

## ‘In Chambers’ Interview Amid A Child Custody Dispute

Elisa Reiter and Daniel Pollack | May 23, 2022



“In chambers” or “in camera” refers to a hearing in the privacy of the judge’s office. These meetings usually take place in order to examine particularly sensitive or private information outside of the formal courtroom setting. One of the purposes of such an interview is to determine whether or not a child has a preference regarding with whom the child will reside. Such interviews may be conducted based on the

motion of a party, or an amicus or an ad litem attorney. The trial court, as always, has the duty to act as a gatekeeper, as demonstrated by the U.S. Court of Appeals for the Fifth Circuit's recent opinion, filed April 25, 2022, in *In the Interest of J.N., L.N., K.N. and M.N., Children*, 2022 Tex. App. Lexis 2678.

TEX. FAM. CODE Section 153.009 provides in pertinent part as follows:

***Sec. 153.009***

***Interview of Child in Chambers***

1. In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child, the court shall interview in chambers a child 12 years of age or older and may interview in chambers a child under 12 years of age to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence. The court may also interview a child in chambers on the court's own motion for a purpose specified by this subsection.
2. In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child or on the court's own motion, the court may interview the child in chambers to determine the child's wishes as to possession, access, or any other issue in the suit affecting the parent-child relationship.
3. Interviewing a child does not diminish the discretion of the court in determining the best interests of the child.

In J.N., the mother appeals the 302nd District Court's neglecting to interview the eldest of the parties' four children in chambers, per the mother's request. The eldest child was over the age of 12 at the time of trial. The mother presented testimony at trial of what she posited demonstrated a pattern of physical abuse by the father of the mother during their marriage. In her appeal, the mother argues that TEX. FAM. CODE ANN. Section 153.004(b) precluded the trial court from appointing

the parties as joint managing conservators, in light of TEX. FAM. CODE ANN. Section 153.004(b), as she contends that she presented credible evidence of a pattern or history of physical abuse by the father, including her testimony that:

1. The father allegedly threw a small bookcase at her, slamming the item at her bare feet. Asked if she was injured, her response was “[i]t broke my heart.”
2. Friends had observed the father yelling at the mother, adding that he confined her to an area, and that “these sorts of things started happening almost constantly.”
3. When the mother moved out with the children, the father carried her gun to her vehicle, handing the gun to her and inquiring if she wanted to take it with her. Asked if that moment frightened her, the mother responded, “It was the scariest moment of my life.”

The father did not deny the foregoing incidents, nor does the record reflect that he was asked about the incidents, though he had addressed one or more of the allegations in the course of a child custody evaluation. The father presented testimony from Christopher Bouchard, a Dallas County family court counselor, regarding the child custody evaluation Bouchard prepared. The child custody evaluation acknowledged the bookcase incident, but added that father explained that he accidentally set the bookcase on his wife’s foot, which incited mother to hit father. When he then attempted to restrain her, the mother had bitten the father and then ran away. Bouchard noted that he reviewed mental health records for each party, and further, that his interviews with the children prompted concern that the mother was trying to sway the children’s opinions of their father by using allegations of abuse against him. Bouchard indicated that one of the children noted that the mother had given the child “suggestions of things to say in his interview with” the child custody evaluator. Bouchard also testified that

he reviewed a report provided by a marriage counselor with whom the parties had worked for two years, during which time the mother opined that the father was “unstable, unsafe and angry.” That counselor, Tim Young, did not agree with the mother’s assessment, nor was Young presented with any third party who might substantiate the mother’s perception. Bouchard recommended that the parties remain joint managing conservators, and that the father have the exclusive right to establish the children’s primary residence.

The children’s maternal grandmother also testified at trial. The maternal grandmother testified that while she harbored no concerns about the father providing care for the children, the mother’s allegations of abuse by the father began only after the parties’ separation, and further, that the mother “needed ‘rehab’” for prescription drug dependency.

Nothing in the record indicates that the 302nd Judicial District Court failed to consider the mother’s allegations that the father engaged in a pattern of physical violence. By contrast, there were additional proceedings where the mother filed an application for protective order, and further, the father filed a writ of habeas corpus alleging the mother had failed to turn the children over to him as required by temporary orders. The associate judge heard the application for protective order, denied that application, and ruled as follows:

1. The father should turn over his firearms to his attorney.
2. The mother’s application for protective order be denied.
3. The mother should turn the children over to the father by 6 p.m. the evening of the temporary hearing.

The mother appealed the associate judge’s recommendation. At the hearing de novo, the trial judge confirmed the associate judge’s

recommendation, and denied the mother's application for protective order. While the early stages of the trial were not part of the appeal, nor was there a record from the temporary hearing, the appellate court did make note of those early rulings.

Almost one year after the trial, the 302nd court entered a final decree of divorce naming the children's parents joint managing conservators and granting the father the exclusive right to determine the children's primary residence. In reviewing the record, the Fifth Court of Appeals finds that the trial court did not err in finding that the mother failed to present credible evidence of a pattern of domestic violence. Further, in regard to the mother's contention that the trial court erred in failing to interview the eldest child in chambers, despite repeated requests by the mother for such an in-camera interview. The appellate court observes that the 302nd District Court's failure to interview the eldest child in chambers should be the subject of a "harm analysis" pursuant to TEX. R. APP. P. 44.1. The appellate court stresses that TEX. FAM. CODE Section 153.009(c) gives the trial court leeway to measure the veracity and credibility of each witness. Therefore, "even if M.N. had expressed a preference to live with mother, as mother suggests she would have done, the trial court would not have been obligated to make a different conservatorship decision."

The appellate court also stresses the important public policy of keeping two or more children together during periods of possession, pursuant to TEX.FAM. CODE ANN Section 153.251 (c). Ultimately, the Fifth Circuit concludes that the trial court's failure to interview the eldest child in chambers was harmless error. Attorneys can learn a number of lessons:

1. If you want to have a child interviewed in chambers, timely file a formal written motion.
2. Often, the pattern established at a temporary hearing will continue to influence the court in a de novo hearing and/or at trial.
3. Having firearms does not necessarily merit entry of a protective order, though it may be prudent to request an order that the firearms be safeguarded in some way during the pendency of the case.
4. There are rules and there are exceptions to rules.
5. The best interest of the children should always be the primary concern of the trial court in its capacity as gatekeeper.
6. The trial court is truly entrusted with great discretion.

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