

Child-Inclusive Divorce: 2008 Colorado Family Law Survey

by Joan H. McWilliams and Donna Kearney Hinds

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This article discusses the "Colorado Family Law Survey" that was conducted by the authors during May and June 2008. The article describes the survey and presents a summary of the key survey findings, representational comments from respondents, and conclusions drawn from survey results.

The term "child-inclusive divorce"¹ is used to describe dispute resolution models or processes that facilitate the consideration of children's preferences in their parent's divorce. The concept, which has been adopted in other jurisdictions,² offers a way to identify children's needs and include them in the development of the family's parenting plan.

The "2008 Colorado Family Law Survey" was created by the authors to measure the extent to which the concept of child-inclusive divorce is being used in Colorado. The survey was designed as an investigatory tool and was not intended to be a social science research project that could be generalized to a more expansive population. It was disseminated by e-mail to more than 1,000 people. Among the recipients were members of the Colorado Bar Association (CBA) Family Law Section and members of the Metropolitan Denver Interdisciplinary Committee (MDIC), as well as judges and magistrates who hear divorce cases.

Introduction

For many years, divorce professionals have relied on a principle that has stood as one of the few bright lines in family law—never involve the children in divorce issues. This tenet has been repeated and enforced by judges and magistrates; it has been taught in parenting classes and followed by mediators and mental health professionals; and it has been adopted by many attorneys.³

However, there are indications that reliance on this principle may be changing. For example, a 2005 study by Elizabeth Marquardt⁴ of 1,500 young adults, one-half of whom experienced the divorce of their parents, reflects that the process would have been less traumatic if, among other things, they had known they could have asked for help from an outside, objective source who would have listened to their requests and found a way to communicate them or help the children communicate them to their parents.⁵

This conclusion is consistent with a 2008 study by Judy Cashmore and Patrick Parkinson,⁶ who state that:

Over the last decade . . . there has been increasing recognition of the need to take into account the views of children on various issues in relation to decisions that directly affect them.⁷

This includes postseparation living and contact arrangements.⁸

Additionally, as reflected in the comments by survey respondents, some practitioners are employing child-inclusive dispute resolution models that allow the children's voices to be heard.⁹ These models are used before litigation and may provide alternatives to the retention of a Child and Family Investigator (CFI) or Parental Responsibilities Evaluator (PRE).

Finally, other jurisdictions have successfully implemented various child-inclusive models through which a child's needs can be expressed and considered in divorce, without compromising the safety of the child or the integrity of the legal process. The Family Court in Australia, for example, has adopted a child-inclusive method to educate parents and teach them to focus on the views and needs of their children. After one year, the child-inclusive intervention was shown to have increased the durability of parental agreements and decreased the instigation of new litigation.¹⁰

Survey Purpose and Description

To learn whether children's ideas and opinions are being included in their parents' divorce in Colorado, a survey was e-mailed to approximately 850 members of the CBA Family Law Section, 150 members of the MDIC, and 64 Colorado judges and magistrates on the Colorado Judicial Department's domestic judges listserv. Responses were received from 156 lawyers, 41 mental health or other practitioners (collectively, mental health professionals), 17 judges, and 16 magistrates.



About the Authors

Joan H. McWilliams of McWilliams Mediation Group, Denver, is a lawyer/mediator and author. Her most recent book is entitled *The PeaceFinder: Riley McFee's Quest for World Peace*—(303) 830-0171, joan@mcwilliamsmediation.com.

Donna Kearney Hinds is a child advocate who has worked with children of divorce for more than thirty years. She has a degree in clinical psychology and has completed graduate studies in psychology with a focus on the effects of divorce on children—(303) 224-9000, nonnihinds@hotmail.com.

The survey asked questions about the respondent's experiences with or opinions about the inclusion of children's thoughts and suggestions in their parents' divorce. Examples of questions are:

- How often are children's ideas and opinions considered in the parents' divorce?
- How often do parents and children jointly define goals for their postdecreed family?
- How often are children interviewed by judges and magistrates?
- Do children participate in mediation?
- Are children ever interviewed by the mediator or a child specialist so their suggestions could be considered in the design of the parenting plan?

The survey also provided space for comments.

Of the attorneys and mental health professionals who responded, 24 percent had served as CFIs; 35 percent had served as mediators. Approximately 77 percent had practiced for more than ten years.

Of the judges and magistrates who responded, 39 percent had been on the Bench for one to five years; 48 percent had more than ten years of experience. In this category of respondents, 74 percent hear more than fifty divorce cases per year.

Summary of Key Findings

The survey resulted in certain key findings. These findings are summarized below.

- *Children's ideas and opinions are occasionally/somewhat frequently considered in their parents' divorce.*

- Attorneys and mental health professionals:
 - 54 percent: children's ideas and opinions are occasionally considered
 - 24 percent: children's ideas and opinions are considered somewhat frequently
 - 15 percent: children's ideas and opinions are frequently considered
- Judges and magistrates:
 - 61 percent: occasionally consider children's ideas and opinions
 - 13 percent: consider children's ideas and opinions somewhat frequently
 - 17 percent: frequently consider children's ideas and opinions
 - 9 percent: never consider children's ideas and opinions

- *Some lawyers, mental health professionals, and judges occasionally observe cases in which the parents and their children jointly define goals for their postdecreed family.*

- Attorneys and mental health professionals:
 - 43 percent: occasionally observe cases in which postdecreed family goals are defined
 - 50 percent: are aware of no cases in which the parents and their children jointly define goals for their postdecreed family
- Judges and magistrates:
 - 43 percent: occasionally observe cases in which the parents and their children jointly define goals for their postdecreed family

- 30 percent: never observe cases in which the parents and their children jointly define goals for their postdecreed family

- *The majority of lawyers, mental health professionals, and judges are aware of parents who incorporate their children's suggestions in their parenting plan.*

- Attorneys and mental health professionals:
 - 67 percent: occasionally aware of parents who incorporate their children's suggestions in their parenting plan
 - 21 percent: somewhat frequently or frequently aware of parents who incorporate their children's suggestions in their parenting plan
- Judges and magistrates:
 - 74 percent: occasionally aware of parents who incorporate their children's suggestions in their parenting plan
 - 13 percent: somewhat frequently or frequently aware of parents who incorporate their children's suggestions in their parenting plan

- *The age bracket at which parents are most likely to consider their children's suggestions or reactions to a particular parenting time schedule is 9 to 12.*

- Attorneys and mental health professionals:
 - 49 percent: 9 to 12 was the age bracket at which parents are most likely to consider their children's suggestions or reactions (most appropriate age bracket)
 - 28 percent: 13 to 19 was the most appropriate age bracket
 - 19 percent: 5 to 8 was the most appropriate age bracket
 - 4 percent: from birth to 4 years of age was the most appropriate age bracket
- Judges and magistrates:
 - 39 percent: 9 to 12 was the most appropriate age bracket
 - 17 percent: 13 to 19 was the most appropriate age bracket
 - 39 percent: 5 to 8 was the most appropriate age bracket
 - 4 percent: birth to 4 years of age was the most appropriate age bracket

- *Judicial interviews with children are rarely requested by lawyers or mental health respondents. Many judges or magistrates reported that children occasionally attempt to meet with them, but most judges never or rarely request an interview with the children.*

- Attorneys and mental health professionals:
 - 29 percent: never ask the judge to interview the children
 - 45 percent: rarely ask the judge to interview the children
 - 15 percent: occasionally ask the judge to interview the children
- Judges and magistrates:
 - 83 percent: children occasionally attempt to meet with them to give them their ideas about their parents' divorce
 - 56 percent: never or rarely request an interview with the children
 - 35 percent: occasionally request an interview with the children

➤ *Parents do not request their children's presence at mediation. Child interviews by mediators and child specialists generally are not used.*


- Attorneys and mental health professionals:
 - 78 percent: have never observed or been aware of parents who request their child's presence at mediation
 - 88 percent: have never or rarely have been aware of parents who ask the mediator to interview their child outside the mediation
 - 56 percent: never or rarely suggest the use of a mediator or child specialist to interview the child and, with the child's consent, bring his or her ideas to a meeting with the parents
- Judges and magistrates:
 - 87 percent: have never observed or been aware of parents who request their child's presence at mediation
 - 100 percent: have never or rarely have been aware of parents who ask the mediator to interview their child outside the mediation
 - 70 percent: never or rarely suggest that a child be interviewed by a mediator or child specialist who can, with the child's consent, bring the child's ideas and suggestions to a meeting with the parents
 - one judge: always makes the suggestion to use a mediator or child specialist to interview the child and, with the child's consent, to bring his or her ideas to a meeting with the parents

- have told me the kids expressed frustration about not being asked what they wanted during the process.
- Children participating in the process too often leads to abuse of the process by parents and often the children involved. Keep them out of it.
- Often, . . . it appears either that the child has expressed different (conflicting) positions to each parent and/or that the parents are incapable of hearing and reporting what the child really says.
- I think it is very dangerous to ask children directly about their opinions on parenting plans, etc. When you do that, you automatically put the child into a position of having to either side with one parent or the other, or refuse to side and thereby state "50/50." Unless the child is in his or her late teens, the child usually lacks the independence or the maturity to see any question about parenting arrangements as something other than a demand that the child side with one of the parents.
- [D]on't be too quick to assume that the parents involved in the case are mature adults. Parents are often quick to push their children to choose sides (consciously or subconsciously) and frequently reward or punish the children in the long term for siding for or against that parent. I think children's opinions on limited issues, like child exchanges, chores, fitting their own schedules into their parents' plans, etc. are important to secure, but I would be very hesitant to ask any questions about proportional allocation

Comments From Respondents

The survey invited recipients to write anonymous comments regarding children's participation in the divorce process. The unedited comments below are representative of the total responses received.¹¹

- Attorneys and mental health professionals:
 - It was a mistake to change the name from Special Advocate to CFI. It was much easier to make a child understand the role, rather than looking like some sort of social worker who is investigating the parents. It is hard to involve the children because so many parents want to coop them and use them in fights between spouses. . . . [I]n collaborative settings, . . . child involvement can be maximized.
 - Parents are letting their battle ruin their children's lives. Attorneys need to teach client[s] so this does not happen.
 - [I]n very high conflict cases, the role of a child legal representative should be considered and/or utilized more often. Attorneys have duties to clients, not children, and CFI's cannot file motions. Children in these highly fractured cases need effective voices in the courtroom.
 - I think it is essential that parents take their children's wishes into account. . . . [I]n most cases, I get my client's children into counseling as a means of eliciting that feedback from the child without the same amount of pressure as would be the case with the child being confronted by either parent.
 - I believe children should be far more involved in determining their parenting time schedules. . . . Kids are not . . . dolls—they can (and want) to deal with the divorce issues. Former clients whose children are now in their twenties




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- of parenting time unless I were dealing with a highly independent, intelligent and very mature child. . . .
- I can see having the child talk to a neutral third party, especially a mental health person. I don't think a [party's] lawyer should be doing so.
 - CFI's tend to interview the children and make recommendations with the children's thoughts in mind. I think with older children, it would be beneficial for mediators to meet with the children and discuss what they would like with respect to parenting time in the lower conflict cases. [because] those are the parents [who] may take their children's wishes into consideration a little more.
 - I find that when people can settle through mediation they own the settlement and are much happier. I think children can be part of that process.
 - It is my observation that children, even young children of four and older have the ability to share with their parents and others what their needs are and what arrangements need to be made to meet those needs. Clearly they need a safe place to voice those needs and parents may need extra assistance in hearing the needs, but this is one piece of critical information that is not getting to parents and to decision makers. The idea of a post-decree family plan is a fabulous idea.
 - Parents try to force or coerce their children into choosing a parent. This has not changed in the 20+ years I have been doing divorces.
 - This is an area that needs further study. It is occurring in other jurisdictions.
 - Judges and magistrates are reluctant to interview the children. Without a CFI, there is no means currently for the children's opinions or wishes to be expressed if the court refuses to interview the children. In addition, a 15 minute interview with the judge or magistrate may not be sufficient for children to adequately express themselves. The members of the bench need to be more open to interviewing the children, but also there needs to be another process whereby the children's stated wishes as to parenting time can be provided to the court without resorting to a \$5,000 custody evaluation or CFI report.
 - Older children (early teens) should be guided to speak up about their wishes and to voice them to both parents. They need to know that it's all a part of becoming an adult, and it's better than having no say at all.
 - Unfortunately, unless it is in a collaborative context, I think involving the children is a horrible idea.
 - I have noticed that even when there is an event or events causing grave concern about one of the parents . . . the [c]ourt continues to try to seek visitation with this parent. There have been times in my practice where the child has been hospitalized with anxiety and [post-traumatic stress disorder] symptoms and there has been no intervention from the [c]ourt to help the child be protected from this situation. It just seems that the child should have rights to grow up to be a functional citizen. All rights seem to be focused on the parents, good or bad.
 - It is untenable to put a child in a position to "choose" a parent. That said, the older a child is, the more weight [his or her] opinion should have.
 - Please please listen to what the kids have to say. They know us and their parents far better than we do. They are wise little beings and have much to offer.
 - I believe that when possible the voice[s] of the children need to be heard, not just in high conflict parenting disputes utilizing CFI or PRE/APR evaluations, or with enlightened mediators or in collaborative or cooperative settlement practices; children need to have a modality where in their voices can be heard to support their needs for security, safety and stability and to continue their emotional and physical support and relationship with both of their parents. We need a process that is sensitive and emotionally attuned to the children and their needs.
 - Use of a child specialist to interview the child is common in my collaborative cases. Use of a [CFI] to interview the child is common in my litigation cases. In litigation cases where there is not a need for a CFI, the parties sometimes request that the mediator or the child's therapist provide input to the settlement conference or mediation regarding the child's wishes. Some therapists and mediators will not do this.
 - We need to be more proactive with the whole family as a unit to work towards the best parenting arrangements.
 - Parents need to be encouraged to jointly meet with kids to discuss parenting time plans and seek their input and to let them know that they will have two homes . . . Mom's house and Dad's house.
- Judges and magistrates:
- The [c]ourt uses Child and Family Investigators whenever the parents cannot agree to a parenting plan. The Child and Family Investigator is required to determine the views of the children when age-appropriate.
 - The court is criticized for interviewing the children because of the availability of CFIs, gals, mediators, etc. etc. In past times I always thought that I was doing a good job of HEARING the children. Most of the times that I interviewed the children, I felt that I was the only person who heard their desires or concerns.
 - Usually, [the children] are not sufficiently mature to offer a meaningful opinion and their involvement only serves to exacerbate their trauma.
 - I have allowed children who are teen-agers, sometimes younger, to speak to me when they have attempted to make it known they want to speak to the [j]udge. I think they appreciate that they have been heard. This does not occur when there is a CFI or Parental Responsibilities Evaluator assigned to the case.
 - I am leery about interviewing children for several reasons. I am concerned that I do not have the training to discern whether . . . I am hearing their true opinions or concerns instead of what the parent who is in favor at the moment has told them to say. I don't feel that I have the necessary set of skills to interview children to obtain the information I need without causing them further emotional damage, for example, putting them in the position of taking sides between two people they love. I also have concerns over the confidentiality of the disclosures they make and I ordinarily won't interview the children unless the parents

and their counsel (if any) agree that the results will not be disclosed and no one will attempt to access the transcript of the interview.

- I do not see the system as “broken” in any way as to the children’s preferences being considered.
- Early intervention in this process could help immensely. Somehow we would need to change the view of parents that children are a prize to be won in this process.
- There are many cases where the parties are just above the indigency guidelines and not eligible for the state to pay for [a CFI, CLR or CASA].
- I am always concerned that, if I interview the children and then rule on the case, they will believe that they either influenced my decision or that they failed to influence my decision. This places too much responsibility on the child.

Conclusions Drawn From Survey Results

The survey responses indicate that some child-inclusive models are used in Colorado. Although it is difficult to generalize, it appears that children’s ideas and opinions are being considered by both parents and judges in the divorce process and are being included in their parenting plans. Some parents are working with their children to define goals for their postdecree family.

Lawyers and mental health professionals rarely request judicial interviews, but it is reported that children occasionally attempt to meet with judges and magistrates. Children generally are not included in the mediation process, and the majority of lawyers, mental health professionals, judges, and magistrates do not use a mediator or child specialist to interview the children and bring their ideas to the mediation.

The survey comments are more specific and reflect a division in the opinions of the respondents. For some, there are clear and substantial reasons for not including children in the divorce process. These involve concerns that children inevitably will become pawns of their parents, be forced to choose one parent over the other, or be damaged by being given too much responsibility or decision-making authority.

On the other hand, many respondents acknowledged a need for finding ways to allow children’s voices to be heard. They stated generally that children’s thoughts, needs, and desires constitute critical information that is not getting to the parents, the attorneys, and the court. Some urged that professionals need to be more proactive with the entire family and encourage parents to jointly meet with their children to obtain their input.

Child-Inclusive Models

There is a balance between these two positions. If studies show that child-inclusive models reduce acrimony between the parties and benefit the children, there are good reasons to incorporate them into the proverbial quiver of professional alternatives. However, they must be used cautiously and only in appropriate cases. Professionals must distinguish between cases that would benefit from the use of these methods and those that would not due to high conflict or parental inability to be rational advocates for their children. When children are involved directly, the children must understand that they can participate, but it is their parents or the judge who will make the final decisions in the case.

Keeping in mind precautions about directly involving children, there are many child-inclusive models from which to choose. Below is a discussion of some child-inclusive models.

Family Mediation

In the family mediation model, the children and parents meet in the mediation forum to discuss relevant issues such as parenting time schedules. Parents and children also may use this forum to design a postdecree family plan in which they jointly create a mission statement, set goals and objectives, identify tasks, and schedule an annual follow-up meeting to fine-tune, amend, or update the plan.¹²

Evaluative Mediation

With the evaluative mediation model, parties retain a trained mental health professional to act as a mediator and help them identify and evaluate factors that are important in the design of a parenting plan. It is a form of mediation in which parties complete a detailed questionnaire and work with the mediator to examine and resolve family disputes. The process can take ten to fifteen hours. Children may be included as the parties and the mediator deems appropriate.¹³

Mediator Interviews With the Children

Mediator interviews with children are conducted by the mediator on the case. Lawyer mediators and mental health mediators are able to perform this service.¹⁴ Before the mediator meets with the children, the mediator obtains a written consent to the interview from the parents, as well as a confidentiality agreement that provides that the interview will be confidential pursuant to CRS § 18-22-307. Additionally, the parties agree (and the children are so informed) that the mediator will discuss only those issues with the parents that previously have been approved by the children. The mediator meets with the children to discuss their concerns and ideas regarding their parents’ divorce. The children identify the information they want the mediator to share with their parents, and the remainder of their conversation is confidential. The mediator conducts a mediation session with the parents, discussing the concerns the children have identified and given permission to share. Ideally, the parents will incorporate some or all of the children’s suggestions in their initial or modified parenting plan.

Child Specialist Interviews With the Children

In this model, child specialists are chosen to consult with the children and bring their concerns to the parents in the mediation forum. It has been very successful in creating durable agreements and reducing the instigation of new litigation.¹⁵

Judicial Interviews With the Children

Studies show that some children, particularly older children in contested cases, appreciate the opportunity to talk to the judge.¹⁶ There is an increasing awareness of the importance of having the ultimate decision maker hear the children’s ideas. The children are interested in being heard¹⁷ and want the judge to know that his or her decision will have a profound effect on their lives. They believe that the judge can make a better decision if he or she has first-hand information.¹⁸ Children sometimes prefer to have their discussion be confidential so they will not hurt their parents’ feelings.¹⁹ Judi-

cial interviews place the judge in a difficult position if he or she goes against the wishes of the child. Some judges may even want to talk to the child to help them understand the decision.

In Colorado, judges may interview the children pursuant to CRS § 14-10-126(1). However, a record of the interview must be made, and it becomes part of the record of the case.²⁰

Therapeutic Intervention With Children

It can be helpful, in some cases, for the children to work with a therapist or counselor to discuss his or her opinions. In appropriate cases and with the children's consent and participation, the therapist meets with the parents and the children to facilitate discussion of concerns, expectations, and goals. This method requires a written consent from the parents, a confidentiality agreement, and the creation of a privilege between the children and therapist. This is a very successful method in cases where children may want to confront one or both parents but need the help of the counselor to facilitate that communication.

Conclusion

Divorce professionals and participants, including parents, lawyers, mental health professionals, and judges, recognize that children's involvement in the parents' divorce is complicated. However, prelitigation dispute resolution, including mediation models, mental health interventions, and judicial interviews, offers methods for including children's ideas and enabling parties to reach positive solutions without giving children undue authority or responsibility. These methods can produce lasting results and avoid the more costly alternative of using a CFI or PRE.

Every divorce is different and requires the application of appropriate methods of resolution. Some cases do not lend themselves to the use of any child-inclusive models, but all cases involving children should be individually reviewed and evaluated to see if the use of a child-inclusive model would be beneficial.

Notes

1. The term "divorce" will be used throughout this article to refer to dissolution of marriage.

2. See The New Zealand Care of Children Act of 2004, § (1)(6)(2)(b) (2004), which requires that "any view the child expresses (either directly or through a representative) must be taken into account." See also note 10, *infra*, regarding the use of the child-inclusive divorce process in Australia.

3. Typically, the involvement of children in domestic relations cases is limited to those cases in which parental rights and responsibilities—that is,

custody—are at issue, and a Child and Family Investigator, a Parental Responsibilities Evaluator, or a Child Legal Representative is used. CRS §§ 14-10-116.5, -127, and -116, respectively.

4. Marquardt, *Between Two Worlds* (Three Rivers Press, 2005).

5. *Id.* at 189. See also Li, "The Kids Are OK: Divorce and Children's Behavior Problems," RAND Labor & Population Working Paper No. WR-489 (May 2007), available at www.rand.org/pubs/working_papers/2007/RAND_WR489.pdf.

6. Cashmore and Parkinson, "Children's and Parents' Perceptions on Children's Participation in Decision Making After Parental Separation and Divorce," 46 *Family Court Review* 1 (Jan. 2008).

7. *Id.* at 91.

8. *Id.* at 92.

9. See Pickard, "The Child's Wishes in APR Proceedings: An Evidentiary Conundrum," 36 *The Colorado Lawyer* 33 (Jan. 2007).

10. McIntosh *et al.*, "Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes From a Prospective Study of Postseparation Adjustment." 46 *Family Court Rev.* 1 (Jan. 2008). This Australian study included two forms of mediation: (1) child-focused mediation, which actively supported the consideration of the children's needs; and (2) child-inclusive mediation, where a child specialist consulted with the children and brought their concerns to the parents in the mediation forum. At the end of one year, both groups showed a reduction in the levels of conflict and improved management of disputes, as reported by parents and children. However, the child-inclusive intervention showed that the agreements reached were significantly more durable, and the parents were half as likely as the child-focused parents to instigate new litigation over parenting matters in the year after mediation. See also The New Zealand Care of Children Act of 2004, § (1)(6)(2)(b) (2004).

11. To obtain a copy of the respondents' comments to the "2008 Colorado Family Law Survey," write to joan@mcwilliamsmediation.com.

12. This model was designed by article author Joan H. McWilliams. It can be used successfully in cases involving relatively high functioning adults, but also can be used in moderately high conflict cases in which the parents are seeking solutions for their future coparenting.

13. This model was designed by Dana L. Cogan, MD. It should be distinguished from legal evaluative mediation, which focuses only on the evaluation or neutral analysis of the legal issues of the case. See McWilliams, "Your ADR Options: Mediation, Arbitration, and Collaborative Law," 24 *Family Advocate* 3 (Spring 2002).

14. Meierding, "Children in the Mediation Process," AFCC Annual Conference, Vancouver, British Columbia (May 28, 2008).

15. McIntosh, *supra* note 10.

16. Parkinson and Cashmore, "What Responsibility Do Courts Have to Hear Children's Voices?" 15 *Int'l J. of Children's Rights* 43 (2007).

17. *Id.* at 49.

18. *Id.* at 51.

19. *Id.* at 52.

20. See Pickard, *supra* note 9. ■

Robert Zupkus Serving as ABA Division Chair

Denver attorney Robert A. Zupkus is serving as the 2008–09 chair of the American Bar Association General Practice, Solo and Small Firm Division (Division). Zupkus is a principal in the Denver law firm of Zupkus & Angell, P.C., where he specializes in complex business legal issues, including insurance, employment, and bankruptcy.

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