LINCOLN **HEARINGS – A PERSPECTIVE 45 YEARS LATER**

Hon. Richard A. Dollinger
New York State Bar Association
Family Law Section
Rochester, New York
May 16, 2014

1. Origin – ***Lincoln v. Lincoln*****, 24 NY 2d 270 (1969)**

Father brings change of custody petition. No attorney for the child. The Court interviews the children privately. First Department says it was error:

> The court interviewed the children in private and denied the application of respondent's counsel to be present. While the court may prevent counsel from participating in any way in the interview and, in fact, require him to remain silent, counsel is entitled to note the course of the interview (*Kesseler v. Kesseler*, 10 N Y 2d 445, 456). The purpose behind the provision is that in the event the interview develops any facts or contentions that would be inimical to the interests of counsel's client, he should have an opportunity to correct the impression created

Dissent says:

> The private interview of the children by the court, unacquiesced in by counsel, and the finding by the court on a matter the court had declared to be "not at issue," both merit a reversal and a remand.

Court of Appeals unanimously says that they agree with the result but write to clarify their "disagreement" with the Appellate Division over whether it was error to interview the children in the absence of counsel or even if a party's counsel could be present:

> It requires no great knowledge of child psychology to recognize that a child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by having to publicly relate its difficulties with them or be required to openly choose between them. The trial court however, if it is to obtain a full understanding of the effect of parental differences on the child, as well as an honest expression of the child's desires and attitudes, will in many cases need to interview the child. There can be no question that an interview in private will limit the psychological danger to the child and will also be far more informative and

worthwhile than the traditional procedures of the adversary system -- an examination of the child under oath in open court.

The test is whether the deviation will on the whole benefit the child by obtaining for the Judge significant pieces of information he needs to make the soundest possible decision. The trial court here concluded that the only method by which it might avoid placing an unjustifiable emotional burden on the three children and, at the same time, enable them to speak freely and candidly concerning their preferences was to assure them that their confidences would be respected. This could only be done in the absence of counsel, and we see no error or abuse of discretion in the procedure followed by the trial court.

We are confident that the Trial Judges recognize the difficulties and will not use any information, which has not been previously mentioned and is adverse to either parent, without in some way checking on its accuracy during the course of the open hearing.

2. Questions remaining in the wake of ***Lincoln v. Lincoln*:**

(A) Is the child psychology of "suffering from the trauma of a broken home" presumed to warrant an in camera in all instances?

NB: No psychological proof of the child's disposition in the record before the Court of Appeals.

(B) If there some threshold of "child psychology" impact on the child required before the in camera can be held – if a party objects can the Court consider expert proof regarding the impact on the child before holding the hearing in camera?

(C) How does a trial judge weed out the "distorted images" that the child may have of its parents and it situation?

(D) How does a trial judge – "check" – the information during the open hearing and can/must the judge disclose the child's confidential testimony if it is adverse to either party?

What if no hearing occurs?

(E) Does the same "checking" guideline apply to "factual issues" as well as "preferences?"

(F) How can the trial judge "use" the information?

3. Procedural Steps in a ***Lincoln* – *in camera* Hearing**:

(A) Ask for it in writing as soon as possible – during first motion practice, as part of the preliminary submission, by letter at the first conference –

Matter of Thillman v Mayer, 85 A.D.3d 1624 (4th Dep't 2011)(the mother did not request a Lincoln hearing and thus failed to preserve for our review her further contention that the court abused its discretion in failing to conduct such a hearing (see *Matter of Lopez v Robinson*, 25 AD3d 1034, 1037, 808 NYS2d 494 [2006]; *Matter of Picot v Barrett*, 8 AD3d 288, 289, 777 NYS2d 698 [2004]

Matter of Lopez v. Robinson, 25 A.D.3d 1034 (3d Dep't 2006)(there was no failure by Family Court to have conducted a Lincoln hearing when there was no request for such hearing (see *Matter of Baxter v Perico*, 288 AD2d 717, 717-718, 732 NYS2d 715 [2001]), we note that had the issue been preserved, we would have found no abuse of discretion due to Dimitri's young age (5))

Matter of Olufsen v. Plummer, 105 A.D.3d 1418 (4th Dep't 2013)(the mother's further contention that the court erred in failing to hold a Lincoln hearing is not preserved for our review inasmuch as the mother did not request that the court conduct such a hearing)

RAD Rule: Do not ask for an appointment of an attorney for the child without also requesting an in camera examination of the children by the Court

(B) Who attends?

AFC and child – no one else. Submitted questions?

R.L. v J.L., 34 Misc. 3d 1236(A)(Sup. Ct. Richmond Cty 2012)(an in camera interview was held on May 9, 2011, at which time the child testified in the presence of the Court and her attorney. Counsel for all parties submitted proposed questions for the in camera interview0.

A.C. v J.C., 2014 NY Slip Op 50656(U)(Sup. Ct. Richmond Cty 2014)(an in camera examination of the subject child was held on December 6, 2013. Both parties submitted questions for consideration at the in camera examination).

Is the Court required to inform attorneys about which questions were asked or answered?

(C) Sworn Testimony

NY CPL § 60.20

2. Every witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A witness less than nine years old may not

testify under oath unless the court is satisfied that he or she understands the nature of an oath. If under either of the above provisions, a witness is deemed to be ineligible to testify under oath, the witness may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof. A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished**.**

Does the same sufficient intelligence and capacity test apply to "preferences" as applies to "facts?"

Stipulations on "capacity?" What if a party declines to stipulate to "capacity?" Is a hearing required?

(D) The New York view on *in camera* interviews after *Lincoln v. Lincoln* – differentiating between *in camera* interviews and *Lincoln* hearings.

Matter of Rush v. Roscoe, 99 A.D.3d 1053 (3d Dep't 2012)(12-year-old child)

Finally, as a Lincoln hearing is not mandatory, we do not find further error in Family Court's refusal to conduct one here (see Matter of DeRuzzio v Ruggles, 88 AD3d 1091, 1091-1092, 931 NYS2d 271 [2011]; Matter of Walker v Tallman, 256 AD2d 1021, 1022, 683 NYS2d 329 [1998], lv denied 93 NY2d 804, 711 NE2d 202, 689 NYS2d 17 [1999]). However, in so holding, we must note the confusion evident in the record as to whether the court's in camera interview with the child—which was conducted shortly after the petition was filed, before issue had been joined and approximately eight months before the commencement of the fact-finding hearing—constituted a Lincoln hearing. It did not as"[t]he purpose of a Lincoln hearing in a custody proceeding is to corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing" (Matter of Spencer v Spencer, 85 AD3d 1244, 1245, 925 NYS2d 227 [2011] [emphasis added] [internal quotation marks and citation omitted]; see Matter of Lincoln v Lincoln, 24 NY2d 270, 273, 247 NE2d 659, 299 NYS2d 842 [1969]; Matter of Giovanni v Hall, 86 AD3d 676, 677 n, 927 NYS2d 427 [2011]).

Are in camera meetings with the children permitted at any time, over objections and solely in the discretion of the trial judge?

(E) Sealing the Transcript – Access Rules

CPLR R 4019/Family Ct. Act §664. Recording in camera interviews of infants

(a) A court shall not conduct an in camera interview of an infant in any action or proceeding to fix temporary or permanent custody or to modify judgments and orders of custody concerning marital separation, divorce, annulment of marriage

and dissolution of marriage unless a stenographic record of such interview is made.

(b) If an appeal is taken to the appellate division from a judgment or order of the court on any such action or proceeding, the stenographic record of any such interview shall be made a part of the record and forwarded under seal to the appellate division.

Matter of Carter v. Work, 100 A.D.3d 1557 (4th Dep't 2012)(finally, although we agree with the AFC that the court improperly disclosed the child's statement at the Lincoln hearing (see Matter of Spencer v Spencer, 85 AD3d 1244, 1246, 925 NYS2d 227 [2011]), we conclude that the error does not justify disturbing an otherwise valid determination (see Matter of Rivera v LaSalle, 84 AD3d 1436, 1437, 923 NYS2d 254 [2011]).

Glenn M. v. Patricia R., 193 Misc. 2d 408 (FAM. Ct. Suffolk Cty 2002)(the purpose of the sealed confidential interview is to protect the child from having to choose openly between parents or to relate difficulties with them and when the State Legislature codified these principles and created CPLR 4019, it was done in language that appears to allow only one circumstance for the unsealing of the child's private testimony, and that is for review by an appellate court.

McManus v McManus 274 AD 2d 378 (2d Dep't 2000)(court improperly granted law guardian's motion to unseal and release transcript of in camera interview with infant to police detective of Connecticut police department).

Matter of Nikki O. v. William N., 64 A.D.3d 938 (3d Dep't 2009) Although Family Court questioned the child's credibility following the Lincoln hearing because it suspected that the child had been coached, it did not reject the psychologist's report and made no finding as to whether the abuse had occurred. Family Court, without explanation, divulged the child's testimony to the parties (see Matter of Hrusovsky v Benjamin, 274 AD2d 674, 676, 710 NYS2d 198 [2000]) and failed to resolve all credibility questions regarding the child's allegations in the mother's favor at this point, observing instead that the truth might never be known.

> Note: In *Hrusovsky v. Benjamin*, 274 A.D.2d 674 (3d Dep't 2000), the Court added: Family Court appeared to summarize the child's testimony from the two Lincoln hearings, and we take this opportunity to reiterate that the HN4child's right to confidentiality (see, Matter of Lincoln v Lincoln, 24 NY2d 270, supra) should remain paramount absent a direction to the contrary (see, Matter of Sellen v Wright, 229 AD2d 680, 681-682). *Accord* *Matter of Roberta GG. v. Leon HH.*, 99 A.D.3d 1057 (3d Dep't 2012)

Matter of Rivera v. LaSalle, 84 A.D.3d 1436, n.1 (3d Dep't 2011)

During the 10-day period between the Lincoln hearing and the conclusion of the fact-finding hearing, the father delivered the letter to the attorney for the children and then to Family Court. The court had a brief discussion with the father, who testified that the younger child had written the letter and that the father did not know its contents. The court then advised the parties that the letter would be sealed and treated as part of the Lincoln hearing. Family Court stated that both children "expressed an unequivocal position" during the Lincoln hearing, but that the court placed little weight on either child's preference as the children subsequently retracted that position in the letter to the court.

(E) Two other Cases to Consider: Outliers?

LDM v. RA, 37 Misc. 3d 767 (Sup. Ct. Bronx Cty 2012)

Mother seeks to change custody, wants to admit nine-year-old child's out-of-court statements regarding father's behavior. The application to admit the child's out-of-court statements is granted but they must be corroborated by evidence other than the child's in camera statements. Such corroborating evidence may be the child's testimony as a trial witness in the courtroom, where he will be subject to cross examination. In such an instance, the parents, who are represented by counsel, will be excluded from the courtroom.

If the parties wish to rely upon the child's own statements to corroborate his prior out-of-court statements, an in camera proceeding is insufficient. The Court of Appeals in Lincoln v. Lincoln, 24 NY2d 270, 247 N.E.2d 659, 299 N.Y.S.2d 842 (1969) held it was not error for a trial court, over objection, to interview children in a custody matter in camera, outside the presence of all counsel. It did not determine it was the only way to take the testimony of children.

The Court in Sandra S. distinguished between a child's opinions on custody matters, i.e, with which parent would the child prefer to live and "crucial factual information" regarding how the parents supervise or treat the child. Id. at 801-02. The Court noted:

Due process concerns are not implicated in the child's opinions or answers to the judge's impression' questions, which are not subject to proof one way or the other. However, factual disclosures about one or both parents, which will likely influence the custodial determination and which are subject to proof, should be clearly disclosed, in some manner, to the parents or their attorneys so that they may be afforded the opportunity to gather and produce evidence to refute or counter or explain the child's statements.

No testimony has been put forth by any expert indicating he is particularly vulnerable or emotionally fragile. If the parties choose to corroborate D.'s out-of-court statements by his own testimony about what happened, the child must testify in court, [*774] but his parents, [***12] who are both represented by counsel, will be excluded. See In re: Sandra S., 30 Misc. 3d at 803. HN23In that an Article 6 proceeding, like an Article 10 matter is civil in nature, the parents' rights to be present are not "absolute." See In re: Randy A., 248 AD2d 838, 839-40, 670 N.Y.S.2d 225 (3rd Dept. 1998).

In so ruling, it should be abundantly clear, this Court is not requiring that the child testify at all. In that D. apparently alleges he and his father were "arrested" for shoplifting, and possibly for speeding, the moving parties are free to call either store security personnel, or the police to corroborate the child's out-of-court statements. However, the father is also free to call the child as his witness, should he choose to put on a case, under the same conditions as discussed above. If the father calls D., he is reminded D. becomes his witness and will not be subject to cross-examination by him.

Matter of Sandra S. v Abdul S., 30 Misc. 3d 797 (Fam Ct. Kings Cty 2010)

The court found that the children's statements during the course of the in camera interviews for the most part were factual allegations of specific conduct by the parents-primarily the father-rather than expressions of the children's preferences or opinions about their parents' relative parenting abilities. Those statements, which were akin to testimony given in a Family Ct Act art. 10 proceeding, were made in the absence, not only of the parties, but their attorneys as well. The

decision to transfer temporary custody of the children to the mother was based in large part on the statements the children made during the in camera interviews. Those statements, many of which were adverse to the father, were clearly relevant to a final custody decision. Unless the father and/or his counsel were apprised of those factual allegations, the father would have been be deprived of the opportunity to marshal and present evidence to refute or explain those charges

Lincoln raised two distinct and competing concerns. The first is that the subject child be permitted to voice her opinions and preferences and that her confidences in those respects be honored so that she may speak freely without fear that she may be hurting the feelings of one or the other parent or that she will incur the wrath or resentment of the less-preferred [**861] parent. The Court resolved that concern by holding that a trial judge may interview the child without her parents or their attorneys present and without requiring her to testify or be subjected to cross-examination in open court.

The second and thornier concern raised by Lincoln is that the accuracy of information gleaned from the child, which may be [*801] adverse to one or both parents, should be tested in the normal course of an evidentiary [***8] hearing. The Court did not provide any guidance as to how such testing might be accomplished without divulging the information to the child's parents or their attorneys, other than to express confidence that trial judges would find a way

To resolve the issue, it is helpful to [***10] distinguish between the types of disclosures that a child may make during the course of an in camera interview and the relative benefit or necessity of keeping some of them confidential while disclosing others. The [*802] child may express her views as to the relative qualities or demerits of her respective parents or her preference for one or the other parent--essentially her opinions on the matter of custody. An in camera interview may also give the judge the chance to learn something about the child herself: Is she outgoing or shy? Is she passionate about sports, books, art, animals? Does she have a lot of friends in one place or the other? Does she make friends easily? Is change easy or hard for her? In whom does she confide? Such information would certainly be relevant in [**862] determining which parent would be the better "fit" for this particular child. In addition, an in camera meeting affords the child a chance to meet and ask questions of the judge who will be deciding her fate, which seems only fair.

The child may also disclose crucial factual information about the conduct of one or the other parent, for example, that her mother beats her or that her father leaves her alone, unsupervised [***11] for extended periods of time.

Due process concerns are not implicated in the child's opinions or answers to the judge's "impression" questions, which are not subject to proof one way or the other. However, factual disclosures about one or both parents, which will likely influence the custodial determination and which are subject to proof, should clearly be disclosed, in some manner, to the parents or their attorneys so that they may be afforded the opportunity to gather and produce evidence to refute or counter or explain the child's statements.

Hence, it is imperative that parents in custodial conflicts be afforded the same due process protections that parents in article 10 proceedings have to challenge [**863] the child's factual assertions in some manner through the normal adversary process. Permitting such challenge will also help assure that the court's decision is based upon evidence that is as complete and as reliable as possible.

In the present matter, the children's statements to me during the course of the in

camera interviews for the most part were factual allegations of specific conduct by the parents--primarily the father--rather than expressions of the children's preferences or opinions about their parents' relative parenting abilities. Those statements, which are akin to testimony given in an article 10 proceeding, were made in the absence, not only of the parties, but their attorneys as well. My decision to transfer [*804] temporary custody of Nisaa and Hakim was based in large part on the statements the children made to me during their in camera interviews. Those statements, many of which are adverse to the father, are clearly relevant to a final custody decision. Unless the father and/or his counsel are apprised of those factual allegations, the father will be deprived of the opportunity to marshal and present evidence to refute or explain those charges.

While there may be several methods of meeting Lincoln's dual goals (see e.g. Barton v Kondrat, Fam Ct, Kings County, Aug. 24, 2007, Hepner, J., index No. V-19700-02/06F [transcripts distributed to counsel for the [***15] parties and the child with specific limiting conditions as to their use and dissemination]), I will endeavor to satisfy those concerns in this case as follows: the court will review the transcripts of the in camera interviews of the children and redact all "opinion" or "preference" statements. Upon request, copies of the redacted transcripts shall be made available to the attorneys for the mother and the father. The children's attorney, who was present during the in camera interviews, shall be provided unredacted copies of the transcripts. The attorneys for the parents may review the redacted transcripts with their clients in their offices, but may not make additional copies or allow their clients to take the copies out of the attorney's office.

Note: *Sandra S. v. Abdul S*. is cited only *LDM v. RA.* The later case has never been cited.

(G) Issues Unresolved:

1. How can a party know if corroboration is needed without access to some portion of the transcript?

2. If a factual dispute arises, how can a party know whether it has been “corroborated” by the children?

3. What if the questions go beyond the mandated scope of the Court’s inquiry?

4. Can a party seek an order limiting the scope of the in camera?

4. SCOPE OF THE INQUIRY DURING THE INTERVIEW

Demeanor

Margaret M.C. v William J.C., 41 Misc. 3d 459 (Sup Ct. Orange Cty 2012)(when the Court had the children come in for the Lincoln hearing, the parties transported them jointly and the Court observed the children to flit from one parent to the other on arrival at the Courthouse seamlessly)

AMS, III v EDG, 35 Misc. 3d 1244(A)(Fam Ct. Suffolk Cty 2012) (5-year-old)(the Court conducted an in camera interview of the child. While not sworn, the child was able to

explain the difference between the truth and a lie. Thus, the Court credits his unsworn testimony. The Court found the child to be personable, articulate and perceptive).

Corroboration

Matter of Scott QQ. v. Stephanie RR., 75 A.D.3d 798( )(Family Court could not rely on the statements made by the child at the Lincoln hearing since they were not corroborated (see Family Ct Act § 1046 [a] [vi]; [***5] Matter of Benjamin v Benjamin, 48 AD3d 912, 914, 851 NYS2d 305 [2008]

Matter of Benjamin v. Benjamin, 48 A.D.3d 912 (3d Dep't 2008)

The father did not object to Family Court conducting a Lincoln hearing of his older son from another relationship, or the court taking judicial notice of its prior orders and proceedings, thereby failing to preserve these contentions for appellate review (see Matter of Damian M., 41 AD3d 600, 600, 836 NYS2d 422 [2007]; Matter of Monroe County Support Collection Unit v Wills, 21 AD3d 1331, 1332, 801 NYS2d 650 [2005], lv denied 6 NY3d 705, 844 NE2d 792, 811 NYS2d 337 [2006]). In any event, the court may appropriately take judicial notice of its own prior proceedings (see Matter of Anjoulic J., 18 AD3d 984, 986, 794 NYS2d 709 [2005]). Although the court should not [***6] have relied upon any evidence from the Lincoln hearing without in some way checking its accuracy during an open hearing (see Matter of Lincoln v Lincoln, 24 NY2d 270, 273-274, 247 NE2d 659, 299 NYS2d 842 [1969]), we deem the court's reliance on the small amount of uncorroborated information here to be harmless error when considering the sufficient properly admitted evidence which supports the custodial determination (see Matter of Tompkins v Holmes, 27 AD3d 846, 847, 811 NYS2d 184 [2006]).

Query: Can the court rely on a child's statements without corroboration?

Visitation/Parenting Time

Matter of Klee v. Schill, 95 A.D.3d 1599 (3d Dep't 2012)(Family Court scheduled an in camera interview to be conducted prior to the commencement of the fact-finding hearing in order to assist the court in determining what, if any, visitation between the father and the child would be appropriate pending a decision on the petitions.)

Matter of Ruple v Cullen, 115 A.D.3d 1123 (3d Dep't 2014)(claim that father failed to establish a substantial change in circumstances. Family Court reserved decision and proceeded to conduct a Lincoln hearing with the child. Following the Lincoln hearing, the court concluded that the father had not established a change in circumstances sufficient to warrant reconsideration of the visitation order in the child's best interests and dismissed the petition.

Matter of Virginia C. v Donald C., 114 A.D.3d 1032 (3d Dep't 2014)(fact-finding hearing conducted over the course of several days, as well as two Lincoln hearings with Alexander, Supreme Court granted the mother sole legal and physical custody and provided alternate weekend visitation to the father).

Matter of Rulinsky v West, 107 A.D.3d 1507 (4th Dep't 2013)(the child's express desire not to visit with the father, provides a sufficient basis for the court's determination that terminating visitation with the father was in the child's best interests (see Matter of Bougor v Murray, 283 AD2d 695, 695-696, 724 NYS2d 215 [2001]; Bowers, 266 AD2d at 742). We therefore find no basis to disturb the court's determination, which was made after a Lincoln hearing and a full evidentiary hearing at which the father was present and testified (cf. Thomas, 277 AD2d at 935))

Matter of Schillaci v Forbes, 70 A.D.3d 1444 (4th Dep't 2010)(obtained by the court at the Lincoln hearing established that the child, who was being treated for leukemia, was opposed to visitation with her grandparents)

Neglect by a parent

Matter of Roth v Messina, 2014 NY Slip Op 2637 (3d Dep't 2014)(information gleaned from the Lincoln hearing, it is evident that the mother neglected the younger child and/or generally abdicated her parental responsibilities by, among other things, placing the child with questionable caretakers while the mother was hospitalized, failing to provide adequate living conditions and proper dental care, requiring the child to care for the mother's health needs and repeatedly subjecting the child to stressful confrontations regarding her custody).

Matter of Darrow v Darrow, 106 A.D.3d 1388 (3d Dep't 2013)(evidence raises serious concerns regarding the mother's temper and use of corporal punishment as a means of discipline. In short, based upon our review of the record as a whole, including the transcripts of the underlying Lincoln hearings, and according due deference to Family Court's credibility determinations (see Matter of Baker v Baker, 82 AD3d at 1462), we are satisfied that Family Court's finding of extraordinary circumstances as to the grandmother is supported by a sound and substantial basis in the record.

Alienation or Undue Influence

Matter of Owens v Chamorro, 114 A.D.3d 1037 (3d Dep't 2014)(without breaching the older child's confidentiality, we note that Family Court made searching efforts during the Lincoln hearing to ascertain the extent of her familiarity with the father, her willingness to have contact with him and whether her attitude toward him had been improperly influenced).

Matter of Nwawka v Yamutuale, 107 A.D.3d 1456 (4th Dep't 2013)(including the child's statements at the Lincoln hearing (see Matter of Lincoln v Lincoln, 24 NY2d 270, 272-274, 247 NE2d 659, 299 NYS2d 842 [1969]), we conclude that the court's determination has a sound and substantial basis, and we decline to disturb it as "the record suggests that the child's opposition to visitation was the product, at least in part, of parental alienation by the mother

Relocation

Venecia V. v August V., 113 A.D.3d 122 (1st Dep't 2013)

There is no merit to the father's contention that the children's expressed positions regarding the proposed move to New Jersey (and relocate with their mother) were not voluntary. Nothing in the record establishes that the children lacked the capacity for voluntary judgment as required by rule 7.2. Nor is there any merit to the accusation that the attorney for the children ignored the forensic expert's findings, or other evidence of alienation. The rule actually prohibits the attorney for the child from advocating a position contrary to the child's stated position unless the attorney is "convinced" that "the child lacks the capacity for knowing, voluntary and considered judgment" (7.2[d][3]). There is no evidence that the children lacked the requisite capacity. While the forensic expert indicated his view that the mother had engaged in behavior that alienated the children from their father, he also found that the father had estranged himself from the children by his own actions. Moreover, the court held a Lincoln hearing at which it heard directly from the children, and determined that the children were not rehearsed or coached, and that they desired to move to New Jersey. Evidence of overreaching or bad behavior by one parent that may influence a child caught in the middle of a custody dispute does not automatically require the child's attorney to be "convinced" that the child's stated position is involuntary.

5. WHEN IS A HEARING REQUIRED

REQUIRED

Matter of Norback v Norback, 114 A.D.3d 1036 (3d Dep't 2014)(Yet, as noted by Family Court, the evidence in the record sheds no light on the reasons underlying the children's hostility. Nevertheless, despite the mother's repeated requests and the support of the attorney for the children, Family Court declined to conduct a Lincoln hearing with the then 9- and 13-year-old children to ascertain their points of view and the reasons for their strained relationship with their father. Without the benefit of the information to be obtained from a Lincoln hearing, there is insufficient evidence here concerning the children's relationship with the father to determine what, if any, modification to the prior order is in their best interests (see Matter of Yeager v Yeager, 110 AD3d 1207, 1209-1210, 973 N.Y.S.2d 381 [2013]; Matter of Jessica B. v Robert B., 104 AD3d 1077, 1078, 961 N.Y.S.2d 608 [2013]; Matter of Flood v Flood, 63 AD3d 1197, 1199, 880 N.Y.S.2d 748 [2009]; Spain v Spain, 130 AD2d 806, 808, 515 N.Y.S.2d 134 [1987]). Accordingly, we reverse and remit this matter to Family Court for further proceedings).

Matter of Angela F. v. Gail WW., 113 A.D.3d 889 (3d Dep't 2014)(the attorney for the child urges that the child should have been interviewed in camera. Although "[t]he determination of whether to hold a Lincoln hearing lies within Family Court's discretion" (Matter of DeRuzzio v Ruggles, 88 AD3d 1091, 1091, 931 N.Y.S.2d 271 [2011]), we note that, given her age and in light of representations by others of the child's wishes, hearing from the child in camera, while not dispositive, could be an insightful and useful factor in determining the extent to which her mother's visitation is in the child's best interests (see Matter of Yeager v Yeager, 110 AD3d at 1209-1210; Matter of Stout v Gee, 110 AD3d 1163, 1164, 972 N.Y.S.2d 748 [2013]).

Matter of Yeager v Yeager, 110 A.D.3d 1207 (3d Dep't 2013)(the mother and the attorney for the child argue that Family Court erred by failing to conduct a Lincoln hearing with the child. While the decision whether to conduct such a hearing lies within the court's discretion (see Matter of Jessica B. v Robert B., 104 AD3d 1077, 1078, 961 N.Y.S.2d 608 [2013]; Matter of DeRuzzio v Ruggles, 88 AD3d 1091, 1092, 931 N.Y.S.2d 271 [2011]; Matter of Walker v Tallman, 256 AD2d 1021, 1022, 683 N.Y.S.2d 329 [1998], lv denied 93 NY2d 804, 711 N.E.2d 202, 689 N.Y.S.2d 17 [1999]), it is often the preferable course (see Matter of Jessica B. v Robert B., 104 AD3d at 1078). In this case, the court originally indicated that it intended to speak with the child and later reiterated this position. While we can assume that the court ultimately decided that an interview with the child was not warranted or appropriate, the record is bereft of any articulation or explanation for such decision.

Matter of Flood v. Flood, 63 A.D.3d 1197 (3d Dep't 2009)

While the children's wishes are not dispositive, they are one factor for the court to consider (see Matter of Miosky v Miosky, 33 AD3d 1163, 1166-1167, 823 NYS2d 269 [2006]; see also Matter of Burch v Willard, 57 AD3d 1272, 1273, 870 NYS2d 141 [2008]). Here, the Law Guardian for the older daughter originally informed Family Court that her client wanted monthly visitation, but later, after a visit between that child and the father, stated that the older daughter wanted visitation once per year. The Law Guardian for the younger daughter proffered that child's wishes not to see the father. The younger daughter also had not been participating in the court-ordered telephone visitation. Despite the older daughter's apparent change in position and the younger daughter's resistance to any contact with the father, neither Law Guardian nor either parent's attorney requested a Lincoln hearing. Such a hearing would have been helpful for Family Court to determine the older daughter's actual desires and whether her preference for visitation was the result of her recent visit with the father, improper influence by the mother or some other cause. Additionally, the court could have determined why the younger daughter did not

want visitation and why she refused to talk to the father on the telephone. In light of the limited evidence at the hearing, the children's ages, their apprehension regarding visitation, change in position and the requirement that visitation take place inside a state prison, discovering this information regarding the children's wishes and their reasons for those wishes would have been helpful to the court's determination of what was in their best interests. Because we feel that a Lincoln hearing was appropriate, and that the record is bereft of evidence as to why the Law Guardians failed to request one, we remit for such a hearing. The current order should remain in effect pending Family Court's order following a Lincoln hearing.

Matter of Casarotti v. Casarotti, 107 A.D.3d 1336 (3d Dep't 2013)

The 14-yeqr-old child testified that her mother told her that there would be consequences to testifying and "sort of" told her that these consequences would be "bad," but she was reluctant to elaborate on these threats in further detail.

Although not an issue directly raised on appeal, the Attorney for the child and the father both requested that Family Court hold a Lincoln hearing (see Matter of Lincoln v Lincoln, 24 NY2d 270, 247 NE2d 659, 299 NYS2d 842 [1969]) rather than require the child to testify in open court. Unfortunately, this request was denied and, after the mother refused to consent to the child testifying outside of the parties' presence, the child had to testify under oath in front of both parents. While we recognize that HN2Family Court has the discretion to decide whether a Lincoln hearing is appropriate (see Matter of McGovern v McGovern, 58 AD3d 911, 913 n 2, 870 NYS2d 618 [2009]; Matter of Farnham v Farnham, 252 AD2d 675, 677, 675 NYS2d 244 [1998]), it was clearly an abuse of discretion for the court to put the child in this awkward position, notwithstanding that her wishes were already known to her parents, particularly considering the testimony that the mother attempted to influence the testimony of her children. We again emphasize that " 'a child . . . should not be placed in the position of having [his or her] relationship with either parent further jeopardized by having to publicly relate [his or her] difficulties with them' " when explaining the [*1339] reasons for his or her preference (Matter of McGovern v McGovern, 58 AD3d at 913 n 2, quoting Matter of Lincoln v Lincoln, 24 NY2d at 272). Given the circumstances of this case and the fact that—at her age her preference would be entitled to great weight, the record indicates that a Lincoln hearing would have limited the risk of harm and "would have been far more informative and worthwhile than . . . an examination of the child under oath in open court" (Matter of McGovern v McGovern, 58 AD3d at 914 n 2 [internal quotation marks and citation omitted]; see Matter of Minner v Minner, 56 AD3d 1198, 1199, 867 NYS2d 601 [2008]; see also Matter of Justin CC. [Tina CC.], 77 AD3d 207, 209-210, 903 NYS2d 806 [2010]).

Matter of Aikens v. Nell, 91 A.D.3d 1308 (4th Dep't 2012)

The Attorney for the Child waived her contention that the court erred in conducting a Lincoln hearing and in relying upon the statements of the subject child adduced at that hearing, inasmuch as the record establishes that the hearing was conducted at her request (see generally Matter of Clime v Clime, 85 AD3d 1671, 1672, 926 NYS2d 235 [2011]; Delong v County of Chautauqua [appeal No. 2], 71 AD3d 1580, 1580-1581, 896 NYS2d 791 [2010]; Matter of James Jerome C. v Mary Elizabeth J., 31 AD3d 1184, 1184-1185, 818 NYS2d 702 [2006]). In any event, we conclude that the court did not abuse its discretion in conducting a Lincoln hearing (see Matter of Lincoln v Lincoln, 24 NY2d 270, 272-274, 247 NE2d 659, 299 NYS2d 842 [1969]; [***3] Matter of Farnham v Farnham, 252 AD2d 675, 677, 675 NYS2d 244 [1998]; cf. Matter of Thillman v Mayer, 85 AD3d 1624, 1625, 926 NYS2d 779 [2011]), or in considering [*1309] the child's statements at the Lincoln hearing in determining her best interests (see generally Eschbach v Eschbach, 56 NY2d 167, 173, 436 NE2d 1260, 451 NYS2d 658 [1982]; Fox v Fox, 177 AD2d 209, 210, 582 NYS2d 863 [1992]; see also Matter of Flood v Flood, 63

AD3d 1197, 1199, 880 NYS2d 748 [2009]).

Matter of Stramezzi v. Scozzari, 106 A.D.3d 748 (2d Dep't 2013)

The Family Court awarded custody of the children to the father without interviewing the children in camera. Under the particular circumstances of this case, in the absence of in camera interviews, the record is insufficient to allow us to make a fully informed determination as to what custody arrangement would be in the children's best interests (see Matter of Lincoln v Lincoln, 24 NY2d 270, 273-274, 247 NE2d 659, 299 NYS2d 842 [1969]; Matter of Oddo v Collins, 100 AD3d 1512, [**587] 954 NYS2d 367 [2012]). In camera interviews will aid in determining the proper custody arrangement in this case because the children are old enough to provide insight as to their interaction with each parent, and the impact of separating them from their older half-brother, [***4] who resides with the mother and with whom they have a close relationship. In addition, the children's preference, while not determinative, may also be indicative of the children's best interests (see Matter of Chery v Richardson, 88 AD3d at 789).

Accordingly, we remit the matter to the Family Court, Nassau County, for a de novo hearing on the petitions. At the de novo hearing, the Family Court shall conduct in camera interviews with the subject children as well as consider all additional evidence relevant to the issues of custody and visitation. The de novo hearing shall be conducted forthwith, and it shall continue on a day-to-day basis, to the extent scheduling allows, until completed. We take no position as to what the new determination should be.

Matter of Zubizarreta v Hemminger, 107 A.D.3d 909 (2d Dep't 2013)

Here, the Family Court did not possess adequate relevant information to determine whether the termination of the father's visitation with the child was in the child's best interest. For instance, although the attorney for the child indicated that the child, who was then 13 years old, did not wish to visit the father, the court failed to conduct an in camera examination of the child to ascertain the child's views. Therefore, under the circumstances of this case, the Family Court improvidently exercised its discretion in granting the mother's petition to modify an order of the District Court of Custer County, Oklahoma, dated August 28, 2008, so as to terminate the father's visitation with the subject child, without conducting a hearing (see Matter of New v Sharma, 91 AD3d 652, 936 NYS2d 265 [2012]; Matter of James v Jeffries, 90 AD3d 929, 935 NYS2d 315 [2011]; Matter of Riemma v Cascone, 74 AD3d at 1083). [***4] Accordingly, we remit the matter to the Family Court, Queens County, for a hearing as to whether the termination of the father's visitation with the child is in the child's best interests and, thereafter, for a new determination of the mother's petition.

William-Torand v. Torand, 73 A.D.3d 605 (1st Dep't 2010)

It is apparent from the record that the trial court neither appointed an attorney for the children nor interviewed them at a Lincoln hearing (see Matter of Lincoln v Lincoln, 24 NY2d 270, 247 NE2d 659, 299 NYS2d 842 [1969]). In light of the children's ages and the mother's [***3] claim that they are reluctant to spend time with their father, on remand, the court should consider, after consultation with counsel, appointing an attorney for the children and holding a Lincoln hearing (see Koppenhoefer v Koppenhoefer, 159 AD2d 113, 117, 558 NYS2d 596 [1990] [preferred practice in custody/visitation cases is to have an in camera interview with the child on the record in the presence of the attorney for the child]).

NOT REQUIRED

Matter of DeRuzzio v. Ruggles, 88 A.D.3d 1091 (3d Dep't 2011)

The court also did not abuse its discretion in declining to interview Daniel in camera. The determination of whether to hold a Lincoln hearing lies within Family Court's discretion

(see Matter of Walker v Tallman, 256 AD2d 1021, 1022, 683 NYS2d 329 [1998], lv [*1092] denied 93 NY2d 804, 711 NE2d 202, 689 NYS2d 17 [1999]). Here, the court noted that during a Lincoln hearing in a prior proceeding, Daniel was very fragile and had a "meltdown." The mother, the father's therapist and the attorney for the children all stated that Daniel was upset by, and did not want to [**272] be involved in, his parents' court proceedings. Considering the potential negative impact on the child, along with the lack of evidence to support most of the father's petition, the court did not err in denying the father's request for a Lincoln [***3] hearing.

Matter of Adams v Morris, 111 A.D.3d 1069 (3d Dep't 2013) (we discern no abuse of Family Court's discretion in failing to conduct a Lincoln hearing, particularly considering the child's age (11) and developmental delays (the child — who was then seven years old — was not toilet trained, was educationally delayed and suffered from serious and substantial untreated dental problems) , the representation provided by the child's attorney and the fact that no request for such a hearing was made

Matter of Burrell v. Burrell, 101 A.D.3d 1193 (3de Dep't 2012)

Contrary to the mother's contention, due to her inability or unwillingness to properly and safely care for the child, Family Court's determination that two hours of weekly supervised visitation was in the child's best interests is supported by a sound and substantial basis in the record (see Matter of Sumner v Lyman, 70 AD3d 1223, 1225, 895 NYS2d 576 [2010], lv denied 14 NY3d 709, 927 NE2d 564, 901 NYS2d 143 [2010]; Matter of Taylor v Fry, 63 AD3d at 1218-1219). Finally, under the circumstances of this case, we cannot say that Family Court abused its discretion in declining to conduct an in camera interview with the child (see Matter of DeRuzzio v Ruggles, 88 AD3d 1091, 1091-1092, 931 NYS2d 271 [2011]).

Matter of VanBuren v. Assenza, 110 A.D.3d 1284 (3d Dep't 2013)(the record also reveals that the child has bonded with her stepfather, who has been in her life since she was two years old, and that the child does not wish to have visitation. The father's newly found desire to have contact has caused her to feel anxious, cry and become upset, and she has been in therapy to deal with her anxiety over the court proceedings

Matter of A.H. v C.B, 35 Misc. 3d 1244(A)(Fam Ct. Queens Cty 2012)

On March 12, 2012, the father made a motion for this court to conduct an in-camera interview with N. The mother and the attorney for the child objected to an in-camera interview. The court denied the father's motion because there was sufficient basis in the evidence for the court to make a determination without conducting an in-camera interview with the child. In addition, the court considered the mother's testimony that N doesn't trust therapists (she believes they play games to gain trust) and that N dislikes speaking about her personal issues. It is clear from the interim therapeutic supervised visitation reports that N is disturbed by the court proceedings of which she is aware, and that she is guarded about them. Dr. Gries reported, "N appears genuinely overwhelmed by various family-related stressors that seem to originate from her parental relationships." (Forensic report, p. [***11] 13) Compelling her against her will to meet with yet another professional about the personal issues in her life would cause N further stress. Because an in-camera interview is unnecessary for the purpose of deciding this case, the court found it unadvisable to further burden N.

Matter of Giannoulakis v. Kounalis, 97 A.D.3d 748 (2d Dep't 2012)

The father had a history of abusive behavior, and a forensic evaluator, who had an opportunity to interview the parties, concluded, among other things, that the father had failed to take responsibility for his actions or rectify his behavior. Considering the evaluator's recommendation that no visitation be awarded, the father's [***3] offensive demeanor during the hearing, and the fact that the father was arrested for domestic

violence while the proceeding was pending, the Family Court's determination that therapeutic visitation was not in the best interests of the children should not be disturbed (cf. Matter of Sinnott-Turner v Kolba, 60 AD3d at 775-776; Matter of Thompson v Yu-Thompson, 41 AD3d at 488). Contrary to the father's contention, the Family Court providently exercised its discretion in declining to conduct in camera interviews with the children (see Bibas v Bibas, 58 AD3d 586, 588, 871 NYS2d 648 [2009]; Matter of Desroches v Desroches, 54 AD3d 1035, 1036, 864 NYS2d 551 [2008]; Matter of Perez v Montanez, 31 AD3d 565, 566,

Matter of Walters v. Francisco, 63 A.D.3d 1610 (4th Dep't 2009)(the court did not abuse its discretion in refusing to conduct a Lincoln hearing. In determining whether such a hearing is warranted, the court must determine whether the in camera testimony of the child "will on the whole benefit the child by obtaining for the Judge significant [***3] pieces of information he [or she] needs to make the soundest possible decision" (Matter of Lincoln v Lincoln, 24 NY2d 270, 272, 247 NE2d 659, 299 NYS2d 842 [1969])

Matter of L. v K., 34 Misc. 3d 1216(A)Fam. Ct. Onieda Cty 2012)(separate Lincoln hearings with each of the subject children. The children were very well-behaved and friendly and appeared to be well-adjusted.

6. AGE AS A FACTOR IN HOLDING A HEARING

Matter of Parchinsky v Parchinsky, 114 A.D.3d 1040 (3d Dep't 2014) ("while not dispositive, the express wishes of older and more mature children can support the finding of a change in circumstances" (Matter of Burch v Willard, 57 AD3d 1272, 1273, 870 N.Y.S.2d 141 [2008]; accord Matter of Casarotti v Casarotti, 107 AD3d 1336, 1337, 967 N.Y.S.2d 783 [2013], lv denied 22 NY3d 852, 998 N.E.2d 399, 975 N.Y.S.2d 734 [2013]), and both sons — then 13 and 15 years old — strongly and openly expressed a preference to reside with the father

Matter of Jessica B. v. Robert B., 104 A.D.3d 1077, (3d Dep't 2013)(to be sure, the wishes of this 12-year-old child were "at minimum, entitled to consideration" (Matter of Rivera v LaSalle, 84 AD3d 1436, 1439, 923 N.Y.S.2d 254 [2011] [internal quotation marks and citation omitted]), and the record does not reflect whether such consideration was given to the child's wishes. As a result, and because we conclude that a Lincoln [*1210] hearing is called for under the circumstances here (see Matter of Flood v Flood, 63 AD3d 1197, 1199, 880 N.Y.S.2d 748 [2009]), we must remit the modification petition to Family Court

Matter of Tamara FF. v. John FF., 75 A.D.3d 688 (3d Dep't 2010)

In the absence of a forensic evaluation or any insight into the children's views, we are unable to determine whether such limitations on the father's access to his children are warranted (see Matter of Rivera v Tomaino, 46 AD3d 1249, 1250, 848 NYS2d 437 [2007]; Matter of Albanese v Albanese, 44 AD3d 1117, 1120, 844 NYS2d 150 [2007]; see also Matter of Amato v Amato, 51 AD3d 1123, 1124-1125, 857 NYS2d 778 [2008]). Accordingly, the matter should be remitted to Family Court to give the court the opportunity, at a minimum, to conduct a Lincoln hearing with these children, who are certainly old enough to provide insight into their relationship with their father (see Matter of Flood v Flood, 63 AD3d 1197, 1199, 880 NYS2d 748 [2009]; cf. Matter of Mitchell v Mitchell, 209 AD2d 845, 847, 619 NYS2d 182 [1994]).

Walker v. Tallman, 256 A.D.2d 1021 (3d Dep't 1998)

We also reject petitioner's contention that Family Court erred in failing to interview the children. The decision to interview the children in a custody dispute, although preferable, is not mandatory, but rather lies within the discretion of the trial court (see, Matter of Lincoln v Lincoln, 24 NY2d 270; Matter of Mitchell v Mitchell, 209 AD2d 845, 847). Given

the subject matter of the hearing evidence, particularly the evidence as to the abusive relationship between the parties, interviewing the children as to their preferences would have provided no additional useful information upon which to base a custody decision. Accordingly, we find no error in Family Court's decision not to hold a Lincoln hearing.

Matter of Rubel v Wilson, 111 A.D.3d (3d Dep't 2013)

Lincoln hearing with the child, then age seven, is supported by a sound and substantial basis in the record. The court characterized petitioner's relationship with Dakota as "healthy and nurturing," discredited many of the mother's proffered explanations for why she opposed or cut off all contact between the children and petitioner as not the true reasons for her objections to visitation, and found that the termination of visitation "arose without a reasonable basis." While the mother has estranged herself from petitioner and has been unwilling to accept any efforts by petitioner to repair that relationship, "an acrimonious relationship is generally not sufficient cause to deny visitation.

Matter of Stout v Gee, 110 A.D.3d 1163 (3d Dep't 2013)(moreover, although not a determinative factor, we note the absence in the court's decision of any discussion concerning the wishes or preferences of the children, both of whom are in their teens, even though this factor should be "entitled to great weight")

Matter remanded because court held Lincoln hearing with only one of the children

Matter of McGovern v. McGovern, 58 A.D.3d 911 (3d Dep't 2009)(while not determinative, the wishes of an almost 14-year-old child are certainly entitled to great weight, particularly given the legitimate academic, medical and other bases for his view (see Matter of Cornell v Cornell, 8 AD3d 718, 719, 778 NYS2d 193 [2004]; see also Manfredo v Manfredo, 53 AD3d 498, 500, 861 NYS2d 399 [2008]).

Matter of Cormier v. Clarke, 107 A.D.3d 1410 (4th Dep't 2013)(in any event, based on the child's young age, we perceive no abuse of discretion in the court's failure to conduct a Lincoln hearing" (Matter of Thillman v Mayer, 85 AD3d 1624, 1625, 926 NYS2d 779 [2011])

Matter of Graves v Stockigt, 79 A.D.3d 1170 (3d Dep't 2010)(the mother's contention that Family Court abused its discretion in not conducting a Lincoln hearing is unpersuasive, particularly given the young age of the child (5)(see Matter of Lopez v Robinson, 25 AD3d 1034, 1037, 808 NYS2d 494 [2006]; Matter of Farnham v Farnham, 252 AD2d 675, 677, 675 NYS2d 244 [1998])

Matter of Nelson v Morales, 104 A.D.3d 1299 (4th dep't 2013)(12-year-old child involved and court concluded that the other evidence, including the child's statements at the Lincoln hearing, was sufficient to establish a change in circumstances).

Matter of Venus v Brennan, 103 A.D.3d 1115 (4th Dep't 2013)

The mother further contends that the Attorney for the Child (AFC) was ineffective on the grounds that the AFC did not present any witnesses or submit any evidence at the hearing, did not advocate a position in her written closing argument and did not request a Lincoln hearing. We reject that contention. We conclude that, under the circumstances presented here, the failure of the AFC to present evidence at the hearing, without more, does not constitute ineffective assistance (see Matter of Grabiel V., 59 AD3d 1132, 1133, 873 NYS2d 840 [2009], lv denied 12 NY3d 711, 909 NE2d 583, 881 NYS2d 660 [2009]). The AFC actively participated in the hearing by cross-examining the parties and witnesses, and there is no requirement that she submit a position in her written closing argument. Additionally, there is no indication that the AFC would have succeeded in obtaining a Lincoln hearing even had she requested one given the age of the child, who was five at the time of the hearing (see generally Matter of Farnham v Farnham, 252

AD2d 675, 677, 675 NYS2d 244 [1998]).

E.B. v M.B., 42 Misc. 3d 1211(A)(Sup. Ct. Kings Cty 2013)(the attorneys for the parties and the attorney for the child represented that they did not believe that any additional information would be gleaned by the Court conducting an in camera interview of the child, who is four (4) years old, and waived an in camera interview)

Scott M. v Ilona M., 38 Misc. 3d 1216(A)Sup. Ct. Kings Cty 2012)(5-year-old)(while a child's preference, especially at this young age, is not determinative of the court's decision, it is a factor in the totality of circumstances (see Ebert v. Ebert, 38 NY2d 700, 346 N.E.2d 240, 382 NYS2d 472 [1976], see also Chery v. Richardson, 88 AD3d 788, 930 N.Y.S.2d 663 [2 Dept., 2011] [***22] citing Dintruff v. McGreevy, 34 NY2d 887, 888, 316 N.E.2d 716, 359 N.Y.S.2d 281 [1974];). This court notes that the child wishes to spend equal time with both his mother and father).

Matter of O'Shea v Parker, 2014 NY Slip Op 2941 (2d Dep't 4/20/2014)(before reaching its determination on the mother's application for a change in custody, the Family Court conducted an in camera interview of the then-13-year-old subject child and the court possessed adequate relevant information [*3] to enable it to make an informed and provident visitation determination without conducting a hearing (see [**2] Mohabir v Singh, 78 AD3d at 1056-1057). To the extent that the Family Court relied upon the in camera interview of the child, who was then 13 years old, it was entitled to place great weight on the wishes of the child, who was mature enough to express them (see id. at 1056-1057; Matter of Mera v Rodriguez, 73 AD3d 1069, 1069-1070, 899 N.Y.S.2d 893)

7. HOW OTHER STATES BALANCE THE COMPETING INTERESTS – DUE PROCESS VS. BEST INTERESTS

Oklahoma - See *Foshee v. Foshee*, 247 P.3d 1162, 1167 n. 5 (Okla 2010); *Ynclan v. Woodward*, 237 P. 2d 145 (Okla. 2010)

The Research Footnote – note 5 in *Foshee v. Foshee*:

See generally, S. Bernstein, Annotation, Propriety of Court Conducting Private Interview [***15] with Child in Determining Custody, 99 A.L.R. 2d 954 (1965). See Jackson v. Smith, 250 Ark. 923, 467 S.W.2d 704, 705 (Ark. 1971); Conkling v. Conkling, 185 N.W.2d 777, 785 (Iowa 1971); Winkler v. Winkler, 252 Ind. 136, 246 N.E.2d 375, 376 (1969); duPont v. duPont, 59 Del. 206, 216 A.2d 674, 681-82, 9 Storey 206 (1966); Lawson v. Lawson, 87 Idaho 444, 394 P.2d 1008, 1010 (1964); Seelandt v. Seelandt, 24 Wis. 2d 73, 76-77, 128 N.W.2d 66 (1964); Franks v. Franks, 163 Ind. App. 346, 323 N.E.2d 678, 681 (1975); Gonyea v. Gonyea, 232 Or. 367, 375 P.2d 808, 811 (1962); Correll v. Newman, 236 Miss. 545, 111 So.2d 643, 645 (1959); Bowler v. Bowler, 351 Mich. 398, 88 N.W.2d 505, 509 (1958); Johnson v. Johnson, 7 Utah 2d 263, 323 P.2d 16, 17-18 (1958); Douglas v. Sheffner, 79 Wyo. 172, 331 P.2d 840, 845 (Wyo. 1958), superseded on other grounds by In re Interest of MKM, 792 P.2d 1369 (Wyo. 1990); Nelson v. Nelson, 43 Wn.2d 278, 280, 260 P.2d 886 (1953); Callen v. Gill, 7 N.J. 312, 319, 81 A.2d 495 (1951); In re Marriage of Armbeck, 33 Colo. App. 260, 518 P.2d 300, 301 (1974); Kitchens v. Kitchens, 305 So.2d 249, 250 (D.C. Fla. 3rd 1974); Brown v. Brown, 510 S.W.2d 14, 16 (Ky. Ct. App. 1974); Lincoln v. Lincoln, 24 N.Y.2d 270, 247 N.E.2d 659, 299 N.Y.S.2d 842, 845 (1969); [***16] Stickler v. Stickler, 57 Ill.App.2d 286, 206 N.E.2d 720, 723 (1965); Oakes v. Oakes, 45 Ill. App.2d 387, 195 N.E.2d 840, 844 (1964); Baker v. Vidal, 363 S.W.2d 158, 159 (Tx. App. 1962); Wilhelm v. Wilhelm, 214 Md. 80, 133 A.2d 423 (1957); Jenkins v. Jenkins, 125 Cal. App.2d 109, 269 P.2d 908, 910-11 (Cal. App. 1954); Hicks v. Hicks, 26 Tenn. App. 641, 176 S.W.2d 371, 377 (1943). Paryzek v. Paryzek 776 P.2d 78, 81 (Utah App. 1989). Kitchens v. Kitchens, supra; Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66, 69 (1990).

In *Ynclan v. Woodward*, the Oklahoma Supreme Court noted that trial courts should be circumspect: Nor should a child be directly asked where the child would rather live

because specifically asking preference provides an opportunity for parental manipulation or intimidation of the child as well as an opportunity for the child to manipulate the parents. It also gives the child the impression that their preference is "the" deciding factor for custody. Rather, the trial court should conduct such an interview so as to discern the child's preference, while at the same time, being sensitive to how the child is coping with the divorce, the pressures put on the child by the divorce and stating [***20] a preference, as well as to ascertain the motive of the child in stating a preference

Illinois - Under statute, court making custody decision may consider wishes of child as to custodian, although there are problems in making decision of child the determinant; more sensitive courts do not specifically ask child whether he prefers to live with his father or mother, and better way than in camera hearing to get child's preferences before court may be through admission of child's hearsay statements, through testimony of guardian ad litem, or through professional personnel; another problem with relying upon wishes of child is that such reliance provides incentive for parental manipulation and intimidation of child, and opportunity for child's manipulation of parents, none of which can be said to be in child's best interests. *Marriage of Hefer* (1996, 4th Dist) 282 Ill App 3d 73, 217 Ill Dec 701, 667 NE2d 1094.

In post-divorce proceeding in which mother and father each sought sole custody of 6-year-old child whose custody had been awarded jointly to both parents in divorce decree pursuant to their agreement, court did not err in awarding sole custody to father where during in camera interviews, child expressed preference to live with father, where court did not place undue weight on child's preference but determined that her preference was corroborated by other evidence in case as well as by her demeanor and testimony at in camera conference. *Prince v Herrera* (1994, 1st Dist) 261 Ill App 3d 606, 199 Ill Dec 174, 633 NE2d 970.

Michigan – In camera conference with children, that excluded husband's counsel and that was alleged to have denied husband right to meaningful review inasmuch as court failed to provide him with transcript of conversation, was proper in order to protect children from pain of openly chosing sides and from distress of cross-examination. *Lesauskis v Lesauskis* (1981) 111 Mich App 811, 314 NW2d 767.

Minnesota – Child custody case would be remanded for further proceedings where custody of children 8, 10, and 12 awarded to father was not supported by findings. On remand, trial court would be required to comply with statute mandating that in camera interviews of children be recorded, and that counsel be allowed to attend. *Smith v Smith* (1988, Minn App) 425 NW2d 854.

Virginia – Questioning 12-year-old child in camera, out of presence of counsel, was proper in child custody dispute; matter was contentious, acrimonious, and had dragged on for more than six years, purpose of taking child's testimony was to hear from him whether he preferred to live with his mother or his stepfather, court offered parties opportunity to proffer any questions they wished to have asked of child, and in camera proceedings were recorded and transcribed. *Brown v. Burch*, 30 Va. App. 670, 519 S.E.2d 403, 1999 WL 786823 (1999).

District of Columbia – Trial judge erred when it failed to record in camera interviews with children, during child custody proceeding. *N.D. McN. v. R.J.H., Sr.*, 979 A.2d 1195 (D.C. 2009).

Louisiana – In child custody modification proceeding, trial court properly modified existing joint custody award by changing primary physical custody from mother to father, and remand would not be required, notwithstanding court's error in holding in camera interview with child without permitting attorneys to be present for purpose of questioning child's competency, and without court reporter to produce transcript of child's testimony, where child's expressed preference to live with mother was unequivocally stated as finding of

court and hence mother was not prejudiced by absence of transcript. *Osborne v. McCoy*, 485 So. 2d 150 (La. Ct. App. 2d Cir. 1986), writ denied, 488 So. 2d 1027 (La. 1986).

Alabama --In proceeding in which mother and father each sought custody, court erred in conducting in camera examination of children over father's objection since in absence of waiver or consent, private interview by trial court with minors in chambers cannot be condoned. *Anderson v. Anderson*, 686 So. 2d 320 (Ala. Civ. App. 1996).

Alaska - As long as the parties involved in a child custody determination are given a summary of the information provided in the in camera interview and to be relied on at trial, the court may conduct the interview outside the presence of the parties and their counsel; however, it is important that the court limit the interview to the issue of the child's parental preference. *Helen S.K. v. Samuel M.K.*, 288 P.3d 463 (Alaska 2012).

8. Final Considerations

A. Procedurally –

(i) always ask for it in writing, include in Milonas materials, include in the complaint or answer

(ii) limit the scope – just preference(?) – order/stipulation to limit(?)

(iii) submit questions for "corroboration" – are you entitled to know the children's answers to questions posed explicitly and solely for corroboration of factual allegations?

(iv) Any limited disclosure of the transcript?

(v) Is there a time when it should be held: before trial, after? Does it depend on whether the purpose is "corroboration" or "preference?"

B. Is the "due process" argument dead in New York? Does the "due process" argument change as the child ages and its preference become more significant?

WWCOAD? Impact of other states?

C. Is there a "psychological" argument regarding the meeting with the child? If so, what proof is needed on either side of the question? Is a preliminary hearing required? Does the AFC's view hold greater weight in that determination?

D. If the issue goes beyond preference to "alienation," is the same confidentiality required or should the child's version be available to counsel? Does age impact that calculation?

E. Is there a "too young" or "too old" standard for an in camera?

F. Is an in camera always required if a party alleges that the AFC is not accurately reflecting the wishes of the child? Should the AFC be excluded from that portion of the in camera and the Court question the child without any attorney present?

G. If there is opposition to conducting the interview, how does the Court decide whether to hold one? What proof is required? Expert proof? Testimony of father/mother?

H. How does the Court test the child's reliability?

Matindale and Gould, *Children's Interests: Article: Including Children in Decision Making about Custodial Placement*, 22 J. Am. Acad. Matrimonial Law. 303, 310-311(2009)(discussing the work Carol Smart, *From Children's Shoes to Children's Voices*, 40 Fam. Ct. Rev. 307 (2002).

Another reason for not including children's participation in the decision making about their custodial placement is that children's decisions are ... how do we say this delicately ... often unreliable, spur of the moment, emotion-driven, short sighted, and generally misinformed. That is, children are not often rational or objective in their decision making. Perhaps a fairer way to frame the concern is that on any given day a pre-adolescent or adolescent child may be rational, objective, and consider the long term effects of his or her decision making, and the next day may be impulsive, emotion-driven, and short sighted.

A further concern is that once a child expresses a preference, the decision makers will accept the child's expressed preference as a way for the adult decision makers (i.e., parents, guardians ad litem, or judges) to avoid making the hard calls. When children's expressed preferences are accepted without critical examination by parents, attorneys, and judges, "children may be given a level of power and authority that they are not equipped to bear."

When parents allow decision making power to be invested in children's expressed preferences, the roles that operate in healthy family systems are reversed with a likely outcome being undermining parental authority.

9. Discussion

10. Additional Resources

(A) D'Ambra, *The Importance of Conducting In-Camera Testimony of Child Witnesses in Court Proceedings: A Comparative Legal Analysis of Relevant Domestic Relations, Juvenile Justice and Criminal Cases*, 19 Roger Williams U. L. Rev. 323 (2014)

(B) Rosen, *Student Note: the Child's Attorney and the Alienated Child: Approaches to Resolving the Ethical Dilemma of Diminished Capacity*, 51 Fam. Ct. Rev. 330 (2013)

(C) Gould & Martindale, *Including Children in Decision Making About Custodial Placement*, 22 J. AM. ACAD. MATRIMONIAL LAW 303, 305 (2009).

(D) Prescott, *Judicial Decision-Making, Personality theory and Child Custody Conflict: Can Heuristics Better predict a Difference between parents who Do and Parents who Don't*, 11 Whittier J. Child & Family Advocacy 185 (2012)

As a consequence today, efforts to measure the human personality for purposes of determining the best child custody option [*194] inevitably leaves judges "with the value questions of what outcomes are the best." 20 Value questions are important to treat seriously as matters of professional practice and ethics. But value questions in child custody cases are psychic readings that rely upon the premise that examining past behavior will yield an historical truth, which, if compiled against present personality profiles, roughly correlates to a decision maker's conclusion about what ought to be in the best interests of a child

Dated: May 16, 2014

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