

CHAPTER 5

KEY POINTS *from Chapter 5*

- Parental separation and divorce have the potential to negatively impact children if they are not buffered from the negative consequences of family breakdown.
- 1 Contrastingly, several factors contribute to children's positive adjustment, including protecting them from conflict, creating parenting plans that meet their needs, and ensuring their voices are heard in an appropriate fashion.
 - 2 Children should be protected from becoming too directly enmeshed in their parents' custody litigation.
- The wishes of a child are frequently a statutory factor in determining best interests and ensuring that the "child's voice" is heard can further their best interests, particularly when the child is of sufficient age and maturity to form independent preferences.
- 3
 - 4 Employing the best methods to secure a child's preference is critical in protecting their best interests.
- A carefully constructed child interview process can assist in limiting the direct exposure of children to the parental conflict while preserving the due process rights of the parents.
- 5
 - 6 Access to all information considered by a judge, including what a child may express as a preference, must be afforded to the parties to preserve their due process rights.

CHAPTER 5

Mitigating the Risk of Children's Adverse Experiences During and Following Divorce

Divorce, parental separation, or disruption to the family has been characterized as an adverse childhood experience (ACE).¹ While prominent ACE studies have typically included divorce as one of the types of adverse experiences (included in household dysfunction, see Figure 1), divorce need not automatically be considered an ACE.

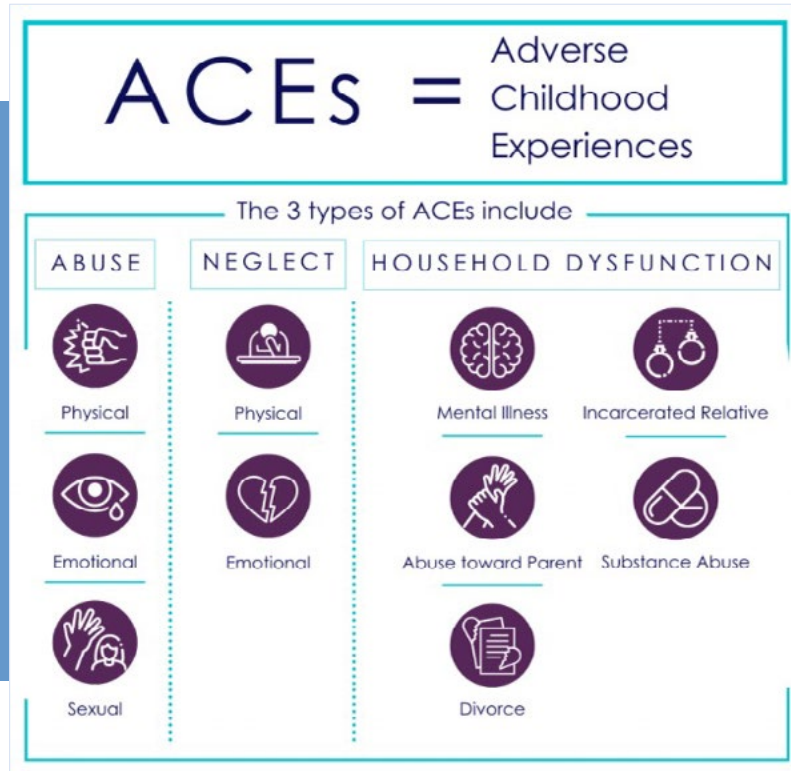
The circumstances, context, and experiences leading up to and during a divorce will have an impact on whether a child experiences the divorce problematically or adjusts to the new circumstance successfully. There are opportunities for the court and stakeholders in the process to protect children from the negative consequences of parental conflict. This can be achieved by providing the necessary structure and support to the family, fostering the child's sense of safety and empowerment as they engage with the legal process, and, when appropriate, providing the child with the opportunity to freely share their experiences.

By implementing approaches to mitigate the risk to the child in family court matters, judges can positively impact the child's short- and long-term adjustment and overall well-being. This chapter outlines various strategies that can be employed for this purpose.

¹ V. J. Felitti et al., "Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study," *American Journal of Preventive Medicine* 14 (1998): 245-58.

Figure 1.
The 3 Types
of ACEs

Note. This image depicts three types of ACEs. From 3 types of ACEs, by RIKTR, (<https://riktr.com/wp-content/uploads/2021/02/3-Types-of-ACEs-768x768.png>).



Children Exposed to Interparental Conflict

Most separating or divorcing couples are able to quickly work through initial feelings of anger, disappointment, and loss and are able to re-establish healthy relationships with their ex-partners and their children. Approximately 40% of separating parents will experience heightened levels of conflict with their ex-partners for a period of time after the separation and, of these conflictual parents, 10% will remain in high conflict despite the passage of time.

The definition of high conflict typically includes ongoing litigation, higher levels of animosity toward the other parent, and ongoing involvement of professionals to help resolve the conflict. In these cases, parents are typically unable to successfully disengage from one another, which can be indicative of pre-existing individual and family dysfunction (e.g., mental health issues, unresolved trauma, abuse) and can be inflamed by circumstances of the family breakdown (e.g., feelings of betrayal, violence).

Being placed in the middle of these conflicts can cause the child to experience anxiety, distress, and loyalty conflicts between the parents. It may also impact the parent-child relationship, which can lead to the formation of alliances as the child struggles with feelings of being caught in the middle of the parents' dispute. Being exposed to this parental conflict is an ACE that should be safeguarded against as it is a stronger predictor of how children cope after separation than the actual event of separation. Exposure to parental conflict can almost double the problems related to children's coping and adjustment compared to a low-conflict experience.

Children's Mental Health and Well-Being Following Separation and Divorce

Children of divorce are at greater risk of having lower self-esteem, difficulties adjusting to school, lower relationship satisfaction with their peers, and higher rates of depression, to name a few. Research suggests that the negative adjustment of children following separation has been associated with increased risk of physical injuries, disease, hospitalization, health-risk behaviors (drugs, tobacco, and alcohol abuse, sleep disturbances, obesity, early engagement in sexual activity and adolescent pregnancy). These risks increase significantly when children are exposed to parental conflict.

Helping Children Adjust Post Separation and Divorce

Parents may expose their children to conflict when there are no clear rules or structure within their parenting plans which, in turn, can create boundary ambiguity or unrealistic schedules that need ongoing negotiation even though the parents are unable to communicate. A well-crafted parenting plan/court order is needed to limit high conflict and should address typical conflict points, such as:

- Transporting the child between homes
- Exchanging the child for visits
- Sharing information about the children
- Scheduling for telephone access, including who can (and cannot) call and the times of these calls
- Making plans for attending the child's school functions

- Making plans for parents' involvement and watching the child participate in extracurricular activities
- Making plans for the transfer of the child's clothes, belongings, and schoolbooks
- Making rules about haircuts, earrings, and other changes to the child's appearance while with either parent
- Making plans for special occasions such as birthdays, religious holidays, and summer schedule

Children's Voices in the Courts

The United Nations addressed the importance of considering the views of a child as part of the "Convention on the Rights of the Child" adopted by General Assembly resolution in November 1989. The Convention provides that a "child who is capable of forming his or her own views [has] the right to express those views freely in all matters" (Article 12). It is important, however, to recognize that there is a difference between a child having the right to be heard versus how much weight should be given to the wishes of a child.

Children's Wishes in Family Courts

In almost all jurisdictions, the child's wishes is one of many factors to be considered.² In some jurisdictions, the consideration of an older child's wishes is even greater.³ Notwithstanding the law of any state, the evidence as to the wishes of the child is to be considered by the court. Yet there are significant implications to child and family well-being if each child were allowed to appear in court during contested custody proceedings to ensure that the child's preference is heard and considered.

Weight Given to the Wishes of a Child

In almost all jurisdictions, the amount of weight to be given to admissible evidence is left to the discretion of the trial judge. But there are some underlying principles in exercising that discretion.

2 For example, see Arizona Revised Statute 25-403(A)(4), which includes among 11 delineated factors consideration of the wishes of a child if the child is "of suitable age ad maturity."

3 For example, see Georgia Code Section 19-9-3(5), which provides that a child who is 14 or older has the right to "select" which parent that child would live with.

Across jurisdictional lines, it is accepted that as the child becomes older and more mature, added weight should be given to the stated preferences of the child. But such thinking ignores many commonly held beliefs about teenagers. One, they are generally more interested in their friends than in their parents. As such, their preferences will gravitate toward the parent who allows them greater access to their friends. Second, they are at a time in their normal development where they will seek independence. This may cause them to express a preference that favors the least restrictive household. Third, they are less likely to accept abiding by rules, therefore more likely to opt for the household where they are held less accountable. For these reasons and others, the adage that “as children are older and more mature, their wishes should be given deference” must be guardedly applied.

Negative Consequences of Children’s Participation in the Courts

It is generally understood and accepted that it is contrary to a child’s best interests for that child to be drawn into the custody dispute of the parents. When a child engages directly in custody litigation, such as through direct testimony or judicial interview, the child may lack the perspective to understand that his or her input is only one data point among many for determining custody. The child may come to believe that he or she is responsible for the outcome and the resulting emotions by the parent against whom the child’s wishes were expressed. Alternatively, if the court rules contrary to the expressed wishes of the child, the child may mistakenly feel marginalized and conclude that his or her wishes have been ignored.

The parent against whom the child conveyed contrary wishes may blame the child for the outcome, thereby harming the future parent-child relationship. Further, a child may state wishes in favor of a parent that the child feels the need to protect, where the child assumes responsibility for the future emotional or physical well-being of the perceived “weaker” of the two parents. This creates an environment of “parentification,” a process under which there is a role reversal where the child feels obliged to take on the role of parent.

It is not uncommon for a child to express to a parent that the child wants to remain with that parent, only then to express the same preference to the other parent. Here, it must not be concluded that the child is being dishonest, or that one parent is misstating the wishes of the child. It is quite possible for the child to express the opposite wishes to each parent with that expression being more about the child’s love for the parent to whom the child is communicating rather than the preference of the child between the parents.

Finally, a child's preferences may be fluid and the child's stated wishes often change over time for a variety of reasons. The longer the time that passes between securing the wishes of the child and conducting a hearing on custody-related issues, the greater the risk that the previously stated wishes may have changed or are less germane.

Triaging Children's Participation in the Courts

Recognizing these and many other risks that a child may be exposed to if directly engaged in the custody litigation, it is incumbent upon the judge to assess whether and how the child's stated wishes should be secured. For this, the first step is to determine whether the wishes of the child are disputed between the parents. This is best assessed in the simplest fashion: Ask the parents. They may agree on what the child would express.

If the parents convey opposing preferences attributed to the child, the second step would be to question the parents. Can they explain the conflicting preferences? Do they account for it as a true evidentiary conflict or are the differences explained in other ways that would not require the court to address the issue directly with the child? Finally, the court may provide the parties with the option of each providing an offer of proof as to what each believes the child would express and the basis for that conclusion. If the parties agree to proceed in this fashion, the court may consider their offers of proof as evidence, thereby negating the need for further engagement of the child.

The Child Voice—Due Process Conflict

If the assessment process reveals that information must be obtained from the child, there are a variety of means by which the child's preference can be secured. This can range from direct testimony, to an *in camera* interview of the child conducted by the judge without the presence of the parents or counsel, to a child interview conducted by a third party neutral who reports to the court, to appointment of a professional to represent the wishes of the child in court, or merely to having the child write a letter to the court.

Having the child testify in the courtroom in the presence of the parents presents the greatest risk for a negative outcome for the child. But it is the best method for protecting the due process rights of each parent by allowing them to know and answer to evidence that is being considered by the court as to the child's wishes. Conversely, a *confidential* child interview, whether conducted by the judge or a third-party professional, where what the child expresses is revealed only to the judge and kept from the parents and their counsel, would have the lowest risk of a

negative outcome for the child but could fail in protecting the due process rights of the parents. After all, neither parent would be informed as to what the child expressed, thereby preventing them from fully presenting their cases and precluding any challenge to the basis upon which the child may have expressed a preference.

While no procedure fully addresses the potentially competing interests in child voice versus due process, there are means by which the child's voice can be preserved while not running afoul of the due process rights of the parents. This is through what has been commonly referred to as the "child interview."

The Child Interview: The Who, How, and What of the Process

1. The court should have professionals in behavioral health assigned the responsibility for interviewing children to secure their stated wishes.
2. If the only option is for the judge to conduct the child interview, even if in chambers without the parties present, the interview should be on the record, and the judge should have a neutral third party present during the interview.
3. No matter the setting for the child interview, the parameters should be stated at the outset. This must include a clear understanding with the parties and with the child at the start of the interview about whether what is said in the interview will be confidential.
4. The judge should adjust the language used to account for the child's developmental and cognitive levels, even for children within the same family.
5. The judge should consider the input from the child in the context of the child's functioning as well as conflict-related issues. Information gleaned may change depending upon who accompanied the child for the interview. Children should be interviewed individually and not with other children present. It is recommended that parents or other caretakers of the child not be present during the interview as they may otherwise influence the child's statements.
6. The judge should consider the child's state of mind. It is a common fallacy of parents that children never lie or will not be influenced by other factors. A child caught in the middle of parental conflict may attempt to be fair to both parents through their expressed wishes; assume a caretaker role for one of the parents and express wishes consistent with that protective role; or respond in favor of the parent who offers the greatest rewards for them.

Adapted from the *Handbook on Questioning Children: A Linguistic Perspective* by Anne Graffam Walker, PhD

Observing Children’s Distress During Court Involvement

Children who appear before the court may display adjustment problems. In the article “Seeing What’s Underneath,”⁴ an understanding of behaviors in context with the child’s age and level of traumatic experiences better equips courts in addressing those adolescents. Here are some examples of common behaviors that may be observed in domestic relations courts and responses:

Table 1. Common Behaviors in Domestic Relations Courts

| Behavior Observed | How Does That Make Me Feel | What May be Underneath |
|---|----------------------------|--|
| <ul style="list-style-type: none"> Negative body language Crossed arms Rolling eyes Refusal to sit/stand/make eye contact | Disrespectful | <ul style="list-style-type: none"> Stress Nervous Embarrassed Fear Sense of unfairness Inability to express feelings |
| <ul style="list-style-type: none"> Defiance Mouthing off Talking back | Insulted | <ul style="list-style-type: none"> Lack of language skills to express feelings/skillset to express disagreement Difficulty expressing emotion especially in front of peers/other people in the courtroom |
| <ul style="list-style-type: none"> Disruptive or distracting behavior | Angry | <ul style="list-style-type: none"> Trauma impacts a youth’s ability to control impulses or perceive risks, meaning they may be unable rather than unwilling to meet adults’ expectation for their behavior |
| <ul style="list-style-type: none"> Disassociation | Frustrated | <ul style="list-style-type: none"> Youth who have experienced trauma may have learned to use compliance or defiance as survival mechanism |
| <ul style="list-style-type: none"> Emotional outbursts | Irritated | <ul style="list-style-type: none"> Youth are particularly sensitive to issues of fairness and respect and have yet to master tempering their emotions, controlling their emotions, and regulating their behavior |
| <ul style="list-style-type: none"> Inability to show remorse | Hurt | <ul style="list-style-type: none"> Youth who have experienced trauma may struggle to convey contrition and remorse shortly after an arrest or adjudication |
| <ul style="list-style-type: none"> Laughing Scoffing Sucking teeth | Disrespected | <ul style="list-style-type: none"> Youth who experienced trauma and other developmental features of adolescence brain such as peer influence and teenage bravado, or simple immaturity may further inhibit expressions of grief/remorse |

⁴ Fair and Just Prosecution (FJP), Juvenile Justice Initiative, Georgetown Law, National Juvenile Defender Center (NJDC), and National Council of Juvenile and Family Court Judges, “Seeing What’s Underneath: A Resource for Understanding Behavior and Using Language in Juvenile Court,” 2021. Retrieved from <https://www.ncjfcj.org/wp-content/uploads/2021/04/Seeing-Whats-Underneath-A-Resource-for-Understanding-Behavior-Using-Language-in-Juvenile-Court.pdf>.

Promoting Well-Being in Domestic Relations Court

Observed behaviors, particularly those encountered in court, are assessed through the lens of the judge or court personnel and not in the context of the life experiences of the individual exhibiting the behavior. Understanding the link between behaviors and underlying distress that may drive behaviors is critical in ensuring fairness and in appropriately addressing or responding to those behaviors.

Closing Summary

A best-interest determination can only be made through a case-by-case analysis. And part of that analysis, particularly for older children, requires the court to consider the views of the child. The court is therefore tasked with securing that information in a manner that least impacts the child while ensuring that the information is reliable for the purposes in which it is being considered.

