HEARING A CHILD’S VOICE IN DIVORCE:
A JUDGE’S EXPERIENCE

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By

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Abstract

This dissertation’s goal was to describe the experiences of California Family Court judges incorporating the 2012 Elkin’s Task Force recommendations, specifically Family Code section 3042. These recommendations have the potential to give the children of divorce a voice in the process of determining their future timeshare with their parents. Semi-structured interviews were conducted with family court judges that delved into their personal decision making process on whether and how they chose to interview children, what the judges listened for, and how and if this information was used to decide on the child’s visitation and custody schedule. Through the study of the transcripts, themes presented that were studied for their applicability to answering the main research question: how judges discerned the need to include children in the decision making process of visitation schedules, and how they proceeded with the gathering of information from these children. The data collected was able to answer this question related to how judges choose to interact with minors in the family law courtrooms. The electronic version of this dissertation is available free at Ohiolink ETD Center, www.ohiolink.edu/etd.
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To judges, attorneys and mental health professionals – it is my sincere wish that the results of this study are helpful in your work. To parents undergoing divorce and contemplating involving their children directly in the process, my wish is that this will help to educate you on the process and the practicalities of such an action.
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Chapter I: Introduction

In accordance with the Elkins Family Law Task Force recommendation, Family Code section 3042, as of January 1, 2012, California Family Law courts must execute procedures for the direct and cross-examination of a child witness, when requested, irrespective of age. Plans must include guidelines or methods other than direct testimony for obtaining information from the child regarding child custody and visitation (California Family Courts, 2012). Due to the recent nature of this ruling there does not exist any literature on the impact of these recommendations.

This study has documented one county’s judicial officers’ experiences of implementing the Elkins Family Law Task Force (EFLTF) recommendations and the changes it has made in their information gathering process, how they came to choose that process, as well as the impact this has had on their child custody and visitation decisions. Because of the EFLTF recommendations, mental health professionals are now tasked with the duty of collecting information for the judges and preparing reports for them, which this may or may not be part of a child custody evaluation. There are opportunities for these experts to perform interviews of all the children in a family in order to gain a picture of their needs and wishes. Mental health experts benefit from knowing this process in order to aid families going through divorce and prepare them for court procedures. Judicial officers are in the unenviable position of having to balance the consideration of the results of the inquiry into the child’s preferences with the possible emotional risk to the child and the parties’ due process rights. Judicial officers must practice due diligence in choosing how to extract the information and then how to use it in their decision making process.
This study was significant in that it may aid judicial officers and mental health professionals by making them aware of how others in similar circumstances are actively gaining and using the information necessary in highly litigious divorce cases. It may help judges and mental health experts to see what methods have been used, and could possibly expose them to ideas on how to proceed with this challenging task. This study also considered how information is extracted and how it is used in the decision making process, as well as why a judicial officer may decide it is not in the best interest of the child to be exposed to the court process. The identified themes were factors that judicial officers and forensic mental health experts may use in the information gathering process.

Terms

There are several key terms that the layperson may not be familiar with that are commonly used in the Family Court System, pertaining to child custody and visitation issues. Legal custody designates the right and responsibility to make decisions relating to the health, education and welfare of the child or children by the adults identified. Often, a judge will award joint legal custody, which necessitates that both parents agree on these issues. When this is not the case, then sole legal custody is ordered, in which one parent, designated by the court, has the right to make major decisions about the child or children (Woody, 2000).

Physical custody, also known as timeshare, refers to the right and obligation of a parent to live with a child or children. Sole physical custody occurs when a child or children live primarily with one parent and may have visitation parenting time with the other. Joint physical custody refers to the arrangement in which a child or children spend a significant amount of time with both parents, typically an equal amount of time.
Visitation, also known as parenting time, or parenting schedule, is the agreed upon or court ordered schedule of time with each parent. This may also be used for parents who are denied physical custody of their child or children and only have supervised visitation. This involves the inclusion of a third party, possibly a professional monitor, to supervise visits with the non-custodial party. These situations may arise in cases of abuse or neglect (Stahl, 1994).

Legal terms that are mentioned include expert witness, defined as a witness who has knowledge not normally possessed by the average person concerning the topic that he or she is to testify about (e.g., a child custody evaluator). The term testimony refers to the statement or declaration of a witness under oath or affirmation, usually in court (Ackerman, 2001).

Specific to this study is the reference to the term case study. This is a qualitative method to gather information specific to the topic at hand, examined in depth, and limited by time and the specific event or topic being studied (Creswell, 2009). The use of feminist theory is defined as putting gender and power at the core of the therapeutic process. It is based on the premise that it is essential to consider the social and cultural context that contributes to a person’s problems in order to understand that person (Sullivan, 1989). The term advocacy/participatory worldview is used in reference to a philosophy that guides the exploration of information that involves an agenda for change to a segment of society. Issues of empowerment and changing processes have been addressed. Recommendations often follow in the case of a study following this worldview. (Creswell, 2009)
Author’s Role and Rationale

My role has been to responsibly and accurately record the information given by the participants. I have stated preexisting beliefs, assumptions and perceptions. In order to explain these preexisting precepts, it is helpful to divulge to the reader my exposure to the family law court system. My understanding of the judicial system’s role in the divorce process comes from a personally experienced high conflict divorce that involved the custody of a minor child. I am an advocate for change in the judicial system and support the Elkins Family Law Task Force recommendations that allow an outside expert to interview and discuss with the child the changes to their family that will be the result of the divorce. This outside expert explains to the child what the different permutations of visitations schedules actually mean, allowing children a say in how they envision their future, and giving them an opportunity to ponder that future and express how they feel about the entire situation. I would promote having judicial officers who are educated on the developmental stages of children and what their needs are on a psychosocial scale. This may enable and support these officers of the court to make educated and sensitive judgments for children who need an opportunity to be empowered through the divorce process that has irrevocably changed their lives. I would promote the use of mental health professionals as important instruments who can be utilized by the courts and by families to seek equal consideration of all family members. My theoretical perspective is that of feminist theory, interested in addressing the injustice of children involved in the divorce process.
Chapter II: Literature Review

The review of the literature includes relevant issues to the proposal at hand. Of interest is the history of child custody in the United States, where the courts have formerly placed an emphasis, the long road it has taken, and the judge’s role in the proceedings. The present emphasis on the empowerment of the children called for more information to be provided on the basics of feminist theory, and the appropriate application to this case study. The existing literature has been investigated to see how the system had attempted to include children’s active participation in past legal actions.

Information on the supportive role of mental health professionals and their involvement in the decision making process was reviewed. Due to the paucity of information on the new EFLTF recommendations, there is little to report on the law specifically. There was an opinion piece that was discovered and has been included in the interest of illuminating the issues and concerns that the legal practitioner author raised (Shear, 2013). This review has looked at these topics as they have been instrumental in the formation of this case study.

History of Child Custody in the United States

Changes in the decision-making process have been made as society changed its views on the role of caregivers in children’s lives, and these changes can actually serve as a litmus test of the position children and their caregivers have held in history. Up until the 1809 Prather v. Prather case, children and wives were considered a husband’s chattel and therefore his property (Fuhrmann & Zibbell, 2012). Since then, the courts have used various guidelines to aid them in the assignation of child custody and placement. The “tender years doctrine” saw the courts award custody to mothers based on maternal law
and the idea that especially young children required a mother’s care and attention (Fuhrmann & Zibbell, 2012). This gave rise to the maternal preference which dominated American courts through to the mid 1900’s (Fuhrmann & Zibbell, 2012). During the social change of 1960-1970, the Watts v. Watts case made the point that mothers were not better parents simply because they were female as part of the move for a less gender bias in society in general (Fuhrmann & Zibbell, 2012). This gave rise to what is known as the best interest of the child standard (BICS), as defined in the federal Uniform Marriage and Divorce Act (UMDA, 1970). The best interests covered the wishes of the parents, the child, the relationship between the child and their parents, their adjustment to their surroundings, and the mental and physical health of all involved (Fuhrmann & Zibbell, 2012). Although practitioners today believe that this is a recent, more evolved determination of custody, it was in 1815 in Commonwealth v. Addicks that the courts used the BICS for the first time, when deciding on the placement of a young female child (Fuhrmann & Zibbell, 2012). In 1980, California adopted a public policy to support a preference for joint custody (California Civil Code, §4600d). In 2000, the American Law Institute offered judges more guidance by providing them with the approximation rule. This rule recommended that “the proportion of caretaking time post-divorce should be about the same as the proportion of caregiving for which each parent was responsible during the relationship” (Fuhrmann & Zibbell, 2012, p. 19). West Virginia was the only state to adopt this rule as a guideline. In 1981, California family law courts moved away from litigious divorce settlement to a mandatory mediation system, in the hopes of lessening the burden on the public court systems and offering families an opportunity to remove the courts from the divorce decision making process (Saposnek, 1998). It was
hoped that the public would naturally choose a child custody placement that was in the best interest of the child and take the child’s preferences into consideration. Mediation research across counties indicated that clients reached agreement in divorce mediation between 50% to 85% of the time, with most studies in the mid to upper range. While all contested California child custody cases are mandated to mediate, only the most highly conflicted cases move forward to trial. In a large California study of 1,388 custody mediations conducted in 1991, 46% of the cases mediated in a two-week period reached agreement, 20% scheduled further mediation, and 30% proceeded toward other adversarial settlement processes, including custody evaluations and settlement conferences (Depner, Cannata, & Ricci, 1994).

A quantitative study from 2007 that examined the participant satisfaction level with the legal divorce process, and the family services and interventions provided bore revealing results (Leite & Clark, 2007). Of the 1,285 respondents it was found that those who had a higher education and were in a higher income bracket were more likely to be satisfied with the proceedings and therefore less likely to re-litigate (Leite & Clark, 2007). It was also discovered that these participants were least satisfied with their attorneys, in keeping with results reported by Pruett and Jackson in their 1999 and 2001 studies. Their report on the perception of the participants was that the adversarial process led to lawyers inflaming the emotional side of the conflict to the detriment of the family (Pruett & Jackson, 1999, 2001). In an interesting twist, in a paper published in 2002, family law attorneys were polled to obtain their opinion on their influence on families going through divorce (Braver, Cookston, & Cohen, 2002). Of note was their contention that opposing council’s actions in half of tried cases served to heighten the emotional
level of participants (Braver et al., 2002). It was contended in studies presented by Emery (2012) and Margulies (2001) that changes in this aspect would not be successful since the legal system is based on the adversarial relationship and there is no room in these actions for a different approach.

A matter that the courts have a direct influence over involves the relocation of children after divorce. Braver, Ellman, and Fabricius (2003) found direct evidence that children relocated with parents who moved were significantly disadvantaged. In self-reports from adult children of divorce, they reported that they suffered financially, felt more hostility and were overall more distressed over the divorce than stationary counterparts. The courts rely on In re the Marriage of Burgess (1996), in which relocation of the primary custody parent is most often granted as long as the best interests of the children are established to the courts satisfaction. In California the onus is on the opposing parent to bear the burden of proof that this would be deleterious to the children.

A 2011 study, Shumaker, Miller, and Ortiz investigated the theory of attachment and the possible impact on judicial decision-making that having all the pertinent familial relationship information may have. Shumaker et al. (2011) discovered that older siblings often take on caregiver roles, which needs to be considered when making placement decisions. In this study, entitled “The forgotten bonds: The assessment and contemplation of sibling attachment in divorce and parental separation” (Shumaker et al., 2011), the authors cautioned judicial decision makers to take into consideration the roles that siblings play in one another’s lives.
Feminist Theory

Sullivan wrote of feminist theory in the sense that the feminine is an “energic pattern of being” (Sullivan, 1989, p. 13), not feminine as in gender. The feminine has been identified as the part of our make-up that constitutes feeling, as opposed to the masculine being thinking (Sullivan, 1989). She elaborated that, the dynamic side of the feminine principle is the basis of play and playfulness, the main element in the creative process … which values noncompetitive creation of things that are appreciated for their own essence regardless of their comparative qualities. The emphasis is on caring for people and for life…rather than seeking to conquer nature or the world, a feminine approach values being in nature and the world, experiencing and savoring one’s interdependent enmeshment in the great web of life. (Sullivan, 1989, p. 18)

A discussion of the feminine would not be complete without drawing comparison to the masculine; in this case it is the masculine principle that has a tendency toward organizing and creating laws, codifying rules, and categorizing knowledge. Our government and laws are firmly masculine along with the objectivity and defined judgments that come from this environment (Sullivan, 1989). In the same text, Sullivan mentioned the polar opposites of the masculine doing versus the feminine being (Sullivan, 1989). Creswell (2007) expressed his view on the feminist research approach being one of “working collaboratively and forming non-exploitative relationships, to place the researcher within the study so as to avoid objectification and to conduct research that is transformative” (p. 247). He went on to state that covering topics in a feminist manner involves ethical issues of care, establishing positive relationships with
participants, and recognizing power and ownership of materials (Creswell, 2007). “In short, rather than a focus on methods, the discussions have now turned to how to use these methods in a self-disclosing and respectful way” (Creswell, 2007, p. 27).

In a self-reflective article written by Brown (2006), entitled “Still subversive after all these years: The relevance of feminist therapy in the age of evidence based practice” she stated that “feminist therapy, speaking out loud about power, disrupts the trance of despair that has become so common in today’s culture” (Brown, 2006, p. 17). She championed the use of feminist therapy to aid the client in gaining their voice in what is perceived to be an unsafe world (Brown, 2006). Feminist therapists encourage clients to have the strength to change (Brown, 2006).

In this study, the site of examination and the domain of law was recognized as being masculine. The methodological use of the case study, an intimate examination of the personal experience of the judges, used the feminine tactics of self-disclosure and introspection. The use of feminist theory in this case study was chosen for its suitability to be applied to this situation in which there was just as much potential for social change (finding the child's voice) as there was for personal development on the part of the judicial officers.

**Child Empowerment**

With the emphasis in childhood on play and creativity, the feminine principle is active in these young participants of divorce. It is only natural that this be a more natural form of interviewing than a linear (legal) approach, when seeking their voices in the process of the family dissolution and needing their input on the issue of visitation schedules. Through the use of introspective interviews, investigating feelings, and
defining their needs, children are empowered to be part of the process and find their voice. These voices have been mainly silent in the divorce process, which is why the EFLTF recommendations have amended the proceedings to include them, if requested.

In a 2010 study performed by Neoh and Mellor, they sought to include the children’s voices and their measures of adjustment to the psychological evaluation. What they discovered was that parents tend to underestimate children’s emotional problems adjusting to the changes in divorce (Neoh & Mellor, 2010). They also found that children were not as pro-reconciliation as most parents believed (Neoh & Mellor, 2010). Given this inability to measure their children’s feelings and thoughts concerning the divorce, it is a good argument for the inclusion of the children’s voices in the proceedings.

In an Australian case study that focused on child custody mediation, Hewlett (2007) attempted to explain to readers how the use of child inclusive proceedings allowed parents to place the needs of their child or children at the forefront of the proceedings. This was found to be an equitable solution when parental relations were otherwise too acrimonious and emotional to discuss custody and visitation schedules. He was able to cite that parental reduction in conflict had a positive effect on the children, despite the inter-relationship conflict that existed (Hewlett, 2007). By placing the needs and wishes of the children above their own, the parents are empowering the children to be part of the process.

In an American pilot study in 2010, Holtzworth-Munroe, Applegate, D’Onofrio, and Bates also looked to parents focusing on their children’s best outcomes. They discovered that through an intensive intervention in which children were interviewed extensively and parents informed of the information gathered, the results were positive
The amount of inter-parental conflict decreased, child distress was lowered, and there was with a subsequent improvement in child mental health. The authors noted that the lawyers involved in the cases in the study were open to hearing the information that the child consultants gathered, and that this ultimately affected the mediation negotiations in terms of issues that were included and the verbiage used in the settlements (Holtzworth-Munroe et al., 2010). This is a direct case of the children’s words, wishes, and needs being of paramount importance, and then dictating the actions of the parents and their legal representation.

In a 2008 study, McIntosh, Wells, Smyth, and Long investigated child focused and child inclusive divorce mediation, performing a comparative outcome study. McIntosh et al. (2008) discovered that the use of interventions focusing on children had a discernible effect on the conflict level, emotional availability of distant fathers, and preservation or improvement in mother relations. The authors also noted a greater contentment of the children with care level from both parents and the subsequent lower change to arrangements, which lead to greater stability over the year of the study (McIntosh et al., 2008).

In his research into the lack of child testimony in divorce, attorney William Slicker (1998), writing for the Florida Bar Journal, related his experience:

The judge in each case, like the judges at the seminar, has publicly stated that it is never in the best interest of children to testify in family law matters. Where did such a view come from? I researched the social sciences literature to see if it supported the judges’ belief. It did not. (Slicker, 1998, p. 46)
According to the article, a social norm seems to have been established concerning children offering direct testimony. Lucy McGough, in her book, “Child Witness: Fragile Voices in the American Legal System” (1994), summarized in State v. Taylor that there were four primary dangers in taking testimony: ambiguity, lack of candor, faulty memory, and misperception. These four reasons alone may deter judicial officials from seeking testimony from a minor during a divorce action.

According to the studies above, the refocusing of the attention and focus of the parents onto the needs of the children has the potential to change the outcome of divorce proceedings. In doing so, the children are empowered to find their voice in the proceedings, which simultaneously accomplishes having their needs met and lowers the conflict level between the parents which ultimately leads to more effective parenting.

**Role of Mental Health Professionals**

There are many governing court rules and professional associations’ guidelines that dictate, delineate, and specify the role of the mental health professionals in the field of child custody evaluations. Their specifications range from the education, training, and experience needed to the ethical conduct of the practitioners. A brief review of those field-shaping documents is included here, to acquaint the reader with the stringent specifications demanded of those practicing child custody evaluations.

**Associations defining role.** The American Psychological Association (APA) published updated guidelines for child custody evaluations in family law proceedings in 2009. In these, psychologists were directed to weight and incorporate overlapping factors such as family dynamics and interactions (APA, 2009). They were also urged to focus upon skills, deficits, values, and tendencies in each parent’s attributes and the child’s
psychological needs (APA, 2009). The guidelines also called for knowledge, skill experience, training, and education in the areas of child and family development; child and family psychopathology; and the impact of relations’ dissolution on children (APA, 2009). There was also mention of the need of a solid knowledge of the science of custody and access assessment instruments (APA, 2009). As well, there was an inclusion of specific standards of ethical clinical practice as it pertains to this field (APA, 2009).

Ethical Principles of Psychologists and Code of Conduct, published by the APA in 2002, is mandatory for evaluators to know and use in their practice.

The Association of Family and Conciliation Courts (AFCC) in 2006 published Model Standards of Practice for Child Custody Evaluation, a document that serves as a guide to evaluators. In preamble Section P2, the standards specified that “child custody evaluators are qualified mental health professionals who function as impartial examiners” (AFCC, 2006, p. 7). The document went on to specify in sections 6.2 - 6.4 that only those of sufficient education and experience can use/select/properly incorporate the use of formal assessment instruments or psychometrics (AFCC, 2006). These specifications reinforce the continued involvement of mental health professionals in the evaluation process. The document also reviewed many other guidelines for evaluators that retain the quality and standards expected in the field of evaluations.

The California Rules of Court (CRC), Title 5, Family and Juvenile Rules (2015), specified that the courts order child custody evaluations, investigations, and assessments to assist them in determining the health, safety, welfare, and best interest of children with regard to disputed custody and visitation issues. This rule governs both court-connected and private child custody evaluators appointed under Family
Code section 3111, Evidence Code section 730, or Code of Civil Procedure section 2032. Data collection and analysis that are consistent with the requirements of Family Code section 3118; that allow the evaluator to observe and consider each party in comparable ways and to substantiate (from multiple sources when possible) interpretations and conclusions regarding each child's developmental needs; the quality of attachment to each parent and that parent's social environment; and reactions to the separation, divorce, or parental conflict. Provide clear, detailed recommendations that are consistent with the health, safety, welfare, and best interest of the child if making any recommendations to the court regarding a parenting plan. (Title 5.22)

In an amendment in 2004, the legislature specified that the requirements concerning the education, training and supervision needed to be a qualified child custody evaluator were open to change. These changes were made necessary by lack of funds, crippling numbers of cases and the scarcity of evaluators available at the masters or doctorate level (CRC, 2015, Title 5.225).

Laws that define the role. There are specific laws that have affected the inclusion of psychologists as expert witnesses, specialists, and the use of assessment instruments and psychometrics in the course of child custody evaluations (Melton, Pertila, Poythress, & Slobogin, 2007). In 1923, Frye v. United States dictated that scientific evidence could only be admitted once it was “sufficiently established to have gained general acceptance in the particular field to which it belongs.” To further restrict the use of evidence, Daubert v. Merrill Dow Pharmaceuticals (1993) determined that expert opinion must be based in the scientific method. The courts wanted testable
theoretical practices and error rates of the methods used as well as approval of peer reviewers. Kumho Tire Co. v. Carmichael (1999) clarified that scientific, technical and specialized knowledge were all to meet these specifications in order to be admissible. Congress amended Rule 702 to specify that testimony was based on facts or data, reliable principles and methods, and that the witness has used those principles and methods to the facts of the case. General Electric Co. v. Joiner (1997) led to further clarification of the language in the Daubert ruling, specifically, that the judge must act as a gatekeeper with respect to admissibility decisions and whether or not to admit or exclude evidence or testimony. It also stated that methodology and the techniques were to be the emphasis and not the conclusion.

These laws are the basis of our legal system, and experts are restricted to scientific data given through the Frye standards, and expert opinion as defined by Daubert. Most importantly for our study is the General Electric ruling, which commands the judges be the decision maker as far as whether evidence or testimony is admissible.

**EFLTF recommendations.** The recommendations made by the California EFLTF were varied. For the purpose of this investigation, a review of only the pertinent information was undertaken. The focus was on Section II, B, namely: “Providing Guidance for Children’s Participation and the Appointment of Minor Counsel” (Judicial Council of California, 2010). The recommendations specifically called for input from children, although they did not provide a one size fits all rule, and in fact called for a case-by-case approach (Judicial Council of California, 2010). They regarded legal and psychological reasons to include the children, such as the need for a child to express their
wishes to the court, when the child is a percipient witness, or when the child has requested to be part of the proceedings (Judicial Council of California, 2010).

In order to provide for the safety and wellbeing of the children, the courts were directed to develop a variety of information extracting methods, appropriate to age, developmental stage, and the procedural issues at hand (Judicial Council of California, 2010). The task force did not specify that the child’s participation had to be in the form of direct testimony; it is permissible to use a mediator or evaluator to collect data (Judicial Council of California, 2010). Should it be deemed necessary to take testimony, the court needs to weigh the benefits to the court and to the child. Should the action be deemed beneficial, then judicial officers are faced with the question of the setting: open courtroom, closed hearing, with attorneys and court reporter, or in chambers, with or without attorneys present.

The task force made recommendations for the training of judicial officers to address these issues. It was specifically noted that this education would include information on “children’s developmental needs, and types of parental behavior that may positively or negatively affect children. Judicial educational courses should also more effectively address children’s needs and place great emphasis on children’s safety and psychological needs” (Judicial Council of California, 2010, p. 54). This call for advanced education may be interpreted as an opportunity for mental health experts to become involved in an aspect of the courts that would directly translate into aid for the children involved, beyond receiving children’s statements and evaluating them. The EFLTF recommendations also called for education for children on divorce proceedings be made available (Judicial Council of California, 2010). This is another opportunity for mental
health professionals to become involved in the process to help children adjust to their new family structure.

In the only article found concerning the new recommendations, Shear (2013) wrote that:

California has begun a challenging experiment to incorporate children’s perspectives into the development of their parenting plans at a time where it lacks the resources to provide the kinds of safeguards family law professionals view as essential. It is likely that the state’s family courts will be engaging in a lot of trial and error as they attempt to implement the new statute and court rule. (p. 12)

The author was concerned about the factors called for in the recommendations, and that safeguards would be impossible to enact (Shear, 2013). Time will be the true test, and studies such as this will bring results to light.

A great deal has been written on divorce and the involvement of mental health experts in the court process. In that category the most relevant information is the use of the assessment tools, the use of the psychologist as evaluator, and their uses in mediation vs litigation. These topics are covered briefly with the understanding that post research more topics may be made evident.

In 2010, Symons published a *Review of the Practice and Science of Child Custody and Access Assessment in the United States and Canada*. In this review, he reported on current trends in legal decisions, professional guidelines with relevant principles from ethics codes, and reviewed the assessment process (Symons, 2010). His review on trends stated that, though joint custody was the norm in low conflict situations, as the child or children approached the teenage years, they tended to prefer sole custody with visitation
rights to the non-custodial parent (Symons, 2010, p. 268). In regard to the professional guidelines, he stressed the importance of psychologists being informed and using the outlines of their own regulatory bodies, as well as being up to date with the demands of the state and local bar associations.

In a review of current literature, Symons (2010) reported that the average length of time taken by psychologists to perform an assessment was 35 minutes. A note was made concerning the inclusion of collateral interviews of friends and relatives, and the psychologist’s strength in incorporating this into the report. Assessment tests were reviewed with the general trend showing the use of projective tests decreasing, while tests that address specific issues, such as personality, mood issues, relationship issues, or substance abuse, are on the rise. The author lamented the lack of assessments that specifically solicit the wishes of the child. Having these developed or integrated into reports would be a boon for judicial officer’s seeking direction on what the child feels they would like to see in their new family construction.

There has been a growing trend in parent education and mediation, and its use to aid in communication and reducing animosity in divorcing couples. While Symons (2010) acknowledged that this was, in theory, a healthier environment for the children, there was a lack of empirical evidence to support the use of the educational programs (p. 272). He concluded by stating that the role of forensic psychology in the field of child custody is a demanding one that requires a great deal from each professional, while allowing them to have a significant impact on the lives of families (Symons, 2010).

In 1981, California family law courts moved away from litigious divorce settlement to a mediation system, in the hopes of both lessening the burden on the public
court systems and offering families an opportunity to remove the courts from the divorce decision making process (Saposnek, 1998). At that time, it was hoped that inclusion of mental health professionals in the process would aid in the adjustment necessary in the process of divorce. In a 2004 quantitative study, Severson, Smith, Ortega, and Pettus sought to compare mediated and litigated outcomes in child custody dispute. The results from the midwest states study were interesting and varied, with judges contending that since “mediators really don’t have any authority to compel the parties to do anything and the parties ultimately have to stand trial before the bench” (Severson et al., 2004, p. 34). The issue that was most often the point of contention was the amount of child support, which was determined by Child Support Guidelines, a computer algorithm. Severson et al. (2004) suggested that there was room for a mental health professional to become involved in reframing monetary issues by pointing out the parental need to support their children and their continued level of need. The authors also called urgently for the use of mental health professionals to intervene at this point in the divorce proceedings to aid in the adjustment issues that would naturally be involved in the reconstituting of the family (Severson et al., 2004). The key issues were to be instrumental in modeling and teaching effective and appropriate communication, setting rules of conduct, and determining the new roles of the family members. In this study, the role of the psychologist is clearly determined to be necessary to facilitate the divorce process in order to have the optimum results (Severson et al., 2004).

In a survey conducted in 2006, forensic psychologists were solicited for their input on their selection and usage of assessment materials in their child custody evaluations (Bow, Gould, Flens, & Greenhut, 2006). Bow et al. (2006) discovered that
the assessments used by most of the respondents was the Minnesota Multiphasic Personality Inventory-2 and the Millon Clinical Multiaxial Inventory III. Respondents noted that while meeting Daubert standards, the Personality Assessment Inventory, Psychopathology Checklist-Revised, and Beck Depression Inventory -2nd Edition were used infrequently in child custody assessments. For projective measures, the only one that they determined met Daubert standards was the Rorschach Method-Comprehensive System (Exner, 1993), with only a fourth of survey participants actually recommending its usage.

A fourth of respondents also recommended the use of the Parenting Stress Index, while noting that it too, met the courts standard for usage (Exner, 1993). All of the responding forensic psychologists reported testing parents, with almost 70% testing adults and only 51% testing children. The authors cited previous research as having established child custody norms in the use of these measures (Bow et al., 2006, p. 30). The implications for practice consist of psychologists being informed as to the validity and reliability of each measure, the research performed, new developments (or challenges to the norms), and the general acceptance in the field.

Of those measures, the ones that that failed this scrutiny were the Bricklin scales and Ackerman-Schoendorf Scales for Parent Evaluation of Custody, specifically designed for child custody testing. Ackerman reviewed his own measure in his 2001 book and noted that critics expressed concern over its internal validity and that its psychometrics properties were unknown. Various other projective and apperception tests were also refuted as meeting Daubert standards of admissibility and survey participants were in agreement with previous research that discouraged their usage in the forensic arena. The
authors promoted the practice by all forensic psychologists of improving their assessment usage in order to provide superior services to the families involved in the litigious divorce process (Bow et al., 2006).

In a study performed in California in 2010, Strachan, Lund, and Garcia wanted to assess children’s perception of family relationships and the use of an interactive instrument in custody disputes. The use of instrumentation brought by forensic psychologists to the divorce arena is an attempt to have empirical measures involved in process. In this study, the Structured Child Assessment of Relationships in Families was used in an attempt to find the child’s voice. The authors discovered that children as young as four to six years old were able to express their opinions concerning “their feelings of emotional security with family members, and their perceptions of the parenting they received, both positive and negative” (Strachan et al., 2010, pp. 210-211). The results were compared to interviews conducted by evaluators and there was a significant correlation in the results. The authors hoped that the use of this instrumentation would bolster the forensic psychologist’s evaluation of the children and aide in representing the child’s voice (Strachan et al., 2010).

A factor that is often ignored or avoided in the courts due to its emotionally charged nature is that of inter-parental hatred. Demby (2009) called for judges and forensic psychologists to meet the issue head on and makes a case for the insidious harm that can be caused for children caught in the middle of this emotional firestorm. Assessments typically measure a parent’s involvement with child rearing, nature of the child-parent interactions, and the parent’s capacity for concern and level of functioning. All of these functions are impacted by parents who are approaching the divorce process
as one in which “the formerly loved spouse is now perceived as a persecutor with whom one is in a mortal conflict: destroy or be destroyed” (Demby, 2009, p. 480). The detrimental effect on children can cause lifelong personality defects as well as relational and intimacy struggles. An experienced forensic psychologist can bring his/her training to the forefront and advise judicial decision makers concerning the parental shortcomings, impact on the children, and the best possible outcome in a very complex situation.

Summary

This review of the literature has included issues relevant to the proposal at hand, particularly the history of child custody in the United States, and the judge’s role in these court proceedings. This case study’s present emphasis on the empowerment of the children begged for more information on the basics of feminist theory. The existing literature was investigated to see how the system has attempted to include children’s active participation in past legal divorce actions. Information on the supportive, audited role of mental health professionals and their involvement in the decision making process has been reviewed. Although children have been witnesses in criminal cases and perhaps dependency cases, testifying in court or speaking directly with a judge has not been readily used in California’s family law divorce courts. There exists concern that doing so puts the children in the middle of the divorce conflict, an action that family law judicial officials strive to avoid. In this bid to protect the children, it is possible their voices have not been adequately heard. This was the general outcome of EFLTF recommendations, to reassure those involved that judicial officers can have the opportunity to hear directly from children or recognize if the process they are using provides the best data (e.g., expert testimony or minor’s counsel). Due to the paucity of information on the results of
the enactment of the new EFLTTF recommendations, there was little to report on the recommendations specifically. There was an opinion piece that was discovered and included in the interest of illuminating the issues and concerns that the legal practitioner author was raising (Shear, 2013). This review looked at these topics specifically, as they have been instrumental in the formation of this case study.
Chapter III: Methods

Qualitative design has been used historically in anthropological and sociological studies (Kirk & Miller, 1986). Witnessing and documenting human experiences in the execution of their work role can be captured using this design. Qualitative research allows for an exploration by the author to understand, to define, to analyze and to record social change. Marshall and Rossman (1989) advocated for the author’s total engrossment in the participants’ environment, as well as maintaining an open flow of communication in order to understand the participant and their interactions with their work domain. Researchers have differed on their interpretation of how to define a case study: Stake (2000) claimed it was the study of the object in question, and Creswell (2007) defined it as “an in-depth exploration of a bounded system (e.g. an activity, event, process, or individuals) based on extensive data collection” (p. 485). Patton (1990) opined that case studies were useful in creating deep understanding of a targeted people, problem, or situation in a comprehensive way.

Research Design

This study used the qualitative case study research design to allow me to study judicial officers in their environment. This research design limited the study by the timeline, and by the number and nature of the interactions that I witnessed taking place. This methodology was particularly appealing in this case study due to the opportunity it presented to document social change as it was occurring. The court system has been subjected to a change that was dictated by social needs: How is it changing? Why has it chosen the methods it has? Through individual, semi-structured interviews that sought to
find rich details, information on whether the child empowerment process has been identified has come to light.

The qualitative design separates itself from quantitative research in several ways, with the following being several that have been categorized and held true by researchers according to Creswell (2009).

1. Qualitative research takes place in the environment where the participant lives/works and where occurrences happen. There is an attempt to capture a participant’s impressions and their discernment of their function in life.

2. The journey is of equal importance to the result of the research being performed. Every case is unique, and every detail and its impact on the resulting themes is considered.

3. The researcher attempts to capture and record the experiences and perceptions of the participants, leaving the results an unknown quantity until the research is completed and analyzed. The author is the data collector, not psychometric measures. Qualitative research is characterized by verbal description, not by statistical means.

4. Qualitative design requires the researcher use his or her world knowledge to aid in their processing of the data acquired, leaving the data to be assessed in a different manner than one would use in a quantitative study. Qualitative research does not posit a theory or hypothesis prior to the study taking place.

5. Qualitative design depends upon the transparent reporting of participants, and that researchers are non-discriminatory. This pushes the use of validity and reliability
measures aside for a favored sense of comprehensibility, discernment, and truthfulness (Creswell, 2009).

The case study research model was chosen due to the lack of information on the new EFLTF recommendations and my perceived need to understand the impact of these recommendations on the court system. It was decided that an in-depth investigation into how one county’s judges used their problem solving skills to meet the needs of the recommendations would offer an initial exploratory look. I believed that it would serve other judges and mental health professionals well to have access to this information and possibly apply it in their own practices. A quantitative survey was briefly considered and rejected due to the fear of a lack of response from the target audience. It was also felt that in order to truly obtain the detail necessary to describe the methods used and solutions, a mere survey would be insufficient and it was necessary to gather the depth of material through intimate personal interviews.

Due to this case study’s focus on one issue, it is termed instrumental or a single case design, and is also exploratory since it is an initial foray into an otherwise un-researched topic. The study encompassed the examination of one county’s protocol, by several judges; therefore it is an embedded context with multiple units of analysis (Yin, 2003). This study also lent itself to a case study design due to it being in a bounded system. Therefore, it was contextual and a study of process (Merriam, 1998). Creswell (2007) defined bounded as “a case being separated out for research in terms of time, place, or some physical boundaries” (p. 485). Indeed, this study was limited by all three, and was defined as a within-site, within-case, for analysis.
Data collection, according to Creswell, features “drawing on multiple sources of information, such as observations, interviews, documents and audiovisual materials” (Creswell, 2007, p. 132). The analysis in this case study was limited to semi-structured interviews, due to the concern that direct observation and perusal of files may violate the privacy of litigants who are presently going through the divorce process. There was also a concern that the subjects would not speak openly and disclose freely if they felt that they were being scrutinized through direct observation. I feared that the inspection of collateral material may substantially alter the natural course of events should the participants feel they were being judged themselves.

Interviews were recorded and transcribed using a telephone/computer app called Rev.com. Files uploaded to this site were securely stored and transmitted using 128-bit SSL encryption, the highest level of security available. Files were only visible to professional transcriptionists, who had signed strict confidentiality agreements. Collected data being transcribed by an outside service allowed for another layer of objectivity to be built into the methodology. These transcripts were then entered into HyperResearch, a software program that was designed to assist with any research project involving analysis of qualitative data. This program simplified the mechanical process of coding and retrieving, building theories, and conducting analyses. It is considered a solid code-and-retrieve data analysis program, with additional theory building features in use since 1991.

All of this data was subjected to analysis to determine any themes that arose across the cases that were tried (within case analysis). An interpretation of these themes followed in what is termed the cross-case analysis and discovery of meaning at the end of
the process, through coding and grouping of ideas in HyperResearch. Creswell identified a good case study by the clear inclusion of details in the case(s) being presented, and identification of the themes: Are generalizations included, and did the author report his or her biases freely (Creswell, 2007)?

Methodology

The goal for this qualitative case study was to describe the experience of California family court judges’ experiences with the incorporation of the EFLTF recommendations, specifically Family Code 3042, the collection of children’s voices concerning custody schedules. How were the voices of children being accessed in the courts? What influenced a judicial officer decision-making process? How did they feel about these recommendations? How did the judges choose to extract the necessary information from children? What did the judges listen for, and how was the information used to decide on the child’s visitation and custody schedule?

Interviewing is known to be used as a data collection source in many approaches to research. This common approach has led to extensive literature on the topic (Creswell, [2007], recommended Kvale [1996] on interviewing). Most recommended the use of an interview protocol that has a standard entry on top that reminds the author of the person, date, and location of the interview, as well as opening and closing statements to recite to participant that remind them of the purpose of the interview as well as thanking them for their participation (see Appendix A for interview protocol). The use of the one-on-one interview was chosen due to the amount of information that could be gathered on the many different cases that have been tried by the participants. Determining a safe environment that the participants can disclose readily was not a challenge since all judges
have their own offices, called chambers. There are obviously challenges inherent to the interview process: possible technological issues of audio-recording the interview, while attempting to take notes at the same time in order to augment the recording. There was an anticipated initial uneasiness on the participants’ part during the initial phase of familiarization and prior to forming a working relationship; however, this did not materialize. The reliance on well-fashioned questions that led to the sharing of details was an important part of the preparation for a successful interview, although there was a needed flexibility exercised in order to accommodate spontaneous information that was shared by the participants (Moustakas, 1994). Follow up interviews were not deemed necessary to verify impressions gained after transcription.

**Main Research Question**

The overarching question posed to the participants was two fold: How did they discern the need to include children in the decision making process of visitation schedules? How did they proceed with the gathering information from these children?

**Data Collection**

**Recruitment and selection of participants.** Family law courtrooms in one Southern California county were identified and selected upon sitting judicial officers agreeing to participate in the study. Letters of solicitation (Appendix B) were sent to sitting officers in a specific geographical area in Southern California. It was hoped that all of them would be open to having their thought processes scrutinized, and that they would be able to share their solutions to incorporating the new recommendations. When I received no responses of interest, there was contact between this study’s external expert and the subjects, followed by brief telephone contacts with me to outline the scope of the
interview, time it would take, and notification of informed consent. Once individuals agreed to meet, a mutually beneficial time and place was selected.

Men in California had a divorce rate in 2009 of eight per 1,000, well under the national rate of 9.2, while the state’s women, at a rate of 8.9 divorces per 1,000, were also below the national women's rate of 9.7 (U.S. Census Bureau, 2012). Even with these statistics, highly litigious cases are abundant enough that there was no perceived shortage of material from which the participants drew upon. The participants in this study were judicial officials in the family law court system. Audio taped interview sessions were conducted in order for the author to review the judicial officers’ statements, and to submit to a professional transcript service. This was possible in all but one of the interviews. When a technical malfunction made it impossible to record the subject, hand written notes were taken instead. Case study dictates the focus of this study to be on the experiences that the participant recounts to the author. Of import was the participant’s understanding and perception of those experiences and how they are related to the author (Creswell, 2009). There was a focus on the incorporation of the changed method of gathering information from children, and how or if that had changed the decision making process.

**Instrumentation.** Interviews were conducted with the consenting judicial officers: A semi-structured interview in which set questions were posed (Appendix A). Gathered information was limited by the number of cases heard on any given judicial officers case load and their willingness to share their procedures or insights, as well as time. Follow up interviews were not conducted for clarification of data, updates, and any further insights that come to the mind of the participant. A brief questionnaire to gather
information on the participants was included in order to have a profile of the participant (Appendix A).

**Data Analysis**

In the use of the qualitative case study design, the analysis of the results are done at the same time as collection of data with classification of participants and the identification of themes or patterns of behavior. Miles and Huberman (1994) defined data analysis as “consisting of three concurrent flows of activity: (a) Data reduction, (b) Data display, and (c) Conclusion drawing/verification” (p. 10). Data reduction is a means of sorting, focusing, and organizing data in order to better see a final theme. It was planned that through the use of HyperResearch, the answers provided by the judicial officers would quantify the results once all of the data had been collected. The conclusion portion would find the author noting patterns, themes, regularities, explanations, and, just as importantly, any outliers in the data. Sources of influence on the decision-making processes were hoped to be discovered and recorded (Creswell, 2009). This results analysis is standard in case studies and when performing field research (Creswell, 2009).

**Validity**

There are several known strategies that heighten internal validity:

1. Multiple data source: use of interviews, direct observations and court documents.

2. Participant confirmation: the frequent and consistent perception checking with the participant, to guarantee authors interpretations are accurate according to the participant.
3. Repeated observations of the court proceedings: Frequent interviews following those observations to record perceptions on proceedings will help identify patterns and isolate solitary incidences.

4. Peer overview: having a doctoral student review the material.

5. Reporting the biases of the author in the section identified as Researcher’s Role.

6. Rich, detailed lengthy descriptions were be used in order for those seeking to duplicate the experience have what they need.

Due to the need to respect privacy there was only one data source used: direct interviewing. This eliminated direct observations, review of the court documents, and photographs. All other strategies were in place to be used to assure internal validity.

**Reporting the Findings**

With the nature of the research, the reporting of the findings was done in a narrative fashion with rich detail. It was done in such a way that the reader would be able to understand the thought process, perceptions and decision-making process of the participants. As expected, readers should be able to gain an insight into the challenges presented to the judicial officers and be exposed to the solutions that have been implemented, along with the outcomes of some of those decisions. This was attained through the rich, detailed information gathered through intimate interviews with the participants. Through the use of carefully thought out, open-ended exploratory questions designed to elicit as much information as possible, they informed myself and the readers about what happens in the decision making process. HyperResearch software aided me to detect themes and common elements from the data collected.
Assumptions and Limitations

An assumption and limitation in this study was that this sample would be representative of the experience of one county’s judicial officers, and may or may not be shared by the total population of the courtrooms and judicial officers in California family law courts. It was also assumed that their responses accurately reflect their professional opinions. The assumption was understood that the participants in this study answered all of the interview questions transparently and completely.

Limitations in this study included geographic location and population sample, and therefore the generalizability of the data gathered was restricted. This study’s participants were members of the American Bar Association, and were practicing in the legal profession in the family law courts in Southern California. Time was also a limitation, with the study interviews between January 2015 and March 2015. Another limitation is that the data collected reflected information from participants who self-selected to participate in this study. Along with the imparted case information and judicial decisions, it was expected that biases may present themselves. In order to protect the final research and conclusions from bias contamination, I was vigilant throughout the interview and writing process and constantly aware of these insidious influences. There was a dependence upon the dissertation committee and external expert to be equally as aware that these possibilities exist and may be so pervasive as to have eluded me. Naturally, any disagreement with the interpretation of the data collected was welcome and invited.

Limitations extend to the use of this data. The intent was to expand the knowledge of those participants in the field of family law in the State of California. Therefore, the generalizability of the information was limited by geography and branch of law. There
were no new theories being advanced in this study nor was there a new paradigm. There was an expectation that the reported results may inform other courts as to the new procedures that are being put into place in this specific court, in order to accommodate the changes mandated by the EFLTF recommendations. It was anticipated that the gathered information would expand existing literature for mental health professionals who specialize in child custody evaluations, as well as judicial officials in like courts. The reporting of proceedings and the decision making process in a family court room may be illuminating for others to read who are interested in the area of family court proceedings.

**Ethical Assurances**

Ethical vulnerability is always a concern when performing any research study. It was felt that this case study would be minimally invasive. Judicial officers make life-changing decisions for others on a daily basis. This study would be a review of their past decisions and as such a judge may benefit from participating in this reflective exercise. They may also feel that they will benefit other decision makers by sharing their procedures and decision-making paradigms. Consideration for the judicial officer was taken into account in the development of the informed consent form (Appendix C) and other materials (Appendices B and A) used with the participants.

The risks, discomforts and inconveniences of the proposed procedures were as follows: There were no perceived risks deemed evident in this study. There could have been some momentary discomfort involved in the sharing of client information concerning a difficult, often traumatic, event. Some inconvenience may have been felt in arranging the time to meet and filling out the necessary paperwork. Again, since this was
merely an interview to discuss past events, it was strongly felt that no harm would come to the participants. There were no known physical risks to participating in this study, neither were there any known legal risks.

The participants in this study were of legal age and were given informed consent. They signed the consent form to participate in the study, as well as a liability waiver. Informed consent was obtained in writing prior to participation in the study. Appendix C shows the sample consent form that was given to the participants. They signed a release to be audio recorded for the purposes of collecting data. The participants in this study would have been excluded if they were emotionally disturbed, mentally disabled, or demented. This study minimized any perceived risks, inconveniences and discomfort by carefully wording the questionnaire, respectfully but directly asking interview questions and offering referrals and follow-up for the participants should they have felt the need for this.

An opportunity to debrief was given to each participant following each interview, as well as a solicitation for more comments or concerns. Should the participant have felt that there was a need for more follow-up consultation to discuss any issues that may arise, the courts offer an Employee Assistance Program that may be accessed for the referral to mental health professionals. Should this not be acceptable to the participants, I would provide three referrals to local mental health professionals (with the understanding that these services may be fee based). Naturally, the participants may have withdrawn at any time they chose to.

Steps were taken to safeguard participant confidentiality by ensuring that interview notes and recordings were kept confidential. Data was kept in a secured
password protected computer that only I could access. Any hard copy of the data collected in the interviews along was kept in a locked file cabinet to which only I had keyed access. The participants’ names were not used when reporting data or during data analysis. The names were changed and any identifying information was altered, keeping as close to the actual content without disclosing identifiable information. Determination of the conclusion of the study was based upon the reviewing of the collected information with the dissertation chair, external expert, and other committee members. Since the data collected may be used for future scholarly publications and educational presentations, it will be preserved for a minimum of three years in a secured position. Should the day arise when the data is no longer felt to be needed, hard copies will be thoroughly shredded and disposed of responsibly, while all computer files will be deleted from the computer and any programs that have been used.
Chapter IV: Results

This study has used a qualitative case study research design to allow me to query judicial officers concerning how and if they include the voice of a minor in divorce proceedings. This research design has limited the study by the timeline and by the number and nature of the interactions that took place that were witnessed and recorded by the author. This methodology was particularly appealing in this case study due to the opportunity it presented to document social change as it was occurring. The court system has been subjected to a change that was dictated by social needs: How did it change? Why has it chosen the methods it has? I used recorded semi-structured interviews as the data collection method as well as written notes. Much has come to light through individual interviews that sought to find rich details and information on the child empowerment process.

Participants

Four of the five potential subjects who were solicited volunteered and consented to participate in the study. All four were Caucasian, over the age of 50, and had been practicing law for decades as attorneys and then subsequently as judicial officials. Three participants were male and one was female. All of the participants were forthcoming with their comments, and appeared to enjoy the opportunity to express an opinion on the EFLT Recommendations.

The recruitment process consisted of sending out letters of solicitation for an interview. These were summarily ignored. I learned that the courts receive many letters of this type and they are not followed up on without someone in the system to advocate for the researchers. With this in mind, I appealed to my external expert, who was
personally and professionally acquainted with the judicial officials, to facilitate meeting them and presenting an opportunity to solicit an interview in person.

The first interview was granted on the strength of a phone call and the personal introduction by the external expert. Once this interview concluded, it led to the next with the personal recommendation of the initial interviewee. The subsequent interviews were solicited through attending a County Bar Association event that was being hosted by the external expert. Through the personal introduction to each of the judicial officers present, I was able to book the final two interviews.

The participants were asked 10 open-ended questions and were encouraged to disclose any information they thought was pertinent to the subject. Many of the questions revealed themselves to be obsolete with the discovery that no grand court changes had resulted from the EFLTF recommendations.

**Themes**

The content of the interviews with the four participants reached saturation and the information gathered produced six clear-cut themes. The first one to be evident was the practices and procedures used for information gathering from minors. The second was the factors that would compel a judicial official to consent to interview a minor child. The third was trainings and the need for further understanding of children’s developmental issues were also recognized as being an essential part of the job description. Fourth, the presence of real challenges were shared by all of the judges. Fifth was changes that were noted since the implementation of the EFLTF recommendations. Sixth and last was also a candid sharing of concerns and general comments on the impact of the EFLTF recommendations.
Practices and Procedures

Responses to interview questions revealed that all the participating judicial officers believed that honoring due process was critical in all court proceedings related to child custody issues. The parameters are set by Family Code Sections 3042 and 5.520, and these guide the judicial officials on whether or not and how to interview minor witnesses. The need to honor due process was defined by one judge as “a constitutional right, a due process right, by an attorney or by a party if they are self representing to confront or cross examine witnesses.” The EFLTF recommendations also state that the child has to express his or her desire to communicate with the judge. It is necessary to have a neutral party to communicate this wish to the judge: not a parent or the parent’s attorney. The judges shared that this role is often filled by a mental health professional, with one saying, “My preference, if at all, I take many steps to avoid actually having the child testify. So, if in fact I have information that a child wants to testify, I require that it be from a neutral source.”

Honoring the need for due process mandates that the minor witnesses be treated in a certain manner. As explained by one judicial officer:

That is going to be closed court, so no one else can come in, but it’s going to be in the court room. I don’t put the child on the stand and let the attorneys have at it with the child. What I do is I tell them that they need to submit to the court a list of questions that they want me to ask the child, or if there is a particular topic that they want me to explore with the child. I won’t necessarily ask them the same way, but I will do my best to explore the particular topic with the child. Then what happens, we have a little room outside so the child will wait there with somebody. The
parents come and sit at the very back against the wall, I come off the bench and I think I have to leave my robe on. The court reporter sits next to me so that it can be recorded, parents and their attorneys are at the back, child comes forward. I try to work it out that the child doesn’t look directly at parents, and the child will sit at child council table and I will sit across from them at council table and then everybody can hear what the child is saying and hear my questions and when I am done I will instruct attorneys even before I am done if they have questions, while I am questioning to pass them up to the front, and sometimes I ask them and sometimes I don’t. That’s how it is in my court room – I try to make it as non-confrontational and yet as transparent to the parties as possible.

One judicial official did share that in days past, taking a child into chambers, with another neutral adult present, was a common practice:

There was always someone from the mediation department there. Typically, meet with child in chambers or with a mediator or go to a more neutral place in the mediation office and meet with child, and it was always with agreement with the parents because no one wanted the child to testify and this seemed to be the least intrusive way to do it.

It should be noted that the local rules of the county examined in this case study provide for recommending mediation. This system involves a mental health professional interviewing both parents, the children, and any community members who are deemed important to the case (grandparents, teachers, child protective service workers, etc). This information is prepared as a report that is presented to judicial officials. Along with factual information on the case, recommendations are made as to how visitation and
custody schedules may be arranged in order to meet the best interests of the child. These reports are used to aid the judicial officers in their decision making process.

Factors

The factors that would compel the judges to consider hearing the testimony of a minor child were focused on age, maturity level, and any possibility of detrimental effects to the child. Age was an overriding component: with the average accepted age of interviewing a child being 13-15, with higher maturity being factored in for those younger and lower maturity for those older. One judicial officer stated:

There is nothing that a child under the age of 12 could tell me that is going to influence me on how I decide that case, alright? It would be almost impossible for me to have the opinion of a child under the age of 12 be a significant factor of any kind in my decision making.

Most of the judges stated that they would have an interest in knowing what children in the 13-14 year age group preferences were, should they express a desire to speak to them. Beyond that age the judges stated quite strongly and shared their thoughts freely:

For children 15 and over: they are a very powerful voice in my court room. Many of them are independent and, just as in families that are not going through a divorce, they think that Mom and Dad are both the dumbest people they have ever met. They have places to be that have nothing to do with Mom or Dad, they have things to do that have nothing to do Mom or Dad, and as I say to people all the time: 16 year old girls don’t really give a damn about what a Superior Court judge tells them to do.

In discussing age as a factor influencing their decision to allow testimony, another
judge shared that:

Age plays a huge role for me – rarely do I have a 17 year old looking to testify because generally speaking at that age they are going to do what they are going to do. If I have a 16 year old, I am more inclined to focus on them – they are getting up there and getting independent. They are driving, working, possibly working toward college. Parents are important to them but frankly parents aren't the main concern of the children at that time, so I am more inclined to hear from a 16 year old.

Minors of younger age were uniformly avoided by the judges: “beyond or below 16 I am really hesitant, especially when it’s 12, 13, 14 year olds getting involved in court process.” Another judge shared:

People would always ask me at what age do you take into consideration the wishes of kids? And prior to Elkins I would always say well, there is no magic age but the rule of thumb seems to be 12. But you could have an immature 14 year old and a mature 11 year old so it just depends.

All of the judges stated that they relied on mediators, therapists or minors counsel to provide information on the child’s maturity level.

One judicial official pointed to a timeline that accompanies cases heard in family court:

I have had the benefit and the burden of having cases assigned to us virtually for years. I have had kids that I first saw as one year old, 6 months old that are now exiting from my jurisdiction because they are turning 18. So I have cases that I see only once, I have cases that I see off and on for years and years and years. So
in the highly conflicted cases, I have a pretty good handle on what is going on with that child and I have probably tried a number of other things before the child wanting to have to talk to me.

In summary, from a unique vantage point of watching these children grow on the periphery of the court system, a judicial official, considering age and maturity, may or may not open the door to hear directly from the minor.

**Trainings**

Judicial trainings and the need for further understanding of children’s developmental issues and emotional needs were also recognized as being an essential part of the job. It should be noted that trainings are mandatory, part of a continuing education program. Three out of four judicial officials expressed being open to trainings that would pertain to furthering the EFLTF recommendations. Some were open to learning more about the interviewing process specifically:

I think that it would be helpful to have that one on one training, you know where we go to actual big trainings that we go to: How to Communicate with Children-What are the Do’s and what are the Don’ts, you know, there could be more training in an in person stand point, maybe even acting out- role playing.

Another was open to enhancing their understanding of child developmental stages and the impact of divorce, saying, “I’m interested in learning as much as I can to make the right custody decisions for kids.”
Challenges

The presence of real challenges was shared by all of the judges. A very real challenge discussed was an overarching concern of working with children who had been severely impacted by the negative relationship between the parents and furthering that conflict exposure by having them give testimony. For some judges, the establishing of a rapport with the minor was a challenge and subsequently attaining a balance in the order that was both realistic and respectful. It was also noted that three out of the four judges volunteered that issues presented by the minors were often better addressed by mental health professionals in their longer interviews and with their specific training.

One official shared, after describing a common situation in which a child has witnessed or been subjected to familial conflict and the child has learned to cope,

Intermeshing with one of the parents is one way to do it, I hate using the word alienation because it depends on who you are talking to as to what alienation means but certainly in a short interview it is easy to say that a child has become alienated with one parent or another, the child has taken sides because that is the only way that they can cope with the conflict that he/she has gone through and so the challenge is: that I have to recognize that I am talking to broken children. And if I am expecting to get a neutral, rational, objective, untainted answer from a child – well, that’s just not going to happen. So I have to recognize that with every child I listen to, and every child’s depending on that I listen to them. So that is a gigantic challenge that takes on a lot of variations depending upon the different situation.

And I went to law school – I did not go to psychology school, I did not go to child psychology school, so I am dealing with this more from experience than from an
academic standpoint.

A requirement for the process to be effective is to be able to establish a rapport with a child in order to obtain the information necessary. Being able to make the child feel comfortable speaking to another adult in the process can be challenging for a professional trained in interrogation techniques. One judicial officer candidly shared:

The challenge for me is to get them to feel relaxed and comfortable, and feel like it’s okay to say what they want to say … That’s my biggest challenge personally: I am here talking to a child I don’t know. My biggest personal challenge is that I don’t like talking to children – I don’t mean that in a bad way, I don’t like to talk to children in this context – I am not trained to do that, I am not trained with child psychology or any of that. Well, here is one more person, because they have probably already spoken to attorneys, they have already spoken to the mediator more than once, and here is another person talking to them and they don’t have a lot of faith that I am going to listen.

Judges felt it was a challenge to balance being respectful of children while at the same time making reasonable and appropriate recommendations and orders for a child and or family. One judge shared: “You don’t want to make orders that no one is going to comply with, so you have to be respectful of them.”

Changes

There were minor changes that were noted since the implementation of the EFLTF recommendations. Most of the judicial officials felt that their county’s changes were stylistic rather than procedural. They all noted an increased reliance upon mental
health professionals that were involved in the cases, most usually court appointed mediators within the court system. One judicial official noted that:

Getting the info on what children say was always the hard part, so we have this mediation that is recommending but technically the children's statements are confidential, so now if I have a mediator up on the stand, in the past they are on the stand, and they couldn't tell me what the child said – so now at last I have the ability to tell the mediator you need to tell me what the child said, but I will preface that with if you divulge the child’s statements in court in front of the parties, will that be detrimental to the child? Because I have and the mediators tell me it would be detrimental to the child if they reveal what they said.

Another subject gave great praise to mediators:

The mediation department are really good at that and they are there for the best interest of the kids. I suppose at some point that may not purport with what the law requires such as security, obligations of circumstance, etc. that may not totally mesh with what is best for child but by and large it is the best. That is why mediation is so good – they just spent three hours with a mediator and I took 10-15 minutes to read your paperwork, so I rely pretty heavily on the mediation department.

There were times that the mediators’ input would change the judges inclination to interview a child or not:

Everyone seemed to think that the Elkins Task Force required us to hear from the children and I have had attorneys tell me that and I say, “No I am not, even if child wants to address the court, I don’t have to let child address court if I can put on
record why I don’t think its in child’s best interests to address courts.” And um, there are times when I have had minors council or mediators say no, it is detrimental for the child to be involved.

Another official addressed this issue as well and the critical role that the mediators played:

I go to the mediator because in this county we have recommending mediators. So I have them come into the court and take the stand and have them tell me their perception of the child’s age, maturity level, does child have a preference and ask them specifically – not so much what child said as to preference, but did the child express a desire to speak to the court and if so, do you think that would be detrimental to the child?

Judges will consult with mediators at different points in the process of collecting information and of deciding upon a ruling:

Never really ask mediators what kids say, but you kind of did in a round about way – you would say “You met with child, is there any reason you would think the child is going to be upset with this recommendation?” So even without Elkins you had an idea of what was going on.

Another official was assured in being able to obtain what they needed from other sources than the children:

And to the extent that you needed to get some information, you can get it from mediators, and the lawyers can always cross examine the mediators and the mediators can always say that I don’t want to tell you what the kid told me, and
most attorneys will respect that. If it came push to shove, the mediator would have
to say what the kid told them.

A judge pointed out that the different roles that the participants played in the process that
made the use of mediators necessary. “We as judges were trained in interrogation
techniques, not interview techniques. So we rely on mediators and their skills to get
information in a more balanced way than how lawyers are trained to do it.”

The judicial officials spoke openly about the changes that they experienced with
the new statutes. One shared,

I talked to children as frequently before the guidelines came out as after. I
certainly thought more deeply and specifically about how I was going to do it,
when faced with the new law, but I certainly never talked to children any more
frequently now and I certainly haven’t taken their opinions any more
meaningfully than I did before.

Perhaps even more candidly another officer of the court said:

Well, if nothing else it says that the courts should give more weight to the kids
than was happening in the past. But still in the real world most parents do not
want to put their kids in the witness stand and having to say all these things and
for better or worse I think a lot of these judicial officers sent out an unwritten
message: If you do it, guess what, because I think historically it was not felt that it
was in the best interest of the kids to make them do that. And they are going to
say OK, are you going to do this? Then that is a black mark against you. How to
deal with that? I don’t know.

Another judge shared that prior to the EFLTF recommendations, it did not occur to most
people to call upon their children to testify. After Elkins, most people were not aware that things had changed, and any cases that returned to court were not to hear child testimony but were due to life changing occurrences or that they were simply not happy with the orders as they stood.

Concerns and Comments

The judicial officers candidly shared their concerns and general comments on the Elkins Task Force recommendations. All of the judicial officials agreed that the level of change with the new recommendations was negligible. Several did share that there was an initial concern that centered on coercion, as described in the following scenario shared by one judge:

Concern when guidelines came out that has not come to pass- that my colleagues and I shared was that, the child meets the criteria – 14 years old, mature enough to have an opinion, mediator says he wants to talk to me, he comes into court room, takes witness stand, his Dad is sitting out there looking at him, his Mom is sitting out there looking at him, and we have attorneys, I ask some questions, the attorneys ask some questions, you know its a long cross examination, the child testifies that he wants to live with Dad, and he never wants to see Mom again, I say any more questions, the lawyers say no more questions, I say Tommy you are excused, and he gets down off the witness stand and as he walks past Dad sitting in the council table. He says, “Dad, do I get the pony?” and that was the fear – that we would have this mad influx of kids and when their testimony finished we would never know just how tainted their testimony was. And as I tell people I don’t do magic and I like to think of myself as the ultimate lie detector, but sometimes it’s pretty
Other concerns were more overarching and centered on the perceived empowerment of the children and the impact on the children as they became adults after enduring their parents divorce process. As one judge summed up the problem:

They need to think about whether it is beneficial for the child to testify. If the court ultimately makes an order in line with child’s wishes, or alternatively if the court makes an order not in line with child’s wishes. In the former case they need to consider whether the child will feel unduly empowered and possibly use that perceived power to either manipulate one parent or play parents against each other. On the other hand if court doesn’t do what child has said they want: will parent be further damaging the child by making child feel less heard and less respected by the adults in their life.

Another judicial official shared their focus on the best interest of the child as an adult, regardless of the child’s current stated wishes:

Now that I have talked to him, am I supposed to say that it’s okay that you don't want to – am I supposed to say I accept what you have to say and I am going to make a note that you never want to see your Dad again. Well, I am not going to do that. I am still going to work on a way that reunifies some relationship between Dad and Tom because I want Dad and Tom to have a successful relationship, not next week or next month but when Tom is 30 years old and needs to talk to his 65 year old Dad about something. When Tom wants to go to college and needs financial help that the has some kind of relationship when Tom gets some girl in trouble- who does he go to? That is what I am trying to accomplish, so I am going to work
very hard to make reunification to happen in some sense, so that when Tom tells me he doesn't want that, it doesn't really throw me off that desire to have reunification for most every child, with both of their parents.

Another judge shared the very real angst that they experience when speaking to the children and their attempts to assure the child:

If I don’t do what you want, it’s not because I am not listening to you, but it’s maybe because what you want is not really in your best interest and I said that I have to be the one to decide. Rather than just listen to the child and have the child go and then just make up some order that will have the child say what was the point of having me come talk to the judge? I just think it is really important that if I am not going to do what the child wants that I explain to the child why I am not going to do what they want, and I do it right then and there while they are in front of me.

Other judges choose not to divulge their intentions to the children and they make their orders later, which are handed down to the attorneys or self-representing parents.

Comments were also made on the cause of the task force and the impact on their courts:

Task Force was necessary and valuable because of some abuses that had crept into some counties as highlighted by the Elkins Case. This county did not suffer from problems that the task force sought to address. Always very liberal in granting evidentiary hearings – had a process for children to be interviewed and make desires known to the court . . . did not prevent people from presenting additional information to courts.
One officer of the court shared a frustration with the task force and their perception of their lack of inclusion of the very individuals that the execution of their recommendations would be impacting:

There was never a time when the Elkins commission called upon trial judges to come and talk to them about what was appropriate and necessary when making decisions, for the best interest of children, and finally we talked to children before the Elkins commission came out and I have certainly never in my career said I will never talk to a child.

Another official commented that overall, the recommendations were made out of necessity:

It, Elkins, was one case that kind of blew everything up, but it did focus on some real issues, in regard to making sure that people have due process, there were a lot of things that, well, the judges taking kids back into chambers – that’s a real problem, so the recommendations, I think ultimately are beneficial. The problem is the practical application – well, fine give us the money to be able to do it. We have this family centered case resolution process and it’s part of the Elkins and now rules of court – so in order to be fully compliant with the whole concept of what it is supposed to do is cost prohibitive, is it ideal? Yes, it is ideal. Is it ideal economically? No, it is not! So that is a concern from having the children’s voices be heard.

Another official recognized the new rulings but still felt that there was support for how things were done in the past.
My sense is that Elkins hasn’t really changed things, candidly, it still boils down to this procedural due process thing that if you are going to have a witness then the other side is entitled to cross examine and I think that most judges subjectively let it be known “You are kidding me? You are going to subject this kid to cross-examination?” . . . There really is just no good way to do it. In my experience, a lot of parents just don’t want to be there when their kids are saying this stuff because they don’t want to hear it, in person, and they don’t want to put their kid through it and no one wants to cross examine the child so maybe just as a consequence, maybe not the best way but as the least intrusive way is to let the judge or someone else that is there to talk to the kid and then let the parents know what the kid said.

One judicial officer recounted having an experience with a task force that asked a gathering of judges to create their ideal working court room that would meet all the needs of the public and of those serving the public. They described “the ideal family law court from beginning to end, all the different things that would be available in a court room – not taking into consideration money, in an ideal world – and that’s kind of what the Elkins Task Force did, they came up with the ideal situation but it’s not really that practical.”

A judge noted the limitation in their role to influence the cases of the children that come before them.

Unless the child has really got some issues, you are kind of stuck. Whatever caused this kid 16-17 years later to want to do certain things – I mean that is water under the bridge – we can’t really change that. I suppose you could get counseling
and therapy to try to make the kid realize there are two parents and that they should have access to both parents – but that is going to be through therapy or counseling, not some judge making a kid realize it. Lawyers and judges don’t work that way.

One judicial officer specifically mentioned domestic violence (DV) cases and two aspects that were impacting child custody visitation and possible child testimony.

I don’t even recall in a DV context that a child came to testify – maybe once or twice. But of course they are not asked where they want to live, but it is still important because what is the first thing that we are supposed to consider? That is the safety and welfare in domestic violence. I don’t know if the kids know that:

How it is important what they observed in alleged DV incident and whether they know it could dovetail into a custody issue.

This same judge noted that many of the newer judges were being sourced from the District Attorney’s office, who had prior professional experiences with child witnesses in domestic violence matters.

They – I won’t say didn’t have any problems with it, but they were forced in the real world to deal with a lot of domestic violence cases that maybe the kids were the witnesses, so their life experience was maybe having these kids come in and testify and so from their perspective, I guess – what I am led to believe, that they were okay with kids testifying.

In summary, each of the participants was able to readily identify concerns, and make astute comments on the impact of the Elkins Task Force recommendations. They were also readily able to relate any changes that had been enacted to incorporate the
recommendations. They all shared a generally agreed upon methodology when it came to interviewing children and the factors affecting their possible inclusion of minors testimony.
Chapter V: Discussion

As with most studies there are just as many unanswered questions as those that were answered. The results readily identified a number of themes, and they speak directly to the impact of the EFLTF recommendations. The results do have implications in regard to clinical practice and future research, which will be addressed in this discussion. A review of the strengths and weaknesses of the study design will be presented. A brief review of the literature will be included, brief due to the sparse material available on this specific topic. Conclusions will be offered on the impact that the EFLTF recommendations have had on judicial officials inclusion of minor testimony in the divorce process and the setting of visitation schedules.

Comparison to Literature

Due to the paucity of existing literature in this area, there is nothing to compare this study’s results to. Child testimony in divorce cases, if there has been any, has been historically limited to domestic violence cases in criminal proceedings (McGough, 1994). These are entirely different situations in which children testify in criminal cases on charges being brought up against a parent that may affect their visitation schedule due to incarceration or safety issues. The results did support the use of California Family Law Rule 5.2, which dictates the general conduct of the judges in family court, and their application of the rules and laws. The law outlined in California Family Code Section 3042 (to set in motion a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony), the judicial officers in the county examined in this study have done precisely that. Although the court rules state that those younger than 14 may be considered appropriately aged witnesses,
the results of this study support 14 as the age that most judges find comfortable in considering hearing a minor’s testimony and not appropriate for children of younger ages.

**Strength of Study**

This qualitative case study yielded rich verbal descriptions of the situation present in one county’s family court system. It studied judicial officials in their environment, hopefully creating a deeper understanding of a finely targeted people, problem, or situation in a comprehensive manner. These judicial officers openly shared their experiences and thoughts, and were generally in agreement on how to work with minors seeking to testify. With this information, this study has been able to explore the judicial and clinical arenas connected to this area of study. This study empowered the subjects to express their frustration about not being involved in the Elkins Task Force process, in making rulings that directly affect their ability to perform their duty. As defined by a case study methodology, the area studied was a closed system both by geography and by branch of law.

**Weakness of Study**

The major discernable weakness of this study is that it is not generalizable to other systems with the results being representative of a single geographic area and a specific county court system. There was only one data source used, interviews, with no supporting court documents, observations of court proceedings, or photos. Another weakness was that the participants in the study were willing, but self-selected. The major discernable weakness of this study was that it is not generalizable to other county courts, with the results being representative of a single geographic area and a specific county
court system. Interviews were the only method of collecting data, with case files and observations of court proceedings required for verification. Another weakness was that the participants in the study were willing, but not randomly selected. If judicial officers from another county were interviewed, they may or may not hold some of the same concerns as this county. For example, the judicial officers of this county relied heavily on court-appointed mediators to provide information to assist in decision-making. Other counties do not have recommending mediation, so perhaps judicial officers in counties without regular testimony of a recommending mediator would hold different views. One judicial officer noted new judges in this county had experience in the District Attorney’s office handling criminal cases. The professional history of a judicial officer could impact their perspectives on children’s testimony. A judicial officer with a professional history as a family law attorney might have different assumptions compared to judicial officers with a professional history as a prosecutor of crimes involving children and the practice of seeking children’s eye-witness testimony.

Implications for Clinical Practice

It was heartening to discover that the role of mental health professionals is firmly ingrained in this family court system. This presents a potential source of excellent opportunities to serve internships and practica for those interested in pursuing a career that integrates mental health and forensics. The results of this study also reinforced for attorneys the need for mental health professionals as the mediators and also the intermediaries needed to act as a layer between the judicial officers and the minors. The use of mediators, whether provided by the court or by private mediation, was not only supported but depended upon by the participants of this study. Mediators
interviewing the parents and children to discern what their needs and wants are provides an integral insight into the family that the judges do not have the time or skill set to do. Child custody evaluators and other mental health professionals provided an even greater in-depth look into the family’s functioning, and could detect more subtle influences taking place. They could thereby offer more nuanced reports on the family and suggestions on visitation schedules that would reflect this. Therapists could offer their services to aid the family in their divorce grieving process, their acclimation to the changing family dynamic, and practical conflict resolution techniques.

**Future Research**

Future research could include a variety of studies that would give a more well rounded and generalizable picture of the circumstances present in all California family law court rooms. In the interest of investigating the effects of one variable, it would be interesting to have another case study in a non-recommending mediation county, which may be more representative and help explore the themes identified in this study.

A statewide quantitative study of California family law judges that differentiates between recommending mediation and non-recommending counties could feature questions on the six themes that were discerned in the present study. Another study may solicit opinions from parents’ attorneys and from minors’ counsel, and yet another mediators in recommending and non-recommending counties.

Another study could focus on how parents faced the situation with their divorce in which their children wanted to testify – or not, noting the impact on the relationships after testifying. A study of children who have given testimony and how they perceive their relationships have been impacted by the rulings – whether in their favor or not. A further
study could be conducted to survey parents who had children testify against them in the past and inquire if the fear that the parent-child relationship was changed forever, as feared by the judicial officers, really came true or not. Did the judicial fear of coercion to manipulate the situation take place, whether it was the use of the threat of providing testimony or actually giving testimony?

A noteworthy study would be to solicit the opinions of adults who, as children, endured their parents’ divorce. This study would investigate whether they gave testimony or not, and whether they felt this did or would have changed their subjective experience of the divorce.

**Conclusion**

The very aim of this study was to explore if the EFLTF empowered children to find a voice in the divorce process more than in litigation prior to the Task Force and subsequent new court rules. The general belief expressed by the judicial officers interviewed was that it was not in the best interests of the child to give testimony: either due to the potential negative impact on their present relationships with their parents or their future relationships. They expressed dismay at the fact that parents might want their children to participate in the legal system. They felt that the Elkins Task Force now presented them with the conundrum of having listened to the child but choosing to possibly not proceed in the direction that the child preferred. The general feeling was that it placed the judges in a position of being perceived as not honoring the wishes of the child, or not having truly heard them. Conversely, the judges could be seen as having honored the child’s wishes when accepting the children’s testimony, but this could also place at risk the future relationship between the child and an estranged parent. A very real
result of honoring the wishes of a teen is empowering them in a relationship in which they still need to view their parents as the authority figures in their lives. On the other hand, a teen motivated to persuade the judge could result in triangulating with an outside authority figure, which could weaken the relationship that the child has with both parents. Finally, the message from the judges was summed up in this quote: “Ultimately, I am not paid to make people happy, I am not paid to make lawyers happy, not paid to make children happy, I am paid to make orders that I think are in the best interest of children.”

I embarked on this study fully supporting the EFLTF recommendations that a more refined, yet generalizable manner of accepting child testimony should be integrated into the evidentiary process when considering setting visitation schedules to empower children in the court system by giving them a voice in the process. On the surface, it appears to be a fair and desirable inclusion. After interviewing the judicial officers, there is now an understanding that they do not want to have that decision foisted upon them. They are being forced to do so because they recognize that the parents cannot come to an agreement, and they are soliciting a third party to do so. The real conundrum of empowering children with a voice in the divorce is that it creates a lose-lose situation: If you listen to the child and grant their wishes, are you creating a situation in which the child will use this perceived power to manipulate his or her parents? If you do not go along with the child’s expressed wishes, then are you confirming his or her beliefs that his or her feelings are unworthy of consideration? The judge may be perceived as yet another adult who does not listen to or respect what they say and feel. This could be perceived as false empowerment of children – do they really have a voice in the system?
Feminist theory supports the empowerment of individuals in gaining their voice in what is perceived to be an unsafe world (Brown, 2006). Part of what one could perceive as unsafe in this world is extending yourself to make known your wishes and then to not have them honored. This sense of false empowerment may be counteracted by the proper presentation of information to a child that is prepared to testify. They would be instructed that they may make a case to the judge and that the final decision lies with this person.

The empowerment consists of the child having the opportunity to voice their wishes – not necessarily the wishes themselves. The child has their day in court, but then finds that their wishes are not followed because a judge decides that the child does not have the wisdom to see what is in their best interests. An adult can look at the situation and see how not having a relationship with one parent or another could very well be detrimental to a child in the long run. An adult knows that what seems to a child to be a do or die situation is in fact another life lesson that will resolve itself in time. The wisdom of knowing what is in the best interests of the child is not always appreciated by those it impacts the most at that point in time.

Judges are placed in an unenviable position when they are approached to hear minor’s testimony. Lawyers are taught to interrogate as part of the training for their adversarial roles and, while judges have ascended to a place of ultimate decision-making power and are looked upon for impartial rulings, it is difficult to go against their basic training. Putting them in a position to interview minors is unfair to them and to the minors. If this author were a judge, there would be as many layers as possible between myself and the experience of receiving testimony from a minor. As a parent with an
understanding of the procedure and of the lose-lose impact on my child, I would not want my child to testify.

A child is a minor and still needs parenting, and in a divorce, there is a redefinition of the role: not as a single parent but as a co-parent. Raising children who are independent, strong and have a voice is important, but introducing them to this concept in the midst of a divorce is cruel, defined as "willfully or knowingly causing pain or distress" ("Cruel," 1993, para. 1). Children are already enduring the disintegration of their family unit. To tell them that they have to decide where to live can be an onerous burden. It is important that parents are open to the expert advice of mediators and custody evaluators. This presents as an opportunity to recognize the role a mental health professional could play as the interpreter of their child’s expressed wishes. It is also an opening for a divorcing couple to agree to include a third person, with the correct training, to smooth out the transitions between homes and learn conflict resolution procedures for when needed.

During the course of this study, I discovered that very little has changed with the EFLTF recommendations as to accepting minors’ testimony and the age range that encompasses. The true change came in establishing procedures to observe due process, while accepting child witnesses or having alternative methods to collect information on the child’s wishes. The role of mental health professionals was found to have been strengthened in the divorce process due to the need for these alternative collection methods. Mediators, court provided and private, child custody evaluators, and therapists grant a child opportunities to find and use their voices while not exposing them to the
possibility of parental retaliation, feelings of neglect or false empowerment by the judicial officers, and remain protected through confidentiality in a safe environment.

This study presents an opportunity to note that while every California court offers mediation, a mental health professional’s recommending report can greatly aid the judicial decision makers in the challenge of determining visitation schedules. It is recognized that not all courts are able to budget for extensive mediation reports that provide the judicial officers with the information they need. The search for an inclusive, affordable solution continues.
References


California Conciliation Courts. (1980). 4600


In re Marriage of Burgess 13 Cal, 4th 25.


Appendix A: Interview Protocol

Time/Date of Interview:
Place:
Interviewee:

Questions:
1) What guidelines or methods have you instituted in your courtroom in order to comply with the recommendations, specifically Family Code Section 3042?
2) What are some of the factors that would influence your decision making process? Time? Money? Length of Case?
3) Do you feel that you have the information and training you need in order to interview children effectively? Is there any other information or training you would like to have?
4) Do the ages of the children have an impact on how you are gathering information? If so, how are you accommodating them?
5) In your experiences talking to children, what approaches have worked best? Side bar? In front of parents? With others in attendance ie. Evaluators, mediators/lawyers?
6) Are there any particular challenges you have faced in trying to learn what you need to know from the children?
7) Overall, have there been any real changes in the custodial visitation rulings since the Task Force Recommendations were introduced?
8) Have these changes made your decision making process easier or more difficult?
9) Any change the in the number of cases that you are trying, and if so, could you attribute that to the new recommendations? ie are parents coming back in now that their children are allowed to testify?
10) Do you have any concerns/comments about the Recommendations that you would like to add?
November 21, 2014

Dear Judge____:

Please allow this letter to serve as an introduction: I am a pre-doctoral intern seeking information for my dissertation. I am in my final year at Antioch University Santa Barbara, in the Clinical Psychology program that has a Forensic emphasis. My area of focus is in Family Law – specifically divorce and the custody/visitation decision making process. I am interested in investigating the impact of the Elkins Task Force Recommendations of 2012: on how the way that children’s voices are heard in the courts, the changes being made by judicial officers to accommodate the recommendations and the influence on the outcomes of the decisions.

I am in search of a participant in order to conduct a case study: a qualitative approach that will involve interviews, direct observations of court proceedings and accessing public documents. The participant should be open to sharing their experiences, perceptions, and expectations of the process. It is anticipated that the length of the study will be over a one month period- with initial interviews being 1/2-1 hour in length and a shorter subsequent interview to follow for clarification, updates, and to incorporate further insights. It is understood that this is an imposition on your time, however, it is felt that there is great merit to the information being gathered, catalogued and disseminated. This is viewed as an initial exploratory work that will hopefully engender discussion amongst other judicial decision makers. I sincerely hope that you will consider participating in this study- please contact me if your interest has been piqued.

Thank you for your consideration,

Whitney Dunbar, MA
Pre-Doctoral Intern
Antioch University Santa Barbara
Appendix C

Informed Consent Form

Project Title: Hearing a Child’s Voice in Divorce: A Judge’s Experience
Project Investigator: Whitney Dunbar, M.A.

Dissertation Chair: Steve Kadin, PhD

1. I understand that this study is of a research nature. It may offer no direct benefit to me.

2. Participation in this study is voluntary. I may refuse to enter it or may withdraw at any time without creating any harmful consequences to myself. I understand also that the investigator may drop me at any time from the study. The purpose of this study is to aid judicial officers by making them aware of how others in similar circumstances are actively gaining and using the information necessary in order to determine a child’s preference and in turn use that information in the decision making process concerning child visitation and placement. Mental health professionals may find this case study provides insight into the decision making and thought process of the court decision makers.

3. As the participant in the study, I will be asked to take part in the following procedures:

   Interviews for the study will take 1/2-1 hours of my time for the first occurrence. The subsequent interview will be shorter and used for clarification and further fact finding. All will take place in a location that is mutually convenient for investigator and myself. The risks, discomforts and inconveniences of the above procedures might be: No risks are involved in this study. Discomfort may involve the sharing of client information concerning a difficult event. Inconvenience may be the time to meet and fill out the necessary paperwork.

4. The possible benefits of the procedure might be:

   a. Direct benefit to me: to aid in future cases, using the information gathered to determine the child’s preference and in turn use that information in the decision making process concerning child visitation and placement.
b. Benefits to others: to aid others in their cases involving judicial decisions that are set to determine child preferences and subsequent child visitation and placement.

5. Information about the study was discussed with me by Whitney Dunbar. If I have further questions, I can call her or Dr. Steve Kadin.

Though the purpose of this study is primarily to fulfill requirements to complete a formal research project as a dissertation at Antioch University, I also intend to include the data and results of the study in future scholarly publications and presentations. Our confidentiality agreement, as articulated above, will be effective in all cases of data sharing. Participant’s name and personal information will be changed to protect their privacy. All collected data will be coded and all cases will be referred to by pseudonyms. All computer data will be password protected, and deleted once all information is utilized in this and any other related studies. All hard-data will be securely stored in a locked filing cabinet that is accessible only to the interviewer.

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Signature of Participant

Whitney Dunbar, M.A., Principal Investigator
Antioch University Santa Barbara

Steve Kadin, PhD, ABAP
Dissertation Chair
Antioch University Santa Barbara