

7-16-2015

Children's voices in family law conflicts

Benedetta Faedi Duramy

Golden Gate University School of Law, bfduramy@ggu.edu

Tali Gal

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>



Part of the [Family Law Commons](#)

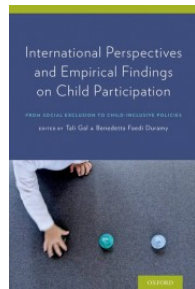
Recommended Citation

Faedi Duramy, Benedetta and Gal, Tali, "Children's voices in family law conflicts" (2015). *Publications*. Paper 735.
<http://digitalcommons.law.ggu.edu/pubs/735>

This Blog Post is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.



Children’s voices in family law conflicts



International Perspectives and Empirical Findings on Child Participation

[BUY NOW](#)

BY [BENEDETTA FAEDI DURAMY](http://blog.oup.com/authors/benedetta-faedi-duramy/) AND [TALI GAL](http://blog.oup.com/authors/tali-gal/)

([HTTPS://GLOBAL.OUP.COM/ACADEMIC/PRODUCT/INTERNATIONAL-PERSPECTIVES-AND-EMPIRICAL-FINDINGS-ON-CHILD-PARTICIPATION-9780199366989](https://global.oup.com/academic/product/international-perspectives-and-empirical-findings-on-child-participation-9780199366989))
JULY 16TH 2015

Children are commonly recognized as separate human beings with individual views and wishes worthy of consideration. Their ability to freely express these views and wishes constitutes the concept of child participation, defined by Article 12 of the United Nations Convention on the Rights of the Child as the right of children capable of forming their own views to be able to express themselves freely in all matters affecting their lives. Children should particularly be provided with the opportunity to be heard in any judicial and administrative proceedings pertaining to them, either directly or through appropriate representatives, and with necessary precautions and support.

Beyond the international law definition of child participation, the right of children to be heard has been increasingly recognized by national courts, even in the United States, which qualifies as one of the very few countries that has not yet ratified the Convention. For instance, the recent case *In Re Marriage of Winternitz*, 2015 DJDAR 3526 (27 February 2015) decided by the 4th District Court of Appeal, Division I, of California on 27 February 2015, includes an important holding regarding children’s wishes in custody law disputes. The California Family Code Section 3042 provides that courts should consider and give due weight to the wishes of a child when making an order granting or modifying custody or visitation. The statute has also recently granted permission to children to address the court if they are 14 years or older, unless it is against their best interest.

California courts have interpreted this statute in different ways. Some judges allow children to provide testimonies, others prefer to meet with children privately, and finally some still refuse to hear children’s preferences. The *Winternitz* opinion concerns Tami Winternitz’s request to move away with her minor daughter, Jamison. The father, William Winternitz, opposed the move and sought custody of the daughter. The trial court found that denying the move-away request was in the best interest of the child and decided to grant primary custody to the father, in spite of Jamison’s wish to remain with her mother. The court clarified that the fact that the decision did not follow the child’s custodial preferences did not establish an abuse of discretion because her wishes were expressly considered and given due weight by the court.





Photo by Succo. CC0 Public Domain via [Pixabay](http://pixabay.com/en/hammer-books-law-court-lawyer-719066/)

(<http://pixabay.com/en/hammer-books-law-court-lawyer-719066/>).

Empirical studies conducted in Ireland and New Zealand have compared the different approaches adopted by national courts in providing children with the opportunity to be heard in family disputes. Findings show the importance of legislation in securing the implementation of the right of children to have their wishes taken into due consideration. In Ireland, where there is no proper regulation granting children the right to participate in family law proceedings, judges reluctantly and seldom seek children's views. In New Zealand, on the other hand, courts are very supportive and accustomed to this practice, regulating judicial interview with children through legislation and national guidelines.

Studies conducted in Canada found that both judges and children benefit from judicial interviewing. Children shared their wish to be involved in the decision-making process affecting their family situations without dictating the final decision. They want to have "a voice, not a choice." Judges, also, believed that meeting with children is a useful tool to complement or corroborate the facts and information about a case. Other studies in Israel have suggested that allowing children the opportunity to participate in their parents' disputes has a positive impact on the decisions reached by the court and contributes to children's well-being and satisfaction with the process. In addition, parents were surprised to find that the information sought by a third party helped them better understand their children and what they were going through. In California, when children are denied the opportunity to meet with the judge and have their voice heard, they become disappointed and frustrated.

Thus, the goal of allowing children to participate in judicial proceedings affecting their lives is not to impose their preferences or grant them veto power. It is instead about empowering children to voice their feelings and opinions and promote their self-esteem, respect, and trust in others and themselves regardless of the outcome. This is also the correct interpretation and the purpose of the children's right to participation under the United Nations Convention on the Rights of the Child. Thus, even though judicial opinions, as in the *Winternitz* case, may not always follow the child's wishes, the court's concern to consider and give them due weight in reaching the decision is exactly what child participation is about.

Image Credit: "Epic Parenting 101" by Peter Kirkeskov Rasmussen. CC BY NC-SA 2.0 via [Flickr](https://www.flickr.com/photos/peterras/14360584083/) (<https://www.flickr.com/photos/peterras/14360584083/>).

Benedetta Faedi Duramy, JSD, is an Associate Professor at Golden Gate University School of Law in San Francisco. She obtained her doctoral degree from Stanford Law School, Stanford University, where she received numerous awards for her extensive research and scholarship on gender-based violence, with a special focus on Haiti. She is the author of several chapters and articles on human rights, children's rights, and gender. She is the co-author of *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (<https://global.oup.com/academic/product/international-perspectives-and-empirical-findings-on-child-participation-9780199366989>) with Tali Gal. **Tali Gal, PhD**, is Assistant Professor and Head of the MA Program at the University of Haifa School of Criminology. Dr. Gal's research interests, teaching, and publications involve children's rights, restorative justice, victims' rights, and therapeutic jurisprudence. Her book *Child Victims and Restorative Justice: A Needs-Rights Model* was published by Oxford University Press in 2011. Prior to her academic career, she practiced law as a children's rights advocate and Legal Advisor at the Israeli National Council for the Child.

POSTED IN: [BOOKS](http://blog.oup.com/category/subtopics/books/) ([HTTP://BLOG.OUP.COM/CATEGORY/SUBTOPICS/BOOKS/](http://blog.oup.com/category/subtopics/books/)) / [LAW](http://blog.oup.com/category/law-legal/) ([HTTP://BLOG.OUP.COM/CATEGORY/LAW-LEGAL/](http://blog.oup.com/category/law-legal/)) / [SOCIAL WORK](http://blog.oup.com/category/science-medicine/social-work/) ([HTTP://BLOG.OUP.COM/CATEGORY/SCIENCE-MEDICINE/SOCIALWORK/](http://blog.oup.com/category/science-medicine/social-work/)) / [SOCIOLOGY](http://blog.oup.com/category/social-sciences/sociology/) ([HTTP://BLOG.OUP.COM/CATEGORY/SOCIAL_SCIENCES/SOCIOLOGY/](http://blog.oup.com/category/social-sciences/sociology/))

Subscribe to the OUPblog via email:

Your@email.here

Subscribe

Or subscribe to articles in the subject area by [email](http://blog.oup.com/subscribe-oupblog-via-email/) (<http://blog.oup.com/subscribe-oupblog-via-email/>) or [RSS](http://blog.oup.com/follow/) (<http://blog.oup.com/follow/>)

What to read next

<p>What Test Should The Family Courts Use To Resolve Pet Custody Disputes? (Http://Blog.Oup.Com/2014/07/What-Test-Should-The-Family-Courts-Use-To-Resolve-Pet-Custody-Disputes/)</p> <p>JULY 5TH 2014</p>	<p>Three Objections To The Concept Of Family Optimality (Http://Blog.Oup.Com/2014/06/Family-Optimality-Same-Sex-Marriage/)</p> <p>JUNE 12TH 2014</p>	 <p>The US Supreme Court, Same-Sex Marriage, And Children (Http://Blog.Oup.Com/2015/07/Us-Supreme-Court-Same-Sex-Marriage-Children/)</p> <p>JULY 9TH 2015</p>
---	---	---