

VOICE OF THE CHILD:

PSYCHOLOGISTS vs LAWYERS: DARE WE COMPARE?

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Voice/Views of the Child – What do Psychologists do and Why?

What do children mean when they say things?

I want a pony



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More of what children say...



- My mom isn't being nice to me. One time I was sleeping this way on the bed (she indicated sideways) and she picked me up and slammed me the other way. When my brother was a baby my mom wouldn't let my dad touch him. Sometimes mom is funny but most of the time she is quite mean. Most of the time she just beats us up. Mom arrested my dad in Hinton when I was a baby and in Leduc and St. Albert. Mom knows I'm scared of the dark and one night she closed her door.

The context...

- This was the third play therapy session for a 7-year-old girl.
- In the first two sessions, when brought by her mother, she was happy, appeared positive and readily engaged in play activities.
- When brought for her third session (brought by her father) she announced she did not want to play; she wanted to talk.
- She spoke for 15 minutes, including the above statement.
- She then went to the waiting room, climbed on her dad's lap and they whispered back and forth.
- She came back into the office and said "OK, we can play now".

And Now – Let’s Meet Sharon

- Sharon was then asked why she calls her father Walter and she went on at great length stating:
- “He wants me to call him dad but I prefer Walter because he’s so rude. He even says he hates Don and that makes me sad. Whenever Walter says stuff about mom or Don I get mad and fight with him. I don’t want to live with Walter, I want to live with mom and Don. He kicked my sissy out of the house. What I want is one day with him and he does not believe me. He says no, that’s not true. And Walter sends bad notes to my mom. When I was a baby and bit him he smacked me on the bum so hard mom had to put lotion on it. He said sissy doesn’t love me but she does.”





- Sharon was then asked if there is anything her mother wanted her to remember to tell me. She replied:
- “She wanted me to tell you a girlfriend with boys stole my room and I need to sleep on the couch. Now they’re going to move out because Walter says bad words about them. He painted my room greenish blue. I lie to them a lot and say mom says bad things but I’m lying because I want to live with my mom. He says Sally wants to live with me. I say that but I want to lie. Mom puts me on the listening chair for five minutes. Walter won’t give me food or drinks and if I talk I have to stay there longer. He buys me toys so I love him more. I like the toys but he will say Don won’t bath me and mom can’t sleep with him but he sleeps with me and baths me. He washes my stuff with Tide and I have sensitive skin and I cough and he never put lotion on me. He wasn’t taking care of his dogs. Jasmine died because he got so old and he gave them McDonald’s, not dog food, just human food.”

- Sharon was then asked if there is anything else her mother wanted her to tell me. She stated:
- “No. I also want to tell you I don’t like Walter because he makes me go on the listening chair because I say bad words: stupid, fuck and fucking asshole. I say them when I get mad. I say them because he gets me mad every time. You need to know if he said something bad to my mom I said I will hang up on him. When I go back he asks why did you hang up did mom say bad words? He asks if Don touched you in bad parts. I say no. He says Don is a bad guy and I will never live with Don. I try to help mom getting Walter away from her.” Sally was asked what she meant by bad parts and she replied “like the penis”.



Oh, I forgot to mention...

Sharon is six-years old



What Should Psychologists Know...

Let's Look at a best practices document...



Model Standards of Practice for Child Custody Evaluation © 2006
Association of Family and Conciliation Courts

According to AFCC Standards –
necessary knowledge includes

- (1) the psychological and developmental needs of children;
- (2) family dynamics, including, but not limited to, parent-child relationships, blended families, and extended family relationships;
- (3) the effects of separation, divorce, domestic violence, substance abuse, child alienation, child maltreatment including child sexual abuse, the effects of relocation, sexual orientation issues, and inter-parental conflict on the psychological and developmental needs of children, adolescents, and adults;
- (4) the significance of culture and religion in the lives of parties;

- (6) when and how to interview or assess adults, infants, and children;
- (8) how to collect and assess relevant data and recognize the limits of the reliability and validity of different sources of data;
- (9) how to address issues such as general mental health, medication use, and learning or physical disabilities;
- (10) how to apply comparable interview, assessment, and testing procedures that meet generally accepted forensic standards to all parties;
- (12) how to inform litigants, children, other participants, and collateral sources, of the purpose, nature, and method of the evaluation and the limits of confidentiality;

- (15) how to make the relevant distinctions among the roles of evaluator, mediator, therapist, parenting coordinator, and co-parenting counselor;
- (16) how to write reports for the courts to which they will be presented;
- (17) how to prepare for and give testimony at deposition or at trial; and,
- (18) how to maintain professional neutrality and objectivity when conducting child custody evaluations.

- (c) Areas of additional specialized training include:
- (1) the assessment of allegations of child sexual abuse issues;
 - (2) the assessment of children's resistance to spending time with a parent or parent figure and allegations of attempts to alienate children from a parent, parent figure, or significant other;
 - (3) the assessment of children's best interests in the context of relocation (move-away) requests by one parent;

Competence

Limits on Practice

5.1 A psychologist shall not provide a professional service or supervision unless the psychologist is competent through education, training or experience to provide that professional service.

5.3 A psychologist, when developing competency in a professional service that is new to the psychologist, shall engage in ongoing consultation with a psychologist or other professional who has expertise in that area and shall seek appropriate education, training, and supervision in the new area.

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The Myth of Twelve

- There is a popular misconception that at the age of 12 a child is able to decide which parent they want to live with. This appears to have arisen from a variety of sources:
 - Child welfare issues where children have been forced to grow up too fast and will run away to the streets if in a bad or non-restrictive placement.
 - Criminal law that does not hold children accountable until the age of 12.
- There are no dimensions of child development that would suggest a child at 12 can fully understand the consequences of cutting one parent out of their life:
 - Cognitive, Emotional, Social, Moral

Characteristics of Children: The "Four A's" of Conflicted Families

- **Alienation** - the child is being "turned" against one parent.
- **Alignment** - the tendency for the child to choose one side in the marital dispute.
- **Affiliation** - the child feels closer to one parent or the other.
- **Appropriate** - the child is appropriately disconnected from one parent due to negative experience(s) with that parent.

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High Conflict Children

- False claims of abuse create an instant life change (residence, contact...).
- Child accepts allegations as truth and becomes a “victim”.
- Child reduces stress by “picking” one parent.
- Child reduces stress by telling each parent what he/she wants to hear.
- Child is enlisted into parent’s dysfunctional behaviours.

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Steps in Conducting a V.O.C. Evaluation for Psychologists

- Step 1: Communication with Lawyers: You need to ensure that the process is appropriate and the results will not be misused.
- Step 2: Service Agreements: Make it clear and detailed.
- Step 3: Court Orders: Make sure the Order matches what you are going to do. Keep communication to 3-way emails or calls.
- Step 4: Starting the Process: Do not start until you have the Signed service agreement, Retainer fee, Filed copy of Order

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Voice of the Child: Process

- Separate Interview with each parent (may include BASC-3)
- Interview 1: Child Brought by one parent after being in their care. Standard Questions, May include testing (BASC-3, PPVT-4). Don't forget informed consent.
- Possible document review and/or collateral contacts
- Interview 2: Child Brought by other parent after being in their care. Questions designed to clarify issues you have seen.
- Report Writing

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Voice of the Child: What It Is...What It Isn't

It is:

- Obtaining the child's opinion of the situation and what their preferences are.
- An exploration of the stresses on the child.
- An evaluation if what they say is their opinion or appears influenced.

It isn't:

- Letting the child pick which parent to be with.
- Done without context (interviewing parents).
- An assessment of the child or the parents.
- A therapeutic conversation with the child.

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Evaluative Voice of Child

- Must be done by a qualified professional
- Will include views, but will also include content related to the expert's observations that speak to reliability and influence in the child's stated views
- Will employ expert knowledge of child development, the 4A's, separation dynamics, high conflict families, myths and assumption set out above

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Evaluative Component

- Are the child's examples age and vocabulary appropriate and from a child's perspective? Or, are they adult issues using adult vocabulary and perspective?
- Is the child talking about herself /himself or using words like "we"?
- Does the child have credible examples or the same simple complaint repeated over and over?
- What needs are seen for the child or with the family that could be addressed?

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Evaluative Component - 2

- Has the child thought out the consequences of a potential change in residence/schedule?
- Is there evidence of alienation from the child’s statement or from what the parent has said?
- Sometimes an “alienating” parent will proudly describe what they do/say to “protect” their child.

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Voice of the Child – What do Lawyers do and Why?

Legislation and case law
 Value of and nature of evidence
 Role of lawyers – in representation and reports

Themes

- There is potential value to report on the “views of the child” by counsel
 - Many Canadian judges prefer this to interview
K.R.D. v C.K.K., [2013] N.B.J. No. 332, per Baird J.
- Still controversy and confusion in Canada
 - Only views, or also “facts” related by child?
 - Lack of consistency in process
 - Views versus assessment of whether “real views”?
 - Views versus broader assessment of interests?



Evidence of children in family law proceedings

- Sworn evidence – may be necessary if *evidence of experiences* of facts in dispute is essential
- Hearsay - No specific exception to hearsay rules (other than in CYFEA)
 - Reliability - Depends in part who statement made to
 - Necessity – what are the alternatives?
 - Generally little weight, if statements repeated by parents
- Videos, letters or affidavits of child



Evidence - 2

- **“Views of the Child” reports**
 - MH professional or lawyer reporting only on interview (or 2)
- Lawyer for child telling about child’s views
 - Advocacy = position on issues
 - Concern about lawyer “giving evidence from counsel table”
- *R.M. v J.S.* , 2013 ABCA 441
- Interview with judge in chambers
- Forensic custody evaluations



Role of Counsel for a Child

- “It is advisable that the lawyer inform the other parties and the court whether a normal lawyer client relationship exists between the lawyer and the child, or whether the lawyer is taking an alternate approach and, if so, what that approach is” *Law Society of Alberta*.
 - Bala, N. “Child Representation in Alberta: Role & Responsibilities of Counsel for the Child” (2006) 43 Alta L.Rev. 845-870
- Representing a child does not equal providing evidence of their experiences, only stating their positions, unless expressly authorized

Purpose of VCR's

"The purpose of getting a view of the child report is to allow a child to speak frankly to a qualified neutral third party without the child being pressured to say things that the parent wants to hear."

K.L.S. v J.G.M., [2012] B.C.J. No. 387

"The sole purpose of requiring a Voice of the Child report is to ensure the Court hears the views and the preferences of the child without pressure from any source."

New Brunswick v S.T., [2014] N.B.J. No. 74

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Ethical Considerations

- Acting within competence
- Acting with judicial authority
- Addressing evidentiary and admissibility issues, whether raised by other parties or not
- Respecting the weight with which the court views participation by counsel assisting a child (representation or reporting)

Professional should not express "opinion"

"[W]hether anyone authoring a 'Voice of the Child' [report] should be entitled to express so-called expert opinion in any area of a court ordered report, without a particular opinion having been sought by the court, is of some serious question. After all, what is actually being authorized by a 'Voice of the Child' is the formal collection of hearsay evidence (if offered for the truth of the assertion) because it is necessary (i.e. to avoid children becoming more directly exposed to custody disputes and because, where feasible, children's views and preferences need to be considered). From a principled evidentiary perspective, what a court is obviously seeking is the most accurate rendition, i.e. an account that meets a threshold of reasonable reliability. Of course, the determination of the accuracy and ultimate reliability of that evidence is for the judge, as is the weight to be accorded to the views and preferences expressed, whether based specifically on the age and maturity of the child or globally, in the context of the child's circumstances as a whole."

M.A.S. v J.S.S., [2012] N.B.J. No. 350



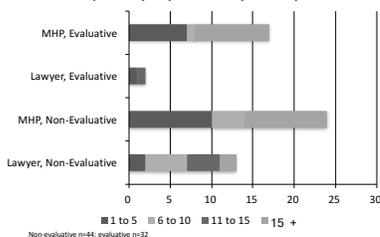
Lawyer's duty of competence

- 3.1-1 In this rule
- “competent lawyer” means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including:
 - (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises
 - (h) recognizing limitations in one’s ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

Competence for lawyers in VCR’s

- Competent in law about parenting
 - Competent to interview a child without suggestion, bias
- If providing more than verbatim reports, consider:
- Competence in child development, alienation, influence, post-separation family dynamics
 - Competence in report writing for court purposes

Number of evaluative and non-evaluative reports completed by respondents in past five years



CANADIAN RESEARCH INSTITUTE FOR LAW AND THE FAMILY

Guidelines for VCR's

- The BC Hear the Child Society
 - Guidelines for lawyers
 - Includes verbatim report process
- Nova Scotia Guidelines
 - VCR;s provided by "assessors" who may give evidence
 - Promote use of model orders
 - Include considerations of report writing process, limiting bias, what is to be included and excluded



Recommendations for VCRs

- Clarity when order made
 - Evaluative or not
 - notice to both parents: *L.C.E. v E.S.B.*, [2014] B.C.J. No. 1258
- Training & consistency between professions
- Report process
 - Neutrality
 - Give child choice about contents
 - Warn parents NOT to interrogate
- Report content
 - Not an assessment, avoid views about "reliability"
 - Child's statements of fact may be admissible; however weight to be given to any report may be challenged

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What voice does this child need?

- | | |
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| <ul style="list-style-type: none"> • <u>PSYCHOLOGISTS CAN:</u> • Provide VOC in course of an assessment • Provide an evaluative VCR – including context and interpretation, within limits, due to competencies • Can give report, or give evidence and be cross examined | <ul style="list-style-type: none"> • <u>LAWYERS CAN:</u> • Provide views of the child through representation as amicus or counsel, but only views and not evidence • Provide a non-evaluative or verbatim VCR, without opinion • Should proceed under Order that authorizes hearsay report as evidence |
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WORKSHOP DISCUSSION

1. What 3 factors most influence the request for a VCR in your practice?

Examples: Older child, allegations of alienation, lack of other resources for child participation, funding for VCRs is/is not available

2. What are the advantages to mental health professionals doing VCRs?
3. What are the advantages to lawyers doing VCRs?
4. In what ways could a VCR be misused or dangerous?
5. Will you make any changes to how you request/receive VCRs as a result of this presentation – if so, what?

QUESTIONS AND ANSWERS

Comments?

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