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# Child Custody: The Judicial Interview of the Child

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# CHILD CUSTODY: THE JUDICIAL INTERVIEW OF THE CHILD\*

## INTRODUCTION

In a contested child custody case, the Louisiana Civil Code requires that the trial judge determine how to award custody in the best interest of the child.<sup>1</sup> Although the Code establishes a presumption that joint custody is in the child's best interest,<sup>2</sup> it permits that presumption to be rebutted. One of the factors which the Code directs the judge to consider in determining whether there has been such a rebuttal is "[t]he reasonable preference of the child, if the court deems the child of sufficient age to express a preference."<sup>3</sup> In order to determine the child's preference, and also to question him about other relevant factors, the judge will normally find it necessary either to put the child on the witness stand, have him evaluated by a mental health professional, or interview him in chambers.

It seems clear that putting a child on the witness stand in a custody case, and expecting him to express a preference or reveal damaging facts about one or both of his parents, is almost certain to make a bad situation worse. As observed by the New York Court of Appeal in *Lincoln v. Lincoln*:<sup>4</sup>

It requires no great knowledge of child psychology to recognize that a child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by having to publicly relate its difficulties with them or be required to openly choose between them.<sup>5</sup>

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1. La. Civ. Code art. 146 provides, in part, that custody of minor children, when claimed by both parents, shall be awarded in the following order of preference, according to the best interest of the child: (1) to both parents jointly; (2) to either parent; (3) to a person in whose home the child has been residing, if it was a stable and wholesome environment; or (4) to any other qualified person.

2. La. Civ. Code art. 146(C).

3. La. Civ. Code art. 146(C)(2)(i).

4. 24 N.Y.2d 270, 247 N.E.2d 659, 299 N.Y.S.2d 842 (1969).

5. *Lincoln*, 24 N.Y.2d at 272; 247 N.E.2d at 660; 299 N.Y.S.2d at 843 (1969). See also Jones, *Judicial Questioning of Children in Custody and Visitation Proceedings*, 18 *Fam. L.Q.* 43, 74 (1984) [hereinafter Jones] ("Under no circumstances should a child in a custody or visitation proceeding be questioned in open court.").

Accordingly, a child should not be questioned in open court.

Each of the two remaining options—a judicial interview of the child in chambers or an evaluation by a mental health professional—have advantages. Both are authorized by Civil Code article 146,<sup>6</sup> and both are often used by Louisiana judges.<sup>7</sup> They will be the subject of this comment.

Initially, this comment will explore the issue of whether to involve the child at all. Next, the judicial interview will be analyzed, and particular attention will be given to the issues of competency and procedural due process. Suggestions by various authors for eliciting accurate information from the child in such an interview will be included in the discussion as well. The use of an evaluation by a mental health professional as an alternative to the judicial interview will also be examined. Lastly, a model procedure for the judicial interview will be proposed.

#### DECIDING TO INVOLVE THE CHILD

In a custody case, the trial judge must decide at the outset whether to interview the child at all. Some experts prefer not to involve the child in the proceedings if possible, and will interview the child only upon the request of one of the parents.<sup>8</sup> One psychologist who specializes in mediation, David Saposnek, will only interview the child if he is an adolescent, or if he has asked to speak to the mediator, or if one parent claims the child has a preference. Otherwise he prefers not to involve the child, believing that "when children are involved in the process, they become repeat victims."<sup>9</sup>

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6. La. Civ. Code art. 146(H):

In a custody or visitation proceeding, an evaluation may be ordered on the motion of either party. The evaluation shall be made by a mental health professional agreed upon by the parties or selected by the court. The court may apportion the costs of the investigation between the parties and shall order both parties and the children to submit to and cooperate in the evaluation, testing, or interview by the mental health professional. The mental health professional shall provide the court and both parties with a written report. The mental health professional shall serve as the witness of the court subject to cross-examination by either party. For the purposes of this Article, "mental health professional" means a psychiatrist or a person who possesses a Master's degree in counseling, social work, psychology, or marriage and family counseling.

See also La. Civ. Code art. 146(C)(3): "For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate, the court may direct that an investigation be conducted." See also La. Civ. Code art. 146(G): "A custody hearing may be held in the private chambers of the judge."

7. This conclusion is based on informal interviews with judges. (The lack of cases describing the procedures used by Louisiana trial courts makes this method of gathering information necessary.)

8. Interviews with Louisiana judges.

9. D. Saposnek, *Mediating Child Custody Disputes* 13 (1983) [hereinafter Saposnek].

Other experts recognize that because the child's future will be profoundly affected by the outcome of a custody case,<sup>10</sup> the child will often have definite ideas about where he wants to live.<sup>11</sup> Sensitivity and fairness to the child warrant that he be consulted as to whether he would like to participate in the proceedings.<sup>12</sup> Nevertheless, it should be explained to the child that he need not express a preference, so as to avoid pressuring him into offering one.

#### THE JUDICIAL INTERVIEW

In order to question the child about his preference and related factors, the judge must interview the child himself and/or order an evaluation of the child and his parents by a mental health professional. In the event the judge chooses to interview the child, he must first ascertain that the child is competent to testify. The procedure he uses must also satisfy the requirements of due process. The Louisiana Fifth Circuit Court of Appeal's decision in *Watermeier v. Watermeier*<sup>13</sup> was the first attempt by a Louisiana court to develop guidelines for the judicial interview of a child in a custody case.

#### I. WATERMEIER V. WATERMEIER

In *Watermeier*, the trial judge intended to interview a five year old who had been in the custody of his mother. The interview was to be conducted in the judge's chambers, without the presence of the parents or their attorneys, and no record was to be made. The father objected to this procedure, and the appellate court upheld his objections.

The court of appeal held that the trial judge did not have the right or discretion to interview the child in the proposed manner, because it was contrary to the concept of the adversary system.<sup>14</sup> The court then established the following procedure for the interview of a child:

[T]he interview must be conducted in chambers outside of the presence of the parties, but in the presence of their attorneys, with a record being made by the court reporter. The judge shall first determine his competency as "a person of proper understanding" by interrogating the child with appropriate questions. The attorneys shall be allowed to participate in the competency

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10. Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study*, 17 U.C.D.L. Rev. 807, 812 (1984) [hereinafter Lombard].

11. Newman and Collester, *Children Should Be Seen and Heard*, 2:4 Fam. Advoc. 8 (1980) [hereinafter Newman and Collester].

12. Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 Yale L.J. 1126, 1165-66 (1978).

13. 462 So. 2d 1272 (La. App. 5th Cir.), cert. denied, 464 So. 2d 301 (La. 1985).

14. 462 So. 2d at 1275.

examination by asking questions and registering appropriate but only necessary objections. If the judge determines that the child is not a competent witness as outlined above, he shall immediately terminate the interview.

However, if the judge determines that the child is competent, he may continue the interview in the presence of the attorneys as observers only. They shall not participate by asking questions, or cross-examining or registering objections . . . .<sup>15</sup>

The court recognized that this procedure is "admittedly a compromise," but deemed it necessary to protect both the child's welfare and the foundations of the adversary system.<sup>16</sup>

The court also noted that this procedure is not mandatory when neither party objects to an examination of a child by the judge in another manner. The judge can, in such a case, examine the child "in chambers, on or off the record, and with or without parents and/or counsel being present—provided all agree on the procedure."<sup>17</sup>

The Louisiana Supreme Court denied writs with a brief mention by Justice Calogero that the court of appeal "struck a good compromise in a difficult situation."<sup>18</sup> He recognized that a judge seeking to interview a child must strike a balance between two potentially inconsistent objectives. The judge must create an atmosphere where the child is not afraid to speak freely, and yet preserve the rights of the parties to appellate review, an opportunity that would be sacrificed if the interview were completely confidential.<sup>19</sup> Any improvements on the *Watermeier* approach must likewise seek to balance these objectives.

## II. COMPETENCY TO TESTIFY

### A. Louisiana Statutes and Jurisprudence

Arguably, Civil Code article 146(C)(2)(i) establishes its own standard of competency for the child to be interviewed. By its terms, if the child is "of sufficient age to express a preference," he may be interviewed

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Watermeier*, 464 So. 2d at 301.

19. *Id.* But cf. *Osborne v. McCoy*, 485 So. 2d 150 (La. App. 2d Cir. 1986), in which the court found that, where a child interviewed by a judge in chambers without a record being made expressed a strong preference for living with her mother, *Watermeier* did not support the mother's request for a remand to get the child's testimony before the appellate court, because the lower court's finding regarding the child's preference was in the appellant-mother's favor.

by the judge.<sup>20</sup> Although this language might be liberally construed to include almost any child old enough to talk, most judges have not taken such a simplistic approach to child competency. Rather, they interpret the article as requiring that the child be competent to testify in the traditional sense of witness competency.<sup>21</sup> Since it is unlikely that the child's testimony will be limited to his expressing a preference, and will probably require in addition his giving the *reasons* for his preference,<sup>22</sup> the child performs no more limited a function than any other witness. Arguably, therefore, traditional competency standards are more appropriately suited to the determination than the "sufficient age" criterion of article 146.

To be competent to testify in a civil proceeding, a witness must have "proper understanding."<sup>23</sup> In addition, the Louisiana Revised Statutes which concern criminal procedure provide specifically that understanding, and not age, must determine whether a person can be a witness in a criminal proceeding. Moreover, no child less than twelve years old may be sworn as a witness in a criminal proceeding over the objection of the district attorney or the defendant "until the court is satisfied, *after examination*, that such child has sufficient understanding to be a witness."<sup>24</sup>

In the absence of a corresponding civil provision, the criminal statute requiring a competency examination of children under age twelve may logically be extended to apply in civil cases also, since the basic standard of competency (proper understanding) is the same in either context. Indeed, the court in *Watermeier* approved the synthesis of these provisions by citing both the civil and criminal rules and by mandating that the judge determine the competency of a five year old boy before interviewing him.<sup>25</sup>

The synthesis of these provisions results in the following rule: the test of competency in a civil proceeding is whether the person has "proper understanding." Age alone is not determinative of competency, but if the witness is under twelve years old, the court must examine him to

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20. La. Civ. Code art. 146(C)(2)(i) provides that the court may consider "[t]he reasonable preference of the child, *if the court deems the child to be of sufficient age to express a preference.*" (emphasis added).

21. Interviews with Louisiana judges.

22. Eliciting only a preference from the child is likely to lead to poor results. The judge should be able to ask the child the reasons for his preference, which would often result in the child testifying as to facts and occurrences. La. Civ. Code art. 146(C)(2)(i) allows the judge to consider any factor relevant to the custody dispute.

23. La. R.S. 13:3665 (1968): "The competent witness in any civil proceeding in court or before a person having authority to receive evidence shall be a person of proper understanding."

24. La. R.S. 15:469 (1981) (emphasis added).

25. *Watermeier*, 462 So. 2d at 1274.

determine if he has proper understanding. This determination is left to the discretion of the judge.

Other Louisiana decisions support this approach. As early as 1910, the Louisiana Supreme Court recognized that a young child should be allowed to testify in a custody proceeding if he is a competent witness, but that his testimony could be excluded "because of incompetency resulting from his tender years."<sup>26</sup> In another case, the supreme court refused to allow a six year old girl to testify in her mother's separation suit because she was not deemed to be a person of proper understanding.<sup>27</sup> There are many cases where, after examination, children well under twelve years of age have been found competent to testify.<sup>28</sup> The youngest child ever allowed to testify in Louisiana, that has been reported, was four years old.<sup>29</sup>

### *B. Suggested Topics and Questions to Use in the Competency Examination*

Generally, when examining the child for proper understanding, a judge looks at several factors. These have been summarized as follows:

- 1) present intelligence to understand, after instruction, the duty to tell the truth;
- 2) mental capacity at the time of the occurrence (if the child is to testify to a specific fact) sufficient to observe and register it;
- 3) memory adequate to recollect independently the occurrence or fact;
- 4) capacity to express his recollection or impression in words;
- 5) capacity to understand simple questions about the occurrence or impression.<sup>30</sup>

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26. *Chavigny v. Hava*, 125 La. 710, 711, 51 So. 696, 696 (1910) (syllabus by the court).

27. *Wilson v. Moser*, 210 La. 1021, 29 So. 2d 49 (1946).

28. *State v. Edwards*, 419 So. 2d 881 (La. 1982) (child five years old at crime, six at trial); *State v. Arnaud*, 412 So. 2d 1013 (La. 1982) (four years old); *State v. Humphrey*, 412 So. 2d 507 (La. 1981), (seven at crime, nine at trial); *State v. Sharp*, 338 So. 2d 654 (La. 1976) (eight years old); *State v. Glover*, 262 La. 495, 263 So. 2d 866 (1972) (twelve years old); *State v. Parker*, 181 La. 635, 160 So. 123 (1935) (ten years old).

29. That the author could discover. See *Arnaud*, 412 So. 2d 1013.

30. See Stafford, *The Child as a Witness*, 37 Wash. L. Rev. 303, 313 (1962) [hereinafter Stafford]; Siegel and Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 Fam. L.Q. 1, 35 (1977) [hereinafter Siegel and Hurley]; Newman and Colletter, *supra* note 11; J. McCahey, M. Kaufman, C. Kraut, and J. Zett, *Child Custody and Visitation Law and Practice*, Vol. 2, § 12.04(2), at 12.19 & n.12 (1986) [hereinafter McCahey]; and Melton, *Children's Competency to Testify*, 5 Law and Human Behavior 73, 74-75 (1981) [hereinafter Melton].

Judges generally evaluate these factors by asking the child simple questions aimed at accomplishing a dual purpose. They help the judge determine the child's intelligence, memory, verbal capacity, and understanding of the difference between truth and falsehood; they also help to put the child at ease.<sup>31</sup> For instance, questions frequently asked by Louisiana judges are the following:

- 1) What's your name?
- 2) Where do you go to school?
- 3) Do you know the difference between the truth and a lie?
- 4) Do you know that you're supposed to tell the truth?
- 5) Do you know what will happen if you lie?
- 6) Do you go to church?<sup>32</sup>

Some hesitancy in answering questions should be expected at first, and does not of itself indicate incompetency.<sup>33</sup> The child need not understand the meaning of the oath in its technical legal sense, as long as he understands his obligation to tell the truth.<sup>34</sup> Also, it is not necessary that the child be able to explain exactly what will happen if he lies, as long as he knows lying is a crime or is wrong, and fears some form of punishment.<sup>35</sup> Nor is it necessary that the child attend church or have any particular religious background. Questions regarding a child's church attendance or belief in God are used as a short cut, since it is likely that a child who goes to church will have been taught that it is wrong to lie.<sup>36</sup>

Most importantly, the questions must be kept simple and easy to understand, although this may be difficult for judges and lawyers accustomed to communicating with other professionals in a highly abstract manner.<sup>37</sup> In preparing the questions to be used to determine competency, the judge should try to cover certain areas:

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31. Interviews with Louisiana judges. See also Stafford, *supra* note 30, at 17; and Siegel and Hurley, *supra* note 30, at 38-39.

32. Interviews with Louisiana judges.

33. *Humphrey*, 412 So. 2d at 516; *State v. Armstrong*, 453 So. 2d 1256, 1259 (La. App. 2d Cir.), cert. denied, 457 So. 2d 16 (La. 1984). See also *Sharp*, 338 So. 2d at 661.

34. Siegel and Hurley, *supra* note 30, at 36-37; Melton, *supra* note 30, at 74; and Stafford, *supra* note 30, at 318.

35. *Sharp*, 338 So. 2d at 661; *Glover*, 262 La. 495, 263 So. 2d 866 (1972); *Parker*, 181 La. 635, 160 So. 123 (1935). See also Siegel and Hurley, *supra* note 30, at 36; Stafford, *supra* note 30, at 318.

36. Siegel and Hurley, *supra* note 30, at 36-37; Melton, *supra* note 30, at 74; Stafford, *supra* note 30, at 318.

37. Lombard, *supra* note 10, at 827. Purposefully regressing to simpler language might prove difficult. See Stafford, *supra* note 30, at 314: "[Q]uestions which appear simple and direct [to the interrogators] may be confusing or absolutely meaningless to a child. A six-year-old child might give an unsatisfactory answer if asked 'with whom do you reside?' However, he could readily answer 'with whom do you live?'"



- 1) questions about home and family members;
- 2) questions about school, including grade, teachers, subjects, attendance record, favorite activities, and academic performance;
- 3) questions to ascertain the child's knowledge of the difference between truth and falsehood, and his duty to tell the truth.<sup>38</sup>

Finally, the determination of competency should be based not only on the child's answers, but on his overall demeanor during the dialogue.<sup>39</sup> Even if the child appears to have been "coached," such an appearance does not justify exclusion of his testimony. Coaching is a matter of credibility, not competency, and goes to the weight to be given the evidence, not to its admission.<sup>40</sup>

### C. Approaches Used in Other States

As early as 1895, the United States Supreme Court identified the factors necessary to make a determination of child competency in *Wheeler v. United States*.<sup>41</sup> The Court held that no precise age is indicative of competency; rather, the determination depends on the child's capacity and intelligence, and his appreciation of the difference between truth and falsehood, as well as of his duty to tell the truth.<sup>42</sup>

Appellate courts of most states have followed the *Wheeler* approach, and have generally considered four years of age to be the minimum at which a child may be found competent.<sup>43</sup> Most state courts have also required that the child be found competent not only at the time of the trial, but also at the time of the occurrence about which he is to testify.<sup>44</sup> Thus, the procedures described for use in Louisiana are consistent with those applied in most American jurisdictions.

### D. A Behavioral Science Approach to Competency

Recent research supports allowing young children to testify in legal proceedings.<sup>45</sup> A study done in 1979 by members of the Department of

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38. Stafford, *supra* note 30, at 316-17.

39. *Humphrey*, 412 So. 2d at 516; *Armstrong*, 453 So. 2d at 1259.

40. *State v. Edwards*, 420 So. 2d 663, 677 (La. 1982); see also Siegal and Hurley, *supra* note 30, at 40; Stafford, *supra* note 30, at 309.

41. 159 U.S. 523, 16 S. Ct. 93 (1895).

42. *Wheeler*, 159 U.S. at 526, 16 S. Ct. at 93.

43. Stafford, *supra* note 30, at 305. In *Wheeler*, the Court upheld the competency of a five year old to testify.

44. *Id.* at 306; Siegal and Hurley, *supra* note 30, at 19.

45. One particularly helpful summary of the current state of social science research is found in 40 J. of Social Issues 1-175 (1984), which is entirely devoted to the topic of "The Child Witness."

Psychology, Loyola University of Chicago (the Loyola study),<sup>46</sup> indicates that the only area in which children were inferior to adult witnesses was that of *free recall*. In other words, after witnessing a staged event, the subjects were asked an open-ended question, such as "What can you remember about the event?" Performance by all ages was poor, but the number of items remembered increased linearly with age. It is noteworthy, however, that younger children, although able to remember fewer items, were less likely to "remember" incorrect items.

When objective "yes or no" questions were asked, there was *no significant difference* in performance among age groups.<sup>47</sup> Nor was there a significant difference among age groups when asked to identify a participant from an array of photographs; data suggested, however, that adolescents might perform this task somewhat better than younger groups.<sup>48</sup>

One area of long-standing concern to members of the legal profession has been whether child witnesses tend to be more open to suggestion than adult witnesses. The Loyola study concluded that there is *no difference* among age groups in susceptibility to leading questions.<sup>49</sup> However, the study used only one leading question, and subsequently has been criticized for that reason.<sup>50</sup> Gary Melton, of the University of Virginia, points out in his discussion of the Loyola study that suggestibility is a real problem, even for the average adult witness. In his view, it is to be expected on the basis of simple learning theory that children would be more susceptible to suggestion, if only because they would want to give the adult questioner the answer he seemed to want.<sup>51</sup> Also, since children have more trouble with free recall than adults, they must be asked more questions and given more prompts, which would further tend to expose them to suggestion.<sup>52</sup> Melton does not suggest, however, that the study results are clearly wrong; rather, he suggests a need for further research.

Melton also raises another consideration: that of young children's different conceptions of events.<sup>53</sup> Classical theory, pioneered by Jean

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46. Marin, Holmes, Guth and Kovac, 3 *Law and Human Behavior* 295 (1978) [hereinafter Marin].

47. But females were significantly more accurate on this test than males. *Id.* at 301.

48. *Id.* at 302.

49. *Id.* at 297, 303.

50. Melton, *supra* note 30, at 80. Cf. Cohen & Harnick, "The Susceptibility of Child Witnesses to Suggestion," 4 *Law & Human Behavior* 201 (1980); and Johnson & Foley, "Differentiating Fact from Fantasy: The Reliability of Children's Memory," 40 *J. of Social Issues* 33 (1984).

51. *Id.* Melton is Professor of Psychology and Law, and Director of the Law/Psychology Program, University of Nebraska-Lincoln.

52. *Id.* at 81.

53. *Id.* at 77-79, 82.

Piaget, the renowned expert on child development, suggests that children up to about age seven have trouble perceiving all of the relevant information in a stimulus. They tend to be "egocentric," or centered in their own personal perspective, and have trouble grasping certain concepts. Such a problem with reality would affect the child's ability to perceive facts accurately; thus he could not recite them accurately in his testimony.<sup>54</sup>

However, recent critics have argued that the problem is not that the child does not perceive accurately; rather, the child has trouble finding words to express what he saw. Melton suggests that if this is indeed the case, even very young children can be good witnesses if the interrogator is able to use simple words the child understands.<sup>55</sup> Also, if a judge is able to "read between the lines" of the child's testimony and understand what he is really trying to say, then the child's cognitive immaturity will be of little significance.<sup>56</sup>

For now, both the Loyola study and Melton's analysis of it agree that the "liberal use of children's testimony is well founded."<sup>57</sup> Even very young children can be good witnesses, considering that they are as capable as adults of answering direct objective questions and are no more prone to lying. Although they may be more susceptible to suggestion, there is probably not a significant difference.<sup>58</sup>

#### *E. Proposal to Use the Federal Rules of Evidence*

As the behavioral science approach indicates, children are not necessarily less competent to testify than adults. Accordingly, some experts have suggested that children need not be examined for competency at all, but that children should be put on the stand and allowed to testify just as any other witness. The credibility and weight to be given their testimony would be left to the jury, or in a custody case, to the judge.<sup>59</sup> This approach is evident in Rule 601 of the Federal Rules of Evidence.<sup>60</sup>

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 81.

58. *Id.* at 81-82; Marin, *supra* note 46, at 304.

59. Melton, *supra* note 30, at 74-76: "Wigmore (1940, § 509) has recommended abolition of the requirement that a child's competency be established before he or she can testify. He would have the trier of fact simply evaluate a child's testimony in context, just as any other witness's testimony must be examined for its credibility."

60. Fed. R. Evid. 601:

Every person is competent to be a witness except as otherwise provided by these Rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the

Such an approach would simplify matters procedurally, as judges could dispense with the child competency determination. In the long run, however, the time actually saved would be minimal, considering that the same questions used to determine competency are frequently the "easy" questions used to relax the child. Thus, a certain amount of time would still have to be spent in allowing the child to become familiar and comfortable with the proceedings.

Louisiana is currently contemplating adopting an evidence code, but there have been no proposals to modify the standard of competency now in effect, that is, that a competent witness must be a person of proper understanding.<sup>61</sup> Likewise, there is no proposal addressing the examination of children. In the absence of any foreseeable changes in the evidence statutes, the solution proposed herein will be compatible with current Louisiana evidence law.

#### F. Recommendation

The procedure proposed in the *Watermeier* case regarding child competency should be followed. The judge will determine the competency of a child under twelve years old by asking him appropriate questions, such as the ones listed in part B of this section. The parents may not be present, but their attorneys may participate by asking questions and registering necessary objections. The objections should be kept to a minimum to avoid distracting or harassing the child. A record of the examination shall be made by the court reporter, and the examination should be held in the judge's chambers. If the court finds that the child is not competent, the interview will not take place. Otherwise, the judge may proceed with the interview.

### III. PROCEDURE FOR THE JUDICIAL INTERVIEW

The only statutory guidance for the judge seeking a procedure by which to conduct the interview is found in Civil Code article 146, which

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competency of a witness shall be determined in accordance with State law.

See also 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 601[01], at 601-9: "(A)ny person will be competent to testify as an ordinary witness" unless he refuses the oath, is the judge, or is a juror. See also *id.* ¶ 601[04], at 601-32: "It had been the practice . . . to have the court determine whether the child is competent . . . . In view of the approach of Rule 601 it is unlikely that such a voir dire . . . will be conducted."

61. Proposed La. Code of Evidence, House Bill Holding. The examination in the judge's chambers is the only variation on traditional courtroom procedure, and it is specifically authorized by La. Civ. Code art. 146(G); see *supra* note 5 and accompanying text.

provides that a custody hearing may be held in the judge's chambers.<sup>62</sup> The jurisprudence is scarce, *Watermeier* being the first attempt by an appellate court to instruct trial courts on a procedure to follow.<sup>63</sup>

As noted, *Watermeier* requires the interview to take place in chambers, and that a record be made. Only the attorneys may attend, but they may not participate. The parties may not be present. This procedure is designed as a compromise between the child's need to speak freely to the judge and the parents' rights to due process of law. The *Watermeier* approach recognizes the hazards which accompany putting a child on the witness stand in open court;<sup>64</sup> in recommending that the interview take place in chambers, the court was certainly responsive to the argument that a child may be more inclined to speak freely and truthfully if his parents are absent.<sup>65</sup>

However, there are difficulties with the *Watermeier* procedure. Even though the parents are absent, their attorneys are present, and the child is likely to harbor the reasonable suspicion that they will repeat anything he says to his parents.<sup>66</sup> Furthermore, his statements will be recorded exactly as he makes them, and thus may be accessible to his parents as part of the record. Obviously, the child will still worry about his parents' reactions under the *Watermeier* procedure.

The court recognized this dilemma, but refused to allow a completely confidential judicial interview, as had been intended by the trial judge. The court reasoned that to do so would "do violence to the basic

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62. See La. Civ. Code art. 146(G), *supra* note 5. Currently, Louisiana judges apparently use a variety of different procedures. One, for instance, conducts the interview in the courtroom, but empties it of everyone except the parties' attorneys and the court staff; others prefer to conduct it in chambers; and some will use either method, depending on the circumstances. See also Lombard, *supra* note 10. The author discusses a study done in Michigan, where the custody statute is almost identical to Louisiana Civil Code article 146. The twenty-six judges interviewed used various approaches, but eighty percent of them opposed any attempt to establish a standard procedure by rule or statute. This study indicates that a standard solution for Louisiana, like the one to be proposed by this comment, should not be mandatory if the judge and parties can agree on another.

63. For a previous case in which the Louisiana fifth circuit approved a custody award based on a private judicial interview, see *LeGrand v. LeGrand*, 455 So. 2d 705 (La. App. 5th Cir. 1984). The court said that although it could not review the private interview, the trial court's decision was entitled to great weight, and other evidence supported the award. See also *Vidrine v. Demourelle*, 363 So. 2d 943 (La. App. 3d Cir. 1978), in which the third circuit tacitly approved a private judicial interview on which the custody award was partly based.

64. See *supra* notes 4-5 and accompanying text.

65. *Watermeier*, 462 So. 2d at 1274.

66. Lombard, *supra* note 10, at 813. Indeed, the attorneys may have an ethical obligation to inform the parents of exactly what took place in the interview. See Model Rules of Professional Conduct Rule 1.4: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

concepts of our adversary system"<sup>67</sup> and would obstruct appellate review of the decision, since there would be no way to contest or disprove any statement the child had made, nor to prove that the judge erred or abused his discretion in the interview.<sup>68</sup> In so doing, the court indicated that procedural due process requires that if the parties are excluded, their attorneys must be present as observers, and a record must be made.

#### A. Requirements of Due Process

The fourteenth amendment guarantees that no state shall deprive a person of life, liberty or property without due process of law.<sup>69</sup> Custody cases involve the state depriving one or both of the parents of the right to live with and rear their child. As the second circuit declared in *In re Howard*,<sup>70</sup> the "integrity of the family and the right of a parent to raise his child has been recognized as a fundamental right or liberty protected by the Fourteenth Amendment."<sup>71</sup> Thus, the requirements of procedural due process must be followed in the custody proceedings.

The essence of procedural due process is the use of a procedure that reasonably guarantees a fair and accurate result.<sup>72</sup> The test for compliance takes into account not only the liberty interest of the individual involved, but any governmental interest that may exist in restricting the enjoyment of that liberty interest. The necessary balancing in this context of the parents' rights against the state's interest in the child's welfare must take place within the three-part inquiry set forth by the United States Supreme Court in *Mathews v. Eldridge*.<sup>73</sup> Noting that "due process is flexible and calls for such procedural protection as the particular situation demands,"<sup>74</sup> the Court identified the following three factors as necessary for consideration:

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67. *Watermeier*, 462 So. 2d at 1274.

68. *Id.* at 1274-75. But see *Osborne v. McCoy*, 485 So. 2d 150 (La. App. 2d Cir. 1986), discussed *supra* note 19.

69. U. S. Const. amend. XIV, § 1: "(N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." See also La. Const. art. 1, § 2: "No person shall be deprived of life, liberty, or property except by due process of law."

70. 382 So. 2d 194 (La. App. 2d Cir. 1980).

71. *Howard*, 382 So. 2d at 198. See also *Smith v. Organization of Foster Families*, 431 U.S. 816, 97 S. Ct. 2094 (1977); *Lombard*, *supra* note 10, at 811.

72. 16A Am. Jur. 2d *Constitutional Law* § 809 (1979): "The due process clause has as its purpose the insuring of the fair and orderly administration of the laws . . . ." (footnotes omitted).

73. 424 U.S. 319, 96 S. Ct. 893 (1976). Although this case involved an administrative proceeding to terminate government benefits, the test has been applied in civil proceedings, including a paternity action. *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202 (1981). Thus, the *Mathews* test should apply to a civil custody suit. *Lombard*, *supra* note 10, at 820.

74. *Mathews*, 424 U.S. at 334, 96 S. Ct. at 902.

1. the private interest that will be affected by the action;
2. the risk of an erroneous deprivation of that interest through the current procedure, and the probable value of any additional or substitute procedural safeguards;
3. the government interest, including:
  - (a) the fiscal and administrative burdens the proposed safeguards would entail,<sup>75</sup> and
  - (b) the function involved.

The following analysis attempts to place the judicial interview of the child within this framework.

### *1. The Private Interest Affected*

The interest of the parents in the outcome of a custody suit is, of course, great: they face the possibility of losing physical custody of the child. Although a custody award to one parent with a denial of visitation rights to the other parent is rare, such a decree is possible. Even if the noncustodial parent is awarded liberal visitation rights, he may well lose the right to make decisions affecting the rearing of his child, such as where the child will attend school, if and what kind of religious training the child will receive, and how the child's social life will be structured.<sup>76</sup> Consequently, the noncustodial parent will lose that day to day contact with the child that is essential to the development of a close parent-child relationship.<sup>77</sup>

Undeniably, the nature of the private interest affected by an adjudication of custody is very important. Indeed, a parent's right to raise his children is at the very heart of American values, and has been recognized as a fundamental right.<sup>78</sup> The need for a procedure that

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75. Using the presence of the attorneys as a safeguard would impose no additional burden on the government, and the cost of recording the interview is insubstantial. Most such proceedings are already recorded using court staff, and the parties pay the cost, not the government. Any such minimal increase in cost to the parties would be outweighed by the increased protection against error or abuse of discretion, and the benefit of having a record available to the appellate court.

76. Lombard, *supra* note 10, at 820-23.

77. *Id.*

78. See *Roe v. Wade*, 410 U.S. 113, 152, 93 S. Ct. 705, 726 (1973) for a summary of the Court's position and citations to major cases:

[T]he court has recognized that a right of personal privacy does exist under the Constitution. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, contraception, family relationships, and child rearing and education. (citations omitted). See also *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 1938 (1977) ("Our

minimizes the risk of error therefore becomes critical in the due process analysis.<sup>79</sup>

## 2. *The Risk of Error*

When a judge interviews a child, the chance of his receiving inaccurate impressions and information is very real. For instance, the judge has no way to verify the accuracy of the child's statements without asking the parents. Understandably reluctant to reveal the child's statements to the parents, the judge might accept an inaccurate statement at face value<sup>80</sup> or might disregard an accurate statement rather than try to verify it.

In addition, the judge usually is not trained to communicate effectively with young children.<sup>81</sup> Children involved in divorces often use identifiable strategies to cope with the stress.<sup>82</sup> Unless the judge can recognize the strategy for what it is, he may reach inaccurate conclusions about the child's feelings.<sup>83</sup>

Finally, as noted earlier in the discussion of competency, a child may still be developing language skills and cognitive abilities. The lack of training of most judges in this crucial area of child development<sup>84</sup> adds to the risk of error. All of these factors which contribute to the risk of error increase the need for procedural safeguards when ascertaining the child's preference.<sup>85</sup>

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decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1213 (1972) ("The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . .").

79. Lombard, *supra* note 10, at 820-23.

80. *Id.* at 824.

81. Goldzband, *Consulting in Child Custody Cases* 33-34 [hereinafter Goldzband]. For a thorough discussion of suggested approaches for effective communication by the judge during a judicial interview, see *infra* notes 102-120 and accompanying text.

82. Saposnek, *supra* note 9, at 119-33. For a list of common coping strategies see text *infra* at notes 110-112.

83. See text at *infra* notes 110-112.

84. Goldzband, *supra* note 81, at 33-34; R. Gardner, *Family Evaluation in Child Custody Litigation* 156 (1982) [hereinafter Gardner].

85. Cf. *Lincoln v. Lincoln*, 24 N.Y.2d 270, 247 N.E.2d 659, 299 N.Y.S.2d 842 (1969), in which the New York Court of Appeals approved a completely private interview, noting that proceedings must be modified in a custody hearing so that the interview would still serve its primary purpose: obtaining significant information the judge needs to make the best possible decision. Although this reasoning makes perfect sense, the risk of error or abuse of discretion in such an interview is simply too great. See *Watermeier*, 462 So. 2d at 1274-75:

The attorneys and parties, as well as the appellate court, would be forced to trust completely . . . the discretion of the trial judge . . . without ever knowing



### 3. *The Governmental Interest*

Louisiana Civil Code article 146 requires that the award of custody to one or both parents be made "according to the best interest of the children." Accordingly, the Louisiana Supreme Court in *Turner v. Turner*<sup>86</sup> explained the role of the trial judge as follows:

[He] sits as a sort of fiduciary on behalf of the child, and must pursue actively that course of conduct which will be of the greatest benefit to the child. . . . He must protect the child from the harsh realities of the parents' . . . conflict. The legislature has mandated that the judge shall look only to the child's best interest.<sup>87</sup>

Thus, the state's interest in the child's welfare has been declared both by statute and by jurisprudence to be of foremost concern in a custody dispute.

### 4. *The Value of Procedural Safeguards*

Procedural due process demands that the elements of the three-part inquiry be weighted and balanced.<sup>88</sup> While the state's paramount concern is for the best interest of the child, the parents must also receive protection of their liberty interest in the custody of their children. These two interests must further be balanced against the significant risk of error present in a completely confidential judicial interview.

Basic to an attempt to insulate the judicial interview from a due process attack is a requirement that a verbatim record be made.<sup>89</sup> The making of a record would serve to decrease the risk of error by the judge who, knowing the transcript would be subject to review, would

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what was told to him. . . . In addition, there would be no way for a party to ever contest, disprove, or argue on appeal any statement . . . that the child may have made . . . .

See Newman and Collester, *supra* note 11, at 11; Siegel and Hurley, *supra* note 30, at 55; Lombard, *supra* note 10, at 817.

86. 455 So. 2d 1374 (La. 1984).

87. *Id.* at 1379. The court added that "[t]he legislature has mandated that the judge shall look only to the child's interests," and not to whatever interests the parents may have. This quote must be interpreted in the context of the case, which was a drawn-out custody battle with the children being used as pawns. Nonetheless, it is still a strong statement for the best interest of the child taking precedence over the interests of the parents.

88. See *supra* notes 73-75 and accompanying text.

89. Siegel and Hurley, *supra* note 30, at 57: "Recording . . . appear[s] to effectively preserve essential legal guarantees that a fair hearing will be conducted." But see *Osborne v. McCoy*, 485 So. 2d 150 (La. App. 2d Cir. 1986), discussed *supra* note 19. It is not clear that the objection in *Osborne* to the failure to record the interview was founded explicitly on due process grounds.

be restrained from asking improper questions. In addition, having a transcript of the interview available is the only way to ensure fair appellate review. Thus, unless the parties agree otherwise, the interview must be recorded to satisfy the requirements of due process.

Given that a verbatim record is essential to a procedurally fair interview, the analysis must also consider which parties, if any, should be allowed to attend and/or participate. Most experts agree that allowing the parents to be present as a procedural safeguard would be unsatisfactory; although their liberty interest in the outcome of the case is significant, their presence would be likely to impede the fact-finding purpose of the interview.<sup>90</sup> There remain two alternatives as possible safeguards: (1) a recorded interview at which the attorneys may be present either as participants or observers; and (2) a recorded interview at which the attorneys are excluded.

Arguably, a procedure which uses the presence of the attorneys as a safeguard would have an impact similar to allowing the presence of the parents. The attorneys' presence would probably make the proceeding more unpleasant for the child and inhibit his responses in order to avoid a hurt or angry reaction by his parents in case the attorneys divulge his statements. In extreme circumstances, the child might even endure psychological trauma in the form of anxiety and feelings of guilt. Thus, allowing the attorneys to be present could actually contribute to the risk of error, especially in cases in which the parents are particularly hostile and the attorneys are particularly adversarial.

Several states do not require that counsel be present during the interview.<sup>91</sup> An especially good statement of the reasoning used by these states appears in *Lesauskis v. Lesauskis*.<sup>92</sup> In this case, the Michigan Court of Appeal allowed a judge to conduct a recorded *in camera* hearing with the parents and attorneys barred from attending. The parties were not allowed access to the record, which was transcribed, sealed, and sent to the appellate court. Noting that the paramount concern in a custody case is the best interest of the child, the court held that such a procedure did not violate due process.<sup>93</sup>

At the time of the case, Michigan law limited the scope of the interview by allowing the judge to elicit the child's preference only, and permitting inquiry as to the reasons. In light of this limitation, the court reasoned that the presence of counsel would have slight utility, and was outweighed by the child's probable reaction to their "foreboding pres-

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90. See *supra* notes 4-5 and accompanying text.

91. Jones, *supra* note 5, at 54. As of 1984, nine states by statute allowed trial judges discretion to bar attorneys. At least three others by their jurisprudence used the same approach.

92. 111 Mich. App. 811, 314 N.W.2d 767 (1981).

93. *Id.* at 816, 314 N.W.2d at 769.

ence."<sup>94</sup> In Louisiana, the court is not limited in the scope of the interview, and the judge may question the child not only as to his preference, but also as to his reasons for it.<sup>95</sup> The reasoning of the Michigan court is still persuasive, though, in its suggestion that due process can be satisfied as long as the interview is recorded, even if the parties and their attorneys are not given access to the record.

Furthermore, the *Lesauskis* approach would certainly seem to eliminate the unpleasant atmosphere created for the child by the presence of the attorneys and/or their access to the record. Some would doubt, however, that due process could be achieved without the presence of the parties or their counsel. Nonetheless, as the Supreme Court declared in *Mathews*, due process is a flexible concept. Not every situation will justify excluding the attorneys. Only when the judge discerns that the *risk of harm* presented by their presence to the accuracy of the interview or to the child's psychological well-being *outweighs the protection* afforded the parents, may the judge exclude them.<sup>96</sup> (Such a situation hereinafter will be referred to as a "worst case scenario.")

Before excluding the attorneys, the judge should be required to make *detailed findings* in the record as to why he thinks it is necessary to do so. For instance, where the dispute is particularly acrimonious and the child appears to have been unduly subjected to his parents' difficulties, the judge should describe the circumstances as cause to believe the child may not respond reliably unless the attorneys are excluded. Similarly, where the attorneys have been particularly hostile to each other's clients and have shown no indication of behaving differently to the child, the judge would be justified in excluding them. Procedurally, it is crucial that the judge be required to balance the reasons for his decision against the need to protect the parents' interests, and that these conclusions are reflected in the record. The record will act as a significant check on the judge, will encourage careful consideration of the issue, and will enable the parties to appeal the decision.

In support of the above proposals, consider that the *Watermeier* court did not believe due process required the attorneys be allowed to *participate* in the interview; rather, they were allowed only to observe.<sup>97</sup> Since they may not participate, their presence can serve only to deter the judge from asking improper questions, to inform them of what was said during the interview in case of an appeal, and to let them observe the child's demeanor.

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94. *Id.*

95. La. Civ. Code art. 146(C)(2) allows the court to consider the reasonable preference of the child and any other relevant factors. The child's reasons for his preference are certainly relevant factors.

96. *Mathews*, 424 U.S. 319, 96 S. Ct. 893.

97. *Watermeier*, 462 So. 2d at 1275.

The first two purposes can be served just as well by making a verbatim record of the interview and by allowing the attorneys later access to it.<sup>98</sup> The child's demeanor, on the other hand, will not be reflected in the record, yet could lend considerable insight into his responses. For example, as the attorneys are likely to be more familiar with the case, they may spot problems with the child's testimony more readily, such as coaching by a parent. As a partial remedy for this problem, the judge might solicit sample questions and suggestions from the attorneys beforehand. This procedure would allow the attorneys to alert the judge to particular issues or problem areas. These sample questions and suggestions would aid the judge in extracting more pertinent, and perhaps more accurate, information from the child.

Alternatively, if demeanor was critical to a particular case, the interview could be videotaped.<sup>99</sup> Due process would not normally require a videotaping, as it would not be necessary to achieve a fair result. In addition, the child may be intimidated by the camera. The decision to videotape should therefore be left to the judge's discretion. He should make his decision according to the balancing approach outlined in *Mathews*.

### 5. Summary

In summary, due process requirements can, in the worst case scenario, be satisfied by making a verbatim record of the interview. The judge should have the discretion to bar the attorneys from the interview, but he must first justify this action by a finding in the record that the harm to the accuracy of the interview and to the state's interest in protecting the child outweighs the parents' interests in having the attorneys present. The parties could appeal this decision to exclude the attorneys, since its basis would be a part of the record. If the judge does exclude the attorneys, he should ask them beforehand for sample questions and suggestions, thus giving them a chance to contribute to the interview even without being present. If the child's demeanor is a hotly contested issue, the judge should consider videotaping the interview.

If the judge does allow the attorneys to be present, he must still make a verbatim record. He should also follow the procedure outlined in *Watermeier* and allow them to act as observers only. He should keep in mind that many who have considered the problem feel that having the attorneys present does more harm than good.<sup>100</sup> Here also, since

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98. Jones, *supra* note 5, at 80; Newman and Collester, *supra* note 11, at 11.

99. For an example of the use of videotaping involving victims of child abuse, see La. R.S. 15:283 (Supp. 1987), and La. R.S. 15:440-440.6 (Supp. 1987).

100. Lombard, *supra* note 10, at 813; Jones, *supra* note 5, at 56, 80; Newman and Collester, *supra* note 11, at 10.

they may not participate, the judge should consider obtaining suggestions and sample questions from the attorneys. The parties will be able to appeal errors or abuse of discretion alleged to have occurred during the interview by using the record.

Probably the single most important recommendation this comment has to make is this: whatever procedure is followed by the judge, he should *always explain to the child exactly what is being done*. He should tell the child at the outset that the child's statements *cannot* be kept secret from his parents.<sup>101</sup>

#### IV. SUGGESTED METHODS FOR ELICITING ACCURATE INFORMATION IN A JUDICIAL INTERVIEW

There remains the problem of how to question the child and accurately interpret his responses. This section will discuss some of the various theories and approaches used by mental health professionals for questioning children in custody cases.

First of all, the questions must be kept simple and within range of the child's mental capacity.<sup>102</sup> The judge should attempt to empathize with the child to put him at ease; he should tell the child that the divorce is not the child's fault and that his parents still care for him.<sup>103</sup> The judge should explain that the purpose of the interview is to help him do the best thing for the child, and should ask the child to help him.<sup>104</sup> The child should be warned that his statements cannot be kept secret and that his parents will probably find out what he says. The judge should explain that the court reporter will be recording the child's statements.<sup>105</sup>

The initial questions in the interview should be specific and easy to answer, such as:

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101. Critics of these recommendations will cry out that there must be a check on the judge and his potential for abuse of discretion or error. The proposed model procedure does, however, provide protection against such abuses, by requiring the judge to make detailed findings prior to excluding the attorneys, and also to make a record of the interview. Cf. *Osborne v. McCoy*, 485 So. 2d 150 (La. App. 2d Cir. 1986).

102. Stafford, *supra* note 30, at 319.

103. Saposnek, *supra* note 9, at 87-88; interviews with Louisiana judges.

104. Interviews with Louisiana judges.

105. This is very important and should never be omitted. If a child talked freely under the mistaken belief that his words would be kept secret and then his parents found out, the effect on the child could be devastating. At least one prominent authority, Dr. R. Gardner, does not warn children that the interview will not be confidential; he says he has never found it to cause a problem. See Gardner, *supra* note 81, at 155-56. This author finds that view hard to accept.

Where do you go to school?  
Do you have any brothers and sisters?  
How old are you?<sup>106</sup>

These questions are the same ones normally used during the competency determination. As long as they are asked at some point, they will serve the function of putting the child at ease. If he can answer the first few questions with confidence, he will be much more at ease during the difficult ones that follow. The questions should progress from the more specific to the more open-ended.<sup>107</sup>

The judge should ask the attorneys to submit a list of questions they would like the judge to ask the child. Their special knowledge of the facts of the case may produce extremely valuable sample questions. In this way, parents and attorneys will be given the opportunity to contribute to the interview.

There are certain key issues that the judge should consider. The best treatment of these issues is found in a book by Diane Skafte entitled *Child Custody Evaluations*.<sup>108</sup> It is filled with practical suggestions and does not require a background in behavioral sciences to understand its proposals. The issues Skafte identifies as important to consider are as follows:<sup>109</sup>

1. How well is the child functioning physically, intellectually, and emotionally?

[Examine the child's motor skills, his ability to think clearly, and his emotional maturity.]

2. What kind of relationship does the child have with his parents?

[Examine the child's attachment: Which one does he like to be with? What do they like to do together? Which one does he identify with? Also, how well does the child communicate with each parent? Does he share his feelings? Is he warm and spontaneous? Which parent does he ask for advice on important issues?

Finally, examine the child's responses to his parents' efforts at discipline. Does he rebel with one parent? Is he intimidated by the other?]

3. How does the child feel regarding the award of custody?

[Does he volunteer a preference? Or does he avoid talking? Does he harbor unspoken feelings? Is his behavior consistent with his

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106. Gardner, *supra* note 81, at 176.

107. Newman and Collester, *supra* note 11, at 11.

108. Skafte, *Child Custody Evaluations* (1985) [hereinafter Skafte].

109. *Id.* at 95-97. Bracketed material indicates elaborations by the author of this comment.

spoken preference?]

4. Are there any other specific issues raised by the facts of the case? If so, they should be considered.

When considering these issues, the judge should keep in mind that a child may not always say what he really means. As mentioned earlier, children frequently use certain "strategies" to cope with the otherwise uncontrollable aspects of their parents' divorce. These strategies are specific and individualized, and the younger a child is, the harder it is to ascertain what he may be doing.<sup>110</sup> David Saposnek, in *Mediating Child Custody Disputes*,<sup>111</sup> identifies the more common strategies and suggests possible interpretations of the child's behavior; for example:

1. Reunion strategy: The child will praise both parents, or the parent "at fault," hoping they will respond to the praise by reuniting. The judge should be alert to descriptions of the parents that sound too good to be true.
2. Pain reduction strategy: The parents may both claim that the child refuses to leave one to visit the other. The child is probably just trying to reduce the pain he feels each time he leaves one parent by refusing to leave, which does not indicate a preference for one parent over the other.
3. Tension detonation strategy: The child may seem very hostile toward one or both parents. It is possible that he is trying to get them to direct their anger toward him instead of each other, and to detonate the tension between them by having them strike out at him.
4. Loyalty proving strategy: The child may pick the parent that seems the most likely to keep him around and sacrifice the other parent to show his loyalty.
5. Fairness strategy: The child will repress his own needs in order to make sure each parent gets equal treatment. He will probably refuse to state a preference, and will exhaust himself trying to divide his time and affection equally between his parents.
6. Permissive living strategy: The child will give up trying to reunite his parents and will repress his pain. He may appear to be coping well, while he is actually manipulating his parents to his own best advantage. Older adolescents are more likely to use this strategy consciously. Younger children are more likely to use it innocently, as when they express a natural preference for the parent who buys nicer presents or who has had custody during vacations.<sup>112</sup>

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110. Saposnek, *supra* note 9, at 119-33.

111. *Id.*

112. *Id.*

The behavior described in each of the above examples is open to several interpretations; the strategies suggested, however, are the ones most likely to be overlooked. There are certainly more obvious interpretations, the most obvious being that the child means exactly what he says. However, a judge should at least consider the possibility that a strategy might be in use, especially if the child seems to contradict himself or if his statements do not seem in accord with the facts.

Another common problem involves the possibility that the child has been coached by one or both parents. Sometimes, coaching is fairly easy to detect, as when adult phrases come out of the child's mouth. For instance, a judge should notice something is wrong when a young child says, "My mother has been primarily responsible for my care since birth."<sup>113</sup> However, detection of the more subtle betrayals of coaching require careful attention. If the child sounds like he is speaking a memorized piece, it may indicate coaching.<sup>114</sup> On the other hand, especially with older children, the child may be speaking his true feelings; he may have just memorized what he wanted to say in preparation for such a crucial proceeding.<sup>115</sup> Another indication is when the child condemns one parent to such a degree that the parent seems to be more evil than is humanly possible.<sup>116</sup> The likely source of the vilification is the coaching parent. Finally, the degree of conviction the child conveys can serve as a clue. A child's true feelings are often expressed with much more conviction than those that have been drilled into him.<sup>117</sup>

In the final analysis, the judge must rely on his own intuition. If he thinks the child has been coached, he should question the child about it. If he still believes that the child is not expressing his true feelings, he should give little weight to the child's stated preference and pay more attention to the child's behavior and his responses to indirect questions.

Having identified the issues to be considered and coping strategies which may get in the way, there remains the question of how to get the information from the child. Again, Skafte gives very useful examples of techniques employed by behavioral scientists.<sup>118</sup> These techniques vary according to the age of the child. Some of them are listed as follows.

*Ages 0-3 years old:* Behavioral scientists concede that a child this age cannot be interviewed. About all that can be done is to observe him with his parents. A judge would not have time to do this, so children this young probably should not be in-

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113. Newman and Collester, *supra* note 11, at 11; Gardner, *supra* note 81, at 176.

114. Gardner, *supra* note 81, at 176.

115. *Id.* at 177.

116. *Id.*

117. *Id.*

118. Skafte, *supra* note 108, at 98-114.



interviewed. (It is interesting to note that the ages here correspond to the age cut-off identified in the section on competency.)<sup>119</sup>

*Ages 3-5 years old:* The child is still too young to be interviewed in the question and answer mode. The best approach is to play games with him and observe his responses. For example, let him use pictures or dolls to help tell a story. Pretend he is at mommy's house, then at daddy's house, or vice versa. Allow him to choose which house to visit first, and let him suggest what happens there.

Another effective game is the Three Wishes Game. Give him three wishes and ask him what they would be. Usually the first is that his parents would reunite. If his second wish is that he could go live with a certain one, he has just stated a preference.

Another more elaborate game for children with a strong imagination is the Desert Island Game. Tell the child a story in which he is stranded on a desert island with every material comfort he could ever want. A good fairy comes along and offers to bring one companion to the island. Let the child choose his companion. Urge him gently to choose one of his parents. If he refuses, work out a happy ending and drop the story.

*Ages 5-8 years old:* The child is old enough to gain most of the information just by talking with him. The Three Wishes Game can be used to get him to think. Otherwise the questions listed in Appendix A to this comment should yield accurate results.

*Ages 10 or older:* Do not try to play games; tell the child that you both know why you are here. Use the questions listed in Appendix A, and any others you have found useful. Even if the child states a clear preference, probe his underlying feelings carefully to make sure there is not a coping strategy at work.<sup>120</sup>

The judge should not directly ask the child to state a preference. He should try to determine the child's preference indirectly from the responses to other questions. At the end of the interview, he should ask the child if there is anything else he would like to say. If the child wants to state a preference, he will probably state it. If not, then he should not be pressured. If the judge feels strongly that he should specifically ask the child to state a preference, then he should make it clear to the child that he does not *have* to state one. The child should clearly understand that the final decision will be made by the judge, so

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119. See *supra* notes 26-29 and accompanying text.

120. Skaft, *supra* note 108, at 98-114.

the child will not feel guilty for causing one of his parents to be hurt.

#### EVALUATION BY A MENTAL HEALTH PROFESSIONAL—AN ALTERNATIVE

Civil Code article 146(H) authorizes the use of an evaluation by a mental health professional (an evaluator).<sup>121</sup> The court is free to select the evaluator to be used, and may apportion the costs between both parties. The parties and children "shall" submit to the evaluation upon the court's order.<sup>122</sup> The evaluator must provide the court and both parties with a written report, and must serve as the court's witness, subject to cross-examination by either party.

Although article 146(H) only authorizes an evaluation to be ordered "on the motion of either party," judges often order evaluations on their own motion in reliance on article 146(C)(3), which authorizes the judge to order an investigation to be conducted to assist him in awarding custody.<sup>123</sup>

The Louisiana Supreme Court noted in *Turner v. Turner*<sup>124</sup> that the court has broad independent powers under this article, and may order an investigation into the mental health of the child or any other factor the judge deems important. Such an investigation for all practical purposes would be the same as an "evaluation" under article 146(H), and herein will be referred to accordingly.

By requiring a written report and in-court testimony by the evaluator, the evaluation process avoids the due process problems that plague the private judicial interview.<sup>125</sup> Similarly, the competency issue becomes irrelevant, since the evaluator, and not the child, is the witness. This procedure may also be more attractive because, although the evaluator must state the substance of the child's statements in his report, he can phrase them in a way to diminish their emotional impact on the parents.<sup>126</sup> As a result, the parents are less likely to punish the child for

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121. See La. Civ. Code art. 146(H), supra note 6. A mental health professional is defined in that article as "a psychiatrist or a person who possesses a Master's degree in counseling, social work, psychology, or marriage and family counseling."

122. La. Civ. Code art. 146(H).

123. La. Civ. Code art. 146(C)(3), supra note 6.

124. *Turner v. Turner*, 455 So. 2d 1374 (La. 1984).

125. See supra notes 69-99 and accompanying text for a discussion of the due process problems. See also *In re Johnson*, 283 So. 2d 333 (La. App. 4th Cir. 1973). In that case, the court held that when a custody decision is based almost entirely on the evaluator's recommendations, rather than on the *facts* the evaluator uncovered, and where the mother was cut short before she could testify as to relevant facts, the mother was deprived of due process.

126. Skafte, supra note 108, at 114-16. For example, the evaluator might say "Susie's statements suggested . . . ." The parents will be inclined to be angry at the evaluator instead of at Susie. They will be able to console themselves that "maybe Susie didn't really say it that way."

his statements. Also, the professional will be able to tell the child that, although the gist of his statements will be reported to his parents, his exact words will not be, and that every effort will be made to prevent them from being hurt or angry.<sup>127</sup> Thus, the child will be less likely to withhold information than if he knows a record is being made, as in a judicial interview. Nevertheless, the evaluator should *always* tell the child that his statements will not remain totally confidential.<sup>128</sup>

Of course, the evaluation alternative is not without its shortcomings. Of foremost concern to the parties may be that the evaluator does not make a verbatim record of the interview. Consequently, the parties cannot prove what actually was said during the evaluation, and must rely upon the evaluator's report in any subsequent appeal of the custody decision. In this situation, the evaluator's report alone would provide the reviewing court with information as to the child's preference. In addition, the evaluation alternative is costly, and there is no guarantee as to the competency of the evaluator chosen.

Ideally, however, the evaluator will possess a certain level of experience and expertise which will contribute to the accuracy of the information gathered. Many judges, on the other hand, may not be equipped to recognize the various "coping" strategies young children may employ in a custody proceeding.<sup>129</sup> In the words of one author, "Practically all judges lack special training in the crucial areas of child development."<sup>130</sup>

In addition to misinterpreting the child's statements, judges may be unaware of certain techniques an evaluator might use to expose the child's preference. Generally, judges have less time to spend with the child than an evaluator. Consequently, the judge is likely to have less time to get to know the child.

In conclusion, judges should consider having the child interviewed and evaluated by a mental health professional, preferably a psychologist.<sup>131</sup> Ideally, a social worker could also go to the proposed custodial homes and observe the child and parents interacting in an informal atmosphere, although in some cases this option would be precluded by the time and expense involved. Nevertheless, a social worker is more

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127. *Id.* at 114-16.

128. *Id.*

129. Saposnek, *supra* note 9, at 122-23. See also *supra* notes 110-12 and accompanying text.

130. Goldzband, *supra* note 81, at 30, 33.

131. A psychiatrist deals more with "organic" disorders, such as brain-damaged or hyperactive children, and would be unnecessary in most instances. A psychologist is trained in the behavioral sciences, and is better equipped to evaluate the child than a social worker, who has less training. McCahey, *supra* note 30, Vol. 3, § 21.01(1) at 21-4; § 22.01 at 22-5; and § 23.01 at 23.4.

sued to make this home visit than a psychologist, and would probably charge a smaller fee. After the visit, the psychologist and social worker would meet to compare and discuss their findings, and each would submit a written report and testify at the hearing, as provided in article 146(H). Such an arrangement would likely provide reliable information, leading to the best possible custody determination by the judge.

If, after receiving the evaluator's report, the judge would like to talk to the child, he could schedule a judicial interview subject to the procedural requirements outlined above. The interview would allow the judge to get a feel for the case, and would provide the child with a chance to express any changes of opinion he might have had in the meantime. The judge would verify the information contained in the reports and satisfy himself that the recommendations were sound. The risk of error by the judge would be greatly reduced, since he would have already read the reports and possibly would be alerted to any strategies the child was using, as well as any other pertinent information the evaluator had disclosed.

#### RECOMMENDATION

The child should be given an opportunity to provide information important to the custody determination. If his parents do not ask for his involvement, the judge should interview the child on his own initiative. However, participation should not be forced on an unwilling child.

The model proposed herein, like the procedure in *Watermeier*, is not intended to be mandatory if the parties *consent* to another method; a standard mandatory procedure would destroy judicial flexibility, which is greatly needed in such a delicate area of the law. Rather, the proposed model is one which is intended to satisfy the minimum procedural requirements of due process and to protect the child from further trauma while he helps the court determine his best interest.

At the very least, due process requires that the interview be recorded. The judge has discretion to exclude the attorneys from the interview if the harm from their presence would outweigh any procedural benefit to the parents. To do so he must make detailed findings in the record. If the judge does not exclude the attorneys from the interview, he should allow them to be present as observers only.

Before attempting to interview a child, a judge should familiarize himself with the approaches used by behavioral scientists to elicit accurate information from children. Suggested questions are provided in Appendix A, to be used along with other questions the judge finds useful. The judge should ask the attorneys to suggest questions, which could be more valuable than any standard list, because of their special knowledge of the case.

Another helpful approach is to have the child and his parents evaluated by a psychologist and observed in their homes by a counselor or social worker. This evaluation may serve either in conjunction with, or in place of, the judicial interview. It may, however, prove too costly.

Nothing can take the place of common sense and sensitivity to the child's plight. Judges are intelligent and dedicated people, and are quite capable of making appropriate custody awards based on the information they elicit during judicial interviews. Hopefully, this comment will serve to provide some background knowledge, and ultimately to improve the accuracy of the information gained in the interviews. For every child that is destined to go through a custody hearing in the future, the judiciary should strive to obtain an accurate determination of his best interests in the least traumatic manner possible.

*Lisa Carol Rogers*

## APPENDIX A

### *Proposed Questions to Minor Children in Divorce Cases*<sup>132</sup>

#### OPENING STATEMENTS

I'm Judge \_\_\_\_\_. I'm pleased to meet you today. Sit down and make yourself comfortable. You know that your parents are getting divorced and will not be living together anymore. I have to decide where you will live.

Your thoughts and feelings will really help me to make a decision as to which parent you will live with. I would like you to know it will not be your decision.

In order that you may help me I must ask you some questions. If at any time you want to ask me any questions, please do so!

#### QUESTIONS

1. Please tell me your full name.
2. How old are you? When were you born?

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132. These questions were printed as part of an appendix to Professor Lombard's article, *Judicial Interviewing of Children in Child Custody Cases: An Empirical and Analytical Study*, 17 U.C.D.L. Rev. 807, 848-50 (1984). They are reprinted with the permission of Professor Lombard and the U.C. Davis Law Review, and were originally compiled and approved by the Family Law Section of the State Bar of Michigan. The questions are intended to be used mainly with children under twelve years of age.

3. What is your mother's name?
4. What is your father's name?
5. What does your mother do during the daytime?
6. What does your father do during the daytime?
7. When do you go to school?
  - a) What are your school hours?
  - b) What are your grades?
  - c) What are your favorite subjects?
  - d) What do you do after school and during your free time?
  - e) What are your hobbies?
  - f) How do you think you will do in school this year?
  - g) Could you do better at school?
  - h) Who helps you with your homework?
8. Where do you eat your breakfast? Your lunch? Your dinner?
9. Who prepares your meals?
10. What do you do on weekends?
11. Who are your closest friends? What do you do with your friends?
12. What do you do with your mother?
13. What do you do with your father?
14. Have you talked to your mother about talking to me or coming to court? What did she say?
15. Have you talked to your father about talking to me or coming to court? What did he say?
16. When you have done something wrong, who punishes you or talks to you about it?
  - a) How does your mother punish you?
  - b) How does your father punish you?
17. What is the one thing your mother does that makes you the maddest?
18. What is the one thing your father does that makes you the maddest?
  - a) What problems do you talk to your mother about?
  - b) What problems do you talk to your father about?
  - c) If you accidentally broke a window, what would your mother do? What would your father do?
  - d) If you fell and injured your knee, who would you go to?
  - e) If you had a fight with your best friend, who would you talk to? Why did you pick that person?
  - f) If you were picked on at school, who would you talk to? Why?
19. When you're sick, who takes care of you?
20. When you have to go to the doctor or dentist, who takes you?
21. How long have you lived where you are living?
22. Is your mother in good health?

23. Is your father in good health?
24. If you were home in the afternoon alone with your mother, what do you think you would do?
25. If you were home in the afternoon alone with your father, what do you think you would do?
26. When you go on vacation, where do you go? With whom do you go? What do you do on your vacation?
27. Do you have any heroes? What kind of people are your heroes? What do you want to be when you grow up?
28. What are your interests in life, such as music, sports, church and any other activities?
  - a) Has your mother helped you develop your interests?
  - b) Has your father helped you develop your interests?
29. Has either your mother or your father said anything bad about the other?
30. Do you know what divorce is?
31. How did you learn about your parents' divorce?
  - a) Who told you?
  - b) When were you told?
  - c) Do you remember what was said?
  - d) How did you feel about the divorce?
32. If I decide that you must live with your mother, how would you feel about my decision?
33. If I decide that you must live with your father, how would you feel about my decision?
34. Do you have any questions? Is there anything you would like to ask of me?

Thank you very much. It has been very nice talking to you.