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Out of the Mouths of Babes: Determination of Child Custodial Preference in Illinois

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I. INTRODUCTION

Custody determinations are among the most difficult decisions a trial judge is called upon to make. Custody trials are always highly-charged, emotional battles. A reality of custody cases is that they tend to fall at opposite ends of the factual spectrum. On one end, the cases involve competent, nurturing parents, each seeking custody for unselfish reasons. In these cases, each parent is fully capable of performing appropriate parenting skills with a proper mixture of love, discipline, and common sense. On the other end of this factual spectrum are cases in which neither parental alternative is adequate. In the course of these custody battles, each parent vigorously highlights the multiple flaws of the other.

The gravity of a custody determination reveals the importance of the judge's decision. Recognizing this gravity, both state legislatures and courts have established guidelines to govern judges' consideration of given factors in custody cases.

II. STATUTORY AND JUDICIAL GUIDELINES GOVERNING THE CUSTODY DETERMINATION AND CUSTODIAL PREFERENCE

One of the most well known custody guidelines, the "best interest of the child" standard, is perhaps the most difficult to define. Although most jurisdictions use the "best interest of the child" test to guide custodial determinations,[1] this standard is vague and heavily fact-dependent. Accordingly, both statutes and case law set forth certain (usually non-exclusive) factors that should be considered when determining the best interest of the child in custody

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1. *See* Cathy J. Jones, *Judicial Questioning of Children in Custody and Visitation Proceedings*, 18 FAM. L.Q. 43, 44 & nn.3, 4 (1984); *e.g.*, ILL. REV. STAT. ch. 40, para. 602(a) (1989) ("The court *shall* determine custody in accordance with the best interest of the child." (emphasis added)); Nye v. Nye, 105 N.E.2d 300, 304 (Ill. 1952) ("The guiding star [in matters of child custody] is, and must be at all times, the best interest of the child.").

actions.[2]

Illinois followed the lead of the Uniform Marriage and Divorce Act ("UMDA") in providing such factors.[3] Under the Illinois Marriage and Dissolution of Marriage Act ("IMDMA"),[4] the best interest of the child is the primary concern in custody decisions.[5] In section 602, the IMDMA sets forth seven non-exclusive factors that "shall" be considered in determining the best interest of the child in a given case.[6]

This Article focuses on the factor enumerated in section 602(a)(2) which directs the judge to consider "the wishes of the child as to his custodian."[7] Historically, this factor has been an important consideration in Illinois case law and its inclusion in the statute merely codified and extended existing common law.[8] Common sense dictates that this factor should be considered by the trier

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2. *See* ILL. REV. STAT. ch. 40, para. 602 (1989); *see also* ILL. ANN. STAT. ch. 40, para. 602 historical note (Smith-Hurd 1980 & Supp. 1991) (discussing the statutory and judicial development of Illinois custody law).

3. UNIFORM MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987) (providing a list of five non-exclusive factors for courts to consider when making custody determinations).

4. ILL. REV. STAT. ch. 40, para. 602 (1989).

5. *Id.* § 602(a); *In re* Marriage of Leopando, 435 N.E.2d 1312, 1317 (Ill. App. Ct. 1st Dist. 1982) ("The primary consideration before the trial court in a child custody case is the welfare and best interests of the child."), *aff'd*, 449 N.E.2d 137 (Ill. 1983).

6. ILL. REV. STAT. ch. 40, para. 602(a)(1)-(7) (1989). Section 602(a) states:

> (a) The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:
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> (1) the wishes of the child's parent or parents as to his custody;
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> (2) the wishes of the child as to his custodian;
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> (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
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> (4) the child's adjustment to his home, school and community;
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> (5) the mental and physical health of all individuals involved;
>
> (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed at another person; and
>
> (7) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

Id.

7. *Id.* § 602(a)(2).

8. *See* ILL. ANN. STAT. ch. 40, para. 602(a)(2) historical note (Smith-Hurd 1980 & Supp. 1991); *see also* Anderson v. Anderson, 336 N.E.2d 268, 269 (Ill. App. Ct. 5th Dist. 1975) ("[T]he feelings of the children in custody matters should always be given serious consideration by the court."); Rosenberger v. Rosenberger, 316 N.E.2d 1, 3 (Ill. App. Ct. 1st Dist. 1974) (stating that trial courts always should consider children's preferences); *cf.* Garland v. Garland, 312 N.E.2d 811, 815 (Ill. App. Ct. 1st Dist. 1974) ("[T]he preferences of the children are only appropriate when based on reasons related to their best welfare.").

of fact in appropriate cases. As one writer stated, "[i]n a case where the child has the capacity to make an enlightened judgment, determining the child's wishes as to his custodian is a factor that can be of particular assistance to the court in reaching its decision."[9]

Prior to the enactment of the IMDMA, Illinois case law recognized the importance of child custodial preference. Repeatedly, Illinois courts held that judges should consider a child's preference regarding custody[10] and that, if a preference existed, it should be given "most serious consideration."[11] Although the trial court has discretion regarding whether it will hear evidence of custodial preference,[12] refusal to consider such evidence may amount to reversible error.[13] Further, while the preference of a child is not binding upon the court,[14] if the minor is of sufficient maturity,[15] or if the expression of preference is based upon factors related to the child's best interests,[16] the court should give considerable weight to the preference.[17]

Cases decided after the enactment of the IMDMA continue to recognize these basic tenets.[18] The trial court now is mandated by

9. John M. Speca, *The Role of the Child in Selecting His or Her Custodian in Divorce Cases*, 27 DRAKE L. REV. 437, 438 (1977) (providing an excellent survey of state statutes regarding custody).

10. *See, e.g., Anderson*, 336 N.E.2d at 269; Finn v. Finn, 297 N.E.2d 1, 3 (Ill. App. Ct. 2d Dist. 1973); Swanson v. Swanson, 274 N.E.2d 465, 468 (Ill. App. Ct. 3d Dist. 1971); Oakes v. Oakes, 195 N.E.2d 840, 842 (Ill. App. Ct. 1st Dist. 1964).

11. *Rosenberger*, 316 N.E.2d at 3-4; Patton v. Armstrong, 307 N.E.2d 178, 178-79 (Ill. App. Ct. 5th Dist. 1974); Marcus v. Marcus, 248 N.E.2d 800, 805 (Ill. App. Ct. 1st Dist. 1969).

12. *See In re* Marriage of Dall, 548 N.E.2d 109, 112 (Ill. App. Ct. 5th Dist. 1989); Stuckert v. Brownlee, 486 N.E.2d 395, 396 (Ill. App. Ct. 2d Dist. 1985); *In re* Marriage of McKeever, 453 N.E.2d 1153, 1156 (Ill. App. Ct. 3d Dist. 1983); ILL. ANN. STAT. ch. 40, para. 604 historical note (Smith-Hurd 1980 & Supp 1991).

13. Crownover v. Crownover, 337 N.E.2d 56, 59 (Ill. App. Ct. 3d Dist. 1975).

14. *Patton*, 307 N.E.2d at 180; *cf.* Stickler v. Stickler, 206 N.E.2d 720, 722 (Ill. App. Ct. 1st Dist. 1965) (holding that a change in the child's custodial preference is insufficient to mandate an alteration in the custody award).

15. *Dall*, 548 N.E.2d at 112 (finding that if seven-year-old had unequivocally stated a preference during the *in camera* interview, then that preference, while not binding, would be entitled to consideration); *In re* Marriage of Kush, 435 N.E.2d 921, 923 (Ill. App. Ct. 3d Dist. 1982) ("[T]he preferences of young children, though entitled to consideration, are not binding upon the court.").

16. *In re* Marriage of McCune, 408 N.E.2d 319, 324 (Ill. App. Ct. 3d Dist. 1980) ("[P]references of mature children should be given considerable weight, when they are based on sound reasoning."); Garland v. Garland, 312 N.E.2d 811, 815 (Ill. App. Ct. 1st Dist. 1974).

17. Marcus v. Marcus, 248 N.E.2d 800, 805 (Ill. App. Ct. 1st Dist. 1969).

18. *See, e.g., In re* Marriage of Siegel, 463 N.E.2d 773, 780 (Ill. App. Ct. 1st Dist.

statute to consider "the wishes of the child as to his custodian."[19] Consistent with the earlier case law, however, the child's choice is not determinative under the IMDMA. When considering the weight of a child's preference, the court must take into account the maturity of the child,[20] the basis for the child's preference,[21] and other factors that might affect or influence that preference.[22] The trial court may find, after consideration of all the evidence, that the child's stated preference is not in his or her best interest.[23]

Thus, the statutory mandate and the directive of prior case law address the appropriateness of considering the custodial preference of minors. The remaining question, how evidence of custodial preference should be presented, has not been examined and is the subject of this Article.

III. Presentation of Custodial Preference Evidence

There are three primary methods for introducing evidence of a child's preference: (1) through direct testimony by the child in open court; (2) through the testimony of third persons; or (3) through an *in camera* interview of the child. Each method introduces variables into the calculus that the court employs to reach its custody decision. These variables may have both positive and negative influences on that decision. Consequently, the court must consider these potential influences when determining how, or if, evidence of custodial preference should be presented.

1984) (stating that preferences of a mature child are to be given serious weight in custody decisions).

19. Ill. Rev. Stat. ch. 40, para. 602(a)(2) (1989).

20. *In re* Marriage of Leff, 499 N.E.2d 1042, 1054 (Ill. App. Ct. 2d Dist. 1986), *appeal denied*, 505 N.E.2d 354 (Ill. 1987) (Table No. 64473); *In re* Marriage of Lovejoy, 404 N.E.2d 1092, 1094 (Ill. App. Ct. 3d Dist. 1980).

21. *In re* Lutgen, 532 N.E.2d 976, 987 (Ill. App. Ct. 2d Dist. 1988) (noting that children's preference was based upon their desire to stay together and their belief that they would not receive treatment equal to that received by the natural children of their potential custodians); *Siegel*, 463 N.E.2d at 780 (explaining that the children's preference was based upon a desire to remain with friends, stay in the same school and environment, as well as a fear about how they would interact with new step-siblings). *But see In re* Custody of Krause, 444 N.E.2d 644, 647 (Ill. App. Ct. 1st Dist. 1982) (rejecting child's preference based upon a desire to stay with current friends and the fact that the child felt more comfortable with his stepfather than his natural father).

22. *Leff*, 499 N.E.2d at 1054 (holding that a child's preference based on fear and guilt was properly rejected by the trial court); *In re* Marriage of Allen, 401 N.E.2d 608, 611 (Ill. App. Ct. 3d Dist. 1980) (rejecting the child's stated preference for non-custodial parent on grounds that preference was based only on fact that custodial parent was responsible for child's schooling and day-to-day discipline).

23. Schoff v. Schoff, 534 N.E.2d 462, 467 (Ill. App. Ct. 5th Dist. 1989); *In re* Marriage of Jones, 513 N.E.2d 1181, 1184 (Ill. App. Ct. 3d Dist. 1987).

A. Direct Testimony by the Child in Open Court

The direct testimony method of offering the child's preference, though simple, is fraught with difficulties. Under this method, the court hears direct testimony by the child, under oath, in open court. Obviously, in a contested case, this testimony places the child in an adversarial position with respect to one of his or her parents. It also places the child, who is often of tender years and enduring possibly the first emotional crisis of her life, in a situation where the child must hurt one or both of her parents while they are present. Additionally, the child is subject to the agonies of cross-examination by opposing counsel.

Direct testimony by the child also lends itself to fears or allegations of undue influence, false promises, or other coercive conduct by the parent who calls the child as a witness. This problem is particularly acute if that parent has physical possession or temporary custody of the child during the pendency of the proceeding. Another negative aspect of in-court testimony by the child is that it allows counsel to lead, confuse, or put words into the mouth of a child witness.[24] This is a problem especially when the child speaks exclusively, or almost exclusively, to only one party's attorney.

Despite the shortcomings of the direct testimony method, cases both prior to and after the adoption of the IMDMA allow in-court testimony by the child. For example, in *Crownover v. Crownover*,[25] a party attempted to offer the testimony of an eleven-year-old child but the trial court declined to hear it. The appellate court reversed and held that "while there is no absolute right to present the testimony of a child in a custody proceeding, the trial court should not summarily refuse to hear such witnesses."[26] The *Crownover* court did not decide how the evidence of the child's preference should be offered; instead, the court left the choice of the preferred method to the trial court's discretion, allowing that court to ascertain the

24. One author observed:

> In addition to the obvious problems . . . concerning a child's ability to understand what is being said and to communicate to others, a final major problem concerning language and the questioning of children is that of suggestibility. As Professor Loftus writes, in noting that the form of a question may significantly affect a child's answer: "The child as a witness, has always been regarded as not only particularly inaccurate but also highly suggestible. This view has been fairly widespread: 'Create, if you will, an idea of what the child is to see or hear, and the child is very likely to hear or see what you desire.' "

Jones, *supra* note 1, at 64 (quoting ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 160 (1979) (quoting M. BROWN, LEGAL PSYCHOLOGY 133 (1926))).

25. 337 N.E.2d 56, 59 (Ill. App. Ct. 3d Dist. 1975).

26. *Id.* at 59-60.

child's preference from the witness stand, in chambers, or both.[27]

Further, in *In re Marriage of Combs*,[28] the trial court refused to allow a child to answer a question about her custodial preference. The appellate court reversed, holding that "if competent as a witness in other respects, the child may testify to his custodial preferences."[29]

These cases illustrate that Illinois law gives the trial court discretion to hear the custodial preference testimony of competent child witnesses. However, the discretion may extend only to the *method* of offering the child's preference. One can argue that if no *in camera* interview is granted, the court may have an obligation to hear offered, in-court testimony regarding the custodial preference of a competent child witness.

B. Testimony of Third Persons

The court also may hear evidence of the child's preferences through the testimony of third persons. This evidence usually is admissible as an extension of the "state of mind" exception to the hearsay rule.[30] The reliability of this evidence depends upon many factors, including: (1) the relationship between the person testifying and the party presenting the testimony; (2) the child's mental state at the time of the alleged statement; (3) the context of the conversation between the child and the third party; and (4) any pressures or desires to please that the minor was under at the time of the alleged statement. Illinois cases have allowed third-party testimony by one or both parents,[31] by neighbors,[32] by relatives,[33] by several witnesses,[34] and by the introduction of a letter written

27. *Id.*

28. 397 N.E.2d 255, 256 (Ill. App. Ct. 5th Dist. 1979).

29. *Id.* at 257 (citing *Crownover*, 337 N.E.2d at 59, and Patton v. Armstrong, 307 N.E.2d 178 (Ill. App. Ct. 5th Dist. 1974)).

30. *See, e.g., In re* Marriage of Gustafson, 543 N.E.2d 575, 576-77 (Ill. App. Ct. 4th Dist. 1989); Quick v. Michigan Millers Mut. Ins., 250 N.E.2d 819, 822 (Ill. App. Ct. 2d Dist. 1969) (citing Mutual Life Ins. Co. of New York v. Hillmon, 145 U.S. 285, 295 (1892)). For a thorough discussion of the "state of mind" exception to the Illinois rule against hearsay, see MICHAEL H. GRAHAM, CLEARY AND GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE § 801.5, at 577-78 (5th ed. 1986).

31. *In re* Marriage of Slavenas, 487 N.E.2d 739, 740-41 (Ill. App. Ct. 2d Dist. 1985); *In re* Marriage of Sieck, 396 N.E.2d 1214 (Ill. App. Ct. 1st Dist. 1979).

32. People *ex. rel.* Bukovic v. Smith, 423 N.E.2d 1302, 1306-07 (Ill. App. Ct. 1st Dist. 1981).

33. *Gustafson*, 543 N.E.2d at 576-77.

34. Stuckert v. Brownlee, 486 N.E.2d 395, 397 (Ill. App. Ct. 2d Dist. 1985) (noting that five witnesses testified about the child's preference for the father).

by the child who was the subject of the custody proceeding.[35]

In *In re Marriage of Rizzo*,[36] the First District Illinois Appellate Court set forth the rationale for admission of this form of evidence:

> One of the factors a court is to consider in determining custody is the wishes of the children concerning with whom they desire to live. Thus, one of the ultimate questions the court must determine is the wishes, or state of mind, of the children concerning custody. This being the case, the statements by the children made to [a neighbor] shortly before trial expressing their then existing state of mind, though hearsay, were admissible if made under conditions assuring trustworthiness.[37]

The *Rizzo* court held that the failure of the trial court to allow a neighbor to testify concerning statements of preference by the children was error.[38] The error, however, was harmless because the trial court, in an effort to elicit the wishes of the children, conducted an "extensive *in camera* examination . . . which served as the functional equivalent of the third party's testimony."[39]

The court in *In re Marriage of Siegel*[40] followed *Rizzo* and held that it was harmless error to refuse to hear certain third-party testimony regarding custodial preference when a full *in camera* interview had taken place.[41] The holdings of these cases seem to express an implicit preference for the *in camera* interview over third-party testimony. One explanation for this potential preference is that courts view the *in camera* interview as a more trustworthy mechanism for making a judicial determination of preference.

The testimony of experts, either retained by the parties or appointed by the court,[42] perhaps provides a more credible form of third-party evidence of the minor's preference. The expert's testimony may include statements or actions by the child during the expert's examination or testing that manifest the child's custodial preference. The expert's testimony is subject to some of the same credibility issues as other third-party testimony. However, in the ideal situation, the hearsay problems are lessened because the child's custodial preference is elicited by an objective person who

35. *In re* Marriage of McKeever, 453 N.E.2d 1153, 1156 (Ill. App. Ct. 3d Dist. 1983).
36. 420 N.E.2d 555 (Ill. App. Ct. 1st Dist. 1981).
37. *Id.* at 560 (citing ILL. REV. STAT. ch. 40, para. 602(a)(2) (1979)).
38. *Id.*
39. *Id.*
40. 463 N.E.2d 773 (Ill. App. Ct. 1st Dist. 1984).
41. *Id.* at 779.
42. ILL. REV. STAT. ch. 40, para. 604(b) (1989).

has some training in determining the truthfulness and the emotional and mental status of the child.

Illinois trial courts have considerable discretion in allowing the testimony of experts. However, the testimony of experts is not determinative of the issue of custody.[43] Recent cases indicate the continued validity of this trial court discretion and the appropriateness of expert testimony regarding the custodial preference of minors.[44] For example, in *In re Marriage of Sieck*,[45] the court allowed a psychologist to recreate a conversation he had with a friend of the father.[46]

Similarly, *In re Marriage of Siegel*[47] involved a registered clinical psychologist who testified for the father. The expert was allowed to give his opinion as to the normalcy and maturity of the children and to testify as to the children's preference and the reasons for their preference.[48] After custody was granted to the mother, the father appealed, alleging that the trial court erred in not allowing the expert to give his opinion concerning which parent should be awarded custody.[49]

The First District Illinois Appellate Court affirmed the custody award, holding that the trial court did not err in refusing to consider the expert's opinion on the ultimate issue.[50] The court found that the trial court appropriately considered the psychologist's testimony regarding the children's expressed wishes, even though those wishes were not reflected in the ultimate decision of the court.[51]

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43. *See id.* ("The court *may* seek the advice of professional personnel, whether or not employed by the court on a regular basis." (emphasis added)); *In re* Marriage of Bailey, 474 N.E.2d 394 (Ill. App. Ct. 1st Dist. 1985) (holding that the trial court did not abuse its discretion by disregarding the advice of professionals in a child custody case).

44. *In re* Marriage of Dunn, 567 N.E.2d 763, 768 (Ill. App. Ct. 5th Dist. 1991) ("In custody modification proceedings, the examining psychologist's testimony is entitled to great weight."); *In re* Marriage of Seymour, 565 N.E.2d 269, 274 (Ill. App. Ct. 2d Dist. 1990) (affirming trial court's grant of custody to mother when no bias was reflected in counselor's discussions with child).

45. 396 N.E.2d 1214 (Ill. App. Ct. 1st Dist. 1979).

46. *Id.* at 1224. The psychologist testified that the child had expressed a preference for the father in a conversation with the father's friend. *Id.*; *see also In re* Marriage of Padiak, 427 N.E.2d 1372 (Ill. App. Ct. 2d Dist. 1981) (affirming the trial court's decision not to conduct an *in camera* interview when a clinical psychologist had testified that the minor had been tutored regarding what to say).

47. 463 N.E.2d 773, 776 (Ill. App. Ct. 1st Dist. 1984).

48. *Id.*

49. *Id.* at 778.

50. *Id.* at 779.

51. *Id.*

C. In Camera *Interviews of Children*

The most credible and appropriate method of determining the preference of a child is the *in camera* interview provided for in section 604 of the IMDMA.[52] Section 604(a) codifies prior Illinois case law concerning judicial interviews of children,[53] but also adds two important procedural safeguards to the previous procedure. First, the parties have an absolute right to have counsel present during the interview.[54] This right can be waived only by the agreement of both parties.[55] The second safeguard mandates that a court reporter be present to make a full and complete record of the *in camera* interview.[56] This requirement cannot be waived by the parties.[57]

The parties have no absolute right to an *in camera* interview.[58] This construction of the IMDMA is consistent with prior Illinois case law holding that there is no absolute right to present testimony by a minor and that the court may decide not only whether, but in what form, such testimony may be received in a particular case.[59]

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52. ILL. REV. STAT. ch. 40, para. 604 (1989).

53. *See* ILL. ANN. STAT. ch. 40, para. 604 historical note (Smith-Hurd 1980) (Section 604 "codifies certain aspects of prior Illinois decisional law regarding judicial interviews of children in child custody and visitation proceedings."). This section of the Illinois Act was derived from § 404 of the Uniform Marriage and Divorce Act. UNIFORM MARRIAGE AND DIVORCE ACT § 404, 9A U.L.A. 600 (1987).

54. ILL. REV. STAT. ch. 40, para. 604(a) (1989) ("Counsel *shall* be present at the [judicial] interview [of the child] unless otherwise agreed upon by the parties." (emphasis added)).

55. *Id.*; *see* DeYoung v. DeYoung, 379 N.E.2d 396, 399 (Ill. App. Ct. 3d Dist. 1978). This requirement may create a problem if one party appears *pro se*. In that event, it may be necessary to allow the unrepresented party to be present, which would clearly undermine the principal benefits of an *in camera* interview. In this situation, if both parties do not agree to waive their presence at the interview, the trial judge should consider the parent's presence when exercising his or her discretion to allow the interview.

56. ILL. REV. STAT. ch. 40, para. 604(a) (1989) ("The court *shall* cause a court reporter to be present [at the judicial interview of the child] who shall make a complete record of the interview instantaneously to be part of the record in the case." (emphasis added)).

57. *DeYoung*, 379 N.E.2d at 399 (holding that the § 604(a) language—"court shall cause a court reporter to be present"—does not authorize a waiver by the parties). *But see In re* Marriage of Slavenas, 487 N.E.2d 739, 741-42 (Ill. App. Ct. 2d Dist. 1985) (holding that failure to provide a record of the *in camera* interview was harmless error when the record of the entire proceeding provided appropriate information for review of the trial court's decision).

58. *In re* Marriage of Milovich, 434 N.E.2d 811, 822-23 (Ill. App. Ct. 1st Dist. 1982); *In re* Marriage of Padiak, 427 N.E.2d 1372, 1378 (Ill. App. Ct. 2d Dist. 1981).

59. Stuckert v. Brownlee, 486 N.E.2d 395, 396-97 (Ill. App. Ct. 2d Dist. 1985) (trial judge's refusal to interview eleven-year-old was not an abuse of discretion since judge "considered the child's . . . wishes through other evidence by allowing hearsay evidence

Although the trial judge's decision to interview is discretionary, appellate cases addressing alleged abuse of that discretion scrutinize three basic criteria. First, the appellate courts require that the child at issue be of an age and maturity such that his or her preference is entitled to consideration.[60] Second, reviewing courts refuse to find an abuse of discretion when other evidence of custodial preference was heard and considered.[61] Finally, when there was some evidence that improper influence was, or might have been, exerted on the minor, appellate courts uphold trial court decisions refusing interviews.[62] Usually, more than one of these factors is present in appellate cases upholding a trial court's refusal to grant an interview.[63] Also, a party cannot successfully complain about a failure to interview when neither party has requested an interview.[64]

Once the trial judge decides to conduct an *in camera* interview, the scope of that interview is also discretionary. In *Fohr v. Fohr*,[65] the issue concerned the scope of the trial judge's questioning of the minor children. In particular, the mother argued that the court

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through five witnesses who testified about [the child's] preference to remain with her father"); *In re* Marriage of McKeever, 453 N.E.2d 1153, 1156 (Ill. App. Ct. 3d Dist. 1983) (considering letter written by child expressing preference instead of in person testimony); *In re* Marriage of Smith, 448 N.E.2d 545, 547 (Ill. App. Ct. 1st Dist. 1983) (finding no error when trial judge gave weight to child's preference presented through court-appointed guardian *ad litem*); *In re* Marriage of Theeke, 433 N.E.2d 1311, 1314 (Ill. App. Ct. 1st Dist. 1981) (reaffirming the court's discretion to hear child custodial preference testimony); *Padiak*, 427 N.E.2d at 1379-80 (finding refusal to grant child's testimony not erroneous as other evidence in record indicated the best interests of the child regarding custody).

60. *McKeever*, 453 N.E.2d at 1156 (finding no abuse of discretion when the trial judge refused to interview a six-year-old regarding his custodial preference); *Padiak*, 427 N.E.2d at 1379 (stating that a seven-year-old was not sufficiently mature to express a preference); People *ex rel.* Bukovic v. Smith, 423 N.E.2d 1302, 1309 (Ill. App. Ct. 1st Dist. 1981) (holding that an interview as to preference would not have been "fruitful" since the children were six- and three-years-old); Thomas v. Thomas, 372 N.E.2d 679, 680-81 (Ill. App. Ct. 2d Dist. 1978).

61. *McKeever*, 453 N.E.2d at 1156 (letter expressing child's preference was considered by the court); *Padiak*, 427 N.E.2d at 1379.

62. *Stuckert*, 486 N.E.2d at 396-97 (trial judge's reluctance to grant interview on belief "that a child naturally would be swayed by adult pressure" was not erroneous as judge did consider preference evidence presented by five other witnesses); *Bukovic*, 423 N.E.2d at 1309 (finding that the trial court did not err in declining to interview the children when "there was sufficient doubt raised by evidence as to the influence exerted on the boys by their grandfather").

63. *See, e.g.*, *Stuckert*, 486 N.E.2d at 396-97.

64. *In re* Marriage of Sieck, 396 N.E.2d 1214, 1224 (Ill. App. Ct. 1st Dist. 1979) (noting that "no suggestion or request was made by either party to the effect that such an interview would have been necessary, or even helpful").

65. 394 N.E.2d 87, 89 (Ill. App. Ct. 5th Dist. 1979).

exceeded the proper scope of the interview by failing to limit its questions to those narrowly designed to elicit "the child's wishes as to his custodian."[66] The appellate court rejected this argument, observing that no objection to the interview procedure was made at the time of the trial.[67] The *Fohr* court further stated:

> [T]he statutory admonition to the court to conduct the interview "to ascertain the child's wishes as to his custodian and as to visitation" necessarily clothes the court with considerable discretion in setting the subject-matter limitations of the inquiry. Factual situations are bound to vary widely as will the personalities of the children being interviewed. Basic to an intelligent election by a child would be an understanding of the necessity, background and basis for the decision. Before a judge can properly weigh an election he must satisfy himself that the child is making it while possessed of the understanding that his age, intelligence, knowledge and experience will permit him to assimilate. The court's obligation to determine such factors operates to expand the scope of the court's inquiry.[68]

At least two other Illinois courts have commented on the scope of section 604 interviews. The trial court in *In re Marriage of Milovich* allowed questions regarding the meaning of telling the truth, the interrelationship between the siblings, the activities the children engaged in with each parent, the help the children received from each parent with school work, the discipline the children received from each parent, and any instructions about what to tell the court the children received from either parent.[69] The appellate court concluded that the scope of the interview was appropriate and that the trial court may determine the custodial preference based upon the children's "answers to other questions, their personality, and other circumstances."[70]

Moreover, in *In re Marriage of Ford*, the scope of questioning included questions about school, friends, health, age, hobbies, favorite activities, the differences between right and wrong, and concluded with the question "[w]hat do you think we ought to do here today?"[71] As in *Milovich*, the *Ford* court held that the trial judge did not abuse his discretion because the proper scope of *in camera* interviews is not confined to questions regarding with whom the

66. *Id.*
67. *Id.*
68. *Id.* at 90.
69. 434 N.E.2d 811, 818 (Ill. App. Ct. 1st Dist. 1982).
70. *Id.* at 823.
71. 415 N.E.2d 546, 551 (Ill. App. Ct. 1st Dist. 1980).

child wants to live and "what visitation he would desire."[72]

The *in camera* interview is not without its detractions. *In camera* interviews suffer from the same problems inherent in the other methods of presenting the child's custodial preference. A parent, relative, or friend still may attempt to influence the child's asserted preference.[73] The child may have been told what to say or what not to say[74] or the child may attempt to play one parent against the other during the pendency of the case to gain some perceived advantage. Moreover, the judge may feel uncomfortable or inadequate in his or her ability to communicate easily with children.

Finally, some believe that it is never appropriate to ask a child to make a choice between parents or to have a child believe that a custody decision will be based upon his or her preference. While this problem is inherent in all of the potential methods of offering a child's custodial preference, it is especially acute in the interview setting, where the judge sits as the inquisitor as well as the trier of fact.[75]

Although the *in camera* interview is subject to these problems, it nevertheless provides the most effective method for a trial court to discover the child's actual preference. The child discloses his or her custodial preference in the least threatening environment. Through skillful questioning and careful observation, the judge can determine factors vital to a proper determination of custody.

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72. *Id.*

73. *See In re* Lutgen, 532 N.E.2d 976, 982 (Ill. App. Ct. 2d Dist. 1988).

74. *See In re* Marriage of Eleopoulis, 542 N.E.2d 505, 509 (Ill. App. Ct. 4th Dist. 1989) (holding that evidence that the child was beaten discredited her testimony that she wanted to live with her father).

75. This last objection was a major issue in *In re* Marriage of Gustafson, 543 N.E.2d 575 (Ill. App. Ct. 4th Dist. 1989). The trial court in *Gustafson* refused to interview the twelve- and seven-year-old children of the parties. *Id.* at 578. The trial court stated its reasoning as follows:

> The evidence as I understand it is closed. With respect to interviewing the children, I don't like to put the children in a position where they feel there is pressure put upon them. That they are making a decision where they're put in a position where they can be pressured by an adult and then have to worry about what adults are going to think about what they said in there, where they think they are responsible for the decision. I don't think that what they contribute would be substantial compared to the drawbacks that would result from the pressure put on them in that situation. They've got to go on living with all of those people so I exercise my discretion and decline to interview the children.

Id. The appellate court reversed and remanded holding that "[t]he trial court's reasoning would be an argument for always refusing to examine children in custody disputes. The position is contrary to respected authority and ignores the elements to consider when deciding the propriety of having children testify." *Id.* at 578-79.

These factors are not readily apparent from the traditional in-court methods of determining custodial preference.

For instance, a judge acting as a questioner, and not merely as an observer, can get a sense of the maturity of the minor and the voluntariness of the minor's statements. The inquiring judge can ask for the reasoning behind the child's statement of preference, can inquire into any inappropriate behavior of the parents, and can question the child about the strength or depth of his or her preference. Finally, the child will have a sense of being a part of a decision affecting his or her life and will have a chance to say anything he or she wants outside the presence of parents.

These benefits, of course, come about only if the judge feels, or at least appears to feel, comfortable with the minor, and if the judge can make the minor comfortable enough to communicate freely. Although guidelines for *in camera* interview techniques are available,[76] each judge must plan and conduct the interview based on his or her background, his or her ability to communicate with children, and the facts of the individual case.

IV. CONCLUSION

Illinois law provides lawyers and judges with several means through which the preference of minors appropriately may be determined and considered in custody determinations. This author favors the *in camera* interview as the most flexible, reliable, and appropriate method of making this difficult factual determination. As another commentator stated:

> The interview should be considered a critical element in the custody determination process. A child of sufficient age and intelligence can make his own choice; he need not be a mental giant to know where he wants to be and with whom. Obviously, the matter should be an appropriate factor in awarding custody. In an appropriate case, it can be controlling. It is as sound a basis upon which to decide the issue of custody as any. Nothing less than the child's future happiness and welfare are at stake. His choice, his wishes, are terribly meaningful if those goals are to be achieved.[77]

Whether the judge conducts an interview and whatever the

76. *See, e.g.*, Jones, *supra* note 1, at 72-91 (providing a proposed model of considerations a judge may employ when conducting an *in camera* interview in a custody action). For an excellent guideline used by Illinois judges, see Judge Susan Snow, *Conducting A Child/Judicial Interview: An Outline for Sensitivity and Success, in* ILLINOIS JUDICIAL CONFERENCE—REGIONAL SEMINAR BINDER—CHILDREN IN THE LAW § 5, A1 (1991).

77. Speca, *supra* note 9, at 457.

scope of the interview, lawyers should ask the court to hear some evidence of a child's wishes in each case in which preference might be an issue. Courts must exercise discretion regarding what types of evidence will be heard. Given the wording of the IMDMA, courts should consider evidence of preference in custody cases and, in this regard, may even allow more than one form of evidence. If no evidence of custodial preference is heard, the court should state specifically the reasons supporting its ruling. The judge should consider granting an *in camera* interview to lessen the impact on the minor. Thoughtful consideration of how and when to consider evidence of child custodial preference can promote custody decisions that truly will be "in the best interest of the child."