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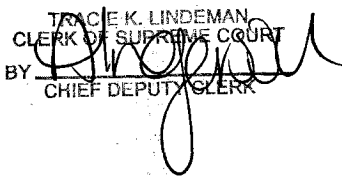
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January 5, 2015

FILED

JAN 26 2015

Chief Justice Mark Gibbons
Justice Nancy M. Saitta
201 South Carson Street
Carson City, NV 89701-4702

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

Justices Gibbons and Saitta:

This letter discusses proposed changes to NRCP Rule 16.215--interviews with children. It is a written submission and comment.

The Committee members are diligent, knowledgeable, and caring. I submit, however, the proposed Rule fails to meet the needs of litigants and the courts: (1) there are no findings as to what harm, if any, a child may suffer if called to testify in a custody matter, and thus the Rule does not inform Bench and Bar what is at stake in the interview or failure to interview and (2) the Rule does not require judges be trained to conduct interviews themselves or to evaluate interviews conducted in alternate methods (NRS 50.500, et seq).

The reasoning:

1. Usually, it is better for children to be heard in the controversy about them. That is the default position courts, lawyers, and parents should take according to the attached work from Ms. Pickard and recent works by Dr. Joan Kelly, respected child psychologist.
2. Judges *must* listen to competent children. They "...shall consider and set forth its specific findings concerning...(a) The wishes of the child if the child is of sufficient age and capacity...". NRS 125.480.
3. Each trial judge must master the investigation techniques needed to interview child witnesses--police, defenders, and prosecutors do.
4. The training is relatively simple, easy and likely available. The training resources have already been created for those who investigate sex crimes and abuse, e.g., assistant DA's and law enforcement.
5. Judges dislike it when parents/lawyers want them to hear the testimony of children and, we lawyers believe, hold it against the lawyer and client. The Court must change

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15-52732

that culture through education to emphasize the benefit to a child of being heard. If Judges do not interview because they do not think they can do so effectively, training will give the judges confidence to take on the task.

6. Judges may refer the task to others under NRS 50.500 et. seq.--the "alternative method" provisions.

7. The "others " to which the matters are referred are usually psychologists and custody evaluators per NRS 50.500 et seq.

8. The "alternatives" are not necessarily trained or skilled in the methods of interrogation. See the works of David Martindale, PhD. on the lack of investigative training and general incompetence of evaluators and psychologists in investigative interviews.

9. Even with "alternatives," the judge must be trained in the interview methods so he or she can evaluate the effectiveness of the "alternative." If the judge were a lawyer, minimum competence and best practices would require the training to cross-examine the "alternate;" this should also be true for jurists.

10. The Proposed Rule does not provide for training, does not discourage the use of "alternatives" and does not make findings on the potential harm and help the child's testimony presents.

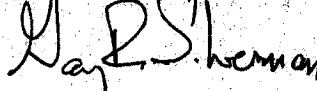
Thank you for your attention to this important topic. At bottom, the public believes judges are special--skilled, kind, wise, knowledgeable in the law and willing to apply it. If the parties know that special person will himself/herself listen to their child, I submit fewer cases will require an interview as parents are as conflict-adverse as the rest of us. Simple *willingness* to listen will increase esteem for the judicial system--more so in those case where an interview is necessary and it is executed with skill.

Please amend your Rule (or make such other order as you might) to provide that judges should usually conduct the child interview and be trained in doing so.

I have attached information from Ms. Pickard which may be helpful.

Respectfully submitted,

SILVERMAN, DECARIA & KATTELMAN, CHTD.



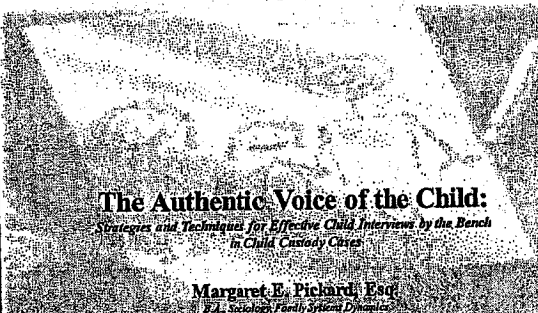
GARY R. SILVERMAN

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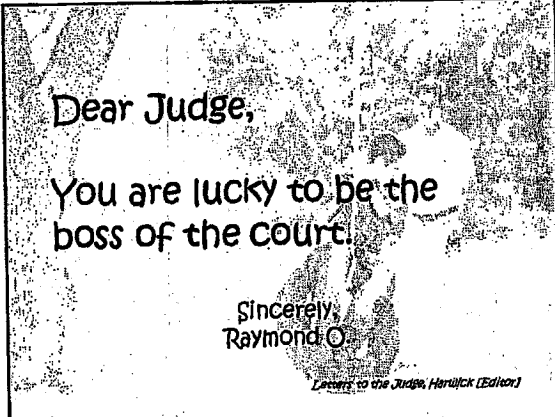
CONTINUING EDUCATION

DIVISION OF EDUCATIONAL OUTREACH



The Authentic Voice of the Child:
*Strategies and Techniques for Effective Child Interviews by the Bench
in Child Custody Cases*

Margaret E. Pickard, Esq.
P.L. Sociology Family System Dynamics



Dear Judge,

You are lucky to be the
boss of the court.

Sincerely,
Raymond O.

Letter to the Judge, Herlihy (Editor)

Rights of the Child

- UN Convention on the Rights of the Child (1989)
 - Applies to civil, political, social or cultural rights
 - Article 12:
 - » Children who are “capable of forming his/her own views” have a right to be heard in “any judicial or administrative proceedings affecting the child”
 - Views of the child shall be “given due weight in accordance with the age and maturity of the child.”
 - Signed by 200 countries
 - Not ratified by US
 - Cited by USSCT *Roper v. Simmons*, 543 U.S. 551 (2005)
 - » Wishes and preferences are ONE factor in best interests
 - » NRS 125.480 (4) (a):
 - The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her custody

Challenges to Judicial Interviews

- *How do we give children the right to be heard without harming them in the process?*
 - What is the effect if we do not follow their expressed wishes?
 - Inappropriately empowering the child
- *How can we hear the child's "authentic voice"?*
 - Loyalty binds/Parental influences
 - Proximity (who brought the child to interview?)
 - Suggestibility
 - Fear of reprisal (parent's reactions)
 - Most fearful of unstable parents' reaction/blame
- *Age Considerations*
 - Children under 12 cannot be expected to assimilate relevant information, understand the process or provide reliable information
(Fidler, 2011)

HOW you begin the interview is crucial

Putting it in Perspective

What Social Science Research Tells Us

- *Children want to be heard*
 - Input – want to know they were heard
 - Perceived control
 - Children who have a perception of control are better adjusted
 - Perceived control is important for positive mental health (Mertinsson)
 - Impact of Lack of Control: Stress, loneliness, isolation, self-blame, anger
- *Voice v. Choice [Separation/Divorce]*
 - Children don't want to make decisions
 - If they do, it's a RED flag
 - Intimidated or influenced by one parent
Kelly 2002/Kelly & Kirkland, 2009

Even when children do not get the outcome they want, they need a voice

Dale & Steinbaum, 2011

Dear Judge,

I want you to undivorce my mom and dad. It is just not working out for me.

Sincerely,
Debbie

Data Collection

- Ideal Circumstances:
 - *Observing children interact with each parent*
 - Parent/Child interviews provides the best source of information for determining healthy relationships
 - Multiple interviews and observations are preferable
 - » Not feasible in courtroom setting
 - » *There is no evidence to show that judicial interviews harm children*

Peto & Brinkman, 2011

Judges need interviewing tips to increase the reliability of judicial interviews

Perspectives for the Bench: *Hearing a Child's Authentic Voice*

1. **Challenges to Hearing the Child's Voice**
 - Cognitive Ability*
 - Suggestibility*
 - Situational Influences (Time and Place)*
2. **Interviewing Protocol**
 - Increases reliability*
 - Minimizes negative impact*

Children's Cognitive Development

- **Younger Children** (<11 years)
 - Limited Cognitive Ability
 - *Acquisition:* Don't understand complex events/relationships
 - *Memory:* "Borrowed Scenarios"
 - *Reporting:* Limited (time delays, influences)
- **Older Children** (>12 years)
 - External influences trump all
 - Parents, peers, family

Social factors strongest influence on encoding, maintenance and retrieval

Brown & Kulik, 1977 (Flashbulb Memories)

Suggestibility

- **Memory can be influenced**
 - *All children are influenced*
 - Age, maturity, expectations, experience, time
 - Situational (where, when, how questioned)
 - Interviewers influence children
 - **Accuracy:** *Memory is not a video recording*
 - We believe that we remember things accurately
 - But details are often wrong but they feel right
 - **Source Monitoring Errors** = "Borrowed memories"
 - *Parental influence plays a large part in memory*

Devin Rosier & McDermott

Great suggestibility associated with low scores on IQ, self-esteem
Harris, Goodman, August, et al.

And don't forget... Children Lie

- **Children in conflict lie more than their peers:**
 - **Protect themselves**
 - Avoid punishment/suek they don't want
 - Embarrassment
 - **Impression management**
 - Maintain appearance of being consistent
 - **Adaptive Management**
 - Trying to survive parent's conflict
 - **Help/Protect one parent**
 - Fear, loyalty
 - **Omissions:** Children will omit information if adults ask them to
 - **To be polite**
 - Children tell us what they think we want to hear

Robert Lee, Emery & Bala 2004

All of us distort the truth based on experiences, recollection, and intimidation

Tips for Child Interviews

Golden O's:

- (1) Ask **ONCE**
 - Re-asking questions makes children think their answer is wrong
 - "If I asked a question, it doesn't mean your answer was wrong; I may have forgotten that I asked it"
- (2) Ask **OPEN-ended** recall questions
 - Allows for memory recall 3-5 times more reliable
 - Avoid yes/no answers ("Did your father threaten you?")
 - Children 5 more likely to say "yes" when asked yes/no questions
 - Don't prompt (Did your mother tell you...)
 - Ask for specifics
 - "Could it be helpful to their answer, ask for examples "Could you give me an example of that?"
- (3) Ask **ONLY simple** questions (no compound questions or negatives)
 - **Leading:** This child is going to finish that question...
 - "Oh yes... can you tell me more about that?"

• **Few Interviewers follow a protocol**
 Children are often asked inappropriate questions, confusing language and complex questions, leading to inaccurate and unreliable information

Three Types of Questions

- **Recognition**
 - "What's your name?"
 - "How old are you?"
- **Reconstruction**
 - "You said... Tell me about that."
- **Free Recall**
 - "What's your favorite thing to do?"

*Free recall provides the most reliable information
BUT younger children need prompting*

5 Wh Questions

Prevents leading questions

- **What, Where, Who, When, Why... How**
 - General to Specific Questions
 - Open-ended questions
 - "Who spoke to you?" - General
 - "What was the color of his hair?" - Specific
 - Specific: Good for younger children who need direction
 - Do Questions: Preparatory
 - "Do you have homework after school?" "When do you do it?"
 - Unanswerable wh questions
 - Children more likely to admit they don't know the answer
 - **YES/NO Closed Questions (yes/no)**
 - BOTH children and adults are more likely to answer YES
 - Wittman, Blada, Spencer 2001

What, where and who provide more accurate responses

Avoid REPEATING

- Avoid **repeating** questions
- Avoid **editing**
 - Helping the child answer
- Avoid **pronouns**
- Avoid **evaluation** bias
 - Confirmatory bias
- Avoid **asking** where they want to live
 - "Really"/Non-verbal responses
- Avoid **time & degree**
 - "How long ago" something happened/lasted
 - Children under age 12 have poor sense of time
 - "How many times" something happened
 - Children under age 12 have poor understanding of elapsed time
 - "How bad" something was

Best Practices Protocol Overview

Semi-structured

- *Set the Stage*
- **Stage 1: Opening** [Roles Purpose & Rules]
 - Get Acquainted
 - Discuss Confidentiality
 - Ground Rules (no matter wrong answers they tell you that's ok)
- **Stage 2: Interview**
 - DON'T start with the child in mind
 - Confirmatory Bias? Neutrality is key
 - Ask questions for information not opinion
- **Stage 3: Closing**
 - Clarification & Follow Up

Key: Introduce as little information as possible while trying to elicit as much information as possible

Set the Stage

- **Preparing for the Interview**
 - **Location:**
 - Chambers Preferred but due to recording issues
 - **Courtroom**
 - Take off your robe
 - Sit at a table NOT across from the child
 - Face child [use eye contact, trust]
 - Listen [don't interrupt, interfere with free recall]
 - **Siblings:**
 - Interview separately
 - Increases honest responses


Step 1: Opening

- **THE CHILD:** *Shake child's hand & Smile* (personalizes)
 - "What's your name?"
- **THE COURTROOM:** "Do you know who I am?"
 - Introduce self & others in the courtroom
- **THE PURPOSE:** "Do you know what I do?"
 - "Has anyone told you why I wanted to meet with you today?"
 - If "yes":
 - "What were you told?"
 - "Who told you about it?"
 - "Your parents have asked me to help make some decisions about where you are going to spend time and I wanted to talk to you."
 - "I need to do what is in your best interests"
 - "Do you know what best interests means?"
 - "It's not always what you want to happen but it's what is best for you"
 - Like eating Ice Cream
 - Emphasize "Judges make decisions, not children"
 - "I will make the final decision based on what I believe is in your best interests"

Dear Judge,

Please send me the
definition of Best
Interest of the Child.

Sincerely,
Carolyn



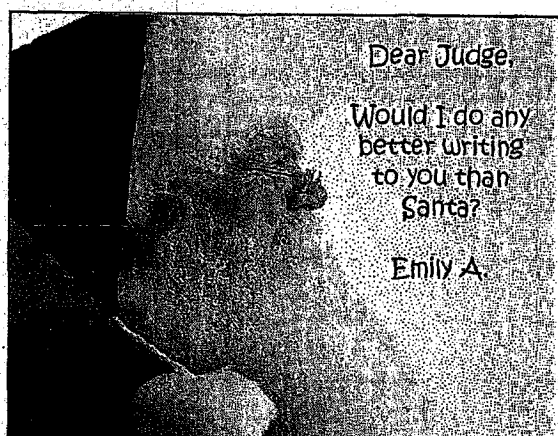
Monologue

- **LET'S TALK:**
 - "I would like to talk to you and ask some questions."
 - "There are no right or wrong answers to my questions."
 - "It's OK if you don't know an answer."
 - "If you don't know, just tell me."
 - "If I ask you my dog's name, what would you say?"
 - "If I ask a question, you don't understand, you say 'I don't understand'."
 - Children rarely ask for clarification.
 - "If I repeat a question, it doesn't mean that you are wrong. I just forgot that I asked it or I might be confused."
- **TELLING THE TRUTH:**
 - "I want you to tell the truth..."
 - Give them a sentence "My balliff is wearing a purple polka dotted shirt" - Is this true?
 - "It's OK to correct me if I say something wrong."
 - TEST: Misstate a fact on a neutral topic to see if they correct.
 - "Ok, so you are (misstate age) you go to (misstate school)?"
- **PUTTING WORDS IN THEIR MOUTH:**
 - "Has anyone asked you to tell me anything?" Who/What

Confidentiality

- **Recording:**
 - "We record things that are said in court, including our conversation."
 - Normalize recording.
- **Confidentiality:**
 - "Your parents can listen to this later."
 - Children must be told this!!!
 - Otherwise, it undermines their trust & security in the future.
 - » Younger children often don't care.
 - » Teenagers are concerned about parent's reactions.

Be clear about this!!!



Investigative Utterances

- **Facilitator** = "OK" "Uh-huh..."
 - Non-suggestive prompt to continue
- **Invitation** = "Tell me more about that..."
 - "What happened next..."
 - Open-ended question help recall information
 - "What do you want to talk about now?"
- **Directive** = "You mentioned... Tell me more"
 - Cued prompt for further recall of information

vs.

- **Option-Posing**
 - "Do you prefer being with your Mom or Dad?"
- **Suggestive Utterances**
 - "Your Mom has an alcohol issue that I would like to discuss with you"

Key is not to interject information, judgment, assessment or non-verbal cues

Step 2: The Interview

- **Start Simple** = every "right" answer reduces child's anxiety
Starting with open-ended questions increases length & detail of recall answers throughout interview

GETTING TO KNOW THE CHILD: (5 minutes - sufficient/10-15 min. fatigue)

- "Where do you go to school?" (caution: "attend")
- "What things do you like about school?"
- "What would you change about school?"
- "Who are your friends?" (tip: "Do you make friends pretty easy?")
- "What kind of things do you like to do outside of school?" (open, broad)

(known narrative areas such as birthday, ask child to describe how "tell me about your birthday")

If the child looks scared, crying, quiet...


- "You look nervous/You are crying/You are quiet"
- "What makes you nervous/scared/cry?" NOT "Why?"
- "Do you think something will happen to you if you talk to me?"

WARNING:

Don't ask: address, phone number, favorite television shows, etc.

Grandma's Visit

Children's Interview



In each house, what is their day like?

Daily activities: breakfast, chores, homework

Can you tell me about your day? Dad's day? Mom's day?

What time do you wake up? What time do you go to bed at night?

Can you tell me about your day? Mom's house? Dad's house?

What time do you get up? What time do you go to bed at night?

Explain: no different? same?

Friends:

"Who are your friends at Mom's house/Dad's house?"

"Do you have friends over at Mom's house/Dad's house?"

"What do you like about your friends..." "What would you change..."

Parents' Friends:

"Who does Mom spend time with?" "Who are they?" "Do you like them?"

"Who does Dad spend time with?" "Who are they?" "Do you like them?"

"Do you have cousins?" "Do you spend time with them?" "Where?"

Chores:

"Do you have chores at Mom's house?" "Do you have chores at Dad's house?"

"If yes, 'What chores do you do?' 'What's your favorite chore?' 'What is your least favorite chore?'"

Homework:

"Do you have homework after school?" "When do you do it?"

"Does anyone help you with your homework?" "Who?"

Discipline:

"Do your brothers/sisters get into trouble at Mom/Dad's house?" "What happens?"

Bedtime/Routine:

"What do you do before you go to bed at Mom's house?"

"What do you do before you go to bed at Dad's house?"

Sleeping:

"Where do you sleep at Mom's house/Dad's house?"

School Activities:

"Do you do any activities at school before/after school?" "What?"

"Do you have friends/games after school?"

"Who takes you?" "Does anyone else go?" (Mom, Dad, Grandparents)

Explore Parental Relationships

- "Tell me about your Mother"
 - What kinds of things do you like to do with your Mother?
 - What are three things you like about your Mother?
 - What are three things you would like to change about your Mother?
- "Tell me about your Father"
 - What kinds of things do you like to do with your Father?
 - What are three things you like about your Father?
 - What are three things you would like to change about your Father?

Ask What, Where, Who....

Avoid When

(Younger children have little concept of time)

Parental Attitudes

Reasons for Divorce

- "Do you know why your parents don't live together?"
[Exploring reasons for divorce may help to identify parental comments:
"Mom can't stand Dad's drinking."]

Attitudes towards other parents:

- "What does your Mom say before you visit your Dad?"
- "Does your Mom help you get ready to go to Dad's house?"
- "What does your Dad say when you visit your Mom?"
- "Does your Dad help you get ready when you visit your Mom?"

Siblings

- "What would your brother/sister say if they were sitting here?"
- Takes the "blame" off the child's shoulder.

Red Flags of Undue Parental Influence

- 1. **Campaign of denigration**
Child clearly expresses a rejection of one parent/Doesn't want to see one parent
Can't remember ANY good memories with rejected parent
One parent's first name and/or calls target parent "him," "cheater," etc.
Spread of animosity
Rejects one parent's family and friends
 - 2. **Lack of ambivalence/guilt**
Irrational reasons for rejection
 - 3. **Independent Thinker Phenomenon**
• "My Mom said it's my choice where I want to live."
• Adult language, misuse of words, rehearsed quality
 - 4. **Reflexive support of Interfering Parent**
• "We"/Uses interfering parent's last name
• All or Nothing (one parent all good/one all bad)
 - 5. **Borrowed Scenarios** (stories heard from others)
• Remembers events they could not possibly recall (birth, court proceedings, etc.)
- Most children want relationship w/ both parents**
- Even abused children are ambivalent about their abusers

Exploring Undue Influence

- If you sense undue influence by one parent, explore:
• "If your Mother was here, how would she describe your Father?"
• "If your Father was here, how would he describe your Mother?"

Can the child identify anything negative about the favored parent?

- If Mother appears "favored":
• "What is your favorite thing about your Father?"
- If Father appears "favored":
• "What is your favorite thing about your Mother?"

Source Monitoring

- When children tell you stories that are likely "borrowed":
Ask: "Where did you learn that?"
• Young children may not remember HOW they know

Three Wishes

*If you had three wishes,
what would they be?*

...Tell me more about that...

**Step 3: Wrapping It Up:
The Child's Voice**

THE CHILD'S VOICE:

- "Have you talked to anyone about these things before?"

- "Who did you talk to?"

- "What did they tell you to say to me?"

- "Is there anything that you would like to say that you didn't have the chance to say?"

THANK THE CHILD: "Thank you for coming in."

- Tell the child the next step in the process

- "I will review what we discussed today, as well as the information your parents provided and make a decision about what seems to be in your best interest."

- "Reminder: There are issues that judges decide and I wanted to talk to you today just to get to know you better."

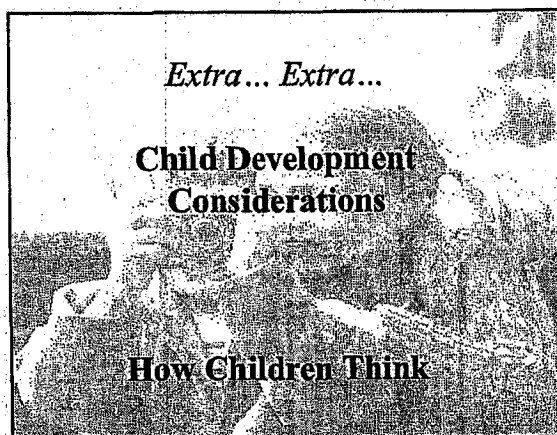
- "Do you have any questions?"

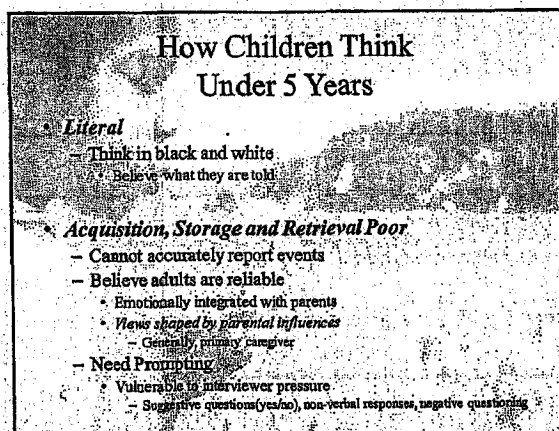
Dear Judge,

**I promise to You and God to
never do this to my children.**

Eligh







How Children Think 5-7 Years Old

- **Pre-Logical**
 - Can't explain own thinking
 - Reporting: May attribute reasons/causes inaccurately
- **Acquisition, Storage and Retrieval Poor**
 - Poor Time Perception
 - Can't determine how long hour/work is
- **Egocentric thinking**
 - See things from their own perspective; Can't understand other's point of view
 - Assume you know what they know
- **Young children's free recall is limited**
 - Need prompting.... "Tell me more about that..."
 - BUT suggestive and biased
 - May lead to guessing the answer

How Children Think 6-11 Year Olds

- **Concrete/Literal**
 - Only answers questions you ask
 - Difficult with hypotheticals
 - "What if..." (likely to guess)
- **Acquisition, Storage and Retrieval Poor**
 - **Memory is faulty**
 - Avoid "do you remember?"
 - Can't assess time
 - "How long?" "How often?"
 - Can't extrapolate
 - "What would it be like to have time with..."
 - **Egocentric: Perceives responsible for everything**
 - Avoid asking "why"

12 Years and Older

- **Abstract Thinking/Reasoning**
 - Therefore, have difficulty with loyalty conflicts
- **Acquisition, Storage and Retrieval Biased**
 - Developed Time Perception
 - landmark dates (birthdays, holidays, etc.)
 - Sense of Fairness/Justice
 - wants control of self/environment
 - **Influenced by parents, peers, self-interest**
 - Often protector/caretaker of vulnerable parent