interests are not considered, and not only are they not considered, parental rights play no role. He argues that children's interests are served by positive parent relationships and that may be a way that parent needs are acknowledged. "No Canadian statute confers rights on adults in custody and access disputes, or indicates that their interests should be considered" (Semple, 2010b p. 295). The contradiction continues in that parents decide when the process begins and ends. Parents are expected to have their children's best interests in mind, however when they only go to court when they are in conflict, this is a difficult time to take into account the child's needs as a primary focus. A qualitative study by Callaghan (1999) found that the bureaucratic pressures tended to emphasize parental rights rather than children's needs. The study also mentioned case law as one of the standards of practice used in law and noted that the pressure to reference case law undermines the specific needs of the child. General referencing takes decision-makers far away from the everyday needs of a particular child in a particular family.

Semple (2010b) comments on the possibility of having a presumption rule, (general guideline for best practice such as what happened historically to aid the court in decision-making) but the criticism of this approach is that it

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would shift the focus from children's best interests to the interests of parents. A few contemporary "presumptions" have emerged for debate in the literature. The approximation standard is one example (Warshak, 2007). Application of the approximation standard means that the court should allocate custodial responsibility so that each parent spends about as much time and in similar ways (delegation of responsibilities) with the child as they each did in the marriage. There are pros and cons related to the approximation standard. The positive factors are that the rule would be gender neutral; respect the decisions parents made in the past about parenting; simplify and expedite the judicial process due to minimizing the factors to consider; a proxy for the quality of the parent-child relationship (may indicate the strength of emotional ties between each parent and child); and a way to promote stable parent-child relationships (preserves the greatest degree of stability in the child's life. As expected these considerations can also be viewed from a less positive point of view. The negative factors include: the rule will favor mothers in most cases (it will replicate the historical maternal preference because men tend to work more than women) (Riggs, 2005); the past decisions made by parents may not have been made then with a realistic view to the future; the decisions may not be simplified and the principle tends to view one parent as primary and the other as secondary which will likely fuel the litigation process as well giving primacy to past caretaking that does not consider changes in future family organization and functioning that may happen after divorce. There is also no way to correlate the quantity of caretaking with the quality of caretaking (Lamb, 1997). The final concern with the approximation rule as promoting stable parent-child

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relationships is that it will more likely maintain the parent/child relationship with the parent who is awarded the primary caregiver role rather than promote strong relationships with both parents. Warshak summarized that there was limited evidence to support the idea that best interests standard increases litigation and there was also no support for the approximation rule to be useful in diminishing custody trials.

If not the approximation rule, other forms of presumption are proposed such as a joint or shared parenting presumption, where children live with each parent approximately the same amount of time. This appears to be gaining in popularity and supported in a meta-analysis by Bauserman (2002). There are others who document the importance of promoting relationships between fathers and children (Clarke-Steward & Hayward, 1996; Kelly, 2005, 2007; Lamb, Sternberg, & Thompson, 1997; Warshak, 2000) and support the idea of children spending as much time as possible with both parents. The problem for decision-makers remains that no matter how the court would like to find systems to simplify and guide the process there are many factors to consider regarding best interests of the child and caregiving arrangements. To name just a few are caregiver sensitivity and responsiveness to the child's needs (Kelly, 2007; Kelly & Lamb, 2000), quality of meaning of each parent relationship to the child (Kelly, 2005), parent over-involvement (Stearns, 2003), and quality of each parents' emotional attachment to the child (Kelly, 2005). Each family must be viewed as unique with intricate ways of being in their interaction together.

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Best interests of the child and the child's participation in matters of decision-making about them have been difficult to negotiate. Both are required by law, but legal systems are designed for adults. For instance, adults, not children have the right to launch a custody and access process. The contradiction, as noted by Semple (2010b) is that although adults launch the litigation process and are in control of most of the information that goes before the court, the law says the interests of adults are not considered and only the interests of children are acknowledged. So what if the information that is presented to the court is not in the child's best interests at all? Semple (2010a) conducted a quantitative review of 181 substantive custody and access decisions reported in Canada during a five-month period in 2009. He wanted to know how many cases involved any form of direct evidence from the child or professional child-focused evidence and to identify the prevalence of forms of children's evidence. The findings indicated that only 45 percent of the judgments sampled mentioned any children's evidence and in the remainder of the cases only testimony of adult parties were recorded. The other findings were that 30 percent of the cases showed children's evidence as coming through an assessment or child specialist third party professional and only three and seven percent came from direct evidence from children and legal representation of children by children's lawyers. Semple (2010a) went on to define types of children's evidence which are not aligned with either of the parent litigants. He noted the evidence can be about a child's views and preferences regarding parenting, or other information relevant to his/her interests or both. The three possible sources of children's evidence are direct children's evidence

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(unmediated from child to Judge), child-focused evidence (from child specialist or assessment professional in report or testimony form or from representations made by a children's lawyer), and derivative children's evidence (information from child protection service employees, counselors for children and medical professionals). When evaluating the child's voice and best interest decisions Semple's overall finding was that out of 181 cases, not one child was a party to the custody and access litigation process. Semple (2010a) notes, "In exercising its discretion to admit or refuse direct children's evidence, a court will generally balance its probative value against its potential a) to do harm to the child, and/or b) to prejudice the interests of the adult parties. Child-focused evidence from a professional is less likely to harm the child" (p. 4).

Although there is much criticism and argument about the best interests of the child standard, Warshak (2007) emphasizes two main advantages: 1) it directs the court to focus explicitly on each child's specific needs, and 2) it has built-in flexibility because it does not use single factors for assessment and it can incorporate new social and legal trends. Semple (2010b) adds that the best interest standard keeps children from the risk of having to choose between parents even if it focuses on a child's interests over rights. Kushner (2008) believes that the reported vagueness of best interest standards provides the scope to address the complex, shifting developmental needs of children and diminishes gaps between policy and practice. Kushner refers to the variety of texts that exist in law (case law) and psychology (best interests criteria). Kushner studied how the needs of children impacted by high conflict

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divorce are addressed by the court system within which child custody experts work. She coined the term “cortexual slippage” to describe a process that occurs when documentation used by the court system “slips” away from its intended use. “Key is consideration of the numerous forms of text defined as the ‘ruling relations’ that shapes the design of child custody plans” (Kushner, 2008 p. 85).

Texts related to custody and access in divorce provides standardization and stability of organizations and institutions and provides important links between policy and practice. Judges and child custody experts are influenced by multiple texts that influence the standard of practice, planning and eventually decision-making (Kushner, 2006). Kushner notes the everyday lives of children of contested divorce as well as the everyday workings of the legal institutions must both be examined on an ongoing basis. The idea of “filling potholes” is presented by Kushner. The potholes represent the gaps between policy and practice that need legislative attention. The criticisms of the best interest principle may need reconsideration in that it allows social science to fill gaps and potholes in institutional structures that provide decisions for custody and access. The vagueness of the best interest guideline allows for a broader scope of focus to address the continually shifting developmental needs of children. It allows for child custody experts to avoid falling into a linear one-way view of the otherwise complex lives of children.

In Kushner’s (2008) study the affidavit was used as an example as a form of legal text that tended to increase conflict while the custody access assessors were mandated to find

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ways to decrease conflict and present their findings back to the Judge. The affidavit is one way for each parent to communicate to the Judge but it ends up being highly adversarial and non-child centered. As Kushner found, it rarely contains pertinent information about the child's development, needs or point-of-view. The affidavit is a piece of text that follows a very particular procedural path through the court system. It is the document that begins the litigation process and contains evidence of facts. It is a sworn document that sets the stage for the family to find a solution regarding residential care of the child. Many affidavits are filled with inflammatory statements which becomes very unhelpful. The criticism is that it does little to quiet the conflict in high conflict families and it does not assist custody experts in their job in assisting families to find less adversarial solutions. Kushner notes "Contextual slippage demonstrates how the court system is caught between two competing paradigms: one that supports a less adversarial approach to family law and one that responds to the needs of high conflict families who are adversarial. The missing link is the use of non-adversarial text of a procedural nature which would satisfy the court system's mandate to be less adversarial" (p. 292).

Justice Canada (2003) provided best interests of the child criteria for consideration in family law decision-making. The criteria were proposed to be included in revisions to the 1985 Canadian Divorce Act, but to date this has not occurred. Section 16(8) of the Act states "the courts shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means,

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needs, and other circumstances of the court.” The inclusion of a list of criteria set forth by Justice Canada was intended in part to provide a guideline to those professionals working with children of divorce so that they may have a standard list to use for review. The list helps to minimize the one factor focus on best interests decision-making and gives both the legal and mental health professionals a common multi-factored focus. The criteria include: The child’s physical, emotional and psychological needs from a development point of view and the overall need for stability; benefit to the child of developing and maintaining meaningful relationships with each parent including each parent’s willingness to support the development and maintenance between their child and the other parent; history of care for the child; family violence and its impact, child’s cultural, linguistic, religious and spiritual upbringing (including aboriginal background); child’s views and preferences; any plans for the child’s care and upbringing; quality of relationship with each parent; quality of relationship between the child and other family members; ability of caregivers; ability of caregivers to communicate and cooperate on issues affecting the child and; any court order or criminal conviction related to the safety of the child. The criteria help to decrease the vagueness of the general term “best interests of the child.” Mnookin (1983) makes the point that “what is best for any child or children in general is often indeterminate and speculative, and requires highly individualized choice between alternatives” (p. 8).

Firestone and Weinstein (2004) report that although the best interests of children of divorce is primarily a legally defined one, in reality, it is a much more complicated psychological

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and social problem. When family matters become legalized, it makes it easy to lose sight of human problems because the focus is on how to address the legal issues.

Firestone and Weinstein state:



The failure to better examine family problems contextually results in little recognition for the ecological perspective of family dynamics. Greater understanding of cultural mores, for example has no place in a system bound by the act of fitting evidence into the fixed definitions of a statute. The law is not the appropriate forum for assisting dysfunctional families to function better. (p. 203)

New ways of addressing dispute resolution are recommended that include comprehensive programs for families experiencing divorce or child protection like the multi-door courthouse concept where families get triaged into the services they need rather than going straight to court.

What is Happening World Wide Regarding Inclusion of Children in Divorce Proceedings?

In Canada, each province has been involved in finding ways to become child inclusive in legal matters related to divorce. The Ministry of the Attorney General in British Columbia has been focused on a series of consultations and reviews to increase accessibility for children and to promote early resolution to custody and access disputes. The Family Justice

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Services Division presented a Children's Participation Discussion Paper that took into account meaningful child participation in the province of British Columbia (Ministry of Attorney General, Justice Services Branch, 2007). The report discusses persons making a major decision affecting a child and children's rights, views of mature children, children and mediation, expert witness reports, automatic-voice-of – the-child mechanisms, legal representation, children's cases model, judicial interviews and children and post-order decision-making. The province of Alberta is involved both in the private and public sectors. Initiatives such as Practice Note 7 and Practice Note 8 (Government of Alberta 2006) provided focused assessment and treatment guidelines for families in high conflict who are experiencing an impasse. The court is able to order treatment and assessment interventions when necessary. The Children's Legal and Educational Resource Centre (non-profit legal and educational resource for children and youths and their families) and the YWCA of Calgary are working with children where violence has occurred in the family. There is a joint collaborative partnership between skilled counselors and children's legal counsel who provides legal service to young people in the City of Calgary. There are also mediation services provided to parents that are child focused through Alberta Justice, early intervention services such as the government funded Parenting After Separation Course and other courses related to communication after separation.

Other provinces such as Saskatchewan and Manitoba also have programs for early intervention including mediation. Saskatchewan allows children 12-years-old and older to be

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interviewed by a mental health specialist in order to have their views known. Manitoba has a program called First Choice that combines assessment, mediation and counseling focused on resolving parental disputes before the court. The Brief Consultation Service is also available in Manitoba where children aged 11-17 years have an opportunity to share their wishes, concerns and views. Parents are also provided with a brief consultation that focuses on their children's emotional and developmental needs (Birnbaum, 2009). The province of Ontario is active in both the private and public sectors as well and the various mental health professionals appear to strongly believe in hearing the voice of the child (Landau, 2006). Ontario is known as the only province that provides a comprehensive child legal representation program for both child custody and child welfare. The Ministry of the Attorney General provides for independent legal representation of children through the Office of the Children's Lawyer. The OCL mandate is: 1) child's counsel obtain the views and preferences if any which the child is able to express; 2) child's counsel does not represent the best interests of the child (rather the court does); 3) child's counsel is the legal representative of the child and is not a litigation guardian or amicus curiae and; 4) child's counsel has a solicitor-client relationship with the child. The OCL provides child representation assisted by clinical input from mental health professionals. The province of Quebec has specific legislation for legal representation of children in custody and access disputes. This is a strict advocate role that is taken by the legal counsel. Children in Quebec are more likely to testify in court about their parents disputes more than anywhere else in Canada (Ministry of the Attorney General, 2007). Provinces

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such as New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut have varying programs for mediation including adults but none of these provinces typically include interviewing children as part of the legal process (Birnbaum, 2009).

The United States is similar to that of Canada in that each state has its own jurisdiction. Like Canada, child custody and access assessments occur in each state and are conducted by private and public service providers. Alternative types of interventions have been explored in order to manage various types of custody and access issues. The Seive Model in Florida is an alternative model example that focuses on conflict resolution and differentiates services for families that range between high and low conflict (Finman, Fraser, Silver & Starnes, 2006; Salem, Kulak & Deutch, 2007). Specific issued mini-assessments are available in place of full custody assessments in Connecticut, California (specifically Los Angeles), Oklahoma, Minnesota and Texas, but the level of child participation in these types of assessments is low. Triaging services are available in Connecticut beginning with the least to most intrusive interventions (Salem, Kulak & Deutsch, 2007). Overall in the United States the level of child participation remains unclear (Birnbaum, 2009).

Australia is well-known for taking a progressive role in empirically-based child-inclusive approaches with children of divorce (Hewlett, 2007; McKay, 2001; McIntosh, 2003, 2005, 2006, 2007; McIntosh, Bryant & Murray, 2008; McIntosh & Deacon-Wood; Moloney, 2005, 2006; Moloney & McIntosh,

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2004). Children have a greater involvement in decision-making in Australia. Australia has family relationship centers where each family receives up to 6 hours of education and mediation, family relationship services for community-based mediation, court services for high conflict families (where a child consultant will interview a child and provide testimony for court, if necessary) and legal counsel for children (Birnbaum, 2009). The Children's Cases Programs is a less adversarial, less formal trial where the Judge calls all the evidence. The focus of evidence is on the future versus the past; it is informal (no robes); there are direct discussions between the Judge and the parties, lawyers and mediators; the Judge may dispense of rules of evidence; and a family member can assist throughout the litigation stage. It was reported after the Children's Cases pilot program that parents were more likely to report better conflict management, less damage to their co-parenting relationship, greater satisfaction with parent-child relationships and living arrangements and improved adjustment in children (McIntosh, Bryant & Murray, 2008). Children's counsel in Australia advocate best interests on behalf of children as well as provide the view of the child. The lawyers can disclose to the court any information that is shared by the child even if the child disagrees as allowed by the Family Law Act. Contact Cases Program for access-based difficulties was also initiated and has been funded by the government since 2005. The program included parent education, children's groups, individual counseling, and mediation (Birnbaum, 2009).

New Zealand is another country with a significant focus on child inclusion and the availability of extensive child legal rep-

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resentation under the Care of Children Act 2004. Legal roles include: 1) explaining the court processes to the child; 2) representing the child, 3) providing the child's views to the court, and 4) meeting with the child after the Judge has made a decision. New Zealand has a child-inclusive mediation program and also a Parenting Hearings Program. The Parenting Hearings Program is similar to the Australian Child Cases Program, with the exception that mediators are not involved in hearings. New Zealand is committed to find ways to include children's voices, but is also interested in protecting children from risk of harm in the process (Boshier & Steel-Baker, 2007).

Incorporating children's views has been an ongoing effort in Scotland (Marshall, Tisdall & Williams, 2002). The Children's (Scotland) Act, 1975 allows for children to provide their views when their parents separate or divorce. Lawyers can assist children to fill-out an F-9 form which asks children about their views and wishes and this form is then presented to the Judge. Lawyers can also write to the Judge on a child's behalf. Scotland also has a number of conciliation services to assist parents early on in the process of separation (Birnbaum, 2009).

England has a number of services in place related to custody and access. Initially, as in other countries, parents of separation and divorce are referred to mediation and other alternative dispute resolution services. Even though there are on-going discussions of inclusion of children in the process, child inclusiveness remains limited. Birnbaum (2009) noted there were four stages parents and children could move

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through and at any point they may find a resolution: 1) early intervention where the Children and Family Court Advisory and Support Services (mental health professionals) receive the court documents; 2) an assessment is done; 3) court hearing occurs where recommendations and referrals are made by the mental health professional; and 4) court decision is made. Mantle, Leslie, Parsons, Plenty, and Shaffer (2006) note the UK government Children and Young People's Unit has set core principles for involving children and young people in policy development, and program design and delivery. The increased involvement of children is considered a right and a way to improve children's safety and is currently focused on the care system.

Chapter 3
RESEARCH METHODOLOGY
AND METHODS



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RESEARCH METHODOLOGY AND METHODS

“Like the kaleidoscope, by shifting theoretical perspectives the world under investigation also changes shape”
(O'Brien, 1993, p.11)

The Problem and Opening Research Question

There are a number of compelling reasons to undertake a qualitative research study when contemplating the question of: What factors do children's therapists and lawyers consider important when gathering and constructing the child's voice for inclusion in court proceedings and how do they do it? The nature of the question itself asks what and how questions rather than to ask a why question which would lend itself more towards a quantitative comparison, relational or cause and effect study. Another reason to choose a qualitative approach is that the topic needs to be explored. Creswell (1998) said by explored "...I mean that variables cannot be easily identified, theories are not available to explain behavior of participants or their population of study, and theories need to be developed" (p. 17).

At this time most of what is written in the literature is vague and lacking definition regarding theory, and explanation of actual approaches to intervening with children involved in legal proceedings. Other considerations included the desire to

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interview professionals in their natural settings, the interest in writing in the first person narrative form, having the flexibility of time and resources to embark in qualitative research. Because I am part of the therapy community that engages with children to provide their voices back to the legal system, those in the clinical and legal communities are aware of and are very receptive to the idea of the study. My membership in the community allowed me to enter into an active learner role whereby I was able to step away from my typical role as hired expert and learn from the participants. I believe the study offered me a unique opportunity to challenge my own conceptualizations and ways of being in my professional role.

Grounded Theory

Although there are many ways to approach qualitative enquiry, grounded theory best fit my research question. Gaining the voice of the child for inclusion in legal matters that affect them indicates that there is a situation where individuals (the therapist, children's lawyer and the child) interact, take action or engage in a process in response to a phenomenon. I was interested in constructing a theory from the data collected that related to this unique situation. The data I collected in the field related to the actions, interactions and social processes observed or reported by the participants and provided a rich resource for conceptualizing the phenomena studied. Theory can emerge through plausible relationships between concepts and sets of concepts that can later be reported in a number of possible ways including narrative form, visual form or by

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way of propositions (Creswell, 1998; Creswell & Brown, 1992; Strauss & Corbin, 1994). My role as researcher also remained a part of the interpretation and construction of theory.

Generally, grounded theory is described as a method of simultaneous activities in data collection and analysis. Analytic codes and categories are constructed by the researcher but not from previously identified hypotheses or prescriptions. Grounded theorists tend to use constant comparison, which involves making comparisons of data during each stage of analysis and they may advance theory development at each of these stages. A theoretical elaboration of a category can be constructed. Other actions taken when using grounded theory are memo-writing (or journaling), sampling with an eye towards theory construction versus something being representative of a population, and a review of alternative writings/research after or during my analysis. Grounded theory has been outlined by many different authors who have differing viewpoints of what it is and how to do it. I constructed my own approach to grounded theory, informed by several different grounded theory writers.

I undertook a review of the various ways grounded theory could be approached (Charmaz, 2006; Clarke, 2005; Glaser & Strauss, 1967; Strauss & Corbin, 1990). Through this undertaking, I was able to narrow my scope and choose an approach that fit with my ideology and my preferred way of approaching the research study. I chose to use Charmaz's (2006) work to generally follow because she described a number of important considerations when engaging in grounded theory including the view that any theory is

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interpretive in that the analysis comes from the researcher, that theory is constructed versus discovered, that “theory emphasizes understanding rather than an explanation” (p. 126), and that theory assumes multiple realities with no exact or static outcome. Charmaz (2006) also notes: “We interpret our participants’ meanings and actions and they interpret ours” (p. 127). Considering I was a significant part of the research process and that I have an insider status, it was reasonable that I would be an integral part of the interpretive process of the data.

Grounded theory viewed this way may be less traditional than the work presented by Glaser and Strauss (1967). Glaser and Strauss were known for fighting off the dominance of positivism found in quantitative research through the rigor and usefulness of their systematic procedures for managing qualitative data. Later they became known for leaning in positivistic ways. Glaser and Strauss’s work focused on the emergence of data and emphasized the fact the researcher should not force the data rather it should emerge naturally. This way the researcher could remain more objective by not imposing concepts or categories. The idea of viewing my role as “objective” for this study or to view the data as “emerging” when I would be an intricate part of the social interaction and ongoing interpretation of the data made this approach to grounded theory a poor fit for my study.

After Glaser and Strauss’s divergence in the 1980’s, Strauss and Corbin (1990) essentially expanded their ideas of grounded theory to include a focus on verification and they developed new technical procedures that did not emphasize

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the earlier described comparative methods. Glaser (1992) thought that Strauss and Corbin's approach departed from what was really going on in a given study and that the categories were not allowed to emerge due to preconceptions. Other reviewers (Allen, 2010; Gosby, 2000; Hoffart, 2000) assert that Strauss and Corbin (1998) have contributed useful, practical methods and procedures and that they also offer a systematic process that can be used flexibly by other researchers. Although systematic approaches were offered and flexibility was encouraged, I found this approach somewhat oriented towards a positivism.

Clarke (2005) combines grounded theory with postmodernism and uses situational maps in her analysis of data. Clarke's focus is on viewing situations as the point of inquiry instead of actions and processes. She shed light on grounded theory as related to postmodernism and that grounded theory could be further explored in that direction. Clarke added to the literature by providing a four-part structure research design and by providing researchers with a technique of how to use situational maps. I found that Clarke tended to view the social world in complex ways and she included non-human systems and environments in her investigation of situations. She developed a unique approach to grounded theory methods and expanded the ways of thinking about and using grounded theory. After reading about Clarke's views, although interesting I decided not to use situational mapping as I was more interested in gaining an understanding of actions and processes in my study.

Although each of the above authors had some compelling

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points to make, I returned to the work of Charmaz (2006). Charmaz follows a postmodern worldview and her ideas related to entering the phenomenon to be studied and the researcher as being part of the construction of a given reality resonated with me. Allen (2010) notes “Much of Charmaz’s book can be considered postmodern since she includes elements of subjectivity, multiple voices and positionality” (p. 1615). She is immersed in constructivist ways of being which mostly supports the constructionist worldview that underlies this study. Charmaz views herself as an interpreter of the phenomena studied and the interpretations are considered constructions. As a constructivist she is interested in studying how realities are made. Her notion is that as researchers we all begin from a number of vantage points (such as familiarity in a profession) and these are simply starting points and not end points in a process. This struck me as important to consider since I am so close to my topic of interest. From the social construction view we create social realities through individual and collective actions and I am part of the actions and social interactions by being a part of the research study. My goal was to study the currently constructed realities of the two local groups (lawyers and therapists) and to understand how they constructed their views.

Charmaz (2006) moved beyond the positivism of Glaser and Strauss and to some degree Strauss and Corbin. Her view is that a researcher could use basic grounded theory guidelines in a flexible manner and not follow a particular grounded theorist. Charmaz views grounded theory as non-prescribed or “packaged” in terms of the research steps and process, but

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non-neutral in how researchers use the guidelines. Considering this, my interest in Charmaz's work is related to her contributions to grounded theory including providing detailed yet flexible guidelines and her theoretical assumption "I assume that neither data nor theories are discovered. Rather we are a part of the worlds we study and a method for developing theories to understand them" (p. 10). Charmaz provided a path from which I felt I could take and/or diverge from. Although the other authors all suggested using their procedures or guidelines in flexible ways, for a novice who also wanted some flexibility, Charmaz's procedural map to her version of grounded theory interrupted my paralysis in getting started.

The Challenge

Choosing to use grounded theory was both exciting and intimidating. I am part of a professional group that is often requested to describe their understandings of the people they work with in scientific (positivistic) ways. Although most of my colleagues do not express a believe that there is a singular way of being or think that people can be described or understood in a uni-dimensional way, courts often demand therapists to provide certainty related to their work with children in a rather black and white manner. I imagined my colleagues asking about my research "outcomes" so that they may use the research to "verify" something in court. Instead, I hoped I would be successful in inviting them to share their expertise and knowledge by entering into dialogues. I wanted to join with them in exploring each other's ideas,

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competencies and realities. Together, perhaps new ideas would emerge that had not been visible previously.

I was more interested in the theoretical possibilities - an interpretive portrayal of the worlds my colleagues (and I) worked in – a constructed reality. Grounded theory with a postmodern worldview as a guide to my methods of data gathering entailed a shaping and re-shaping of data. It generated abstract concepts and relationships between concepts and helped to shed some light on some situations in a few substantive areas.

The exciting part of the process was that I was indeed a part of the world I was about to study and that I would be intricately involved in the process of interpretation of the data. Additionally, I could “announce” my interpretive role in the study. The intimidating part of the process was being a part of the unknown journey and allowing myself to use Charmaz’s guidelines in some of my own ways. In consultation with my advisor, he encouraged me to follow what felt right to me and invited me to remain a part of the process and use some of procedures and guidelines in creative ways. This allowed me to use my imagination versus becoming mechanical in the process. Once I got comfortable with this idea I became less immobilized. So, the journey began.

The Participants

Therapists and children’s legal counsel were the chosen participants for the study. Therapists are defined as professionals with a clinical master’s degree in a mental health field who are asked to provide the voice of the child

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(the child's thoughts and wishes as they relate to his/her family circumstances post-separation) to the court. Children's legal counselors are family law lawyers whose primary client is the child and who represent children legally in family matters. These two professional groups were chosen as they are primarily responsible for gathering and constructing the child's voice for inclusion in court-related proceedings.

The other possible professional who may be involved in gaining the voice of the child for legal decision-making is the Judge. Judges have the opportunity to directly speak to children if they deem it appropriate to the situation and they feel competent in managing the process. I did not choose to include Judges because it is more common for therapists and children's lawyers to provide the information about children's thoughts and wishes to the Judge in Canada. Judges are often a part of ordering therapist involvement so that they may gain a broader understanding of the family circumstances when parents are divisive about the ways to manage decisions related to children post-separation.

The therapists are then deemed experts to the court in that they are viewed as having a level of expertise not held by the Judge. They offer the Judge information that would otherwise not be accessible to him/her. Information provided by the therapist is used by the Judge to make decisions on children's behalf.

Children's lawyers may also be requested by the Judge, but more frequently legal representation is initiated by one of the parent's lawyers. Children may also request a lawyer. They

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must, however, know how to access children's legal counsel (or have access to a helper) to initiate the assignment. Direct access to a lawyer by the child is less common but it does occur. There are special provisions for children to access lawyers in Calgary, Alberta through a program called CLERC (Children's Legal and Educational Resource Centre). CLERC provides free legal advice and representation as well as information about the law in Alberta to children and youth.

Although I am connected in a broader way to the international community of therapists and I could have accessed those in other countries or other parts of Canada, I decided to focus on the local community of Calgary, Alberta. Each province, state and country have variations on clinical practice for inclusion of children in legal matters and each have different points of law. In the province of Alberta the two main cities (Calgary and Edmonton) also function quite differently to one another. Due to differences in local knowledge, culture and wisdom I realized that more may be gained by remaining locally focused. Therefore, the choice of one geographical location made the most sense if anything were to be constructed from the study for consideration for use in the future. The local Calgary focus would allow for any variations in the Calgary community to emerge.

Invitation to Participate in the Study

I did a number of presentations in the legal and clinical community during the first year and a half of this study about the inclusion of children in legal matters. This stirred interest in the two professional communities, and without direct

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solicitation, elicited people to come forward to ask to be placed on a list to be involved in the study. This unto itself was enough for me to see that there was real interest in the study topic. The professional groups were interested in what each other were doing. As a follow-up to the presentations to the professional groups, I designed a letter outlining what would be entailed in being a volunteer for the study. The letter was an invitation that outlined the following: Title of the study, information about the researcher, invitation to participate details including confidentiality issues, time commitments and honorarium offering, location options, my role as researcher, benefits to participants or others and the option to the withdraw from the study any time. The letter was not provided to anyone during a presentation, rather it was kept to mail out at a later time. This was to ensure potential participants were informed around the same time and that some people were not favored over others since I am a member of the community.

I attained a list of lawyers and therapists who are currently working with children and the court system. The next step was to contact those who spontaneously volunteered during previous presentations and I mailed out the invitation to everyone on the list. I followed-up with professionals who were on the mailing list by telephone after the invitation was sent. I then set up an interview schedule to begin to meet the participants. For those who agreed to participate, I designed a sheet requesting some basic demographic information such as age, gender, number of years in the field, workplace type, specialized training in work with children, training in high conflict separation and divorce, number of times delivering

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expert witness testimony (for therapists), and approximate number of child clients seen or represented.

Demographics

Of the 22 participants involved in the study, the average age was 55 years. Of the total group interviewed 12 of the participants had been practicing for more than 20 years, 7 had been practicing from 11-15 years and three participants had been practicing between 6-10 years. No one in the study had been practicing for less than six years. With the exception of four participants who work in the field part-time (two lawyers and two therapists) the other 18 professionals work full-time. Of the 11 lawyers involved, they reported representing between 2 and 1500 children over their years of practice. The 11 therapists reported having worked with between 80-1500 children. The participants consisted of Asian and Caucasian ethnicities and multiple religious backgrounds.

The therapists consisted of three males and eight females and the lawyers consisted of two males and nine females. Although participant gender is often considered a factor to consider in research studies, it appeared as though respect and reputation in the field was more relevant to the participants in how they interacted with one another. The therapists had on average provided expert witness testimony 82 times. All the participants had received between 5-500 plus hours of training in one or more of the following areas: Issues related to high conflict separation and divorce, children's issues, interviewing children, parenting coordination,

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mediation, high conflict issues and abuse and divorce impasse. All of the participants were members of the Law Society or a professional college.

Open-Ended Intensive Interviews: Individuals and Groups

The research problem related to “how” and in “what ways” therapists and lawyers collected and constructed the voice of the child to deliver to the court. The method of intensive interviews was chosen for data collection. Although I could have considered observations, Internet discussion groups, structured questionnaires or reviewing case law outcome, none of these approaches would as have as adequately brought me in contact with the participant practice ideas and views as the intensive interview conversations. Additionally, some observation methods would have been difficult, if not impossible, due to client confidentiality, which would disallow my presence. I wanted to offer an opportunity for each participant to provide an interpretation of his/her practice experience and to have a forum for reflection on the topic area.

The in-depth interview is viewed as a particularly good fit for grounded theory research (Charmaz, 2002; Fontana & Prokos, 2007). The interview is considered a data-gathering technique and grounded theory draws on the simultaneous nature of coding and analysis throughout the interview process. As data is collected and analyzed, it informs the interview direction and by following up on emerging themes,

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the open-ended interview in grounded theory allows the researcher to adjust the conversation to focus on those topics that are raised.

I planned to follow the multiple interviews process given that I conducted both individual and group interviews. Fontana and Prokos (2007) emphasize the latest trend in interviewing is that it is now most often viewed as a “negotiated text” and that interviewers are “active participants”. The focus on co-construction of the interview data as coming from the interaction between the researcher and the participant(s) is compared to what ethnographers have always claimed – the role of the researcher is non-neutral. There are a number of authors that emphasize the idea that researchers are non-neutral and use different descriptions for the interview style. For instance, creative interviewing based on feelings and knowing the participants more deeply is described by Douglas (1985). The interviewer in this approach is highly active and shares thoughts and feelings with the respondents.

More historically, Pool (1957) described interviewing as an “interpersonal drama with a developing plot” (p. 193). Gubrium and Holstein (1998) refer to interviews as storytelling. Others have focused on the reflexive approach to interviews by referring to the interview as a social encounter (Dingwall, 1997). The shift in thinking about the interview is emphasized by Fontana and Pinkos (2007) and Holstein and Gubrium (1995) from the “whats” to the “hows” of the interviews. This process view allows for the researcher to be highly reflexive and for the focus of the shifting, co-constructed realities to be captured moment to moment

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during the interviews. Because I am interested in how therapists and children's lawyers gather and construct the "voice" of the child, it stands to reason that I would also consider the hows in gathering information from these respondents.

I developed a number of broad, open-ended questions to begin the interview process. I decided I would be the interviewer for all interviews. I viewed my role as a facilitator of the talk about participants' experiences as well as a non-neutral part of the dialogues. Charmaz (2006) states: "An interview is contextual and negotiated. Whether participants recount their concerns without interruption or researchers request specific information, the result is construction-or reconstruction-of a reality" (p. 27). I thought my practice background and interviewing experience could assist to expanding the discussion by way of following up on comments and asking for clarification on particular comments.

I am familiar with the clinical and legal language of those who work with children and who attend court, which was also a consideration as an interviewer. Knowing the language is both good and bad in that I may bypass something said because I think I know what was meant, while some terms may need no follow-up or clarification and which would avoid interruptions in the interview process. I did consider my status in the community and whether participants may alter what they said due to me being present. But again, my thought was of course my presence would shift the meanings and expressions of others. I am not as Charmaz (2006) would say a "passive receptacle into which data is poured" (p. 15).

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I became focused on reflecting on how and in what ways my presence played a role in the interview discussions. I noticed that where I sat and how much or little I spoke made a difference to the participants' input and expectation of me. I changed my position at the table with one group, so that it did not appear that I was at the "head of the table". In a way it was not surprising that my position at the table made little difference. I still found that participants would engage in lively discussions with one another, and then they would stop and look to me to continue the process or expect me to lead the discussion. The reason I was not really surprised with this behavior was that most of the participants worked in hierarchical environments whereby the person who calls a meeting, leads a meeting – a kind of a community group ritual. When the leadership expectation occurred, I attempted to refocus the group by adding different open-ended questions, asking for more elaboration of an idea or by reframing or restating previously expressed ideas. I tried to see myself as a cog in the wheel that helped to keep the wheel spinning.

I also thought about the group make-up related to power and status differences, gender, race, age and previous relationships participants had with one another. I made decisions about who attended group interviews and who attended individual interviews based on these factors. I decided to assign most of the males to the group interviews as a way to potentially balance the male input in discussions with the females. There were a couple of participants I did not assign to groups due to past relationship issues with other potential

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group members.

My clinical sensibilities and mediation background were helpful to manage potential power imbalances when a participant felt either disempowered or overly empowered. The same sensibilities were important when making decisions about when to probe further and when to not probe further. Participant comfort and emotional safety was a primary consideration in the interview process. All the participants were provided food and beverages if they met with me on my site.

The intensive individual interviews were implemented with five therapists and seven family law lawyers. In addition, interviews were completed with two focus groups consisting of four family law lawyers (one did not attend and was later interviewed individually) and six therapists. Since I did not use questionnaires or draw on government reports (case law) or any other organizational records I did not use elicited texts or extant texts. I did however ask the participants for some basic demographic information in the form of a simple form format prior to the interviews as previously noted.

Using both individual and focus groups was appealing because it provided a way enrich the data. Two different ways of interviewing made it possible to elicit deepened responses to the research questions: 1) What factors do you consider when gathering the thoughts and wishes of children of separation and divorce? 2) How do you gather this information? and 3) Once the information (data) is gathered, what is your process for constructing the voice of the child in

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order to present back to the court? There were other questions, but these were provided in a handout and placed on the table at the time of the interviews. Questions were meant as possible topics for conversation. Each conversation began its own course, creating dialogues between participants. “In dialogue, participants jointly examine, wonder, and reflect on the issues at hand” (Anderson, 2012 p. 11).

Previously I predicted my colleagues’ potential towards a positivistic focus. The open-ended discussion format made some a little anxious and some participants were concerned they were not giving me the answers necessary to address my questions.

Here is one comment that exemplified the worry that that I would not get what I needed from the dialogue during a group interview:

(Participant interrupts discussion) “So let...You start running the show now, cause otherwise we’ll run away from you. You need to get what you want from this.”

(Me) “Your conversation about this is what I want to hear.”

Types of comments such as “Am I answering your questions the way you need me to?” or “Is this helpful?” occurred from time to time in both the individual and group interviews. The queries about the process came in the middle of interesting dialogues and it did not seem to matter that I had prepared the groups or individuals for an evolving conversation that could create more ideas and new theory; participants just seemed to view me as needing particular answers. All of the participants involved are typically viewed as “experts” in their

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field and referred to as such by courts and their professional associations, so the experience of dialogues forming theory was a bit foreign for some. Having said that, all of the participants wanted to stay longer and were grateful to have the time to have conversations about their work with others in their field. I witnessed shifts in ideas and changes in use of language as the groups conversed about their worlds. I also noticed my own shifts and changes and this was one of the wonderful parts of being a part of this research.

Memo-writing

I began prior to and during data collection to engage in memo-writing. As a form of conversing with me, memo-writing helped me to capture thoughts, questions and later, emerging categories. This form of activity was done before, during and after collecting data. It assisted me to discuss the topics related to data, identify flags, develop categories, make connections, clarify issues, provide a way to go back-and-forth with different concepts related to data, define relationships, identify patterns, identify gaps, define analytic categories and identify future questions and directions.

Charmaz (2006) states:



Memo-writing forms the next logical step after you define categories, however, write memos from the beginning of your research. Memos spur you to develop your ideas in narrative form and fullness early in the analytic process. Your memos will help you to clarify and direct your subsequent coding. Writing memos prompts you to elaborate processes, assumptions, and

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actions covered by your codes or categories.
(p. 82)

Charmaz reinforces the use of memo-writing and she views it as the “core” of grounded theory. There are many possible ways to use memos including defining codes and categories, focusing on processes, identifying raw data, making comparisons, identifying gaps in the analysis, asking questions about codes or categories and writing about patterns. I recorded questions and emerging ideas in memo-writing, which helped to fill in gaps and to follow various directions when attempting to make sense from the data.

The usefulness of memo-writing was quite remarkable. It kept me interacting with the data. I was able to dialogue with myself about what I heard and observed. It was also a reflexive activity that helped to keep me aware of my own biases and agendas. After the first interview I began to explore some ideas about the coding and any provisionally developing categories.

January 24, 2012

During the meeting with the first participant I noticed I was interested in hearing about some familiar practices because of the background of the therapist being a play therapist (like I am). I became aware that being in dialogue with the research participants was not about being validated- rather it was about creating through conversations. Although I heard about some familiar practices, other things stuck me such as: never force

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a conclusion, give the child power during the process and drop your mandated agenda to support and protect the child. These ideas were not foreign, but the emphasis surprised me and I felt a shift in my thinking. Outside forces that direct our roles as therapists seemed to be at play in these expressions. Outside forces and working around things- I need to listen further...

Right away I began to think “here I was in the middle of something” and as vague as that sounds in writing, the idea that I was not the driver, director, the insider who knew something different than others or didn’t know as much as others melted away. I wrote about the unspoken agendas I had and guessed on ones I could have. The above memo is one example of discovering an unspoken agenda - will I be “validated”? It also exemplified an early potential code of “outside forces” that I could continue to listen for in other conversations.

The use of memos was used as an “in the moment” and ongoing activity. I used my own elaboration of this activity by initially writing summaries of themes and ideas that jumped out as unique or unusual after reading each transcribed interview. This activity also helped to guide the coding process and helped me to interact with the data as it was being produced.

Coding the Data

Throughout the process of coding, I found many interesting ways participants identified their work thematically. In a preliminary way, after each transcription was complete I read

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through each interview (group and individual) and drew out special words and phrases each professional used that made his/her input unique to the other and wrote a number of identifying words on the front page of the interview. I found this step helped me to create an image of what each person emphasized both in language and in their descriptions of what was most important to them process-wise. It seemed to give each interview an identity. I kept a copy of these summaries for each interview before moving to the stage of line-by-line coding. I then made notes or memos about the ideas that appeared to be communicated.

I generally followed Charmaz's suggested guidelines in coding for grounded theory. "Coding means categorizing segments of data with a short name that simultaneously summarizes and accounts for each piece of data" (p. 43). As an entry point to studying what was happening in the data, I began with, line-by-line coding. What I mean by "generally followed" Charmaz's steps here is that I am an experiential learner. I first read about coding from a variety of perspectives and then used the general idea of choosing short phrases to capture lines of text. As hard as this phase in the process was for me, I allowed myself to enter the process and dismantle the interviews into a line-by line illumination and asked "What did this participant say in this moment?" "What actions did each take and were there consequences to these actions?" I went through all the interviews this way, enlarged the font and color-coded each code phrase from each line of text. Each participant's codes were then assigned a different color that I could later take out and cut up into stand-alone pieces of information. I could also later identify each

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participant's contribution visually.

I decided to use the line-by-line approach to coding by naming each line (Glaser, 1978) because I was not using documents or other types of written data. Word by word coding is more useful if the researcher is studying a number of written texts as it encourages the researcher to focus on images, meanings and word flow. Since I was interested in how the participants were gathering information from child clients (process) and what they were most interested in when collecting the information (content), a detailed approach to identifying a range of ideas upon which I could then create other questions for interviews was important. I was interested in the processes experienced by my participants and the line-by-line approach helped to minimize the possibility of my own preconceived ideas about the data taking over completely. I wanted to ensure that I did not become as Charmaz notes "immersed in your respondents' world views" (p. 51). I wanted to meet the grounded theory criteria of "fit and relevance" (p. 54) when analyzing the data. Fit occurs when codes encapsulate the participants' experience and relevance occurs through an analytic framework that exposes relationships and processes that would otherwise remain implicit and invisible.

I considered In Vivo codes (specialized terms used by participants) as important because the participants in the study come from two distinct professional communities and tend to use words to describe their practices and experiences that uniquely belong to their groups and their social worlds. Legal terms, legal roles, references to court rules and

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processes, names of assessments, clinical descriptions using certain clinical terms, mental health diagnostic terms, process terms and terms that appeared not to have meaning or be words you could not look up in a dictionary were all part of the specialized language observed when coding. None of these terms ended up becoming main codes in their own right, rather they were thought of as commonly understood terms, meanings and perspectives that shed light onto the local knowledge of each group. The In Vivo codes factored into the analysis, but they did not describe the developing categories. Even though I am an insider to the participant therapist group, I did have to clarify some of the terms and references that were used.

Focused coding (a synthesis of the line-by-line coding and a comparison of data-to-data), was used in analyzing the data. This was the next significant step I took in coding. As I noted above, I now had my color-coded codes cut out in piles and ready to go. I had to make a lot of decisions in this stage due to the volume of the data in front of me. This was the most dynamic part of the process and the most unsettling. Here I had again taken apart narratives and now simply had hundreds of bits of information in front of me. The “bits of information” codes were all manually cut out and re-organized multiple times into categories or topic areas onto large boards. I analyzed the two groups (therapists and lawyers) separately and looked at the codes from the therapists on one large board and codes from the lawyers on

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another large board. From there I looked for the relationships among the emerging categories for therapists and separately looked at the relationships between categories for lawyers.

Charmaz (2006) states:



Consistent with the logic of grounded theory, coding is an emergent process. Unexpected ideas emerge. They can keep emerging. After you code a body of data, compare your codes and data with each other. A telling code that you constructed to fit one incident or statement might illuminate another. (p. 59)

After analyzing the two groups it was possible to see how each group illuminated some of the statements and actions of the other. So I took the analysis to the next step. Many groupings and overlapping of groupings of concepts were present for the lawyers and therapists. Additionally there were overlapping themes between the two groups. A third large board was arranged and categories that overlapped between the groups and categories that remained unique were placed in this third visual location. New levels of codes were constructed. I entered what I viewed as a theoretical coding phase (Glaser, 1978).

Glaser (1978) refers to “Six Cs: Causes, Contexts, Contingencies, Consequences, Covariances, and Conditions” (p. 74). Upon reflection on these coding “families” that Glaser refers to in his work on grounded theory, I did not intentionally follow the analytic edge he describes. After looking at the substantive theoretical categories that emerged I

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had to ask “What theoretical coding families could these categories indicate?” Although Glaser offers guidance regarding this concept, there are no rules or pre-conceived ways of answering this question. I represent my current theoretical categories gained from this study in the form of diagrams in Chapter Four. I feel the focused coding process now has form and according to Glaser (1978) the fractured story has been re-woven. In my words, what was taken apart, analyzed and reconstructed now tells a coherent story.

Up until this point, I had put aside my original summaries of each interview (pre-coding). I returned to the summaries to reflect if any concepts or specific language had indeed re-emerged after the coding and grouping process. I can report that some of the powerful language and legal process ideas were reflected in the theoretical coding and re-emerged in more powerful ways as each person’s input added to the other’s. The initial interview themes came alive again with more depth and complexity after the data was laid out. This deepening of what initially presented as a number of surface stories struck me as an interesting part of the research process. If you look into the kaleidoscope you see the many shifting colorful combinations. I spun my bits of color-coded codes to manually see more that I could have before.

Having two different professional groups who both provide children’s input to the legal system was very interesting as it offered an opportunity to identify any overlap in views, actions or insights. More overlap than expected emerged. Each professional group tended to highly respect the other and both professionals were child-focused and concerned

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about the child and his/her family. Surprisingly there was a systems/family focus for both groups as well as a desire to work as a team. Both groups wanted a new procedural map. An effort was made to understand where the groups were similar and where they were different.

Approaches to Clarify Data

Multiple attempts were made to clarify the ways in which the data was collected and approached. Checking back with participants was an important part of the data collection process. Each participant was emailed their transcribed interview and asked to clarify, add to, or correct any part they would like. I asked a few participants to clarify comments or statements that I did not understand. Everyone was offered an opportunity to call me or to discuss the meeting process. A couple of group participants made use of this invitation and we talked about what it was like to be a part of the group experience.

Regarding the selection of the participants for this study, those involved were self-selected based on a mass mail-out to those professionals who work with children of separation and divorce in Calgary. Those who agreed to partake in the study answered the invitation letter and volunteered their time. Some participants requested to be involved prior to the mail-out by providing their business cards to me after attending one of a series of presentations I did on the topic of inclusion of the voice of the child in legal matters in Calgary. The sample needed was related to two specific groups of profes-

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sionals (therapists and children's lawyers) who represent or work with children of separation and divorce in legal matters.

The major theoretical categories that emerged during and after this study are detailed in Chapter Four entitled "Theorizing". Both lawyers and therapists were concerned about the legal process and how this affected their ability to provide children's input. There were many indicators that pointed to the main categories. The experience with the legal system for therapists and lawyers was one example. Therapists and lawyers struggled to get the child's voice to the Judge. Various approaches used by each professional and the attempts to find common language to define high conflict situations were a couple of other examples that were indicators of main emerging categories.

Theoretical sampling occurred as each interview was completed and ideas and concepts were taken from one interview into the next. This process tended to guide the data as new questions could be formed and other participants could comment on their experiences by adding similar or different issues that arose in their practices working with children. Initially I anticipated that there would be a number of different, yet specific approaches to gaining input from children and that the two professionals may approach the children differently. I also anticipated that there would be more differences than similarities in the ways in which the two professionals viewed family conflict and how to view children as part of the conflict. My guesses did not hold up as expected as the categories of data tended to be more similar than different and the differences were more subtle

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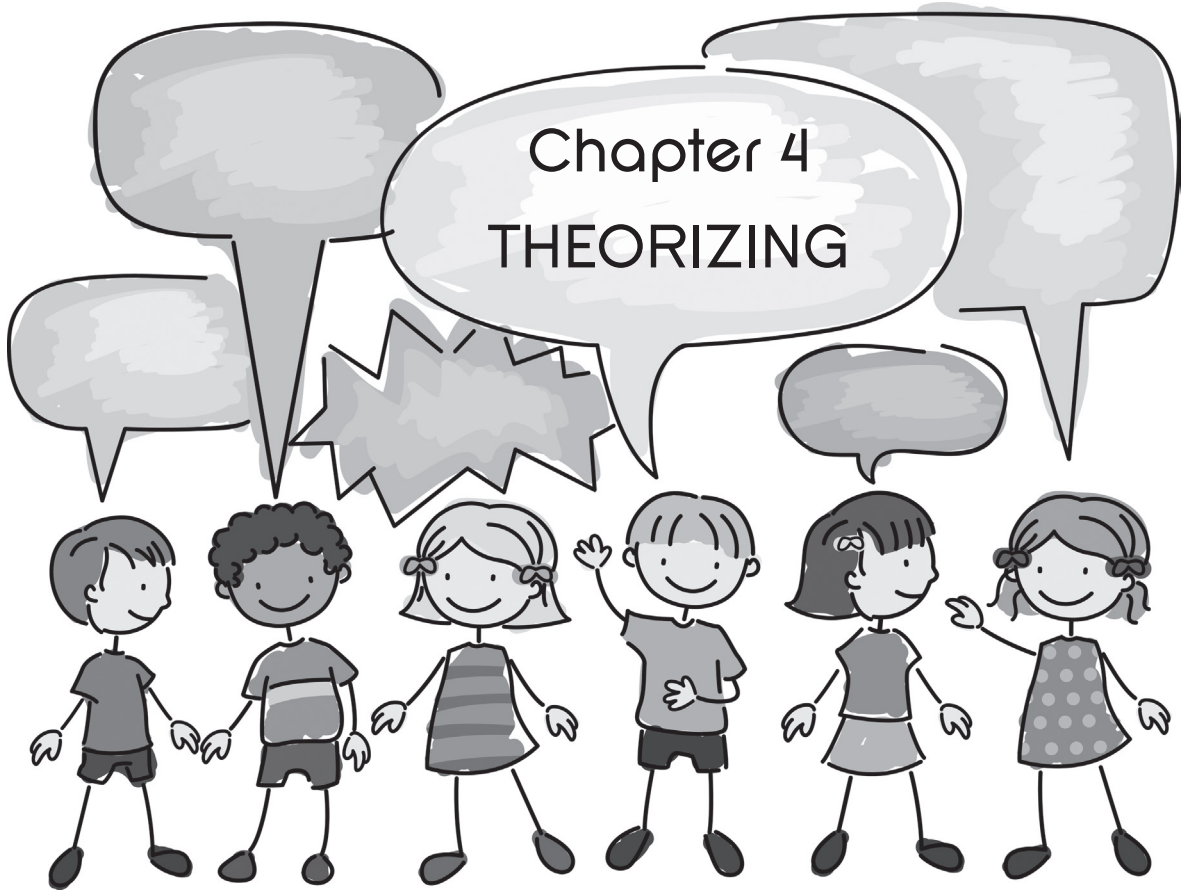
than specific. For example, although it became clear that both therapists and lawyers did not find the current legal system as helpful and both tried to basically “work around” the system, they both viewed the family conflict story as complex and important to put forward albeit in different ways. Lawyer’s hands were tied in that they could not directly present the greater family dynamic due to their advocate role, but they hoped to include the therapists in this process so they could provide the rest of the story. I had initially wondered if the children’s lawyers would view the child as an independent individual, relatively non-impacted by a parent. It was pretty clear as the codes were identified and organized this was not expressed by the lawyers. Categories indicating a rule-bound system that held them to having to present a child’s views in an individualistic way emerged instead. The categories appeared to rapidly form into a particular story of frustration with the system with an accompanied intent to help children and families in conflict.

Some very practical and useful information appeared through the analysis of the data. From the point-of-view of generation of new theory, some important practical new proposed processes appeared to be generated. I did not imagine or predict an emergence of a family law reform process at the outset of the study. Upon reflecting back on the literature, it would appear that other countries (especially Australia) support the early non-adversarial inclusion of children in separation and divorce matters. Calgary has some very helpful, non-adversarial processes available to children and families except they are not currently mandated nor are they highly coordinated. The lack of an early process of inclusion

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of children of divorce in Calgary was examined, questioned and debated by the participants. The participants in the study were asked: “What factors do therapists and children’s lawyers consider important when gathering and constructing the child’s voice for inclusion in court proceedings and how they do it?” This question led to an intense series of conversations about what was needed to really support children’s input. Theory was generated around what was important when meeting with children. Through the collective wisdom of the two professional groups, a number of ideas and new processes were illuminated.

Chapter 4
THEORIZING



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THEORIZING

“It’s all in the ongoing surprises”

Both children’s lawyers and child therapists partook in the study of presenting the voice of children of separation and divorce to the court system. These two professionals are most commonly called upon to provide the views of the child. It was clearly expressed during conversations with both professional groups that by the time either professional is involved, the family conflict is high and the marital couple have not been able to disengage and make appropriate parenting plans for their children. The legal system is therefore utilized (by one or both parties) to put forth their positions and solve their conflicts.

Being part of the research process and interacting with my colleague participants was a powerful experience. I was struck by how I constantly shifted my perspectives, language and thinking throughout the interviews and afterwards. I was stunned by the number of assumptions I had made at the start of the process and how being in dialogue with the participants actually transformed my own practice. I began to incorporate new words and expressions used during discussions and my perspective on the systems I work within changed. I was working around the system versus looking for ways to make it better. I had presumed many things not the least of which was that it would be an easy task for seasoned therapists and lawyers to describe their interactions with children.

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Lawyers and therapists had similar and different things to say about their roles in presenting children's views. The lawyers (although aware of the context of the child's family and social life being important to consider) did not see themselves as able to provide any context to the Judge and felt that others may be able to do this or that the Judge would hopefully read between the lines. Lawyers were concerned and unhappy about their roles as advocates for children as the role restricts what they can present to the court. Protection of the child from a parent and/or protection of the child from being the mouthpiece for the family dynamic seemed to be thematically presented by the two groups.

During conversations with both groups I heard that most participants held a protectionist approach to children. As the literature suggests, in the emergence of promoting children's rights there were two main models of thinking about children: protectionists and liberalists (Farson, 1974; Holt, 1974). There was a minor indication of the liberalist self-determination thinking provided by children's lawyers (children are autonomous individuals and are bounded beings) but generally the professionals in the two groups leaned in the direction of children being relational beings. Some lawyers, however, viewed the context of the family influence debate as diminishing the child's voice and as not accepting that children have independent views. All the therapists viewed children as relationally connected and therefore not independent of the influences of others in their expressions and input. The two communities (law and mental health) appeared to be representative of two worldviews about under-

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standing people and relationships.

The comments of children's lawyers and children's therapists have been included to exemplify their points-of-view. I asked all participants if they would like any of their comments clarified. Some participants clarified some statements and the participants gave permission for me to modify minor grammatical errors or to add a word from time to time to clarify their idea(s). I have indicated clarifications by using brackets so the reader is aware of any added words.

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PART ONE

What Children's Lawyers Say

Family Systems Focus: Child-Centered

Children's lawyers generally identified the desire to view children as part of a family system. The idea that divorced families are rearranged families came forward.

"I talk to my clients about this – (I say), don't think of it as a broken family, think of it as a rearranged family."

Woven through the conversations with many lawyers was the belief that children were part of a community and culture that influenced them daily and also influenced what they may say or not say during meetings with lawyers.

"But then I also have to adapt to a reality outside the family. And so that's where a lot of the conflict comes, between the individual and their family and their community (realities) and the world around them. Like, how do you balance all that? How do I be who I want to be within the context I'm living in?"

A different worldview is presented by a lawyer who provided an answer to the question: Do you think children are autonomous and independent?

"I think your question – with the greatest of respect – is... Lumps all of the different kinds of children together, which is impossible. You have kids that have IQs of 180 that come from households that are stable up to a certain point. They have great confidence as human beings, and by the time they're 12 years old they know the score. Like, they're

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confident in their decisions. You have other kids that, you know, are messed up from the word go, have about 110 IQ and when they're 18 still can't get it figured out. You know, that's been my experience."

During the interviews, I was part of the shifting acceptance of new and different ideas. The group members respectfully challenged one another and for instance those holding a bounded-being perspective of children began to loosen their hold on this belief. Discussions during the interviews led to who a child feels closer to, what the roles in family were before and after the separation and how these things might influence children. There was an emphasis on the point that parent/child alignments happen in intact families as well as in families of separation and divorce. A further thought was put forth that divorcing families should not be pathologized based on dynamics that may have been there before the divorce.

Divisiveness in families was viewed not solely as a post-separation phenomenon.

"I've seen my own kids, where they (see me) as the most hateful person on the face of the earth. You know, for probably months at a time, and they adore their father. And then it switches. And it could be something as innocuous as dinner."

"Something... You know, he's looked at them sideways at dinner and then the allegiance changes."

"Even in an intact family you could have alienation, say there's a power imbalance between mom and dad, and say the dad's a very strong person and really does everything with the child, to the exclusion of the other parent. It may not

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be... I mean, it might even be good intention, like hockey and baseball, all of those sorts of things, and just sort of almost overwhelming the child to the point that the other parent is excluded.”

Negatively reconstructed family stories post-separation were discussed as part of high conflict outcome. Taking into consideration that the family stories may be re-told would be important as the stories are also told through the child. The re-telling of family history often tends to support a dominant parent's position according to the professionals in this field. The new story may re-script the historical meaning and integrity of relationships between family members. The parent position is then thought to be represented through the voice of the child. Lawyers thought that children might construct memories without direct parent assistance in order to support an emerging position. Many lawyers agreed that the child's views are family influenced and did not hold the bounded-being view of the child. Of consideration by lawyers, however, was degree or type of influence.

A child, for instance could be influenced into being a conduit for one parent's view of the other as dangerous or abusive. *“Well, and the family fables change as well over time. When the family initially breaks up there's a lot of hostility. And there's things that have happened in the past that were harmless to the family at the time that they happened, but after the breakup suddenly those things are dredged up and modified and amplified, and they're turned into part of a whole new family history that supports one part of the family against the other part of the family.”*

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Children's lawyers generally identified the need children had for both parents to remain in their lives and thought of rejection of a parent as a "red flag". Children did not have to be living in the same house as their parents, but they needed contact. On this note there was some discussion that if children were caught dramatically in the middle, they may choose a parent for self-preservation and this may also be an acceptable family dynamic outcome.

Some lawyers were more accepting of the idea of one parent being good enough, while others were not.

"I guess I acknowledge that there is benefit to a young person to having two parents, but I also recognize that...It's not going to be the end of the world for a young person to not have to deal with one of the parents..."

"...my personal belief is that kids need two parents, or as many parents as we can have, right? You know, the more people, the better. So, for me to be discouraged from that notion, there has to be some pretty compelling reasons."

The idea of changeability was also embraced and that children from one meeting to another may change how they feel about a parent or their relationship(s) with siblings or other family members.

Conflict Story

I did not expect to be pointed into the direction of discovering the nuances of the conflict story through my discussions with children's lawyers. I had of course thought about what is

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happening between family members dynamically, but what was the story as told by the members of the family and the child? How did this story read? Well-known to therapists working with high conflict separation and divorce was the idea of traumatic endings in marital relationships which were discussed by Johnston and Campbell (1988). But what were children's lawyers hearing and what did they think was important information to pay attention to?

One idea was that power structures in families pre-separation tend to become illuminated in post-separation behavior. What behaviors could be identified? One avenue for children's counsel to gain the story as constructed by each parent was for them to read the parents' affidavits and pleadings.

Additionally through conversations with lawyers I understood that for them, the conflict story is told through cross-examinations of others.

"If they're my witness (parents for instance) then I can do a direct examination, which means I'm saying very little and they're telling their story, whatever their involvement has been with the child. Cross-examination is if, say, for example, one of the parties takes the stand. Then I can then ask them specific questions, or maybe put certain hypotheses to them, and see what their reaction is."

Viewing conflict on a continuum appeared to be necessary. Some families appeared to children's lawyers to be workable and others not. This idea of a continuum was not named by the lawyers rather it was implied and I interpreted it this way. For instance, some parents may respond to requests made

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by children's counsel (often through parent counsel or letters written by children) to stop or minimize fighting and some will not. Some families go to extreme ends to be heard and go bankrupt using the system to fight – regardless of the impact on their children.

Is ongoing parent conflict considered traumatic for children? This question arose during a dialogue with one lawyer. There was some discussion as to what constitutes being traumatized and are all children in high conflict trauma victims? I understood for one lawyer high conflict was always traumatizing for children. The lawyer worked in the field of child protection and had represented many children in the Family Court system.

The understandings of the trauma impact on children the lawyer dealt with are exemplified here:

“You know, we present the facts as they are. And at some point, you know, I think therapists would like to fix it, like, fix it. The job is to fix it. And some days we have to say, we can't help who these children's parents are. We can't help it. We cannot make them new parents...”

“...if there's conflict between the parents there's trauma for the children. And for us (lawyers), if there's high conflict, those kids are traumatized. Mostly, I mean there are some (children) that are going to have resiliencies.”

Consensus Reality

Consensus reality is defined as what society as a whole says is real or what specialized groups or communities say is real. Children's lawyers are working within a social-legal

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community that follows what the majority say is reasonable and “true” or real in that community. There are certain norms and ways the court views families post-separation. A few consensus points raised in interviews include: children need both parents, children have a right to both parents, and children need to be safe from abuse and danger (to name a few). As pointed out however, children present a constructed reality that must also be heard and understood. This is not to say what children experience is not to be believed, rather it is to say that children may be living in families that are not following legal community consensus reality and they may be influenced by a family reality. Families influence us and we are challenged to adapt. Lawyers claimed it was a matter of sorting out the interests of the child, the family and child’s cultural reality and comparing it to post-separation legal consensus reality.

The child with a mentally ill parent was one example given by a lawyer. The ways in which the child needs to respond to an ill parent becomes their norm or reality. The child’s reality that has a mentally ill parent may be very different to the child whose parent follows more of a general societal consensus model of reality.

The beliefs of the child are important and we should seek to understand his/her beliefs. There is also an obligation within the role of the lawyer to help the child understand his/her rights and the consensus reality of the law post separation and divorce.

“So you have a kid who’s from another culture for instance, there may be concepts in that culture that are not the ones

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that we're used to in Calgary, but that it's whether the child fits into that reality. So families also make their own realities. So the child's operating within the family reality, and then part of what you're doing is interpreting...Acting as an interpreter between that reality and the consensus reality outside, which is what the Judge is going to be looking at."

Lawyers and Language Wars

The use of the word alienation was discussed and there were opposing views over the use of this word. There were a number of strong reactions and cautionary side notes about its use. Some lawyers thought it best described a purposeful interruption of a child's relationship with their other parent through negative talk, disallowing contact and re-scripting the past parent/child relationship as negative and possibly abusive. The result of this type of interference is the child may have a disproportionately negative response to minor parenting errors and that they had a previous positive relationship with that parent. According to the literature alienated children tend to eventually fully reject a parent. Although the lawyers group generally agreed with a definition of alienation, there was concern that the word was now over-used and used to further a parent's position. Many felt alienation rarely happened and when it did some lawyers thought it best to either switch roles from advocate to Amicus Curiae (friend of the court that takes a neutral position, but gathers information for the court and does not argue in favor of a child's position) or to get a therapist involved. Other words that were considered friendlier, causing less divisive-

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ness between them were estrangement, alignment, coaching, and influence. There was either comfort or discomfort in using the word alienation.

The dialogues with and between lawyers brought forward the political power the word appeared to have gained. One lawyer attempted a new description focusing on the child being relationally “pulled in” versus a parent being “kept out”. It would seem that the sensitivity to the word was related to it now holding some legal meaning in progressing the parent fight over custody and access and that it was overused. Each person also used the word a bit differently. Not having words that the legal and therapy community can use and understand in the same ways can create divisiveness. Kelly and Johnston (2001) provided a re-formulation of the alienated child by describing the continuum of parent/child relationships after separation and divorce. The continuum differentiates words such as aligned, realistically estranged, and alienated.

The law community has made their own decisions on the usage of these words and their accompanying meanings. *“Well I think, I don’t have really any difficulty (using the word) because it’s sort of our common verbiage in, you know, right now. That’s what we’re using to describe the phenomena. I mean, if I think about what the phenomena is, I think it’s certainly one parent trying to conscript a kid onto their team. They see it as an us-against-them. But the easiest way to describe that is alienation. And it, I suppose, if one would describe it like that it feels so negative to the other parent. But if we can think of it as not so much as shutting a (parent) out, as pulling the child in.”*

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“But I don’t like the words. And so, let’s not use them. We haven’t been. We managed to survive without talking about alienation. I mean (there is) coaching, manipulation. I prefer the language of alignment. So when, if we suspect any of that, of course, from my perspective, the existence of those kinds of factors are way easier to sort out if there’s therapeutic or counseling work going on for the young person.”

Personal Experience Influences Approach To Children

Personal experiences in the life of a professional influence the approaches and or beliefs they have about families and children. As I listened to the stories lawyers told, some drew heavily on their personal experiences and knowledge about child development based on their own children with special needs. Others drew on their personal experiences of being divorced and having made errors along their own family paths. Others had experiences with mentally ill parents and became aware of this impact on them as children. Additionally personal past childhood abuse informed some lawyers about what to look for in children but for others can create a reactive experience.

Some lawyers talked about biases based on literature and recommendations in the literature, such as it is best for children to spend as much time with each parent as possible, that children “vote with their feet” when they get old enough to refuse to physically go to see a parent and children

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typically love both parents (regardless of the parents' capacities) and children want their parents to simply stop fighting. Some supported the idea that children did not really need both parents – one good one was enough.

Different levels of reflexive practice appeared to contribute to the ways in which personal experience was either helpful in gaining an understanding of a child or in the way.

“But that’s one of the things that I would tell people when they were divorcing, I’d say (to parents) this is what your goal is, is, you know, when your kid’s 16, they tell you ‘thanks for getting along with my other parent’. And so, that’s always the direction, I think, you have to go.”

“Both my kids spent time living with their dad’s at various points. You know, we all come with our baggage and our biases. You know, a lawyer who has been abused may, you know, go to the n-th degree with a child who they think has been abused, whether or not the child has.”

Diverse Approaches to Meetings with Children

Lawyers focused a lot on being in a safe and neutral environment when meeting with children. None of the lawyers met with children in their offices. They all noted they would meet at restaurants, parks, in vehicles at the child’s home or foster homes. They used a variety of ways to increase children’s overall comfort by bringing small toys, drawing materials, and some brought cardboard representations of court-rooms and people in court. All of these strategies were viewed as engagement activities versus therapeutic in nature by the lawyers. Lawyers gained the views of children by

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talking to them in an open-ended discussion format. There were no reports of standard questions or a standard interview approach. One lawyer view was that using a structure used to be helpful, but now felt it a bit too constricting. Giving children more freedom to direct a discussion or meeting was emphasized. There was a lack of use of the word “interview,” rather I noticed lawyers preferred the words meetings, conversations, talks or visits. This was somewhat surprising, as I expected that there would have been more of a focus on structured interviews by the children’s lawyers especially when they expect standardized approaches from therapists in their roles as cross examiners in court.

When I asked the lawyers what approach to interviewing or meeting with children they used they shared the following:

“And so, you might ask about that with very open questions. So, certainly open-ended questions would be an overriding way that I like to... would try to discuss things.”

“And that’s an interesting part, because that’s something after every interview that I have with the children - and actually, I don’t know why I’ve have slipped back to that cause I call them meetings, not interviews.”

“Okay, that’s a really interesting question because I realize as you ask it that I haven’t got a specific list of protocols for interviewing.”

Lawyers were focused on describing their activities with children and some lawyers found unique ways to increase the child’s understanding of the legal process through diagrams and pictures.

“Do you know what I use for that is a free website you go on,

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where there's all those cartoon pictures and there's cartoon pictures of a Judge and a courtroom and a lawyer? And if you color with your 3 1/2-year-old and then you ask them questions about what's this, what's this? They'll tell you if they understand what's going on or not going on. And you can kind of, without coaching them, find out if they know what a courtroom is, and what happens in the courtroom."

Ensuring confidentiality tended to be limited for lawyers to when a child disclosed abuse. There was also some discussion about taking instruction from a child and how to manage children's requests for privacy and confidentiality. Lawyers were less concerned about having specific discussions related to confidentiality than were therapists due to their different professional roles and professional guidelines. For therapists, professional guidelines exist requiring a discussion about confidentiality with clients whereas lawyers follow a lawyer/client privilege model. Lawyers were more apt to share with a child what they would like to tell the Judge or to ask a child what they would like them to tell a Judge. Lawyers can protect a child's disclosures without concern that their file will be subpoenaed whereas parents actually have a right to access a child's file that is held by a therapist.

There appeared to be more limitations to remain confidential for therapists than for lawyers.

"Well, I tell kids at the start: The first thing, I say when I talk about confidentiality, I say, if I know that you're being abused I will report that. So they know from the start that that's something that will be reported. Other than that, it's... I wouldn't tell.

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...you can tell me anything and I'll keep (it) in confidence, but you should know that there's a law that says that if you tell me that somebody's been sexually abusing you or beating you up, or something like that, I have an obligation to report it to Child Welfare.

Actually, I'm not sure the lawyers have a complete obligation to report abuse. I think they may be exempted..."

Children's Input is Complex and Requires a Process

Children's lawyers described the difficulty of getting input from children in high conflict situations. Lawyers tended to begin with an emphasis on providing rules and boundaries to parents so that the parents were informed they were not the directors of the process. For the lawyers there was a main focus on ensuring the parents did not interfere with their process of representation of a child. Managing parent behavior was important because lawyers were aware of the possibility of inadvertently forwarding a position of one of the parents through representation of the child.

Children's lawyers have to be highly aware of levels of influence for children because they have the opportunity to shift their role from advocate to Amicus Curiae (friend of the court and non-advocate) upon request of the court. Lawyers expressed their views on roles in the following ways:

"The (parents) have to understand that you have a role, I think, to define that for them, that they don't have any role in directing your service. In fact, they are not the client. The

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child or children are the client. And I've found the best way to do that is in writing, by doing up almost a contract with them, where they... And they can take it to a lawyer if they want it (explained) to them. But that they clearly understand that they're not directing what's going on here. So, if we encounter, you know, the situation where we can't believe what's being said or we think that by having an advocate it just makes the young person a conduit for the information from a parent, or they're told what to say, or whatever, then we ask for our role to be changed."

Gaining the context of the child's views was energetically discussed. Lawyers were clearly concerned about the conflict between their role as an advocate and their knowledge of there being many variables and influences that modify the child's views. Impassioned discussions took place between lawyers in the group interview and between the individual lawyers and me. It was a topic of interest to me in that it was a dilemma I faced with my clients. The difference between my role and the advocate role was that the advocates were more restricted in what they could do and they mostly felt that having a team approach where therapists could add more detail was more useful. Advocates were otherwise stuck with presenting exactly what the child said to the Judge. Judges had to then have the ability to read between the lines if there was no other information available to them from other sources and make decisions for the child. Lawyers collectively raised the need for team-work.

"So, I think the strict advocate role is very limiting. It does not necessarily encompass what needs to happen for a particular child. That being said, when we met with our professional

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group a while ago, and we had, you know, a sort of discussion on how to best bring the voice of the child forward in these proceedings, I really believe that a holistic approach would be a really good way to go in serving kids. And that means having therapists involved and having, maybe lawyers involved, maybe not, for the child. But, having parent's counsel involved, having the Judges involved and really, you know, sort of a circle approach. So, as opposed to somebody representing this person's interests, somebody representing this person's interests, which I think leads to further division as opposed to working together to find something that works for the children."

Lawyers highly valued the idea of teamwork and they contributed many ideas as to how the teams could be organized. Previous dialogues in the law community had previously taken place as exemplified in the above "circle" approach quote. Triaged services for divorcing families that could identify levels of conflict and the approach of immediate assignment of a children's lawyer versus parent lawyers. Lawyers imagined a process whereby the focus was immediately taken off the parental fight and the child was placed in a greater position of support.

The main complaint is that the whole process is parent-driven based on parents that cannot disengage from one another.

"What I've kind of mused about is how Family Law needs to change from the adversarial to...Like, when mom or dad comes in and they file a claim, instead of Legal Aid appointing counsel for mom and for dad, appoint counsel for the children. So right away you're saving money, cause you've got one lawyer. The (child) has a team with them...like a counselor or

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psychologist. And so you're focusing right from the outset on the children instead of mom and dad's stories."

"There would need to be criteria set up to identify that quickly. And then I really like (participant's name) idea of those are the ones where the court would say, okay, thank you, we need to have quick intervention here and...parachute someone in for that kid right now."

These ideas are ones that may bring relief to those working in this field. The complexity of managing parents takes up enormous energy and makes me wonder what voice or view of the child can we hear? How easy is it for children to provide their input without the enormous pressure from caregivers they most rely on? Lawyers were concerned about children aligning with the stronger parent, screening for past abuse that would explain why a child refused contact with a parent, children feeling responsible to take emotional or physical care of a parent, natural alliances with a parent, supporting a child's family relationships and managing children's inconsistent accounts.

"But not only that, children have a sense of survival. And if they see that one parent is strong and they think that that parent is going to win, they may align themselves with that parent, which might mean, to make sure they stay connected with one parent, (while) trashing the other one."

"No, no, but instead of the inconsistency of being, like, black-and-white or A and Z, sometimes there'll be a whole lot of detail in the child's story, and the next time they tell the story there's not so much detail. And that might be because they've have an influence, and I don't mean like a negative (experience) or...yes they may have had a great day playing

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soccer and now they are telling a more positive story.”
“Do you know everything about that child though? You know everything that has happened to that child? Do you know everything that happened between the other parent and that child in the past, that that child may now feel safe enough to go, ahh, goody, I’m safe? I don’t have to see them anymore.”

The process for gaining children’s input was viewed by lawyers as being complex but bounded by the strict advocate role. For instance when complexities arose regarding children’s input some lawyers said they will challenge the child’s input and others did not view this as their role and would instead either deliver to the Judge exactly what the child said or deliver what the child said and use their ability to call witnesses or, if that does not help, they will use their unspoken “leeway”. Leeway was an insider lawyer term that meant that lawyers were given unspoken flexibility by Judges. *“I get a lot of leeway. The Judges are really good at letting children’s counsel ask leading questions. Or, you know, we can get a little bit of hearsay in sometimes. And so, I would ask those kinds of questions.”*

“The other thing, the other bias (I have) is for lawyers to be effective with young people, I don’t challenge what they’re telling me. You have to accept it. You go with it. You don’t try and change...remake their opinions. I’m just not so sure. Don’t you challenge the kid, when it’s something that’s so outrageous that just does not fit with anything?”

There was no easy response to my original research question of what do you do and how do you do it? The lawyers who represent children seemed to be as unsettled with the task of

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being a proxy voice for the child as I was. The local wisdom seemed to be that gaining children's input was not straightforward and yet the input provided to the court was being used to make significant decisions in the lives of children.

Working Around the Advocate Role

I heard most strongly how children's lawyers felt about being mandated into a strict role of advocate when representing children. Historically, the lawyers said they were able to present more context to the court as it related to best interests of the child. The lawyers felt they were not restricted in presenting the context of the child's story before and now they spend significant energy finding ways to maneuver around the legal rules. My thought is that the legal system is set up in an individualistic and divisive way with each person hiring their advocate who then cannot or does not speak about how the individuals work together as a family and community group. Families are relational and hold the individuals in some form of order or care. Without some family/group community, it is difficult to meet the "best interests" of the child based on children's relative lack of independence from caregivers.

Generally, children's counsel appeared to bear the burden of the divisive process. Those that felt no burden from the role tended to feel they were doing the right thing for the child and were willing to accept the face value of the child's input as important even if it meant a child may have little to no contact with a parent in the future. Understandably, lawyers that worked mostly for children who were in the care of social

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services and who were identified by the protection system as abused children were more apt to feel comfortable accepting children's input with or without a team approach.

My own experience with working in child protection was that children who were identified as abused tended to express a level of wisdom about their care needs that more privileged children from environments where child protection was not necessary did not.

“And the kids that have gone through a lot of trauma and stuff often have incredibly together voices. I’ve known 11-year-olds who can articulate absolutely clearly exactly what’s going on, who’s doing what, what is happening, what they think should happen. And what they think should happen is absolutely right on.”

“You know, if that means I’m not a good advocate, I don’t know. But I think there’s so much more to (consider) than just what the child says. And to give the child a voice, to me, means, you know...there are many voices, and that’s one of them. But there are so many other things going on, and so many different facets.”

“Okay, let’s look at advocacy, cause I’ve had a real...I mean, this is a real discussion. And the Judges do not like what the Law Society came up with. I don’t like what the Law Society came up with. Most of the lawyers don’t like what the Law Society... You get some middle-class people sitting off in their ivory towers coming up with stuff like this and you end up with this.”

The frustration and complexities of the job of the children's lawyer was exemplified in their conversations with one

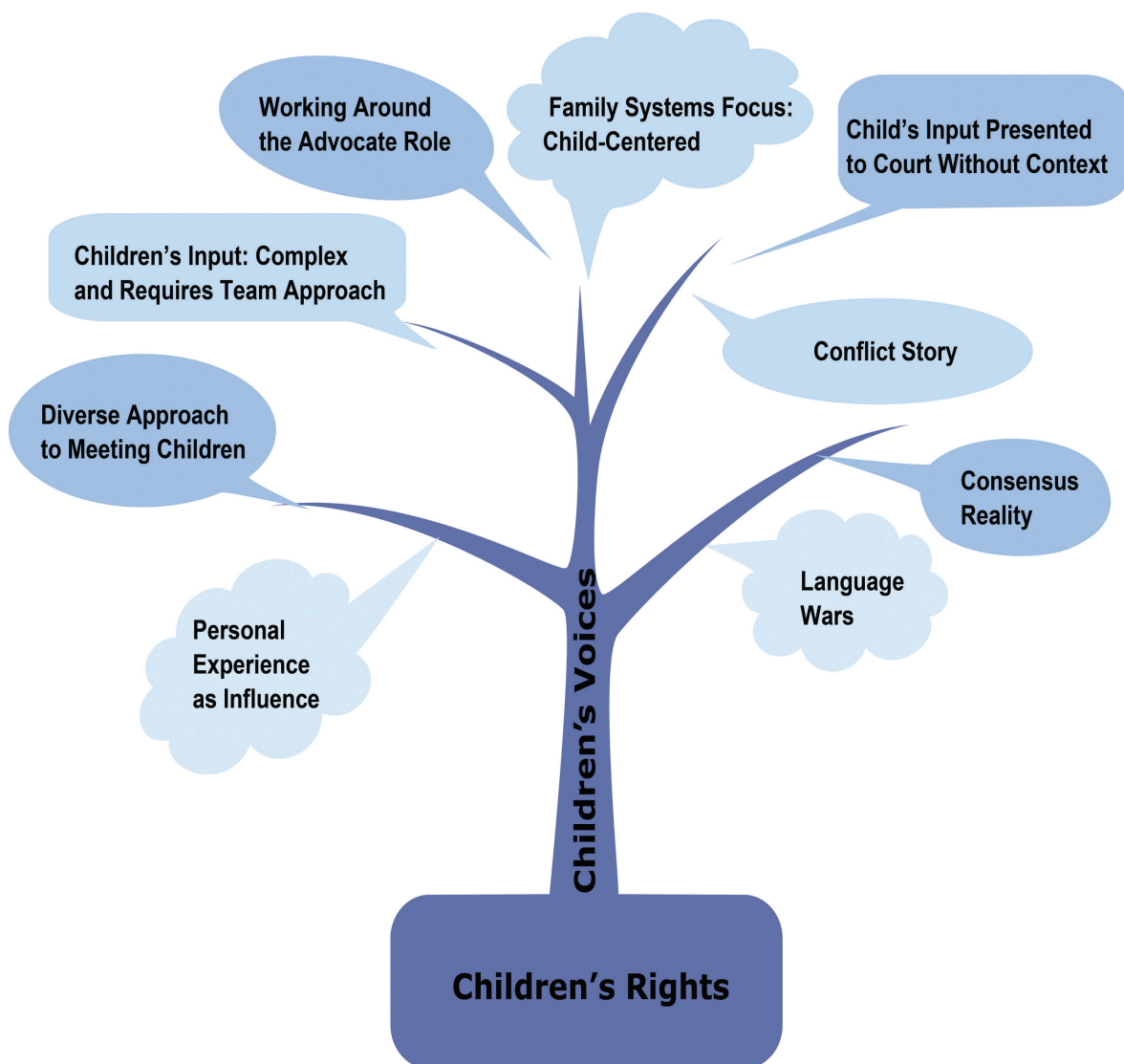
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another and me. This was not what I expected. The conversations were flooded with procedural constraints and issues. I understood that providing the voices of the child to the court was fraught with complications. The following diagram is a theoretical representation of categories related to collaborations made by lawyers in the study.

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CHILDREN'S LAWYERS

Figure I: Theoretical Categories



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PART TWO

What Children's Therapists Say

Systems Focus and Child and Family Relationships

Although the questions posed to therapists were about bringing the voice of the child forward in their work, their discussions steered towards the inclusion of family members and particularly the children's parents. Meeting parents prior to meeting children was what appeared to be an expectation of all therapists. Therapists told me they began to gather information about the system the child was living in immediately. If possible, they wanted to observe the child with each of his/her parents and if this was not possible they wanted to ensure each parent brought the child to a session. Although lawyers also saw the family as an important consideration, therapists went further in their purposeful exploration of family dynamics. Children were not viewed as independent to their families. This is not to say therapists shared that children should not have a voice and be able to express their thoughts and feelings, they just said there was a lot going on related to understanding the child's underlying reasons for saying what he/she says.

Gathering the intervening factors that affect the voice of the child for inclusion in report writing was viewed as part of the clinical obligation of the therapist. I pondered this point as I only realized after a number of interviews with lawyers and

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therapists that therapists were held to a much higher level of responsibility for what they said and how they came to their conclusions. Therapists are witnesses that must stand the legal cross-examination tests and lawyers will never be held accountable this way, as they will never be in the position of being a witness due to a difference in roles. I was aware when speaking to the two groups that therapists structure their work to accommodate the legal expectations. No one wants to be on the witness stand and say “Yeah, I just used my intuition” as any one of us would be shredded and made embarrassed by the cross-examiner. I also realized after the discussion with lawyers this fact did not seem to be part of their understanding of the role differentiation. The other interesting difference is that what children say to legal counsel can be held in confidence whereas parents can run interference by subpoenaing the child’s file from the therapist. Therapists are acutely aware that parents hold the power over their children’s voices in extreme ways. I wondered further after this difference emerged whether parents have ever attempted to subpoena the notes of children’s counsel.

I also wondered if this contributed to the lawyer’s ability to “hold” the rights of the child for input to the court in a more protective manner.

The family and systems focus is exemplified by therapists in the following excerpts. The quotes from therapists tend to tell the story of a desire to include parents in their work with children.

“So I’ll always meet with the parents and always meet with both – because I think that kids don’t have the power to

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effect change in the whole family and they really need help.”
“Of course when you are hired to give feedback, when you are hired to advise the courts about a child’s welfare, you can’t promise confidentiality the way you would in a lot of other situations. I mean, children are different to begin with, I think that the level of confidentiality that we can offer them and what they expect because for example we want to be able to give feedback to parents so the parents can help their children in turn.”

Providers of the Conflict Story

Therapists seemed to be concerned about family relationships and maintaining family systems. I interpreted a collective agreement among the therapists that they viewed part of their role as providing the court with the larger family context story. The conflict between parents was what therapists saw as driving the court applications and the need for children to have a voice in the process. They were generally against the idea of children putting forth a preference of a parent. Providing a “preference” in the separation and divorce world leads to the idea of amount of time spent with a parent. Where would you like to be more of the time? Who would you like to live with? Direct questions related to a child’s preference are now avoided by lawyers and therapists, but the preference may be put forth by the child without a question prompt and then be shared with the court.

Therapists talked about being unhappy with placing children in a position of either choosing a parent or making choices

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that influenced access to a parent. They listened to children but they also wondered about the context of why the child said what they said. Dialogues took place regarding taking children's input at face value and many therapists were highly suspicious of children who fully rejected a parent. The idea of children having many views (voices) was deeply discussed. The therapists were more engaged in deciphering the details and nuances of what was happening for the child. What role did the child play in the conflict story? What really needs to be understood here?

Therapists viewed themselves as providing the context for the family conflict story.

"She said, well who will take care of the other children? She was 100% on point with that. She (child) took on a very maternalistic role relative to the well-being of (her) 2 younger siblings and she was very poised and very mature and of course she wasn't honored and she was placed with her grandmother. And, within the next 2-4 years child welfare removed the other children due to gross neglect. So this little girl, even though she was seven or eight (I mean she was just a little tiny thing) really knew that she had to be there to take care of those children. So her voice was a powerful voice around the well-being of those children. Not necessarily what would best serve her..."

"I want to start off by avoiding the notion where the framing of the problem is that we're trying to find out, where the child's preference is, because it will be about love. And if we don't make it about love, we're doing what the Nazis did (forcing parents to choose between their children). At least, that's my own feeling. So, what I do is that I first approach the parents

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to find out the nature of the conflict, the concerns that each parent has for the child.”

Interpreters of the Context of the Child's Voice

The story of conflict provides some of the context of the child's voice. Each child may respond differently to his/her family situation and each conflict story is a bit different. Therapists are requested to provide details about a child to the court so that the Judge has enough information to make a decision on behalf of that child. As part of qualifying the information for consideration by a Judge, the information must be out of the scope of knowledge or expertise for the Judge. Therapists then provide clinical information, which may include information on temperament, resilience, personality, development and special needs of the child.

During interviews, therapists talked about considering such things as children's abilities, interests, verbal responses gained through interviews, and verbal and non-verbal responses gained through projective tests as well as observations of the child. Therapists have three main roles they can be assigned through which to provide information that is requested of them by the court about a child and their family: 1) Bilateral assessment, 2) Voice of the child report, and 3) Child therapy report. Of these three, the court will often order one or more of these interventions based on the fact that the parents cannot agree on how to develop a post-separation parenting plan. Inherent in most of these arguments is the argument over what percentage of time each parent should spend with their children. There is still a

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very strong hangover of the “tender years doctrine” where mothers tend to view themselves as the primary nurturers and therefore they should also be the primary caregivers post separation.

Therapists’ conversations included a focus on fathers, money and conflict. According to some therapists, fathers have stepped forward to claim their parenting role with their children, but depending on the views of the assessors, counselors, Judges, and lawyers, the father’s role may or may not be seen to be as primary to the child as the mother’s role. I heard agreement among therapists with the current intellectual wisdom that fathers are important in the lives of children, and that they need to have significant contact with their children. The area of disagreement came from what I interpreted as a difference of opinion of whether fathers could do the same job raising children as mothers could. Therapists conversed over the belief that the fight over father access to children was wrapped up in the mother’s gatekeeping role over time spent he can spend with the children. The local wisdom was that until there is a court order in place that states how the parents will share time with their children, the fight continues. Therapists said that an unfortunate complication to an already complicated gender and role argument was that federal and provincial law linked amount of time spent with children with child support payment calculations. Added to the fight over access time with children was that a parent (usually the father) was viewed as only wanting to spend more time with their children because it decreased his child support payments. I thought this is one more dynamic that feeds parental conflict and one more thing

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as a therapist I must sift through on my way to understanding the context of the child's voice. Providing the context of the child's voice is complex. Therapists reflected on the following:

"To deny a child a father? And I say I know lots of kids that I would have denied them their father."

"Time is tied into money, unfortunately."

"And, you know, it's like love equals time, equals money. But it doesn't. But that's the mathematical formula."

Therapists and Language Definition Wars

Therapists entered into interesting dialogues about use of language when they discussed high conflict separation and divorce processes. Of interest was the meanings and use of the word alienation. Conversations about the use and non-use of this word was extensive. It was almost as though the word had become synonymous with high conflict divorce and therapists were still storming over a way to categorize a situation. After listening to my colleagues speak, I could identify with what they said. It appeared that although the word could be useful, in order to deal with what appeared to be the pressure of controversy, therapists preferred not to use the word itself, but they were in agreement with using the behavioral definition of the word in their reports. The therapist group emphasized the need to protect children and families and together talked about how they would prefer to offer a helpful or healing summary to families in conflict rather than to be inflammatory. I understood from the discussions if they emphasized the term alienation, it would create further divisiveness in a family. I thought that in addition to furthering divisiveness in families, the use of the word could

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further divide the clinical and law communities. This would be part of my experience as an insider therapist. There were such strong feelings about the concept of alienation held by various professionals in their local communities of law and therapy that it was a like walking into a minefield.

Therapists are typically trying to find ways to be helpful and not cause more harm so the explanation of aid or help to a family makes professional sense in the community of therapists. Reading between the lines however, using the term alienation may also place the therapist at risk of being reported to their professional association by an angry parent. Therapists would prefer to be in the neutral position. This led me to also think about the current literature wars on the term alienation and how both lawyers and therapists are influenced by the various points of view and camps that have emerged on the subject. Because different individuals in both the law and therapy communities have varying views about the use of the word alienation, it seems as though the individuals are careful to not be in conflict with their colleagues.

To exemplify the issues around the word alienation, the Family Court Review (2001) put out a whole issue on alienated children in divorce. The wars over the definition of the word alienation began with Richard Gardner (1987, 1992) who established the term Parental Alienation Syndrome (PAS). According to Gardner it was a diagnosable disorder in a child that occurred in the context of high conflict divorce. PAS was defined as a child denigrating a parent with no justification that resulted from brainwashing by one parent to vilify the other, and the contributions of the child vilifying the

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other parent. As far as I could tell, the trouble with divisiveness amongst practitioners began when Gardner indicated it was usually the mother (who is the sole problem) who did the brainwashing and in addition false allegations of sexual abuse may come from this maternal campaign. As could be expected, the feminist community was upset by such a sweeping accusation. So much effort had been placed on believing children and on not dismissing abuse allegations that this formulation caused upset in the professional advocate communities. Following that problem was the argument that PAS could not be viewed as a syndrome because it had not been accepted into the Diagnostic and Statistical Manual by the medical and clinical communities. Regardless of this fact, PAS was used as a legal strategy when children were resisting or refusing contact with a parent. A few jurisdictions in the United States began to reject expert witness testimony related to PAS because of the mass confusion about the definition of parental alienation. These jurisdictions also began to hold higher standards for admissibility of evidence.

PAS has diminished in popularity of use, but the experts in the literature tried to salvage the word alienation. This is exemplified in Kelly and Johnston's (2001) reformulation of PAS, calling it the Alienated Child. They offered a continuum of parent/child relationships after separation and divorce and gave the both the legal and clinical communities something more to work with that did not start with alienation or blaming a parent. In fact they introduced a range of words that identified different relationships and behavioral indicators were attached to those examples. The words used in the

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formulation were: positive preference, affinity, alliance, estrangement (realistic) and alienated. This formulation is yet to catch on in a consistent way. Lawyers and therapists felt most comfortable with the word estrangement and alignment over any of the others in this model. Its use as a tool diminishes by way of a lack of common understanding and use. I theorize that those upset by the PAS formulation picked up bits of Kelly and Johnston model and held tight to their disagreement with the original conceptualization of PAS and ever using the word alienation. It now seems hard for professionals (especially the advocate groups) to use another model of thinking.

Therapists shared their caution and concern about using the word alienation.

"I don't like the word, I don't. Because it's a lightning rod. Well, the whole parent alienation thing, I think it's a lightning rod. And people just go for it. And people think...It's just that once you start naming things like that, it blows it up. So, my bias... I might call it, is it works to undermine a relationship."

"But undermining the relationship does not necessarily equal what I think is commonly accepted as alienation, because it's sort of a continuum. Parents can be undermining the relationship of their child with the other parent, to a lesser degree, or, you know...It's a continuum, right?"

Personal Experience Influences Approaches to Children

It would stand to reason that we cannot separate our cumulative and moment-to-moment experiences from the work

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we do with people. It would seem, however that each professional is at a different place in his/her awareness of the impact of the self on others and vice versa. This would appear to be one more variable to consider in the critical work of bringing the voices of children to court. This is particularly important when therapists bring the child's voice and context to the Judge. Identifying context can be influenced by what therapists think is most adaptive for children after separation and divorce. Private conversations with therapists working in the divorce field have been telling in that some believe children should have one main house with the mother and others feel that a shared parenting arrangement is an acceptable norm. Other things commonly discussed include: Should both parents work? Should there be more than one childcare provider? Should nannies go back and forth between houses? Who should organize health care? Who is better at nurturing the child? How much time should fathers have with their children? etc.

Many discussions leading to therapist bias seemed to me to be role bound. How binding should roles be after separation and divorce if both parents are functional caregivers? Some therapists are biased in self-reported ways and others infer bias in their answers. If a therapist has experienced a difficult divorce herself, she may use some of her experience to draw on to make decisions for others. Using experience can be both beneficial and risky to a child. Therapists may over-identify or under-identify a child's input rather than to "be with" and hear the child's experience.

Avoiding personal experience is impossible, but acknowledg-

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ing its presence in the work a therapist does is important in that it shapes how matters are framed and how decisions are made. Therapists made various comments related to their own biases.

“I’m seeing it more as an interaction just thinking back to this really difficult case that I was working on years ago and it almost – I don’t know – it probably became bias because it was almost that the one parent was so relentless about not wanting to hear the child’s point of view, blaming the other parent for those things, ignoring evidence that had nothing to do with the other parent. Bias...well it’s so tough as everybody is different. Each child is different and each parent is different and I know a lot of decisions now are being made on the 50/50 (schedule)... regardless.”

“I think those are always there and again biases have been there for most of since birth – we’ve grown up in families and cultures and systems where that’s just part of the fabric its that we don’t often know that we have it.”

Therapist Role: Part of Resolution and Management of Family Conflict

I experienced therapists as describing themselves as managers and resolvers of conflict. Through discussions about the work therapist did, I heard a collective acceptance for this role. Again, I understand this as part of the helping profession mandate. Even if the role was to gather information and provide feedback to the court for decision-making purposes, therapists I spoke to thought they could do

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more than that. I heard therapists refer to educating parents and to providing feedback to them about the needs of their children. Therapists wanted to affect change, but change that came from the parents themselves and not court ordered change. It would seem that they thought their very involvement could actually make a difference from time to time. One therapist wished she knew what had happened to the families she worked with and whether anything she did actually made a difference. Did families stop fighting at some point after reports, assessments and interventions? This hope seemed to be the theme amongst therapists.

In my own work with children and families, I also feel that I have an obligation to influence change. I had to ask where did this unspoken responsibility come from? In an attempt to answer this question I would guess that making meaning about this work is critically important to keep therapists involved in continuing to do what they do. I would claim working in high conflict separation and divorce is thankless work, but a single diminished conflict outcome could fuel my fire to continue.

Another factor that was discussed was the work is difficult and requires highly developed therapy skills. The need for advanced skills tends to put this work in an elevated category; one reserved for the highly experienced practitioner. This “expert” factor in combination with the helping profession mandate adds even more fuel to the practitioner’s role. From my own experience, I realized during the interview process with my colleagues that I feel an increased competence in being able to work with high conflict families. This seemed to be

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echoed by my colleagues through their various references to how long they had been in the field of practice and to the various ways they conceptualize working with divorcing families.

Some therapists even used unique language to describe their interventions.

“First I want to have their confidence and I want them to have a buy in to the process and then I will work with the family around the issues, right, and then to meet with the child. Now, the other part of it is – it goes to treatment- I just say it is a process of approximation and desensitization.”

“Then I give the parents some feedback about what I’m noticing, what seems to be the needs of the child at that present time – give them some strategies that might help them with the child’s coping. Then often I do find the parent/child sessions with the parents are helpful if the parents are open to that and the child feels safe enough in their relationship to do that where the child can give some feedback and the parent can understand where the child’s needs are – the things they like to do with them. Build some attachment, build some additional attachment back so that the child feels safe in the relationship.”

Structured and Unstructured Approaches Used by Therapists

Although many participants (lawyers and therapists) tended to first say they did not have standard ways to interview, test or work with children, after some prompting most therapists were able to name what they did to gather information and

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learn about the child for reporting back to the court. This was a more difficult task than I thought it would be for therapists. I understood them to engage in both formal and structured and informal and non-structured activities with children. Included in the list of types of interventions discussed were: play therapy (directive and non-directive), use of toys in interviewing, direct interviewing (structured and non-structured), projective standardized tests, non-projective standardized tests and drawings. There was some discussion about the use of more standardized forms of testing for bilateral assessments than for voice of the child reports. A few therapists in the group discussed together the distinction between these two therapy activities. One therapist pointed out that voice-of-the-child reports are more clinical in nature while bilateral assessments were more standardized and scientifically oriented. The therapist made the differentiation as relating to legal expectations and rules. Bilateral assessors had to defend their findings and make use of standardized measures indicating outcomes whereas the voice of the child reports did not require the same mandated combination of required tests, interviews and clinical observations. The bilateral assessors in the study were familiar with having to meet higher standards of evidence for their reports. The professional associations have also provided a list of required activities for the bilateral assessor. The aim according to some of the participants was to make these assessments as scientifically valid as possible.

Of course there was a varied response as to whether the study of a family can be scientific in a positivistic way. This was an interesting dialogue. Although there were strong people presenting one worldview, another worldview of

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bilateral assessments was also heard. The bilateral document can help to tell a family story that is not scientific. Bilateral assessors not only put forward the voice of the child, but the voices of the parents. Bilateral assessments are family-focused assessments. The full dynamic family picture is collectively agreed upon to come from a bilateral assessment. Bilateral assessments carry a lot of weight in court in that they also contain recommendations. The Judge takes the recommendations quite seriously because the bilateral assessor has spent considerable time with the family and knows more about the members and their behaviors than the Judge could possibly know.

Training levels and types of training also created a variation on what types of activities each therapist used, regardless of the type of assessment or clinical activity. The trained and Registered Play Therapists utilized specialized play-based interventions. These interventions had projective value in that through the activities children projected family and relational themes onto play objects and told about their thoughts and feelings through objects such as miniatures. Disclosures about relationships and family matters are witnessed and documented through play therapy.

Many therapists reported doing both clinically focused work as well as formal assessment work. Although not required, those therapists involved with completing the voice of the child reports also utilized some formal and structured tests and information in their outcome reports. The role of therapist as “helper” slid in further for those that did voice of the child reports, although there were a few strong opinions on making

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a bilateral assessment therapeutic. It was interesting as the conversations with therapists unfolded, reference to the child was somewhere in the mix, but not as prominent as I would have guessed. The therapists commented on their clinical activities in the following ways.

“Since I don’t feel that custody evaluations are particularly helpful for children, and since I have philosophical problems with the whole process, I stopped doing them some time ago. And my work has been trying – in the last 10 years – trying to tell a story, for people who have to make decisions.”

“We’ve used, like, the PORT (The Perception of Relationships Test- projective test) in our office, with the really little ones.”

“And then, I guess the next step would be to interview the kids, after they were brought by each of their parents.”

“Yeah, playing, drawing maybe.”

“So they say, can I check out the doll house? I say sure. I sit and watch how they organize it...how they arrange it and often times they arrange it like one of their houses now or before the separation...depending on how recent the separation was. And you can start to get some picture of how they saw or see their actions between people in their lives.”

Therapists Interface with the Legal System

Therapists in the study found the legal system a rather unfriendly challenge. Therapists generally did not think the legal system supported increased positive family functioning, but it was at times a necessary intervention for some families. I listened as therapists described the legal system as a necessary pathway used by high conflict parents to have their voices heard. Entrenched in their conflict positions, each

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parent hopes that someone will join with him/her by making a court order for his/her desired action. There was a lot of sensitivity towards Judges by participants as Judges are met with the difficult job of sifting through affidavits and notices of motion (court applications) to understand what requests are being made by divorcing parents. Therapists become one of the expert groups called upon by the Judges and lawyers to help out. Usually therapists are called on once the litigation process has begun. In my experience there have usually been a couple of applications made to the court before I ever meet a child. The work of the therapist interfacing with the court system and family is typically one of working with increasingly entrenched conflict between the parents.

According to many therapists communication and collaboration between them, lawyers and Judges could be better, but generally the groups do what they can to manage the rules set out before all of them. As the therapists say:

“We are each guests in the legal system here. We don’t get to enter the system just because we feel like it.”

“In families where our mental health operation does not work, or they don’t or can’t access it, the only other system is the legal system.”

Therapists conversed about wanting to remain in control of what they will and will not do related to court matters. There are roles or clinical activities therapists said they sometimes refuse to do. If ordered by a court to engage in a role, therapists must follow their professional college guidelines regarding remaining within scope of practice and expertise.

Sometimes courts do name specific therapists in their orders.

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“Because if the lawyer is saying, okay, we want this answered and this answered, and then okay, yeah, I’ll do that or no, I can’t answer that. Here’s what I can help you with.”

“If I can’t answer the complete question in a way that can be helpful, I won’t do that.”

“I just wanted to say – and I think that’s a better focus (referring to legal role) that could be better resolved in your venue than in mine, as an assessor.”

Therapists say they frequently get stuck in the middle between the legal system and parent expectations. Parents often enter the legal system angry and positional and the therapists cannot resolve or affect the kinds of changes many parents want.

“I can’t tell you how frequently I tell parents who are arguing about the fairness of this and all of that, this isn’t right, and all that... And I have to say to them, I say, listen, I can’t get you justice. And I can’t get you truth. And I can’t get you satisfaction. But if you work with me, I think I can get you a relationship with your child. You’ll have to make your choice.”

Therapists, as they interface with the legal system, have to understand their role and scope of what they are doing and what they will provide back to the court right from the outset. The trouble is that sometimes rules can be made mid-stream via new court orders about what the therapist can do or not do. Therapists still have an opportunity to reject the new directive, but it would typically mean removing themselves from the file. If a therapist is mid-way through a process with a child, an ethical dilemma occurs about withdrawing. Will that help the child any better? This question is really only

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answerable on a case-by-case basis, but it does demand the therapist to know the roles they could take on as well as to understand the interface between the legal system rules and the professional association's rules. As it stands, courts have a lot of directive power, but they cannot order a therapist into an activity that goes against the practice guidelines or ethical codes of conduct outlined by the professional colleges. As an insider listening to my colleagues I remembered many times when I had to refuse to take a court-ordered file. I also thought about court orders that had been made part-way into a case and how difficult it was to make a decision on how to proceed.

"I think, in this case, it's a matter of monitoring (referring to role). I'm wondering now about this whole voice of the child. That's really not what we're looking at. We're really looking at what the child says about how they're experiencing their parents' conflict."

"So, to put this into context: Part way through the file a change in order occurs, now the custody assessor can't talk to her, because there's an order saying that she is not supposed to submit a report to court, okay? I can't talk to her, as the assessor, because it's without prejudice, right? Well, it's a silencing. And then, I guess, you could just, I mean, you could withdraw, or not. But I'm interested in what you would do at that juncture, because now you have a relationship with the child?"

Although therapists present as well-meaning and tend to want to help families manage their conflicts and to find a way to provide the voice of the child with accompanying context, they are often inadvertently stuck in the positional war parents

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are in over time spent with a child. The legal rule is that time spent with a child is also linked to child support payments. Issues related to money and time filter through children to the therapist. As part of the therapy community, I have come to understand some of my own biases and my colleagues' biases about the time children spend with each parent. Before the study I had a bias of shared parenting (if both parents were able to provide for their children). After meeting with my colleagues for more in-depth discussions, my ideas on the matter are no longer as firm. Beyond the bias of a therapist however, is another legal interface issue that must be managed and contextualized. What I as a therapist say in a report may affect many things in a family, including finances. When what therapists say crosses into the financial security of parents, emotions run high. Therapists may be relationship focused, but the legal system has wrapped what parents view as their relationship time up with money.

“But it also impacts the relationships of the parent who... Like, the parents who are losing (time). It impacts their strain, their stress, their discomfort, which impacts the whole family situation.”

“It’s more about money now, because of the guidelines, you see?”

One participant emphasized that when he interfaced with the legal field he had to be aware of current literature, research and case law. Working with the legal system requires more than a set of clinical skills, it requires an awareness of what factors drive court decisions. Therapists must also be aware that through their report-writing they are contributing to case law.

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“Decisions are driven by case law. I’m not saying by psychological research. But by case law, it’s pretty clear: The only way you can get case law, of course, is to try it (referring to lawyers asking for specific court orders from Judges), and it becomes a precedent-setting case. Whether it’s relocation, child custody, same-sex parents, doesn’t really matter. They set... It sets forth the criteria.”

Therapists need to prepare for the interface with the courtroom. The message of being prepared was made loud and clear by the therapist group. I know this only too well personally. What did the therapist group mean by this? There were different perspectives regarding preparation on what was considered a clinical focus and what was considered a scientific focus. I am not sure about these differences because I think that all action taken by a therapist could be viewed as clinical in nature. The ways words were used in the group therapist interviews seemed to be driven by different individuals trying to make sense of what they were doing in their own practices and how to define it. Use of the idea of scientific rigor and how to defend assessments appeared to be one of the main differentiations.

“But going to court is not a clinical issue, it’s a scientific one.”

“Yes, and I see clinical and scientific as quite connected.”

A story emerged through collaborations with children’s lawyers and therapists. It was not the simple story of a list of procedures to use with children. I understood more deeply the importance of the “how” part of my question. Most of the dialogues focused on the twists and turns of the legal system and the difficult position for children of high conflict divorce

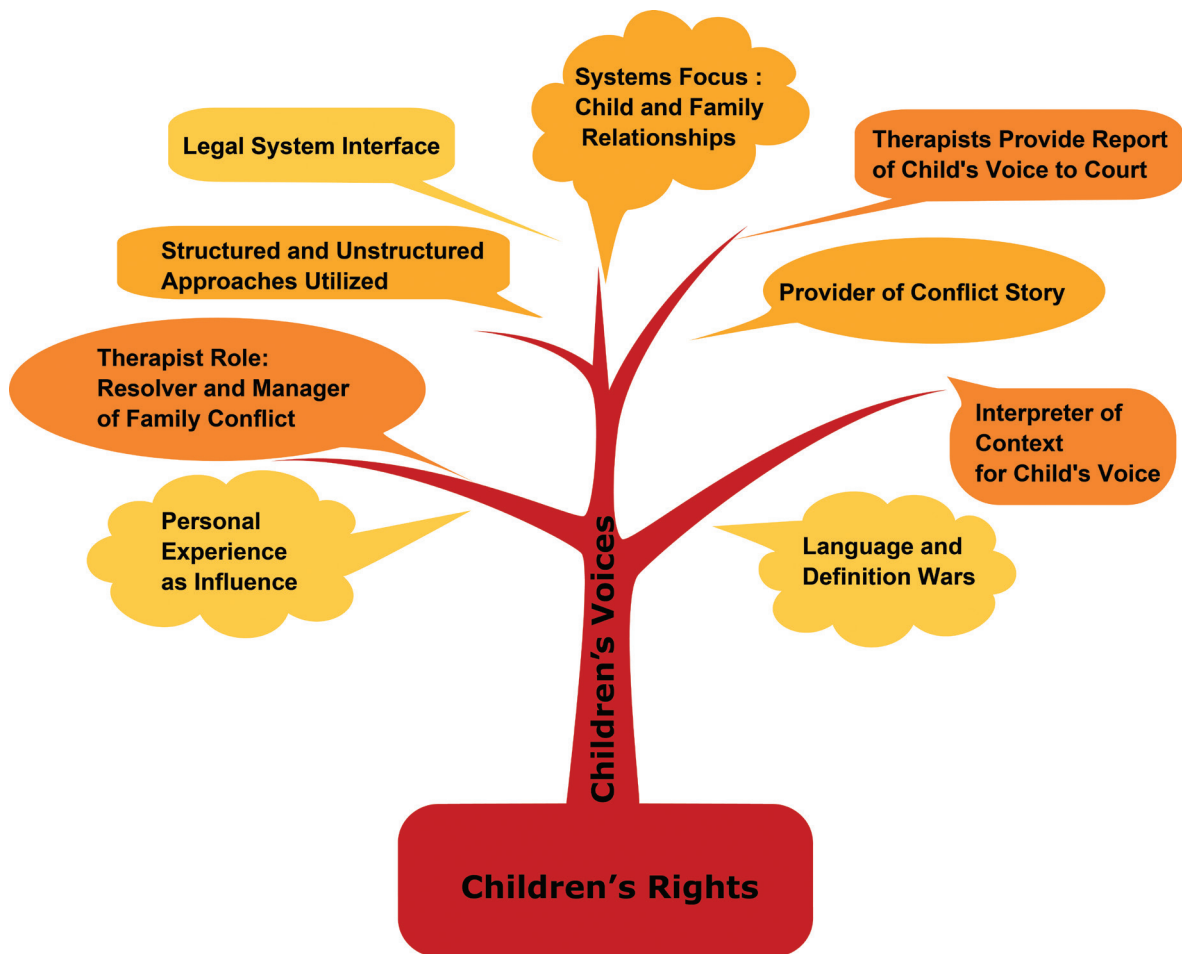
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situations and the difficult position of those of us who are asked to provide their proxy voices. The story of therapists is captured below by way of a number of theoretical categories. The theoretical categories tell a strikingly similar but subtly different story to that of children's lawyers.

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CHILDREN'S THERAPISTS

Figure 2: Theoretical Categories



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PART THREE

Lawyers and Therapists: The Differences

Lawyers and Therapists Need a Common Language

Of interest to me was where children's lawyers and therapists differed in their roles and perceptions of including of the voice of the child in legal matters. Although both lawyers and therapists in the study discussed including the voice of the child as "the right" of the child, the lawyers' advocate role seemed to elevate this notion. Their contributions to discussions were more child-centered. Therapists shared they were more likely to be family-focused and involved with all or most members of a family. The therapists lacked the protection of confidentiality for the child due to parents having legal rights over their children's clinical materials. The therapists were more exposed to parent backlash and negative consequences by way of complaints to professional associations for not supporting a parent position.

The therapists claimed to be the interpreters of the family issues and conflict story and they expressed wariness about exposing what they came to understand about the child and family in case they increased the overall conflict in the family or in case they increased the risk to themselves professionally. The theme of professional risk arose for children's lawyers too, but in a different way. They talked about being at risk to being reported to the law society, but

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parents are not able to be as involved with them due to the rules and boundaries put forth related to lawyer/client privilege. I realized after listening to the two groups that the one benefit to individual representation was that it offered more protection to the lawyer and perhaps to the child because parents could not demand the lawyer's file and expose their child's input. Children may have more power about what parts of their views are presented when they have their own lawyer. The following quotes by therapists suggest the complications of doing this work.

"So just to sort of maybe back up, I have made a decision as a result of a complaint (made against me by a parent) not to deal with high conflict divorcing families."

"Well I always felt like I was walking on the razors edge... in terms of how to bring alive the voice and the feelings of the child without exposing him or her."

Through the role of advocate the lawyers are mandated to gain the voice of the child and they are not required or expected to provide context for what the child says. Most of the lawyers discussed their struggle to get around this obligation to provide the child's input without context, but in the end they adhered to the community consensus; they must deliver what the child says without clarification or interpretation. During dialogues with lawyers, hope for therapeutic support or the ability to cross-examine others to expose more details about the family story emerged. Some lawyers hoped the Judge asks them a direct question about the situation, but they do not always get opportunity. The lawyers drew the line at managing the family issues whereas the therapists viewed this as a major part of their role.

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The theme of risk of being reported or blamed ran through the lawyers input as well. I learned the added risk to lawyers is being reported by one another. The cost of working in conflict is high as it seduces those working in such a dynamic to join a side. As shared with me, there are times when the lawyers become embroiled in the conflict and mirror the family functioning.

“But you know, you’re not a real lawyer until you’ve been reported to the Law Society [laughs].”

“Oh, this was a horrible case, Lorri. You know, one of the lawyers reported the other to the Law Society. And the other one...And there had been costs associated with the report... So, Mom’s lawyer reported dad’s lawyer to the Law Society for misconduct. I (children’s lawyer) never got involved in that, and I don’t even know what it was. Then, dad’s lawyer brought an application for costs against mom’s lawyer, personally, and won. So they really hated each other. So, I really tried to just stay out of it.”

The lawyers are placed in situations where they must tread lightly. They may be asked by a Judge to explain themselves or offer more context to the problem as this lawyer expressed so poignantly.

“You know, when I was alone with the Judge, I said...Off the record, I will tell you this because you’re asking me and I don’t know what my rights are with you, you know? He goes, its off the record. It’s not a trial you know, its fine. He just wanted to know my thoughts I guess, I don’t know.”

As a therapist I can relate to these circumstances and even though therapists can offer opinions and explanations to the

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Judge, I have become aware of how quickly what is said may affect my relationship with the child, family or legal counsel. If I cannot remain engaged, I can no longer be of any assistance. The pressure is different for therapists in this regard because therapists are more concerned about managing the family conflict and being as neutral as possible while telling what in actuality is the non-neutral story. I have been involved in a number of situations where I felt that if I stated what I observed too directly, it would cause a divisive reaction that would either affect my reputation with one of the lawyers, or that one of the parents would become more enraged and turn the rage on me. This situation happened to me as one parent became angry at me for outlining a pattern I observed that identified her in what she perceived in a negative light. She then reported me to my professional association as a result. Although the complaint was dismissed, this set forth a long course of defense for me and made it necessary to remove myself from the file. To be in the role of therapist who is asked by the legal system to provide the interpretation of the family context is a no-win position. My experience is the presence of conflict unto itself suggests there is no neutrality somewhere in the family system. I have found that it is impossible to present each parent's contributions to conflict in an "equal" manner simply because it rarely presents that way. I listened as my therapist colleagues seemed to struggle with wanting to find ways to be neutral and helpful. Therapists reported not wanting to increase conflict, but more than that, therapists expressed the need to use all of their skills to help the family function better. This is likely an embedded role definition and a therapy community consensus issue. If your job is in the mental health

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field, you are likely influenced by a number of ideas related to increasing client capacities and well-being.

“So, as I approach children in a family where attachment has suffered an earthquake, where the attachment at the top of the family called a marriage has been lost, and that the family is therefore struggling to find a way to continue to be a family and to have family attachments without having a marriage. It can be done; in fact that’s a large part of my practice. Maybe 30- 50 percent of my practice through my life has been trying to help, you know, families make this transition from a married family to a divorced family. And the commonality, the key issue, is family.”

Therapists tended to view themselves as interpreters of the voice of the child in the context of the family. Lawyers said they must present the voice of the child without context (at least not directly from them). Providing context to the voice of the child is a complex activity and there were many comments about how difficult this job was. The therapists did not view the child as an independent source of input, rather they viewed the child as intricately connected and influenced by family and other relational factors. While listening to the therapists I was struck at how much effort it took to talk about the voice of the child.

“I’m wondering now about this whole voice of the child. That’s really not what we’re looking at. We’re really looking at what the child says about how they’re experiencing their parents’ conflict.”

“Doesn’t matter what the age of the child. So that’s sort of, I think, the beginning of sort of unfolding the voice or the voices, because I think that question sort of brings up a lot of

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information from kids; what they've been told, or what they're saying. Or, you know, you have a child that's trying to tell you, and you can see they're trying to remember something. And then, have they been prompted? Have they been coached? There's all of that coming in."

Therapists can take on one of two roles when providing children's input or the child's voice back to the court: therapist for the child or bilateral assessor. Each role has different levels of responsibility and procedural structure attached. How a therapist role begins sets the course of action in how they will provide the child's input. This is one more difference between lawyers and therapists. For the most part lawyers are directed into the advocate role. What is then more difficult to establish by our legal colleagues is what role can we as therapists play in this family situation. Lawyers are mostly responsible for making a request for therapist involvement.

"See, I think that your first question was the most important one: What is the voice of the child? Because it's determined by the role. If someone says, do a voice of a child, and just tell me what she (child) thinks, that might be different than the role of a custody assessor, whose work has to be much more rigorous in terms of the investigation; versus maybe a child protection issue, which might have to be a little bit more rigorous; versus a personal injury matter, which might have to be rigorous in a different way; which might be different than therapy with children, because the parents just brought them in and the court's not involved. The context is everything."

One example of role confusion between professionals came up during an energetic dialogue between therapists. The term

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firewalling was discussed. I considered firewalling an In Vivo term used by the therapy community. Firewalling was used to describe a legal action such as a court order being used to stop collaboration between the therapist and lawyers or others who are involved with the child. The consensus in the therapist group was that firewalling was not helpful. Some therapists theorized the reason for lawyers to take this action was to give the child his/her own person to talk to without any interruptions and to protect him/her from the parents' conflict. The therapists in the group interview understood this to be unrealistic as children live in daily conflict with their parents and we as law and therapy communities cannot stop this reality for children. In addition, this interrupted the role of the therapist to understand the larger dynamic picture. Although potentially coming from a protectionist intent, my understanding was that firewalling could be used as another divisive intervention.

"I think what you're talking about is that there was a move, and there still is a move sometimes, to firewall children away from the difficulties that parents may put them through."

Lawyers and therapists differed from one another in what I saw as four main theoretical areas: 1) Therapists are not simply focused on the child, rather they are busy interpreting the broader context of the family story so they can present the voice of the child to the Judge with context; 2) Therapists are working hard to manage and resolve family conflict even when this request is not made by the court or family; 3) Lawyers are interested in providing context to the voice of the child, but their advocate role limits them in doing so; and 4) Lawyers work very hard to creatively get around the

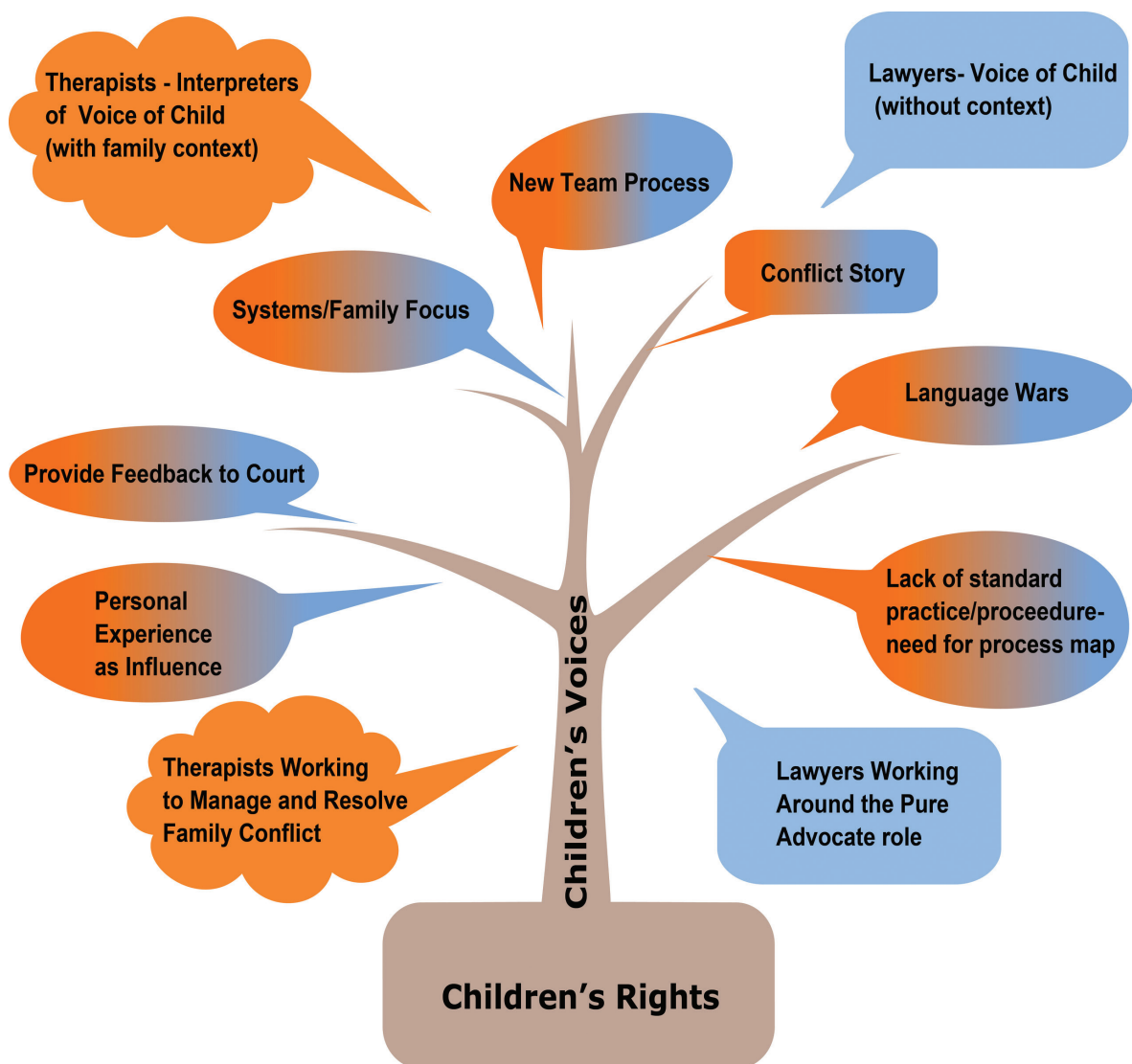
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advocate role so that they can provide enough information to the Judge so he/she can make an informed decision on behalf of the child. This is especially true when there is no therapist involved with a child to provide some of this information.

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CHILDREN'S LAWYERS & CHILDREN'S THERAPISTS SIMILARITIES AND DIFFERENCES

Figure 3: Theoretical Categories



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LAWYERS AND THERAPISTS

Team Approach: A Request for a New Procedural Map

Both groups in the study reported no standard approaches to gaining input from children. When asked the open-ended question: “What can you tell me about your approach to meeting with children?” most participants talked about a variety of different procedures about meeting a child, but claimed they did not follow a standardized pattern with each child. It was generally difficult for therapists and lawyers to freely describe their practice approaches and participants required many prompting questions to provide a descriptive account of what they did in their work with children. During interviews with lawyers and therapists, participants in both groups said that it would be a good idea to have a procedural approach that would be more collaborative and systematic. Participants asked me if the research might unfold a more standard way of working with children and families of high conflict divorce? Being a therapist insider, I had hoped to hear about what others were doing. I also wanted to find out if what I was doing was similar or different to others. It turned out that everyone seemed interested in this information about each other.

Being in the fields of separation and divorce counseling and assessment or legal advocacy for children did not preclude professionals from having the similar training and/or exposure

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to research or literature. Some therapists mentioned following other senior colleagues' ideas, but it was clearly difficult for professionals to find opportunities to talk about what they actually did in their practice. At the end of each group interview with lawyers and therapists, these participants spent time reflecting on how interesting it was to get together and actually talk about their approaches to practice. Even the participants in the individual interviews expressed gratitude for the opportunity to talk about their practices with me. It was one thing to know one another professionally and another to be talking about process and actual practice approaches with one another. Both group interviews went over the allotted two-hour time line scheduled due to animated conversations that appeared to hold everyone's attention and interest. Similarly, most of the one-hour individual interviews went over-time as well. Some of the following comments are indicative of the interest in a procedural map – different ways to gain the voice of the child.

“No, no system but that would be good to know what to leave out....” (Therapist)

“No, but if there was a template... that would be very helpful for us!” (Therapist)

“I'd like to have a template (for work with children of divorce) – one that was consistent.” (Therapist)

“You know, we need...we need your paper written, Lorri, you know? We really do.” (Lawyer)

A New Team Process?

My understanding is children's lawyers and therapists are

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concerned about similar things but take on different roles in the legal process. The therapists and lawyers interviewed appeared to highly regard one another. The participants appeared to want to help and receive help from each other. The Calgary community of therapists and children's lawyers seemed to be highly motivated to sort problems for high conflict divorcing families outside of court. This meant that the professionals working with the children and their families needed to have a good working relationship and a way to discuss issues that arose. This flavor of collaboration appears to me to have been influenced by the movement of Calgary family law lawyers to embrace the practice of collaborative law. There are now 57 Calgary collaborative lawyers listed on the Association of Collaborative Lawyers of Alberta (ACLA) website (www.collaborativepractic.ca). Collaborative law is a practice that avoids going to court, utilizes problem-solving approaches to family matters, emphasizes the needs of children and encourages mutual respect. I believe that the therapists involved with children and families of divorce are also (for the most part) collaborative in their approaches to working with the legal system.

"My perception, in Calgary, is that we've been quite successful in being non-litigious. I have esteem for most of the matrimonial lawyers and the divorce operation going on in Calgary. I think, by and large, that people have heart. They don't want litigation." (Therapist)

Therapists had a lot to say about being guests in the legal system. Not unlike the lawyers, therapists were concerned about finding ways to work with the legal system and lawyers more effectively. This entails understanding one another's

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roles and the scope and limitations of those roles. A glaring point raised by both groups was the issue of working around the legal system rules. The rules appear to entrap both lawyers and therapists. You cannot directly say what you see or what you have come to understand about a family without some type of impact, either with the legal system or with the family members.

“And I think that this multimodal approach of trying to resolve this kind of conflict with kids, so that they can have more of a voice, will always be encumbered because this is within the legal system.” (Therapist)

Teamwork Could Make All the Difference

Lawyers had many ideas about how we could all work together. They realized the dilemmas, complexities and barriers that exist as a result of the current legal system in Alberta. Lawyers had thought about a variety of possibilities that were remarkably like those that have been tried in Australia. For example, as part of the Children’s Cases Programs (McIntosh, Bryant & Murray, 2008) children are central to the process of divorce. This approach removes the focus on the parent fight.

Outcomes from the pilot study on this approach noted less damage to the co-parenting relationships, better conflict management and improved adjustment in children. This is akin to what lawyers and therapists would like to see happen here in Calgary. The parents are in control of all of us – including the so-called voices of their children. It is hard to imagine being a child thrown into the middle of the bargaining ring without being influenced to the degree that you include some of the

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bargains in your views – whether the influences are obvious to the listener or not. Lawyers and therapists do not really want to try to work around the current rules if they do not have to. And who are the rules for other than to maintain a historical standard practice of law? The rules as far as I heard do not serve lawyers, therapists or families and worst of all the rules demand the inclusion of children, potentially placing them at risk emotionally. Here is an important point made by a participant about doing things differently.

“What I’ve kind of mused about is how Family Law needs to change from the adversarial to... Like, when mom or dad comes in and they file a claim, instead of Legal Aid appointing counsel for mom and for dad, appoint counsel for the children. So right away you’re saving money, cause you’ve got one lawyer, who has a team with them... Like a counselor or psychologist. And so you’re focusing right from the outset on the children instead of mom and dad’s stories.” (Lawyer)

Lawyers clearly indicated their interest in collaborative work with the Mental health community. The other role that arose as invaluable was that of the Parenting Coordinator. I realized this role may be best new resource the Calgary community has for working with high-conflict separation and divorce. Parenting Coordinators have a quasi-judicial role definition when parents have signed a Consent Order to delegate a list of approved decision-making items related to parenting to the Coordinator. The decision-making role is only initiated when parents cannot come to consensus about a parenting matter. The Parenting Coordinator can assist in the management of the family conflict and can also hear the child’s views.

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Parenting Coordinators work with all the lawyers involved, children's therapists and any other services utilized by the family. Parenting Coordinators are like having a "hands-on" Judge.

"People are reporting that the accountability held by the parenting coordinator is just a very different kind of level."

(Lawyer)

"So the parenting coordinator becomes the person through which all of these things can be coordinated then."(Lawyer)

One pilot program in Calgary that had the potential for a collaborative model that put children at the forefront was called "Speaking for Themselves". This three-year pilot project was located at the YWCA and was supported by the YWCA and Children's Legal and Education Resource Centre (CLERC). The aim was to provide support for children caught in domestic violence custody disputes. Although the program did not continue, it was one example of the innovation in working with high conflict families. A second program has sprung up in Calgary (and Medicine Hat for part one of the program) this past year as well called the "High Conflict Custody/Parenting Program" (HCCPP). This program, like "Speaking for Themselves", is a collaborative program between the YWCA of Calgary and the Children's Legal and Educational Resource Centre (CLERC). It is a two-step intervention plan. Intervention one is a focus on parents and skills based training. Parents have an opportunity to attend confidential counseling for six weeks to focus on the needs of their children. If the therapist agrees at the end of the six

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sessions, each parent may have three (non-confidential) counseling sessions with their children and a different counselor. If parents are unsuccessful at reaching a parenting/custody agreement after this phase they are transferred to Intervention Two. This intervention is a focus on the children and children are provided a trauma therapist and a children's lawyer. The intent is for children to be heard, provide them with coping skills and to ensure decision-makers are provided with what the program refers to as "authentic information" about children's circumstances.

Participants in the study that do legal work for CLERC appeared to know something about this program. Otherwise, even when asked about collaborative ideas or programs, the HCCPP program was not mentioned by other participants. I theorize that the lack of knowledge about this program is likely due to the division in the community between privately funded and publicly funded services and programs. The demographic is different for the two types of services in that those with more financial resources tend to buy their services privately and do not often opt to use funded services. This leaves the private practice community to piecemeal the work together in their own creative ways. In addition to the different clientele, there appears to be differences in how private and funded groups acknowledge and identify abuse in separation and divorce.

Lawyers made the following comments:

"You might be more likely to see them, because you might see families, more middle-class families than we do. Because we offer a free service, right? You might see more middle-

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class families who can see that their children are just not doing well, not thriving. But that everybody's caring pretty much for them, or it seems like it. But they just need some counseling, some support, or they're looking for that."

(Lawyer)

"I mean, there is a new program out there through CLREC actually, which is the HCCPP program, which I have referred a couple of people to when there is a high conflict that I think would lend itself to having a more all-inclusive or holistic approach to deal with something." (Lawyer)

The thoughts and considerations of therapists and lawyers prompted me to think about all the services we currently have available to us in Calgary. What would happen if we use the services and processes we have, but coordinated them differently so that children could be involved at the beginning of family break-ups and parents had to follow an alternative process to the court system? I would have to advocate for a few new procedural actions, but it appears as though there would be plenty of support for a new process by the participants of this study. Procedural law reform was not what I anticipated coming from lawyer and therapist dialogues. Additionally, after listening to participants' requests for a procedural map when meeting with children, I thought a summary of the current collective practices used by therapists and lawyers would be helpful for their future reference.

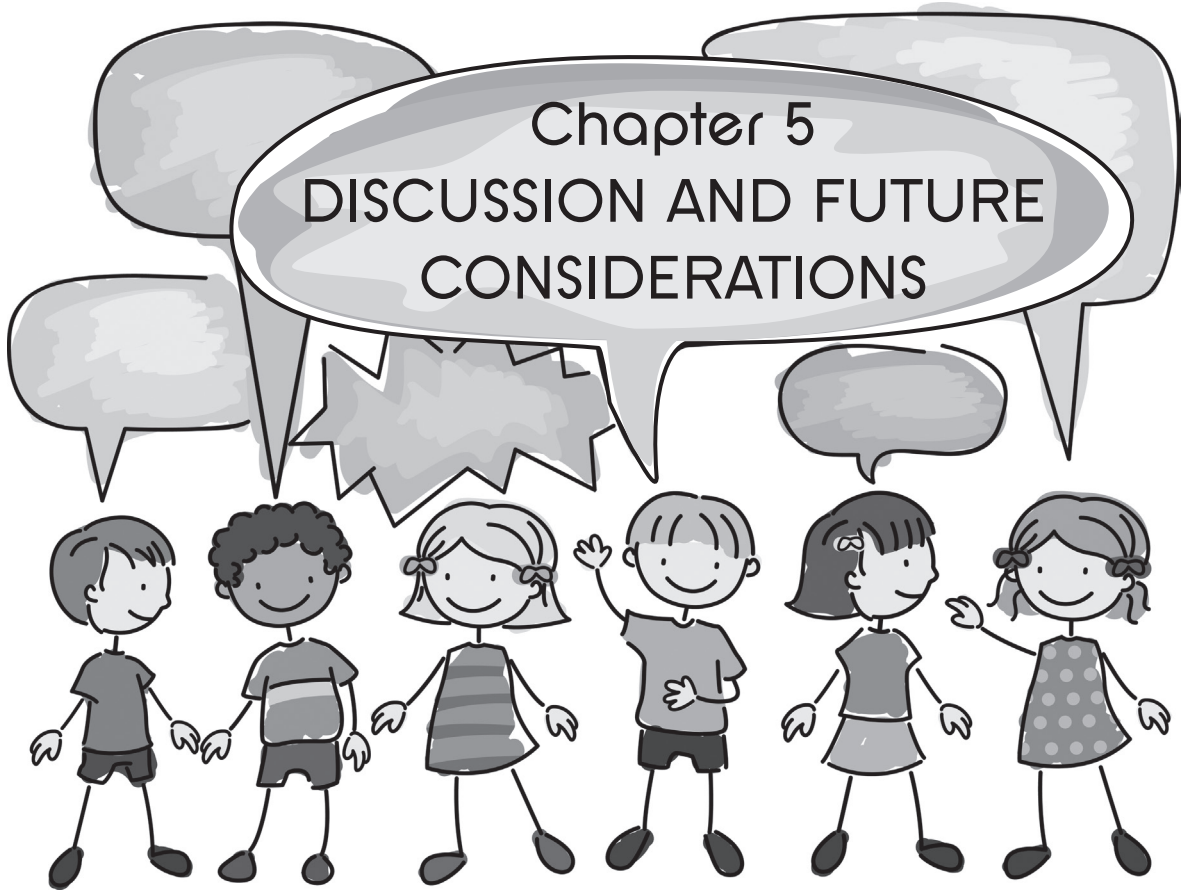
Key Ideas for Exploration

The creative task for me was to take the main ideas generated through participant dialogues and construct some visual representations and provisional descriptions of new

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legal actions. I began with the current legal system and the inclusion of children and imagined a new restructured system for including children earlier in the process. I considered what I had come to understand as important to the lawyer and therapist communities. The key ideas of 1) Giving children a voice earlier in the process; 2) Diminishing family conflict through alternative legal processes; 3) Coordinating and re-organizing current services already available to families in Calgary; 4) Shifting the focus from the parental fight to family functioning post divorce; 5) Focusing on professionals working as a team and; 5) Offering a menu of considerations for working with children are more fully explored next.

Chapter 5
DISCUSSION AND FUTURE
CONSIDERATIONS



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DISCUSSION AND FUTURE CONSIDERATIONS

“Creating actions together”

The aim of the study was to hear from children’s legal counsel and children’s therapists about their roles and procedures in providing the voice or voices of the child of separation and divorce to the court. Since Canada ratified the United Nations Convention of the Rights of the Child in 1991, children were officially considered rights-bearing individuals internationally. A greater emphasis on children having input in legal decisions that affect their lives followed. What factors do Calgary lawyers and therapists consider important when gathering and constructing the child’s voice for inclusion in court proceedings related to separation and divorce and how do they do it? This question provided guidance to the research.

Grounded theory (Charmaz, 2006) was the research approach chosen to examine the above question. At the time of the study, the literature was vague and lacking in definition regarding theory and explanation of actual approaches to interviewing children involved in legal divorce proceedings. The data collected in the field related to the actions, interactions and social pressures and provided a rich resource for the phenomena I studied.

Twenty-one practitioners from Calgary Alberta volunteered to be a part of the study (10 child therapists and 11 children’s

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lawyers). Of these two groups, there were two focus group interviews, one for lawyers and one for therapists and 12 individual interviews that both therapists and lawyer participants attended. What emerged from the dialogues with lawyers and therapists was that both groups were generally frustrated with the court system procedures and rules as related to divorcing families and that they spent most of the time trying to manage parent behavior and maneuver around the legal system in order to find ways for children's voices to be untangled from the mess of parental conflict. By the time the two professional groups become involved, children and families are identified as being "high conflict" families. Due to the slow movement of the legal system, significant time passes between the family break-up period and clinical or legal assistance. Many divorcing families do not require the assistance of a child therapist or children's legal counsel, as they have been able to work things out themselves and place the children at the forefront of the process.

One point raised by a number of participants was that they did not view children as being central to the process in a positive or productive way by the time they became involved with them. Children were typically pulled in when the parental conflict had hit an impasse. It was at this point that both professional groups reported the greatest degree of frustration, as there was an attempt to disentangle the child's voices from the positional voices of their parents.

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Multiple Voices and Reflections

Children's lawyers and child therapists belong to different professional communities with their own histories and experiences. I would expect each of these communities to be what McNamee (workshop handout, 2012) describes as a discursive community, each with their own monologue. As noted by McNamee (2008), each group (in this situation lawyers and therapists) partakes in coordinated actions within their particular disciplines thereby creating rituals and patterns that then form standards and expectations. This leads to the development of values, beliefs and realities. I invited each of these communities to enter into a dialogue about their ways of working with children of divorce and how they collected the voices of children. The multiplicity of professionals' voices emerged through both individual and group dialogues. I listened to the interaction between participants in the groups and to the interaction between me and individual participants and I observed the influence we all had on one another. After the therapist group and individual meetings I found myself using metaphorical terms and words that I had never used before, but resonated with me, in my own practice. This to me was an immediate example of social construction in action. Terms such as levels of emotional taxation, structural and dynamic court interventions and consensus reality are examples of what seemed to be a new way of expressing concepts or ways of looking at what impacts children of divorce.

I also used some of these "new to me" ways of describing actions and interactions in subsequent interviews with other

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participants. The act of entering into dialogue with the legal and therapy communities transformed some of my language and views. Hearing from multiple people also helped me to become more reflective of my own practice. I began to further question my approaches to children and families and I contemplated my own biases more closely and I wondered how I might consider different “ways of being” with my clients. As the views of others met with mine, something new evolved through our interaction.

I observed participants in the group meetings each shifting and adding to their initial input as each listened to and responded to the other’s comments. The participants knew one another professionally from the community, but neither the therapist group nor the lawyer group had come together to have a discussion like this before. A respect for their emerged as some participants emphasized a more relational practice and others emphasized a practice driven by a scientific viewpoint. Each acknowledged the value of their colleagues’ points-of-view and commented on the different ways to be involved with children and families and the legal system. Stronger member voices from each community group tended to attract the most agreement, at least within the time of being together.

The participants appeared to be surprisingly engaged during the meetings and the ability to meet together was reportedly useful to those who participated. I was concerned about taking up the time of my busy colleagues but as it happened, most of the interviews ran over the allotted time (as decided by the groups) and participants commented on how fast the

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time went by and that they found the discussions useful, enjoyable and they learned a lot from one another. Both professional groups stated they needed more opportunities like this. Gathering around a common topic with plenty of food in a comfortable space was important to the process, as it seemed to provide a positive condition for exploratory dialogue.

Envisioning Effective Futures Together

Through the interactions, exploration, and the multiple voices of the participants of the study, creative action related to the question of inclusion of the voice of the child in legal matters developed. I became a part of the process as an interpreter and translator of the developing ideas. Children's lawyers and children's therapists provided two discourses providing somewhat different, yet potentially collaborative ideas for better practices. I had originally thought children's lawyers and children's therapists would share very different comments with one other, but what seemed apparent was that the professional groups had more in common with one another than expected. There seemed to be what I call a "third cross-training action" that had occurred whereby lawyers had sought child development and specialized training for working with children and therapists had sought training in legal system issues and procedures. The two groups generally respected one another and many participants in both communities said they would never want the job of the other. The cross-training situation appeared to create a third type of coordination that may not be as clearly defined as the primary discourses of lawyers' and therapists' communities,

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but nevertheless my theory is that the shared training actions taken by each created a bridge between the two groups.

Group members in both groups generally honored the work of the other. Members of the groups seemed to have a sense of the complexity faced by the other. Although this does not emphasize overall “agreement” it does provide a potentially important concept for the bridging of groups as each entered a bit of the other’s world. Through this cross-over experience that seemed to join lawyers and therapists, two main ideas emerged: 1) The children’s lawyers put forward comments and ideas to increase the legal system’s responsiveness to children by shifting the current legal processes and procedures, and 2) The children’s therapists provided ideas for consideration when gaining the voice of the child and suggested finding a way to share this information with one another. The value of viewing the relationship the professionals had with children as primary emerged through the dialogues with children’s lawyers and children’s therapists. Although a template or a procedure may not be needed, the therapists did want me to share with them what others considered when interviewing or meeting with children prior to court. I viewed this request as a desire by both groups to expand their understanding of the possibilities and choices that may be available to them when meeting with children.

Although children’s lawyers and children’s therapists come from different communities, the ideas that surfaced between them seemed to be more collaborative than divisive. During dialogues with both groups, it was apparent that each group felt they needed and welcomed the other. As I contemplated

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this experience with the lawyers and therapists, I thought that perhaps those that are involved with the children of family conflict situations are drawn together even if they have different roles and histories. I wondered if the focus on gaining the child's voice could actually serve as a function to bring us all to a third community space.

Resources for Action

An Alternative Proposal for Children and Families of Divorce

What is abundantly clear from this study is what is currently happening in our court system is not working for children. Separating parents may actually be fueled by using legal procedures to continue their engagement with each other through conflict. Parents may make this choice but their children suffer. Professionals who attempt to provide children's input or voice to the court identified the complexity of providing such input without forwarding a parent agenda or placing the child at greater risk. The professionals involved with children pointed out the many difficulties with gaining the voice of the child. Children were not put first, rather they seemed to be tossed into the fight as bargaining chips and then asked what their thoughts were. The longer the family was in conflict after separation the more entrenched and positional the parents were and the more applications they appeared to make to the court for solutions. Both children's lawyers and children's therapists overwhelmingly agreed that a new system would be welcomed.

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Lawyers presented a number of ideas and suggestions that mirrored the Australian Family Court model The Children's Cases Programs. As noted in the Australian Family Court media release (2004):



Under the common law system of numerous English speaking countries including Australia, the approach is adversarial. Opposing parties have control of how the case runs and the evidence that will be put forth to the Court. They often take a combative stance and litigation is prone to be drawn out and costly. They are too focused on the parties' complaints about each other instead of the future of the child. (p. 1)

The suggestions made by participants were primarily child-focused and child-centered. The current system is parent/adult centered, with all processes beginning with and then focusing on the parents. Various things have been attempted in Calgary to avert the primary parent focus including the two pilot programs Speaking for Themselves, and the High Conflict Custody Parenting Program (HCCPP). These programs, in addition to informally organized teams of professionals in the private sector (children's lawyers, children's therapists, mediators and parenting coordinators) each attempt to stop the fight between parents well after the dynamic of conflict is entrenched. For example, one of the entry requirements for the HCCPP program is there must have been two or more custody access applications made by parents in one year. By the time of involvement by the professionals, family relationships are further strained and family history may have been re-scripted as negative and,

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potentially, as having been abusive. The participants indicated that children are then involved by being asked for their input, but that input is difficult to decipher. Children remain at risk in the current legal model because they are dependent on their families for survival and care and the legal system's response to day-to-day issues is extremely slow. For example, by the time parents are in front of a Judge, another school year for a child may be over and patterns of parental conflict leave the children to manage the conflict. Essentially practitioners of therapy and law are picking up the pieces with children rather than really offering the support they would all like to provide – at the front end of family separation.

A list of currently helpful, but not particularly coordinated services for the families of divorce were highlighted by participants of the study. After evaluating the list of suggestions provided, I began to form a picture that does not exactly mirror the Australian model for alternative services for children and families of divorce, but contains many elements of the model. After listening to what lawyers and therapists said, it appeared that both groups spent great effort in working around the current legal system. Accepting the way things are and working around them is only one way to manage an ineffective system. It would appear that if other jurisdictions around the world have faced the same dilemmas and have come up with new ways to work with children and families, then why not Alberta?

The contributions from participants provided me with an overview of the services that Calgary already has that are both funded and not funded by government. As funding is always

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the first issue at hand when new proposals are made, I thought that making use of what Calgary already had available made sense. From the interest in this study and the expertise shared during the interviews, it became clear that there was potentially a way to take what already exists and make it better.

The Services that Currently Exist

The funded services that are available to divorcing parties in Calgary include: Government-funded family mediation program; Parenting After Separation Course; children's counsel through CLERC and LRCY (Legal Aid); subsidized child custody and evaluation services (Government Open Project); Child and Family Service contracted assessments (when child abuse is in question); and the partially funded HCCPP program for high-conflict families. The one service that was cut from the government budget was the previously funded role of Amicus Curiae (friend of the court). This was a role that lawyers thought was helpful and a role lawyers can still engage in through request of the court (albeit now not a funded program). Although the levels of court (Family Court and Court of Queen's Bench) did not become "unified" as was discussed in the recent past in Alberta, Calgary does now have one building that houses Family Court, Court of Queen's Bench, Family Mediation, Parenting After Separation Seminars and Focus on Communication Seminars.

The non-funded services include: Parenting coordination and private practice lawyers and therapists (including bilateral assessors). The private sector therapists will also complete

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the work for court ordered Family Law Practice Note 7 Interventions and Parenting Time/Parenting Responsibilities Assessments, Practice Note 8. These Practice Notes were developed for the use of Court of Queen's Bench Judges in Alberta. They are interventions that are meant to facilitate resolution between parents and help the functioning of the family. Judges order these interventions to assist them further in helping to make decisions in children's best interests. The intent of these practice notes was that they would provide the Judge with information about a family without the length of time taken with the more traditional full bilateral assessments.

The Current Legal System

The map of the current legal system begins with a party of the marriage calling a lawyer or self-representing. A party typically files a statement of claim that includes information such as birthdates and addresses of the spouses, date of the marriage, birthdates of each child of the marriage, and terms for child custody, child support and spousal support. The Statement of Claim is then served to the other spouse. The party served then has the option to respond or not to the claim. If there is no response, the divorce will be viewed as uncontested and the parties will typically work out the details on their own. If the party does respond by filing a statement of defense or counterclaim, then that indicates one spouse disputes the terms put forth in the statement of claim and both parties will usually seek the assistance of lawyers to aid in the negotiation phase. Negotiations can be held by lawyers, mediators, or the court. Court is typically reserved as the last

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resort to conduct any negotiations. Prior to going to court, a party must file a notice of motion, which includes an affidavit completed by the applicant, the respondent's affidavit and a reply to the affidavits written by each party. After these documents are completed and filed the parties will be assigned a court date.

The first court appearance is called Morning Chambers and it will be under twenty minutes in length with no live evidence provided. At this time a lawyer can make an application for the parties to see a Dispute Resolution Officer. DRO's are senior lawyers that will meet with parties to attempt to negotiate and settle matters in dispute with the parents. The DRO will not make court orders for the parties and they do not conduct trials, but they may help parties avert more court appearances and come to a settlement. If this is not successful, the parties may go on to an Afternoon Special which is a hearing that may go longer than twenty minutes, but there is still no live evidence provided. At this hearing Interim Interim child custody Orders may be made. The Judge will likely order professional involvement including child therapists, bilateral assessors and/or children's counsel and potentially parenting coordinators. The professionals then bring information back to the Judge for him/her to consider for decision-making. Long periods of time pass while information is gathered and returned to the Judge.

Children remain in the middle of any parental disputes and must endure living in a family that has now divided into two opposing community discourses with separate monologues. At this time, children are typically required to provide their

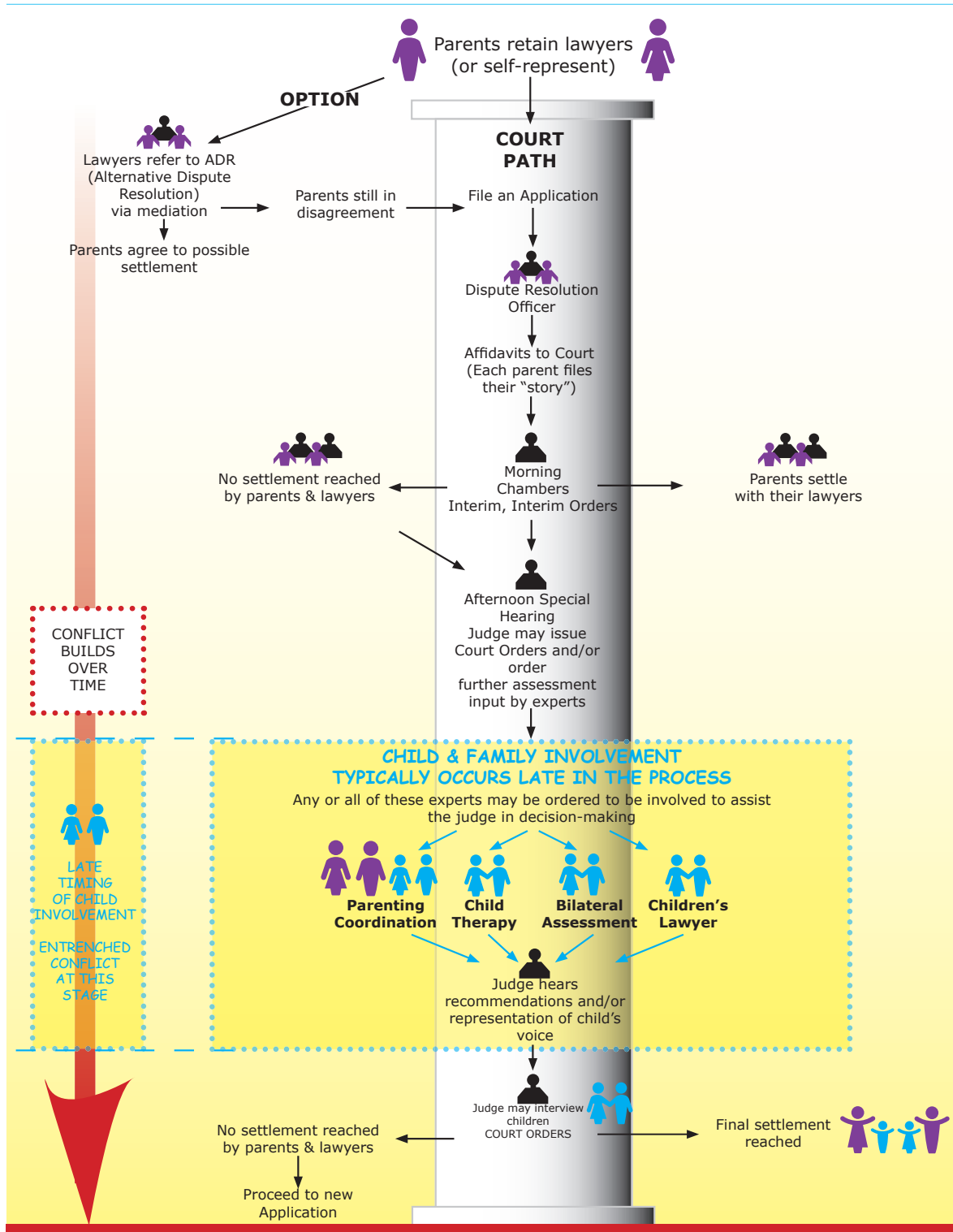
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input for the court's consideration. Judges make court orders to involve experts to engage with the children and parents. Professions such as child therapists and lawyers meet with children and then provide information back to the Judge. A visual diagram showing the current court process is provided (Figure 4). It visually demonstrates the time that passes before children's voices are generally included in the legal process and the potential conflict that increases over time with multiple applications to court.

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Figure 4: Current Inclusion of Child's Voice

Current Inclusion of Child's Voice (An Adult-focused Approach)



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Proposal for a Pilot Project: Early Inclusion of Child's Voice

The main idea for introducing a new way to work with divorcing parents is to avert the path towards greater degrees of conflict thereby placing the child in a position of having to fully join one of the parent communities at the cost of belonging to both. The proposed program would have an entry requirement that included parental disagreement related to any part of a parenting plan (access schedule, day-to-day parenting and issues related to health, extracurricular activities, education and third party child care, expenses, etc.) or property division at the time of filing a Statement of Claim.

A triage system would start the process with everyone on equal footing – with children being a part of the entry point of the process. This would entail shifting the process from a direct adversarial route for parents who are in contest over their divorce to one more reflective of Australia's program whereby parties who are filing applications for parenting issues and property division would immediately file an application with basic information including any orders sought as the first step. As soon as this process is completed, the parties (parents) would attend a divorce case coordination meeting led by a coordinator. At this point parents would be provided information and a referral would be made for a child to see a child consultant, and the parents to meet with a mediator. All children and families going through a family breakdown (unless they come to an agreement before referral to any services) would attend these two intervention services.

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The children's consultant would provide the child information about separation and divorce and potentially offer the child supportive counseling. The parents would meet with the Mediator and negotiate a parenting agreement. The parents would also attend the Parenting After Separation Seminar. The parents needing more one on one support for parent education could meet with an HCCPP trained counselor and attend a "focus on communication" session. If a parenting agreement is made at the mediation service stage, parents would provide their completed parenting plan report to their respective legal counsel and children would be involved in a discussion of the parenting agreement through a final session with their parents and the mediator. At this point all parties would exit the program.

Those parents who did not complete a parenting plan would then be transferred to a Parenting Coordinator. All matters discussed with the PC would be on record ("with prejudice") meaning that anything discussed during PC could be used in court proceedings or for decision-making. Children would remain involved with their originally assigned children's consultant. The PC may discuss the needs of the child with the children's consultant in order to bring back information to the parents for their consideration. The child consultant and child may also attend a PC session as recommended by the PC or by the children's consultant. The parents may come to a reasonable parenting approach and plan with the PC and exit the system at that time.

If there is ongoing conflict and no agreement, the PC can provide a summary report to the Judge with a potential

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recommendation for further formal assessment and assignment of children's legal counsel. At that point a trial notice can be made and a Notice of Motion can be put forth with accompanying affidavits and responses. At this stage, the court path can begin (Figure 5).

This is one way to use the processes that are already in place, including the current legal procedural path. Kushner's (2008) research, however could lend a useful evaluation of the legal procedures in place in Alberta, as she noted, "The missing link is the use of non-adversarial text of a procedural nature which would satisfy the court system's mandate to be less adversarial" (p. 292).

When I first read Kushner's (2006) dissertation "The Helpfulness of Child Custody Experts" as part of my literature review I thought it was interesting and somewhat relative to what I intended to study. What I did not realize until the end of my research process was how relative it really was! Kushner identified similar kinds of problems that I did as related to the legal system. She spoke to bilateral assessors and Judges in Calgary and through her conversations with these professional groups noted "The justice system must consider not only the future development of children influenced by their parents' difficulties, but its own systemic difficulties" (p. 211). Kushner's study held similar ideas to what lawyers and therapists shared with me in my study. A couple of similarities included too much time going by before intervening with families, and a need for law reform in order to promote a less adversarial system.

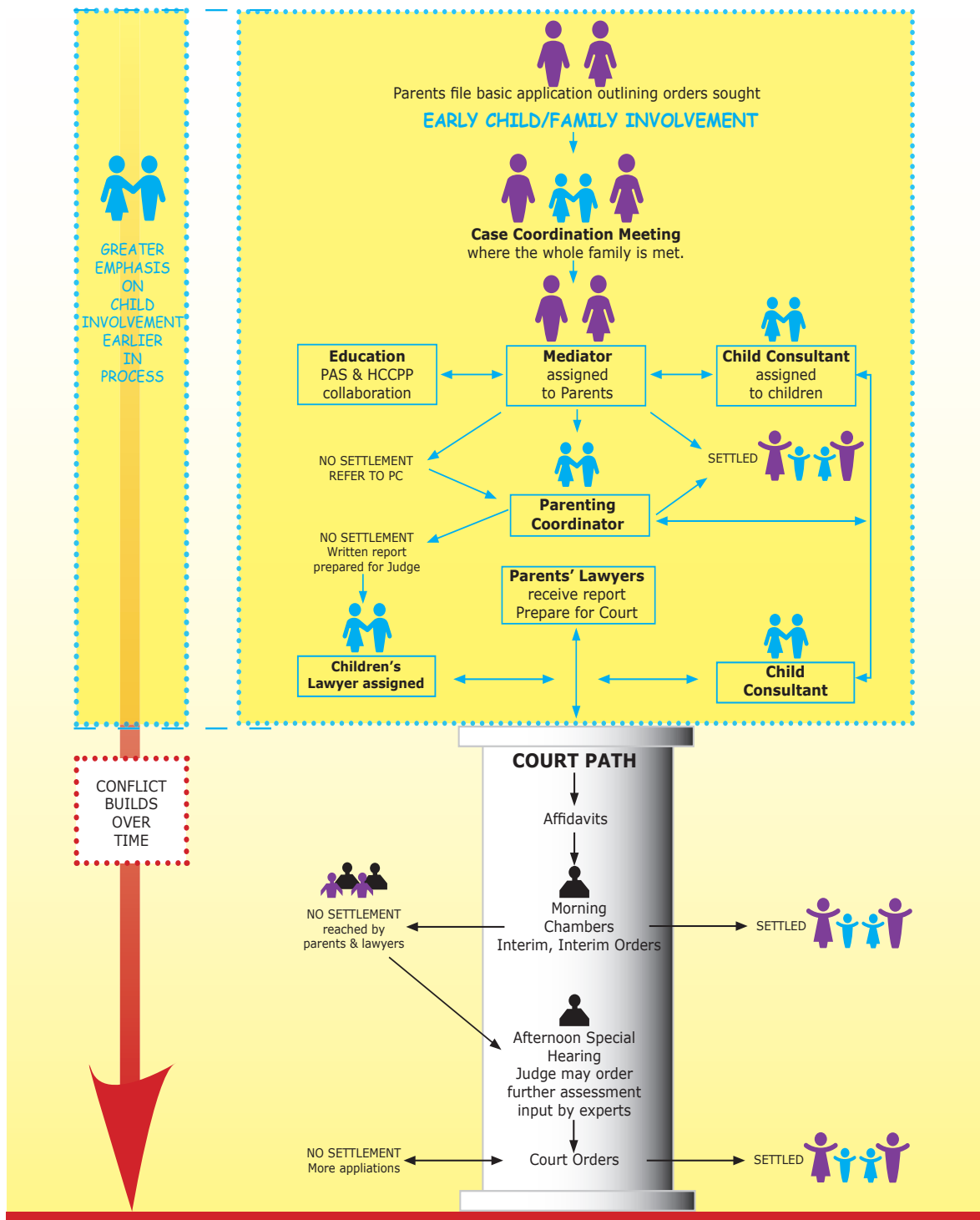
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The Australian Children's Cases Model is an example of a less adversarial approach to working with families in high conflict. This model may be worth using as an example for Calgary. Even without the Australian model as an example, Calgary has many positive programs and approaches to working with high conflict families. It is how these services are coordinated with each other that may be worth more attention for an immediate shift in how actions are taken by all the parties involved. The participants of this study put forth their thoughts and ideas related to the current services that exist in Calgary and many emphasized providing a place for children sooner in the process. Figure 5 is one example of a potential re-organization of the current process. This example of a new action would not require new services, rather a re-arrangement of current services and processes.

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Figure 5: Proposed Inclusion of Child's Voice Proposed Practice - Early Inclusion of Child's Voice (A Child/Family-focused Approach)

Families would be required to enter a non-divisive process at the beginning of separation in order to create a timely collaborative process inclusive of children.



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taken by children's therapists and lawyers that learning about children's lives needed to at least in part occur in the child's natural (home) environment. Learning about a child in a child friendly environment and/or entering the child's world or natural environment was emphasized. The voice of the child as a product of social interaction was indicated as the participants struggled to describe the specific details of what they thought the voice of the child meant. They could describe the process of meeting with a child, listening to and interpreting the child's input, but what I noticed was the therapists in particular were interested in what the child's voice comprised. This reflects what Komulainen (2007) asks researchers to think about by referring to voice as a product of social interaction rather than individual property.

With this view in mind, gaining the voice of the child included considering a number of factors. The main areas of consideration as derived from this research include: process of meeting with children, parent involvement, confidentiality, activities and tools, child development, gathering the conflict story, child's role, managing personal bias, language use and what to include in court reports. These areas are not exhaustive, rather they reflect what the participants thought of as areas that currently comprised the voice of the child. Considering that the discourse about inclusion of children in legal matters is ongoing, this is another point of reference for those working with children at this time. The collected ideas are represented in Figure 6.

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Coordinated Action

Considerations for Gaining the Voice of the Child

Dialogues with both children's therapists and lawyers contributed to multiple ways to gaining the voice(s) of the child for inclusion in legal matters. Children's voices matter and courts want to hear from children when and if possible. Gathering this information was emphasized by the professionals of this study as not a straight-forward or simple task. Children initially belong to a family system and community before family separation occurs, and after their parents separate they find themselves belonging to two re-negotiated systems and communities.

Considering people are influenced by their immediate environments, this means that professionals speaking to children must acknowledge children will reflect parts of their two family environments when providing their input which would indicate multiplicity and potential contradiction in their thoughts and views. They may even present with two monologues that have little connection to one another which may cause confusion when presenting their voices back to the court – especially if both children's therapists and children's lawyers hear different things from the child and present different things. The participants of the study echoed the literature in that each child and family must be viewed as unique and as presenting with intricate ways of being in their

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interactions with each other (Kelly, 2005, 2007; Kelly & Lamb, 2000; Stearns, 2003). There was also an ethnographic view taken by children's therapists and lawyers that learning about children's lives needed to at least in part occur in the child's natural (home) environment. Learning about a child in a child friendly environment and/or entering the child's world or natural environment was emphasized. The voice of the child as a product of social interaction was indicated as the participants struggled to describe the specific details of what they thought the voice of the child meant. They could describe the process of meeting with a child, listening to and interpreting the child's input, but what I noticed was the therapists in particular were interested in what the child's voice comprised. This reflects what Komulainen (2007) asks researchers to think about by referring to voice as a product of social interaction rather than individual property.

With this view in mind, gaining the voice of the child included considering a number of factors. The main areas of consideration as derived from this research include: process of meeting with children, parent involvement, confidentiality, activities and tools, child development, gathering the conflict story, child's role, managing personal bias, language use and what to include in court reports. These areas are not exhaustive, rather they reflect what the participants thought of as areas that currently comprised the voice of the child. Considering that the discourse about inclusion of children in legal matters is ongoing, this is another point of reference for those working with children at this time. The collected ideas are represented in Figure 6.

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Concluding Comments

This dissertation provides a window into two professional community groups whose roles are to gather and interpret the voices of children for inclusion in legal matters related to separation and divorce. Children's therapists and children's lawyers enthusiastically engaged in discussions related to their roles and they shared their methods of practice for the purpose of this research and to forward new and existing ideas related to their day-to-day practices. The objectives of the study were to more clearly understand what therapists and lawyers considered and how they approached gaining the input of children.

Both groups provided information that reflected the problematic structural conditions of the current court system for families of divorce. The current system did not help them to include children early in the process. Children were not placed in a position of priority to gain their views, rather they were pulled into the process later, when none of the adults could come to an agreement. In the current system, children's input is generally gained near the end of the process when the conflict is deeply embroiled and the parents have created a negative case against one another. It is at this time the spotlight is shone on the child as they are whisked in to meetings with therapists and/or lawyers "to be heard" about how they feel, and think about their family circumstances. In

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the current system, children tend to be used as tie-breakers of conflict between their two parents.

My involvement in this research endeavor shed light on my own level of frustration and concern of being a player in a process of seeing children long after the family separation problems are entrenched. Lawyers pointed out the need to re-evaluate the process of involvement of children and to focus on their needs first.

This research supports research completed by Kushner (2006) albeit from a different angle. Her research examined the work of child custody assessors and the structural court system procedures and identified the conditions that restrain professionals who conduct custody assessments, which in turn affects the ultimate decision-making process. Kushner notes, "When an individual is afforded the opportunity to investigate a system of governance missing its ideological purpose, he or she will be embarking on a journey that becomes empowering" (p. 222). I felt similar in my exploration of the ideological purpose of providing children an opportunity to be heard in legal matters that affect them. Promoting the inclusion of the voice of the child was one more area of concern facing the legal system. Lawyers in this study added to the discourse on designing a better process. After listening to what lawyers were saying, I realized that many good resources already existed. The resources were simply not coordinated in a manner to achieve the ideological goals of promoting the voice of the child and diminishing an adversarial approach to family conflict.

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This research added to Kushner's research. She had proposed a need for law reform in the area of family law in Calgary as well as documentation revision. Unfortunately the ideas presented through Kushner's study have not yet been addressed. The child custody assessors and Judges involved in Kushner's study were, however, very open to change. The problem for Judges is they must remain politically neutral. The question I have is who will or can drive the changes necessary? Those working with families of separation and divorce continued to work in a procedural system that does not allow for the desired goal of minimizing family conflict. This research emphasized the point that the involvement of children is also not served by the current legal system. Law reform has taken a backseat, as children's lawyers and therapists try to work around the system.

Placing children at the beginning instead of the end of the process was an important concept. From the discussions with and between lawyers, I interpreted the many suggestions and constructed a revised possible pathway for families of separation and divorce.

Expecting children to provide an acceptable narrative by Western standards (or the proper story as noted by Gergen, 2009a) which includes a valued end point, events relevant to the end point, ordering events and causal linkages was simply not possible. Children's input was complex and was comprised of many factors. The context of the child's voice was deemed important and therapists were concerned about how to provide the court and families with information that would be helpful. Generally therapists were dedicated to

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minimizing family conflict and preserving relationships. There was a strong focus on children as part of families and communities and the emerging ideas from participants encompassed children's thoughts and experiences as relationally bound.

Therapists (and lawyers to a lesser extent) provided lists of factors to consider when meeting with children. I felt "at home" with this discourse as I am an insider to the therapist group. It was a rewarding experience to be a part of this process. I had wondered about my own clinical practices and questioned if I was approaching children similarly or differently than others. I found both to be true. I was able to grow as a therapist as a result of the interviews with therapists and lawyers in that I expanded my ideas about children of separation and divorce and integrated many ways others saw the process of meeting with children into my current practice. The study was generative in that together we envisioned a more effective future.

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Figure 6: Voice of the Child Considerations

CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Preparation Phase: Decide where to meet? (in office, child's home, neutral location) Who will you meet first if more than one child? Meet individually? Together? Both? What will you need (items and type of space) re: Child's age and Stage of development? Will you observe child with each parent? If so, where and for how long? Meet 2-6 times minimum</p>	<p>PROCESS OF MEETING WITH CHILDREN</p>	<p>Preparation Phase: Same Considerations as therapists</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Parents: Meet each parent (together or individually) Ensure each parent brings child to at least one meeting Provide parent guidelines and outline your role Gain Consent for treatment regardless of court order Provide helpful information to parents re: divorce and child development Gain information from parents about their child Listen to the parent breakdown story</p>	<p>PARENT INVOLVEMENT</p>	<p>Parents: Decide if you will meet with parents (with parent counsel or at home visit?) Provide parents a written summary of your role as child advocate Let parents know they will not be involved in directing the process Redirect parents to their respective legal counsel</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Let child know they have some privacy about their sessions but that you are there to help them tell the Judge about what they think and feel</p> <p>Tell child you will let them know what you would like to say to the Judge before you say it</p> <p>Review contents of reports about child with older children –allow them to clarify</p> <p>Child abuse disclosures are not confidential</p>	<p>CONFIDENTIAL- ITY FOR CHILDREN</p>	<p>Client/lawyer privilege – advocate role</p> <p>If child does not want something to be said, lawyer takes direction from child</p> <p>Child abuse disclosures are not confidential (although there may not be an obligation to report if child instructs not to)</p> <p>But...You may use the “obstruction of justice” claim if you feel you must report abuse and child asks you not to.</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Use both structured and non-structured tools/activities</p> <p>Children 6 and under see a qualified play therapist</p> <p>Non-directive and directive play therapy for young children</p> <p>Standardized tools used include:</p> <p>Bricklin Scales, Perception of Relationships Test (PORT), Behavior Assessment Scales for Children (BASC), Roberts Apperception Test</p> <p>Parenting Stress Index (PSI)</p> <p>Temperament Scale</p>	<p>MEETING WITH CHILDREN: ACTIVITIES AND TOOLS</p>	<p>Enter conversations with children</p> <p>Use some semi-structured interview questions</p> <p>Don't ask child to choose between parents</p> <p>Don't ask child about "amount of time" to spend with each parent</p> <p>Consider child's age when talking to them – bring play objects</p> <p>Use cardboard cut-outs or coloring books describing court and people in court</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Provide child distance from being directly questioned Focus on non-divisive possibilities with child- don't ask children to choose a parent Explore the child's experience of relationships with family, etc. Use expressive and play-based activities: family drawings, kinetic family drawings, other projective drawings, books on divorce (dinosaurs divorce), narrative therapy approaches, two doll houses and miniatures, blocks, puppets, nurture items such</p>	<p>MEETING WITH CHILDREN: ACTIVITIES AND TOOLS (continued from previous page)</p>	<p>Provide age appropriate education about separation and divorce</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>as food, doctor kits, dolls Share helpful ideas with parents Re: what their child needs prior to reporting to court Use structured/ semi structured age sensitive interviews Provide child information and education about divorce</p>	<p>MEETING WITH CHILDREN: ACTIVITIES AND TOOLS (continued from previous page)</p>	

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Children under 6 see a qualified play therapist who has tools and training to use projective tests and activities</p> <p>Understand time concepts for young children (4-7)</p> <p>Understand language differences: When having discussions or structuring interview questions – use simple tenses, simple grammar, ask single questions and for children under 12 years old avoid questions that require abstract reasoning</p> <p>child's views?</p>	<p>CHILD DEVELOPMENT CONSIDERATIONS</p>	<p>Same considerations as therapists</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Decide what type of meeting- getting to know child or learning about child's views? For multiple children – individual meetings (could add joint sibling meetings). Begin with open-ended conversations, then use some specific non-leading questions, and (if necessary) closed questions (give choices vs. asking for yes/no), no leading questions Check in with child that you understand what they said and if they</p>	<p style="text-align: center;">CHILD DEVELOPMENT CONSIDERATIONS (continued from previous page)</p>	<p>Same considerations as therapists</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>understand you – don't assume use of language means a child understands the language Be observant of: child repeating parent positions (rehearsed), child using language, sentence structure outside of age/ stage of development, child viewing one parent as all bad and the other as all good, full rejection of parent without logical reason</p>	<p style="text-align: center;">CHILD DEVELOPMENT CONSIDERATIONS (continued from previous page)</p>	<p>Same considerations as therapists</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Gather information from affidavits, reports, court applications and interviews of parents</p> <p>Ask parents and children about family break-up story</p> <p>–write the story out</p> <p>Listen to the language of blame, victimization – is there a named aggressor and/or victim? Are there neutral parties?</p> <p>Why are parents not doing better now? What gets in their way? What do children say about the story?</p> <p>What do children say others say about the story?</p> <p>authorities when</p>	<h3>CONFLICT STORY</h3>	<p>Read affidavits of parents and court applications</p> <p>Read court reports</p> <p>Listen to children and pay attention to children following a story-line from one parent vs. the other parent</p> <p>Is the child blaming a parent? Is one parent stronger than the other according to the story told by the child?</p> <p>Has an abuse story been constructed?</p> <p>Did the child make an allegation? If plausible, refer to child therapist</p> <p>Report to authorities</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Gather information from affidavits, reports, court applications and interviews of parents</p> <p>Ask parents and children about family break-up story</p> <p>–write the story out</p> <p>Listen to the language of blame, victimization – is there a named aggressor and/or victim? Are there neutral parties?</p> <p>Why are parents not doing better now? What gets in their way? What do children say about the story?</p> <p>What do children say others say about the story?</p>	<p>CONFLICT STORY (continued from previous page)</p>	<p>Read affidavits of parents and court applications</p> <p>Read court reports</p> <p>Listen to children and pay attention to children following a story-line from one parent vs. the other parent</p> <p>Is the child blaming a parent? Is one parent stronger than the other according to the story told by the child?</p> <p>Has an abuse story been constructed?</p> <p>Did the child make an allegation? If plausible, refer to child therapist</p> <p>Report to authorities</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Intensity, duration of conflict? Allegations of abuse? Explore and assess for validity, report to authorities when necessary</p>	<p>CONFLICT STORY (continued from previous page)</p>	
<p>Listen for roles played by child in family conflict: Gatekeeper of information Confidant to one parent Carrier of parent distress (anger, guilt, sadness, shame) Communicator for a parent Creator of conflict Invisible child Victim child</p>	<p>IDENTIFY THE ROLE CHILD PLAYS IN THE FAMILY CONFLICT</p>	<p>Not identified by lawyers.</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Is child the focus for parent conflict? Protector of siblings Other roles? Be reflective, remain aware of the following: Your own family conflict story The role you played in your family Your positive and negative family experiences Your beliefs about separation and divorce Your beliefs about the roles of mothers and fathers in children's lives</p>	<p>MANAGE PERSONAL BIAS</p>	<p>Same considerations as therapists</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Any abuse you experienced in your family</p> <p>Any dynamics of separation and divorce you experienced as an adult or when you were a child</p> <p>Your bias about amount of time children should spend with each parent</p>	<p>MANAGE PERSONAL BIAS</p> <p>(continued from previous page)</p>	<p>Same considerations as therapists</p>
<p>Use descriptions of behaviors and child and family functioning instead of using labels</p> <p>Avoid the use of words that do not carry shared meaning between the legal and clinical communities (such as alienation)</p>	<p>LANGUAGE CONSIDERATIONS</p>	<p>Same considerations as therapists</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
Language is important and use of some words may cloud what is actually being described or shared – child's input may not be heard or understood otherwise	LANGUAGE CONSIDERATIONS (continued from previous page)	Same considerations as therapists
<p>Provide Context of each family situation to the court</p> <p>Provide the family break-up story</p> <p>Child's view of family</p> <p>Explain child's needs</p> <p>Include abuse disclosures</p> <p>Describe the child's relationship with each family member</p>	WHAT TO TELL THE COURT?	<p>Provide to court what child tells you (if in advocate role)</p> <p>Attempt to have the context of the family situation put forward by the children's therapist</p> <p>Cross-examine others to bring forward the context of the family (see therapist areas of consideration from which to develop questions)</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
<p>Describe the child's developmental age and stage and how development is impacted or impacts the child's meaning making of their current situation</p> <p>Role of child in family conflict and the consequences</p> <p>Ensure there is an educative section in the report</p> <p>Avoid furthering parent conflict by being sensitive in the way you</p> <p>Write the report and reference</p> <p>Parent behaviors</p> <p>Provide verbatim comments from child only if requested by or</p>	<p>WHAT TO TELL THE COURT? (continued from previous page)</p>	<p>Ask to change roles to Amicus Curiae if obvious there is no safety for child to speak without forwarding a parent's position</p>

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CHILDREN'S THERAPISTS		CHILDREN'S LAWYERS
approved by child Include references to the literature/research Provide a summary list of items for the court to consider for decision-making	WHAT TO TELL THE COURT? (continued from previous page)	

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APPENDIX A

AN INVITATION TO PARTICIPATE

Dear _____:

Your name is well known to me as a professional who works with children and families of separation and divorce in Calgary, Alberta. I am currently conducting PhD research through Tilburg University in Holland regarding including the voice of children experiencing separation and divorce. The title of the study is: **Inclusion of the voice of the child in legal matters: What factors do therapists and children's lawyers consider important when gathering and constructing the child's voice for inclusion in court proceedings?**

I would like to invite you to take part in the research study. I am very interested in your practice expertise, opinions and thoughts related to the inclusion of children of separation and divorce. I will be speaking to therapists and lawyers who provide information back to the court regarding children's thoughts and wishes after their parents separate.

What Can You Expect If You Volunteer?

The research approach will be an interview/discussion that will also be taped and the time commitment will be approximately one hour. Your identity and the identities of your clients through possible examples will be kept confidential in the dissertation. You would either be part of a focus group or be interviewed individually. I plan to use

APPENDIX A

a qualitative approach to the research study and I will use grounded theory method when analyzing the data. It is proposed that theory will be constructed through the data as a result of my discussions with you and others who also do the same or similar work. I may check back with you to ensure the points you have made are what you meant to say before including your thoughts in the data. If you are interested, I will provide feedback to you and your colleagues about any outcomes.

As a volunteer participant, you have the right to decide what you will share. If you need to end an interview early, you may also do so. No preparation is necessary to be a part of the study. I am only interested in what you think and what you draw on for gaining the voice of the child.

Location?

For the focus groups, I will offer my boardroom for discussion (1318 15th Ave SW). We will have refreshments and food available for the time we are together. If I meet with you individually you will have a choice of me coming to see you in your environment or you coming to my office. I will also be providing all volunteers with a small honorarium to thank them for their time and effort.

Benefits to Participants and Others

This research study will provide the opportunity for therapists and children's lawyers to enter into a dialogue about their work with children of separation and divorce and share their thoughts and insights. You will add to the current

APPENDIX A

understanding of ways of approaching children and representing children's voices during a time when they are experiencing significant family change. You will help to illuminate how the community of therapists working with children of separation and divorce work to assist young people to be heard.

Children of separation and divorce may benefit from the community of those who represent their views. For the most part, adults provide a proxy voice for children. The more the community works to understand one another and share in the ways to approach children so they are part of the process, the more the children will have a voice.

Volunteer Process

To volunteer for the study, please **contact my office at 403-245-5981, extension 229** or email me at **yasenikl@telus.net**. I will need you to leave your name and contact information. I will phone you back to talk to you further about the way you may be involved. The date for the focus group for **therapists and lawyers** will be decided based on participant responses and availability. I will contact you to provide possible meeting dates. I will contact you to set up an individual or group 1.5- 2 hour interview that accommodates your schedule during the months of January and February.

Thank you very much for your interest and consideration in being a volunteer for this study.

Sincerely,

Lorri Yasenik MSW, RSW, RPT-S, RFM, RPC-A

APPENDIX B

University of Tilburg Taos/Tilburg PhD Program Human Subjects Research Research Consent Form

NAME:

DATE:

TITLE OF STUDY:

Inclusion of the Voice of the Child in Legal Matters: What Factors do therapists and children's lawyers consider important when gathering and constructing the child's voice for inclusion in court proceedings and how do they do it?

PHD RESEARCHER:

Lorri Yasenik, doctoral student, University of Tilburg, Holland.

PARTICIPANT CONSENT

I consent to participate in the above named research study. I am aware I will be taped during the interview(s) and that I have the right to decide what I will share. If I need to end the interview early, I will be able to do so. My identity and the identity of my clients through the sharing of possible examples will be kept confidential. I am aware the researcher may check back with me to ensure the points I have made are what I meant to say before my thoughts are included in the data. I am aware I will have the opportunity to gain feedback about any outcomes that arise from the study.

I understand my time commitment will be a maximum of a two-hour time period. The researcher may call me back if she

APPENDIX B

would like to me to elaborate on something I said, but I will be able to make the decision at the time whether to provide any further feedback. The role of the researcher is to facilitate the group or individual interviews, but I am aware her role is to find out about my thoughts and practice approaches.

There are a number of potential benefits to my involvement in the study. I am aware I will be able to enter into a dialogue about my work with children of separation and divorce and share my thoughts and insights. My input will add to the current understanding of the ways to approach approaching children and representing their voices in court and I will assist to illuminate how children's voices can be heard.

I agree to fill in a short form (attached) related to demographic information for use in the study.

If I have any concerns or questions during or after the research discussions I am welcome to contact Lorri Yassenik at 403-245-5981.

I have read this consent to participate and understand its contents. I am aware that I retain the right to participate or not at any time. I am also aware I will receive an honorarium for my time spent with researcher Lorri Yassenik.

Signed by: _____

Witness: _____

Date: _____

APPENDIX C

Participant Demographic Data: Therapists and Lawyers

Please fill in this confidential information sheet prior to attending a focus group or individual interview. The information is for data collection purposes only.

Name: _____

Age: _____ Gender: Female Male

Marital Status: Married Divorced Common-law

Remarried/re-partnered Single

Children: Yes No Stepchildren: Yes No

Professional designation(s): _____

Number of years in practice:

1-3 years 4-6 years 6-10 years 11-15 years

15-20 yrs more than 20 years

Professional Association/ Organization: _____

APPENDIX C

Workplace: Private Practice Agency Firm

Do you work? Full-time Part-time Contract

About how many children of divorce have you seen therapeutically or legally represented?

If applicable, how many times have you provided expert witness testimony on behalf of a child?

Please list any specific training you have taken for working with children of separation and divorce (i.e., child development and divorce, high conflict issues, alienation factors etc.)

APPENDIX D

Group and Individual Interview Questions for Children's Lawyers

- Can you tell me about your approach to representing children?
- In the Advocate role – what are the scope and limitations of your involvement with your child client? Do you treat the process any different to the way you represent an adult client and if so why and if not, why not?
- Do you follow a specific process when you begin to work with a child client?
- What factors do you consider when interviewing a child?
- Do you use any standard interviewing techniques or approaches and if so what are they?
- Do you use any other way of gathering information about a child's views other than through interview with the child?
- Do you ever interview parents of the child? If so why? If not, why not?
- What factors do you consider when identifying how “autonomous” the child is able to be? In other words, how do you establish what undue influences may be contributing to the child's input?
- What factors do you consider when identifying “capacity” of the child i.e., to instruct, to understand the process, to understand the impact of their contributions? This question relates to the debate on age and corresponding weight given to the child/youth's input.
- What developmental factors do you consider when interviewing children?

APPENDIX D

- How do you handle inconsistent reporting (if any) by the child? i.e., the child changes his/her answers and opinions?
- In what ways do you provide “counsel” to the child?
- How do you ensure you do not lead the child during your interviews? What are your strategies, approaches to this?
- In what ways do you record your contact meetings with the child? Do you have any standard ways to do this? Is your client privy to these recordings? What parts of the recordings get chosen to present to the judge and why?
- Do you use any evaluative processes related to the degree of family conflict when representing children? For instance do you identify what level of conflict the family is in and what role the child may play in the conflict? If you do use evaluative processes – what do you consider?
- What do you think of the term “alienation”? If you think (after meeting with your child client) your child client is being alienated from one parent, what do you do? How do you approach this?
- What steps (if any) do you take in your interviews with children to establish that their wishes and thoughts are not significantly influenced by others? Extended family, siblings, the other parent?
- How does your bias about separated families impact the work you do? For instance – children will fare “well enough” with one good parent, or children should have as much access to both parents as they can, or if there has been hurtful things that have happened in a family it is not necessary to restore those hurts and children should have the right to walk with their feet... etc.
- What do you think about children’s rights related to divorce? What rights should be given greater weight?

APPENDIX D

- How do you know you are representing the child's voice? Is this question even relevant to the role of advocate?
- As counsel, if instructed by the child to refrain from saying something they said in an earlier/meeting (retraction) do you follow this instruction?
- At what point can your role shift from Advocate to guardian ad litem or Amicus? Or can it? Why would you do this and what are the deciding factors?
- What value, if any, is there in meeting with other professionals involved with the child's family

APPENDIX E

Group and Individual Questions for Children's Therapists

- What can you tell me about your approach to meeting with children?
- What factors do you consider when interviewing children?
- What if anything noted already do you do consistently (with each child)?
- Do you use any standard interviewing techniques or approaches and if so what are they?
- Do you use any other methods of gathering information about a child's views other than through interview with the child? If so, please explain, if not – why not?
- How do you address limits of confidentiality with children?
- How do you manage children who retract their comments and ask you not to report on those comments?
- Do you ever interview parents of the child? If so why? If not, why not? Do you use any standard ways of interviewing parents? If so, what ways?
- What factors do you consider when identifying how “autonomous” the child is able to be? In other words, how do you establish what undue influences may be contributing to the child's input?
- What factors do you consider when identifying “capacity” of the child i.e., to instruct, to understand the process, to understand the impact of their contributions? This question relates to the debate on age and corresponding weight given to the child/youth's input.

APPENDIX E

- What developmental factors do you consider when interviewing children? How do you modify your approach to meet developmental needs?
- How do you handle inconsistent reporting (if any) by the child? i.e., the child changes his/her answers and opinions?
- How do you ensure you do not lead the child during your interviews? What are your strategies, approaches to this?
- In what ways do you record your contact meetings with the child? Do you have any standard ways to do this? Is your client privy to these recordings? What parts of the recordings get chosen to present to the judge and why?
- Do you use any evaluative processes related to the degree of family conflict when representing children? For instance do you identify what level of conflict the family is in and what role the child may play in the conflict? If you do use evaluative processes – what do you consider?
- What literature do you draw on to guide your work? i.e., guidelines or checklists etc.
- What do you think of the term “alienation”? If you think (after meeting with your child client) your child client is being alienated from one parent, what do you do? How do you approach this?
- How do you establish if a child is alienated from a parent? What methods do you have to identify this potentiality?
- What steps (if any) do you take in your interviews with children to establish that their wishes and thoughts are not significantly influenced by others? Extended family, siblings, the other parent?

APPENDIX E

- How does your bias about separated families impact the work you do? For instance - children will fare “well enough” with one good parent, or children should have as much access to both parents as they can, or if there has been hurtful things that have happened in a family it is not necessary to restore those hurts and children should have the right to walk with their feet... etc.
- What do you think about children’s rights related to divorce? What rights should be given greater/lesser weight?
- What do you consider regarding inclusions/exclusions before providing a written report to the court regarding the voice of the child?
- In what ways do you include children in the outcome of your written reports?
- Do you have a process related to inclusion of other professionals involved with the child’s family?