I. Introduction

When compared with their counterparts in other courts, family court judges face the profound task of determining a child’s future contact with his or her parents in the context of child custody disputes.\(^1\) Child custody rulings create circumstances vastly different from divorce decrees, property settlements, and even support orders; judges have the dual role of protecting a child’s welfare by basing custody on the child’s best interests while simultaneously protecting the child from unnecessary trauma during the custody battle.\(^2\) To determine which custodial arrangement would be in the child’s best interest, the judge considers evidence from numerous sources, one of which may be the child herself.\(^3\) In an effort to ascertain the child’s preference without subjecting the child to the trauma of offering direct testimony in open court, most states authorize courts to...
interview children in camera. Although in camera interviews allow children to express their custody preferences, judges themselves have struggled with how much weight to give these preferences, what interview methods to employ, and the proper scope of appropriate subject matter in the in camera interviews. Furthermore, some judges have questioned whether they should even conduct interviews or leave ascertaining of children’s preferences up to other legal professionals with more experience in child-related matters, such as guardians ad litem, attorneys, or Friend of the Court personnel.

There have only been a few studies in the United States covering judicial attitudes concerning in camera interviews of children. To provide an empirical analysis of child interviewing procedures in Michigan, a judicial survey was conducted of Michigan circuit court judges assigned to the Family Division. Judges responded to several different sets of questions about their own personal practices in assessing children’s wishes in child

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5. States vary greatly in how much discretion a judge should be afforded in making these determinations and in how much weight a child’s preference should be given. Compare In re Marriage of Milkovich, 434 N.E.2d 811, 818 (Ill. App. Ct. 1982) (holding that the scope of in camera interviews may include questions on various topics, including discipline received from each parent, activities engaged in with each parent, etc.) with Molloy v. Molloy, 637 N.W.2d 803, 804 (Mich. Ct. App. 2001) (scope of in camera interview should be limited to reasonable inquiry into preferences of the child). A minority of states leave both the decision to consider preference and the determination of its appropriate weight wholly to the discretion of individual judges. See, e.g., N.H. REV. STAT. ANN. § 461-A:6 II (2012) (if child of sufficient age and maturity, judge must give substantial weight to preference if not based on improper influence); OKLA. STAT. tit. 43, § 113 (West 2012) (court determines whether the best interest of the child shall be served by allowing child to express preference); UTAH CODE ANN. § 30-3-10(1)(e) (West 2012).


custody cases. This survey was adapted from one completed by Professor Barbara Atwood from the University of Arizona with the hope that it would provide some basis of a comparison between Michigan and other states. Much like Professor Atwood’s survey, the responses of this survey revealed, not surprisingly, a wide variety of beliefs and methods. This survey is not meant to be conclusive of how all judges in Michigan handle interviews with children but to provide an overview of judicial practices, which factors judges take into account in determining preferences, and how judges view their performances in this unique and essential role. Interestingly, some judges felt the judiciary was well equipped to interview children of varying ages, whereas others felt these sorts of difficult preference determinations were better left to Friend of the Court (FOC) personnel and guardians ad litem (GAL).

Part II provides an overview of Michigan case law and scholarship on the issue of determining children’s preferences in custody disputes via in camera interviews. Part III describes the survey methodology and results of this study with fifty-one judges in Michigan. The results focus on three themes: (1) the factors influencing the likelihood of judges’ choosing to interview a child, (2) the methods employed during in camera interviews, and (3) how judges view the effectiveness of in camera interviews in ascertaining children’s preferences. Part IV concludes with a discussion of lessons to be learned from the current Michigan jurisprudence and empirical research regarding judicial interviews with children. Additionally, it also proposed for strengthening not only the processes used in in camera interviews of children in custody disputes, but also for the Michigan Family Division as a whole.

II. Michigan Child Custody Case Law

Michigan created a family division of the circuit court in 1996. As of July 1, 2003, in each judicial circuit, the chief judge and the probate judges established a “family court plan” that detailed how the division would function in that circuit as well as what services would be provided to families. Notably, judges assigned to the family division would be required to receive appropriate training as required by the Michigan

8. See Atwood, The Child’s Voice, supra note 2. Many scholars who have written similar articles have not only completed surveys of the judiciary, but have also interviewed various judges and participated in various focus group activities with them with regard to children’s preferences.

9. Mich. Comp. Laws § 600.1001. See also id. § 600.1003 (stating that “[e]ach judicial circuit shall have a family division of circuit court.”).

10. Id. § 600.1011. Some of these services include access to the friend of the court, family counseling services, county juvenile officers, and any other state or public agencies. Id. § 600.1043.
Despite this training, the opposing interests inherent in the difficult task of determining a child’s preferences in custody litigation appear frequently in Michigan case law. It is easiest to group these interests into three general categories: (1) the judge’s interests in rendering competent decisions, (2) children’s privacy and well-being interests, and (3) parent’s due process rights.

Courts in the United States largely agree that children’s wishes are a relevant, although not dispositive, factor in resolving custody disputes. In some states, judges are statutorily required to consider the child’s wishes. In other states, however, the consideration is discretionary. The Michigan Court of Appeals has held “[i]n order to determine the best interests of children in custody cases, the trial court must consider the eleven factors provided in § 3 of the Child Custody Act . . . and explicitly state its findings and conclusions with regard to each factor.” Michigan law does not advocate for one particular technique for judges to ascertain a child’s preferences, however, as demonstrated by the Survey results, the in camera interview is by far the most popular method used in the state.

A. Must the Trial Court Interview the Child in a Custody Dispute?

The Michigan Court of Appeals has implicitly recognized a harmless error approach with respect to a failure to comply with subsection (i) of the Child Custody Act, which requires courts to ascertain a child’s preference in the custody dispute. The trial court in Sinicropi v. Mazurek stated that it would not consider the child’s preference in the custody dispute because neither party presented the child for an interview. On appeal, however, the appellate court held that the trial court committed error in not interviewing the six-year-old child. Nevertheless, the court stated this error did not merit reversal because the child’s preference would not have changed the trial court’s overall ruling due to the weight of the other best

11. Id. § 600.1011(4). See also id. § 600.1019 (stating that “[t]he Michigan judicial institute shall provide appropriate training for all probate judges and circuit judges who are serving pursuant to the family court plan.”).
13. For example, under the Uniform Marriage and Divorce Act, judges “shall consider all relevant factors, including . . . the wishes of the child as to his custodian.” Unif. Marriage & Divorce Act § 402, 9A U.L.A. 282 (1998). In other states, courts have ruled that they may consider children’s wishes within their discretion but are not required to do so. See, e.g., Tasker v. Tasker, 395 N.W.2d 100, 103 (Minn. Ct. App. 1986).
15. See, e.g., Appendix I, Table 4.
interest factors.\textsuperscript{17}

The *Sinicropi* decision can be distinguished from *Flaherty v. Smith*\textsuperscript{18} where counsel for a seven-year-old’s stepfather requested the child be interviewed with regards to his custody preferences. The trial judge declined the interview and stated, “[t]he Court is of the opinion that a seven-year-old is not in a position to voice his opinion as to whom it should live with. . . . [h]e hasn’t lived long enough and experienced enough.”\textsuperscript{19} On appeal, the Michigan Court of Appeals held that the failure to consider the child’s preferences constituted error and that an evidentiary hearing should always be held to determine whether a child is able to express a reasonable preference.\textsuperscript{20} Just because a child is given an opportunity to express a preference at the appellate level, however, will not necessarily result in an overruling of the trial court’s decision, if the preference is against the weight of the other best interest factors.

**B. What Procedures Do Judges Follow in Conducting In Camera Interviews of Children?**

Courts throughout the country historically have allowed *in camera* interviews in recognition of the emotional trauma felt by a child required to testify in open court in front of his or her parents.\textsuperscript{21} Originally, Michigan case law held that all *in camera* interviews of children in custody cases had to be recorded and sealed for appellate review. For example, the *Molloy I* decision held that videotaping the child’s interview and making the tapes available to counsel under certain circumstances pro-

\textsuperscript{17} Id. at 182–83. See also Juneac v. Miller-Garcia, No. 306260, 2012 WL 1698367 (Mich. Ct. App. May 15, 2012) (holding that the trial court erred when it failed to interview the child in a custody dispute but even if the child expressed a preference to live with the mother, this desire would not outweigh the other factors under the Child Custody Act).


\textsuperscript{19} Id. (quoting trial court).

\textsuperscript{20} Id. at 73. Several years earlier, in *In re Custody of James B*, a trial court declined to interview a four-year-old child as to his preference because the trial court did not deem the child to be of sufficient age to express a preference. 238 N.W.2d 550 (Mich. Ct. App. 1975). The Michigan Court of Appeals noted that, in a close case, an expression of preference by an intelligent, unbiased child might be a determining factor in the decision as to what the best interests of the child are. Id. This decision has been subsequently reaffirmed. See Lewis v. Lewis, 252 N.W.2d 237 (Mich. 1977); Barnes v. Barnes, 258 N.W.2d 65, (Mich. Ct. App. 1977).

\textsuperscript{21} In a child custody dispute it is “wise and considerate on the part of all to refrain from publicly pressing the child in open court by direct and cross-examination as a witness to take sides or make choices between his parents.” Ex parte Leu, 215 N.W. 384, 386 (Mich. 1927); Impullitti v. Impullitti, 415 N.W. 2d 261, 263 (Mich. Ct. App. 1987) (“[B]y conducting an in camera conference with the child, which was limited to determining the child’s preference and excluded discussion of other factors not germane to the custody dispute, the judge appropriately protected the child from the trauma of choosing between her two parents in open court.”).
tected parents’ due process rights. Otherwise, the court reasoned, such cases would essentially be tried in chambers on the presumption that the judge had sufficient expertise to determine the reliability of the child’s testimony.

The requirement that in camera interviews be recorded and made available to counsel was overturned by the Michigan Supreme Court in *Molloy II*. Some scholars have criticized the *Molloy II* decision, arguing that it leaves no way to accurately determine what was discussed in chambers. *Molloy II* required judges to keep some sort of record of the interview and to refrain from citing the child’s discussion of other topics in their own dialogue concerning the case. However, the Michigan Supreme Court did not provide any advice on how judges should go about verifying and weighing the information offered by the child.

C. What Is the Permissible Scope of an In Camera Interview?

Michigan case and statutory law advises that information obtained during in camera interviews can only be applied to the reasonable preference factor. Nevertheless, trial courts must take testimony in open court on issues of abuse or mistreatment in order to protect parents’ due process rights if a child discusses either of these events in camera. Conversely,

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22. *Molloy v. Molloy*, 637 N.W.2d 803, 804–05 (Mich. Ct. App. 2001) (“Thus, we are further compelled to mandate that in the future all in camera interviews with children in custody cases be recorded and sealed for appellate review.”).

23. *Molloy v. Molloy*, 643 N.W.2d 574 (Mich. 2002). Compare Packard v. Bickle, Nos. 262530, 264561, 2006 WL 2576754 (Mich. Ct. App. Sept. 7, 2006) (holding that it was not error for the trial court to speak with the child, without recording the session, to address the child’s preference, in light of the allegations of verbal abuse and the child’s fear of his father); *German v. German*, No. 292244, 2010 WL 99270 (Mich. Ct. App. Jan. 12, 2010) (holding that the trial court could properly conduct interviews and then keep the preferences expressed by the children itself); with *Couch v. Couch*, 146 S.W.3d 923, 925 (Ky. 2004) (“If a trial court accepts and acts upon statements made by the child during the in camera interview, it is manifestly unfair not to record and disclose the contents of the interview in order to provide an opportunity for rebuttal.”); *KES v. CAT*, 107 P.3d 779 (Wyo. 2005) (holding that no in camera interviews with children should be conducted over a parent’s objection because successive interviews deprive the parent of the right to cross-examine the witness).


25. It should be noted that some judges in their survey responses indicated that if a child in an interview disclosed information relevant to other custody factors, he or she is required to disclose the statement and give the other side an opportunity to present evidence; thus, judges prefer not to discuss extraneous matters with children in order to refrain from having to discuss this information and potentially misleading other parties.

26. See BROCK & SAKS, CONTEMPORARY ISSUES, supra note 24, at 128.


28. *Id.* at 812–13 (“[A]lthough courts should seek to avoid subjecting children to the distress and trauma resulting from testifying and being cross-examined in court, concerns over the child’s welfare are outweighed when balanced against a parent’s due process rights.”).
Michigan courts have also stated that “the interview should not take place in a vacuum,” and “inquiry must be made in order to test the authenticity, the motives, and the consistency of the preference. Often, a strong *in camera* interview will result in information that affects other child custody factors.”

In *Solomon v. Moore*, the child expressed unhappiness in defendant father’s custody and wanted to live with her plaintiff mother and brothers. The court recognized that this was “precisely the type of custody preference that the *in camera* interview intends to elicit.” Problematically, however, the child also went on to reveal other information about the defendant father, including his sexual behavior toward his live-in girlfriend. The defendant on appeal argued that the use of this information had little bearing on the child’s parental preference under subsection (i) and should have been excluded. The court of appeals, however, stated that the trial court did not commit error because it never relied on this information in making a custody determination. “Therefore, it does not appear that the circuit court conducted secret *in camera* questioning of the children that it then utilized in evaluating factors beyond the children’s preferences.”

The Michigan Court of Appeals in *Modreske v. Modreske* recognized that there is some natural overlap between a child’s stated preference and the emotional ties to a parent. Thus, when evaluating a child’s preferences, judges often consider one parent’s influence on the child’s relationship with the other parent when evaluating the emotional ties between the child and each of her parents.

Although Michigan case law does contain some strict rules when it comes to ascertaining a child’s preference *in camera*, the courts seem to allow flexibility based on the circumstances of each case. Furthermore, cases discussing the proper processes and scope of *in camera* interviews are heard rather infrequently in Michigan. Thus, in order to get a better understanding of how the *in camera* interview process works in Michigan, other sources of information must be examined.

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30. *Id.*
31. *Id.* The defendant also alleged on appeal that the court improperly used information gained in an *in camera* interview concerning the defendant’s striking of the children. The court of appeals held that the plaintiff’s mother’s testimony suggested that defendant sometimes hit the children and the record contained ample evidence that defendant’s mother primarily cared for the children while the defendant worked two jobs.
III. The Michigan Judicial Survey

The absence of legislative direction in Michigan leaves judges with wide latitude to independently make difficult determinations in ascertaining children’s custody preferences. Judges ultimately decide whether to interview a child, how to frame the questioning, whether to make a recording, and to whom to disclose the recording, if at all. In light of this broad discretion, a survey seemed particularly helpful to establish the assortment of judicial practices and the rationale accompanying these choices.

Questionnaires were sent to 100 Michigan circuit court judges, a majority of whom handled cases in the family division. At least one judge in each of Michigan’s fifty-seven circuits received a survey. A total of fifty-one judges responded. Thirty-four were male, and seventeen were female. Interestingly, a comparison of the survey responses revealed no significant differences in responses between the male and female judges. The judicial experience of the respondent judges ranged from two years to almost twenty years since being elected to the bench. As with gender, there were no noteworthy differences in comparing the answers of respondents by years of experience. In the forty fully completed surveys, judges responded to a series of questions about their practices and strategies in assessing children’s wishes in child custody adjudication. Overall, the Michigan judges expressed a devotion to giving children a voice in custody disputes. Individual judges, however, disagreed on the best methods of ascertaining these preferences as well as what other underlying factors need to be considered in properly weighing the child’s response. Moreover, a number of judges indicated that the lack of financial and personnel resources in the Michigan Family Division posed an obstacle to their ability to interview children. Especially in regard to the amount of time these judges can spend interviewing children and the quality of information they can gather in order to ascertain the rationale behind a child’s preference.

A. Weight Given to a Child’s Preference

The survey posed a series of questions asking judges to rate the significance of a child’s preference based on his or her chronological age. Consistent with the findings from similar surveys completed in other

33. Ten judges sent replies stating that they no longer handled child custody cases.
34. See, e.g., Appendix I, Tables 4 & 5 (demonstrating a large percentage of judges who do not employ guardians ad litem, children’s attorneys, and other court personnel in determining a child’s custody preference).
35. See Appendix I, Table 1.
states, Table 1 in Appendix A shows that 74.36% of respondents reported that they consider the preferences of teenagers to be “very” or “extremely” significant, while 30% would ascribe that same weight to the views of children aged eleven to thirteen. Not surprisingly, 97.37% of judges stated that the preferences of young children (infancy to age two) would be “of no significance whatsoever.” Judges similarly attributed little to no weight to the preferences of children age three to five, with 81.08% of judges not giving any weight to these children’s preferences. Within the remaining age categories, there was wide variance given to children’s preferences, but generally more weight was given to older children.

The child’s age generally correlates with the significance judges ascribe to the child’s views. Several studies have suggested that judicial deference to older children’s preferences results from the apparent psychological maturity and awareness “of the practical difficulties in forcing an adolescent to live with a parent against her choosing.” Several Michigan judges have additionally commented on their hesitancy to give greater weight to the preferences of younger children due to their impressionability and ability to be manipulated by their parents. Older children, judges argue, are better able to separate out extraneous pressures when discussing their custody preferences.

B. Additional Factors Affecting the Weight Given to a Child’s Preference

The survey responses indicate that Michigan judges are greatly influenced by individualized impressions of the child’s circumstances and outside influences, in deciding how much weight to give the child’s wishes. Rather surprisingly, however, judges reported that they are more influenced by the child’s chronological age than by the child’s psychological maturity; 66.67% of judges stated that a child’s age was “very” or “extremely” significant, as opposed to the 60% of judges who found a

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36. Empirical studies of judicial practices from other states have consistently indicated that judges are more likely to give greater weight to the wishes of teenage children than of a younger child. See, e.g., Atwood, The Child’s Voice, supra note 2 (indicating that 95.8% of Arizona judges viewed the preferences of children who were between fourteen and seventeen as significant, as opposed to the 44.6% who found the wishes of children between ages six and ten to be significant).

37. See Appendix I, Table 1.

38. Id. (noting that 28.94% of judges consider the opinions of children between the ages of six and ten “significant” or “very significant” as opposed to the 82.5% of judges that considered the opinions of children between ages eleven and thirteen “significant” or “very significant.”).


40. See Appendix I, Table 2.
child’s psychological maturity to be “very” or “extremely” significant.\textsuperscript{41} Furthermore, respondents appear to be more affected by the apparent emotional health of the child, than by the perceived intensity of the child’s preferences.\textsuperscript{42} This finding begs two important questions. First, whether the wishes of a child who earnestly wants to remain with a specific parent will be honored. Second, whether judges note that despite the intensity of a child’s preference, a child may not be able to properly separate his or her own preference from outside influences and emotions. This inquiry is further supported by the 62.16% of Michigan judges who weigh as “very” or “extremely” significant the additional reasons behind a child’s preference.

Seventy-five percent of respondents gave a child’s preference the same weight in a modification proceeding as in the original custody proceeding; only 17.5% of judges gave the preferences more weight in a modification proceeding.\textsuperscript{43} This seems a bit odd considering that a child’s preference in a modification proceeding will most likely be based on actual experience within a decreed custody arrangement, as opposed to the original litigation before the custody arrangement has been enacted.\textsuperscript{44}

**C. Dynamics Underlying a Child’s Preference**

The survey importantly demonstrates that Michigan judges were extremely interested in understanding the various dynamics that played a role in a child’s custody preference. The survey attempted to uncover some of these underpinnings by utilizing a series of descriptions about why a child might desire a particular custody arrangement. As reported in Table 3 in Appendix I, more than 84% of respondents agreed with three descriptions of children’s preferences: that most children prefer a custodial arrangement that poses the least disruption to their continuity with home, school, and friends;\textsuperscript{45} that most children prefer to be in the phys-
cal custody of the parent with whom they have the closer emotional bond; and that most children prefer a custodial arrangement that allows them to avoid direct contact with an abusive parent.

Interestingly, about half of respondents felt as though a child’s custody preference was oftentimes based on sympathy for a parent, which in turn might explain why judges were more inclined to value the emotional health of the child over the intensity of the preference. At the same time, the responses suggest that most judges believe children have legitimate reasons for their custodial preferences.

D. Judicial Methods of Ascertaining a Child’s Preference

Table 4 demonstrates that a majority of Michigan judges never allow children to testify as to their preferences in open court. Interestingly, the in camera interview was the most significant method by which Michigan judges determined children’s preferences. Almost 54% of respondents revealed that they “almost always” interviewed children in camera, in contrast to the 5.13% that only used this technique “occasionally.” This particular survey result varies incredibly from the findings in surveys conducted in other states. Michigan also diverges sharply from other states with respect to how often judges utilize GALs, children’s attorneys, mental health experts, and other court personnel in discovering children’s preferences. For example, in Michigan, 39.47% of judges “never” utilize GALs, and 29.73% “never” employ the assistance of additional court personnel. In contrast, a slight majority of judges in Arizona “regularly” use evaluations by court personnel and GALs.

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46. Id. 84.6% of respondents agreed that most children prefer to be in the physical custody of the parent with whom they have the closer emotional bond.

47. Id. 84.4% of respondents agreed that most children prefer a custodial arrangement that allows them to avoid direct contact with an abusive parent.

48. Id. 51.28% of respondents agreed that children base their custody preferences out of sympathy for a parent.

49. Appendix I, Table 4. 75.68% of respondents stated that they never make children testify as to their preferences in open court, whereas 24.32% noted that this occasionally happens.

50. Id. Additionally, 23% of judges replied that they conducted in camera interviews “very often,” and 17.95% used this technique “regularly.”

51. For example, a similar survey was conducted in Arizona. See Atwood, The Child’s Voice, supra note 2, at 636. The results revealed that in camera interviews were the least preferred methods of ascertaining a child’s custody preference. Id. In fact, over a quarter of the Arizona respondents reported that they “never” conducted in camera interviews. Id. at Appendix I, Table 4 (25.0% never conduct in camera interviews). In Michigan, 0% of judges reported that they “never” conducted in camera interviews. Appendix I, Table 4.

52. Id.

53. See Atwood, The Child’s Voice in Custody Litigation, supra note 2, at Appendix I, Table 4 (2003) (53% use court personnel regularly or more often and 42% use guardians ad litem regularly or more often).
This disparity between Michigan and other states in the utilization of resources other than in camera interviews is further demonstrated in Table 5, which examines factors influencing a judge’s likelihood of using techniques beyond in camera interviews in custody disputes. Between 21% and 61% of judges never used GALs and attorneys for children in a variety of circumstances, including requests for their uses by parties, high degrees of conflict, and allegations of child abuse. Over a quarter of survey respondents left comments in the margins of returned surveys indicating that they would appoint GALs and children’s attorneys with great frequency if their circuit had the resources to fund these individuals.

E. Methods Employed in In Camera Interviews

There is a consensus among respondents that parties’ attorneys are never permitted to attend an in camera interview. Judges showed more of an inclination to electronically record the interview, but not allow individuals involved in the proceedings to be present, unless they were a court reporter or a FOC employee with whom the child was familiar. Interestingly, some judges left notes stating that they allowed a female staff member to be present at the interview in the hopes that it would make a child feel more at ease and less intimidated by the judge’s presence. Furthermore, for those judges that do create a record of the interview, over 91% of judges “never” make a child’s in camera interview available to the contesting parties; 27.7% of judges “always” seal the record and make it available on appeal, whereas 60.6% “never” make the record available on appeal, even if no one else is privy to the information.

Additionally, judges differed in how they approach the in camera interview. The frequency with which judges directly asked children their preferences regarding custody varied greatly among respondents. About 17% of judges stated that they “never” ask direct questions regarding children’s preferences, whereas 29% revealed that they “almost always” do. The remaining 54% range from asking direct questions “occasionally” to

54. Appendix I, Table 5.
55. For example, one judge left a note stating that “[i]n Wayne County, there is little to no ability to pay for the appointment of guardians or lawyers for children; if the funds were available, I would appoint these individuals with frequency.” Another judge was concerned that the survey results would be skewed on this particular issue because many of her colleagues lacked resources beyond the in camera interview in order to ascertain children’s preferences.
56. Appendix I, Table 6 (revealing that 100% of respondents do not permit attorneys in in camera interviews and do not require court reporters).
57. Appendix I, Table 6 (20.52% of judges “almost always” require electronic recording, but do not permit other persons to attend; 28.95% of judges do not permit other persons to attend and do not allow recordings).
58. Id.
“very often.” A vast majority (84.84%) of respondents reported that they “regularly” tell the child that the interview will remain confidential. In contrast, less than 10% tell children that their responses will be shared with others.\(^{59}\)

**F. Judicial Views on the Strengths and Weaknesses of In Camera Interviews**

The survey also examined the competing interests at stake in ascertaining children’s views through the *in camera* interview. Table 7 reflects the wide variance of opinion among respondent judges about the strengths and weaknesses of these interviews.\(^{60}\) Not only do a majority of Michigan judges employ the *in camera* interview in custody proceedings, but 78% of judges utilizing this technique feel as though children’s expressed preferences are vital forms of evidence that must be considered, and 73.69% feel as though children have a right to be heard.\(^{61}\) Furthermore, about two-thirds of respondents agreed that judges can acquire a better understanding of the child and the parties through an *in camera* interview, which may in turn help them in analyzing other aspects of the custody case.\(^{62}\) Nearly half (48.65%) of judges disagreed that a child’s expressed preference was unreliable due to manipulation by a parent, whereas only 18.9% felt as though preferences were indeed unreliable.\(^{63}\)

Despite the importance that children’s voices play in custody proceedings, eighty-two percent of respondents expressed concern that children may suffer emotionally long after the custody dispute is resolved if they must choose a parent. Judges were also split on the issue of whether they lacked the necessary training to effectively determine a child’s preference,\(^{64}\) as well as whether *in camera* interviews might lead parents to settle more readily in a custody dispute.\(^{65}\)

In summary, survey responses revealed a remarkable difference not only in judicial opinions in Michigan, but also when compared to the values held by judges in other states.\(^{66}\) Judges have expressed their desire to

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59. *Id.*
60. Appendix I, Table 7.
61. *Id.*
62. A child’s stated preference is but one of twelve factors that Michigan judges are required to analyze in a custody dispute. MICH. COMP. LAWS § 722.23.
63. *Id.*
64. *Id.* 54.06% of respondents disagreed with the statement that judges lacked necessary training, whereas 35.14% agreed.
65. *Id.* 34.21% disagreed that parties might settle more readily, whereas 34.21% believed that they would.
66. In addition to the divergent responses found in Appendix I, Appendix II also reveals the variety of solutions judges posited to problems they saw within the Michigan Family Division’s handling of custody cases. See Appendix II.
give a voice to children in custody disputes, but vary on the methods by which to attain these preferences and, consequently, the weight these opinions should be given. Furthermore, although this survey focuses more on the children’s and judges’ roles in custody litigation, there is also some concern for the rights of parents. If a minority of judges make a record of the in camera interview and even less make this record available to the parties,\(^\text{67}\) there are some procedural due-process risks. Only 27% of judges recognized procedural due-process risks stemming from in camera interviews; 60% did not find this to be an issue.\(^\text{68}\) Thus, there seems to be the view that the need for confidentiality to protect the child outweighs the procedural rights of the litigants.

IV. Making a Change: Suggestions for Reform

Michigan judges in the family division not only face the tiresome task of sitting behind the bench in emotionally heated trials, but also often are required to step into the roles of mediator and counselor between the feuding parties and children caught in the middle. As a result, many respondent judges expressed frustration with the current adversarial process in resolving child custody disputes and have expressed the opinion that other resources might provide better resolutions.\(^\text{69}\) Nevertheless, courts at a minimum should consider the child’s views if the child is capable of making views known and wants to make them known.\(^\text{70}\)

A. Are In Camera Interviews the Best Method of Ascertaining Preferences?

While over 73% of Michigan judges believe that children’s “voices” should be “heard” by the court in some way, there is no consensus on how, when, and whether judges feel qualified to do so by meeting with the children themselves. Although the use of an in camera interview is discretionary,\(^\text{71}\) an astounding number of judges in Michigan use it.\(^\text{72}\) Despite its prevalence, there are some concerns with using an in camera interview as the sole method to give children a voice in custody litigation. There may be other models of ascertaining a child’s preference that can provide better results.

\(^{67}\) See Appendix I, Table 6.

\(^{68}\) See Appendix I, Table 7.

\(^{69}\) See Appendix II (demonstrating that many judges would like to see a more extensive mediation process adopted in custody disputes before parties ever get into the courtroom).

\(^{70}\) Interestingly, a majority of respondents in the Michigan survey agreed with the proposition that children have a right to be heard in custody litigation. See Appendix I, Table 7 (73.69% of respondents believe that children have a right to be heard in custody litigation).

\(^{71}\) 24A AM. JUR. 2d Divorce and Separation § 965 (2002).

\(^{72}\) See Appendix, I, Table 4 (17.95% of judges “regularly” use in camera interviews,
The survey reveals that the average length of an *in camera* interview is nineteen-and-a-half minutes.\(^{73}\) It seems fair to question whether a judge, in this short time, can not only ascertain a child’s preference, but also sift through the additional extraneous considerations that could underlie the preference.\(^{74}\) Additionally, scholars have questioned whether the formality of *in camera* interviews may, in fact, be intimidating to children and thereby inhibit judges from building the necessary rapport with them.\(^{75}\) Additionally, judges normally do not have a preexisting relationship with the child who is the subject of the interview. Judges throughout the country have expressed concern that the lack of a preexisting relationship prevents them from being able to adequately discern whether a child has been coached or unduly influenced by a party to the suit.\(^{76}\) Thus, although a judge might know what information is necessary in rendering a competent decision,\(^{77}\) he or she might not have sufficient background on the particular child to effectively communicate with the child.\(^{78}\)

Judges in Michigan, however, might be better suited to conduct *in camera* interviews as compared to their judicial colleagues in other states partly because Michigan is one of only a small number of states that has a separate family division of the circuit court.\(^{79}\) Thus, many of these judges generally have more experience in dealing with child custody cases as opposed to a judge who hears a wide variety of cases. Even so,
just because Michigan judges might have more experience handling custody cases does not mean that they should not look to available court and community resources to hone their skills in interviewing children and ascertaining children’s preferences so that more accurate and efficient results can be achieved.

B. Guardian ad Litem and Friend of the Court Personnel May Be Better Equipped to Ascertained a Child’s Preference

The right to be heard does not necessarily mean that the child must always communicate directly with the decision-maker in a custody case. Numerous judicial respondents in the Michigan survey preferred to receive information concerning the child’s preferences through means other than the in camera interview. Both scholars and judges have noted that oftentimes if a judge does not feel as though he has the requisite expertise to interview a child, the judge can delegate the task to a third party with more time or experience. In most states, there is not an absolute right to have a GAL appointed in a private custody dispute unless abuse or neglect is alleged. However, all courts have equitable power to appoint a GAL at their discretion.

Unlike the results of other judicial surveys conducted in other states, the results of the Michigan Survey reveal a dire circumstance existing in the state—the lack of funding to provide judges in the Family Division with sufficient resources to competently conduct custody hearings. Not only do the empirical results reveal a gross disparity in methods used to ascertain a child’s preference, but also judges themselves have earnestly requested more funding and training for additional court personnel to assist them in custody cases.

Additional court personnel, including GALs and FoC staff members, can be beneficial because these individuals can establish a rapport with the child over several meetings and may be able to develop a better understanding of the child’s circumstances apart from a twenty-minute meeting. Furthermore, as one respondent judge firmly stated, judges and FoC personnel should have more experience and training in the area of discerning whether or not a child’s opinion is truly his own and not the product of parental manipulation. Although judges may not have the time or resources

80. See Appendix II.
81. See Wright, Interviewing Children in Custody Cases, supra note 75, at 301 (2002) (stating that “[s]till the judge should have a general background in the area of child development in order for the questioning to be effective. The judge must know what to ask; how to ask them; and how to interpret the child’s answers.”)
82. See Appendix I, Table 4.
83. See Appendix II.
to have lengthy interviews with the children, more information on the child’s relationship with the parents could be extremely helpful. Furthermore, if GALs are employed in the custody dispute context, courts should explicitly enunciate whether these individuals will advocate for the child’s preference or his or her best interests.

C. Less-Adversarial Methods of Dispute Resolution Should Be Utilized More Often

Comments from many of the judges reveal that parties to a custody dispute should first make an effort to seek mediation or counseling before bringing their case before the court.84 About one-quarter of the states mandate mediation in custody disputes.85 If the couple is seeking to resolve their problems in a less-adversarial manner, the custody dispute may have less of a negative effect on the child in that he or she will not be pulled into the adversarial process. Children still may be required to participate in the mediation process and may be encouraged to share preferences in front of the feuding parents. Although this may be stressful for the child, it may be less traumatic than being interviewed by a judge or having to give testimony in a formal proceeding. Mediation, as an alternative to litigation, is still beneficial in that it ensures a child the opportunity to participate in an event that will have significant bearing on his or her life.

V. Conclusion

Michigan judges show a growing devotion to giving children voices in custody litigation. The child’s voice is incorporated in custody proceedings through a variety of methodologies, but most importantly the in camera interview. Although the lack of available funding in some jurisdictions appears to be frustrating to many judges with heavy dockets and often emotionally trying cases, many Michigan judges state that they are comfortable with their role in ascertaining the preferences of children. Nevertheless, judges should continue to utilize any available community resources, including guardians ad litem, mental health experts, attorneys and court personnel, in order to maximize both the accuracy and efficiency of the process and to make children feel comfortable during these trying times. Until Michigan courts receive more funding to employ additional personnel in the custody litigation process or a mandatory nonadversarial process is in place, courts should continue to create and perfect a dispute resolution structure that incorporates the child’s right to be heard.

84. See Appendix II.
### Appendix I

#### Table 1. Significance of Child’s Preference by Chronological Age

<table>
<thead>
<tr>
<th>Age Bracket</th>
<th>Not Significant</th>
<th>Possibly Significant</th>
<th>Significant</th>
<th>Very Significant</th>
<th>Extremely Significant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ages 0–2</td>
<td>97.37</td>
<td>2.63</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Ages 3–5</td>
<td>81.08</td>
<td>18.92</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Ages 6–10</td>
<td>13.16</td>
<td>57.89</td>
<td>23.68</td>
<td>5.26</td>
<td>—</td>
</tr>
<tr>
<td>Ages 11–13</td>
<td>—</td>
<td>17.50</td>
<td>52.50</td>
<td>25.00</td>
<td>5.00</td>
</tr>
<tr>
<td>Ages 14–17</td>
<td>7.69</td>
<td>17.95</td>
<td>43.59</td>
<td>30.77</td>
<td></td>
</tr>
</tbody>
</table>

---

1. Table 1 shows responses, in percentages, to the following question:

In adjudicating child custody disputes, how significant to you are children’s preferences within the following age brackets? In answering this question, assume you have found that the parties seeking custody are equally fit to exercise custody. Please use a 5-point scale, with 1 = of no significance whatsoever, 2 = possibly significant, 3 = significant, 4 = very significant, and 5 = extremely significant (i.e., the child’s preference is the presumptive custodial arrangement, absent a strong showing to the contrary).

A. Infancy to 2 years
B. 3 to 5 years (early childhood)
C. 6 to 10 years (elementary-school age)
D. 11 to 13 years (middle-school age)
E. 14 to 17 years (high-school age)
Table 2. Factors Affecting Weight to Be Given Child’s Preference

<table>
<thead>
<tr>
<th>Factor</th>
<th>Not Significant</th>
<th>Possibly Significant</th>
<th>Significant</th>
<th>Very Significant</th>
<th>Extremely Significant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child’s age</td>
<td>2.56</td>
<td>7.69</td>
<td>23.08</td>
<td>41.03</td>
<td>25.64</td>
</tr>
<tr>
<td>Child’s psychological &amp; cognitive maturity</td>
<td>2.63</td>
<td>5.26</td>
<td>31.58</td>
<td>34.21</td>
<td>26.32</td>
</tr>
<tr>
<td>Child’s apparent emotional health</td>
<td>2.7</td>
<td>8.1</td>
<td>40.54</td>
<td>32.43</td>
<td>16.22</td>
</tr>
<tr>
<td>Intensity of child’s preference</td>
<td>—</td>
<td>46.15</td>
<td>35.9</td>
<td>15.38</td>
<td>2.56</td>
</tr>
<tr>
<td>General impression of child’s relationship with parties</td>
<td>—</td>
<td>7.69</td>
<td>64.1</td>
<td>20.5</td>
<td>7.69</td>
</tr>
<tr>
<td>Reasons for child’s preference</td>
<td>—</td>
<td>5.4</td>
<td>32.43</td>
<td>45.95</td>
<td>16.21</td>
</tr>
<tr>
<td>Wishes of siblings</td>
<td>7.69</td>
<td>38.46</td>
<td>41</td>
<td>10.26</td>
<td>2.56</td>
</tr>
</tbody>
</table>

2. Table 2 shows responses, in percentages, to the following question:
A. In deciding on the weight to give a child’s wishes or preferences as to custody and visitation, how important to you are the following factors? In answering this question, assume you have found that the parties seeking custody are equally fit to exercise custody. Please use a 5-point scale, with 1 = of no significance whatsoever, 2 = possibly significant, 3 = significant, 4 = very significant, and 5 = extremely significant.
1. The age of the child
2. The psychological and cognitive maturity of the child
3. The apparent emotional health of the child
4. The apparent intensity of the child’s preference
5. Your general impression of the child’s relationship with each party
6. Your understanding of the reasons for the child’s preference
7. The wishes or preferences of siblings
B. In general, do you tend to give children’s wishes or preferences more weight, the same weight, or less weight when the proceeding is for a modification of custody as compared to a proceeding for an initial custody decree?
1. Less weight in modification proceeding than in original custody proceeding.
2. Same weight in modification proceeding as in original custody proceeding.
3. More weight in modification proceeding than in original custody proceeding.
### Table 3. Judges’ Perceptions of What Children Want

<table>
<thead>
<tr>
<th></th>
<th>Disagree Strongly</th>
<th>Disagree</th>
<th>No Opinion</th>
<th>Agree</th>
<th>Agree Strongly</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Custody with least disruption to daily life</td>
<td>—</td>
<td>—</td>
<td>7.69</td>
<td>71.8</td>
<td>20.5</td>
</tr>
<tr>
<td>B. Custody with parent with closer emotional bond</td>
<td>—</td>
<td>2.56</td>
<td>12.82</td>
<td>71.79</td>
<td>12.82</td>
</tr>
<tr>
<td>C. Custody with more freedom and less discipline</td>
<td>2.56</td>
<td>48.72</td>
<td>28.2</td>
<td>20.51</td>
<td>—</td>
</tr>
<tr>
<td>D. Custody to avoid contact with parent’s new partner</td>
<td>2.56</td>
<td>28.21</td>
<td>38.46</td>
<td>28.21</td>
<td>2.56</td>
</tr>
<tr>
<td>E. Custody to avoid contact with abusive parent</td>
<td>—</td>
<td>7.69</td>
<td>7.69</td>
<td>53.58</td>
<td>30.77</td>
</tr>
<tr>
<td>F. Custody choice out of sympathy for parent</td>
<td>—</td>
<td>23.08</td>
<td>25.64</td>
<td>46.15</td>
<td>5.13</td>
</tr>
</tbody>
</table>

3. Table 3 shows responses, in percentages, to the following question:
   Indicate your agreement or disagreement with the following statements about children’s preferences in custody litigation. Please use a 5-point scale, with 1 = disagree strongly; 2 = disagree, 3 = no opinion, 4 = agree, and 5 = agree strongly.

   A. Most children prefer a custodial arrangement that poses the least disruption to their continuity with home, school, and friends.
   B. Most children prefer to be in the physical custody of the parent with whom they have the closer emotional bond.
   C. Most children prefer a custodial arrangement that offers them more freedom and less discipline.
   D. Children often prefer a custodial arrangement that will allow them to avoid contact with a parent’s new partner.
   E. Children often prefer a custodial arrangement that will allow them to avoid contact with an abusive parent.
   F. Children often express a preference in custody litigation that is based on sympathy for a parent or care-giver.
Table 4. Methods of Ascertaining Children’s Preferences

<table>
<thead>
<tr>
<th>Method</th>
<th>Never</th>
<th>Occasionally</th>
<th>Regularly</th>
<th>Very Often</th>
<th>Almost Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open court</td>
<td>75.68</td>
<td>24.32</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>In camera</td>
<td>-</td>
<td>5.13</td>
<td>17.95</td>
<td>23.07</td>
<td>53.85</td>
</tr>
<tr>
<td>Parties’ testimony</td>
<td>33.33</td>
<td>30.55</td>
<td>11.11</td>
<td>19.44</td>
<td>5.56</td>
</tr>
<tr>
<td>GAL</td>
<td>39.47</td>
<td>42.11</td>
<td>5.26</td>
<td>7.89</td>
<td>5.26</td>
</tr>
<tr>
<td>Child’s attorney</td>
<td>68.42</td>
<td>24.32</td>
<td>2.7</td>
<td>---</td>
<td>2.7</td>
</tr>
<tr>
<td>Mental health expert</td>
<td>7.69</td>
<td>76.92</td>
<td>7.69</td>
<td>7.69</td>
<td>---</td>
</tr>
<tr>
<td>Court personnel</td>
<td>29.73</td>
<td>29.73</td>
<td>18.92</td>
<td>18.92</td>
<td>2.7</td>
</tr>
</tbody>
</table>

4. Table 4 shows responses, in percentages, to the following question:
Which of the following methods, if any, do you use in ascertaining a child’s wishes or preferences as to custody? Please indicate if your answer varies according to the age of the child. Please use a 5-point scale, with 1 = never, 2 = occasionally (about 25% of the time), 3 = regularly (about 50% of the time), 4 = very often (about 75% of the time), and 5 = always or almost always.

A. Testimony by child in open court, subject to cross-examination.
B. In camera interview of child.
C. Testimony by parties.
D. Report from guardian ad litem (GAL).
E. Submission from child’s attorney.
F. Testimony by mental health expert.
G. Evaluation by court personnel.
## Table 5. Factors Influencing Likelihood of Judges’ Interviewing Child, Ordering Custody Evaluation, Appointing GAL, or Appointing Attorney for Child

<table>
<thead>
<tr>
<th>A. Judicial Interview of Child</th>
<th>Never</th>
<th>Occasionally</th>
<th>Regularly</th>
<th>Very Often</th>
<th>Almost Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Request by party</td>
<td>2.78</td>
<td>16.67</td>
<td>13.89</td>
<td>22.22</td>
<td>44.44</td>
</tr>
<tr>
<td>2. Agreement by parties</td>
<td>—</td>
<td>5.56</td>
<td>11.11</td>
<td>11.11</td>
<td>72.22</td>
</tr>
<tr>
<td>3. High degree of conflict</td>
<td>—</td>
<td>20</td>
<td>25.72</td>
<td>31.43</td>
<td>25.71</td>
</tr>
<tr>
<td>5. Allegation of domestic violence</td>
<td>8.57</td>
<td>17.14</td>
<td>25.71</td>
<td>17.14</td>
<td>31.43</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B. Custody Evaluation</th>
<th>Never</th>
<th>Occasionally</th>
<th>Regularly</th>
<th>Very Often</th>
<th>Almost Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Request by party</td>
<td>5.56</td>
<td>25</td>
<td>19.44</td>
<td>27.78</td>
<td>22.22</td>
</tr>
<tr>
<td>2. Agreement by parties</td>
<td>—</td>
<td>5.56</td>
<td>13.89</td>
<td>27.78</td>
<td>52.78</td>
</tr>
<tr>
<td>3. High degree of conflict</td>
<td>2.86</td>
<td>8.57</td>
<td>28.57</td>
<td>37.14</td>
<td>22.86</td>
</tr>
<tr>
<td>4. Allegation of child abuse</td>
<td>2.86</td>
<td>11.43</td>
<td>31.43</td>
<td>22.86</td>
<td>31.43</td>
</tr>
<tr>
<td>5. Allegation of domestic violence</td>
<td>2.78</td>
<td>19.45</td>
<td>27.78</td>
<td>22.22</td>
<td>27.78</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>C. Guardian Ad Litem</th>
<th>Never</th>
<th>Occasionally</th>
<th>Regularly</th>
<th>Very Often</th>
<th>Almost Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Request by party</td>
<td>33.33</td>
<td>27.78</td>
<td>16.67</td>
<td>19.44</td>
<td>2.78</td>
</tr>
<tr>
<td>2. Agreement by parties</td>
<td>20.59</td>
<td>23.53</td>
<td>8.82</td>
<td>20.59</td>
<td>26.47</td>
</tr>
<tr>
<td>3. High degree of conflict</td>
<td>25.71</td>
<td>45.71</td>
<td>11.43</td>
<td>17.14</td>
<td>—</td>
</tr>
<tr>
<td>4. Allegation of child abuse</td>
<td>30.3</td>
<td>45.45</td>
<td>12.12</td>
<td>9.09</td>
<td>3.03</td>
</tr>
<tr>
<td>5. Allegation of domestic violence</td>
<td>31.43</td>
<td>40</td>
<td>20</td>
<td>5.71</td>
<td>2.86</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>D. Attorney for Child</th>
<th>Never</th>
<th>Occasionally</th>
<th>Regularly</th>
<th>Very Often</th>
<th>Almost Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Request by party</td>
<td>60.6</td>
<td>24.24</td>
<td>6.06</td>
<td>9.09</td>
<td>—</td>
</tr>
<tr>
<td>2. Agreement by parties</td>
<td>40.63</td>
<td>28.13</td>
<td>12.5</td>
<td>12.5</td>
<td>6.25</td>
</tr>
<tr>
<td>3. High degree of conflict</td>
<td>51.51</td>
<td>33.3</td>
<td>9.09</td>
<td>6.06</td>
<td>—</td>
</tr>
<tr>
<td>4. Allegation of child abuse</td>
<td>59.38</td>
<td>34.38</td>
<td>—</td>
<td>6.25</td>
<td>—</td>
</tr>
<tr>
<td>5. Allegation of domestic violence</td>
<td>60.6</td>
<td>33.33</td>
<td>3.03</td>
<td>3.03</td>
<td>—</td>
</tr>
</tbody>
</table>

---

5. Table 5 shows responses, in percentages, to the following question:
   Indicate the circumstances under which you would be likely to interview a child, order a custody evaluation, appoint a GAL, or appoint an attorney for the child. Please use a 5-point scale, with 1 = never, 2 = occasionally (about 25% of the time), 3 = regularly (about 50% of the time), 4 = very often (about 75% of the time), and 5 = always or almost always.

A. Judicial interview of child
1. When a party requests such an interview
2. When the parties agree to such an interview
3. When there is a high degree of conflict between the parties
4. When one party alleges child abuse by the other
5. When one party alleges domestic violence by the other
**B. Court-ordered custody evaluation**
1. When a party requests an evaluation
2. When the parties agree to an evaluation
3. When there is a high degree of conflict between the parties
4. When one party alleges child abuse by the other
5. When one party alleges domestic violence by the other

**C. Appointment of guardian ad litem**
1. When a party requests that a GAL be appointed
2. When the parties agree to such an appointment
3. When there is a high degree of conflict between the parties
4. When one party alleges child abuse by the other
5. When one party alleges domestic violence by the other

**D. Appointment of attorney for child**
1. When a party requests that counsel be appointed for the child
2. When the parties agree to such an appointment
3. When there is a high degree of conflict between the parties
4. When one party alleges child abuse by the other
5. When one party alleges domestic violence by the other
### Table 6. Methods Employed During In Camera Interviews

<table>
<thead>
<tr>
<th>Method</th>
<th>Never</th>
<th>Occasionally</th>
<th>Regularly</th>
<th>Very Often</th>
<th>Almost Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. I permit attorneys and require court reporter</td>
<td>100</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>2. I permit attorneys but do not allow recording</td>
<td>97.22</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>2.78</td>
</tr>
<tr>
<td>3. I require court reporter but do not permit attorneys to attend</td>
<td>75.68</td>
<td>8.12</td>
<td>—</td>
<td>—</td>
<td>16.23</td>
</tr>
<tr>
<td>4. I require electronic recording but do not permit other persons to attend</td>
<td>69.23</td>
<td>7.69</td>
<td>2.56</td>
<td>—</td>
<td>20.52</td>
</tr>
<tr>
<td>5. I do not permit other persons to attend and do not allow recording</td>
<td>55.26</td>
<td>7.89</td>
<td>—</td>
<td>7.89</td>
<td>28.95</td>
</tr>
<tr>
<td>6. I ask children directly for preferences</td>
<td>16.67</td>
<td>17.95</td>
<td>23.08</td>
<td>15.39</td>
<td>28.95</td>
</tr>
<tr>
<td>7. I ask indirect questions to reveal preferences</td>
<td>8.11</td>
<td>8.11</td>
<td>16.22</td>
<td>35.14</td>
<td>32.43</td>
</tr>
<tr>
<td>8. I question children to reveal quality of relationships</td>
<td>43.24</td>
<td>29.73</td>
<td>5.41</td>
<td>10.81</td>
<td>10.81</td>
</tr>
<tr>
<td>9. I explain that preferences are not binding</td>
<td>7.69</td>
<td>5.13</td>
<td>2.56</td>
<td>10.26</td>
<td>74.36</td>
</tr>
<tr>
<td>10. I explain that child’s statements are confidential</td>
<td>7.9</td>
<td>7.9</td>
<td>2.63</td>
<td>13.16</td>
<td>68.42</td>
</tr>
<tr>
<td>11. I explain that child’s statements are shared</td>
<td>75.68</td>
<td>16.22</td>
<td>5.4</td>
<td>1.49</td>
<td>2.7</td>
</tr>
<tr>
<td>12. I make record available to parties</td>
<td>91.89</td>
<td>2.7</td>
<td>2.7</td>
<td>—</td>
<td>2.7</td>
</tr>
<tr>
<td>13. I seal record and make available only if appeal</td>
<td>60.6</td>
<td>6.06</td>
<td>3.03</td>
<td>3.03</td>
<td>27.27</td>
</tr>
<tr>
<td>14. Estimate of time spent in interview</td>
<td>Median Time: 19.54 Minutes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

6. Table 6 shows responses, in percentages, to the following question:
   In those cases in which you do interview children, which of the following techniques or procedures do you follow? Please use a 5-point scale, with 1 = never, 2 = occasionally
(about 25% of the interviews), 3 = regularly (about 50% of the interviews), 4 = very often (about 75% of the interviews), and 5 = all or almost all judicial interviews.

A. I permit attorneys to be present during the interview, and I require that the interview be transcribed
B. I permit attorneys to be present during the interview, but I do not allow any stenographic or electronic recording.
C. I do not permit attorneys to be present during the interview, but I do require that the interview be transcribed by a court reporter.
D. I do not permit any other persons to be present during the interview, but I do require that the interview be recorded electronically.
E. I do not permit any other persons to be present during the interview, and I do not allow any recording to be made of the interview.
F. During the interview, I ask children directly for their preferences as to custody and parenting time.
G. During the interview, I avoid direct questions, but I ask children indirect questions that will reveal their preferences as to custody and parenting time.
H. During the interview, I ask children questions that will reveal the quality of their relationship with each parent or care-giver, but I do not try to ascertain their preferences.
I. During the interview, I explain to children that their stated preferences are important but are not binding on me as the decision maker.
J. During the interview, I explain to children that what they tell me will remain confidential.
K. During the interview, I explain to children that what they tell me will be shared with others.
L. I make available to the parties a record of the interview.
M. I seal the record of the interview and make it available only in the event of an appeal.
N. My interviews with children generally last about ________ (Please state in minutes.)
Table 7. Judicial Views About In Camera Interview

<table>
<thead>
<tr>
<th>Statement</th>
<th>Disagree Strongly</th>
<th>Disagree</th>
<th>No Opinion</th>
<th>Agree</th>
<th>Agree Strongly</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Children benefit emotionally by expressing their preferences or wishes to the judge during custody litigation.</td>
<td></td>
<td>13.16</td>
<td>36.84</td>
<td>39.47</td>
<td>10.53</td>
</tr>
<tr>
<td>2. Parties may settle more readily if children’s preferences are communicated to the judge.</td>
<td>10.53</td>
<td>23.68</td>
<td>31.58</td>
<td>31.58</td>
<td>2.63</td>
</tr>
<tr>
<td>3. Children have a right to be heard during litigation affecting their interests.</td>
<td></td>
<td>18.42</td>
<td>7.9</td>
<td>60.53</td>
<td>13.16</td>
</tr>
<tr>
<td>4. The child’s expressed preference is important evidence in a judge’s determination of the child’s best interests.</td>
<td></td>
<td>11.11</td>
<td>11.11</td>
<td>66.67</td>
<td>11.11</td>
</tr>
<tr>
<td>5. By use of an in camera interview, the judge can acquire a better understanding of the child and parties.</td>
<td>2.63</td>
<td>10.53</td>
<td>15.79</td>
<td>50</td>
<td>21.05</td>
</tr>
<tr>
<td>6. Children’s expressed preferences are unreliable because children are subject to influence and manipulation by parents or care-givers.</td>
<td>2.7</td>
<td>48.65</td>
<td>29.73</td>
<td>18.91</td>
<td>—</td>
</tr>
<tr>
<td>7. Children may suffer emotionally if they feel that they must choose one parent or care-giver over another</td>
<td></td>
<td>7.9</td>
<td>10.53</td>
<td>65.79</td>
<td>15.79</td>
</tr>
<tr>
<td>8. Parties’ procedural due process rights are at risk if judges rely on unrecorded in camera interviews in resolving custody disputes.</td>
<td>8.11</td>
<td>45.95</td>
<td>10.8</td>
<td>35.14</td>
<td>—</td>
</tr>
</tbody>
</table>

7. Table 7 shows responses, in percentages, to the following question:
Indicate your agreement or disagreement with the following assessments of the judicial practice of interviewing children to ascertain their preferences during custody litigation. Please use a 5-point scale, with 1 = disagree strongly, 2 = disagree, 3 = no opinion, 4 = agree, and 5 = agree strongly.
A. Children may benefit emotionally by expressing their preferences or wishes to the judge during custody litigation.
B. Parties may settle more readily if children’s preferences are communicated to the judge.
C. Children have a right to be heard during litigation affecting their interests.
D. The child’s expressed preference is important evidence in a judge’s determination of the child’s best interests.
E. By use of an in camera interview, the judge can acquire a better understanding of the child and the parties.
F. Children’s expressed preferences are unreliable because children are subject to influence and manipulation by parents or care-givers.
G. Children may suffer emotionally if they feel that they must choose one parent or care-giver over another
H. Judges generally lack the necessary training to interview children and evaluate children’s statements.
I. Parties’ procedural due process rights are at risk if judges rely on unrecorded in camera interviews in resolving custody disputes.
Appendix II

Please identify two ways in which the procedural or substantive law of child custody dispute resolution could be improved.

1. (A) One issue we struggle with is the delay in making initial determinations in high-conflict cases because of heavy dockets and lack of hearing time.

2. (A) The legal community needs direction from therapists and teachers of these children. These folks have a good handle on what is happening in the end result of custody disputes. I would like to know their recommendations for the decisions we make.

3. (A) If possible, determine methods to make the process nonadversarial (e.g., mediation).

   (B) Eliminate the buzzwords “joint” and “physical” custody from the law. “Labels” oftentimes themselves lead to conflict. Just say “parenting time with each parent shall be. . .” and forget the labels.

4. (A) Reasonable preference should be reserved for high-school age children who are mature to make informed decisions and judges should not put the child in the middle of litigation. Adults should make adult decisions.

   (B) Parents should be required to meet, except in domestic violence cases, with a trained professional to formulate a parenting time plan early on in the case. While many counties choose to provide such services, this should be required before a motion is heard.

5. (A) Eliminate the entire concept of “physical custody.” I settle many cases by providing for joint legal custody and arriving at a parenting time plan for each parent. In that way, each party leaves with a sense that they have shared custody and no one is a loser. Of course, there are some cases where sole legal custody is appropriate.

   (B) More training for judges and FOC referees on mediating settlements.

6. (A) Reduction of “due process” based trials and move to a “conference trial” process. Most family court litigants/parents to day are proceeding in “pro per” without legal counsel.

7. (A) Eliminate requirements of an interview and have GALs make the recommendations.

8. (A) Eliminate no-fault divorce.

   (B) Require marriage and family counseling before a divorce is granted.

   (C) Early and extensive use of mediation.

9. (A) Use parenting coordinators to facilitate communication.
(B) Use GAL to get better understanding of the situation.

10. (A) Improved funding for GAL appointments for children and home visits in child custody disputes.

11. (A) Presumption that children will be shared equally with parents.
   (B) Better education available to parents of child’s needs.

12. (A) Parents start putting their children’s needs first.
   (B) Parents really listen to their kids about what is important to them and the difficulties they face when the parents separate.

13. (A) Statutory presumption of 50/50 legal and physical custody split between parents.

14. (A) Use of nonadversarial mediation and alternative dispute resolution.
   (B) More consistent FOC services, county to county.

15. (A) Adequate funding that would enable the court to more regularly appoint GALs in appropriate cases.
   (B) Adequate funding to permit court to order evaluations at little or no cost to litigants who lack financial means to pay.

16. (A) Require a psychological examination of child and parties in every contested custody dispute.
   (B) Have a GAL for the child in every contested custody dispute.

17. (A) Avoid the adversarial model of litigation.
   (B) Require facilitative mediation of most cases.

18. (A) I wish that the legislature (or appellate courts) would offer a more direct protocol which would clearly sanction in-chambers discussion with the child in this area (child’s motivations for offering a firm opinion on parental preferences), including difficult parenting time disputes, and also require the judge and FOC staff to have specific training in questioning and evaluating the responses of children in this regard.