DIVORCE & DIVISION: 
REINCORPORATING THE MARGINALIZED VOICES OF CHILDREN 

by 

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STATEMENT BY AUTHOR

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DEDICATION

For Maxwell, my light and my love,
without whose unconditional support, encouragement, and understanding
this project would never have been completed. We did it!
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ABSTRACT

Despite the Arizona family court’s purported focus on the “best interests” of the child, it is inherently parent-centered and does not, in actuality, serve children’s well-being. When children are offered opportunities to participate in this legal system, studies have found positive impacts to both the children and the judicial system. The overwhelming majority of these studies were conducted in countries that have ratified the United Nations Convention on the Rights of the Child; the United States is not one of those countries. As such, facilitating children’s participation in the court process by encouraging judicial interviews is one way Arizona family law could better promote children’s best interests and well-being.

What began as a quest for research on how judicial interviews affected children emotionally and psychologically, has evolved into a critical analysis of the family law framework as it exists in the United States—particularly, the State of Arizona. Through a detailed presentation of Arizona family law, this paper demonstrates the court’s focus on parents’ rights—often in the absence of children’s rights. An exploration of the ways in which various philosophical and legal theories work to critique and expose the dominant power relationships in the family law structure follows. It is only through such deconstruction of this law that children’s voices can be effectively reincorporated into the family law schema and their “best interests” properly considered.
I. INTRODUCTION

This project began in Summer 2014 when I was externing with a commissioner on the family law bench at the Arizona Superior Court in Pima County. One of the Arizona Rules of Family Law Procedure was in the process of being amended—Rule 12, on court interviews of children. The commissioner, Hon. Dean Christoffel, was interested in learning more about the emotional and psychological impact these judicial interviews had on children—were they traumatized? was it embarrassing? did it make them scared or nervous? or did allowing children to speak directly with the person making important decisions regarding their future positively affect them?

A. International Insight

My research indicated that it was mostly the latter: children of all ages appreciate being made part of the legal process by having the opportunity to meet the judge in private and discuss their thoughts and feelings on their parents’ separation. Children feel acknowledged and respected when given the option to meet the judge, even if they decide not to. Interviewed children also

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1 I write this thesis in partial satisfaction of the requirements for my dual J.D./M.A. in Gender & Women’s Studies. As such, I have attempted to write for both a legal and general academic audience, and I hope my legal and theoretical analyses are accessible to readers in a variety of disciplines. Another note on my crafting of this paper: I have often—and purposefully—employed the gender neutral pronoun “they” and its possessive form “their” in the singular in an attempt to deflect inherent gender bias as well as acknowledge and reflect non-binary gender identities.

2 For a complete outline of my research on these issues, see Appendix E, “Annotated Bibliography of International Insights.”


4 See sources cited, supra note 3.
seem to understand that whatever they tell the judge is not determinative, and they are relieved to know that—while their input is important—the ultimate decision is not on their shoulders.\(^5\)

Judges, furthermore, recognize an intrinsic value in hearing directly from children and have been pleasantly surprised to gain unexpected insights during these meetings.\(^6\) And, while some express concern about their lack of skill and experience in dealing with children face-to-face, they have been open to receiving appropriate training.\(^7\) Other court professionals, such as social workers and lawyers, have also shown initial hesitancy regarding increased implementation of judicial interviews of children—but, as time passes and training and awareness increase, these concerns, too, fade.\(^8\) Finally, parents generally agree that judicial interviews of their children are beneficial, both to the children themselves and to the legal process.\(^9\) Parents also express confidence in judges’ ability to handle the interviews effectively, and they note satisfaction with how their children are supported during court participation.\(^{10}\)

Almost all of the studies researching the impact of judicial interviews on children has been conducted outside of the United States—in nations that have ratified the United Nations (U.N.)

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5 See Birnbaum et al, supra note 3. See also supra Appendix E.
8 See Morag & Sorek, supra note 7; Bala et al, supra note 7. See also supra Appendix E.
9 See Parkinson et al, supra note 3; Morag et al, supra note 3. See also supra Appendix E.
10 See Parkinson et al, supra note 3; Morag et al, supra note 3, at 14 (77% of the parents whose children were interviewed expressed satisfaction regarding their child’s participation in the court process). See also supra Appendix E.
Convention on the Rights of the Child (CRC).\textsuperscript{11} From Great Britain to Australia to Israel, investigations reveal a particular international consensus on the recognition of children’s right to participate in matters affecting them.\textsuperscript{12} Since its adoption by the U.N. on November 20, 1989, the CRC has been signed and ratified by 196 nation-states, including every U.N.-member nation but one.\textsuperscript{13} In the United States, the CRC is still awaiting Senate approval.\textsuperscript{14}

Within its comprehensive rights framework, the CRC provides that children possess a right to have their best interests taken as a primary assessment and consideration in all matters that concern them.\textsuperscript{15} Furthermore, the CRC emphasizes that respecting a child’s right to be heard is integral to any examination of a child’s best interests.\textsuperscript{16} In recent years, these rights have been broadly conceptualized as “participation” involving children’s right to information regarding the situation at hand; institutional encouragement of children to form and express a view free from

\begin{itemize}
\item \textsuperscript{12} \textit{See supra} Appendix E. \textit{See also} Convention art. 12.
\item \textsuperscript{13} When I started my research, the United States, Somalia, and South Sudan were the only three UN-member nations to have not yet ratified the CRC. South Sudan and Somalia have since become the 195th and 196th nation-states to ratify, on April 30 and October 1, 2015, respectively. Of note, during nearly the entire time since the CRC’s adoption, Somalia had been at war and without a functioning government. South Sudan, furthermore, did not become an independent nation until 2011. \textit{See} UNICEF, \textit{Joint Statement on Somalia’s Ratification of the Convention on the Rights of the Child} (Oct. 2, 2015), http://www.unicef.org/media/media_85718.html; OHCHR.org, supra note 11; \textsc{Barbara Bennett Woodhouse}, \textit{Hidden in Plain Sight: The Tragedy of Children’s Rights from Ben Franklin to Lionel Tate 315 n.2} (2008). (There are currently 193 UN-member states; the discrepancy between the number of UN-members and CRC-ratifiers is due to the dissolving and merging of member states, as well as the non-member permanent observer status of the Holy See (Vatican City) and the State of Palestine. \textit{See generally} OHCHR.org, supra note 11.)
\item \textsuperscript{14} \textit{See} OHCHR.org, supra note 11.
\item \textsuperscript{16} \textit{See} source cited supra note 15.
outside pressure; the option for a child to choose whether or not to exercise their right to be heard; and an intense, mutual, respectful, and ongoing exchange of information and dialogue between children and adults, to take place in an environment that enables the child to exercise their right if they so choose.\textsuperscript{17}

A detailed, comprehensive, and persuasive argument in favor of United States ratification of the CRC is outside the scope of this paper. I note, however, the words of scholar and attorney Barbara Bennett Woodhouse.\textsuperscript{18} From her decades of experience working with children and advocating for their rights, Woodhouse sees American discussions about children’s rights as “polarized and mired in simplistic imagery” and “superficial debates that pit conservatives against liberals and parent advocates against advocates for children.”\textsuperscript{19} She argues that the rights of adults and children need not be a mutually exclusive zero-sum game and that it is important to understand that children’s rights are not about “children refusing to take out the garbage or even hiring lawyers to ‘divorce’ their parents.”\textsuperscript{20} Instead, a proper conceptualization of children’s rights encompasses the notions of dependency and difference as well as the core principles of privacy, agency, protection, dignity, and equality—all values expressly or implicitly present in the United States Constitution and Declaration of Independence.\textsuperscript{21} Woodhouse wonders, then, how we as a society can expect children to grow and develop into healthy, happy, successful adults if, when they are children, we devalue them and deny them recognition of basic rights?\textsuperscript{22}

\textsuperscript{17} See CRC Comment 12, supra note 15; CRC Comment 14, supra note 15.
\textsuperscript{19} WOODHOUSE, supra note 13, at 7, 6.
\textsuperscript{20} Id. at 9, 7.
\textsuperscript{21} See id. at 32-43.
\textsuperscript{22} Id. at 6.
B. Argument Outline

What began as a quest for research on how judicial interviews affected children emotionally and psychologically, has evolved into a critical analysis of the family law framework and its purported focus on “children’s best interests” as it exists in the United States—particularly, the State of Arizona. In this paper I argue that, despite its purported focus on the “best interests” of the child, Arizona’s family court system is inherently parent-centered and does not, in actuality, serve children’s best interests. Indeed, facilitating children’s participation in the court process by encouraging judicial interviews is one way Arizona family law could better promote children’s best interests.

To that effect, Section II, “Divorce & Division in Arizona,” demonstrates the court’s focus on parents’ rights—often in the absence of children’s rights—through a detailed presentation of Arizona family law. This legal overview provides the general structure of family law in Arizona and also discusses the various ways the law attempts to consider children’s wishes and best interests. Section III, “(De)Constructing the Rights Framework,” explores the ways in which various philosophical and legal theories can work to critique and expose the dominant power relationships reflected in and reinforced by the family law structure described in Section II. It is only through a deconstruction of this law that children’s voices can be effectively reincorporated into the family law schema, as I urge in Section IV, “Remarks and Recommendations.” I also address arguments against my position in that final segment.

II. DIVORCE & DIVISION IN ARIZONA

Given how unique each family and each situation is, generalizing the divorce or separation process is a difficult task—and probably not one that should be undertaken. While there are a few standard routes such cases can take, the specific procedural avenues and substantive laws vary by
court and location. As the following subsections should make clear, modern family law structures exist only because legislative statutes say they do.23 Court cases interpret the laws and provide guidance as to them, but family law is—to borrow a common legal maxim—inately “a creature of statute.”24 Thus any analysis of family law requires a close reading and understanding of that location’s (or “jurisdiction’s”) particular legislative language.

Accordingly, a comprehensive review of family law globally is beyond the scope of the present paper. This project thus focuses specifically on how family law cases are handled in Tucson/Pima County, Arizona. Some insights on national trends are indicated in footnotes, however, and Appendix E outlines the international research mentioned in the Introduction. Furthermore, as this paper advocates for a reincorporation of children’s voices, I outline only the court processes relating to parents who are divorcing or separating or who are otherwise attempting to establish what has been widely referred to as child custody and visitation.

After presenting the general structure of Arizona family law, including who it considers to be “parties” to the litigation, I outline three paths that children’s voices take before reaching the court and present a brief contrast between the treatment of children in family court and in juvenile court.

A. General Structure

In Arizona, “Marital and Domestic Relations” are addressed by Title 25 of the Arizona Revised Statutes25 and are largely structured by the Arizona Rules of Family Law Procedure (ARFLP), which came into effect on January 1, 2006.26 In the context of marriage, a person seeking

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23 See A.R.S. § 25-311(A) (vesting original jurisdiction in the superior court over these matters).
25 See A.R.S. §§ 25-101 to -1401
26 See 211 Ariz. Cl (2006); Ariz. R. Fam. Law P. 1-95 [hereinafter ARFLP].
a divorce (also called a “dissolution of marriage”) or a legal separation begins the legal process by filing a petition with the court. The parent who files the petition is referred to as the “Petitioner”; the other parent, who must respond to the petition, is called the “Respondent.” The parents may have attorneys to represent them, or one or both may represent themselves. The case is heard by judges and commissioners who serve on the county’s family law bench. Throughout the course of the case, the parents (or their attorneys) present evidence to the judge regarding the disposition of marital property and debts, the appropriateness of spousal maintenance (formerly known as “alimony”), and, in regards to the children, the award of legal decision-making, parenting time, and child support. There is usually a temporary orders hearing near the beginning of the case to determine some of these issues on an interim basis during the pendency of the matter.

The Arizona family law statutes went through a major overhaul effective January 1, 2013, in which the more widely known custody and visitation framework was replaced by the legal decision-making and parenting time structure. Legal decision-making means a parent’s “legal

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27 See generally A.R.S. §§ 25-301 to -381.24; ARFLP 1-43. A legal separation is essentially the same as a dissolution of marriage; regarding the possible arrangements to be made for children as well as the division of property, there are no inherent differences. As a practical matter, a married couple might choose a legal separation over a divorce for reasons of insurance or retirement benefits or religious beliefs.

28 The differences between judges and commissioners are largely irrelevant for the purposes of this paper, and thus, going forward, I will refer to members of both judiciary offices under the umbrella term of “judge” or, interchangeably, the “court.” (While jury trials are permitted in family court cases, they are rare.)

29 See generally A.R.S. §§ 25-301 to -415; ARFLP 1-95.

30 See A.R.S. § 25-404; ARFLP 47.

31 Technically the Arizona change from “visitation” to “parenting time” occurred in 2001, but the 2012 overhaul emphasized and clarified the differences. See AZ H.R. Comm. Min., 3/14/2012; AZ S. F. Sheet, 2001 Reg. Sess. H.B. 2026. The legislative change to “legal decision-making and parenting time” aimed to further recognize and address the valid arguments that the courts inequitably and disproportionately awarded mothers primary physical custody of children without justification. See AZ H.R. Comm. Min., 3/14/2012; AZ S. F. Sheet, 2001 Reg. Sess. H.B. 2026. Beginning in the 19th century Victorian Era, under the “tender years” doctrine, judges presumed children needed their mothers during their “tender years” of early childhood. See WOODHOUSE, supra note 13, at 41. Such presumptions remained largely unchallenged into recent history. In its consideration of the amendment, the Arizona House Committee heard testimony from psychology professor William Fabricius regarding research findings on the positive impact of a father’s parenting time on children’s development. See AZ H.R. Comm. Min., 3/14/2012. Although Arizona already statutorily prohibited a preference of custody based upon the children or parents’ sex (A.R.S. § 25-
right and responsibility to make all nonemergency legal decisions for a child.”32 Parenting time refers to “the schedule of time during which each parent has access to a child at specified times . . . [and] is responsible for providing the child with food, clothing and shelter and may make routine decisions concerning the child’s care.”33

Under statute, the court “shall determine legal decision-making and parenting time . . . in accordance with the best interests of the child . . . consider[ing] all factors that are relevant to the child’s physical and emotional well-being.”34 One parent may be awarded sole legal decision-making or both parents may share joint legal decision-making.35 While not explicit, the statutory factors in place for the court to consider when awarding legal decision-making create a presumption that joint legal decision-making will be in the children’s best interests and a hope that the parents will agree to that arrangement on their own.36 Parents must submit to the court a Parenting Plan that sets forth a specific parenting time schedule and delineation of particular

403.01 (2012)), the new regime explicitly provides that the court maximize both parents’ parenting time. A.R.S. § 25-403.02(B). These changes also follow the court’s attempt to make the divorce process less adversarial and more collaborative. For example, instead of a Petitioner filing a petition to which the Respondent responded, it used to be that a Complainant or Plaintiff filed a complaint for the Defendant to defend. Is not the inclusion of children’s voices into this ever-growing collaborative schema a next logical step?

32 A.R.S. § 25-401(3).
33 A.R.S. § 25-401(5). See also, AZ S. F. Sheet, 2001 Reg. Sess. H.B. 2026 (the term parenting time refers to “the time parents not residing together spend with their children”). “Visitation” is now reserved to mean the “schedule of time that occurs with a child by someone other than a legal parent,” such as grandparents. A.R.S. § 25-401(7).
34 A.R.S. § 25-403(A) (emphasis mine). For a more thorough discussion of “the best interests of the child,” see Section II(C), supra p. 18.
35 A.R.S. § 12-403.01(A).
36 A.R.S. § 25-403.02(B) (“Consistent with the child’s best interests . . . the court shall adopt a parenting plan that provides for both parents to share legal decision-making . . . and that maximizes their respective parenting time.”) See also supra Appendix A, “A.R.S. § 25-403. Legal decision-making; best interests of child. Effective January 1, 2013.”
parental rights and responsibilities; there can be one agreed-upon joint parenting plan or a proposed parenting plan submitted by each parent.37

For parents who are not married to each other, the process is largely the same.38 Before it can decide issues in regards to the child, however, a court must find a man or woman to be the child’s legal parent.39 If a couple is married, there is a rebuttable presumption that they are the child’s legal parents.40 Otherwise, a child’s paternity can be legally established by a father’s voluntary acknowledgment to the court, by a signed birth certificate, or by genetic testing.41 Either parent may thus petition the court in a “Paternity” action to establish the identity of a child’s legal father and have the court award appropriate legal decision-making, parenting time, and child support.42 These parents must also submit joint or proposed parenting plans.43

B. Parents as Parties

Most of the statutes and rules discussed above refer to the “parties” to the case. It is important here to note that the parents—and not the children—are considered “parties” in divorce and paternity actions.44 This is true in Arizona and most other state courts.45 Indeed, after a review

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37 A.R.S. § 25-403.02. In Pima County, before a court will decide any issues of legal decision-making and parenting time—including temporary orders—the parents must attend a parenting education class (A.R.S. § 25-351; Super. Ct., Pima Cnty. Local R. of Prac. 8.12 [hereinafter Local Rule]) and also participate in mediation to try to come to an agreement on the issues themselves (ARFLP Rule 68; Local Rule 8.12).
38 See generally A.R.S. §§ 25-801 to -818, -401 to -415; ARFLP 1-95.
39 See A.R.S. § 25-402.
41 See A.R.S. §§ 25-812, -814
42 See sources cited supra note 38. If the case is seeking the legal establishment of the father’s identity, the petition is for “paternity” regardless of which parent submits it. See A.R.S. § 25-803. Statutorily, an action can be submitted to establish maternity or paternity. A.R.S. §§ 25-801 to -818. Of all such actions, however, the court primarily hears paternity cases, as the identity of a child’s biological mother is usually already established via birth records.
43 See supra note 37 and accompanying text. Because there was no marriage, there is no disposition of marital property or decision as to spousal maintenance.
45 See id. “[M]ost courts have found that a child is not a party to the parents’ divorce.” Linda D. Elrod, Child Custody Prac. & Proc. § 12:1 (June 2015). See also, e.g., In re Marriage of Hartley, 886 P.2d 665, 670-75 (Colo. 1994) (finding that, when a child had been appointed a guardian ad litem [GAL] (1) the
of cases nationwide, a 1994 Arizona Appeals Court decision noted, that “[w]e have not found any cases in which a child has been considered, as a matter of right, to be a named ‘party’ in a domestic relations custody dispute between his own parents.”\textsuperscript{46} A cursory look at more recent cases from across the country indicates this is still the general rule, with courts noting their jurisdiction’s specific statutory frameworks.\textsuperscript{47} Courts also discuss how they see party status for children as unnecessary because—as I outline in the next section—there are others ways for the court to discover a child’s best interests.\textsuperscript{48}

I thus use “parent(s)” in my summary of the court process to emphasize that it is the parents who are parties and have rights in these cases. It is the parents who begin and respond to the case, present evidence to the court, and are permitted to hire an attorney to represent them. It is the parents who participate in mediation with each other—without the children—in attempts to agree
on the issues. It is the parents who, during “parenting time,” “have access to the children.” 49 It is to the parents that the judge awards legal decision-making, parenting time, and child support. Furthermore, the judge only makes these awards in “contested” cases in which the parents are “unable to agree.” 50

C. “Best Interests” and “Wishes of the Child”

Family law decisions involving children must be made in accordance with the children’s best interests and considering “all factors that are relevant to the child’s physical and emotional well-being.” 51 Arizona family courts have long held that “the primary duty of the court is to safeguard the best interests and welfare of the children,” 52 but that there “is no hard-and-fast rule as to what will best serve the welfare and interests of a child.” 53 Accordingly, “all the circumstances which may affect that determination must be considered.” 54 Some—but not all—of the factors the court should include in its analysis are outlined by statute. 55 Although these factors are not exclusive, they shape the types of circumstances the court can legitimately consider and the lens through which those circumstances are to be viewed. When it orders legal decision-making and parenting time, the court must discuss the factors it deemed relevant and the reasons why such a decision was in the best interests of the child. 56

When the Arizona legislature changed to the legal decision-making and parenting time structure, it also adjusted the statutory factors to be included in the court’s considerations. 57 For

49 A.R.S. § 25-401(5).
50 A.R.S. §§ 25-403(B), -403.02(D).
51 A.R.S. § 25-403.
54 Id.
55 See supra Appendix A.
56 A.R.S. § 25-403(B).
57 For the list of factors as they stood before the legislative change, see supra Appendix B, “A.R.S. § 25-403. Custody; best interests of the child. Effective until January 1, 2013.”
example, rather than including “whether one parent, both parents or neither parent has provided
primary care of the child” as a factor, the court should now consider “the past, present and
potential future relationship between the parent and the child” and “the interaction and
interrelationship of the child with the child’s parents…” Similarly, the old statute noted “the
wishes of the child’s parent or parents as to custody,” but, reflecting the court’s hope that the
parents come to an agreement as to legal decision-making and parenting time, the parents’ (likely)
oppositional wishes as to custody are no longer considered relevant.

Tellingly, the old statute included “the wishes of the child”—without statutory constraint—
as a factor relevant to the determination of a child’s best interests. Now, however, the child’s
wishes are only to be considered “[i]f the child is of suitable age and maturity.” This restriction
as to “age and maturity” (and the ambiguous modifier of “suitable”) appears, as we will see,
throughout the treatment of children’s voices. Furthermore, although the court is instructed to
hear the wishes of a suitably mature child, the judge is likely to hear testimony in court only from
the parents. While there is no blanket ban, it is general judicial practice in Pima County that
children are not called to testify in divorce and paternity proceedings. Indeed, the Arizona Rules
of Family Law Procedure (ARFLP)—categorically and without comment—outline that it “is

59 A.R.S. § 25-403(A)(1)-(2) (2013). See also supra note 31; supra Appendix A.
61 A.R.S. § 25-403 (2013). See also supra note 31; supra Appendix A.
64 See, e.g., supra pp. 22, 27.
65 Hon. Ken Sanders, Court Commissioner on the Family Law Bench, Arizona Superior Court in Pima
County, as guest expert for Juvenile Law class presentation at the University of Arizona James E. Rogers
College of Law (Oct. 8, 2015) [hereinafter “Class presentation”].
generally not in the child’s best interest” to be present at a court proceeding affecting them and, as such, a child cannot attend a hearing “without prior permission of the court.”  

Because of these restrictions, then, the court can usually only learn the “wishes of the child” through social service investigative reports, representation by a child’s attorney or advisor, and/or judicial interviews with the child themself.  

i. Social Service Investigative Reports

In Pima County, social service reports are typically handled by counselors at the Family Center of the Conciliation Court (FCCC), where the professional staff have advanced degrees in behavioral sciences and experience in conducting these types of investigations. Writing an evaluation is a very involved process during which “the investigator may consult any person who may have information about the child or the child’s potential legal decision-making and parenting time arrangements,” including the child themself. The final report can be around forty pages long, supplying the judge with a thorough assessment of the family’s needs and offering guidance as to what legal decision-making and parenting time arrangement would be in the children’s best interests.

Of the three avenues through which the court can learn the wishes of the child, legal decision-making and parenting time evaluations are the most commonly ordered. A 2003

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66 ARFLP 11.  
66 See Conciliation Court, ARIZONA SUPERIOR COURT IN PIMA COUNTY, http://www.sc.pima.gov/fccc (last visited Dec. 15, 2015). In addition to the Legal Decision-Making and Parenting Time Evaluations, FCCC provides optional conciliation marriage counseling and mandatory parenting education classes and family court mediation. Id. Investigations may also be completed by a private entity compensated by the parents. A.R.S. § 25-406(B).  
69 A.R.S. § 25-406(F); Class presentation, supra note 65.  
70 See Conciliation Court, supra note 68; Class presentation, supra note 65.  
survey—conducted prior to the adoption of the ARFLP—found that more than half of Arizona family court judges used mental health experts or court personnel to ascertain children’s wishes regularly or more often than they used other procedures.\(^{72}\) Preference for these reports is likely both practical and fiscal.\(^ {73} \) For example, while some judges might feel it necessary to receive guidance from individuals with more training and experience, others note that funding for FCCC services (but not for other procedures) is relatively reliable.\(^ {74} \)

While I do not mean to discredit the obvious usefulness of social service evaluations, it is important to note that the inherent structure of these investigations may still result in children’s participation being minimized, removed, or misinterpreted.\(^ {75} \) For example, in the international studies, children expressed doubts as to whether any reports could accurately inform a judge of their thoughts and feelings; the children preferred the judge meet them face-to-face to learn exactly how they felt without any mixed messages.\(^ {76} \) Furthermore, although Scottish family court judges automatically receive background reports prepared by child welfare professionals, they often elect to speak to children anyway, as a complement to the professional reports.\(^ {77} \) These judges note the intrinsic value of hearing directly from children and regarded the interviews as more than a token exercise or symbolic gesture.\(^ {78} \) Many judges also found that speaking to children reaped unexpected insights.\(^ {79} \)

\(^{72}\) Atwood, supra note 71, at 637 n.32 (67% of judges report using mental health experts regularly or more often), 637 n.34 (53% use court personnel regularly or more often).

\(^{73}\) See sources cites supra note 71.

\(^{74}\) Because commissioners in Arizona Superior Court rotate from bench to bench, the family court judiciary often includes individuals who have little or no prior family law experience. While other family court procedures (such as the appointment of child representatives) are paid for with the court’s “emergency fund,” the FCCC is compensating by the court’s general fund. See sources cites supra note 71.

\(^{75}\) See, e.g., Parkinson et al, supra note 3; Schuz, supra note 7; Birnbaum et al, supra note 3.

\(^{76}\) See sources cited supra note 3.

\(^{77}\) See Raitt, supra note 6, at 208.

\(^{78}\) Id.

\(^{79}\) Id.
ii. Representation by an Attorney

As previously discussed, despite the fact that the child will be strongly affected by the outcome, is “clearly” “a person with a legitimate interest in [their] own welfare,”\(^80\) and, indeed, may be the only subject involved in the litigation, it is well established in Arizona family law that a child is not a legal “party” in his parents’ custody dispute.\(^81\) Consistent with this, children are not automatically allowed or appointed an attorney in family law cases.\(^82\) Instead, the court has limited discretion to appoint an adult “to represent the interests of a minor.”\(^83\) Such a representative may be a best interests attorney or a child’s attorney.\(^84\)

Best interests attorneys (a.k.a. guardian ad litem, or GAL) are not bound by a child’s directives or objectives—their purpose is to provide independent legal services in order to protect the child’s best interests.\(^85\) The Arizona Court of Appeals has held that, if “the court determines, due to the child’s lack of maturity or judgment or other circumstances, that it is more appropriate for a lawyer to be appointed to discern—and then advocate—the child’s best interests,” a best interests attorney will be appointed.\(^86\) On the other hand, “a trial court will consider appointment of a child’s attorney, for an older child who has judgment and maturity, to represent the child’s views.”\(^87\) A child’s attorney “owes the same duties of undivided loyalty, confidentiality, and

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\(^80\) J.A.R., supra note 44, at 274 n.6, 877 P.2d at 1330 n.6 (internal citation omitted).
\(^81\) Id. at 274, 877 P.2d at 1330.
\(^82\) See A.R.S. § 25-321.
\(^83\) ARFLP 10(A).
\(^84\) See ARFLP 10(E), cmt. (setting forth the different duties and responsibilities of these representatives, in reference to the American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases (2003), reprinted in 37 Fam. L.Q. 131 (2003) [hereinafter ABA Custody Standards].
\(^85\) ARFLP 10 also allows for the appointment of non-attorney advisors. More commonly known as CASAs (Court Appointed Special Advocates), non-attorney representatives are volunteers from the community. See CASA of Arizona, http://www.azcourts.gov/casa (last visited Dec. 16, 2015). In Pima County, these CASA volunteers are specifically reserved for juvenile court abuse and neglect cases and are not appointed in general family court disputes. Id.
\(^86\) ABA Custody Standards, supra note 84, at II(B)(2).
\(^87\) Aksamit v. Krahn, 224 Ariz. 68, 72, 227 P.3d 475, 479 (App. 2010)
\(^87\) Id.
competent representation as are due an adult client.”88 This means that the attorney’s ultimate task is to seek the objectives of the child-client by advocating the child’s point of view and interests—which may or may not be in tune with the child’s “best interests.”89 While the child themself cannot, generally, be present for the hearings,90 any attorney representing a child “shall participate in the conduct of the litigation to the same extent as an attorney for any party.”91

Although the court is allowed to appoint child representatives, it may only do so under limited circumstances and must clearly set forth its reasons in the order of appointment.92 These circumstances include allegations of abuse or neglect, a history of substance abuse or domestic violence, persistent and significant conflict between the parents, a child’s infancy or special needs, and “any other reason deemed appropriate.”93

With all of these restrictions, Pima County Family Court judges do not often appoint child representatives.94 When they do, however, they prefer best interests attorneys over child-directed

88 ABA Custody Standards, supra note 84, at II(B)(1).
89 Id. at II(F) comment. at 136-37.
90 See supra notes 65-66 and accompanying text.
91 ARFLP 10(E)(1).
92 ARFLP 10(A).
93 ARFLP 10(A)(2). Note that these rules were adopted after J.A.R., supra note 44. As such, that case relied on the Arizona Rules of Civil Procedure and the brief language of A.R.S. § 25-321 to hold that children have no absolute right to intervene in their parents’ custody proceedings. J.A.R., supra note 44, 274-75, 877 at 1330-31. The J.A.R. court also surveyed other states’ decisions on whether and when to allow children a representative. See id. In its discussion, the court noted that the appointment of an independent child’s representative might be appropriate if a mental health expert’s involvement is insufficient “to represent and advocate [a] child’s best interest,” or if parents’ hostile contentions position their interests in conflict with the child’s. Id. Accordingly, J.A.R. set forth the following non-exclusive factors regarding the discretionary provisions of A.R.S. § 25-321 in appointing an independent (i.e., not “best interests”) attorney, as related to “this particular child’s request” (emphasis mine): (1) parental allegations, such as of abuse or neglect, which “place the interests of the parents in potential conflict with the best interests of the child”; (2) circumstances that allow an independent attorney to be able to “serve as an effective advocate for the child,” which, in this case, included “undisputed evidence of the child’s maturity and ability to communicate his circumstances and wishes”; and (3) the possibility of ensuring a more accurate and complete judicial record. Id. at 276, 877 at 1332. These concerns were later reflected in the factors adopted by ARFLP 10, as discussed herein.
94 See Barbara A. Atwood, Representing Children Who Can’t or Won’t Direct Counsel: Best Interests Lawyering or No Lawyer At All?, 53 ARIZ. L. REV. 381 (2011); Class presentation, supra note 65.
First is the issue of cost, due to which appointments in general occur in only a small percentage of court cases. Unlike legal decision-making and parenting time evaluations, attorney appointments are paid for through the court’s emergency fund, acquired through the court’s filing fees; as filings go down, so does the availability of funds. In explaining their preference for best interests attorneys, judges noted both a desire for broader evidence than may be offered if advocacy were limited to a child’s expressed direction and the concern that a child-directed attorney would result in too great an emphasis on the wishes of the child.

The laws and practice in family court thus diverge greatly from the standard in juvenile court, where children are considered parties and are appointed an attorney representative in, effectively, every case.

iii. The Juxtaposition of Juvenile and Family Courts

In Arizona, matters of dependency and delinquency are handled outside of family court, in a separate “creature of statute” called juvenile court. There, minor children are recognized as parties to dependency cases, their due process rights are protected in delinquency actions, and it is generally assumed that children will attend court hearings. Furthermore, juvenile court statutes in Arizona explicitly mandate that children have “the right to be represented by counsel” in “all juvenile court proceedings in which the dependency petition includes an allegation that the

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95 Atwood, supra note 94, at 398.
96 Id.
97 Class presentation, supra note 65.
98 Atwood, supra note 94, at 398.
99 See A.R.S. § 8-221.
100 See supra note 24 and accompanying text. See generally Title 8 (“Child Safety”) of the Arizona Revised Statutes, A.R.S. §§ 8-201 to -891.
101 Ariz. R. P. Juv. Ct. 37(A). Among other definitions, a Title 8 “dependent child” is one “whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child.” A.R.S. § 8-201(14)(a)(iii).
102 The U.S. Supreme Court, in the Arizona-originated case In re Gault, recognized limited due process rights for juveniles in delinquency cases. In re Gault, 387 U.S. 1, 41 (1967).
103 Class presentation, supra note 65.
juvenile is abused or neglected”\textsuperscript{104} and in “all proceedings involving offenses . . . that may result in detention.”\textsuperscript{105}

The default in Maricopa County Juvenile Court (the Phoenix area) is to appoint best interests attorneys for all children, but a child’s attorney may be appointed for older children (usually after age twelve).\textsuperscript{106} In Pima County, however, it is local court policy that all appointed child-representatives in juvenile court are attorneys for the child-clients, not best interests attorneys.\textsuperscript{107} A child’s attorney may request the court \textit{also} appoint a guardian ad litem to represent the child, if the child-client insists on a position that the attorney believes is contrary to the child’s best interests, despite the attorney’s advice to the child-client.\textsuperscript{108}

In \textit{J.A.R.}, the court rejected the argument that, because children had a right to an attorney in juvenile court cases under Title 8, children had a similar right in domestic relations disputes under Title 25.\textsuperscript{109} Choosing not to construe the right of the juvenile to counsel under Title 8 to extend to cases under Title 25, the court stated that “such a holding would eviscerate the explicit discretion given in A.R.S. § 25-321, and would require all children in divorce cases to have a court-appointed attorney”—something “obviously not intended by the legislature.”\textsuperscript{110}

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\textsuperscript{105} A.R.S. § 8-221(A). Juvenile due process rights include the right to an attorney. \textit{See \textit{In re Gault}}, supra note 102, at 41.


\textsuperscript{107} \textit{Id.} at 29.

\textsuperscript{108} \textit{Id.} at 43-44.

\textsuperscript{109} \textit{Supra} note 44, at 274, 877 P.2d at 1330

\textsuperscript{110} \textit{Id.} \textit{See also supra} pp. 22-24.
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iv. Judicial Interviews of Children

Another possible—though less-often utilized—way the family court can discover the child’s wishes is to interview them.111

Effective January 1, 2015, Rule 12 of the Arizona Rules of Family Law Procedure (ARFLP) outlined specific procedures and precautions for handling judicial interviews of children in family court cases.112 Before 2015, there were much less specific rules regarding these interviews, and prior to the 2006 enactment of the ARFLP there was effectively procedural silence.113 Overall, the new Rule has not really changed the way judges conduct interviews, as they were, and still are, only ordered in a minority of cases.114 Instead, the Rule has changed and standardized the ways in which the outcome of the interview is shared with others.115

Before 2015, the parties could agree (“stipulate”) that a child interview not be recorded or not be provided to the parent-parties.116 Now, however, the ARFLP explicitly states that any interview with a child ordered by the court must be recorded and made available to the parents.117 As a practical matter, the judiciary automatically discloses to the parents a summary of any ordered

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111 See A.R.S. § 25-405 (allowing the court to “interview the child in chambers to ascertain the child’s wishes” as to legal decision-making and parenting time); ARFLP 12 (2015). See also sources cited infra note 114.
114 Atwood, supra note 71, at 636 (2003 study of Arizona family court judges revealed that 25% of judges never order judicial interviews of children, 56% occasionally order them, and only 19% regularly, often, or almost always interview children in chambers); Class presentation, supra note 65.
115 Class presentation, supra note 65. Arizona case law is sparse on this issue. But, for example, in Baker v. Meyer, the Appeals Court noted without much fanfare that the trial judge conducted “in camera interviews” [plural] with the 14-year-old child and that the court’s evidence of “strain on the children” came from summaries of those interviews. 237 Ariz. 112, 115 and n.7, 346 P.3d 998, 1001 and n.7 (App. 2015). While the Baker appeals decision came in April 2015, the original trial would have occurred prior to the effective date of the new ARFLP 12. In camera is a legal term meaning “in chambers.”
116 ARFLP 12 (2014). See also supra Appendix D.
117 ARFLP 12(A) (2015). See also supra Appendix C.
interview and instructs them to keep the summary confidential from the public and not discuss it with the child.\textsuperscript{118} The recording itself is put on a CD and placed under seal, only to be made available to the parents if they request it.\textsuperscript{119} Generally, because they already have the summary, a parent will only request the full recording if they were appealing the judge’s legal decision-making and parenting time decision.\textsuperscript{120}

Of note, judicial interviews may only be granted upon motion of a “party” or the court itself—not at the independent urging of the child, who, as we’ve discussed, is not a “party” in family law cases.\textsuperscript{121} Furthermore, the court is instructed that it “should not conduct an \textit{in camera} interview of a child . . . unless it finds that the child is of sufficient age and intellectual capacity to reason and form an intelligent preference.”\textsuperscript{122} Indeed, the court is “strongly encouraged to utilize other resources, where available and appropriate, to ascertain” the child’s wishes as to legal decision-making and parenting time.\textsuperscript{123} If a judicial interview is ordered, “the court must take special care to protect the child from embarrassment”\textsuperscript{124} and “not overwhelm children because of excessive formality, or their immaturity, embarrassment, fear, or lack of understanding about the interview’s function or limited confidentiality.”\textsuperscript{125}

In conjunction with its apparent concern that judicial interviews are contrary to children’s well-being, the Arizona State Bar argued the need for a more definitive procedural outline in order

\textsuperscript{118} Class presentation, \textit{supra} note 65. \textit{See also} ARFLP 12(A) (2015); \textit{supra} Appendix C.
\textsuperscript{119} \textit{See} sources cited \textit{supra} note 118. For a detailed overview of the various positions taken by other state courts in the matter of judicial interviews, see \textit{Ynclan v. Woodward}, 237 P.3d 145 (Okla. 2010). \textit{See also}, Holiday v. Holiday, 247 P.3d 29, 33 (Wyo. 2011) (in which Wyoming law requires that “the child’s expression of a preference must be considered” and thus the court must fashion a procedure for each case that “protects the parents’ rights while minimizing the stress and trauma to the child with the balance weighing in favor of the child’s best interest.”). For a sampling of international processes, see Appendix E.
\textsuperscript{120} Class presentation, \textit{supra} note 65.
\textsuperscript{121} ARFLP 12(A) (2015). \textit{See} \textit{supra} pp. 16-17.
\textsuperscript{122} ARFLP 12(A) (2015) cmt to 2015 amend.
\textsuperscript{123} \textit{Id}.
\textsuperscript{124} ARFLP 12(B) (2015).
to protect parents’ rights. Without a clearly delineated process for trial courts to follow, parents’ “twin constitutionally protected rights to due process and to exercise custody and care of their own children” may be violated. Explained simply, due process requires fair procedures in order to prevent the government from unnecessarily and mistakenly depriving someone of their personal interest in something; as such, due process applies in all legal situations, both criminal and civil (including family law). In regards to ARFLP Rule 12, the State Bar noted concerns that “confidential interviews of children . . . violate due process when parents are excluded . . . and receive no opportunity for a meaningful response or further investigation.” In other words, if the judge were to make a legal decision-making and parenting time determination—a determination that would by definition affect parents’ constitutional rights regarding their children—based upon what a child said during a judicial interview, and the parents were not able to know or refute whatever the child said, it would violate the parents’ due process. The new Rule thus seeks to balance “the right of the parents to have access to potentially pivotal facts affecting their access to their children, and the ability of the Court to continue to benefit from first-hand testimony of minors affected by its decision.”

During the two-year amendment process, the proposed Rule 12 was “extensively vetted with stakeholders” and put through several iterations. Among those who evaluated the proposal

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126 See Petition, supra note 125.
129 Petition, supra note 125, at 1:15-19.
were family court judges and attorneys (including the Family Law Section of the Arizona State Bar), the Arizona Legislature’s Domestic Relations Committee, University of Arizona College of Law Professor Barbara Atwood,\textsuperscript{132} mental health professionals, the Arizona Chapter of the Association for Family and Conciliation Courts, the Arizona Psychological Association, the Maricopa County Mental Health Committee (including a representative from Conciliation Services), and the Administrative Office of the Courts.\textsuperscript{133} The committee also reviewed the laws of other states in the U.S..\textsuperscript{134} It seems, however, that they did not consult any children and they did not research procedures and studies internationally.\textsuperscript{135}

### III. (DE)CONSTRUCTING THE RIGHTS FRAMEWORK

The details outlined in Section II demonstrate that family law in Arizona focuses heavily on parents’ rights in the absence of children’s rights.\textsuperscript{136} I note again, for example, that the court shall make findings “in a contested legal decision-making or parenting time case”\textsuperscript{137} and shall

\textsuperscript{132}See generally Atwood, supra note 71, and accompanying text. In her article, Atwood noted judges’ united “desire to give the child a voice” but their “very different views on how best to achieve that goal.” \textit{Id.} at 639. Her analysis furthermore revealed a common judicial attitude that emphasized the court’s paternalistic function and deemphasized the child’s autonomy and agency. \textit{Id.} at 635. She also remarked on the “striking diversity in judicial philosophy” and the tension arising from “the concurrent goals of facilitating the child’s meaningful participation in the litigation process, minimizing trauma to the child, and protecting the litigants’ due process rights.” \textit{Id.} at 639. Specifically, although 65\% of surveyed judges “agreed that the child’s expressed preference is important evidence” in the court’s best interests determination, and 61\% agreed that judges “can acquire a better understanding of the child and the parties” through judicial interviews, 87\% agreed that “children may suffer emotionally if they feel they must choose one parent over another.” \textit{Id.} at 638-39 & nn.44-49. At the same time, 51\% agreed that “children may benefit emotionally by expressing their preferences” to the judge, but 45\% agreed that “judges lack the necessary training” to properly and effectively conduct private interviews with children and evaluate their statements \textit{Id.} Judges also showed profound disagreement as to the utility and advisability of \textit{in camera} interviews and wide variation in when, why, and how to conduct them. \textit{Id.} at 638-39.

\textsuperscript{133}E-mail from Mark Armstrong (see supra note 131) to author (Sept. 9, 2015) (on file with author).

\textsuperscript{134}Id.

\textsuperscript{135}See E-mails, supra notes 131, 133. As CRC Comment 12, supra note __, at III(11) explains, “The views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation.”

\textsuperscript{136}See, e.g., supra pp. 16-17.

\textsuperscript{137}A.R.S. § 25-403(B) (emphasis mine).
determine parenting plan elements “if the parents are unable to agree.” Such legal caveats make the inquiry not a child-centered one, but one about parental rights and (dis)agreement. While the law purports to emphasize and promote the best interests of the child, doing so under the current structure is, in actuality, a false prospect.

Accordingly, family law professor Martin Guggenheim, argues that so long as parents are “minimally fit” the state has virtually no interest in parental disagreements over time, place, and proportions of child-rearing. It is only when parents cannot agree that one or the other (or both) can bring in the state to “serve[] as an arbiter of a purely private dispute.” Further illustrating his point, Guggenheim describes the proto-typical custody case wherein the judge agonizes over his decision not because of the children’s interests, but because he “cannot easily choose between the competing parties”—both of whom would be fit custodians and caretakers and both of whom “have rights to be with their children.” Similar arguments have been made that presumptions of

138 A.R.S. § 25-403.02(D) (emphasis mine).
139 For example, the Ynclan court held that in camera interviews require “a balancing of parental due process rights with the child’s right to be heard and the court’s interest in hearing from the child.” Supra note 119, at 159 (emphasis mine). Ynclan borrowed “the child’s right to be heard” language from Mackowski v. Mackowski, 721 A.2d 12, 14 (N.J. App. 1998). See Ynclan, supra note 119, at 153 n.7. Mackowski had based its insistence on children’s rights on New Jersey statutory language that, at the time, provided the court “shall” interview the child. 721 A.2d at 14; D.A. v. R.C., 105 A.3d 1103, 1118 (N.J. App. 2014). Embracing what it saw as the child’s statutorily protected right to “participate in the decision-making process,” the Mackowski opinion declared: “we cannot accept the denial of a hearing premised on a notion or hope that such denial is protecting the child. The child has a right to be heard and voice an opinion to the finder of fact and ultimate decision-maker. The court need not be bound by the child’s view but that cannot be a basis for denying the child the right to express a view if he or she chooses to do so.” 721 A.2d at 14
But, as noted in 2014 by D.A. v. R.C., the New Jersey rule was changed in 2002 from “shall” to “may,” in consideration of the Mackowski concurrence’s belief that interviews “irreparably” harmed children. 105 A.3d at 1118; Mackowski, 721 A.2d at 16 (Kestin, J., concurring).
141 Id. at 29.
142 Id. at 29-30. See supra p. 28.
substantially equal parenting time reflect a “best interest of the parent” standard.\textsuperscript{143} It can thus be misleading to discuss parental authority and legal standards in terms of children’s best interests.\textsuperscript{144} 

I note briefly that “childhood” is a social construction both historically and culturally situated.\textsuperscript{145} The definition of a child—who is one and what sort of capabilities one has—adjusts in response to societal changes and varies across time periods and disciplines, both reflecting and reinforcing the corresponding shifts in power relationships between adults and youth.\textsuperscript{146} As such, the construction of “child” makes the paradigm of “adult” possible and further delineates the meaning of them both.\textsuperscript{147} For example, medieval European society through the 15\textsuperscript{th} century considered humans to come into adulthood at age seven, at which time they participated in normal adult activities, were fully integrated into the community, and were treated as full members of that community.\textsuperscript{148} During the Renaissance, however, the phase of human development before a person reached sexual maturity was redefined as discrete and separate to mark “children” as essentially and inherently different from adults.\textsuperscript{149} At that point, with children being viewed as “not yet full

\textsuperscript{144} See Guggenheim, \textit{supra} note 140, at 28-29. In its entirety, Guggenheim’s article argues that any litigation whatsoever goes against children’s best interests and, thus, the current schema merely serves parental rights.
\textsuperscript{147} Rosenbury, \textit{supra} note 146, at 27.
\textsuperscript{148} See Ainsworth, \textit{supra} note 145, at 565-66.
\textsuperscript{149} \textit{Id.} at 566. Two competing threads of thought emerged as to “children” at this time: the Calvinist doctrine of infant depravity, in which children were inherently sinful, and the Enlightenment philosophy (followed by Romanticism), in which children were innately innocent. \textit{Id.} Both theories required that children be guided by adults so that they were able to one day reach adulthood themselves. \textit{Id.} For more on the historical development of categorical childhood and adolescence in relation to family and juvenile law, see generally \textit{id.} at 565-67.
persons," cultural treatment shifted to reflect their presumed vulnerability, dependency, and disability.

Human and child development theories are likewise formed within ever-shifting power relationships and societal attitudes. Whatever the contemporary theories hold, then, become the foundation upon which to base and justify legislative changes, professional trainings, and the overall lens through which to view children. Most modern conceptions of childhood development involve a series of maturational stages and find heavy influence in the work of 20th-century psychologist Jean Piaget. Newer models of development recognize and emphasize an inherent capacity in all children to develop through interactions with their environment. Recent theories also note that the uniqueness and individuality of each child marks the variability of developmental progression, creating a more fluid developmental model. It is these newest, most fluid models of child development—referred to as “evolving capacities”—that inspire the CRC and many international judicial interview procedures.

For the remainder of Section III, I will present various theories in order to (de)construct the rights framework as it persists in Arizona family law. To “deconstruct” is to examine and critique in order to expose existing dominant power structures and relationship schemas. Subsection A, “Paternalism and Attributability,” describes a philosophical analysis that embraces the “inherent” differences between adults and children, wherein children are not considered “full

151 See Ainsworth, supra note 145, at 566; Rosenbury, supra note 146, at 20-21.
152 See generally WOODHOUSE, supra note 13, at 18-21; Atwood, supra note 71, at 654-55.
153 WOODHOUSE, supra note 13, at 18; Atwood, supra note 71, at 654.
154 WOODHOUSE, supra note 13, at 18; Atwood, supra note 71, at 654.
155 See WOODHOUSE, supra note 13, at 19-21; Atwood, supra note 71, at 654-55.
156 See generally sources cited supra note 155.
157 See generally CRC Comment 12, supra note 15, at III(A)(1)(a)(ii)(21); supra Appendix E.
persons,” to justify paternalism. This particular analysis, however, encourages adults to be responsible in their treatment and guidance of children as “emerging persons.” The relational subjectivity approach discussed in Subsection B depicts the rights of parents, children, and the state as interdependent and provides a new, relational lens through which to consider these legal subjectivities. Finally, the extensive examination in Subsection C analogizes a critique of human rights law and judgment theory to describe the ways in which children and their voices have been disregarded and prevented from participating in the legal processes of family law.

A. Paternalism and Attributability

According to philosophy professor Tamar Schapiro, the “attributability argument” is the only philosophical argument that adequately justifies the paternalistic attitude which fundamentally shapes adult-child relations. For Schapiro, the “paternalistic attitude” is the implicit idea in modern legal and social practice that “children are persons, but not full ones.” Recognizing the asymmetrical authority that adults exercise over children, Schapiro aims to explain what must be argued for that authority to be justified and, then, how adults must act in order to properly exercise their relative power over children.

In philosophical tradition, adults and children are inherently different. Under the proficiency argument, children are incapable of deliberating well and making good choices—defined as those which protect and advance their own interests. They are not proficient enough in their reasoning to be considered full persons. Within the attributability argument, however,
children lack the ability to reason at all and are incapable of making any of their own choices, whether good or bad.\textsuperscript{167} Any choices a child purports to make are not actually of their own reasoning, and thus cannot be attributed to them.\textsuperscript{168}

Recognizing the weaknesses of the proficiency argument, Schapiro refers to Immanuel Kant’s Formula of Humanity, wherein “humanity” is the power of choice and reasoning is autonomy.\textsuperscript{169} Simply stated, readings of Kant’s humanity principle require strong respect for other people’s choices and the power they have to make those choices.\textsuperscript{170} A tendency to make poorly reasoned choices does not, generally, strip an adult of their right to choose, so why should it strip a child’s?\textsuperscript{171} Thus, Schapiro argues, paternalism can be justified only when a person is already in such a condition of impairment or alienation that they systematically lack the capacity to exercise any power of choice at all.\textsuperscript{172}

Further explaining the attributability argument for paternalism, Schapiro claims that “childhood” is a condition in which a person is not yet themself.\textsuperscript{173} Because children are not yet themselves, any actions are not their own: they may produce actions/choices but they are incapable of identifying themselves with these choices, claiming representation by them, and taking responsibility for them.\textsuperscript{174} Put another way, children’s thought processes have not yet emerged out of and away from the instinctual control that prevents them from establishing any individual

\begin{itemize}
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} See id. at 590-91.
  \item \textsuperscript{169} Id. at 587.
  \item \textsuperscript{170} See id. at 582-84. My discussion of how Schapiro’s argument invokes Kant’s humanity principle is very simplistic. For an in depth discussion of Kant, autonomy in choice, and the differences between human instinct and personality as it relates to full personhood in the family law context, see id. at 585-593.
  \item \textsuperscript{171} See Schapiro, supra note 150, at 582-84.
  \item \textsuperscript{172} Id. at 584-85.
  \item \textsuperscript{173} Id. at 590-91.
  \item \textsuperscript{174} See id.
\end{itemize}
Paternalism is thus required in order to guide children through development until such time as their choices can be attributed to them. And, since children’s deliberative processes do not constitute their own authority as of yet, paternalistic interference does not violate their humanity. 

Schapiro emphasizes, however, that—even if attributability justifies paternalism—paternalism can only be compatible with the concept of adult autonomy/humanity “if it is exercised in such a way as to make the autonomy of the child possible in the long run.” Indeed, she says, “[c]hildren, as emerging persons, need to learn what it means to relate to themselves on the basis of freedom, and they cannot do this unless others relate to them, as far as possible, on the same basis.” In other words, Schapiro urges adult responsibility in guiding children toward full, rights-bearing personhood.

### B. Relational Subjectivity

While Schapiro’s philosophy accepts the power asymmetry of adult-child relations, law professor Laura A. Rosenbury expounds on the work of Martha Minow to recognize the ways in which such power asymmetry is created in the first place, as well as the ways in which current legal approaches both reflect children’s reduced capacity and create some of that incapacity.

In her relational subjectivity approach, Rosenbury argues that it is children’s complex relationships with others (including parents and the state)—rather than their specific

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175 See id.
176 Id. at 593.
177 Id. at 594.
178 Id. at 593.
179 Id.
180 See id.
181 Rosenbury, supra note 146, at 18.
182 Id. at 20-21.
dependencies—that should shape and define children’s legal rights.\textsuperscript{183} Instead of maintaining a binary structure in which autonomy and dependency are mutually exclusive, relational subjectivity recognizes the multiple ways in which the interconnectedness of autonomy and dependency create the legal definition of a subject.\textsuperscript{184} Because of this interconnectedness, argues Rosenbury, discussions of children’s legal subjectivities “need not hinge on their potential autonomy or a denial of their dependency.”\textsuperscript{185} Applying relational subjectivity analysis to children’s experiences, we see that existing law indeed focuses heavily on the perceived need to protect children because they cannot protect themselves.\textsuperscript{186} As with ARFLP 12, for example, judges are statutorily cautioned against interviewing children unless they are “of sufficient age and intellectual capacity” and urged to “take special care to protect the child from embarrassment,” because of children’s presumed dependency and lack of autonomy.\textsuperscript{187}

As part of relational subjectivity, Rosenbury notes how existing law is motivated by a hierarchical relationship schema in which the state and adults/parents are at the top and children at the bottom.\textsuperscript{188} Such a schema largely ignores the diverse and interdependent nature of people’s relationships, particularly children’s relationships with non-state and non-parent adults, as well as siblings, peers, and the broader community.\textsuperscript{189} Minow and Rosenbury emphasize that a relational approach to subjectivity could encompass all of these interactions and recognize children as not

\textsuperscript{183} See \textit{id.} at 18, 21.
\textsuperscript{184} \textit{Id.} at 21-22.
\textsuperscript{185} \textit{Id.} at 18, 22.
\textsuperscript{186} See generally \textit{id.} at 19-21.
\textsuperscript{187} See \textit{supra} notes 122-25 and accompanying text; Rosenbury, \textit{supra} note 146, at 20-21.
\textsuperscript{188} Rosenbury, \textit{supra} note 146, at 22-24.
\textsuperscript{189} \textit{Id.} at 22-24. I do note, however, that A.R.S. § 25-403(A)(2) (2013) includes as a factor relevant to children’s best interests, the “interaction and interrelationship of the child with the child’s parent or parents, the child’s siblings and any other person who may significantly affect the child’s best interest.” See \textit{supra} Appendix A.
always relegated to receiving from the hierarchical structure until the point of their development into full adults.\textsuperscript{190}

In support of her approach, Rosenbury explains how adults’ seemingly autonomous rights and actions are actually enabled by an interdependency of legal relationships.\textsuperscript{191} Parents’ rights exist because of the relationships they have with their children and the state’s interests in facilitating those connections.\textsuperscript{192} For example, and as I described in Section II, parents can only make decisions regarding their children because the law recognizes the parent-child relationship and grants parents specific rights and a certain scope of authority.\textsuperscript{193} This granting, protection, and restriction of parental rights is possible precisely because adults are dependent upon the law.\textsuperscript{194} Thus, Rosenbury argues, “[t]o conceive of parental rights in terms of individual autonomy is a denial of the dynamic nature of these relationships [that] reduc[es] children to objects or mere property interests.”\textsuperscript{195}

Because of this conceptual reduction of children into objects, Rosenbury finds parallels between the old legal structure of marital coverture and the ongoing regime of children’s legal dependencies.\textsuperscript{196} Under coverture, virtually all of a married woman’s legal rights were conveyed to her husband for her purported benefit and protection.\textsuperscript{197} Such laws were crafted in response to women’s perceived dependencies regarding childbearing and childrearing.\textsuperscript{198} Similarly, as we have seen, children’s lack of legal empowerment has been largely justified by the perceived need

\textsuperscript{190} Rosenbury, supra note 146, at 22-24.
\textsuperscript{191} Id. at 22-23.
\textsuperscript{192} Id. See also Guggenheim, supra note 140, at 28-29.
\textsuperscript{193} See Rosenbury, supra note 146, at 21-23; Guggenheim, supra note 140, at 28-29; supra p. 30.
\textsuperscript{194} See Rosenbury, supra note 146, at 23.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 18, 21.
\textsuperscript{197} Id. at 21
\textsuperscript{198} Id. at 21.
to protect children.\textsuperscript{199} These “justifications” for withholding rights create legal disabilities, which in turn shape society’s perceptions of women and children.\textsuperscript{200} Although women can now enter into contract, vote, obtain divorce, and maintain custody of their children upon doing so, children remain largely voiceless and rightsless, subject to the decisions of their parents, and objects of both parental and state authority.\textsuperscript{201}

C. Marginalization & Cauterization

As my discussion of Arizona law shows, and the theories of Schapiro and Rosenbury analyze, children have been excluded from social and political power and denied a voice and rights in the American family law system. Accordingly, they would be part of what social justice and human rights professor William Paul Simmons refers to as the Marginalized Other.\textsuperscript{202} While Simmons specifically discusses and deconstructs international human rights law, I will here use his analysis by analogy in my examination of family law to describe the ways in which children and their voices have been disregarded and prevented from participating in the legal process.\textsuperscript{203}

First, Simmons uses the term “cauterization” to illustrate the comprehensive manner that the Marginalized Other is excluded from and by most legal rights discourse.\textsuperscript{204} Utilizing the three interrelated meanings of “cauterize,” Simmons describes how the Marginalized Other is branded as inferior and sealed off from the rest of society at the same time as full members of the society deaden their feelings toward the Others’ suffering.\textsuperscript{205}

\textsuperscript{199} Id. at 19; supra p. 26-28.
\textsuperscript{200} Rosenbury, supra note 146, at 21.
\textsuperscript{201} Id. at 19, 21, 24-25. I note these exercises of independence are limited by privilege and only available to some U.S. citizen women.
\textsuperscript{202} Simmons, supra note 158, at xiii.
\textsuperscript{203} See generally Simmons, supra note 158. As Simmons laments, “the voices that should be empowered by human rights law are often disregarded by human rights law and frequently even further silenced by it.” Id. at 3.
\textsuperscript{204} See id. at 10.
\textsuperscript{205} Id.
Second, to situate Simmons’s work alongside Rosenbury’s relational subjectivity approach, consider the following: Just as the family law structure has been shaped by the relational perceptions Rosenbury discusses, so too was much of the human rights law schema “quite clear[ly] . . . steeped in a particular way of looking at the world.” As Simmons notes, these attitudes continue to retain and reinforce what Jacques Derrida would call the “original violence” inherent in the laws’ formation. In this context, violence is not limited to the use of physical force: “anyone or anything that threatens the law is deemed to be violent.” According to Derrida’s conceptualization, founding violence exists when law is challenged via a violent and successful revolution. The successful revolution then constructs a legitimating narrative to justify the violence with which it created the new rules. This “founding violence” lingers in subsequent law, is reproduced and conserved in repeated iterations, and is constantly re-imagined and reinforced as “conserving violence.” As Simmons explains, “Such conserving violence will necessarily seep into new spheres of society—spheres never implicated during the founding moments.”

Thus, in the family law context, when statutes were written certain types of rights in certain situations were privileged over others, such biases were absorbed into the family law regime, and the hierarchy of rights upon which the regime relies was perpetuated. At the same time, because the socially constructed paradigm of the “child” is/was one of inferior, incomplete personhood, the voices of children were cauterized from the legal process. This, then, explains the rather routine

206 Id. at 5.
207 Id. at 5-6 (citing Jacques Derrida, Force of Law: The ‘Mystical Foundation of Authority,’ in DECONSTRUCTION OF THE POSSIBILITY OF JUSTICE 3 (Drucilla Cornell et al. eds., 1992)).
208 Id. at 77.
209 Id. at 77 (citing Derrida, supra note 207).
210 Id. at 77.
211 See id. at 75-77 (citing Derrida, supra note 207).
212 Id. at 77.
way with which the Arizona domestic relations committee constructed a new ARFLP Rule 12 without consulting the children the Rule purports to protect.\textsuperscript{213}

In a more detailed illustration of the ways in which law cauterizes the Other, Simmons discusses political theorist Hannah Arendt and her theory on judgment.\textsuperscript{214} Broadly, Arendt’s theory spotlights what Simmons sees as a common problem inherent in law: the idea that the only legitimate opinions are those of like-minded elites who base their decisions in artificial categories created with little regard for marginalized persons or their voices.\textsuperscript{215} Such abstract delineations create and maintain a “hierarchy of rights”\textsuperscript{216}—similar to the way biases are codified into laws and perpetuate inequities, as we saw in Rosenbury’s relational subjectivity approach and the discussion of original violence.

I note that Arendt’s theories on “judgment” reach beyond the scope of sworn judicial officers handing down legal opinions. Instead, judgment for Arendt extends to all those \textit{with a voice} in the political sphere.\textsuperscript{217} Importantly, however, Arendt does not invite the Marginalized Other into the polis or the courtroom, does not adopt the Other’s perspective, and, indeed, insists on cauterizing them from the process so as to ensure a proper, valid judgment.\textsuperscript{218} Arendt’s judgment involves, however,

> ‘the ability to see things’ from ‘the perspective of all those who happen to be present’ (Arendt 1968, 221). To be present for Arendt means to be one of the few in the public sphere. To be a judge means to consider the viewpoints of other judges. To be [without speech], on the other hand, means not to be present in the political sphere, not to judge, and

\textsuperscript{213} See supra pp. 26-29.
\textsuperscript{214} See Simmons, supra note 158, at 30-42
\textsuperscript{215} \textit{Id.} at 23-24. Note that “like-mindedness” here is not mere agreement, but, rather, is “an agreement among good men about the fundamentals of a society.” \textit{Id.} at 30.
\textsuperscript{216} \textit{Id.} at 216 (quoting SEYLA BENHABIB, THE RELUCTANT MODERNISM OF HANNAH ARENDT 150 (1996)).
\textsuperscript{217} \textit{Id.} at 30.
\textsuperscript{218} \textit{Id.} at 40-42.
not to have your opinions considered when judgment on the basis of communal validity occurs.\footnote{\textit{Id.} at 35-36 (quoting \textsc{hannah arendt}, \textsc{between past and future} 221 (1968)).}

Judgment for Arendt thus creates an affirmative duty in citizens to reinforce exclusion by not only monitoring the political realm so as to prevent the entrance of the self-interested, but also purposefully rejecting their views.\footnote{\textit{Id.} at 35 n.14, 37.}

Accordingly, under Arendt’s typology, people without speech—without a voice—are politically irrelevant: they are not a political person and they do not have political rights and duties.\footnote{See \textit{id.} at 35.} As politically irrelevant beings, their subjective opinions do not factor into the judge’s calculations.\footnote{See \textit{id.} at 39-40.} Indeed, their voices will only be heard through the voice of the judge.\footnote{See \textit{id.} at 42.}

\section*{IV. REMARKS AND RECOMMENDATIONS}

Simmons contends that, to better serve the Marginalized Other, legal players must push past the many discourses enforcing dominant power structures and modify procedural rules so as to encourage the voice of the Other.\footnote{See Simmons, \textit{supra} note 158, at xiv.} Giving the Other a voice—allowing children to speak—is not enough, however; rather adults (both parents and lawmakers) have to \textit{listen}, patiently and actively.\footnote{\textit{Id.;} CRC Comment 12, \textit{supra} note 15, at III(A)(1)(a)(v)(28); \textsc{Tali gal & Benedetta Faedi Duramy}, \textsc{enhancing capacities for child participation: introduction}, in \textsc{international perspectives and empirical findings on child participation: from social exclusion to child-inclusive policies} 1, 6-7 (\textsc{Tali gal & Benedetta Faedi Duramy eds.}, 2015). \textit{See also} Simmons, \textit{supra} note 158, at 122 (“patient listening”).} I equate Simmons’s idea of “patient listening” with the concept of “participation” outlined in CRC Comment No. 12.\footnote{See Simmons, \textit{supra} note 158, at 122; CRC Comment 12, \textit{supra} note 15, at I(3).} This “participation” is an ongoing process of “information-sharing and dialogue between adults and children based on mutual respect, and in which children...
can learn how their views and those of adults are taken into account and shape the outcome of such processes."\textsuperscript{227} Effective participation requires, furthermore, a mutual exchange and a “mutual willingness to convince and be convinced, to be changed, and to give away one’s control over the decision.”\textsuperscript{228}

In order to achieve the effective participation of Marginalized Voices, it is of critical importance that professionals working with children or involved in any issues that affect children approach family law cases with an interdisciplinary framework.\textsuperscript{229} Such a framework will allow a theoretically critical evaluation of children’s experiences and their relative position in society.\textsuperscript{230} Children’s lives—like adults’ lives—are complex and ambiguous, involving an irresolvable interpellation of “dependence and independence, victimization and heroism, authenticity and group identity.”\textsuperscript{231} To consider children as subjects of influence thus requires a broad “rethinking” of childhood itself that draws upon developmental psychology, social work and justice, sociology, anthropology, history, biological and health sciences, and environmental and cultural studies.\textsuperscript{232} It requires an equally broad rethinking of adulthood.

As Barbara Bennett Woodhouse notes, these types of “rethinkings” are not new or radical: “Each generation, to some extent, rethinks the meaning of childhood,”\textsuperscript{233} and “every generation has experienced its own ‘moral panic’ over the demise of childhood and the state of ‘today’s’ children.”\textsuperscript{234} For the present and upcoming generations, a rethinking of childhood must include

\textsuperscript{227} CRC Comment 12, \textit{supra} note 15, at I(3).
\textsuperscript{228} Gal & Duramy, \textit{supra} note 225, at 6-7.
\textsuperscript{229} See Simmons, \textit{supra} note 158, at xiv; WOODHOUSE, \textit{supra} note 13, at 11, 15-17.
\textsuperscript{230} See WOODHOUSE, \textit{supra} note 13, at 11, 15-17. \textit{See also supra} pp. 35-38.
\textsuperscript{231} WOODHOUSE, \textit{supra} note 13, at 11.
\textsuperscript{232} \textit{Id.} at 15-17.
\textsuperscript{233} \textit{Id.} at 16 (discussing Peter B. Rufall & Richard P. Unsworth, \textit{The Imperative and the Process for Rethinking Childhood}, in \textit{RETHINKING CHILDHOOD} 1, 2 (Peter B. Rufall & Richard P. Unsworth eds., 2004).
\textsuperscript{234} \textit{Id.} at 17 (discussing STEVEN MINTZ, HUCK’S RAFT: A HISTORY OF AMERICAN CHILDHOOD (2004).
the recognition of children’s voices and agency, including how children understand their own lives and actively engage in the molding and shaping of their experiences.  

In the words of Peter B. Rufall, psychology professor, and Richard P. Unsworth, professor of religion and pastor, “Rethinking requires a thorough examination of this apparent ambivalence in society’s estimation of its children—patronizing on the one hand and idealizing on the other. It is a challenge to understand children as they are and where they are by listening to them and understanding the ways in which they act to create their own futures.” Unfortunately, Woodhouse also notes the remarkable staying-power of the stereotype of children as passive, malleable, and incapable. Despite dozens of studies and strong anecdotal and experiential evidence—consider the “terrible twos” and “impossible teens”—children’s capacity for voice and agency and the role they have played in shaping their own lives have been continually ignored. Sociologist Allison James thus argues for “exploring and understanding how this child—the one who stands in front of us—helps to shape our expectations of childhood and what children can and cannot do.”

A. Issues with Children’s Participation and a Rights-Based Framework

I address now some of the arguments against a rights-based framework and the enhanced legal participation of children.

First, some arguments suggest that a rights-based framework is more compelling in dependency and termination cases than in divorce and paternity actions. This is because, in the

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235 See id. at 14-16. For further discussion of “voice” and “agency,” see id. at 24.
236 Rufall & Unsworth, supra note 234, at 2 (qtd. in WOODHOUSE, supra note 13, at 16).
237 See WOODHOUSE, supra note 13, at 24.
238 Id. at 24, 17; supra at pp. 8-11; supra Appendix E.
239 Allison James, Understanding Childhood from an Interdisciplinary Perspective: Problems and Potentials, in RETHINKING CHILDHOOD 25, 36 (Peter B. Rufall & Richard P. Unsworth eds., 2004). (quoted in WOODHOUSE, supra note 13, at 26).
240 See Bala et al., supra note 7, at 138.
former, a governmental agency is threatening to deprive the child of their parental relationships.\textsuperscript{241} But is not the same thing really happening in family law disputes as well? After all, in divorce and paternity proceedings, the court’s role is in deciding parental control over the child and allocating parental access to the child—both of which have the possibility of depriving children of their parental relationships.\textsuperscript{242}

Furthermore, as attorney and scholar Janet Ainsworth argues, a continued shift in the recognition of rights in family law may spell the end of the juvenile court.\textsuperscript{243} For her, a breakdown of the child-adult dichotomy will further erode a juvenile court system whose distinctive features are already melting so as to more and more resemble the adult criminal justice system, with a focus of retribution over rehabilitation.\textsuperscript{244} Using some of the same reasoning as Rosenbury’s relational subjectivity approach,\textsuperscript{245} Ainsworth sees the societal distinction of “adolescence” as no longer actually existing.\textsuperscript{246} Instead, judicial decisions regarding juvenile justice procedures and protections have kept the adolescent-adult dichotomy artificially alive.\textsuperscript{247}

Another argument against the advancement of children’s rights comes from family law professor Martin Guggenheim.\textsuperscript{248} Cautioning against a rights-based family law framework for children, he states:

\begin{quote}
[T]here is an implicit claim that [children’s] rights are something which must be recognized. But children's advocates should remember that children and their legal fate are always in the hands of adults. Whatever rules are made for or about children are made by adults. However we go about the business of identifying, defending, and vindicating the rights of children, we are unavoidably in the business of adults determining what constitutional rights children have.
\end{quote}

\textsuperscript{241} See id. See also supra p. 17 (due process).
\textsuperscript{242} See supra pp. 13-17.
\textsuperscript{243} See Ainsworth, supra note 145, at 571.
\textsuperscript{244} See id. at 570-578.
\textsuperscript{245} Supra pp. 35-38.
\textsuperscript{246} See Ainsworth, supra note 145, at 575-578.
\textsuperscript{247} Id.
\textsuperscript{248} Martin Guggenheim, Maximizing Strategies for Pressuring Adults to Do Right by Children, 45 ARIZ. L. REV. 765 (2003). See also supra p. 30.
Moreover, adults are free to make whatever rules they choose. They are also free to characterize the rules they choose to invoke as rights of children or as something else entirely.249 Guggenheim’s concerns, then, are based upon the current legal hierarchical schema and ignore any possibility of a change in that framework.

I ask those lawmakers and scholars who have similar views to critically consider the inherent assumptions of their arguments. Why is it that children’s legal fates are always in the hands of adults? What socially constructed categories and artificial rights hierarchies are influencing the ways in which adults make rules for children? And what, exactly, is so unavoidable about this entire landscape? Neither the cultural structuring of childhood nor the laws reinforcing that construction should be driven by the idealizing visions or unsubstantiated fears of adults.250 It is only with a deconstruction of the family law rights schema—as I put forth in Section III—that we can begin to refute the conceptualization of children as constituting “the empty space against which the category of the adult subject comes into being.”251

B. Final Recommendations

The discussion of children’s rights and children’s voices—and particularly of children’s right to be heard in the context of judicial interviews—is ongoing and ever-developing. For example, the Association of Family and Conciliation Courts (AFCC), an interdisciplinary association of professionals in law, counseling, and mediation, held its regional conference in November 2015 around the theme “Do You Hear What I Hear? Listening to the Voice of the Child.”252 And, earlier in 2015, Oxford University Press published a broad portrayal of the

249 Guggenheim, supra note 248, at 776.
250 WOODHOUSE, supra note 13, at 16.
251 Rosenbury, supra note 146, at 18.
practical implementation of children’s participation in family courts. There is thus no shortage of ideas for successfully implementing children’s voices in family law, without violating parents’ rights to due process. For sources outlining examples of these procedures, see my Appendix E, “Annotated Bibliography of International Insights.”

Accordingly, I hope the Family Law Section of the Arizona State Bar and the Arizona Legislature’s Domestic Relations Committee will rethink the new ARFLP 12 to acknowledge its misapplied focus on parents’ rights in derogation of children’s rights. The two are not mutually exclusive. In order to promote children’s best interests, ARFLP 12—and the rest of Arizona family law—must embrace and encourage marginalized children’s voices and experiences and reincorporate them into the family law schema.

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253 See generally INTERNATIONAL PERSPECTIVES AND EMPIRICAL FINDINGS ON CHILD PARTICIPATION: FROM SOCIAL EXCLUSION TO CHILD-INCLUSIVE POLICIES (Tali Gal & Benedetta Faedi Duramy eds., 2015).
254 See generally supra Appendix E; supra pp. 16-17 (parents’ due process rights), 26-29 (judicial interviews of children), 8-12 (international insights).
APPENDIX A


A. The court shall determine legal decision-making and parenting time, either originally or on petition for modification, in accordance with the best interests of the child. The court shall consider all factors that are relevant to the child's physical and emotional well-being, including:

1. The past, present and potential future relationship between the parent and the child.
2. The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.
3. The child's adjustment to home, school and community.
4. If the child is of suitable age and maturity, the wishes of the child as to legal decision-making and parenting time.
5. The mental and physical health of all individuals involved.
6. Which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent. This paragraph does not apply if the court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being a victim of domestic violence or child abuse.
7. Whether one parent intentionally misled the court to cause an unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference to that parent.
8. Whether there has been domestic violence or child abuse pursuant to § 25-403.03.
9. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time.
10. Whether a parent has complied with chapter 3, article 5 of this title.¹
11. Whether either parent was convicted of an act of false reporting of child abuse or neglect under § 13-2907.02.

B. In a contested legal decision-making or parenting time case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child.

Credits
APPENDIX B


A. The court shall determine custody, either originally or on petition for modification, in accordance with the best interests of the child. The court shall consider all relevant factors, including:

1. The wishes of the child's parent or parents as to custody.
2. The wishes of the child as to the custodian.
3. The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.
4. The child's adjustment to home, school and community.
5. The mental and physical health of all individuals involved.
6. Which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent. This paragraph does not apply if the court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being a victim of domestic violence or child abuse.
7. Whether one parent, both parents or neither parent has provided primary care of the child.
8. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.
9. Whether a parent has complied with chapter 3, article 5 of this title.
10. Whether either parent was convicted of an act of false reporting of child abuse or neglect under section 13-2907.02.
11. Whether there has been domestic violence or child abuse as defined in section 25-403.03.

B. In a contested custody case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child.

History
A. General. On written motion of any party filed pursuant to Rule 35, or its own motion, the court may conduct an in camera interview with a minor child who is the subject of a legal decision-making or parenting time dispute to ascertain the child's wishes as to both. The interview must be recorded by a court reporter or any electronic medium that is retrievable in perceivable form. The record of the interview may be sealed from the public, in whole or in part, based upon good cause and after considering the best interests of the child. The parties may stipulate that the record of the interview will not be provided to the parties. The record of the interview must be made available to the parties, unless they have stipulated otherwise, not less than 14 days prior to the hearing at which the interview may be considered by the court unless the assigned judge finds good cause for a different time frame.

B. Special Precautions. In conducting an in camera interview with a child, the court must take special care to protect the child from embarrassment and restrict the unnecessary repetition of questions. The court must also take special care to ensure that questions are stated in a form that is appropriate to the child's age and intellectual capacity. The court must inform the child in an age-appropriate manner about the limitations on confidentiality, that the information provided to the court will be on the record, that the information provided to the court will be provided to the parties in the case unless the parties have stipulated otherwise, and that whatever the child says will be considered but will not alone be determinative of the issues of legal decision-making and parenting time. In the process of listening to and inviting the child's input, the court must allow but not require the child to state a preference regarding legal decision-making and parenting time and should, in an age-appropriate manner, provide information about the process by which the court will make a decision.

C. Definition. As used in this rule, “court” includes any Conciliation Services department, agency or other third-party professional ordered by the assigned judge to conduct a child interview pursuant to ARIZ. REV. STAT. § 25-405 or the Arizona Rules of Family Law Procedure.

Credits

Editors' Notes
COMMENT TO 2015 AMENDMENT
Generally, the court should not conduct an in camera interview of a child under this rule unless it finds that the child is of sufficient age and intellectual capacity to reason and form an intelligent preference as to legal decision-making and parenting time. The court is strongly encouraged to utilize other resources, where available and appropriate, to ascertain that preference. In particular, a court should proceed with caution when interviewing a child in any case in which a party has alleged “domestic violence” as defined in Ariz. Rev. Stat. §§ 13-3601(A) and 25-403.03(D), or “abuse” as defined in Ariz. Rev. Stat. § 8-201(2).
COMMITTEE COMMENT

Arizona Revised Statutes § 25-405 allows for an in camera interview of a child to ascertain the child's wishes as to the child's custodian and as to parenting time. A record of the proceeding will be kept to ensure the integrity of the process, to allow for rebuttal information in appropriate cases, and to provide for appropriate appellate review. The definition of "record" is derived from A.R.S. § 25-1010(E).

Arizona State court rules are current with amendments received through 10/15/15

AZ ST RFLP Rule 12
APPENDIX D


On motion of any party, or its own motion, the court may, in its discretion, conduct an in camera interview with a minor child who is the subject of a custody or parenting time dispute, to ascertain the child's wishes as to the child's custodian and as to parenting time. The interview may be conducted at any stage of the proceeding and shall be recorded by a court reporter or any electronic medium that is retrievable in perceivable form. The record of the interview may be sealed, in whole or in part, based upon good cause and after considering the best interests of the child. The parties may stipulate that the record of the interview shall not be provided to the parties or that the interview may be conducted off the record.

Credits

COMMITTEE COMMENT
Arizona Revised Statutes § 25-405 allows for an in camera interview of a child to ascertain the child's wishes as to the child's custodian and as to parenting time. A record of the proceeding will be kept to ensure the integrity of the process, to allow for rebuttal information in appropriate cases, and to provide for appropriate appellate review. The definition of “record” is derived from A.R.S. § 25-1010(E).

AZ ST RFLP Rule 12
APPENDIX E
Annotated Bibliography of International Insights
arranged by date, oldest first


Sets forth the history of the judicial interview in New Zealand, the current social and legal context in the country, the creation of a “mixed system” encompassing both adversarial and inquisitorial aspects, and the collective pros and cons of the judicial interview. Argues for a “team approach” consisting of conversations between the judge, the child’s lawyer, and an expert reporter (like social worker or psychologist) in order to “determine the most appropriate process for ensuring that the particular child is given a reasonable opportunity to express his or her views” (50). Describes true “listening” as understanding the child’s communications from the child’s perspective and conveying to the child that their views will be heard and respected. Classifies the judge’s interactions with a child as a *conversation* and not as an interview, meeting, or other formal process. Also gives steps for setting up the conversation to be the most effective.

Pros of judicial interviews include respecting a child’s wishes to see the judge, showing respect to the child by explaining the judge’s decision to him or her, helping the child understand that he or she is not responsible for the decision, empowering the child through making him or her part of the legal process, ascertaining the child’s views and whether they have changed, being able to put the child’s views in context with the child’s particular perspectives, developing an appreciation for the depth and intensity of the child’s feelings, getting to know the child as an individual person, gaining an appreciation for the child’s maturity level, and hearing unique solutions offered by the child.

Cons of judicial interviews include a lack of time to develop trust between a judge and child; a lack of skill enabling the judge to facilitate effective and valuable conversations with the child; a lack of skill to provide the child with support and to understand a child’s communication styles; parents’ due process considerations; confidentiality concerns; appropriate timing of interviews; and the possibility that the child is intimidated by the judge, will feel responsible for the judge’s decision, will feel disloyalty to parent(s), will fear his or her confidences would be betrayed, or will be susceptible to parental manipulation.


Discussion of Scottish judiciary’s thoughts on the circumstances in which they choose to speak with children and their reasons for doing so. Outline of historical context, where common law practice of judicial interviews was codified by the Scottish response to the United Nations Convention on the Rights of the Child: the Scotland Children Act of 1995. Comments on the purpose of judicial interviews, the benefit of children’s contributions, and the gaining of unexpected insights. Concerns about judges’ training, children being coached, and confidentiality. Basing whether or not to interview a child because of chronological age creates an artificial line: “There is no justification on protectionist grounds alone for denying children an opportunity to speak to a judge, if that is what they wish” (214). Judges make a difference by helping the child feel that she has become a part of the process. Discussion of confidentiality processes and child trust.

Explores children’s views on adults’ assumptions that judicial interviews would be a stressful, intimidating, and problematic experience. Discussion of and quotes from children’s and parents’ perspectives. Includes who would be the best person for the child to speak to, reasons for wanting and not wanting to talk with a judge, children’s level of trust in judges, and a comparison of parents’ views to those of their children. Notes procedural issues and suggests solutions to those problems.


Discussion of the Israeli legal system’s response to the United Nations Convention on the Rights of the Child. References the ongoing Israeli Pilot Project (see Morag et al. 2012 & 2015). Describes how most judges do not see a need to interview children and prefer instead to rely on a report of the child’s wishes by a social worker or other expert. Explains how proposed Israeli law focuses on the child’s right to express her feelings, opinion, and position, and to be accorded the opportunity to be heard freely as appropriate for her age, developing capacities, wishes, and needs. Further discussion of subtle differences of policy in custody cases versus abduction cases. Suggests procedure for judicial interviews. Counters objections and misperceptions (unnecessary, lack of professional tools, harms the child). Discussion of the appropriate weight to give child interviews and how to/whether to assess child’s maturity level in determining the hat appropriate weight.


Discusses Swiss legal improvements to divorce law since the country ratified the United Nations Convention on the Rights of the Child. Presentation of how children’s interests are identified and considered. Emphasizes the need for appropriate professional training and analyzes the extent to which the new laws are being adequately implemented.


Explores the limited implementation in Ghana of the child’s right to be heard as protected in the United Nations Convention on the Rights of the Child. Discusses how cultural values and beliefs, as well as a prioritization of rights and needs by children themselves, effects implementation. Notes how—in locations where rights to and needs of education, life, food, shelter, medical attention, and parental care are of higher priority and less likelihood—children told the researcher, “If you do not express your opinions you will not die” (135).

Provides background of previous research, studies, and assumptions. Outlines current study on how children felt being involved with family justice professionals (including judges). Summarizes and quotes children’s perspectives. Analyzes and reviews child participation structures. Notes how the study results bust the prior assumptions: children view judicial interviews as positive because they feel that they matter and that their voices are being heard. Emphasizes that this is true even if their preference is not honored; most are relieved the ultimate decision is not on their shoulders.

*Additional Guidance*

Discusses the controversy over judges meeting with children, the legal context, and the permissive legislation. Proposes that the purpose of judicial interviews of children is not to gather evidence, but to make the children feel at ease about the process and like their voices are being heard. Provides in depth guidelines and rationales.

*Updated*

Discusses the continued controversy surrounding judicial interviews of children in Canadian family court. Outlines Canadian law and reviews the various procedural methods implemented for children’s participation. Summarizes key empirical findings of children’s perspectives, judicial views and practices, and attorney input. Argues that “children should be offered the opportunity to express their views directly to decision makers in a manner that is sensitive to their needs and circumstances . . . [but] should never be required to speak to a judge if they do not wish to” (136).


Presents the pilot project to implement recommendations of the United Nations Convention on the Rights of the Child. Outlines the Rights, including purpose and principles, and provides an overview of child involvement in Israeli family courts. Gives committee recommendations for child participation in court cases, including the structure of the pilot. Summarizes children’s reactions and parents’ viewpoints. Discusses the contributions and benefits of judicial interviews. Analyzes the differences between interviewing with social workers and with judges. Presents problems, both real and imagined, and their solutions.

*Additional Guidance*
Reviews the benefits of judicial interviews. Discusses how lawyers’ negative perceptions of children’s interactions with judges act as a gate that then limits those interactions.

*Updated*


Provides findings from a follow-up study into the perspectives of court professionals, including judges and social workers. Discusses cumulative insights into the Israeli pilot project, the regulations of which were extended (with revisions) to all Israeli family courts in September 2014. Emphasizes the need for ongoing professional training and continual program re-evaluation so as to further enhance children’s meaningful and effective participation in family courts. Notes an ever-growing acceptance and support for children’s participation by all involved persons.

Michelle Fernando, Family Law Proceedings and the Child’s Right to be Heard in Australia, the United Kingdom, New Zealand, and Canada, 52.1 FAM. CT. REV. 46 (2014).

Provides a comprehensive overview of the United Nations Convention on the Rights of the Child. Reviews literature on the “child’s right to be heard in family law proceedings in four international jurisdictions, comparing laws, practices, and attitudes relating to children’s participation” (46). Also discusses the benefits of judicial interviews as stated by judges in New Zealand and Scotland.
WORKS CITED, in order of appearance


Rowe v. Rowe, 218 P.3d 887 (Okla. 2009).
A.R.S. §§ 25-403 to -403.01 (2012).
In re Marriage of Hartley, 886 P.2d 665 (Colo. 1994).
Miller v. Miller, 677 A.2d 64 (Me. 1996).
In re A.G., 13 N.E.3d 199 (Ohio 2014).
In re Hammill, 732 P.2d 403 (Mont. 1987).
Hon. Ken Sanders, Court Commissioner on the Family Law Bench, Arizona Superior Court in Pima County, as guest expert for Juvenile Law class presentation at the University of Arizona James E. Rogers College of Law (Oct. 8, 2015).
Barbara A. Atwood, *Representing Children Who Can’t or Won’t Direct Counsel: Best Interests Lawyering or No Lawyer At All?*, 53 ARIZ. L. REV. 381 (2011).


In re Gault, 387 U.S. 1 (1967).


Stanley v. Illinois, 405 U.S. 645 (1972)

U.S. Const. amend. XIV.


E-mail from Mark Armstrong, member and past-Chair of the State Bar of Ariz. Fam. Law Prac. & Proc. Comm., to author (Sept. 9, 2015) (on file with author).


