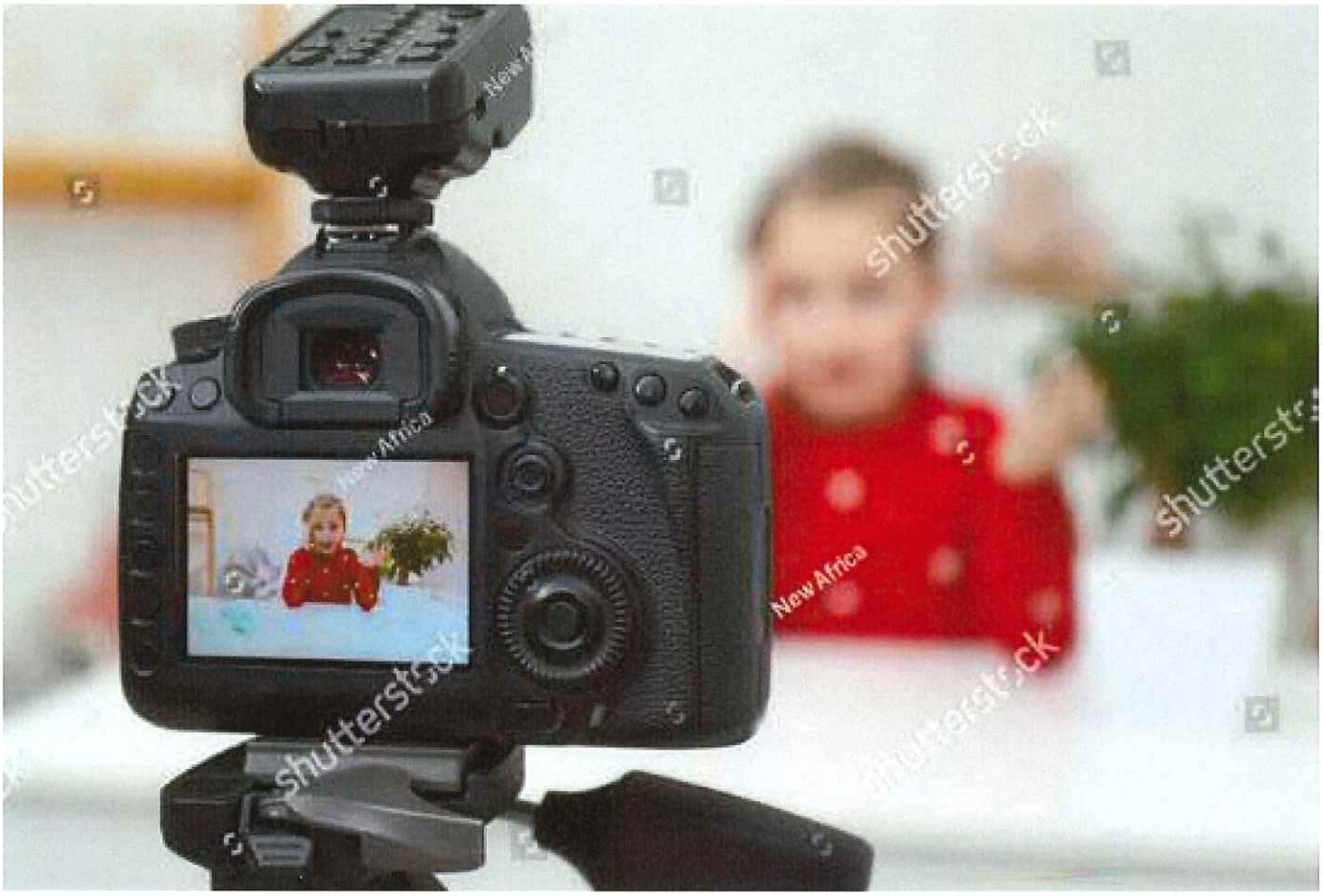
In Cameras and Lincoln Hearings: Ongoing Questions of Due Process Persist

By Lee Rosenberg, Editor-in-Chief



With contested initial custody and custody modification matters seemingly proliferating at a higher rate, post-COVID, than ever before, there is equally rampant ongoing discussion criticizing various aspects of the process. These run from delay in having matters heard to conclusion, to the role of the child's attorney (in concept and in actuality),[1] to due process concerns relating to in camera interviews with children, and all in between.

This last issue continues to be vexing and misunderstood. The perception of the sacrosanctity of the in camera interview appears impenetrable,[2] despite the existence of case law that does not make it so. Similar to the oft confused differences between a Lincoln hearing[3] and a "run of the mill" in camera interview,[4] the closed door, cone of silence,[5] Fort Knoxian view of the utter inviolability of the in camera interview that bars all attorneys and parents from looking behind the curtain, is not as absolute as proponents assert and well intentioned, concerned judges enforce.

While many jurists (and attorneys for children—often placed, despite the rules of the chief judge and name change from law guardian[6] —in a continued position of deference) do not like the due process argument, its short shrift does not do justice. Further, due process may be properly addressed while still providing clearly necessary parens patriae[7] protection for the child.[8]

Lincoln v. Lincoln

The seminal case addressing in camera interviews is the Court of Appeals' 1969 decision in *Lincoln v. Lincoln*. Though often misunderstood as to its function (see endnote 2), the *Lincoln* court asserted that a private interview with the child "will limit the psychological danger to the child, and will also be far more informative and worthwhile in the traditional procedures of the adversary system—an examination of the child under oath open court." The court provided for confidentiality in the transcript of the in camera interview proceeding with

the child's interest to be superior to that of the parents, and felt confident that the information to be provided to the trial court in this private manner—attended only by the judge, the child's attorney, and a stenographer—would be subject to corroboration during the course of an open hearing for purposes of "checking on its accuracy." Some 54 years hence, we still cannot know how the court is "checking the accuracy" of the in camera interview when we are precluded from all of the information.

Lincoln, though, references a binary choice between the private interview with the child or an examination of the child under oath in open court. Ultimately, upholding the private procedure used by the trial court, the Court of Appeals saw "no error or abuse of discretion in the procedure followed by the trial court." It does, however, conclude with the following clear observation: "The entire issue is a most delicate one, but in weighing the competing considerations, we are convinced that the interest of the child will be best served by granting to the trial court in a custody proceeding discretion to interview the child in the absence of its parents, or their counsel." This, again, is not and has never been a blanket prohibition against a parent being permitted their due process rights beyond the complete secrecy that currently exists, and the *Lincoln* court recognized the "grave risks involved in these private interviews."

In the underlying Appellate Division, First Department decision,[9] the majority, while finding the ultimate conclusion of the trial court to be appropriate, found the trial court's private interview and denial of counsel to be present, to be erroneous, and noted that the trial court could have placed restrictions on counsel's participation, citing to *Kessler v. Kessler.*[10] The Court of Appeals did not address any in-between options, however, and affirmed, with use of the word "discretion."

Cases of More Recent Vintage

In 1996, the Third Department in *Sellen v. Wright*[11] found that the Family Court properly denied the mother access to the transcript of the Lincoln hearing as she failed to address the *specifics* of any harm or prejudice that resulted from the court's ruling. In a footnote, the court advises that the confidentiality of the Lincoln hearing was breached, as part of the transcript was reproduced and included in the appendix to both parties' appellate briefs. Presumably, when the file went from the Family Court to the appellate court, it was not sealed in the transmission, and was then available to be viewed and attached as part of the appellate record. In its footnote, however the court reminds us of the Family Court's discretion to release the transcript on appeal—citing to the Fourth Department's decision in *Ladd v. Bellavia,*[12] which also references the discretion of the trial court in making the transcript available.

The Supreme Court, Bronx County, also expressed concern as to using the in camera interview as corroboration for the child's hearsay statements where the mother sought to substantially reduce the father's visitation rights. In 2012's *L.D.M. v. R.A.,*[13] the court, quoting *Lincoln,* found, "in instances where the family court receives material adverse to one of the parents during the in camera interview, it is incumbent to 'in some way' ascertain 'its accuracy during the course of an open hearing.' That situation is here." The court explained that because the in camera interview testimony is untested, it would be "inappropriate as well as fundamentally unfair" to use it to "curtail the father's meaningful visitation." This court also compared an Article 6 proceeding to an Article 10 proceeding, and explained that the overall duty in both is the best interests of the child as well as protecting important parental rights.

In *Julie, E. v. David E.,*[14] from 2015, the Appellate Division affirmed the Family Court's denial of the mother's request to relocate with the children to Texas. The appellate court, however, criticized the Family Court for conducting a "modified Lincoln hearing" in which counsel for both parents were permitted to be present during the court's interview with the children and did not seal the transcript. The Third Department found both circumstances to have been improper even in affirming the underlying decision. The court, however, despite referencing *Lincoln* in itself and other cases referencing the lower court's discretion, such as *Sellen v. Wright,* and 2000's *Hrusovsky v. Benjamin,*[15] says nothing about that discretionary power.

In *Sagaria v. Sagaria*[16] from 2019, the Second Department denied the father's application to unseal the minutes of an in camera interview with the parties' child. The court, without categorizing the in camera interview as a Lincoln hearing, cited to *Lincoln* and Family Court Act § 664, noting that the in camera interview must be conducted on the record and sealed in order to protect confidentiality, but stated quite succinctly that "the trial court has the inherent authority to direct the unsealing of the transcript." In affirming the lower court's determination to deny the unsealing of the transcript, it noted that the father "failed to give a sound reason for its disclosure." The Second Department in this regard cited to the First Department's decision in *Anderson v. Harris,*[17] which again addressed the failure "to give a sound reason for disclosure" of the transcript. Notably, the 2010 *Anderson* decision also references *Matter of Sellen v. Wright.*

Citing to *Anderson v. Harris,* the Kings County Family Court in *Sandra S. v. Abdul S.,*[18] reminds us "no court, as far as I am aware, has held at sealing such transcripts during the course of the trial is mandatory or the trial courts lacked discretion to provide the parties or their counsel with copies or otherwise test the accuracy of the child's in camera [interview] disclosures." The court also points out, citing to *Verry v. Verry,*[19] that as a general rule, what happens at a Lincoln hearing, is confidential "absent a direction to the contrary."[20] In

Sandra S., the court had to balance three interests in a custody proceeding: the responsibility of the court to gather relevant information, the duty to protect the child, and the duty to protect the parents' due process rights. The court looked at the ability to distinguish between the types of disclosures that a child may make during the course of the in camera interview and determining which statements are factual assertions versus opinions of the child on matters of custody. The court opined,

> ...a parent in an Article 6 custody case has no less significant to process right to know and meet the factual evidence that will determine his or her constitutionally protected right to the care and custody of his or her child. A child's relevant, factual disclosures in Article 6 in camera interview, like a child's factual testimony, in an Article 10 proceeding, will most certainly influence the ultimate decision, as to which parent is awarded legal custody of the child. Hence, it is imperative that parents and custodial conflicts before the same due process, protections that parents in article 10 proceedings have to challenge the child's factual assertions in some manner through the normal adversary process. Permitting such a challenge will also help for sure that the court's decision is based upon evidence that is as complete and as reliable as possible.

Left with the task to test the accuracy of the information from the in camera interview, the *Sandra S.* court explained that while "a number of courts suggest to preserve the confidences of the child" by sealing the transcripts, no court has held that the sealing is mandatory, or that the trial court lacks discretion to provide parties or their counsel with copies to test the accuracy of the disclosures. Ultimately the court reviewed the transcripts of the in camera interviews to redact all "opinion or preference" statements of the child, and the redacted transcripts were then made available to the attorneys for the parties. The redacted transcripts were then provided with the admonishment that no additional copies could be made, but could be reviewed in the lawyers' office with the parties—essentially the same process used to review a forensic custody report.

In his May 21, 2021 decision in *Matthew A. v. Jennifer A.*,[21] Justice Richard A. Dollinger explored the Lincoln hearing, its purposes, and limitations. Justice Dollinger noted the discouragement of Lincoln hearings in Article 10 proceedings involving abuse and neglect "given the significant due process rights involved." Citing initially to the Third Department decision in *In Re Justin CC*,[22] the court references non-custody proceedings having greater due process implications. In *Matthew A.*, the issue involved whether or not a Lincoln hearing was appropriate in a contempt proceeding. The court concluded, just as in an Article 10 matter, that it was not. The court, contrary to the position taken in *Sandra S.*, in the analysis of different levels of due process rights sees the ramifications of an abuse or neglect case and the quasi-criminal nature of a contempt matter as creating additional concerns whereby the secrecy and confidentialities of a Lincoln hearing would be inappropriate. The court, in a footnote, opines though, that the Court of Appeals should revisit the holding in Lincoln stating "...the half-century-old decision lacks any citations to any professional studies of child psychology for an analysis of the consequences to children when they are questioned in camera during a custody or matrimonial proceeding regarding their preferences, or relations with their parents. Too often, in this court's experience, that prospect can put the children in a hot seat and leaves them potentially exposed to subtle or even direct parental influence, seeking to persuade the child on what to tell the court in private. *J.F. v. D.F.* 112 NYS 3d 438, p. 81 and n. 65 (Sup. Ct. Monroe Cty 2018) (Dollinger J)"[23] The court's footnote is rooted in its concern over involving the children in any form of additional conflict with their parents. That being said, the ongoing existence of the in camera interview remains exactly why due process is vital to a parent's ability to address the "subtle or even direct" parental influence and persuasion that is referenced by the court, and a parent's need to be able to test and challenge those statements, at the very least, in an indirect fashion, if not directly with the opposing parent.

A Balanced Solution Is Needed

It remains unfair and inequitable for the child's attorney to be the only one privy to this information and, depending on how that information is used, can sway the court in favor of the one parent who is more in the know. And perhaps it is the parent more "aligned" with the child's attorney who is actually exercising the undue influence upon the child.

The referenced decisions (save for *Julie, E. v. David E.*, which still affirmed the lower court determination despite the disclosure), including those reinforcing confidentiality, remind us that *Lincoln* does not strictly preclude disclosure. Others such as *Sandra S.* have found a way to balance due process with the need to preserve confidentiality. Other states, including Florida, Minnesota, Louisiana, Maine, Oklahoma, New Jersey, Alaska, Tennessee, and Alabama, provide for parental due process in the in camera interview.[24]

Amidst the ongoing back-and-forth regarding forensic custody evaluations,[25] as well as the extent that such resultant reports with raw data and notes should be available to pro se litigants,[26] it should not be lost that such reports contain statements made by children regarding the underlying issues, and often their views on each parent. While such statements might be subject to redaction at trial, depending on the circumstances and presiding judge, at the very least litigants usually may

read or have summarized the contents of those reports. While the forensic evaluator should tell the child that its interviews are not confidential, statements made by children in that context may be conceivably different from or may corroborate statements made in an in camera interview. Counsel having access to the statements in the forensic report should also have access to the transcript of the in camera interview. Whether any of those statements should be available directly to a parent, or available in the alternative subject to a protective order or redaction, should remain discretionary. But parents' counsel at the very least should know what was said. That does not necessarily require physical presence or participation in the in camera interview but does demand knowledge.

While some judges may permit questions to be provided by the parents' attorneys to be asked, those attorneys do not know whether or not the questions were asked, whether or not or how they were answered, or whether or not the question was modified by the judge or influenced by the child's attorney. And in one recent commentary in the New York Law Journal, an experienced child's attorney stated that judges are frequently testing the credibility of parents in their questioning of the child.[27] Lawyers who represent parents and not children, and thusly not privy to this process, would have no way of knowing that this was occurring but for the published disclosure of a children's attorney. One must then wonder what else is going on behind closed doors. Attorneys representing parents are again not asking, by and large, to be physically in chambers during the course of an in camera interview, but at the very least should be provided with a copy of the transcript in the same confidential manner as the forensic report is. This way, there is at least minimum due process afforded to the parents for purposes of preparing for trial, or even possibly coming to resolution. This article does not call for an end to the in camera interview, which can still operate as a needed and important tool for a court to have at its disposal. It may in fact be argued that early in camera interviews are more vital than waiting for the Lincoln hearing to occur and may very well result in a more expeditious intervention on crucial issues of parenting as well as child well-being.

I believe that the process adopted in *Sandra S.*, while it may not always be optimal, is at least a step forward and certainly better than the status quo. I expect that this view will be scorned by children's attorneys and judges, but this total blockade of information is not the holding in *Lincoln* nor in subsequent cases. It is then incumbent upon counsel to argue and move persuasively for access to at least a modicum of due process where none currently exists. Yes, the court has discretion, but due process properly fits within that discretion to avoid the "grave risks" referenced in *Lincoln,* particularly as children now live in a more sophisticated, confusing, and information-available time, and should be the norm while still subject to reasonable protections.

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Endnotes

1. *See* e.g., *A Somewhat Modest Proposal for Custody Cases: Bring Back the GALS*, Robert Z. Dobrish, NYLJ April 4, 2023.
2. The record of the in camera hearing is sealed even at the appellate level unless otherwise directed. CPLR 4019(b); *Matter of Ladd v. Bellavia,* 151 A.D.2d 1015 (4th Dep't 1989).
3. 24 N.Y.2d 270 (1969).
4. *Matter of Spencer v. Spencer*, 85 A.D.3d 1244 (3d Dep't 2011);. *T.E.G. v. G.T.G.* 44 Misc3d 449 (Sup Ct, Monroe County 2014): The "purpose of a Lincoln hearing in a custody proceeding is to corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing" *Matter of Spencer v. Spencer*, 85 A.D.3d 1244, 925 N.Y.S.2d 227 (3rd Dep't 2011) (a true Lincoln hearing is held after, or during, a fact-finding hearing and adding there is no authority or legitimate purpose for courts to conduct such interviews in place of fact-finding hearings). In short, the lesson from these cases is simple: the court may meet in camera with a child, in advance of a hearing, but the court, in deciding any question involving the children, must hold a fact-finding hearing and thereafter seek to corroborate any trial testimony by examining the children in a Lincoln hearing setting.
5. See *Get Smart,* TV Series, NBC (1965-1969); CBS (1969-1970).
6. 22 N.Y.C.R.R. § 7.2(b).
7. *Matter of Bachman*, 1 N.Y.2d 575 (1956).
8. *See,* e.g., *Court System Should Train Judges on the Importance of In Camera Interviews With Children in Contested Custody Cases*, Sondra J. Miller, NYLJ March 22, 2023.
9. 30 A.D.2d 786 (1st Dep't 1968).
10. 10 N.Y.2nd 445 (1962).
11. 229 A.D.2d 680 (3rd Dep't 1996).
12. See endnote 1.
13. 2012 N.Y. Slip Op. 22260 (Sup. Court Bronx Co. 2012).
14. 124 A.D.3d 934 (3rd Dep't 2015).
15. 274 A.D.2d 674 (3rd Dep't 2000).
16. 173 A.D.3d 1096 (2nd Dep't 2019).
17. 73 A.D.3d 456 (1st Dep't 2010).
18. 30 Misc.3d 797 (Family Ct., Kings Co. 2010).
19. 63 A.D.3d 1228 (3rd Dep't 2009).
20. The appellate court in *Verry* still found that the trial court's disclosure of portions of the in camera did not result in reversible error.
21. 72 Misc.3d 753 (Sup. Ct. Monroe Co. 2021).
22. 77 A.D.3d 207 (3rd Dept 2010).

23. Ironically or perhaps being the intent of the *Matthew A.* footnote, Judge Keating, writing for the Court of Appeals in *Lincoln,* states "it requires no great knowledge of child psychology to recognize that a child already suffering from the trauma of a broken home, should not be placed in a position of having its relationship with either parent further jeopardized by having to publicly relate difficulties with them and being required to openly choose between them." Judge Keating also, in a remarks clearly reflective of the time in which *Lincoln* was decided, repeatedly refers to the hypothetical judge acting in "parens patriae," using the words "he" and "his."

24. See e.g. *Talarico v. Talarico,* 3D20-0560 (Fla. 3d DCA April 22, 2020); *Smith v. Smith,* 425 NW2d 854 (Minn App 1988); In re Lyric, No. E2021-00578-COA-R3-CV (Tenn. Ct. App. Jul. 29, 2022); *Osbourne v. McCoy,* 485 So2d 150 (La Ct App 2d Cir 1986); *Ynclan v. Woodward,* 237 P2d 145 (Okla 2010); *Barrett v. Wright,* 897 So. 2d 398 (Ala. Civ. App. 2004); *Hutchinson v. Cobb,* 2014 Me. 53 (Me. 2014); *Helen S.K. v. Samuel M.K.,* 288 P3d 463 (Alaska 2012); *Campbell v. Campbell,* 397 NJ Super 164 2007). *See also The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions on Reform,* Barbara A. Atwood, Arizona Law Review Vol. 45:629 (2003), at http://www.arizonalawreview.org/pdf/45-3/45arizlrev629.pdf; *The Preferences and Voices of the Children in Massachusetts and Beyond,* Donald R. Tye, Family Law Quarterly, Vol. 50, No. 3, Fall 2016.

25. Numerous forays into forensic evaluations are currently being offered in the Legislature including attempts to provide a moratorium of evaluations and to substantially overhaul the use of evaluations in the context of accusations of domestic violence and abuse cases. The governor's Blue Ribbon Commission on Forensic Custody Evaluations also issued a report in December 2021 with various recommendations, https://ocfs.ny.gov/programs/cwcs/assets/docs/Blue-Ribbon-Commission-Report-2022.pdf. The only law that has passed as of the date of this article relates to educational and training requirements of forensic evaluators effective December 23, 2023 (A00632/S00860. Signed 3/3/23, Laws 2023, Ch 23 amending A02375C/S0685B. Signed 12/23/22, Laws 2022, Ch 740.

26. See proposed legislation at A3771 and S4474. Much of this debate arises from the decision in *Sonbuchner v. Sonbuchner,* 96 A.D.3d 566 (1st Dep't 2012). The dangers of providing unfettered access to these reports and data were the subject of the author's editorial in the summer/fall 2019 issue of Family Law Review, *A Justifiable Double Standard: The Dangers of Access to Forensic Custody Reports by the Self-Represented.*

27. *Praemonitus Praemunitus: The Importance of the In-Camera Interview in Child Custody Matters,* Philip Katz, NYLJ February 27, 2023. Such practice of a court cross examining a child for the purpose of testing the parents' credibility was critiqued in the responding commentary, *In-Camera Interviews Should Not Be Used to Cross-Examine Children About Parents.* Robert Z. Dobrish, Lee Rosenberg, Adam John Wolff, Eric I Wrubel, NYLJ March 2, 2023.