

Spring 2014

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Recommended Citation

D'Ambra, Lauren A. (2014) "The Importance of Conducting In-Camera Testimony of Child Witnesses in Court Proceedings: A Comparative Legal Analysis of Relevant Domestic Relations, Juvenile Justice and Criminal Cases," *Roger Williams University Law Review*: Vol. 19: Iss. 2, Article 2.

Available at: http://docs.rwu.edu/rwu_LR/vol19/iss2/2

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Articles

The Importance of Conducting In-Camera Testimony of Child Witnesses in Court Proceedings: A Comparative Legal Analysis of Relevant Domestic Relations, Juvenile Justice and Criminal Cases

The Honorable Lauren A. D'Ambra*

I. INTRODUCTION

There is widespread discussion by legal experts regarding whether children should testify in Family Court proceedings involving parental visitation, child custody, or placement issues. Procedurally, the judge may decide these issues after determining that both parents should have joint custody. The trial judge

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awards joint custody in most divorce matters when both parents are fit and proper persons to have custody and are able to make joint decisions regarding the child's health, education, and well-being.¹ Many child advocates believe that it is in the best interest of the child for a judge to conduct a hearing in chambers with the child, rather than testimony in open court, when rendering a decision regarding placement² of the child and/or parenting time. Others believe that it is not the role of the court to hear from the child and that children should not be in the middle of the decision-making process. Thus, there is extensive debate in the legal community regarding whether children should be subject to in-camera testimony.³ In-camera testimony of a child witness is recorded testimony taken outside of the public and the courtroom, generally in the judge's chambers or office. In civil family court disputes, the parents are not present, but their attorneys may participate in the judge's questioning of the child. In-camera testimony is generally utilized to protect the emotional well-being of the child, particularly a younger child. Issues of confidentiality involving sensitive subjects might also be a serious concern. This article supports the position that the use of in-camera testimony of children is very valuable and should be encouraged when feasible in court-adjudicated domestic proceedings. Understandably, a case-by-case analysis needs to be applied to the unique circumstances of each case, since an in-camera interview of a child may not be necessary or appropriate in all cases.

In weighing whether to conduct an in-camera proceeding, the trial judge must consider a number of factors depending on the particular facts of each case. Among the factors it is necessary to determine the child's competency, to record the interview as a procedural safeguard, and to define the role of counsel. If there is case law or statutory guidance, the court must also consider the relevant criteria pursuant to the mandates of the jurisdiction.

1. In these instances, if parents are not able to communicate and make joint decisions or if one parent has a serious disability, sole custody may be awarded and testimony from the child is not generally necessary.

2. In this article, "placement" is the legal term utilized for the parent with whom the child physically resides. Some jurisdictions entwine the terms "placement" and "custody."

3. See generally Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629 (2003).

Moreover, other factors such as the child's age, the child's competency to testify and understand the oath, and case-specific issues must also be considered. This article attempts to provide an understanding of these legal factors as well as highlight relevant case law relating to the legal rights of all parties involved in the court proceeding.

If a decision is made to conduct an in-camera interview, additional care must be taken to preserve due process, and ensure that constitutional rights of all parties are handled fairly. Additionally, the best interest of the child, in conjunction with due process, must outweigh all other considerations.⁴ Clearly, there is no easy answer to this complicated legal issue and there is tremendous responsibility placed on the trial judge who is determining the future of the parent/child relationship in these difficult domestic cases.

Although the trial judge may not necessarily agree that a child's preference is in the child's best interest, it is still important that the child has a voice in the proceedings. While states vary as to the discretion that trial judges may exercise when balancing a child's preference with what is in the child's best interest, there are common key factors, procedural safeguards, and legal issues that transcend different state policies and competing interests.⁵ This article also attempts to summarize the relevant statutory issues, as well as define and distinguish the essential components that need to be considered in the decision-making process to ensure a just outcome for all involved.

This article also highlights summaries of relevant case law in (1) civil domestic proceedings involving child testimony, and (2) a comparative compilation of criminal cases, which require a higher standard of proof and greater protection of the defendant's rights within the criminal justice system. It is important to note that in

4. See *Dupre v. Dupre*, 857 A.2d 242, 251–52 (R.I. 2004) (stating that “[f]ew principles are more firmly established in the law, however, than that in awarding custody, placement, and visitation rights, the ‘paramount consideration’ is the best interests of the child.”). See also *Pettinato v. Pettinato*, 582 A.2d 909, 913 (R.I. 1990) (acknowledging the Court's previous holdings that “child-custody awards must be made in the ‘best interest[s]’ of the child.”).

5. “The absence of legislative direction in Arizona thus leaves judges with wide latitude to independently and individually make policy choices.” See *Atwood*, *supra* note 3, at 633.

both civil and criminal matters, the competency of the child witness is a paramount legal concern for the trial judge. There is considerable case law on this issue, and several states statutorily define the legal factors that must be considered to determine competency of a child witness.⁶ Although this legal analysis focuses on child custody cases, a comparison to criminal cases and termination of parental rights cases is included to further clarify these important legal distinctions and due process considerations.

II. ISSUES FOR JUDICIAL CONSIDERATION

A. *Competency of the Child Witness*

The first and most important legal factor for the trial judge to consider when conducting in-camera testimony of a child is the competency of the child. In establishing competency, the court considers age, whether the child is capable of understanding the oath and the importance of telling the truth, as well as the child's ability to communicate sufficiently with the judge. The trial judge must make this determination and specify findings of competency in each case. If the child is being treated by a mental health specialist, whether the professional recommends to have the child testify is also a major consideration. The specific legal standards may vary depending on the jurisdiction and statutory requirements.

1. *Relevant Case Studies Regarding Competency*

The major focus of family court cases is always on the best interest of the child. In certain circumstances, the child may be able to speak to his or her preference. However, while there is no right to face-to-face confrontation in civil proceedings, a competency determination must be made when there is a child witness. The age of the child is a factor when the trial judge considers whether to grant a motion for in-camera testimony.⁷

6. See, e.g., Nora A. Uehlein, Annotation, *Witnesses: Child Competency Statutes*, 60 A.L.R. 4th 369 (1988).

7. As evidenced in the 2003 nationwide survey of forty-eight Family Court Judges who responded to questionnaires about child custody disputes:

80% of respondents reported that they consider the preferences of older teenagers to be very or extremely significant, while about 40% would ascribe that same weight to the views of children aged eleven

For example, in *Haase v. Haase*, the Virginia Court of Appeals held that the trial judge must consider whether the child is of reasonable intelligence and of sufficient age and experience to express a preference regarding custody.⁸ In that divorce case, the parents were fighting over custody of their children.⁹ The mother sought to have her twelve-year-old son testify regarding his preferences for which parent. The father objected, arguing that forcing the son to testify would be injurious to his emotional well-being.¹⁰ The commissioner elected to have the son testify in an in-camera interview without counsel or the parties present.¹¹ On appeal, the court held that requiring a child to testify in a custody case in open court about his preferences for one parent or another is frowned upon, and that the preferred method in many jurisdictions is to conduct an in-camera interview.¹² The court also held that in order to determine how to proceed with evidence from a child, it must consider the age and maturity of the child, the acrimony between the parents, and the likelihood of improper influence by one or both of the parents on the child's testimony.¹³ In considering these factors, the court should choose the method that best serves the interests of the child. Clearly, prior to putting the child through the rigorous discovery process, the court must first determine whether the child is competent to testify and understand the importance of telling the truth.

Finally, as previously mentioned, criminal cases require a higher standard of proof and greater protection of the defendant's rights and privileges as afforded to him or her by the constitution. Thus, particularly in criminal cases, a stringent adherence to due

to thirteen years. In contrast, more than 70% agreed that the preferences of very young children (infancy to the age of two) would be "of no significance whatsoever." Within the remaining age categories, however, there was wide variation as to the weight given the children's preferences. About 50% of the respondents indicated that the preferences of children aged three to five were possibly significant, but more than a third responded that the views of children in that category were of no significance whatsoever.

Atwood, *supra* note 3, at 634–35.

8. 460 S.E.2d 585, 590 (Va. Ct. App. 1995).

9. *Id.* at 587.

10. *See id.*

11. *Id.*

12. *Id.* at 589.

13. *Id.* at 590.

process is extremely important when determining the necessity of closed circuit testimony of the child witness and the need to first determine the competency of the child victim. An assessment of criminal case law is very helpful when examining the factors considered in determining competency of the child witness.

2. *Relevant Criminal Case Studies Regarding Competency*

Similar to civil proceedings, the trial judge must make competency determinations before a child is permitted to testify in criminal cases. Generally, criminal cases are decided by a jury unless a jury trial is waived by the defendant. The child is not permitted to testify in-camera, because the defendant is legally entitled to confrontation and cross-examination of the accuser, and the trial judge is required to decide issues of competency before the child is permitted to testify in open court on the witness stand. Utilization of closed circuit television for child witnesses in criminal cases is distinguished from in-camera testimony in civil litigation. The defendant's attorney is present and is permitted to question through cross-examination the child. Simultaneously, the defense attorney is able to communicate with his client and the defendant is able to observe the proceedings, while in a separate location, through the use of closed circuit technology. A trial judge's determination of the competency of a child witness in a criminal case is not significantly different from the analysis a trial judge in a custody case would use when determining whether the child is competent to testify. An examination of relevant criminal cases may be helpful.

People v. Morales

This New York criminal case involved a defendant convicted of rape and sodomy against two minor children who lived with him.¹⁴ Both children testified at trial after the court conducted a competency inquiry.¹⁵ The competency hearing occurred outside the presence of the jury. Moreover, the defendant was not allowed to attend the hearing because the court found that he had no constitutional right to be present for the child's competency

14. *People v. Morales*, 606 N.E.2d 953, 954 (N.Y. 1992).

15. *See id.* at 954.

hearing.¹⁶ Both the prosecutor and the defense attorney were allowed to be present during the hearing, but they could not directly examine the child.¹⁷ Rather, the judge allowed the attorneys to submit additional questions for him to ask the children.¹⁸ By statute, in New York, children under the age of twelve are presumed to be incompetent to testify at trial.¹⁹ However, this presumption may be rebutted if, after a preliminary examination, the trial court is satisfied that the child understands the nature of an oath.²⁰ The factors that are considered at this preliminary hearing involve several inquiries: whether the child knows the difference between a lie and the truth; whether the child knows the meaning of an oath; whether the child understands what can happen if he or she tells a lie; and whether the child has the ability to recall and relate prior events.²¹ In the event that the court finds that the child cannot appreciate an oath, the court may still permit testimony that is not sworn to if the trial judge is satisfied that the witness possesses sufficient intelligence and capacity to give unsworn testimony.²² The appellate court affirmed the defendant's conviction.

Kertell v. State

The defendant in this Florida case was charged with capital sexual battery on a minor.²³ The trial court found that the child victim was competent to testify and, subsequently, the defendant was found guilty.²⁴ During the trial, the trial judge conducted a voir dire examination of the child, who was four years old at the time.²⁵ The trial judge concluded that she had demonstrated a sufficient ability to know what it meant to tell the truth.²⁶ The trial judge also found that the jury was competent to consider the

16. *Id.* at 954–55.

17. *Id.* at 955.

18. *See id.*

19. *Id.*

20. *See id.* (citing N.Y. CRIM. PROC. § 60.20(2) (McKinney 2014)).

21. *Id.* at 955.

22. *See id.* (N.Y. CRIM. PROC. § 60.20(2)).

23. *See Kertell v. State*, 649 So. 2d 892, 893 (Fla. Dist. Ct. App. 1995).

24. *See id.*

25. *Id.*

26. *See id.*

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weight that it should afford her testimony.²⁷ Although the appellate court gathered that the child was not of remarkable intelligence upon a review of her testimony, and that she was non-verbal until the age of three, Florida law provides trial justices with wide discretion to determine a child's competency as a witness.²⁸ The state's law provides that the trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the court or to a jury, and (3) whether the child has a sense of his or her moral obligation to tell the truth.²⁹ Here, the trial judge determined that, although the child was only four years old, she was competent to testify in open court in the presence of the jury. This finding shows that there are some instances in which a very young, four-year-old child can be deemed competent enough to give testimony regarding the events in her life.³⁰

Harrington v. State

In this Indiana case, the defendant was charged with child molestation.³¹ A jury convicted the defendant and sentenced him to four years in prison. He appealed, arguing that the evidence was insufficient to determine that the five-year-old victim was competent to testify.³² To find a child competent to testify, an Indiana court must determine that the child (1) understands the difference between telling a lie and telling the truth, (2) knows he or she is under a compulsion to tell the truth, and (3) knows what a true statement actually is.³³ The court noted that an effective method for determining whether a child understands the meaning of telling the truth is to ask the child to give an example of someone telling a lie.³⁴ Generally, simplifying the issue for the child through examples helps the child understand the process and clarifies the record regarding this crucial element. The

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.* at 893.

31. *Harrington v. State*, 755 N.E.2d 1176, 1179 (Ind. Ct. App. 2001).

32. *Id.* at 1181.

33. *Id.*

34. *Id.*

appellate court agreed with the trial judge that there was sufficient evidence to determine the competency of the child witness and determined that there was no abuse of discretion by the trial judge.³⁵

Warner v. State

In this Arkansas case, the defendant was convicted of raping a five-year-old child.³⁶ The trial justice admitted hearsay statements made by the child and found that the child, who was seven years of age at the time of the trial, was competent to testify.³⁷ The question of the competency of a witness is a matter within the sound discretion of the trial justice and, in the absence of clear abuse, an appellate court will not reverse a trial justice's competency determination on appeal.³⁸ In Arkansas, witness competency may be established by considering (1) the witness's ability to understand the obligation of an oath and to comprehend the obligation imposed by it, (2) whether the witness had an understanding of the consequences of false swearing, and (3) the witness's ability to receive accurate impressions and to retain them.³⁹ The child must be able to communicate a reasonable statement of what was seen, felt, or heard to the fact-finder.⁴⁰ In determining the competency of a child witness, the trial court will examine, in addition to the factors above, the child's testimony in its entirety, and will not rely entirely on the preliminary questioning.⁴¹ As long as the trial judge could find a moral awareness of the obligation to tell the truth and an ability to observe, remember, and relate facts, within the records, an appellate court is unlikely to reverse the decision due to the insufficiency of a child's testimony.⁴²

35. *See id.*

36. *See Warner v. State*, 218 S.W.3d 330 (Ark. Ct. App. 2005).

37. *See id.* at 332.

38. *Id.* at 332.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

State v. G.C.

Here, the defendant in this New Jersey case was charged with the molestation of a minor⁴³ and the child was found competent to testify against the defendant at trial.⁴⁴ The trial court determined that the five-year-old child was capable of understanding the difference between a truth and a lie and found the child competent to testify, although the court did not inquire into her understanding of the moral obligation to tell the truth.⁴⁵

The Supreme Court of New Jersey held that, to be competent, a witness must “have sufficient capacity to observe, recollect, and communicate with respect to the matters about which he or she is called to testify, and to understand the nature and obligations of an oath[.]”⁴⁶ Under New Jersey law, all witnesses including children must be sworn or affirmed before they may testify in court.⁴⁷ Although the rules require an oath from each and every witness, there is no set requirement for how the oath is administered.⁴⁸ The court held that any ceremony that obtains, from a child, a commitment to comply with the special obligation to tell the truth in court on pain of future punishment of any kind constitutes an acceptable oath.⁴⁹ The court noted that adopting a stricter approach would virtually prevent children from testifying against their abusers.⁵⁰ The court also thought that departing from the traditional oath would not result in convictions based on the testimony of children who may not understand the difference between right and wrong because they must still meet competency requirements.⁵¹

43. *State v. G.C.*, 902 A.2d 1174, 1177 (N.J. 2006).

44. *See id.* at 1179.

45. *See id.*

46. *Id.* at 1181 (quoting *State v. Butler*, 143 A.2d 530, 554 (1958) (internal quotation marks omitted)).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1182.

B. *Confrontation Clause Issues: Criminal Cases Involving a Child Victim Require the Use of Closed Circuit Technology When the Child is Too Young to Testify in Open Court*

A leading United States Supreme Court case involving child testimony addressed the Confrontation Clause and due process guarantees for defendants in criminal cases.⁵² This case clearly distinguished criminal due process issues from civil domestic custody and visitation matters. The Supreme Court held that the use of closed circuit technology may be utilized in a criminal case involving a child victim who is too young to testify in open court.⁵³ Nevertheless, there is a delicate balance between the defendant's rights to confrontation and the well-being of the child victim.⁵⁴ Thus, in-camera testimony is not utilized in criminal cases because the defendant's due process rights to confrontation and cross-examination may be challenged on appeal if there is a conviction.

Closed circuit technology has been determined a viable solution as the Confrontation Clause does not guarantee face-to-face contact in criminal cases.⁵⁵ Thus, the creative use of technology permits defense attorneys to communicate with their clients and cross-examine the child without the defendant being in the same room with the child. Although the defendant is not in the physical presence of the child, the defendant is able to observe the child's testimony and communicate with defense counsel during the child's testimony through the use of closed circuit television. Additionally, the child is not in a large, crowded, courtroom. The physical and psychological welfare of the child is always a consideration and is an important public policy as well as a compelling state interest. Consider, for example, *Maryland v. Craig*, where the court balances the well-being of the child with the defendant's due process rights.

Maryland v. Craig

This Maryland case involved a criminal prosecution for felony

52. *Maryland v. Craig*, 497 U.S. 836 (1990).

53. *Id.* at 860.

54. *See id.* at 855.

55. *Id.* at 844.

child abuse.⁵⁶ The prosecution invoked a Maryland statute⁵⁷ that allowed the trial judge to receive the testimony of a child witness through a one-way closed circuit television.⁵⁸ This statutory procedure requires the prosecutor and defense attorney to retire to a separate room with the child witness where they perform direct questioning and cross-examination while the judge and jury watch the testimony of the child via closed circuit television.⁵⁹ Through this method, the defendant is able to communicate with his attorney during the proceeding.⁶⁰

The Maryland court referred to the United States Supreme Court in reaching its decision. The United States Supreme Court held that the Confrontation Clause does not provide defendants with an absolute right to a face-to-face meeting with witnesses against them at trial.⁶¹ In fact, there are exceptions to the “face-to-face” requirement when the general goal of the Confrontation Clause is met. In addition to face-to-face confrontation between defendants and the witnesses presented against them, the Confrontation Clause also ensures that witnesses will give their statements under oath and understand the seriousness of what they are doing. Moreover, the Sixth Amendment forces witnesses to submit to cross-examination, which is the most effective legal tool in finding the truth of their testimonies. Cross-examination also permits the jury to observe the demeanor of the witnesses.⁶² Although Confrontation Clause jurisprudence reflects a preference for face-to-face confrontation[,]”⁶³ this goal is flexible to the specific necessities and circumstances of the case, so long as the public policy goals of the Clause are met⁶⁴

Therefore, courts may choose to waive face-to-face confrontation at trial when necessary to further an important public policy goal and where the reliability of the testimony is

56. *Id.* at 840.

57. MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (West 2006) (current version at MD. CODE ANN., CRIM. PROC. § 11-303 (West 2008)).

58. *Craig*, 497 U.S. at 840.

59. *Id.* at 841.

60. *Id.* at 842.

61. *Id.* at 844.

62. *Id.* at 845–46 (quoting *California v. Green*, 399 U.S. 149, 158 (1970)).

63. *Id.* at 849 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

64. *Id.* (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

otherwise assured.⁶⁵ The Supreme Court held that states have a compelling interest in the physical and psychological well-being of children and, in some cases, that interest is sufficient to outweigh a defendant's Confrontation Clause rights.⁶⁶ The Court also held that a procedure like Maryland's could be used where a physical confrontation with a defendant would cause the child emotional harm and prevent him or her from effectively testifying in front of the defendant and the jury.⁶⁷ Thus, the trial judge needs to determine whether the presence of the defendant could affect the child's testimony *before* he or she renders a ruling to permit the use of closed circuit testimony in a criminal case.⁶⁸

Maryland v. Craig is of extreme importance because it not only establishes the legal parameters for the use of closed circuit testimony in criminal cases, but it is also one of the first cases recognizing the use of technology as a means to provide due process rights to the defendant while simultaneously ensuring that protective safeguards are afforded to the child victim.

C. *In-Camera Testimony in Custody Proceedings must be on the Record*

Despite the Court's acceptance of in-camera testimony, due process requires that in-camera interviews respect the fundamental rights and other legal protections owed to both the child and the parents. Appellate courts have universally held that the use of unrecorded and off-the-record in-camera interviews in custody proceedings violate a parent's due process rights.⁶⁹

65. *Id.* at 850.

66. *Id.* at 853.

67. *See id.* at 856–57.

68. *See id.* 860.

69. *See, e.g.,* *Helen S.K. v. Samuel M.K.*, 288 P.3d 463, 473 (Alaska 2012) (noting that “in-camera interviews should be used rarely, and only when truly necessary, because the in camera process creates a risk of infringing the due process rights of the parents”); *C.E.T. v. K.M.T.*, 880 So. 2d 466, 468 (Ala. Civ. App. 2003) (holding that an unrecorded interview without the father's consent or waiver of his right to have counsel present violated the father's due process rights); *In re H.R.C.*, 781 N.W.2d 105, 112 (Mich. Ct. App. 2009) (concluding that although an in camera interview limited to questioning about a child's parental preferences does not violate due process, stating that “the use of an in camera interview for fact-finding presents multiple due process problems”); *Ynclan v. Woodward*, 237 P.3d 145, 152–53 (Okla. 2010) (noting that a child's best welfare is served by conducting an interview “in the

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Clearly, unrecorded testimony may deprive a parent of the ability to preserve certain questions of fact and law for appeal and may prevent meaningful appellate review.

A study of some cases is helpful to examine the safeguards that courts have set up to ensure that the parent received due process. *In re H.R.C.*⁷⁰ is a case involving a termination of parental rights. The Michigan Department of Human Services brought a petition to terminate the parental rights of a couple on the grounds of sexual abuse and neglect.⁷¹ The jury found that the grounds for termination had been proven.⁷² The court heard testimony from the children's counselors and held that the grounds were established,⁷³ but concluded that the termination of parental rights was in the children's best interest after the children's in-camera interviews.⁷⁴

The Michigan Child Custody Act⁷⁵ allows in-camera interviews for the purpose of determining parental preferences, but a termination of parental rights case is not governed by this act. In a custody proceeding, a court's concern for the child's well-being must not outweigh the due process rights of the parents.⁷⁶ Multiple concerns arise with such interviews, specifically questions or answers concerning disputed facts, since parents do not get an opportunity to cross-examine or impeach.⁷⁷ If no appellate record is created, a party will not be able to challenge the basis for the court's decision.⁷⁸ However, despite these risks, Michigan courts have held that in-camera interviews are permitted in custody disputes.⁷⁹

There is no authority in Michigan that supports the use of in-camera interviews governed by the Michigan Juvenile Rules⁸⁰ in

calm of the judge's chambers, away from the pressure of the parents," but, nevertheless, conducting such an interview undeniably raises concerns regarding the parent's due process rights).

70. 782 N.W.2d 105, 109 (Mich. Ct. App. 2009).

71. *See id.* at 109.

72. *Id.* at 110.

73. *Id.*

74. *Id.* at 110–11.

75. MICH. COMP. LAWS ANN. § 722.27 (West 2011).

76. *H.R.C.*, 781 N.W.2d at 112.

77. *Id.*

78. *Id.*

79. *Id.*

80. MICH. COMP. LAWS ANN. § 722.21.

the context of termination of parental rights.⁸¹ The Michigan Juvenile Rules appear to distinguish termination of parental rights cases by not including them in the Juvenile Rules relating to domestic custody disputes.⁸² It should also be noted that Michigan permits jury trials in termination of parental rights cases as part of the fact-finding function, but a jury trial is not permitted in any phase relating to domestic custody matters.⁸³ The reason may be that termination cases are a permanent severance of the parental relationship that permits the child to be adopted by another family. Since such severance is extremely serious, it generally requires a standard of clear and convincing evidence, as found by the jury. In contrast, custody cases in most jurisdictions usually require the lesser standard of proof by a preponderance of the evidence.⁸⁴

The Michigan court's dictum states that the risk of an erroneous deprivation of the fundamental rights of the child and parents is very high when an in-camera interview is conducted.⁸⁵ The court concluded that the value of the in-camera interview is low when compared to this risk and it carries a high potential of unduly influencing a court's decision-making.⁸⁶ Furthermore, the court held that conducting an in-camera interview deprives the parents of a right to cross-examine, impeach, or preserve grounds for appellate review.⁸⁷ Therefore, the court determined that the use of unrecorded and off-the-record in-camera interviews in juvenile proceedings for any purpose in a termination of parental rights case violates the parent's due process rights.⁸⁸

Although unrecorded and off-the-record in-camera interviews may be permissible for the limited purpose of determining a child's custody preferences in custody disputes, such interviews

81. *H.R.C.*, 781 N.W.2d at 112.

82. *See generally id.*

83. *See id.* at 110.

84. *In re Moss*, 836 N.W.2d 182, 186 (Mich. Ct. App. 2013) (holding that while clear and convincing evidence is required for the termination determination, a preponderance of the evidence standard better suits the best interest of the child determination), *appeal denied*, 836 N.W.2d 174 (Mich. 2013).

85. *H.R.C.*, 781 N.W.2d at 114.

86. *Id.*

87. *Id.* at 114.

88. *Id.*

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are never permissible in termination of parental rights cases in Michigan.⁸⁹ *In re H.R.C.* appears to leave open the question of whether an on-the-record in-camera interview is permissible in termination of parental rights cases. Although termination of parental rights cases require a heavier burden of proof, they are still civil cases and do not require the same standards as criminal cases. There may be additional requirements pursuant to state statutes and case law. For example, it appears that Michigan has specific legal mandates that were not followed in accordance with statutory requirements; this distinction may be unique to Michigan.

Moreover, *Haase v. Haase*, discussed previously, also suggests that if counsel is not present during the in-camera interview, the interview must be on-the-record.⁹⁰ The mother sought to have her son testify regarding his custody preferences and the father objected, arguing that forcing the son to testify would be injurious to his emotional well-being.⁹¹ The commissioner elected to have the son testify in an in-camera interview without counsel or parties present.⁹² The Virginia Court of Appeals held that requiring a child to testify in open court about his or her preferences for one parent or another in a custody case is frowned upon; the preferred method in many jurisdictions is to conduct an in-camera interview.⁹³ The court further held that the trial judge has discretion over whether counsel shall be present during an in-camera interview, however, if counsel is excluded, a record must be made of the interview to protect the parents' due process

89. Compare *Surman v. Surman*, 745 N.W.2d 802, 809 (Mich. Ct. App. 2007) (stating that it is well-established that a trial court may conduct an in camera interview strictly limited to determining a child's preferences to protect a child from the trauma and distress of choosing between his or her parents in open court), and *Burghdoff v. Burghdoff*, 239 N.W.2d 679, 682 (Mich. Ct. App. 1976) (noting that "a child who is the subject of a custody dispute, who most likely has already undergone the agony inherent in the breakup of a family unit, should not be subjected to the additional pain of having to testify in open court and be cross-examined"), with *H.R.C.*, 781 N.W.2d at 114 (concluding that "the use of an unrecorded and off-the-record in camera interview in the context of a juvenile proceeding, for whatever purpose, constitutes a violation of parents' fundamental due process rights").

90. *Haase v. Haase*, 460 S.E.2d 585, 589 (Va. Ct. App. 1995).

91. *Id.* at 587.

92. *Id.*

93. *Id.* at 589.

rights.⁹⁴ Clearly, basic due process requirements suggest that any in-camera interviews by a trial judge in domestic proceedings must be on the record. There cannot be an appellate review of the procedural and/or legal issues without a record of the child's interview. In this case, one can see the importance of counsel in these interview processes.

D. *Role of Counsel*

In Family Court proceedings, the trial judge may appoint a guardian ad litem to represent the best interest of the child. Many jurisdictions have statutory provisions for appointment of a guardian ad litem;⁹⁵ however, the parties are generally responsible for paying legal costs for the guardian.⁹⁶ Litigants may not be in agreement that a guardian ad litem be appointed because they are not able to afford the additional expense. If the child already has a court-appointed guardian, it may not be necessary or feasible to conduct an in-camera interview of the child. In most jurisdictions, guardians are appointed to act as an independent attorney representing the best interest of the child.⁹⁷ Because it is often an additional expense for the parents, and they may not be able to afford another attorney, in-camera testimony may be a viable option.

Additionally, the trial judge should consider whether the parents are both represented by counsel or whether they are

94. *Id.* at 590.

95. *See* Atwood, *supra* note 3, at 663 n.208.

96. *See, e.g.,* Dep't of Health and Rehab. Serv. v. Lee Cnty. (In Interest of R.W.), 409 So. 2d 1069, 1070 (Fla. Dist. Ct. App. 1981) (noting that the court "consider[s] an award of fees to a guardian ad litem appointed as required by statute to be closely akin to an award of costs and attorney's fees provided by statute to be awarded to a prevailing party").

97. *See* Atwood, *supra* note 3, at 636.

Significantly, the least popular method of ascertaining children's wishes, other than direct testimony in open court, was the in-camera interview. A quarter of the respondents reported that they never conduct such interviews, and fewer than a fifth of the respondents indicated that they conduct in-camera interviews on a regular basis. On the other hand, more than half responded that they conduct judicial interviews of a child occasionally, suggesting that for most judges the decision to interview a child is case-specific and highly dependent on the child's circumstances.

Id.

representing themselves. It is difficult to conduct an in-camera interview if both parties are self-represented. In these instances, in-camera testimony should be discouraged. A self-represented parent may be hostile and argumentative with the child, and would certainly be unfamiliar with the legal process. Ultimately, the damage inflicted upon the parent-child relationship through a parent-child confrontation may be impossible to repair. In-camera testimony is often utilized to allow the child to be open and honest about the parent-child relationship in the absence of the parent.⁹⁸ If the parent is present during the in-camera interview, it may be difficult for the child to be upfront regarding his or her circumstances, especially if one parent is abusive. It is clearly not the role of the judge to act as a therapist with the parent and child in a confrontational situation.

In the event that there is an appeal, it is generally advised that both parties and their attorneys be in agreement for an in-camera interview of the child. The agreement should be stated on the record before the in-camera interview is conducted.⁹⁹ The record should state that the parties have agreed or stipulated to the court conducting an in-camera of the child and whether the attorneys are permitted to submit questions to the court. Generally, when conducting an in-camera interview, a judge will incorporate the attorneys' questions into the judge's inquiry of the child.¹⁰⁰ Lastly, the trial judge should state on the record the purpose of the in-camera interview and that the court is not bound by the child's stated preference. If these procedural safeguards are followed, it is doubtful that there would be any legal basis to sustain an appeal relating to the protocol followed when conducting the in-camera testimony of the child.

Other states may require that the counsel take an even more active role during the in-camera interview. In the case of *C.E.T. v. K.M.T.*, the Alabama Court of Civil Appeals held that counsel should be present during an in-camera interview unless expressly waived by the client.¹⁰¹ In that case, the husband and wife were

98. *Id.* at 646.

99. *See id.* at 642-44.

100. *Cf. id.* at 649 (noting that the American Law Institute's proposal recommends that the counsel for the parent or the child be allowed to submit questions).

101. 880 So. 2d 466, 468 (Ala. Civ. App. 2003).

divorced and the husband was awarded primary custody of their minor son.¹⁰² The wife filed a motion to modify custody of the first child and a trial was eventually held.¹⁰³ During the trial, the wife requested that the court conduct an in-camera interview with the older child. The father objected and requested that his counsel be present and able to ask questions if the court chose to grant the in-camera interview.¹⁰⁴ The court denied the father's request and conducted an in-camera interview without the father's counsel present.¹⁰⁵ The interview was not recorded even though a court reporter was present.¹⁰⁶ The trial court ultimately awarded the mother custody of the minor child.¹⁰⁷ The appellate court reversed the holding that, in the absence of a waiver or consent from the other parent, an in-camera interview with a child cannot be permitted.¹⁰⁸ Quoting the Alabama Supreme Court, the Alabama Court of Appeals held that "[t]o sanction such a procedure would fly squarely in the face of the constitutional right of litigants to a public trial" if such interviews were held without a waiver or consent by both parties.¹⁰⁹ Moreover, pursuant to Alabama Rules of Civil Procedure,¹¹⁰ in-camera interviews may not be conducted in the absence of waiver or consent without the parties or their attorneys present.

In re Marriage of Benjamin S.,¹¹¹ a California case which relates to an in-camera interview in the context of sexual abuse allegations, applied the requirement that in-camera interviews do not have to be recorded as long as there is a waiver of objection or the consent of the parents. This interview process was upheld because the parties did not object to an in-camera interview at the time of the trial and the objection was thus deemed waived.¹¹²

102. *Id.* at 466. The wife was also pregnant with another child and a paternity test showed that the child belonged to the husband. *Id.*

103. *Id.* at 466–67.

104. *Id.* at 467.

105. *See id.*

106. *Id.*

107. *Id.*

108. *Id.* at 468.

109. *Id.* at 467 (quoting *Ex parte Berryhill*, 410 So. 2d 416, 418 (Ala. 1982)).

110. ALA. R. CIV. P. 43.

111. 217 Cal. Rptr. 561 (Cal. Ct. App. 1985).

112. *See id.* at 565.

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The couple, in *Benjamin S.*, had two children, Christopher and Stephanie,¹¹³ and when the judgment dissolving the marriage was entered, the wife was granted custody of Christopher and the husband was granted custody of Stephanie.¹¹⁴ The wife had been cohabitating with another man. Shortly thereafter, the husband noticed that the children were engaging in inappropriate sexualized behavior and Christopher was using profane language when he visited.¹¹⁵ Stephanie reported that the man living with her mother hurt her when he touched her vaginal area.¹¹⁶ The father also noticed contusions on Christopher's buttocks and reported it to Child Abuse Services. The father did not let the mother see her children, so she requested an order to show cause. The father then counterclaimed with a motion to suspend her visitation.¹¹⁷

During the trial, with the consent of the parties, the trial justice conducted an in-camera interview with the children, which was off the record and the parents' attorneys were not present.¹¹⁸ The court then noted on the record that the children's responses during the interview were consistent with abuse and incorporated the children's statements in the court's memorandum of decision.¹¹⁹ The California Court of Appeal held that the parties consented to the court's in-camera interview of the child and thus the court committed no error in conducting the interview without the parents' attorneys' participation.¹²⁰

Alabama and California Courts adhere to a "raise it or waive it theory" and have decided that the appellant's failure to object to the in-camera process at the time of trial constitutes a waiver.¹²¹ However, other jurisdictions have clearly stated that in-camera interviews must be conducted on the record, particularly if such interviews are statutorily mandated.¹²² For example, Oregon enacted a law mandating that attorneys be present during a

113. *Id.* at 563.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 563–64.

120. *See id.* at 565.

121. *See id.*; *C.E.T. v. K.M.T.*, 880 So. 2d 466, 467 (Ala. Civ. App. 2003).

122. *See Atwood, supra* note 3, at 643.

child's in-camera testimony and that it be on the record in accordance with the Oregon Juvenile Code for juvenile court hearings.¹²³ The Juvenile Code provides:

The hearing shall be held by the court without a jury and may be continued from time to time. During the hearing of a case filed pursuant to ORS 419B.100, the court, on its own motion or upon the motion of a party, may take testimony from any child appearing as a witness and may exclude the child's parents and other persons if the court finds such action would be likely to be in the best interests of the child. However, the court *shall not exclude the attorney for each party and the testimony shall be reported.*¹²⁴

Submission of questions by each party's attorney to the trial judge conducting the in-camera interview of the child provides some input from legal counsel to the in-camera interview. It further ensures that specific legal rights and issues are addressed by the trial judge conducting the interview so that the judge does not have total discretion. These safeguards ensure the parent's due process rights are protected. Additionally, it gives counsel the choice to participate in the in-camera process or waive their right to be present.

E. The In-Camera Interview Process Should Include an Ability to Provide Questions to the Trial Judge When Attorneys are not Present

Generally, the trial judge has discretion to determine whether counsel should be present during an in-camera interview.¹²⁵ Again, the trial judge must weigh the specific facts and circumstances of each case against the interests of all parties, especially the child. Attorneys are not legally mandated to be present in civil custody matters during in-camera interviews, unless required by a legislative enactment. The court must determine how to best serve the child's interest when conducting an in-camera interview.¹²⁶ It is important for the parents'

123. OR. REV. STAT. ANN. § 419B.310 (West 2013) (emphasis added).

124. *Id.* (Emphasis added).

125. *See, e.g., In re James A.*, 505 A.2d 1386 (R.I. 1986).

126. Appendix B contains a sample of generic questions to be used by the

attorneys to provide input regarding the relevant facts of each case. When the parents' attorneys are not present during the in-camera testimony, the court should allow written questions and/or follow-up questions to be incorporated into the interview process to balance the interests of all involved.

In re James A., a Rhode Island case, establishes legal precedent and protocol for conducting in-camera interviews of children in custody cases.¹²⁷ This matter was brought by child welfare authorities alleging sexual abuse of two young boys by their father.¹²⁸ This case establishes excellent procedural protocol for the handling of in-camera testimony involving young children. The mother of the two minor children voluntarily placed them into the care of Children's Friend and Service ("CFS"), a private child care agency, because she was experiencing emotional difficulties after separation from their father.¹²⁹ The children were subsequently placed with foster care caretakers who noticed that the children showed signs of abuse.¹³⁰ A CFS caseworker then filed a complaint with the state's child welfare services, alleging that the children had been sexually abused by their father before being placed in foster care, prompting a placement hearing. At trial, the judge held an in-camera interview with the older child, who was five years old.¹³¹ During this interview, the boy testified at length about incidents of sexual and physical abuse by his father.¹³² The trial justice stated that he would ask the child any questions that the attorneys submitted and also allow the attorneys to be present during the questioning.¹³³ Thus, the attorneys for both sides were present until the child began to cry. At that point, the judge cleared the chambers and continued the questioning with only the stenographer present.¹³⁴ The trial judge ordered the testimony to be read back to the attorneys, who were then permitted to submit follow-up questions. However,

trial judge during an in-camera interview. These questions may also be used by the judge to develop a rapport with the child.

127. *James A.*, 505 A.2d at 1386.

128. *See id.* at 1387.

129. *Id.*

130. *Id.*

131. *Id.* at 1388–89.

132. *Id.* at 1389.

133. *Id.*

134. *Id.*

they were not allowed to cross-examine the child. In this case, neither party submitted any follow-up questions.¹³⁵

The father appealed and argued that the court's procedure in interviewing the child, without allowing him the right of confrontation, failed to afford him his constitutional right to due process of law.¹³⁶ The Rhode Island Supreme Court held that, while the Sixth Amendment to the Constitution extends the right of confrontation in criminal prosecutions, there is no constitutional right to confrontation in civil actions involving family disputes.¹³⁷

In this case, the child, as the sexually abused victim, had direct knowledge of the facts, and his testimony was paramount in determining the father's culpability.¹³⁸ However, because of the child's young age and the sensitive nature of the sexual acts, the judge decided that an in-court examination of the child would result in psychological trauma to the child, and, therefore he ordered an in-camera interview.¹³⁹ The Rhode Island Supreme Court further held, "the best interest of the child as weighed against the interests of the parent and the state certainly supports use of this type of procedure and it was within the discretion of the trial justice to grant it."¹⁴⁰ These procedures adequately protected the due process rights of the father while protecting the interests of the state and the child. It should also be noted that the court did not conduct the in-camera procedure to determine the child's custody preference in this case, but, rather to allow for direct questioning regarding acts of sexual abuse by the child's father.

Subsequently, in the case of *In re Diana P.*, the Rhode Island

135. *Id.*

136. *Id.* at 1390.

137. *See id.* (stating that "[t]he Supreme Court [of R.I.] has stated that the rights of parents to determine what is in the best interest of their children may be subject to state intervention when the physical or mental health of the children is drawn into question . . . 'In child-abuse and related custody proceedings, we have long espoused the position that the rights of parents are a most essential consideration, but we further recognize that the best interests and welfare of the child outweigh all other considerations'" (quoting *In re Lester*, 417 A.2d 877, 880 (R.I. 1980)).

138. *Id.* at 1389.

139. *Id.* at 1390.

140. *Id.* at 1391.

Supreme Court reinforced their earlier decision in a case involving similar allegations of child sexual abuse alleged by child welfare authorities against a caretaker.¹⁴¹ This case concerned the determination of custody for Diana, the daughter of Mr. and Mrs. P. However, the determination depended on the truth of a seven-year-old girl's allegations that her older sister's husband (Mr. P.) had sexually molested her.¹⁴² As a result of the seven-year-old Gina's allegations, child welfare authorities investigated and required that Mr. P. not be left alone with his daughter, Diana.¹⁴³ When the child welfare authorities found that the husband spent a lot of time alone with the daughter, they filed a complaint alleging neglect against both parties.¹⁴⁴

During the trial, the case relied heavily upon the testimony of Gina. Instead of allowing Gina to testify in open court, the trial justice conducted an in-camera interview without the parties or their attorneys present.¹⁴⁵ The trial justice did not provide a reason for using this procedure and refused to incorporate questions from the parent's attorney during the in-camera interview.¹⁴⁶

The Rhode Island Supreme Court held that, so long as the trial justice provided a sufficient reason for excluding the parties and the lawyers, in-camera questioning of a child witness without their presence was permissible.¹⁴⁷ However, because the trial justice did not make a finding that the presence of the parties and their lawyers "would have upset or been harmful to" the child witness, the case was remanded for the Family Court to conduct a new hearing permitting the attorneys to be present or otherwise submit questions to the trial judge to use during the in-camera interview.¹⁴⁸

In the later decision of *Duhamel v. Duhamel*, the Rhode Island Supreme Court upheld the trial judge's decision to give custody of two children, ages six and seven, to their father based on the children's in-camera testimony during the child custody

141. 656 A.2d 620 (R.I. 1995).

142. *Id.* at 621.

143. *Id.*

144. *Id.*

145. *Id.* at 622.

146. *Id.*

147. *See id.*

148. *Id.* at 622–23.

hearing.¹⁴⁹ In this case, the mother did not raise procedural issues regarding the in-camera testimony of the children;¹⁵⁰ rather, she argued on appeal that the trial judge abused his discretion by not considering any factor aside from where the children preferred to live.¹⁵¹ The Rhode Island Supreme Court sustained the trial judge's custody decision and held:

The trial justice here interviewed both children individually in his chambers, and they both expressed the desire to remain in Florida with their father, his wife, and their new baby brother. The trial justice was impressed with their forthright statements and believed that their wishes should be given the greatest consideration. He found that they have "fashioned a life for themselves in Florida," and therefore, he did not believe that it was in their best interests to disrupt this custodial arrangement by any change in physical possession. In *Kenney v. Hickey*, 486 A.2d 1079, 1083 (R.I.1985), we ruled that it has been our policy to afford a child's preference considerable weight. Further, we have stated that determining whether a minor child is competent to testify is a decision that rests primarily with the trial justice, who is in a better position to observe the witness. *Id.* (citing *Brierly v. Brierly*, 431 A.2d 410, 413-14 (R.I.1981)). This decision will not be disturbed unless the record discloses that it was clearly erroneous.¹⁵²

In contrast, in other jurisdictions, a judge may not be required to incorporate the attorneys' questions into the in-camera interview. The Florida Appellate Court afforded great discretion to the trial judge in *Monteiro v. Monteiro*.¹⁵³ This case involved an action for dissolution of marriage that was consolidated with four domestic violence petitions.¹⁵⁴ One of the domestic violence petitions was on behalf of the victimized wife and the other three arose from the father's alleged sexual abuse of the couple's three

149. *Duhamel v. Duhamel*, 704 A.2d 212, 212 (R.I. 1997).

150. *See generally id.*

151. *Id.* at 213.

152. *Id.* at 214.

153. *Monteiro v. Monteiro*, 55 So. 3d 686 (Fla. Dist. Ct. App. 2011).

154. *Id.* at 687.

children.¹⁵⁵ The trial court entered an order stating that it would conduct an in-camera interview with the two oldest children outside the presence of the parties and their counsel before hearing testimony from other witnesses, and noted that the court reserved the right to interview the youngest child if the interview was determined to be necessary.¹⁵⁶ There is no evidence in this case to suggest that the attorneys were given authorization from the trial judge to submit interview questions, nor is there evidence that they requested permission from the court to do so.

The trial court's order was upheld because the appellate court found that the trial judge did not deviate from the essential requirements of law, and the father cited no authority requiring the court to subject minor children to cross-examination by a party's counsel in a domestic violence case.¹⁵⁷ The father also cited no authority that the presence of a party or his or her counsel is required during an in-camera interview.¹⁵⁸ Under Florida law, "a parent's due process rights are protected by the mere presence of a court reporter in an in-camera interview without counsel or parties present."¹⁵⁹ In Florida, the interests of the child are of the utmost importance in domestic and sexual violence cases. The Florida Appellate Court held that, due to the primacy afforded to the best interests of the child, the trial court has discretion to determine how to best serve the child's interest while conducting an in-camera interview.¹⁶⁰ The court further held that a trial court is authorized by statute and case law in Florida to implement a procedure that is not expressly authorized by law in order to protect the interests of the child.¹⁶¹

III. STATE STATUTES OUTLINING IN-CAMERA TESTIMONY STANDARDS AND PROCEDURES

Sixty percent of states lack any statutory guidance regarding in-camera testimony.¹⁶² Of the twenty states that have specific

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 688.

160. *Id.* at 688–89.

161. *Id.* at 689; *see also* FLA. STAT. § 92.55 (2010) and *Hickey v. Burlinson*, 33 So. 3d 827, 829 (Fla. Dist. Ct. App. 2010).

162. *See id.*

statutes relating to this type of interview, the vast majority define legal parameters and protocols solely for criminal cases.¹⁶³ In fact, only eight of those twenty states include statutory provisions for civil matters.¹⁶⁴ In some instances, states require that civil matters relate to physical or sexual abuse.

Requiring a child to testify in open court may be daunting and exceptionally traumatic, particularly if maltreatment by a parent is an issue. For that reason, some states have enacted laws that establish legal criteria for the court to consider when deciding whether an in-camera interview is appropriate.¹⁶⁵ Still, many states have not endorsed legislation concerning in-camera interviews because of the perceived due process infringement that may be posed if the defendant is denied confrontation of his accuser.

An examination of the statutes providing criteria for in-camera interviews is helpful. For example, in Ohio, in-camera testimony of children is expressly permitted by statute if the circumstances meet the criteria prescribed in the statute.¹⁶⁶ In *Jackson v. Herron*,¹⁶⁷ the Appeals Court of Ohio interpreted the statutory authority of the court to conduct an in-camera interview with a child. Stacey Jackson, the mother of the child, was granted custody and placement while the father, Timothy Herron, had visitation rights.¹⁶⁸ The father filed a motion to change custody because the mother allegedly interfered with his visitation, talked

163. *See id.* (showing twenty different state provisions).

164. *See id.*

165. *See, e.g.,* *Jackson v. Herron*, No. 2003-L-145, 2005 WL 1861965, at *16 (Ohio Ct. App. Aug. 5, 2005).

166. OHIO REV. CODE ANN § 3109.04 (B)(1) (West 2013) provides:

When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children. In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

167. *Jackson*, 2005 WL 1861965, at *10.

168. *Id.* at *2.

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derogatively about him in front of the child, physically abused the child, and exposed the child to second-hand smoke.¹⁶⁹ During the trial, the court conducted an unsworn in-camera interview with the child.¹⁷⁰ According to the Ohio statute, the court has the authority to conduct an in-camera interview,¹⁷¹ but the trial court must “make a record of [such] interview with children involved in custody proceedings . . . [to] ensure that an appellate court can effectively review the trial court’s decision pertaining to custody matters.”¹⁷² Thus, the Ohio court held that when an in-camera interview is performed, it must put the substance of that interview on the record.¹⁷³ However, the statute does not specify how the interview is to be conducted, nor does it require that questions be asked in a particular manner. Thus, the court “may [use] any reasonable method [in] questioning the child, as long as [it] does not violate the [purpose] of the statute[,]” the protection of the best interests of the child and protection of the parents’ due process rights.¹⁷⁴ So long as the inquiry focuses on issues raised in open court during the trial and the child’s custody preferences, it will not violate a parent’s due process rights.¹⁷⁵

Another example of statutory requirements for in-camera testimony of a child was enacted by the Texas legislature. The Texas Family Code¹⁷⁶ states that, in a nonjury trial or at a hearing, the court must interview in chambers a child twelve years of age or older but has the discretion to interview in chambers a child under twelve years of age regarding the child’s wishes as to the child’s primary residence. In a jury trial, though, the court may not interview the child in chambers on a factual or legal issue in which the jury will place its verdict. The Texas statute also provides that the court may allow the parent’s attorneys or guardian ad litem to be present during an in-camera

169. *Id.* at *4–5.

170. *See id.* at *3.

171. OHIO REV. CODE ANN § 3109.04 (West 2013).

172. Jackson, 2005 WL 1861965, at *16 (quoting *Donovan v. Donovan*, 674 N.E.2d 1252, 1255 (Ohio Ct. App. 1996)).

173. *Id.* at *16.

174. *Id.* at *22 (quoting *Kellogg v. Kellogg*, No. 04AP-382, 2004 WL 3090184, *17 (Ohio Ct. App. Dec. 30, 2004)).

175. *See In re H.R.C.*, 781 N.W.2d 105, 112 (Mich. Ct. App. 2009) (citing *Molloy v. Molloy*, 637 N.W.2d 803, 804 (Mich. Ct. App. 2001)).

176. TEX. FAM. CODE ANN. § 153.009(a) (Vernon 2009).

interview of a child witness and that the interview shall be on the record.¹⁷⁷

Both Texas and Ohio statutes address conditions that must be met before a trial judge may conduct an in-camera interview of a child if requested by the parties. Both statutes mandate that the child's testimony be on the record.¹⁷⁸ The Texas mandate establishes that, if the child is twelve years of age or older in the context of a nonjury trial or hearing, the "court *shall* interview" the child.¹⁷⁹ Ohio law does not state a specific age and gives the trial judge discretion.¹⁸⁰

Arizona and Florida also have statutes permitting in-camera interviews of minors in both civil and criminal proceedings pursuant to a motion made by either party or the court.¹⁸¹ The statutes in both states outline the procedure to commence an in-camera interview, who is allowed in the room during the interview, and the certain motions and waivers concurrent with such interviews. Florida indicates that in-camera interviews are to be utilized when the witness is under the age of sixteen, or an adult with mental retardation, where there is substantial probability that such person would suffer severe mental or emotional stress testifying in open court.¹⁸² Arizona, however, does not specify a certain age at which in-camera interviews are permitted.

Other states, such as Kentucky, Mississippi, Tennessee, and

177. *Id.*

178. See OHIO REV. CODE ANN. § 3109.04; TEX. FAM. CODE ANN. § 153.009(f).

179. TEX. FAM. CODE ANN. § 153.009(a) (emphasis added).

180. OHIO REV. CODE ANN. § 3109.04.

181. ARIZ. REV. STAT. ANN. §13-4253 (West 1985); FLA. STAT. §92.53 (2013).

182. FLA. STAT. §92.53 (1) provides:

On motion and hearing in camera and a finding that there is a substantial likelihood that a victim or witness who is under the age of 16 or who is a person with mental retardation as defined in s. 393.063 would suffer at least moderate emotional or mental harm due to the presence of the defendant if the child or person with mental retardation is required to testify in open court, or that such victim or witness is otherwise unavailable as defined in s. 90.804(1), the trial court may order the videotaping of the testimony of the victim or witness in a case, whether civil or criminal in nature, in which videotaped testimony is to be utilized at trial in lieu of trial testimony in open court.

Vermont, also have statutes regulating the in-camera testimony of minors pertaining to both civil and criminal matters. However, these statutes specifically state that the minor must be a victim of or witness to unlawful sexual acts, abuse, neglect, exploitation, lewd and lascivious conduct, or dependency.¹⁸³

For example, in *Commonwealth v. Willis*, the Fayette County Circuit Court's decision to deny the Commonwealth's motion for an in-camera interview of the child was reversed and remanded by the Supreme Court of Kentucky.¹⁸⁴ In this case the defendant was charged with first-degree sexual abuse and sought to prevent the five-year-old victim from testifying by asserting that the child was incompetent.¹⁸⁵ The circuit judge was unable to rule on the child's competency during a competency hearing at which the child was unresponsive to the majority of questions asked. The Commonwealth then filed a motion for an in-camera interview of the child but the judge granted defendant's motion to exclude the interview. The defendant's motion included an argument that the statute was unconstitutional because it denied the defendant the right of confrontation.¹⁸⁶ The trial court's decision was reversed and remanded by the appellate court because technology was available to interview the child-victim in-camera as well as afford the defendant his right to confrontation. While the defendant has a right to confrontation, that right must be balanced with the intimidation and stress that would befall the child testifying in open court and the reasonably necessary need for the victim's testimony.¹⁸⁷

Sixteen of the twenty states define specific criminal matters for which in-camera testimony of minor children victims or witnesses would be appropriate.¹⁸⁸ Most statutes specify that criminal physical or sexual abuse must be an issue in the proceedings for the child to qualify for in-camera interviews. In particular, judges are given wide discretion on in-camera interviewing because sexually-based attacks against minors are

183. KY. REV. STAT. ANN. § 421.350 (West 2013); MISS. CODE ANN. § 13-1-405 (West 2014); TENN. CODE ANN. § 24-7-117 (2013); VT. R. EVID. 807(e).

184. 716 S.W.2d 224, 226–27 (Ky. 1986).

185. *Id.* at 226.

186. *Id.*

187. *Id.* at 227.

188. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-86g (West 2014); KY. REV. STAT. ANN. § 421.350 (West 2014); MISS. CODE ANN. § 13-1-405.

considered particularly heinous in our legal system.

Juxtaposing these sixteen statutes, they all have similar procedural formats for commencing or excluding in-camera testimony. However, there is a wide range of difference among the statutes when defining the age at which the child victim or witness may testify. For example, Georgia gives the greatest limit on age, restricting the age for which the court may grant the in-camera interviews to child victims or witnesses that are ten years old or younger.¹⁸⁹ Connecticut and Minnesota enacted statutes under which the minor must be twelve years old or younger to be eligible for an in-camera interview in lieu of testimony in open court.¹⁹⁰ Louisiana allows a child seventeen years old or younger to participate in an in-camera interview.¹⁹¹

Two main factors were common across all the in-camera testimony statutes examined: (1) the interview must be recorded either by Closed Circuit Television (“CCTV”) or by a stenographer, and (2) the well-being of the child takes precedence over all other factors, including the wishes of the parties.¹⁹² As mentioned, preserving the due process rights for all parties involved is a major concern when conducting an in-camera interview. Thus, the sixteen states that have statutes regarding such interviews specifically outline the necessary procedures to put these interviews on the record to avoid any due process violations that may lead to an appeal. Also, having the interview on the record allows an appellate court the transcript for review. Most statutes give the trial judge discretion when deciding how to conduct the interview on the record. For example, the Kentucky Statute authorizes in-camera interviews so long as they are recorded through CCTV, as well as by a stenographer.¹⁹³ Moreover, Louisiana, Maryland, and Vermont all require in-camera interviews to be taken utilizing CCTV equipment.¹⁹⁴ Pennsylvania only requires that the interview be conducted on the stenographic

189. GA. CODE ANN. § 17-8-55 (West 2013).

190. CONN. GEN. STAT. § 54-86g; MINN. STAT. § 595.02 (2013).

191. LA. REV. STAT. ANN. § 15:283 (West 2013).

192. *See generally infra* app. A.

193. KY. REV. STAT. ANN. § 421.350 (2).

194. LA. REV. STAT. ANN. § 15:283(A); MD. CODE ANN. CRIM. PRO. § 11-303 (West 2011); VT. R. EVID. 807.

record.¹⁹⁵

As previously mentioned, out of the fifty states, only twenty states have any statutes outlining the procedural criteria for conducting in-camera interviews of minors. Only eight of those focus on civil as well as criminal proceedings, and the majority of those eight statutes apply only to cases where unlawful sexual contact with a minor is an issue.¹⁹⁶ Improvements must be made in legislation regarding such interviews across the country. Nevertheless, positive steps have been taken. For one, twenty state statutes grant discretion to the fact-finder in deciding, on a case-by-case basis, whether an in-camera interview of a minor is appropriate. The trial court judges utilize factors such as the child's age, competency to testify and understand, as well as case-specific issues to determine whether to allow in-camera interview of the minor.¹⁹⁷ Having a statute that sets out the principles for conducting an in-camera interview of a minor allows the court a readily available alternative to open court testimony when such testimony would be mentally and emotional detrimental to the minor.

IV. CONCLUSION

The use of in-camera testimony of a child in domestic custody cases may be extremely useful in reaching an amicable dispute resolution of the issues pending before the court. It is essential at the outset of the child's testimony for the trial judge to determine whether the child is able to communicate or understand the importance of telling the truth and whether the child is competent to testify, given the child's age and circumstances. If the child has a severe disability, for example, or is otherwise not able to provide competent testimony, then in-camera testimony of the child should obviously not be utilized.

Once a trial judge makes a determination of competency, it is critical that the judge explain to the child and all parties involved, at the outset of the in-camera interview, that, while the child will be providing input to the court, the interview will not be the deciding factor. In fact, the judge may decide to act against the

195. 42 PA. CONS. STAT. § 5985 (2013).

196. *See generally infra* app. A.

197. *See, e.g.*, GA. CODE ANN. § 17-8-55(a)(2), (d)(5).

child's wishes, but in the child's best interest. The major consideration is for the child to have a voice in the proceedings.¹⁹⁸

The child's in-camera testimony must be recorded and the child must be sworn in, like all the other forms of testimony. At the discretion of the court, the attorneys should be given an opportunity to submit questions, if they are not present during the in-camera interview. Clearly, unrecorded testimony of a child raises serious concerns regarding procedural safeguards afforded to the parent in these proceedings and should be discouraged. Moreover, in the event that both parents are representing themselves, it becomes extremely difficult to balance the interests of all parties. It is an accepted protocol that in-camera interviews of a child should not be conducted under such circumstances.

In-camera testimony of children in domestic custody cases is an extremely useful tool and should be encouraged when a totality of the circumstances indicates that it is in the child's best interest. These cases are clearly distinguished from criminal cases, which require a higher legal burden of proof and compliance with procedural safeguards that ensure the defendant's due process right to confrontation and cross-examination. In child custody disputes, the delicate relationship between a parent and child also requires a fair process. Therefore, it is essential that litigants and judges recognize the substantial component that in-camera testimony of a child provides in the trial process and evidentiary fact-finding role of the court. The trial judge must always balance the interests of all involved when conducting in-camera testimony of a child in domestic cases.

Although judicial philosophies may vary on the use of in-camera testimony in child custody disputes and the procedural safeguards that need to be implemented, judges seem to be united in their desire to give children a voice. Balancing the rights and interests of all involved is critical. In many instances, the daunting task of deciding a child custody case cannot be done without use of in-camera testimony, especially when it is not financially feasible for a child to have a guardian ad litem representing the child's best interest. It is a valuable tool that the

198. Research indicates that children may derive long-term emotional benefits from the very experience of being consulted during custody litigation. See Atwood, *supra* note 3, at 631.

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trial judge should promote when useful to the trier of fact and in the best interest of the child, while simultaneously ensuring that legal safeguards are in place to protect the rights of all parties, including the child.

State lawmakers should be encouraged to define a protocol for the use of in-camera testimony in family court matters based on a careful and balanced policy assessment.¹⁹⁹ Public policy demands that judicial protocols be established in each jurisdiction to specifically define the legal procedure that should to be followed by trial judges deciding family court matters involving child witnesses within the context of relevant case law and/or legal mandates. This directive should authorize and encourage trial judges to utilize in-camera testimony of a child in domestic cases, when appropriate, depending on the unique circumstances of each case. The trial judge, however, should always have discretion to determine whether an in-camera hearing of the child's testimony is necessary, appropriate, and, most importantly, in the best interest of the child, given the specific unique circumstances of each case.

199.

While the law of almost all states provides that courts may consider children's preferences in deciding custody, states vary widely in the discretion they provide their trial judges. States differ not only with respect to the weight given children's wishes but also to the methods used by courts in ascertaining children's views. In particular, states disagree on the procedures that trial courts must follow in order to fully protect the due process rights of litigants. States even disagree about the permissible scope of the judicial interview.

Atwood, *supra* note 3, at 630–31.

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APPENDIX A
TABLE OF STATE STATUTES REFERENCING IN-
CAMERA TESTIMONY

State	Criminal Only	Criminal & Civil	Statute Citation	Brief Summary
Arizona		X	ARIZ. REV. STAT. ANN. § 13-4253(A)	Criminal & civil proceedings involving dependency or TPR where the child is under fifteen years of age or mentally disabled.
California	X		CAL. PENAL CODE § 1347	Criminal proceedings involving alleged sexual assault/violent felony with victim/witness under thirteen years of age.
Connecticut	X		CONN. GEN. STAT. ANN. § 54-86g	Criminal proceedings involving assault, sexual assault, or abuse of a child twelve years of age or younger.
Florida		X	FLA. STAT. ANN. § 92.53	Criminal or civil proceedings where the victim or witness is sixteen years of age or younger or mentally disabled.
Georgia	X		GA. CODE ANN. § 17-8-55	Criminal proceedings with a victim or witness ten years of age or younger.
Indiana	X		IND. CODE ANN. § 35-37-4-8	Criminal actions for felonies under Ind. Code Ann. §35-42 or attempts of those felonies.
Kentucky	X		KY. REV. STAT. ANN. § 421.350	Criminal proceedings, felonies, & dependency where the victim or witness is twelve years of age or younger.
Louisiana	X		LA. REV.	Victims, witnesses, or

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			STAT. ANN. tit. 15, §283	protected persons in criminal proceedings under seventeen years of age or with a disability.
Maryland	X		MD. CODE ANN., CTS. & JUD. PROC. § 9-102	Victims or witnesses of criminal child abuse under fourteen years of age.
Massachusetts	X		MASS. GEN. LAWS ANN., Ch. 278 §16D	Criminal proceedings when the victim or witness is under fifteen years of age.
Minnesota	X		MINN. STAT. ANN. § 595.02	Victims or witnesses under twelve years of age to criminal physical or sexual abuse.
Mississippi		X	MISS. CODE ANN. § 13-1-405	Criminal & civil proceedings where the victim of or witness to sexual abuse is under sixteen years of age.
New Jersey	X		N.J. STAT. ANN. § 2A:84A- 32.4	Criminal child abuse and neglect.
New York	X		N.Y. CRIM. PROC. § 65.00- 65.30	Criminal proceedings where the victim or witness is fourteen years or younger or declared “vulnerable.”
Ohio		X	OHIO REV. CODE. ANN. § 3109.04	Criminal & civil proceedings where the child is under eighteen years of age.
Oklahoma	X		OKLA. ST. tit. 10A, § 1-	Only applicable to proceedings brought under Oklahoma

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			4-506	Children's Code.
Pennsylvania		X	42 PA. CONS. STAT. ANN. § 5985	Any proceeding involving a child victim or material witness.
Tennessee		X	TEN. CODE ANN. § 24-7-117	Criminal & civil child sexual abuse; children thirteen years of age or younger.
Texas		X	TEX. FAM. CODE ANN. § 153.009	Criminal or civil proceedings where child is twelve years of age or younger.
Vermont			VT. R. EVID. 807	Criminal & civil proceedings when child is under twelve years of age or disabled.

APPENDIX B

APPROPRIATE GENERIC QUESTIONS TO ASK A CHILD FIVE YEARS OF AGE AND OLDER AFTER ESTABLISHING THE CHILD'S ABILITY TO TESTIFY AND UNDERSTAND THE OATH IN DOMESTIC CUSTODY CASES

Initial Questions

Do you know why you are here?

Did anyone tell you what to say?

Where do you live? Who do you live with?

What are three things do you like about being with your mom or dad?

What are three things do you not like?

Feelings

What do you like to do with your parents?

What worries you the most?

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School

What grade are you in?

What is your favorite subject in school?

Do you like to read?

Are you a good student?

Do you have someone who helps you with your homework?

Friends

Do you any close friends?

What do you do after school? Who do you do that with?

Are you involved in any sports?

What do you do for fun? What games do you like to play?

Family

How often do you visit your parents? Your brother(s)/sister(s)?

What did you do during your last visit with your family?

Do you talk, text or email your brother(s)/sister(s) or parents between visits?

Well-being

Have you been to the doctor or counselor?

When did you go?

Do you like going? Why or why not?

Wrap-up Questions

Did anyone use any words you did not understand today?

Is there anything that we are missing?

Do you have any questions?