The Child in the Court Room

Professor Jo Delahunty QC

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This lecture will explore

Whether the Family justice system is doing enough to give a voice to the children who are the subject of its deliberations?





- What does the family justice system do to hear the voice of the child?
- Opening the Court Room door
- The judge meeting the child
- The judge hearing the evidence of the child
- The child's right to participate in hearings abut its future
- Is the child's voce heard loudly enough?

"As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants.....

But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides.

Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them."

Lady Hale: Re D (A Child) (Abduction: Rights of Custody) [2007] 1 FLR 961

"There is the wider issue of how we treat the vulnerable, whether they come before us as parties or witnesses. Vulnerability comes in many forms. In our understanding of these issues, and in the practices and procedures which are in place to enable the vulnerable to participate fully and fairly in our courts, the family justice system lags woefully, indeed shamefully, behind the criminal justice system"



per Munby P speech to Family Law Bar Association [2015] Fam Law 386

Final Report of the Vulnerable Witnesses and Children Working Group

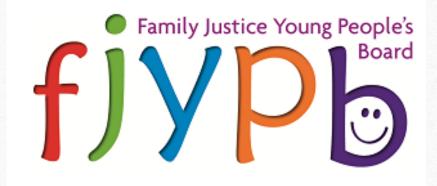
Chaired by Mr Justice Hayden and Ms Justice Russell set up by Sir James Munby in 2014.

Published March 2015





The dissatisfaction of children and young people expressed by those on the FJYPB reveals their underlying belief that they are not being listened to and heard.

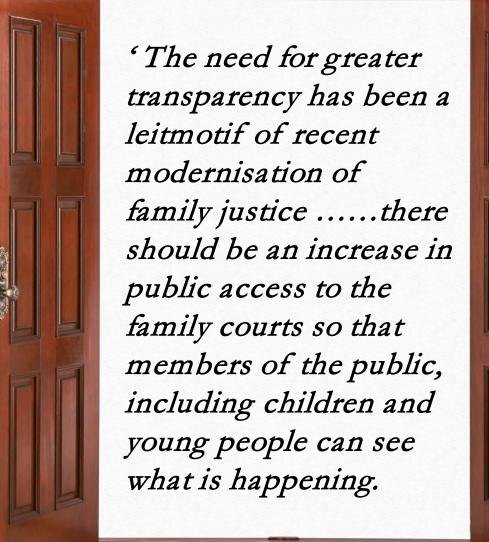


Those young people ... do not expect, or even want, the judge to do as they say; they want to know that they have been listened to and this perceived (and in many cases actual) defect cannot be cured with by meeting the judge or tribunal alone if at all



To hear a child must mean to hear her or his evidence and if the child/young person is not going to give oral evidence there must be provision for their evidence to be heard as directly as possible without interpretation by the court





Open days: Fun for the Family?!





"For too long, children and young people have struggled to have their voices heard during the family court process. Although they are often at the centre of proceedings, the views of children and how they feel are often not heard, with other people making vital decisions for them. I've been really impressed with Family Justice Young People's Board and the arguments which its members put forward. This is why I have taken steps to make sure that children and young people from the age of 10 will be able to express their views in cases which affect them."

"Young people are some of the most vulnerable in society, and it is vitally important that we make sure they are at the heart of the family justice system."

Justice Minister Simon Hughes MP in an announcement on 19.2.15

The Judge meeting the Child?



What could possibly go wrong?

Guidelines for Judges Meeting Children who are Subject to Family Proceedings

Purpose

The purpose of these Guidelines is to encourage judges to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives and to give them an opportunity to satisfy themselves that the Judge has understood their wishes and feelings and to understand the nature of the Judge's task

The primary purpose of the meeting is to benefit the child. However, it may also benefit the Judge and other family members

'Guidelines for Judges Meeting Children who are Subject to Family Proceedings' [2010] 2 FLR 1872'

- B told the Children's Guardian on 30 May 2017 that she would like to meet the judge
- Sol was sent a reminder 27th June
- Friday 30th June solicitor for B emailed the court proposing (assuming) that I meet B
- 15-year-old young person came to the court believing she would be meeting the judge



- No consideration to the purpose of a meeting from B's perspective,
- No provision made for the other parties to make representations as to the desirability
- No opportunity for the court to consider:
 - o The purpose of the meeting,
 - At what stage during the proceedings it should take place,
 - o The location of the meeting,
 - o Who would bring B to the meeting,
 - o Who would prepare B for the meeting,
 - Who would attend the meeting and
 - Who would record it



I was persuaded by the Children's Guardian to see B at the end of the day yesterday, in circumstances where she had been brought to court with that expectation

I was then compelled to renege on that decision when it became apparent that utter confusion still reigned with respect to the manner in which the meeting was to take place.

Macdonald J in London Borough of Brent v D and Otrs [2017] EWHC 2452 (Fam).

- Guidelines drafted to encourage judges to overcome a reluctance to meet the children who are subject to proceedings
- Judges required to consider child's wishes and feelings

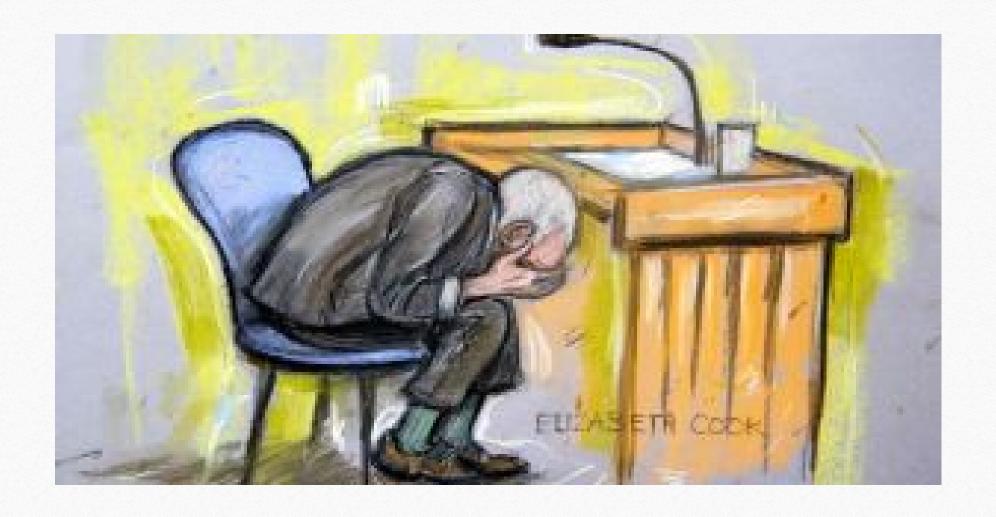
But ascertainment of this evidence is not a judicial function.

What not to do:

Re KP (Abduction: Child's Objections) [2014] EWCA Civ 554, [2014] 2 FLR 660

- 13 year old girl was seen by the High Court judge, Mrs Justice Parker, for over an hour.
- Parker J met with the child directly on the first day of the trial.
- This was not planned in advance, but "the plan for the judge to meet K seems to have developed during the oral testimony of the CAFCASS Officer on the first morning of the hearing"
- K was brought to court after she finished school that day. She had expected to meet the judge at some stage but not that day.

- Parker J and K spoke for over an hour in the well of the courtroom, in the presence of her clerk (who took a full note)
- The child was asked 87 questions by the judge
- The judge concluded that K was confused and was not objecting to returning to Malta on cogent or rational grounds
- The judge departed from the recommendation of the CAFCASS Officer, having concluded that the Officer failed to evaluate the rationale of K's expressed views

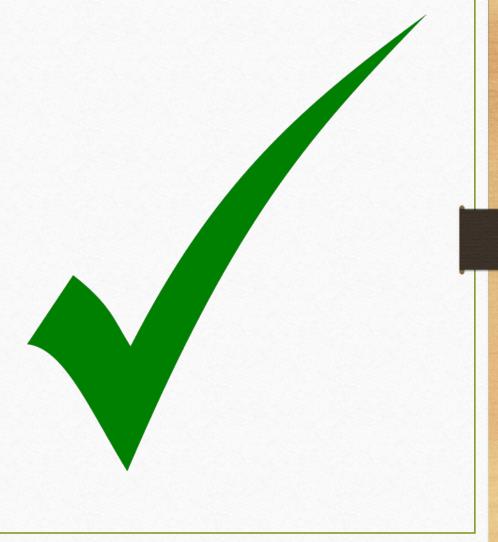


Sir Mark Potter P in <u>De L v H [2009] EWHC 3074</u> (FAM), [2010] 1 FLR 1229.

In that case the young person was also 13 years old.

Sir Mark sets out the various purposes of the judicial meeting:

- "(a) assuring him that I had received full evidence as to the nature and force of his objections;
- (b) at the same time explaining to him the law in relation to the issues before me, the philosophy of the Convention, the constraints upon the English Court on proof of wrongful removal, and the fact that, if I declined to order his return, the Portuguese Court might nonetheless require it; and (c) seeking to dissuade R from his expressed distrust of the Portuguese Court.



The WG recommended that a new Practice Direction be created replacing the 2010 Guidelines for children seeing judges in the Family Court and Family Division setting out in clear terms

- the status of the communication between judge and child;
- including at what point during the proceedings any meeting should take place;
- the persons who should be present and
- the purpose of any meeting.
- There was to be guidance for the manner in which the court's decision is to be communicated to the child

Kids are way smarter than most people give them credit for.

Listen to them; you might learn something.



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Cryonics

14-year-old girl who died of cancer wins right to be cryogenically frozen

Judge backs UK mother in allowing body of teenage daughter, who died of cancer, to be preserved in US - a process her estranged father



The judge, Mr Justice Peter Jackson, ruled that nothing about the case should be reported while she was alive because media coverage would distress her. She was too ill to attend the court hearing but the judge visited her in hospital.

Jackson wrote:

"I was moved by the valiant way in which she was facing her predicament."

TAKING EVIDENCE FROM THE CHILD THE CHILD AS A WITNESS

There was and is a pressing need for the Family Court to address the issue of vulnerable people giving evidence in family proceedings 'something in which the family justice system lags woefully behind the criminal justice system; .

Thousands of children and young people go through the criminal justice system every year but the direct evidence of children is seldom heard or rarely available in the family courts'

48,000 children and young people went through the criminal courts in 2008/9 and 33,000 in 2012 as witnesses

Joint Inspectorate Report CPS & Witness Service

'How young is too Young; the evidence of children under 5 in the criminal Justice system': Ruth Marchant

Very young children are particularly vulnerable, both to maltreatment and to inept adult questioning.

- Very young children can give reliable and accurate evidence.
 - There is now consistency and clarity of guidance in relation to the evidence of very young children at interview and at trial.
 - The communicative competence of very young child witnesses depends heavily on the competence of interviewing teams, intermediaries, advocates and the judiciary

Child Abuse Review 2013 Wiley On line Library DOI 10 1002/car 2273

In **R v Barker (2010) EWCA Crim 4** the Court of Appeal Court upheld a conviction for rape based on the evidence of a child aged three at interview (four at trial) who was describing events which had occurred when she was two.

The Lord Chief Justice said...

'The age of a witness is not determinative on his or her ability to give truthful and accurate evidence . . . the judge determines the competency question. ... provided the witness is competent, the weight to be attached to the evidence is for the jury'

If your child gives evidence in court



Lorent graat strates sit servet, corporately satisfacting etil. The English criminal justice system has not developed with young children in mind, and relies heavily on spoken testimony.

These barriers particularly disadvantage very young children for several reasons

- Their ability to understand and use language is at an early stage of development.
- They are less able to respond to open questions, tend to provide briefer accounts and are more likely to respond erroneously to suggestive questions forced-choice questions and yes/no questions
- Adults may find it difficult to adapt their own communication in order to make sense to young children.
- Professionals often ask complex questions, use complex language or add unnecessary words that create confusion
- Young children rely much more on gesture, facial expression or demonstration than older children, both to understand and be understood.
- Unspoken communication may go unnoticed or unrecorded, or be unintentionally disregarded at interview or trial

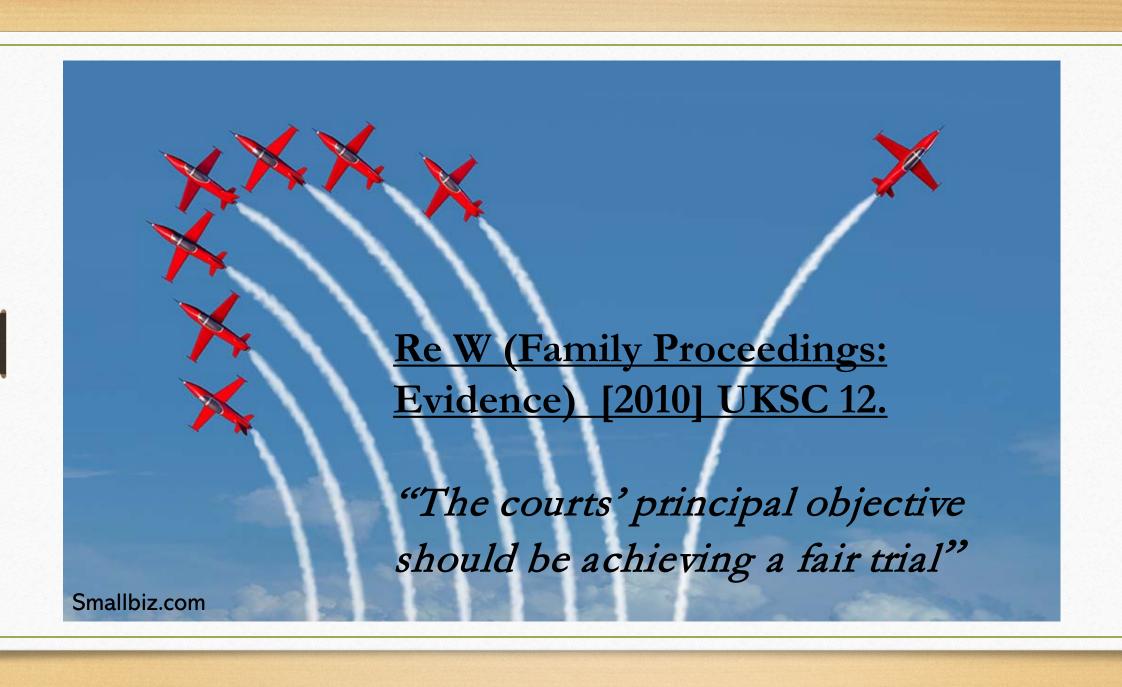
Hershkowitz et al., 2011; Lamb et al., 2008, 2011; Powell and Snow, 2007).

Why is this significant?

The simple answer is because the child may be the only witness to an act of harm, against themselves or against another.

- Young children are particularly vulnerable to maltreatment
- 1-4 year olds are more likely to be subject to a child protection plan than any other age group children
- Children under the age of one consistently have the highest rate of homicide per million population
- 36% of serious case reviews involve a baby under one
- The costs of not listening are high: child sexual abuse in the UK cost £3.2bn in 2012





Removed the presumption which was rarely if ever rebutted, that it was only in the exceptional case that a child should be so called.

There is and should be no presumption that a child should not be able to give direct evidence to the court.

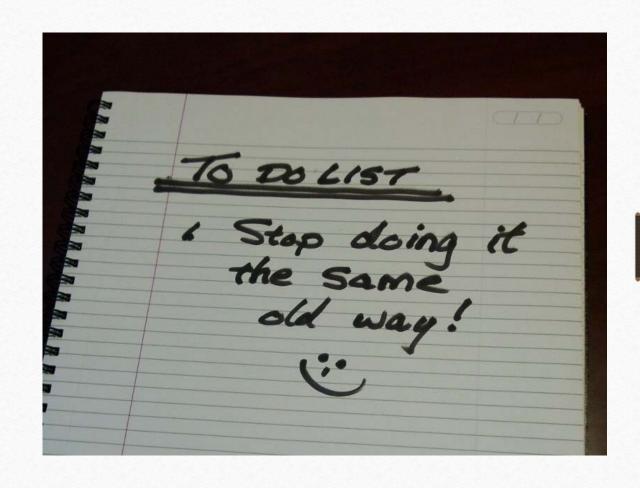
The court must balance the advantages the oral evidence will bring to the determination of the issue against the damage it may do to the welfare of this or any relevant child

In addition, the court must balance the Article 6 Right to a Fair Trial and the Article 8 Right to respect for a private family life.

Guidelines in Relation to Children Giving Evidence in Family Proceedings (December 2011 [2012] Fam Law 79)

- The child's wishes and feelings; in particular their willingness to give evidence; as an unwilling child should rarely if ever be obliged to give evidence
 - The child's particular needs and abilities
 - The issues that need to be determined
 - The nature and gravity of the allegations
 - Whether the case depends on the child's allegations alone
- The quality and reliability of the existing evidence
 - The quality and reliability of any ABE interview
 - Whether the child has retracted allegations
 - The age of the child; generally the older the child the better
 - The maturity, vulnerability and understanding, capacity and competence of the child
- The length of time since the events in question
 - The support or lack of support the child has
 - The right to challenge evidence
 - Whether justice can be done without further questioning
 - The risk of further delay

This will ultimately require a substantial change in the prevailing culture in respect of the evidence of children on the part of judges, social services, Cafcass and others who work with children in the family courts.'



There are 'toolkits' available that provide advocates with general good practice guidance when preparing for trial in cases involving a child

- 6. Planning to question a child or young person
- 7. Additional factors concerning children under 7 (or functioning at a very young age)
- 13. Vulnerable witnesses and parties in the family courts



Intermediary

Intermediaries are appointed to support vulnerable witnesses or parties to participate in or understand proceedings inside the courtroom.

What do they do?

- Carrying out an initial assessment of the Childs's communication needs;
- Providing advice to professionals on how a child best communicates, their level of understanding and how it would be best to question them whilst they are giving evidence
- Directly assisting in the communication process by helping the child understand questions and helping them to communicate their responses to questions
- Writing a report about the child's specific communication needs
- Assisting with court familiarisation
- Facilitate communication between a child and other participants
- Ensure that vulnerable people have a fair hearing



LAST TOPICS

The degree to which the family court properly respects the Article 6 rights to Fair Trial and a direct voice in court:

Discuss....

Art 12 of the United Nations Convention on the Rights of the Child 1989

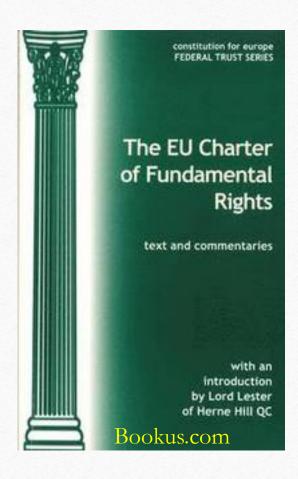
Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

"... The child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."



Art 24 of The Charter of Fundamental Rights of the European Union

"Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity"



Re D (A Child) (International Recognition) [2016] EWCA Civ 12, [2016] 2 FLR 347 Per Ryder LJ

The child's right to an opportunity to be heard is a 'child-centred issue' said the judge.

It "ensures that the child is engaged in the process and is accorded due respect in that process" (para [36]). It is thus part of the rule of law in England and Wales that a child has the right to participate in the process about the child

"that is rightly an acceptance that the rule of law in England and Wales includes the right of the child to participate in the process that is about him or her.

That is the fundamental principle that is reflected in our legislation, our rules and practice directions and our jurisprudence. At its most basic level it involves asking at an early stage in family proceedings whether and how that child is going to be given the opportunity to be heard.

The qualification in s 1(3)(a) of the CA 1989 like that in Art 12(1) of the UNCRC 1989 relates to the weight to be put upon a child's wishes and feelings, not their participation.'

In private law cases children are not automatically joined as parties

The court will look at each individual case on its facts and issues such as these:

- Where the child has a standpoint which is inconsistent with or incapable of being represented by both parents;
- Where the views and wishes of the child cannot be adequately met by a Cafcass report to the court;
- Where an older child is opposing a proposed course of action;
- Where there are serious allegations of physical, sexual or other abuse in relation to the child; or
- Where the proceedings concern more than one child and the welfare of the children is in conflict.

<u>In the majority of cases</u>, the court can establish a child's wishes and feelings by directing for Cafcass to complete a section 7 welfare report. Therefore the issue of separate representation is the exception rather than the rule.

Ciccone v Ritchie(No 2) [2016] EWHC 616 (Fam),

15 year old son, Rocco, was separately represented.

He wanted active rather than passive participation (through CAFCASS/his parents) in the proceedings and his application to be joined as a party was successful as it was deemed to be in his best interests.



In public law proceedings the child is automatically joined as a party regardless of age

Their right to participate in the trial is reflected through the automatic appointment of a solicitor to represent them from the Children's panel and a Guardian to act for them and to give instructions to the solicitor on their best welfare interests.

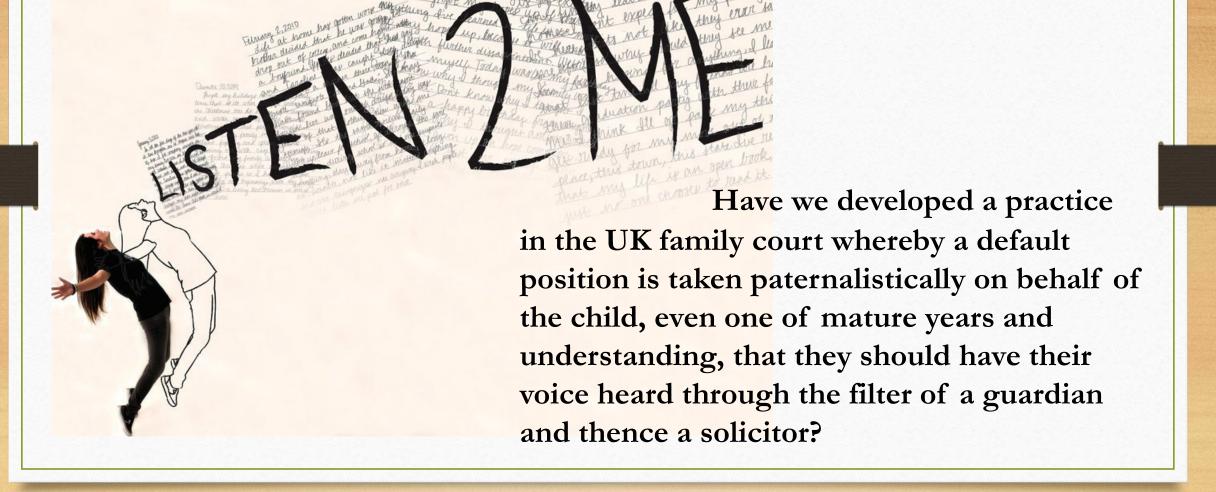
The children's guardian must advise the court on the following matters:

- whether the child is of sufficient understanding for any purpose;
- the wishes of the child in respect of any matter relevant to the proceedings including that child's attendance at court;
- the options available to it in respect of the child and the suitability of each such option including what order should be made in determining the application; and
- any other matter on which the court seeks advice or on which the children's guardian considers that the court should be informed.,

The solicitor acts on the guardians instructions unless there is a conflict between what the Guardian may recommend and what the child wants and the child wishes to give instructions and the child is able, having regard to his understanding, to give instructions on his own behalf,

Then the solicitor must conduct the proceedings in accordance with the child's instructions: FPR 2010 r 16.29(2)

Art 12 of the UN Convention: the right to be heard includes being heard directly or through a representative or body:



The child's solicitor and Guardian may have the potential clash between 'best interest' and 'child's wishes' in their minds

but how often is the child told that in this situation they may have a right to make the decision that they want to instruct their solicitor direct rather than the Guardian advising the solicitor that the point has come for separation?

I have looked at the duties of the guardian and the solicitor for the child and cannot see a specific obligation on either professional to advise the child of their Article 12 or Convention 24 rights which may include being able to directly instruct the solicitor. Is this so?

Have we become unduly protectionist?

Do professionals shy away from actively advising a mature or vocal child what their rights entail and how they could be expressed as opposed to waiting until that conversation becomes unavoidable because what the child wants to happen may not be in their best interests from an outsiders point of view?

How often do children who are instructing their solicitor direct participate to the point of coming into court hearings?

How would the court deal with that situation?

Mabon v Mabon [2005] EWCA Civ 634, [2005] Fam 366 Thorpe LJ on UN Convention on the Rights of the Child, Art 12

A child who is 'capable of forming his or her own views' has a right to express them according to the child's 'age and maturity'.

In the case of articulate teenagers' said Thorpe LJ, judges must 'accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare.'

Welfare is not irrelevant, said Thorpe LJ, but 'judges have to be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings'

Re W (Children) (Abuse: Oral Evidence) [2010] UKSC 12, [2010] 1 FLR 1485

Tomlinson LJ pointed out that the judge had 'confused welfare with understanding' Black LJ was troubled that the judge had 'strayed into a welfare assessment' for a decision which is not 'governed by the child's best interests'

Nearly thereclosing remarks





The tendency of the English common law is to make the child a passive object of concern, or welfare (CA 1989, s 1); rather than, positively, the subject of rights to which he or she is entitled at UN/EU law'.

David Burrows: July 2017 https://www.newlawjournal.co.uk/content/child-s-play-pt-3

Next lecture: 24 May 2018, 6pm Barnard's Inn Hall

Transparency in the Family Court: What Goes on Behind Closed Doors?

Who does the care story belong to: the family or society?

Until relatively recently the Family Court door was closed to all save the parties and professionals involved in the case. A 2014 initiative aimed to secure 'an immediate and significant change in practice' to usher in greater understanding of the way in which the courts operate.

'Transparency' was the watch word of the day. Has it worked?