**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

### FAMILY COURT

**DOMESTIC RELATIONS BRANCH**

**[PLAINTIFF], )**

**) DOCKET NO. [YEAR] DRB [NUMBER]**

**Plaintiff, ) Judge [JUDGE]**

**v. )**

**)**

**[DEFENDANT] ) Trial: [DATE] at [TIME]**

**)**

**Defendant. )**

**GUARDIAN AD LITEM’S OPPOSITION TO CHILD’S TESTIMONY**

[GUARDIAN AD LITEM], Guardian *ad litem* (GAL) for the minor child [CHILD] (born [DATE]) hereby opposes the defendant’s [DATE] request to have the minor child testify in the upcoming evidentiary hearing in this matter.

Respectfully submitted,

\_\_*/s/*\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[GUARDIAN AD LITEM], Esq.

D.C. Bar # [NUMBER]

[ORGANIZATION]

[ADDRESS]

[PHONE NUMBER]

[EMAIL ADDRESS]

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**)**

**[DEFENDANT] ) Trial: [DATE] at [TIME]**

**)**

**Defendant. )**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE GUARDIAN AD LITEM’S OPPOSITION TO CHILD’S TESTIMONY**

On [DATE] defendant [DEFENDANT] (defendant or “[DEFENDANT]”) filed a Motion to Modify Visitation in the above captioned case asking the court to take testimony from the [AGE] year old child at issue.[[1]](#footnote-2) The undersigned GAL opposes [DEFENDANT]’s request to have the child testify.[[2]](#footnote-3)

The child at issue in this matter is [CHILD], the only daughter of the plaintiff [PLAINTIFF] (plaintiff or “[PLAINTIFF]”) and defendant. [CHILD] turned [AGE] years old on [DATE] and recently completed [GRADE] at [SCHOOL] in Washington, DC.

The parties have been litigating custody of [CHILD] since [PLAINTIFF] filed for a divorce from [DEFENDANT] in [MONTH] [YEAR]. With the exception of a brief period when Judge [JUDGE] temporarily awarded [DEFENDANT] sole custody of [CHILD] in the above-captioned case, *see* *Temporary Custody Order*, D.C. Super. Ct. Case No. [CASE NUMBER] ([DATE] [JUDGE]),[CHILD] has lived primarily with [PLAINTIFF] in Washington, DC since [YEAR]. During most of this time [DEFENDANT] worked [PLACE OF WORK] in order to provide [CHILD] with financial stability. *See* *Permanent Consent Custody Order*, D.C. Super. Ct. Case No. [CASE NUMBER] ([DATE] [JUDGE]) attached custody agreement at [PAGE #]. However one or both parties have requested that the court modify custody of the minor child approximately every six months since the parties’ divorce was finalized in [MONTH] [YEAR]. An evidentiary hearing on the pending motions to modify is scheduled for [DATE].

Undersigned counsel expects that at the upcoming evidentiary hearing [DEFENDANT], [PLAINTIFF], and former [ORGANIZATION] [POSITION] [WITNESS] will each testify about the relationships [CHILD] shares with [HIS/HER] parents. The testimony will at minimum include observations of [CHILD] with [HIS/HER] mother and father (from [WITNESS] ), statements about activities that [CHILD] likes doing with her parents (from [WITNESS] , [DEFENDANT], and [PLAINTIFF]), and [CHILD] ’s concerns that [PLAINTIFF] won’t allow [HIM/HER] to see [DEFENDANT] (from [DEFENDANT]). The testimony will establish that [CHILD] loves spending time with both of [HIS/HER] parents.

Defendant has proffered that if [CHILD] testifies [HE/SHE] will say that [HE/SHE] wants to live with [DEFENDANT].

**ARGUMENT**

The Court may modify custody if it determines that there has been a substantial and material change in circumstances and that the modification is in the best interest of the child. *See* D.C. Code § 16-914(f)(1). In determining the best interests of the child the court must consider at least seventeen enumerated but non-exclusive factors including the wishes of the child as to her custodian “where practicable.” *Id.* at § 914(a)(3)(A).

The court may not ignore a child’s wishes simply because of her young age. *See P.F. v. N.C.*, 953 A.2d 1107, 1117 (D.C. 2008) (holding that the trial court erred in failing to mention and consider ten and seven year old children’s wishes in awarding custody to the children’s father, despite the children’s undisputed preference to live with their mother). In *Duguma v. Ayalew* the DC Court of Appeals found that the trial court erred in failing to interview three children ages fourteen, nine, and seven when there was no other information in the record about whether the children wished to reside with their mother in Ethiopia or father in the District of Columbia. *See Duguma v. Ayalew*, 145 A.3d 517, 521 (D.C. 2016).

Although the DC Court of Appeals has held that young children may be competent to testify, the court should consider the probative value of the child’s testimony. *In re Jam J.*, 825 A.2d 902, 918 (D.C. 2003). The court should consider the materiality of the child’s testimony, the reliability of the child’s statements, alternatives to taking testimony from the child, and the totality of the evidence. *Id.* (announcing a three part balancing test for whether the child should have testified in a neglect matter where the child made accusatory statements outside of the courtroom: (1) whether testifying would create a risk of serious harm to the child, (2) whether the risk can be alleviated by means short of prohibiting the child’s testimony, and (3) the probative value of the child’s testimony and the parent’s concomitant need for it); *see also Johnson v. U.S.,* 683 A.2d 1087, 1099-1100 (D.C. 1996) (adopting Federal Rule of Evidence 403, which empowers the court to exclude relevant evidence if its probative value is outweighed by several factors including unfair prejudice or needlessly presenting cumulative evidence).

1. THE COURT SHOULD EXCLUDE [CHILD] ’S TESTIMONY BECAUSE IT HAS LOW PROBATIVE VALUE AND THERE IS OTHER EVIDENCE OF HER WISHES.

The probative value of [CHILD] ’s testimony in this case is very low. [CHILD] just turned [AGE] years old on [DATE]. [DEFENDANT] proffers that if [CHILD] is called as a witness she will testify that she wants to live with her mother. [CHILD]’s testimony, however, is not the only or the best way for the court to hear evidence of [CHILD]’s wishes.

The DC Court of Appeals recently reiterated that the court must consider the child’s wishes as one of seventeen non-exclusive custody factors. *See Duguma,* 145 A.3d at 521. *Duguma* held that the court erred in refusing to directly interview the children about their wishes. *Id.* at 521-22. This case, however, is distinguishable from *Duguma* in three important ways. First, unlike in *Duguma* in this case there will be other evidence of the child’s wishes at trial. *Id.* at 521 (stating that “the court received no evidence relating to the children’s wishes”). [DEFENDANT], [PLAINTIFF], and [WITNESS] are all likely to present evidence about [CHILD]’s wishes—namely to continue enjoying relationships with both of [HIS/HER] parents.

This case is also distinguishable from *Duguma* because [CHILD] is considerably younger than the children at issue in that case. *Id.;* s*ee also P.F.,* 953 A.2d 1107. [DEFENDANT]’s proffer does not suggest that it would be practicable for Court to gather information about which parent [CHILD] would wish to be her custodian even if she was called to testify. *See infra* p. 6.

The stakes in this case are also much lower than they were in *Duguma*, where one of the parents resided in Ethiopia. *See Duguma*, 145 A.3d 517. Though plaintiff and defendant live too far from each other to share equal physical custody of [CHILD], the distance between the parties in this case—and the implication for each party’s ability to maintain a relationship with [CHILD] —is not nearly as great as the distance between Washington, D.C. and Ethiopia. [CHILD]’s proffered testimony that she wants to live with [DEFENDANT] is therefore of low probative value.

[DEFENDANT]’s need for the testimony is also low. This case is distinguishable from *In re Jam J.* where the parent would have had no opportunity to confront the children about their specific accusations of neglect if the children were not called to testify. *In re Jam J.*, 825 A.2d at 915 (acknowledging that the importance of eliciting the child’s testimony is heightened where proof of neglect turns on the accusatory statements that the child made outside of the courtroom). [DEFENDANT] is not facing an infringment of parental rights akin to the neglect matter in *In re Jam J.* such that she has a need to confront the child about any wishes expressed outside of court.

Finally, [DEFENDANT] has not offered any reason that [CHILD]’s testimony would be more reliable than alternative methods of considering [CHILD]’s wishes, such as [CHILD]’s conduct and statements outside of the courtroom. Defendant’s proffer assumes that [CHILD] will step into a courtroom for the first time and tell an adult she has never met that she would rather live with her mother than her father. Under circumstances of a contentious custody case, there is no reason to believe that forcing [CHILD] to “choose” a custodial parent in court would reflect her true desires. Children commonly “tell each parent what they think that parent wants to hear at the time” of questioning. Richard A. Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 Family Relations 373, 374 (2003). While having a child testify theoretically allows [HIM/HER] to share [HIS/HER] wishes there is a “tension that exists between empowering children and placing them in the middle of their parents’ disputes.” *Id.* at 375; *see also N.D. Mc.N v. R.J.H., Sr.*, 979 A.2d 1195, 1200 (DC 2009) *(*acknowledging that a “child's choice between parents is often emotionally wrenching, and announcing that choice in open court could add significantly to the child's emotional toll”). Alternatives to taking testimony from the child, such as admitting out of court statements that fall within exceptions to hearsay, will likely constitute sufficient and possibly superior evidence of the child’s wishes. They will enable the court to consider the child’s wishes without further embroiling her in her parents’ dispute.

The totality of these circumstances including: the questionable reliability of [CHILD]’s testimony, the low probative value of her testimony, the nature of the proceeding and the rights at stake, the availability of alternative evidence, and the potential distress to the child in testifying demonstrate that it is not in [CHILD]’s best interests to testify.

1. IN THE ALTERNATIVE THE COURT SHOULD PLACE SPECIFIC LIMITATIONS ON THE CHILD’S TESTIMONY.

If the court does not preclude [CHILD]’s testimony it should (1) interview the child in the presence of only the judge and GAL, (2) determine which of the parties’ questions, if any, the court will ask the child, and (3) schedule the child’s testimony for a different day than the [DATE] evidentiary hearing.

The court may make accomodations to a child’s testimony that serve the best interests of the child, such as conducting the interview *in camera* (as long as there is a record of the child’s testimony available for review) and limiting the scope of the child’s examination. *See N.D. Mc.N.,* 979 A.2d 1195*; In re Jam J.*, 825 A.2dat 916-17*.* Undersigned counsel, as the GAL, is charged with seeking any accomodations that may minimize the adverse consequences that arise from a child being called as a witness by a party. *Superior Court of the District of Columbia Practice Standards for Guardians ad Litem in Custody and Related Consolidated Cases* at pp. 8-9.

Eliciting [CHILD] ’s testimony in the presence only of the judge and the lawyer charged with advocating for the child’s best interests will hopefully reduce the “emotional toll” of expressing [HIS/HER] wishes in court. *See* *N.D. McN.*, 979 A.2d at 1200. Retaining discretion over the questions posed to [CHILD] will similarly insulate [HIM/HER] from emotional distress. Finally, scheduling [CHILD]’s testimony to occur on a separate date from the remainder of the hearing will ensure that [CHILD] does not spend more time in court than strictly necessary and give [HIM/HER] the opportunity to prepare for the experience of testifying.

WHEREFOREthe undersigned GAL respectfully requests that the court deny the defendant’s motion to have the minor child testify or in the alternative place the aforementioned limitations on the child’s testimony.

Respectfully submitted,

\_\_*/s/*\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[GUARDIAN AD LITEM], Esq.

D.C. Bar # [NUMBER]

[ORGANIZATION]

[ADDRESS]

[PHONE NUMBER]

[EMAIL ADDRESS]

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**[PLAINTIFF], )**

**) DOCKET NO. [YEAR] DRB [NUMBER]**

**Plaintiff, ) Judge [JUDGE]**

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**)**

**[DEFENDANT] ) Trial: [DATE] at [TIME]**

**)**

**Defendant. )**

**(PROPOSED) ORDER REGARDING CHILD’S TESTIMONY**

Upon consideration of the defendant’s [DATE] request to have the minor child testify at the [DATE] evidentiary hearing in this matter, the plaintiff’s position, the Opposition to Child’s Testimony filed by the Guardian *ad litem*, the relevant case law and the record in this matter the court hereby DENIES the defendant’s request to have the minor child testify. [DEFENDANT]’s [DATE] Motion to Modify Visitation is therefore DENIED IN PART.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Judge [JUDGE]

Associate Judge

Copies to:

[PLAINTIFF]

[ADDRESS]

*Plaintiff, pro se*

[DEFENDANT]

[ADDRESS]

*Defendant, pro se*

[GUARDIAN AD LITEM], Esq.

[ORGANIZATION]

[ADDRESS]

*Guardian ad litem*

**Certificate of Service**

I hereby certify that on [DATE], a copy of the foregoing Guardian *ad litem*’s Opposition, to Child’s Testimony was mailed by first-class mail, postage pre-paid to:

[PLAINTIFF]

[ADDRESS]

*Plaintiff, pro se*

[DEFENDANT]

[ADDRESS]

*Defendant, pro se*

*\_\_\_\_\_/s/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_*

[ATTORNEY]

1. Undersigned counsel was not served with defendant’s motion but learned of its existence and obtained a copy of it from the Domestic Relations Branch Clerk after the hearing in this matter on [DATE]. [↑](#footnote-ref-2)
2. The defendant makes two other requests in addition to having the child testify. She asks the court to (1) award her more visitation with the minor child and (2) to drug test the plaintiff. This GAL supports the first request, as detailed in the Guardian *ad litem*’s Pretrial Statement filed in this matter on [DATE], and takes no position on the the request to drug test the plaintiff. [↑](#footnote-ref-3)