



# PROFESSOR LEX

BY HARVEY I. HAUER

Dear Professor Lex:

**I am embroiled in a high-conflict custody case that I believe will eventually have to be tried. The court has set a deadline for exchanging witness lists. My client wants me to include the parties' minor child on her list of witnesses. Do you think that it is an appropriate course of action?**

**Practitioner**

Dear Practitioner:

I have no factual background pertaining to your case. The following should be helpful to you. "It is well established that to protect a child from the trauma and distress of choosing between his or her parents in open court, a trial court may exclude the child's parental preference testimony from trial and instead interview the child in camera.<sup>FN9</sup>" *Surman v Surman*, 277 Mich App 287, 297, 745 NW2d 802 (2007). Footnote 9 states:

MCR 3.210(C)(5); *In re Leu*, 240 Mich 240, 249 (1927) (stating that in custody disputes it is "wise and considerate on the part of all to refrain from publicly pressing the child in open court by direct and cross-examination as a witness to take sides or make choice[s] between his parents"); *Molloy v Molloy*, 247 Mich App 348, 351 (2001) (*Molloy II*), *aff'd in part and vac'd in part* 466 Mich 852 (2002); *Impullitti v Impullitti*, 163 Mich App 507, 510 (1987) ("[B]y conducting an in camera conference with the child, which was limited to determining the child's preference and excluded discussion of other factors not germane to the custody dispute, the judge appropriately protected the child from the trauma of choosing between

her two parents in open court."); *Burghdoff v Burghdoff*, 66 Mich App 608 (1976). [*Id* at Fn. 9 (some internal citations omitted).]

The *Surman* Court held that "when necessary to facilitate a trial court's assessment of the child's best interests, a trial court may call a child to testify in court concerning his or her allegations of abuse during a child custody proceeding." *Id* at 303. Accordingly, *Surman* relaxes the blanket-prohibition on all testimony from a minor child in open court, but the *Surman* Court extends the exception *only* to "abuse or mistreatment." *Id* at 302. Such a narrow exception is consistent with longstanding Michigan Jurisprudence:

A private, informal interview with the child by the court would seem to be the natural and most effectual way to obtain an unembarrassed and uninfluenced expression of the child's actual choice. [*Ex parte Leu*, 240 Mich 240, 250, 215 NW 384, 387 (1927).]

The facts in your case are going to determine whether or not it is appropriate for you to call the child as a witness, based upon the holdings cited herein.

Answer respectfully submitted by  
Harvey I. Hauer, Hauer & Snover.

The above response is not meant to serve as a solution to a case. That would require complete disclosure of all facts in the case, including client consultation. Rather, the intent is to provide informal guidance based upon the facts that have been presented. The inquiring lawyer bears full legal responsibility for determining the validity and use of the advice provided herein.

Please send questions for Professor Lex to [Hhauer@hauersnover.com](mailto:Hhauer@hauersnover.com).

