



## Perspective

### **A Client-Directed Attorney for Children: Giving Weight to Children’s Voices**

*Suzanne Chester, PhD, JD*

March 2024  
VOL. 19 No. 3

Based on ten years of providing client-directed representation to children embroiled in contested custody proceedings between their parents and the prior ten years representing parents in litigation, this writer proposes that in contentious cases (e.g., domestic violence, child maltreatment/abuse, allegations of “parental alienation,” children with special needs, one parent’s rejection of a child’s sexual orientation, relocation, etc.), the appointment of a client-directed attorney is the optimal way of ensuring the judge and other family court professionals hear, listen and heed the voice of the child. (Chester 2021). This author will show how 1) allegations of parental alienation can unjustifiably discredit and distort the child’s voice; 2) a client-directed attorney is necessary for the court to receive reliable evidence about a child’s experiences, views, and preferences; and 3) a client-directed attorney is in the child’s best interests.

#### **The narrative of parental alienation can destroy children’s credibility.**

The concept of parental alienation is rooted in the belief that a child has rejected a relationship with a parent because the other parent has sabotaged the relationship. From this position, the “alienated” child is viewed as “brainwashed and programmed,” and the child’s perception of the rejected parent is viewed as “false, skewed and distorted.” Therefore, the child’s voice is not to be believed. (Joshi 2023). A virtual conference in 2021 on parental alienation and the courts, hosted by Family Access: Children’s Rights, illustrates how parental alienation concepts discount children’s voices. Robert Hoffman, a prominent trial attorney with an international practice litigating parental alienation cases, was categorical: “We are not guided by what children say...they are brainwashed...theirs is the last voice we should listen to...we should rescue them.”

## **Children are harmed by the misuse of parental alienation concepts**

In her recent report to the U.N. (2023), Reem Alsalem, the Special Rapporteur on violence against women and children, points to the growing use of parental alienation to rebut claims of family violence in custody proceedings across the globe. She shows how parental alienation charges against mothers are used to distract from and delegitimize allegations of child and intimate partner abuse, sometimes resulting in courts placing children in the care of abusive parents. Compounding the problem is the failure, on the part of court professionals, to listen and credit children's accounts of being victimized by physical or sexual violence by a parent. She cautions that "children's views are selectively integrated depending on whether they accord with the prevailing trend towards 'pro-contact' for both parents." To counteract the risks posed by parental alienation allegations, the special rapporteur recommends that all member states of the United Nations—including the United States --- provide children with client-directed legal representation in contested custody proceedings to ensure that the views of the child are "sufficiently and independently" represented consistent with their age, maturity, and understanding. (Alsalem, 2023, p. 19). After a two-year investigation by the Irish government into the use of parental alienation in family courts in Ireland, a similar conclusion was reached. Noting "the impact that claims of parental alienation can have on the weight that is attached to children's views in the courts," the government's primary recommendation was to "give priority to children's voices being heard and considered by the court, and support [children] in their journey through the system." (Irish Government Policy Paper on Parental Alienation, p. 32).

## **What have children in contested proceedings told us they need?**

Birnbaum and Saini (2012) conducted the first qualitative syntheses of thirty-five studies exploring children's views about their experiences post-separation and divorce. Based on the narratives of 1325 children in 11 different countries, most children want to be included in the decision-making process regarding parenting plans even if they do not want to make the final decision. Within the distinction of "voice vs choice," children wanted their voices to be heard even if they were not making the ultimate decisions. Birnbaum and Saini conclude that decision-makers need to hear children's voices, "not just what professionals believe is in children's best interests" (p. 408).

In court systems across the globe, children describe feeling disempowered and struggling with the lack of confidentiality. (Neale & Smart 1998). In contested cases involving violence, children felt they should be made aware of the option to speak with the decision-maker. (Birnbaum et al. 2011). However, children who spoke with judges felt unprepared for what to expect. (Campbell 2008).

Similarly, in the related field of child protection proceedings, "children who said they were given little if any information or were not asked for their views and did not have the chance to be involved in any important decisions felt frustrated, confused, powerless and angry."

(Cashmore et al. 2023, p.12) By contrast, when children believed their caseworkers considered their views, they reported feeling “a greater sense of empowerment and agency, as well as positive emotional well-being.” (p.12)

### **Children need client-directed attorneys in “high-conflict” cases to ensure their voices are given appropriate weight**

The Child’s Advocate (“TCA”), a project of Legal Aid of North Carolina, offers family court judges in select jurisdictions the opportunity to appoint attorneys to represent children in contentious custody cases. Staff and pro bono attorneys represent children between nine and seventeen. Cases accepted for representation must include concerns related to domestic violence, child abuse or mistreatment, allegations of parental alienation, children avoiding contact with a parent, etc.

Judges typically appoint TCA in these cases to ensure the court receives evidence from an advocate independent of the parents--about the child’s experience, perspective, and preferences. TCA accepts appointments for children from families across the economic spectrum—from low-income, self-represented litigants to high-wealth parents with attorneys from influential law firms. If a case goes to trial (TCA settles two-thirds of its cases when the parents have counsel), TCA can call witnesses, make legal arguments, and test the evidence presented by the parents and their witnesses. Judges consider a child’s preferences---and the reasons for their preferences-- in the context of the totality of the evidence. Parents do not pay for TCA’s services.

Another example of direct legal representation is the Office of the Children’s Lawyer (“OCL”) in Ontario, which provides client-directed lawyers to children in contested custody proceedings request by the court. As in the U.S., most custody cases in Canada involve vulnerable children usually unrepresented non-parties who seldom participate directly in the process. (Martinson & Tempesta 2018). The legal representation provided by OCL is grounded in the legal rights granted to children by the United Nations Convention on the Rights of the Child. In a widely cited decision, former Supreme Court Justice Donna Martinson, summarized these rights as follows:

The Convention... says that children... have the legal right to express [their] views in all matters affecting them, including judicial proceedings. In addition, it provides that children have the legal right to have those views given due weight in accordance with their age and maturity...The Convention is very clear...it does not make an exception for cases involving high-conflict, including those dealing with domestic violence, parental alienation, or both...A key premise of the legal rights to be heard found in the Convention is that hearing from children is in their best interests.

2010 YKSC 44 at paras 3 and 13.

In an article advocating for legal representation for children to ensure their meaningful participation in matters which directly affect them (2018), Tempesta and Martinson, point

to the need for children, through counsel, to “participate in the testing of evidence...address the expertise of proposed experts....and participate in all legal arguments relating to how the child’s views are weighed.”

### **How client-directed representation refocuses the custody case on the child**

In the child welfare field, client-directed representation is strongly supported among children’s advocacy practitioners and the academic research community. (Duquette et al. 2021). The preference for client-directed attorneys over GALs arises from “a growing consensus...that personality, personal opinions, values, and beliefs should play as small a role as possible in carrying out the responsibilities of representing a child in a legal proceeding” (Guggenheim 1998, p. 301).

At TCA, we are proponents of the client-directed role. Our duty as children’s attorneys is to advocate for what our clients believe is in their best interests, not to substitute our judgment. (ABA Standards 2003). However, we do not act with robotic allegiance to our clients’ every wish. Instead, we emphasize the “counselor” in our roles as counselors-at-law. We meet with our child clients on multiple occasions between the time we are appointed, and a final order is entered. We get to know our clients and try to understand their world and point of view thereby reducing the role that race, class, and culture play in our legal representation (Peters 2007). We treat our clients as “experts” about their lives and experiences in each parent’s home. As Haralambie (2006) notes: “Children have a great deal to tell us if we know how to listen... [w]e need to go beyond finding out *what* children want and explore their *reasons* for what they want... children have unique and vitally important expertise about themselves that we need to honor” (pp.1281-1282).

Like all attorneys for children, we investigate the facts of the case and interview parents and other people important to our child client. If child protective services (CPS) has been involved but has not substantiated allegations of abuse, or when the court has not determined child abuse has occurred, we understand that neither is necessarily a reliable indication that no abuse has occurred. (Milchman, 2021). Instead, we work closely with our client and their therapist to determine whether there is evidence of abuse that needs to be presented to the court.

Based on our experience with individual judges, we advise our clients whether a judge is likely to rule the way they want. We explore different parenting plans with our clients and their ramifications. We explain that the court has given them a “voice,” but they do not get to make the ultimate decision. We continually remind ourselves and our clients of the duties of loyalty and confidentiality we owe them. After counseling our clients, they get to decide what they want us to advocate for. After a trial, we explain the judge’s decision, what changes our clients can expect, and the reasons for the court’s ruling.

In cases where a child will need to speak with the judge in chambers, we prepare the child for what to expect by visiting the courtroom in advance, informing the client about the

limits of confidentiality, and helping the child organize in their mind what they want the judge to know.

Occasionally, a child may not want an attorney—usually in cases where we suspect a parent is pressuring a child to take a certain position--or the child does not want to express a preference for fear of hurting or angering a parent. If the child’s reluctance continues, and with their consent, we request permission to withdraw from representation. In the extremely rare case where a child wants us to advocate for an outcome that poses a clear danger to them, we request the appointment of a GAL (ABA Standards, 2003).

### **TCA’s experience with parental alienation allegations in family court**

The concept of parental alienation is highly contested. Warshak (2020) noted the risk of false positives, namely, when evaluators and courts wrongly conclude the child is alienated or fails to recognize that the child’s rejection is a justifiable response to a parent’s violence, abuse or gross mistreatment. Given the high stakes involved—to be placed in the custody of a parent who has abused them and removed from the care of a nurturing parent -- children deserve no less than to have an advocate throughout the litigation to test the evidence of “alienation” and to present the legitimate reasons a child may be avoiding contact with a parent. Moreover, given the radical remedies ordered by some courts when evaluators or judges determine a child to be “alienated”—an abrupt change of custody to the other parent, extended periods without contact with the primary caregiver, forced attendance at intensive reunification treatments—the support of an advocate is critical to help such children navigate a potentially traumatic and harmful situation. (Mercer 2019).

Unfortunately, from my perspective, litigating cases in family court for over twenty years, it has become increasingly common for parents or their attorneys to raise allegations of parental alienation with little to no credible evidence, knowing that the accusation alone casts suspicion on the other parent, and by extension, undermines the child’s credibility. Sometimes, the custodial parent is accused of alienation even when a child is having regular contact with the non-custodial parent but is opposed to a 50/50 schedule. However, in our experience at TCA, when the child has a client-directed attorney to present evidence at trial, judges are more likely to receive evidence related to the many legitimate reasons the child does not want to spend half of their young lives in the care of the supposedly “alienated” parent—grossly inappropriate parenting, failing to spend quality time with the child, harsh discipline, favoring a new partner over the child, a poor relationship with step-siblings, parent’s home is far from child’s friends, school or important activities, to name a few---*and* the affirmative reasons the child wants to maximize their time with the parent who is their primary caregiver.

A small fraction of TCA cases involves a child who persists in avoiding all contact with a parent. In most of those cases, after the child is appointed legal representation, the court found that the child had legitimate reasons for refusing contact: child sexual or physical abuse, chronic exposure to domestic violence by the non-custodial parent, or a parent’s

abandonment of a child during their early years. In the rarest of cases, the court has found that the only plausible explanation for a child rejecting contact is true alienation by the other parent. This is also confirmed by Martinson & Tempesta, who indicate that in many cases where alienation is alleged, children may have legitimate affinities for one parent over the other or may have experiences with the “alienated” parent that justify the estrangement. (Martinson & Tempesta 2018).

## **Conclusion**

Research indicates that “children are more capable than adults give them credit for and that their capacity for decision-making increases in direct proportion to the opportunities offered to them” (Lundy 2013, p. 938). With a client-directed attorney to test the evidence and bring the reasons for children’s preferences and views to the court’s attention, children have the opportunity for meaningful participation in the decision-making process.

## **References**

American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases. (2003). 37 Fam. L.Q. 129.

Alsalem, R. (Special rapporteur on violence against women and girls and its causes and consequences), Custody, Violence Against Women and Violence Against Children, U.N. Doc. A/HRC/53/36 (13 Apr. 2023)

Birnbaum R. & Saini, M (2012). A qualitative synthesis of children’s participation in custody disputes. *Research on Social Work Practice* 22: 400-409, 409.

Birnbaum, R., Bala, N., & Cyr, F. (2011). Children’s experiences with family justice professionals and judges in Ontario and Ohio. *Inter-national Journal of Law, Policy, and the Family*, 25, 398–422.

Campbell, A. (2008). The right to be heard: Australian children’s views about their involvement in decision-making following parental separation. *Child Care in Practice*, 14, 237–255.

Cashmore, J., Kong, P., McLaine, M., (2023). Children’s participation in care and protection decision-making matters. *Laws*, 12:49.

Chester, S., (2021). Reunification, alienation, or re-traumatization? Let's start listening to the child, *Journal of Family Trauma, Child Custody and Child Development*.

Duquette, D., Oelerbeek, B, Zinn, A., Pott, R., Skyles, A., Zhou X., (2021). Children’s Justice: How to Improve Legal Representation of Children in the Child Welfare System. NACC E-version.

Guggenheim, M., (1998) Reconsidering the need for counsel in custody, visitation, and child protection proceedings.29 Loy. U. Chi. L. J. 299.

Haralambie, A.M., (2006). Recognizing the expertise of children and families. *Nevada Law Journal*, Vol. 6, Issue 3, 1277-1283.

Department of Justice. [www.gov.ie](http://www.gov.ie), Irish Government Policy Paper on Parental Alienation, (2022)

Joshi, A. (2023). On a sticky wicket: representing the best interests of brainwashed and programmed children in high conflict child custody cases. *Litigation*, 50:1, 48-53. American Bar Association.

Lundy, L., (2013). The United Nations Convention on the Rights of the Child and child well-being. In *Handbook of Child Well-Being: Theories, Methods, and Policies in Global Perspective*. Edited by Asher Ben-Aryeh, Ferran Casas, Ivar Frønes and Jill E. Korbin. Dordrecht: Springer, 2439–262.

Martinson, D., Tempesta C. (2018) Young People as humans in family court processes: A child’s rights approach to legal representation. 31:1 *Can J Fam L* 151.

Mercer, J. (2019). Are intensive parental alienation treatments effective and safe for children and adolescents? *Journal of Child Custody*, 16(1), 67-113.

Milchman, M., (2022). Distinguishing parental alienation from child abuse and adverse parenting. In Jean Mercer and Margaret Drew (Eds.), *Challenging parental alienation: New directions for professionals and parents*. 107-137. Routledge.

Neale, B., & Smart, C. (1998). Agents or dependents? Struggling to listen to children in family law and family research (Centre for Research on Family, Kinship & Childhood, Working Paper, 3).

Peters, J. K., (2007). Representing children in child protective proceedings: ethical and practical dimension (3d ed., LEXUS Law Publishing).

Warshak, R., (2020). When evaluators get it wrong: false positive IDs and parental alienation, *Psychology, Public Policy, and Law*. Vol. 26, No.1, 54-68.



**Suzanne Chester** was the project director of The Child’s Advocate, Legal Aid of North Carolina (“TCA”) from January 2014 through December 2023. Prior to leading TCA, a program providing direct advocacy for children in contentious custody cases, Suzanne focused on representing adult survivors in domestic violence and child custody proceedings. Suzanne also litigated sex, race, and disability discrimination claims under the Fair Housing Act. Suzanne has presented at multiple state and national conferences on client-directed advocacy for children, domestic violence, and fair housing. Suzanne has published in the *Journal of Trauma*, *Child Custody* and *Child Development*.

In December 2023, Suzanne was hired to lead the Child's Voice Project, a new program seeking to elevate the child's voice in family court by replicating TCA's model of client-directed representation in select jurisdictions across the U.S. For additional information, contact Suzanne at [schester@childsvoiceproject.onmicrosoft.com](mailto:schester@childsvoiceproject.onmicrosoft.com).