Including the Voices of Children of Separation and Divorce in the Legal System

Proefschrift

ter verkrijging van de graad van doctor aan Tilburg University op gezag van de rector magnificus, prof. dr. Ph. Eijlander, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de Ruth First zaal van de Universiteit op

maandag 11 november 2013 om 14.15 uur

door

Lorri Anne Yasenik
geboren op 8 maart 1962 te Port Arthur, Canada
INCLUDING THE VOICES OF CHILDREN OF SEPARATION AND DIVORCE IN THE LEGAL SYSTEM
# TABLE OF CONTENTS

**ABSTRACT** ........................................................................................................ vi

**ACKNOWLEDGEMENTS** ........................................................................ viii

**DEDICATION** ................................................................................................ xii

**LIST OF FIGURES**

<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Theoretical Categories for Children’s Lawyers</td>
<td>160</td>
</tr>
<tr>
<td>2</td>
<td>Theoretical Categories for Children’s Therapists</td>
<td>184</td>
</tr>
<tr>
<td>3</td>
<td>Children’s Lawyers and Children’s Therapists: Similarities and Differences</td>
<td>193</td>
</tr>
<tr>
<td>4</td>
<td>Current Inclusion of Child’s Voice (An Adult-focused Approach)</td>
<td>217</td>
</tr>
<tr>
<td>5</td>
<td>Proposed Practice: Early Inclusion of Child’s Voice (A Child/Family Focused Approach)</td>
<td>222</td>
</tr>
<tr>
<td>6</td>
<td>Voice of the Child Considerations</td>
<td>230</td>
</tr>
</tbody>
</table>

**CHAPTER ONE: INTRODUCTION** ................................................................. i

*Jennifer’s Story* ................................................................................... 2

Children’s Communication .................................................................... 3

Complexities in Gaining Children’s Views ....................................... 6

Legislation of Inclusion of Children ................................................. 6

Best Interest of the Child ................................................................ 8

Multiple Helpers ............................................................................... 11

Research Question .......................................................................... 14

What draws me to this work? ......................................................... 14

Families and Divorce ...................................................................... 16

Interfacing with the Legal System *Terry’s Story* ......................... 17

*Terry’s Story* .................................................................................. 20
# TABLE OF CONTENTS

My professional Influences ................................................................. 23
  Janice’s Story ........................................................................ 24
The Traditional Legal System Demands Re: The Proper Story .......................................................... 26
Co-constructing Memory ................................................................... 29
  Chrissy’s Story .......................................................................... 32
Why Include the Child’s Voice Now? How Did We Get Here? ................................................................. 35
Tender Years Doctrine .................................................................... 37
The Social Construction of Divorce .................................................. 39
Children as Victims and Children’s Rights .................................... 41
Child Liberalists and Child Protectionists ...................................... 43
What are the challenges to the Child’s Participation in Legal Family Matters? ........................................... 45
Children’s Lawyers and Therapists .................................................. 46
Family Groups Splintered Post Separation ....................................... 48
Roles of Children’s Lawyers ............................................................ 48
Best Interests vs. Advocacy ............................................................. 50
Protection of Children’s Rights or Not? ............................................ 53

**CHAPTER TWO: LITERATURE REVIEW** .......... 56
Children’s Rights ........................................................................... 56
The Child’s Voice in Separation and Divorce: The Pros and Cons ............................................................... 62
Who Hears the Voice of the Child ..................................................... 67
What Does the Literature Say about What Children Say? ................................................................................. 72
How and What Do Legal and Mental Health Professionals Consider in Accessing the Voice of the Child? .... 76
Best Interests of the Child: What is this About......................... 86
TABLE OF CONTENTS

What is Happening World Wide Regarding Inclusion of Children in Divorce Proceedings? ........................................ 97

CHAPTER THREE: RESEARCH METHODOLOGY AND METHODS ................................................................. 105
The Problem and Opening Research Question .................. 105
Grounded Theory .............................................................. 106
The Challenge ................................................................. 111
The Participants .............................................................. 112
Invitation to Participate in the Study ................................. 114
Demographics ................................................................. 116
Open-Ended Interviews: Individuals and Groups ............. 117
Memo-Writing ................................................................. 123
Coding the Data .............................................................. 125
Approaches to Clarify Data .............................................. 131

CHAPTER FOUR: THEORIZING ........................................... 136
What Children’s Lawyers Say: Part One
Systems Focus and Child .................................................... 139
Conflict Story ................................................................. 142
Consensus Reality ........................................................... 144
Lawyers and Language Wars ......................................... 146
Personal Experience Influences Approach to Children ... 148
Diverse Approaches to Meeting with Children ............... 149
Children’s Input is Complex and Requires a Process ....... 152
Working Around the Advocate Role ................................. 157

What Children’s Therapists Say: Part Two ................. 161
Systems Focus and Child and Family Relationships ...... 161
Providers of Conflict Story .............................................. 163
**TABLE OF CONTENTS**

Interpreters of the Context of the Child’s Voice ............165
Therapists and Language Definition Wars ......................167
Personal Experience Influences Approaches to Children ..................................................170
Therapist Role: Part of Resolution and Management of Family Conflict ..................................................172
Structured and Unstructured Approaches Used by Therapists ..................................................174
Therapists Interface with the Legal System .....................177

**Lawyers and Therapists:**

**The Differences: Part Three** ..................................185
Lawyers and Therapists Need a Common Language ....185
Team Approach: A Request for a New Procedural Map ..194
Working Together Re: Best Interests of Children ..........
New Team Process? ..................................................195
Teamwork Could Make All the Difference .................197
Key Ideas for Exploration ........................................201

**CHAPTER FIVE: DISCUSSION AND FUTURE CONSIDERATIONS** ........................................204
Creating Actions Together .......................................204
Multiple Voices and Reflections ...............................206
Envisioning Effective Futures Together ......................208
Resources for Action: An Alternative Proposal for Children and Families of Divorce ..........................210
The Services that Currently Exist ..............................213
The Current Legal System ........................................214
Proposal for a Pilot Project: Focus on Parenting Program ........................................................................218
# TABLE OF CONTENTS

Coordinated Action: Considerations for Gaining the Voice of the Child .................................................................224  
Concluding Comments ...........................................................................226  

REFERENCES .............................................................................247  

Appendix A: An Invitation to Participate ........................................272  
Appendix B: Consent Form .................................................................275  
Appendix C: Participant Demographic Data: Therapists and Lawyers ...........................................................................277  
Appendix D: Interview Questions for Children’s Lawyers ......................................................................................279  
Appendix E: Interview Questions for Children’s Therapists .....................................................................................282
ABSTRACT

Children and youth (18 years and younger) of separation and divorce have historically been excluded as participants in legal decision-making that will ultimately affect the rest of their lives. Including children in the context of family law is referred to as promoting “the voice of the child.” More emphasis has been placed on including children’s voices in separation and divorce since Canada ratified the United Nations Convention of the Rights of the Child in 1991. This was the first legal step taken to view children as rights-bearing individuals internationally. Since this time there has been greater emphasis on children having more input related to legal decisions that affect their lives. This study sought to understand how and in what ways children’s lawyers and children’s therapists gather and promote children’s voices to the court. A total of 22 participants (11 lawyers and 11 therapists) engaged in open-ended conversations/interviews both individually and in groups. Using a grounded theory research approach, theoretical categories were created and were presented, describing the stories told by both groups. Dialogues with participants highlighted the complexity of presenting the voice of the child to the court due to legal process barriers and late timing of inclusion of children. Although applicable to the broader Canadian legal system, the study focuses on specific practice traditions and peculiarities from the viewpoints of lawyers and therapists in Calgary. This study proposes changes to the current legal process as a way to decrease the adversarial approach to divorce and include children earlier in the process. It includes a presentation of factors lawyers and therapists consider when meeting with children to gain their
input for inclusion in court.