
Promoting Positive Perceptions of Justice by Listening to Children's Sentiment in Custody Decisions

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Divorce is a prevalent issue within the structure of American families. In 2009, the United States divorce rate was 3.4 per 1,000 people (Tejada-Vera & Sutton, 2010) with a greater percentage of married couples divorcing in their subsequent marriages compared to their first marriages. Consequently, thousands of children are affected by their parents' decision to file for divorce. Most children of divorced parents are subject to large amounts of stress as they deal with the separation of their parents and the restructuring of their lives (McIntosh, 2003). When a couple goes through a divorce, child custody arrangements are generally resolved through either mediation or litigation (Wallace & Silverberg-Koerner, 2003). In the former, custody decisions are negotiated by the couple and their attorneys outside the courtroom, and often through the aid of a third party called a mediator. In the latter, judges decide who receives physical and legal custody of the children and the amount of contact that each parent has with the children.

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Although only a small percentage of custody cases are contested in court (Stamps, Kunen, & Rock-Faucheux, 1998), it is important to consider the effects of litigated cases on children, as these children are likely to experience exacerbated stress due to the combination of both at-home (e.g., observing parental conflict) and in-court (e.g., forced to share sentiment) stressors (Weisz, Beal, & Wingrove, 2013). The overall purpose of this chapter is to discuss the sentiment of children involved in contested custody cases and how legal professionals' consideration of children's wishes can promote positive perceptions of justice (see also Chaps. 13 and 14, this volume, for more on the link between sentiment and justice). When children exhibit positive perceptions of justice, they may be more inclined to feel satisfied with custody proceedings and adjust to judges' custodial decisions (Tyler, 2006a, 2006b).

When making custody decisions, judges generally rule on the basis of what is in children's best interests (Wallace & Silverberg-Koerner, 2003). The best interests of the child standard includes many guidelines which consider parents' preferences, children's wishes, the relationship between children and their parents, children's adjustment, and the mental and physical health of both children and parents (Krauss & Sales, 2000). Often, judges limit the amount of children's participation in custody cases, which can affect children's level of satisfaction with and adjustment to custody decisions (Barnett & Wilson, 2004). Furthermore, the inability to share custodial

wishes can influence children's perceptions of justice, such that children may not perceive judges as fair or legitimate. Therefore, comprehensive training standards for legal professionals should document how to obtain children's wishes.

This chapter will first provide a legal overview of the history of custody standards, the ways in which judges solicit children's preferences, and the factors that limit judges' involvement of children and their disclosed wishes. Next, the chapter will examine the therapeutic benefits that children receive when they participate in custody decisions, and investigate children's perceptions of procedural justice and legitimacy in relation to their involvement in decisions that concern them. Finally, recommendations will address the issues surrounding the procurement of children's wishes in custody decisions. It should be noted that throughout this chapter, children's responses to custody decisions are used as proxies for children's sentiment. An essential component of community sentiment research entails studying the sentiment of those who are affected by legal policies and procedures. As such, this chapter focuses exclusively on children involved in litigated custody cases, the procedures that legal professionals use to include children in custody decision-making, and how these procedures affect children's perceptions of justice and the legal system.

Legal Overview of Child Custody Standards

Child custody standards initially favored parents' interests, but have shifted over the years toward children's interests. During the nineteenth century, the United States was an agriculture-based society. On farms, families worked together as a unit in order to establish an income and provide for themselves. The male of the household presided over all decisions concerning the family and had considerably more rights than his wife and children (e.g., right to own property, vote). In fact, according to the doctrine *parental famillus*, children were considered their father's property (Krauss & Sales, 2000). Thus, when a divorce occurred (usually as a result of the wife's adulterous behavior), children were placed in the custody of their fathers.

During the twentieth century, the United States transitioned into an industrial society. As such, fathers began to earn income through factory work, mothers tended to the children and daily household chores, and children attended school. Because fathers did not depend on their children as a source of labor, they were no longer considered to be their fathers' property. Within custody cases, case law acknowledged this shift by basing custody decisions on the children's rights, needs, and interests rather than the parents' (Krauss & Sales, 2000). It was assumed that children needed love and nurturance during their tender years and that mothers were the most suitable parent to provide for their children's needs (Pruett, Hogan-Bruen, & Jackson, 2000). This standard became known as the tender years doctrine and mothers were usually granted custody of their children unless fathers could prove that the mothers were not suitable to tend to their children's needs (Pruett et al., 2000).

Although the tender years doctrine was increasingly becoming the standard on which to base custody decisions, it was challenged within several states during the 1970s. As a result, these state supreme courts deemed the doctrine unconstitutional on the grounds that it violated the equal protection clause of the Fourteenth Amendment (Pruett et al., 2000). Each court ruled that the tender years doctrine did not provide equal rights for men, as it unfairly favored women as the parent who would retain custody. For these states, new gender-neutral standards had to be established. The primary caretaker doctrine, for example, presumed that whichever parent performed the most caretaking responsibilities should retain custody of the children (Emery, Otto, & O'Donohue, 2005). The psychological parent standard presumed that whichever parent provided the most for the children's mental and emotional needs should retain custody of the children (Krauss & Sales, 2000). These two standards never reached nationwide acceptance, as their underlying concepts exhibited *de facto* discrimination. That is, on the surface these standards appeared to be gender-neutral, but when put into practice they seemed to prefer the mother as the parent who would retain custody. Because fathers were the ones who financially supported their families by

entering into the workforce, mothers were the ones who stayed home and took care of their children's physical, emotional, and mental needs. The use of the primary caretaker doctrine or the psychological parent rule in custody decisions overwhelmingly favored mothers being awarded custody of their children; thus, these standards fell out of favor (Emery et al., 2005).

To combat the preference for mothers, the 1970 Uniform Marriage and Divorce Act (UMDA) provided a framework for child custody decisions that listed five factors to use when considering what is in the best interest of the child. These factors included the children's custody wishes; the parents' custody preferences; the relationship between the children and their parents, siblings, or any other important family members; children's adjustment to home, school, and community; and the physical and mental health of all involved in the custody dispute (Wallace & Silverberg-Koerner, 2003). In 1974, the American Bar Association approved these factors in the hope that all states would adopt them as the standard for what is in children's best interests (Pruett et al., 2000). A majority of states have adopted these recommended factors; however, they are not the only ones included in each state's best interest standard. The UMDA encourages states to consider additional factors for what is in children's best interests, and some of these include elements of the primary caretaker standard, the psychological parent rule, and parents' moral fitness (Krauss & Sales, 2000). Written as such, the UMDA creates variance among states' "best interest" criteria, allowing judges' flexibility in discerning which factors to consider and use during each individual custody case—flexibility has its advantages and disadvantages, but that discussion is beyond the scope of the chapter.

Judges' Procurement of Children's Custody Wishes

In custody proceedings, judges sometimes elicit children's sentiment through testimony, judicial interviews, or guardians ad litem (GALs). Judges are able to call children to testify in court, but such direct participation (i.e., giving testimony) is rarely used in custody proceedings (Kruk, 2005).

The UMDA provides judges the opportunity to obtain children's wishes via judicial interviews (Crosby-Currie, 1996). For states that allow judicial interviews, the interview must be recorded within the judges' chambers (Crosby-Currie, 1996). The UMDA, however, does not specify the way in which interviews should be conducted or recorded (Starnes, 2003). Additionally, the UMDA states that parents' attorneys can be present during interviews (Crosby-Currie, 1996), but whether they are present or absent depends on judges' discretion. Attorneys' presence might affect the amount of information that children disclose within judicial interviews (Crosby-Currie, 1996; Starnes, 2003). For example, if attorneys are permitted to be present, then children could be less inclined to reveal their custody wishes because they know that the attorneys will inform their parents of their preferences. Overall, the majority of judges within the United States have the discretion of whether they want to obtain children's preferences through judicial interviews, and can vary the ways in which they conduct the interviews.

Children's wishes can also be obtained through the representation of GALs. In the United States, agencies that are part of a national organization recruit and train volunteers to act as GALs (Bilson & White, 2005). This organization does not provide agencies with national recruitment and training standards; thus, the qualifications and requirements of GALs vary by state and agency. However, there is one requirement that all GALs must abide by: they are required to protect children's best interests. This obligation, though, can conflict with children's own preferences. That is, although children might express their custody wishes to GALs, these representatives are not obligated to communicate children's preferences to the court. When presenting information regarding what is in children's best interests, GALs can choose not to convey children's sentiment because they believe children's preferences are not in accord with their best interests. Thus, GALs allow for children's sentiment to be heard, but only to the extent that the guardians consider it to be in the children's best interest.

Although children's wishes can be obtained through these three strategies, judges may choose

not to involve children in custody proceedings. Thus, children's preferences might not be heard at all. This appeared to be the case for Virginia and Michigan judges in Crosby-Currie's study (1996). Judges indicated that judicial interviews were more likely than GAL reports and GAL reports were more likely than direct testimony to be used in obtaining children's preferences; however, judges reported that these avenues were not likely to be used in general.

When children's wishes are procured, however, it is important to understand judges' perceptions of the sentiment. Many studies have noted that when judges are asked to rate or write down factors they consider the most important when making child custody decisions, they perceive children's sentiment as an important factor in the decision-making process (Crosby-Currie, 1996; Felner et al., 1985; Wallace & Silverberg-Koerner, 2003). Unfortunately, they may not readily apply such preferences within their custody decision-making. In Felner and colleagues' study (1985), only half of the judges reported that they actually used children's wishes in practice. Thus, although studies suggest that judges perceive children's preferences as an important factor, it does not necessarily indicate that they are consciously employing them in their practice.

Judges report that children's sentiments are an important factor in deciding custody arrangements, but children's involvement is often restricted due to their age. Judges were reportedly more likely to obtain children's wishes through direct contact (Felner et al., 1985) or judicial interviews (Crosby-Currie, 1996) for older children compared to younger children. Furthermore, as children become older, judges give more consideration to their wishes (Crosby-Currie, 1996; Wallace & Silverberg-Koerner, 2003). Judges are more inclined to obtain and use older, rather than younger, children's preferences based on the assumption that older children are more developmentally advanced. Judges are likely to perceive that older, rather than younger, children are more knowledgeable and certain of their physical, emotional, and psychological needs and of which parent and corresponding home environ-

ment would most adequately provide for those needs. Some researchers, however, argue that children's age should not preclude their participation in custody decision-making. Instead, custody professionals should cultivate and maintain an open, supportive, and trusting relationship within which children of any age feel comfortable to voice their sentiment (Smith, Taylor, & Tapp, 2003).

Overall, judges can obtain custodial preferences through children's testimony, judicial interviews, or GALs. However, the use of these strategies is minimal in litigated custody cases, largely because children's age may preclude judges from adequately obtaining and considering their preferences. Most often, judges will involve older, rather than younger, children by asking them about their custodial wishes.

Outcomes Relative to Children's Participation in Custody Decisions

It is often difficult for judges to decide whether they should involve children in custody proceedings by asking them about their preferences due to potential detrimental outcomes. Most judges perceive children's involvement as harmful because it may cause emotional difficulty (e.g., guilt) or place children in a conflicting position by asking them to choose between their parents (Felner et al., 1985). Many judges will only actively engage children in custody proceedings when they feel that children are at an age at which they can cognitively and emotionally combat any potentially damaging consequences as a result of their involvement. However, children of any age who *want* to be involved in custody decisions should be provided the opportunity as they could receive many beneficial outcomes (Campbell, 2008; Cashmore & Parkinson, 2008; Darlington, 2006). Opposition does exist, however, as some researchers believe that children who are given the opportunity to be heard may be burdened with a sense of responsibility (Emery, 2003), especially if forced or required to participate (Starnes, 2003).

In general, children who *want* to be involved in custody cases covet the opportunity to have their

sentiment heard and considered by the court (Barnett & Wilson, 2004; Cashmore & Parkinson, 2008; Darlington, 2006), even if they are not included in making the final decision (Birnbaum & Saini, 2012; Campbell, 2008). Additionally, those children who *want* to be involved in the decision-making process contend that children of all ages should be able to participate and express their custodial wishes. Children in Campbell (2008) noted that adults and authority figures involved in the decision-making process may assume that the age of children precludes younger ones from knowing what is in their best interests, and consequently, might not ask or consider their wishes. However, the children interviewed asserted that children of all ages should be able to express their custodial decisions. Although children may present inaccurate information or express an unreasonable custodial preference (Starnes, 2003), all children who *want* to share their custodial wishes should be provided the opportunity, regardless of age. Overall, children do not want to be solely responsible for the decisions that concern them, but want to have their sentiment heard and considered during the decision-making process (Birnbaum & Saini, 2012; Campbell, 2008).

Judges who seek children's custody preferences promote principles of therapeutic jurisprudence (see Chap. 14, this volume, for more on therapeutic jurisprudence). Therapeutic jurisprudence is a perspective in which legal rules, procedures, and actors can be used to produce therapeutic or anti-therapeutic outcomes for individuals involved in the legal process (Wexler, 1996). Pertinent to this chapter, therapeutic jurisprudence applies to the role of judges in custody cases and their behavior in the courtroom. Based on research, therapeutic jurisprudence principles suggest that judges, as legal actors, should actively procure children's sentiment for those who *want* to participate in custody cases because it results in therapeutic outcomes for the children. Specifically, children are satisfied with the decision-making process because they feel as though they are listened to (Darlington, 2006), respected and valued (Campbell, 2008), and acknowledged (Cashmore & Parkinson, 2008). Furthermore, research indicates that individuals who are given

a voice in the decision-making process are likely to have elevated perceptions of procedural justice (Tyler, Rasinski, & Spodick, 1985). Similarly, it is assumed that children are satisfied when judges seek their custodial sentiment because they are provided some sense of agency and control over how the custodial decisions are made (Kaltenborn, 2005; Szaj, 2002), which likely contributes to their elevated perceptions of procedural justice.

To further understand children's perceptions of justice, it is important to consider legitimacy. This justice principle refers to the perception that authority figures are appropriate governing entities; perceptions that the authority figure is legitimate influence individuals to feel obligated to obey (Tyler, 2006b). The more legitimate authority figures appear, the more likely individuals will feel responsible to accept and comply with their actions and decisions. Authority figures can appear legitimate by making decisions through just procedures. For example, Fagan and Tyler (2005) found that children who perceived that they were treated fairly by legal actors were more likely to view the legal actors as legitimate (although this view declined over time for some children). Furthermore, the study demonstrated that children's perceived legitimacy of the legal actors influenced their compliance with the legal actors' authority (Fagan & Tyler, 2005). These findings confirm that when authority figures are perceived as legitimate, individuals are then more inclined to accept and follow the law and legal outcomes (Tyler, 2006b). It is presumed, then, that children consider judges to exhibit procedural justice when they provide the opportunity for them to express their custodial wishes to the court. Thus, children who have the opportunity to voice their custodial preferences would be more likely to perceive judges as legitimate and, consequently, be more likely to accept their custodial decisions compared to children who are not given the same opportunity to be heard (Tyler, 2006a). What happens, though, when judges allow children to share their custodial preferences, but judges' decisions oppose children's wishes? Children could still regard judges as legitimate because judges acted fairly by obtaining their custodial wishes. In this situation, children are

more likely to attribute judges' "unfair" decisions to external factors rather than the judges' internal characteristics (Tyler, 2006a). Thus, it is important for judges to promote procedural justice in order for children to regard them as legitimate, which hopefully shapes children's acceptance of and compliance with their decisions.

Overall, children are satisfied with the decision-making process when they are allowed to participate and express their custodial sentiment to the court. When judges provide children the opportunity to act as agents in their own decision-making, children often receive therapeutic benefits that help them accept and adjust to final custody decisions. Furthermore, legitimacy and procedural justice provide explanations regarding the relationship between children's involvement in custody decisions and their perceptions of judges and the legal system (see Chaps. 15, 16, 17, 18, this volume, for further discussion of the outcomes of relying on sentiment in legal decisions). Based on these assumptions, the following section provides policy recommendations regarding judges' willingness to obtain and use children's sentiment when making custody decisions.

Recommendations and Future Research

Extant research demonstrates that children benefit from participating in custody decision-making (e.g., Campbell, 2008). Judges who do not obtain children's preferences likely contribute to children's negative perceptions about judges and the legal system (Tyler et al., 1985). The following section provides recommendations regarding: (1) training standards for legal professionals who solicit custodial preferences and (2) legal actors' adherence to an age-neutral principle when obtaining children's wishes. Furthermore, this section presents recommendations about other methods that could be used to promote children's positive perceptions of justice in addition to their actual inclusion in custody proceedings. Finally, this section proposes future research ideas to address whether children have the maturity to

share their sentiment and their ability to adapt to the final custodial decision.

Training Standards for Obtaining Sentiment

Judges should provide the opportunity for children to participate in custody decision-making, especially for those children who *want* to express their wishes (Birnbaum, Bala, & Cyr, 2011). When judges seek children's sentiment, they have the option to call children to testify, interview children, or appoint GALs as representatives for children, but none of these avenues are likely to be used in general (Crosby-Currie, 1996). Judicial interviews were implemented as a way for the judicial system to protect children from the harmful effects of testifying in court (e.g., court pressure, story fabrication; Wright, 2002); however, such interviews might have potentially negative consequences as well. Conducting interviews "behind the scenes" does not preclude children from experiencing the burden of choosing between their parents or enduring other negative emotions, such as shame or guilt. Judges can be educated on conducting child interviews via manuals and other resources (e.g., see American Bar Association Child Custody and Adoption Pro Bono Project and American Bar Association Center on Children and the Law, 2008), but they should receive more in-depth, one-on-one training on how to conduct interviews with children (Saywitz, Camparo, & Romanoff, 2010). For example, judges could receive continued instruction on how to ask age-appropriate questions or learn a free-narrative approach for child interviews.

Regarding the appointment of GALs, training volunteer citizens as GALs might not adequately prepare these individuals for all the legal and psychological issues related to family and child custody law. In fact, GALs themselves contend that their training does not provide sufficient means to determine what is in children's best interests (Pitchal, Freundlich, & Kendrick, 2009). As such, uncertainty surrounds the use of GALs

to protect children during custody cases and determine what is in their best interest.

A better approach to procuring children's sentiment would be to appoint both attorneys and advocates for children in custody cases. This tandem model, or dual representation, has been implemented in countries such as England (Bilson & White, 2005), and similar models have been enacted, but not necessarily adopted, in the United States (Atwood, 2008). Specifically, the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (the Act; based predominately on the American Bar Association's Standards of Practice for Lawyers Representing Children in Custody Cases) provides for the possibility of two separate lawyers to represent children in custody cases—the child's attorney and the best interests attorney (Atwood, 2008). The child's attorney serves as children's legal representatives to ensure that their rights are protected. Given the power differential within the adult-child relationship, however, children might be unable to relate to their lawyers in the same manner as adults (Appell, 2006). Therefore, in addition to the child's attorney, the best interests attorney serves to represent children's best interests to counteract this potential imbalance. Each lawyer serves children's best interests, but the best interests attorney is able to advocate a best interests position even if it is in direct contrast to the child's expressed custodial wishes; the child's attorney is bound to advocate the child's position (Atwood, 2008).

Interestingly, the court has the discretion to appoint neither, one, or both of these lawyers, and when assigned, the representative(s) must communicate children's wishes to the court if that is what the child wants (Atwood, 2008). It is recommended that each attorney be appointed to children involved in custody cases, but obviously such appointment depends upon parents' ability to pay lawyer fees (although the Act recommends states establish funds to compensate attorneys in cases in which couples cannot afford legal representation; Atwood, 2008). Such dual representation would allow children's best interests to be protected within both legal and welfare contexts, and permit children to participate in proceedings

and communicate their custody preferences to the court if they so desire. It should be noted that there is strong opposition against the Act. The American Academy of Matrimonial Lawyers' Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings argues that lawyers appointed to children in custody cases should *only* advocate for the child's expressed sentiment—a child-directed approach (see Guggenheim, 2009). Regardless of the approach used, though, any court-affiliated adult who interacts with children to obtain their custody preferences should have a solid legal and psychological background and receive adequate and ongoing training (Ballard, Rudd, Applegate, & Holtzworth-Munroe, 2013).

Establish Age-Neutral Standards

Previous studies have indicated that the age of children limits judges' willingness to obtain children's sentiment within the decision-making process (Crosby-Currie, 1996; Wallace & Silverberg-Koerner, 2003). Many judges perceive that children's involvement could produce detrimental consequences, but judges should seek children's sentiment for those who *want* to share their custodial preferences. Children who are provided the opportunity to participate in custody decisions often receive therapeutic outcomes (Campbell, 2008; Cashmore & Parkinson, 2008; Darlington, 2006). Furthermore, children are satisfied because they have some sense of agency and control regarding how custody decisions are made (Kaltenborn, 2005; Szaj, 2002), which may increase their perceptions of procedural justice (Tyler et al., 1985) and the legitimacy of judges and the legal system in general (Tyler, 2006a). States' best interest standards do not specify an age qualification or restriction when considering children's wishes; thus, children of all ages should technically have the opportunity to be involved in the decision-making process. It is recommended that states make it explicit within their own best interest standards that judges obtain children's sentiment from those who *want* to express their custodial

preferences to the court, regardless of their age (Birnbaum et al., 2011). If judges choose to incorporate children's wishes into the custody decision, then at that time they should consider the age of the child.

Promoting Positive Perceptions of Justice

Children who are provided the opportunity to voice their custodial preferences to the court are likely to have elevated perceptions of procedural justice (Tyler et al., 1985; but see Appell, 2006 regarding procedural justice limitations when attorneys promote children's voice). It is important, however, to consider other methods that could be used to promote children's positive perceptions of the legal system in addition to their participation in custody proceedings. Most children are not familiar with judicial processes, but during custody disputes they often find themselves in the uncomfortable, foreign environment of the courtroom. Before children enter the courtroom, they should receive education about legal proceedings and their rights in the judicial system (Appell, 2006). In particular, children should be prepared for court by receiving instruction on the titles, roles, and responsibilities of the legal actors whom they might encounter during the legal process. Moreover, children should be informed about the sources that judges use to make decisions (e.g., testimony, best interest standard). All children should receive age-appropriate education and materials about legal proceedings and the judicial system. For example, younger children could be provided with a picture book depicting legal actors and their specific titles, whereas older children could receive handouts with content that corresponds to their appropriate reading level. Increasing such knowledge may allow children to draw more positive and appropriate conclusions about fairness and justice in the legal system, especially when judges' decisions do not coincide with their custodial sentiments.

Future Research

Along with the above recommendations, it is imperative to consider suggestions for future research. Age is the primary factor that inhibits judges' willingness to obtain children's wishes (Crosby-Currie, 1996; Wallace & Silverberg-Koerner, 2003). Therefore, future research should address whether children, at different ages, are developmentally able to cope with the stress that could result from expressing their wishes and the decision outcomes regardless of whether decisions correspond with their sentiment. Individuals in the psychological field should conduct multi-method research to assess children's cognitive, emotional, and psychological levels when placed in a stressful environment like courtrooms. It would be important to determine at which ages children are likely to (1) understand that communicating their sentiment to the court can produce both positive and negative outcomes for themselves and (2) have the ability to cope with the consequences of their actions whether positive or negative. Such research would reveal the age at which children are able to cope with stress and decision outcomes when they do share their wishes with the court. While there is not likely a uniform age at which all children become mature enough, it is certainly possible for psycho-legal professionals to develop an assessment that would measure a child's competency.

Furthermore, social psychologists should investigate the relationship between children's participation in custody decisions and their perceptions of procedural justice to determine whether the relationship affects their views about the legitimacy of judges, the fairness of judges' decisions, and the satisfaction with the legal process. Presumably, court participation increases children's perceptions of the fairness of legal proceedings, which could contribute to children's assessment regarding the fairness of the final custodial decision. However, empirical research should actually test these assumptions in the courtroom setting, either by interviewing or surveying children involved in contested custody cases.

It would be important for researchers to consider children's age, developmental maturity, and legal attitudes as possible covariates as these may influence the relationship. Findings would provide valuable evidence for how children's perceptions of justice, judges, and the legal system contribute to their overall well-being after their involvement in custody decision-making.

Conclusion

The lack of structure surrounding states' best interest standards provides insufficient means for judges to procure and use children's wishes when making custody decisions. If states incorporate some of the above recommendations, then children will have more opportunity to participate in the decisions that concern them, presumably resulting in greater therapeutic benefits. Furthermore, allowing children to share their custodial sentiment may positively enhance their perceptions of procedural justice and the legitimacy of judges and the legal system, making it easier to accept and adjust to final custody decisions. Therefore, implementations of these recommendations will likely increase children's overall well-being for those children who want to participate in litigated custody cases and communicate their custody sentiment.

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