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The Child in the Family Court Room

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In family court rooms all over the land, in private law cases, in public law cases, in magistrate's courts, district judge's rooms, before county court and high court judges the futures of children are being discussed, litigated and decided on their behalf by strangers to them. Out of the infinite possibilities of outcomes for these children the one likely common ingredients are the absence from the court room of the very child over whom the adults are arguing for different outcomes.

The judge deciding the case will, oftentimes, have reams of paper before him or her setting out, in the words of others, what they think the child's life has been like, what might have happened to them, what harm has befallen them, who is responsible for it, where they should live, who they should see. The judge will be told what the child has said to others and what their wishes and feelings are about their future but rarely is the child seen in the court room. The judge may see photographs of the child, letters from the child, watch video recorded interviews with the child and sometimes, for a specific purpose, the child may even give evidence. But none of these measures amount to direct participation in the trial on a day by day basis in the majority of cases: arguably the child has a 'walk on part' of various length and limited lines despite being at the centre of the dialogue.

Why is this so?

In essence it is because children have a right to be protected from the disputes of the adults around them. They should be protected from evidence they do not have the maturity or emotional resilience to be able to deal with or to make sense of. They should not be made to feel responsible for decisions being made on their behalf. What they say they want to happen in their lives may not be the best thing for them, objectively assessed. A court seeks to decide by putting the child's welfare as its paramount concern and, if a decision is being asked of the court that is generally because the adults involved with the child cannot agree on an outcome for the child.

The child's accounts, the child's wishes and feelings, are reflected within the evidence and reports of those around them and relayed to the court but the child's wishes and feelings are not paramount: the child's welfare is. The older the child, the more weight their wishes and feelings are likely to have: if only to acknowledge the reality that the older the child becomes, the more autonomous they become, they can 'vote with their feet'. But if their wishes and feelings are to be conveyed to the judge through the filter of social workers, parents, the child's court appointed Guardian that still leaves the child who is the subject of the proceedings outside the court room whilst adults walk through its doors. The absence of the child, who is a party to the case in their own right, imposes upon the judge an obligation to ensure that the child's Article 6 rights to a fair trial are being fully respected and reflected in the court process. It is that area that this lecture explores.

So: how does a family court take account of what a child has to say? Is it doing enough?

As long ago as 2007 Lady Hale (in what was then the House of Lords) in ***Re D (A Child) (Abduction: Rights of Custody)*** **[2006] UKHL 51; [2007] 1 FLR 961** had this to say in a Hague Convention case

> *"57…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. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. 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. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides*

whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parent's views.

In 2014 The President of the Family Division, Sir James Munby, issued a call to arms to the profession saying, '*there is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something the family justice system lags woefully behind the criminal justice system.' H*e continued '*it is time for an update. This requires - demands - urgent action by all, including ministers and officials. I do not want to start 2018 with a further call to action'*. He set up a working group to take views and to work up proposals.

By 2015, not enough had been done to bring about change: *'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'* [1] per Munby P.

On 17.3.15 the **Final Report of the Vulnerable Witnesses and Children Working Group** [2] was published. It was chaired by Mr Justice Hayden and Ms Justice Russell and set up by Sir James Munby in 2014[3]. The Working Group (WG) had set out to consider arrangements for children meeting judges, and children and vulnerable parties giving evidence, in so doing the WG found these considerations were linked to the role of children and young people in family proceedings and how their voices could be brought to the fore in the family court.

The Working Group's Report stressed the need to give prominence to the treatment of children and families and encouraged their participation in the court process. In respect of support available, the Working Group concluded:

"In all family proceedings the lack of appropriate support and assistance for witnesses, whether they are parties, the children and young people or interveners would amount to a denial of justice."

In one of its most striking paragraphs under the heading **'Evidence of children/young people[4]'** it had this to say:

This report contains recommendations in respect of the evidence of children and young people. It is the view of the WG that the Family Court has fallen behind the criminal courts in its approach to their evidence. Modernisation and reform must include the direct evidence of children and support for the evidence of children to be heard at the youngest age appropriate for each child; just as in the criminal court the Family Court should hear the evidence of children ***of pre-school age****. The dissatisfaction of children and young people expressed by those on the FJYPB[5] (and others reveals their underlying belief that they are not being listened to and heard.* ***Those young people*** *that the WG heard from 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*** *(bold is my emphasis).*

To hear[6] 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.

The Working Group recognised the need for a de-mystification of the family court and so recommended that Family Courts should hold open days.'

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

[2] https://www.judiciary.gov.uk/wp-content/uploads/2015/03/vwcwg-report-march-2015.pdf

[3] set up by Sir James Munby, President of the Family Division with the aims which he set out in the 12th "View from the President's Chambers" published on 4th June 2014:

[4] Para 35

[5] FJYPB ; cf below The Family Justice Young Persons Board

[6] The right of the child to be heard and the need to make provision for hearing from the child is contained in numerous international conventions including the UN Convention on the Rights of the Child (now part of Welsh Law). See also Council of Europe (2010) "Guidelines on Child Friendly Justice"; The European Convention on the Exercise of Children's Rights.

There are four important points condensed into this single paragraph. I will develop them in this lecture because, as of March 2018, some three years on, as a result of The President's industry and that of others, we have rules and guidance which address some, but by no means all, of the problems identified by the WG relating participation in the family court process by children.

Demystification of the family court process

The media and twitter world routinely talk about 'secret courts' and 'secret justice'. Compared to the criminal justice system the family court room must seem closed to the outside world because the public are denied access to its hearings and what can be reported by the regulated press is constrained to protect the anonymity of the children whose futures are being decided. This has the unintended consequence that the family justice system seems remote and inaccessible leading to concerns about injustice by those who don't know how hard the system works to make things fair. Transparency of the family court's decision-making process and the important role the press must play will be the subject of my next lecture and so I will not develop that point in this lecture[7]. But as a minimum the family court should be prepared to be more visible, literally, about its workings: hence the suggestion of open days. Judges are appointed to serve the community; the community should be able to see in what circumstances its decisions are made.

Hence this recommendation by the WG[8]:

> *'The need for greater transparency has been a leitmotif of recent modernisation of family justice and in keeping with that approach the WG recommend that there should be an increase in public access to the family courts so that members of the public, including children and young people can see what is happening. The Family Courts should hold Open Days every year – some have already with great success, as have numerous Crown Courts. Visits by groups of school children such as those arranged by the Inns to the High Court and by judges in Crown Court have proved to be very effective; it has the dual purpose of de-mystifying the Family Court and is educative'.*

I would welcome information of how often and in which courts this has happened. Those that haven't should take the lead from the Supreme Court that runs a very popular open court event every year[9]. Bristol, under the energetic and forward-thinking leadership of HHJ Wildblood, has taken the lead but too few other family courts have followed his and the Supreme Court example in my view.

The judge meeting the Child

The WG set out to review the Family Justice Council's **April 2010 'Guidelines for Judges Meeting Children who are Subject to Family Proceedings' [2010] 2 FLR 1872**, particularly in the light of the Court of Appeal's decision in **Re KP [2014] EWCA Civ 554.**

This coincided with the then Minister of State for Justice and Civil Liberties' announcement made 24th July 2014 at the Family Justice Young Persons Conference on 'The Voice of the Child regarding the National Charter for Child Inclusive Family Justice' in which Simon Hughes MP said that the Government believed:

> '*Children and young people should be given the opportunity to meet and communicate with the professionals involved with their case including workers from the Children and Family Court Advisory and Support Service (CAFCASS), social workers, the judges and legal representatives; every child of sufficient age and ability should have the opportunity of meeting with the judge overseeing their case; every child should have the opportunity through CAFCASS of submitting their views directly to the judge in writing; all children should be able to communicate their wishes and feelings to the judge; children and young people should be kept informed about the court proceedings in an age appropriate manner, kept informed of the stage*

[7] 24.5.18 'Transparency In the Family Court: what goes on behind closed doors '
[8] Para 34
[9] https://www.supremecourt.uk/.../open-days-and-open-house-london-weekend.html

their case has reached, and contacted prior to the first hearing, and have the opportunity of giving feedback through email, text, telephone or written form.'

This sentiment was reiterated by Justice Minister Simon Hughes MP in an announcement [10]on 19.2.15

'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 (FJYPB[11]) 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.'

This was published under the 2010-2015 Conservative and Liberal Democrat Government. I have not been able to find any repetition of this ethos since then[12] or governmental action upon the intent in 2015. If that is right, this might be something to do with the revolving door of Ministers who have since taken up the position of Minister for Justice.

Judges have a longer tenure. Hence, we have the following developments through judicial guidance. I've chosen the most recent High Court reported case on children seeing judges to highlight the point[13]. We still don't have updated Guidelines on Children seeing Judges, we still work from the 2010 Guidelines that were thought flawed in part by the WG, but we do have young and creative Judges who make sure they are applied even when professionals acting on behalf of children may not. Here is the resume of their significance by Macdonald J in **London Borough of Brent v D and Otrs** [2017] 4 WLR 193] **[2017] EWHC 2452 (Fam).** In this case he was concerned with the welfare of three children J, aged 14, B, aged 15, and M, aged 16. He considered compliance with the Guidelines *for Judges Meeting Children who are Subject to Family Proceedings* [2010] 2 FLR 1872. (The same before the WG)

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.

Preamble

• In England and Wales in most cases a child's needs, wishes and feelings are brought to the court in written form by a Cafcass officer. Nothing in this guidance document is intended to replace or undermine that responsibility.

• It is Cafcass practice to discuss with a child in a manner appropriate to their developmental understanding whether their participation in the process includes a wish to meet the Judge. If the child does not wish to

[10] https://www.gov.uk/government/news/voice-of-the-child-children-to-be-more-clearly-heard-in-decisions-about-their-future

[11] https://www.gov.uk/government/groups/family-justice-young-peoples-board The Family Justice Young People's Board's (FJYPB) draft 'National Charter' sets out how young people should be at the centre of all proceedings and that children and young people should feel that their needs, wishes and feelings have been considered in the court process.
The FJYPB is formed of over 40 young people aged between 8-25, all members have either had direct experience of the family justice system or have an interest in children's rights and the family courts. The FJYPB is a permanent sub-group of the national Family Justice Board (FJB) and is responsible to this board. Two members of the FJYPB regularly attend FJB meetings.

[12] After the 2015 UK General election, the position was given by PM Cameron to former Government Chief Whip Michael Gove. Michael Gove was replaced after Theresa May became Prime Minister of the United Kingdom on 14 July 2016 and succeeded by Liz Truss. Following the 2017 General Election which resulted in a minority Conservative government, David Lidington was appointed Secretary of State for Justice, who in turn was succeeded by David Gauke on 8 January 2018.

[13] http://www.bailii.org/ew/cases/EWHC/Fam/2017/2452.html

meet the Judge discussions can centre on other ways of enabling the child to feel a part of the process. If the child wishes to meet the Judge, that wish should be conveyed to the Judge where appropriate.

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

Guidelines

1. The Judge is entitled to expect the lawyer for the child and/or the Cafcass officer:
   (i) to advise whether the child wishes to meet the Judge;
   (ii) if so, to explain from the child's perspective, the purpose of the meeting;
   (iii) to advise whether it accords with the welfare interests of the child for such a meeting take place; and
   (iv) to identify the purpose of the proposed meeting as perceived by the child's professional representative/s.
2. The other parties shall be entitled to make representations as to any proposed meeting with the Judge before the Judge decides whether or not it shall take place.
3. In deciding whether or not a meeting shall take place and, if so, in what circumstances, the child's chronological age is relevant but not determinative. Some children of 7 or even younger have a clear understanding of their circumstances and very clear views which they may wish to express.
4. If the child wishes to meet the Judge but the Judge decides that a meeting would be inappropriate, the Judge should consider providing a brief explanation in writing for the child.
5. If a Judge decides to meet a child, it is a matter for the discretion of the Judge, having considered representations from the parties –
   (i) the purpose and proposed content of the meeting;
   (ii) at what stage during the proceedings, or after they have concluded, the meeting should take place;
   (iii) where the meeting will take place;
   (iv) who will bring the child to the meeting;
   (v) who will prepare the child for the meeting (this should usually be the Cafcass officer);
   (vi) who shall attend during the meeting – although a Judge should never see a child alone;
   (vii) by whom a minute of the meeting shall be taken, how that minute is to be approved by the Judge, and how it is to be communicated to the other parties.

This is the situation the judge was faced with: Remember he is delivering this judgment on 5.7.17:

41. 'B told the Children's Guardian on 30 May 2017 that she would like to meet the judge deciding her case. Whilst the Children's Guardian communicated her wish immediately to the solicitor for B, and sent a reminder on Tuesday of last week, it was not until a month after B's request, on the afternoon of the Friday before the commencement of this final hearing, that the solicitor for B emailed the court proposing that I meet B. That email was couched in terms that simply assumed that the request would be granted.'

1. The bottom line is that the solicitor for B (as, to her credit, she concedes) simply failed to pick up on, or acknowledge the request by B passed on to her by the Children's Guardian on 30 May 2017. The net result of that default on the part of the solicitor resulted in a 15-year-old young person coming to the court believing she would be meeting the judge, or at least being given that impression subsequent to her arrival, when the professional responsible to her had not taken any of the steps required to ensure that such a meeting would be facilitated in accordance with the Guidelines for Judges Meeting Children who are the subject of Family Proceedings 2010. Of particular concern is the fact that, in making the request, the solicitor for the child had failed to undertake the detailed preparatory steps articulated in the 2010 Guidelines.

The judge continued:

1. *In this case, no consideration had been given to the purpose of a meeting from B's perspective, the reasons such a meeting accorded with B's welfare interests or the purpose of such a meeting as perceived by her legal representatives. No provision had been made for the other parties to make representations as to the desirability of such a meeting. In the circumstances,*

there was no opportunity for the court to consider, ahead of the final hearing, the purpose of the meeting, at what stage during the proceedings it should take place, the location of the meeting, who would bring B to the meeting, who would prepare B for the meeting, who would attend the meeting and by whom a minute of the meeting should be taken.

2. *Ultimately,* ***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,*** *or had been given that expectation during the day, and having been assured that consideration had now been given to the issues outlines in the foregoing paragraph.* ***However, 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.***

1. *In Re KP Moore-Bick LJ emphasised at [52] that the manner in which the task of hearing the child is discharged will depend on the developing skill and understanding of the judge and the other professionals involved, and that the 2010 Guidelines are just that, guidelines. It is however, vital that the court has the basic information it needs to decide in a given case whether the appropriate method of hearing the child is a meeting with that child. Within this context, I cannot emphasise enough the need for parties to comply with the Guidelines for Judges Meeting Children who are the Subject of Family Proceedings 2010 and the required steps preparatory to a judge meeting a child which the Guidelines mandate.*

1. *The 2010 Guidelines exist to ensure that when a judge meets a child, the purpose of that meeting and the expectation of all who are party to it are clear both to the child and to the parties to the proceedings. The need for the purpose of the meeting, and the expectations of those who are party to that meeting to be clear is emphasised by the clear injunction in the Guidelines against using the meeting to obtain evidence and in favour of using the meeting to ensure that the child feels more involved and connected with the proceedings.*

I cannot imagine a starker contrast with the Guidelines intent than that which befell this 15-year-old. Fortunately for her she had a judge who was fully cognisant of his duties: he concluded thus '*As for B's wish to meet the judge who is taking decisions about her, I have made clear to counsel that I am able to make arrangements for B to see me at a later date if she still wishes'.*

This case serves as a sharp reminder to the legal profession to keep up to date with their professional training, their professional obligations to their clients and their instructions. Fortunately, it stands out because in many courts in the country children are being listened to when they say they wish to meet with their judge. But it cannot be stressed enough that the child's meeting with the judge is not for the purpose of gathering evidence. That is the responsibility of the Cafcass officer. The purpose of the meeting is to enable the child to gain some understanding of what is going on in court and to be reassured that the judge has understood him/her.

There should be no need to remind all judges that part of the evidence they are required to consider in every case involving children is the child's wishes and feelings but that the ascertainment of this evidence is not a judicial function. How does that fit with seeing a child? Without careful management boundaries can become blurred, for the child if not the judge.

The purpose of children meeting the judge needs careful consideration and delineation; this will include the management of the expectations of the child and of the judge.

In their 2015 report the WG identified room for misunderstanding. The reasons behind the guidelines was to encourage judges to overcome a reluctance to meet the children who are subject to proceedings by providing some guidance on how it should or could be done, however the children and young people themselves might come at it from a different perspective. Do they not wish to be included and listened to and to know that that was part of what happened in their case? That was the clear sense from the representations I have read of the Family Justice Young People's Board's (FJYPB) 'National Charter' which set out how young people should be at the centre of all proceedings and that children and young people should feel that their needs, wishes and feelings have been considered in the court process.

But how do the 2010 Guidelines help in this process? They are part of a process best described as 'exploratory ': the WG identified the need for them to be amended in light of the case below.

In **Re *KP (Abduction: Child's Objections)* [2014] EWCA Civ 554, [2014] 2 FLR 660** the Court of Appeal was concerned with a 13-year-old Maltese girl who was wrongfully brought to the United Kingdom by her mother in contested proceedings wherein her father applied for the return. The 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" [§10]. 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). During the course of this meeting the child was asked 87 questions by the judge. The tape was on, and a transcript of the meeting was before the Court of Appeal. The judge concluded that K was confused and was not objecting to returning to Malta on cogent or rational grounds. She identified "passion" in K's objection to return, but departed from the recommendation of the CAFCASS Officer, having concluded that the Officer failed to evaluate the rationale of K's expressed views.

K was not separately represented at the trial, but she was a party to the appeal. She supported the appellant mother's case and her counsel contended that it was inappropriate for an extended oral examination of the child to have taken place, particularly when she had not been forewarned that she would be making oral representations or submissions to the judge. The mother appealed against the judge's order that her daughter should be returned to Malta. The CA allowed the appeal and ultimately the child was allowed to remain in England[14].

> *"[T]he process [of judges meeting children] ... does not include receiving evidence from the young person of questioning him in order to evaluate the rationality, or otherwise of his objections. The process is simply, but importantly, a two-way transmission in which the young person says what they wish to say, and the judge explains the court's role within the structure of the Convention" [§29].*

The court expanded on this point at [§56], in which they accepted the submissions made by counsel for the appellant and counsel for the child. The court stressed throughout the judgment that the purpose of judges meeting the child is not to obtain evidence, and the judge should not therefore test or probe what the child says. The task of gathering evidence from the child should instead be given to a CAFCASS Officer, who alone has the necessary expertise in the field.

In **RE KP** (cf below) the CA set out good examples where senior judges had seen children within Hague Convention cases (that jurisdiction is outside the scope of this lecture) and carefully navigated the line between seeing the child, hearing from them and not straying into receiving evidence. This was one

> *27. A similar process was undertaken by Sir Mark Potter P in* ***De L v H [2009] EWHC 3074 (FAM)****, [2010] 1 FLR 1229. In that case the young person was also 13 years old. The judge had evidence of his objections to a return to Portugal via a CAFCASS report, two affidavits from the Children's Guardian appointed to represent him, which included the Guardian's note of a meeting with his charge and, finally, the judge had "a lengthy conversation" with the young man in the presence of the CAFCASS officer. At paragraph 44 Sir Mark Potter explains that he took "this unusual course in the light of [the boy's] age and maturity, and his view, firmly expressed to the Guardian that he wished to see the judge who decided his case". At paragraph 45 Sir Mark sets out the various purposes of the judicial meeting:*
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> *"(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."*

[14] Thank you to Mr Burrows for bringing this case to my attention in his article of 6.4.18: cf below

28. Later, at paragraph 65, Sir Mark Potter describes the meeting in the following terms:
"I consider that the observations of Ms Barnes and his guardian in those respects were amply confirmed and justified in the course of my own conversation with him for the purpose of ensuring that he understood the nature of the court's tasks and the constraints imposed upon it in reaching its decision. He fully demonstrated his capacity to understand the position and to explain his own wishes and state of mind generally, as well as in relation to a return to Portugal even for a restricted period to await the outcome of the Portuguese proceedings. He engaged calmly and intelligently with the issues, while firmly maintaining and explaining his objections to return."

29. As in the case of JPC, the process described by Sir Mark Potter does not include receiving evidence from the young person or questioning him in order to evaluate the rationality, or otherwise, of his objections. The process is simply, but importantly, a two-way transmission in which the young person says what they wish to say, and the judge explains the court's role within the structure of the Convention.

The Court of Appeal considered the 2010 Guidelines and emphasised that they were *'no more than they purport to be, namely guidelines'*. They were, the CA said, *'feeling their way forward'*. The court continued:

> [52] *…' Our collective understanding of these matters and how best to 'hear' a young person within the court setting, is developing and is still, to an extent, in its infancy.'*
> *That best describes the status of the Guidelines; they amount to that and no more, but what of their purpose?*
> *It is expressed to be 'to encourage judges to enable children to feel more involved in proceedings' which affect them and to ensure judges have understood their wishes and feelings.*

This a difficult concept for any young person to grasp at best; and is misleading as it amounts to saying the judge is here to listen to you but cannot take any notice of what you say.

The principle difficulty is the blurring of lines between evidence gathering and principles of child-welfare and good practice. There should be no need to remind all judges that part of the evidence they are required, by statute, to consider in almost every case involving children is the child's wishes and feelings, nor that the ascertainment of this evidence is not a judicial function. It is not part of the judicial function to evidence gather so if the child should express their wishes and feelings at the meeting that cannot properly be taken into account when decision making.

As the WG said '*The purpose of children meeting the judge making the decision in their case needs careful consideration and delineation; this will include the management of the expectations of the child and of the judge. There is a dangerous conflation of the need for the child or young person to be part of the proceedings and to be given an understanding the legal process (which should include meeting the judge if appropriate) with having her or his views, wishes and feelings and direct evidence of what they may have suffered or seen (their evidence) before the courts. It is clear from the available research and the views of children and young people expressed so vividly in the presentations by the FJYPB that young people want to know that they are heard and listened to; that they have chosen to focus on meeting the judge is understandable, but it is less clear what is understood to be the purpose of such meetings.*

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. They advised it should be drafted to reflect the Court of Appeal's decision **Re KP [2014] EWCA Civ 554**. And should include provisions 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/young person.

This was put forward in 2015. We have yet to see the promised reformulated Guidance.[15] Lady Hale now the

President of the Supreme Court spoke in 2017 at the World Congress of Family Law and Children's Rights on the topic of '*Are children human beings*?' She said that judges should view children as *"real human beings"* when speaking to them in private.

> *"There was confusion about whether this was basically a public relations exercise, so that the child could meet the judge and realise the judge was a real human being.'*

I know that Leeds Family Court judges and magistrates have participated in a year-long pilot for meeting children and young people (initiated by FJYPB with CAFCASS's cooperation). Children over 7 have been invited, subject to their age and understanding, by their Guardian in public and private proceedings to come and meet the trial judge. The take up wasn't high (possibly once a month) and children who did say yes were over 10. Anecdotally we know judges are now more accepting of a child's wish to meet them: I do so, as do my full-time colleagues.

Once expectations are managed and preparations are properly made it is a real privilege to meet the child you have read about. They add life and personality to the court: they add colour to the black and white words you have read.

The judge hearing the evidence of the child

Meeting the child to make them aware of who is deciding their future is very different to the judge hearing from the child and by default or design turning them into a witness (the error Parker J fell into in Re KP above illustrates this point).

Perceptions of children's competence as witnesses have shifted repeatedly in the last few decades. Recent international research confirms that very young children can provide reliable descriptions of past events when properly interviewed. In England, the legislative foundations are now in place to enable the evidence of very young children to be heard and tested: clear guidance is available for interviewing teams, prosecutors, advocates, and the judiciary. Yet implementation of practice with very young children is erratic: not only within practice areas (crime being the leader in the field) but divisions: i.e. between expectations and practices of the criminal judge and the family judge.

The WG reviewed the Family Justice Council's Working Party's December 2011 Guidelines[16] on Children Giving Evidence in Family Proceedings **[2012] Fam Law 79.** Those Guidelines were prepared following the decision of the Supreme Court in **In re W (Children) (Family Proceedings: Evidence) [2010] UKSC 12, [2010] 1 WLR 701.** Since then we have had the decision of the Supreme Court in In re **LC (Children) (Reunite International Child Abduction Centre intervening) [2014] UKSC 1, [2014] 2 WLR 124.**

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*[17].

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[15] 18 months later a working party of the Family Justice Council issued "*Guidelines in relation to children giving evidence in family proceedings*" which can be found at [2012] 2 FLR 456. These latter guidelines were issued following the Supreme Court decision in ***Re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12**, [2010] 1 WLR 701 where it was held that there was no longer a presumption, or even a starting point, against children giving evidence in family proceedings. The focus of those guidelines is upon a child "giving evidence" within the ordinary setting of an adversarial court hearing. In that regard, and in the light of the Supreme Court decision in *Re W*, it is stressed that "the Court's principal objective should be achieving a fair trial". Thereafter the substance of the guidelines focuses entirely upon a child who is to be called to give oral evidence within the proceedings. This is an entirely different subject to the judge meeting the child as part of a familiarisation process.

[16] *Guidelines in relation to children giving evidence in family proceedings,* December 2011, [2012] FAM Law 70.

[17]Sir James Munby, President of the Family Division with the aims which he set out in the 12th "View from the President's Chambers" published on 4th June 2014.

As the WG remarked in 2015 *'as seen from the guidance already available for criminal cases in the Advocate's Gateway toolkits children are self-evidently "vulnerable witnesses". 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[18]. Whereas a handful of children participate by giving evidence in the family courts despite the rewriting of the judicial landscape of this bias against such evidence in Re W.

In my view the family court still shies away from hearing evidence of children in complex and serious cases where the absence of their evidence may make it harder for the court to come to the best decision possible. Many advocates and indeed judges, appear to have an ingrained reluctance to countenance the prospect of children giving evidence and the younger the child the more obvious the disinclination. But other services specialising in working with children approach the issue in a more robust manner I would suggest.

I have had the opportunity of delving into the work of Ruth Marchant for this lecture. Ms Marchant's background in psychology informs her work as a forensic interviewer and witness intermediary in an organisation called Triangle[19] which specialises in work with young children. She also teaches how to safely question young children for legal proceedings and, as long ago as 2016, could call upon the experience of working with over 200 witnesses aged 22 months to five years.

In her fascinating article ***'How young is too young; the evidence of children under 5 in the criminal Justice system***' [20] she tells us that:

- 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.

Ms Marchant pointed out that The Youth Justice and Criminal Evidence Act 1999 effectively removed the legal constraints on calling younger witnesses, clearly separating out the issue of competence from issues of credibility and reliability since which time there has been a significant recent growth (of almost 60%) in the number of young witnesses called to criminal court. The great majority of these young witnesses are over ten, but a number of four- and five-year olds have recently been cross-examined at trial.

In **R v Barker (2010) EWCA Crim 4** the Court of Appeal 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.'*

Consistent with the legislative position, current English guidance does not suggest a minimum age at which a child can be interviewed (Ministry of Justice, 2011) and this is also the case at trial: *'There are no fixed rules about how old children must be before they can give evidence or before we will prosecute a case'* [21]and even more explicitly*: 'whatever the age of the victim, as long as the legal safeguards and support necessary to ensure a fair trial are in place, their voice will be heard.'*[22]

[18] source: Joint Inspectorate Report CPS & Witness Service.
[19] http://www.triangle.org.uk/
[20] Child Abuse Review 2013 Wiley Online Library DOI 10 1002/car 2273.
[21] (Crown Prosecution Service (CPS), 2006, p. 9).
[22] (CPS, 2010).

Ms Marchant makes a critical point: namely that:

'The English criminal justice system has not developed with young children in mind and relies heavily on spoken testimony. This presents significant barriers to anyone who finds it difficult to put their experiences into words and tell what happened. 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 ('that didn't happen, did it?'), forced-choice questions ('was the car red or blue?') and yes/no questions.*[23]
- *Adults may find it difficult to adapt their own communication in order to make sense to young children.*
- *Very little specialist training is available and professionals often ask complex questions: 'When this happened, and mummy was out shopping, whereabouts exactly in the room were you?', or use complex language 'Can you explain in greater detail the layout of the room?', or add unnecessary words that create confusion 'I wonder if you can remember where you were in the room at the time that this happened?'*
- *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.*

In summary, given the barriers inherent in the system, the communicative competence of very young child witnesses (and therefore the accuracy, completeness and coherence of their testimony) depends heavily on the competence of interviewing teams, intermediaries, advocates and the judiciary. This competence is extremely variable and therefore practice is erratic.'

Why is this relevant? It is because a child's potential to give an account should not be dismissed because of age alone.

Ms Marchant calls on her experience as an interviewer to suggest:

> *'Very young children need to be able to predict and make sense of what is happening, to be clear about the choices that they can make, to be asked questions that they can understand, to perceive themselves as competent communicators and to realise that they are the experts on their own experience.'*

Ms Marchant is clear as to the responsibilities of the adults around the child:

> "*When the processes of interview and trial are adapted in line with their needs, very young children can provide accurate, complete and coherent accounts of their experiences, something that was perhaps better understood long ago: 'Infants of very tender years often give the clearest and truest testimony.' (Blackstone, 1769, v 4/214) Crucially, the ability of very young children to answer questions is dependent on the ability of the questioner to ask developmentally appropriate questions that the child can understand: how young is too young thus depends heavily on the competence of the questioner.'*

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. Adults may show restraint when another (non-participating) adult is in the room but may be careless as to what a child sees, hears or experiences because of their vulnerability.

In a companion article ***'Age is not determinant: The Evidence of Very Young Children in the English Justice system'*** [24] Ms Marchant points out why a child's account should not be discarded as unobtainable or unreliable; the consequences of doing so can be life altering:

> *'Young children are particularly vulnerable to maltreatment, for example, 1-4-year olds are more likely to be subject to a child protection plan than any other age group*[25]*. Children under the age of one consistently have the highest rate of homicide per million population*[26]*. 36% of serious case reviews involve a baby under one*[27]*. The costs of not listening are high, for example this report estimates that child sexual abuse in the UK cost £3.2bn in 2012*[28]*.'*

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

[24] Published in Criminal Law and Justice Weekly Issue: Vol.180 Nos.12 & 13 Date: *25th March 2016.*

[25] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254084/SFR45-2013_Text.pdf.

[26]http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/2015-02-12#tab-Homicide-risk-for-different-age-groups.

[27] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/184053/DFE-RR226_Report.pdf.

[28] https://www.nspcc.org.uk/services-and-resources/research-and-resources/2014/estimating-costs-of-child-sexual-abuse-in-uk/.

These are striking statistics, and behind very number is a family in crisis. I could not agree more with Ms Marchant when she says that:

> *'Young children's evidence may be crucial to justice. Listening to children while they are very young can reduce the risk of contamination of evidence. It can also enable earlier interventions, thus reducing developmental trauma, a major cause of mental ill health'.*

In the family jurisdiction, the case of **Re W** reset the basis upon which the court should consider whether a child should give evidence in a hearing.

Re W (Family Proceedings: Evidence) [2010] UKSC 12. In this judgment the Supreme Court reformulated the approach a family court should take when exercising its discretion to decide whether to order a child to give live evidence in family proceedings. In so doing it removed the presumption or starting point of the existing test, 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. *'The courts principal objective should be achieving a fair trial'.*

How did it come to that position: a closer look at **Re W?**

At issue in this case was the care of five children. The mother and father at the relevant time were in a relationship and the father was the biological parent of the four youngest children. A sixth child was due to be born to the couple this month. The proceedings began in June 2009 when the eldest child, a 14-year-old girl, alleged that her de facto stepfather had seriously sexually abused her. All the children were taken into foster care and the four younger children had supervised contact with both parents. The father was later charged with 13 criminal offences and is currently on bail awaiting trial.

In the family proceedings the parties originally agreed that there would be a fact-finding hearing in which the 14-year-old girl would give evidence via a video link. The judge however asked for further argument on whether she should do so. The local authority, having had time to consider the material received from the police, decided that they no longer wished to call the girl as a witness. In November 2009 the judge decided to refuse the father's application for her to be called. Instead, she would rely on the other evidence, including a video-recorded interview with the child.

The Court of Appeal dismissed the father's appeal (see [2010] EWCA Civ 57). They did, however, express some concern about the test laid down in previous decisions of that court and suggested that the matter might be considered by the Family Justice Council. The father appealed to the Supreme Court.

The Supreme Court unanimously allowed the appeal and remitted the question of whether the child should give evidence, and if so in what way, to the trial judge to be determined at the fact-finding hearing in light of the principles set down in this judgment.

REASONS FOR THE RE W JUDGMENT

- The court agreed with counsel for the local authority that there were very real risks to the welfare of children which the court must take into account in any reformulation of the approach [17 to 21]. However, the current law, which erected a presumption against a child giving live evidence in family proceedings, could not be reconciled with the approach of the European Court of Human Rights, which aims to strike a fair balance between competing Convention rights. In care proceedings there must be a

balance struck between the article 6 requirement of fairness, which normally entails the opportunity to challenge evidence, and the article 8 right to respect for private and family life of all the people directly and indirectly involved. No one right should have precedence over the other. Striking the balance may well mean that a child should not be called to give evidence in a great majority of cases, but this is a result and not a presumption nor even a starting point [22, 23].

- Accordingly, when considering whether a particular child should be called as a witness in family proceedings, the court must weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child [24]. The court sets out a number of factors that a family court should consider when conducting this balancing exercise. An unwilling child should rarely, if ever, be obliged to give evidence. The risk of harm to the child if he or she is called to give evidence remains an ever-present factor to which the court must give great weight. The risk, and therefore the weight, will vary from case to case, but it must always be taken into account [25, 26]. At both stages of the test the court must also factor in any steps which can be taken to improve the quality of the child's evidence, and at the same time decrease the risk of harm to the child [27, 28].
- The essential test is whether justice can be done to all the parties without further questioning of the child. The relevant factors are simply an amplification of the existing approach. What the court has done, however, is remove the presumption or starting point; that a child is rarely called to give evidence will now be a consequence of conducting a balancing exercise and not the threshold test [30].
- In this case the trial judge had approached her decision from that starting point. The Supreme Court could not be confident that the judge would have reached the same result had she approached the issue without this starting point, although she might well have done so. Nor did the court consider it appropriate to exercise its own discretion, given that all the relevant material was not before the court. The question was remitted to the trial judge to decide at the fact-finding hearing scheduled for next week. [31 to 35].

Following **Re W** the Family Justice Council Working Party created **Guidelines in Relation to Children Giving Evidence in Family Proceedings (December 2011 [2012] Fam Law 79).**

When balancing the competing options, the court should have regard to:

a. 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;
b. the child's particular needs and abilities;
c. the issues that need to be determined;
d. the nature and gravity of the allegations;
e. the source of the allegations;
f. whether the case depends on the child's allegations alone;
g. corroborative evidence;
h. the quality and reliability of the existing evidence;
i. the quality and reliability of any ABE interview;
j. whether the child has retracted allegations;
k. the nature of any challenge a party wishes to make;
l. the age of the child; generally, the older the child the better;
m. the maturity, vulnerability and understanding, capacity and competence of the child; this may be apparent from the ABE or from professional discussions with the child;
n. the length of time since the events in question;
o. the support or lack of support the child has;
p. the quality and importance of the child's evidence;
q. the right to challenge evidence;
r. whether justice can be done without further questioning;
s. the risk of further delay;
t. the views of the guardian who is expected to have discussed the issue with the child concerned if appropriate and those with parental responsibility;

u. specific risks arising from the possibility of the child giving evidence twice in criminal or other and family proceedings taking into account that normally the family proceedings will be heard before the criminal; and
v. the serious consequences of the allegations, i.e. whether the findings impact upon care and contact decisions.

By the time the Presidents Working Group came to report Re W and the Guidelines had been in existence for some 4.5 years, yet practice had failed to move apace of the approach adopted by the Supreme Court. The Working Group were alert to this issue, saying:

> *37. Evidence of children and young people*
> *Further work will need to be carried out by the WG on modernising the way in which the evidence of children and young people is gathered and put before the family courts. 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.'*

That was in 2015, we're now in 2018 and still practice hasn't kept apace of protocols and practice tools or available training.

From the perspective of a practitioner, as I said in last month lecture, making an application for a child to give evidence is now less frowned upon, but the number of times the application succeeds is still far below the level expected in the criminal jurisdictions[29]

There is still a lack of engagement by the profession with the training available to help the process of getting the best evidence from vulnerable witnesses.

I have referred to the Advocate's Gateway guidance in a number of lectures and make no apology for doing so again. The Advocate's Gateway gives free access to practical, evidence-based guidance on vulnerable witnesses and defendants. Their 'toolkits' provide advocates with general good practice guidance when preparing for trial. As they say '*effective communication is essential in the legal process'* and it gives any reader the most informed and enlightened advice possible anywhere with practical tips that one could wish for. I cannot commend it highly enough. They are quite simply not as widely known about as they should be nor used as often as they could be.

The toolkit most relevant for today's lecture is Toolkit 6. Planning to question a child or young person 15.12.15 [30]

Key points:

1.1 Tailor your approach to the individual child and be flexible because no two children have the same profile of communication strengths and weaknesses. Advocates must adapt to the witness, not the other way around.[31]
1.2 Always consider assessment of a child by an intermediary because all children under 18 are eligible to be considered for the intermediary special measure (Ministry of Justice, 2011 (cf below). Just because a child appears to be able to communicate well, does not mean that they will be able to understand complex legal questioning during a cross examination, or feel able to say when they do not understand.

Services to assist: intermediaries[32]

[29] E.g. *Re S (Care Proceedings: Case Management)* [2016] EWCA Civ 83; [2017] 1 FLR 1476, a 15-year-old child's 'evidence' (which the police turned down as not sufficiently reliable in criminal proceedings) should be received not from the child but as hearsay from two social workers despite it being critical to the case of a father who stood to lose contact with his child

[30] But see also 7. Additional factors concerning children under 7 (or functioning at a very young age) and 13. Vulnerable witnesses and parties in the family courts ' 8.11.14

[31] (**R v Cokesix Lubemba; R v JP [2014] EWCA Crim 2064**

[32] See Toolkit 16. Intermediaries: step by step - **Updated!**

In family cases, particularly in public law, the adult parties (the parents) as well as children are frequently 'vulnerable witnesses'. The family courts have grappled with and been exercised with the needs of vulnerable witnesses over the past two years and the need for the use of intermediaries to assist vulnerable and intimidated witnesses.

The issue of funding intermediaries to assist vulnerable witnesses has been considered by the President, the Court of Appeal and the Administrative Court. The family court has had to deal with situations that were an affront to all principles of fairness[33]. The Ministry of Justice President issued guidance on this vexed issue on 13.2.18 "Guidance to family courts: payment for special measures" when, with the President no doubt snapping at the heels to get things done, the MoJ have agreed to take responsibility for the fees of an required intermediary service.

What does an intermediary do?
In court proceedings, the role of an intermediary is to facilitate communication between a vulnerable party or witness and other participants and to ensure that vulnerable people have a fair hearing. Intermediaries are appointed to support vulnerable witnesses or parties to participate in or understand proceedings inside the courtroom.

What do they do?
Intermediaries can assist by:

- Carrying out an initial assessment of the child'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.

Triangle is an intermediary service[34] which provides intermediaries across the United Kingdom to enable communication with children and young people up to the age of 25. They have particular expertise with very young and traumatised children and with children and young adults.

And now the final and fourth topic.

The degree to which the family court properly respects the Article 6 rights of the child

The right of the child to be heard and the need to make provision for hearing from the child is contained in numerous international conventions including the UN Convention on the Rights of the Child. See also Council of Europe (2010) "Guidelines on Child Friendly Justice"; The European Convention on the Exercise of Children's Rights.

The UK has agreed to be abide by conventions which guarantee to children a right to express views where the child who is capable of forming his or her own views is affected by the outcome of any decision-making concerning the child. Let us take two by way of illustration:

Art 24 of The Charter of Fundamental Rights of the European Union is clear:

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[33] See for example: Re A (Vulnerable Witness) [2013] EWHC 1694 (Fam) (Pauffley J), Re A (Vulnerable Witness: Fact Finding) [2013] EWHC 2124 (Fam) (Pauffley J), Re M (A Child) [2012] EWCA Civ 1905 (CA), Re X (A Child) [2011] EWHC 3401 (Fam) (Theis J), Wiltshire Council v N [2013] EWHC 3502 (Fam) (Baker J) In Re C (A Child) (Care Proceedings: Deaf Parent) [2014] EWCA Civ 128 (CA)a

[34] Intermediary Services | Triangle https://triangle.org.uk/service/intermediaries

'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.'

Art 12 of the United Nations Convention on the Rights of the Child 1989 echoes this principle:
'*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.'*

Having identified the principle, Art 12 then identifies what this means in practice: it requires that an 'opportunity to be heard [be provided] in any judicial and administrative proceedings'. I.e. the judge and social workers must make sure a child who wishes to express views can do so by whatever means is appropriate and in accordance with procedural rules.

Art 12 continues:
'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.'

I am indebted for David Burrows contribution to this subject and all can access his articles at https://dbfamilylaw.wordpress.com/2018/04/06/hearing-the-child-in-family-courts/. The two I have drawn upon for this area were published on 6.4.18 and 10.4.18.

Mr Burrows asked the question '*to what extent, however, are English and Welsh judges complying with their duties to hear a child's views?'* His answer, and one I agree with is, *'at best falteringly'*. As Mr Burrows points out[35] there is nothing beyond Children Act 1989 s 10(8) which records how English judges should recognise Arts 12 and 24 and formally hear child's views. The Children Act 1989 s 1(3) records only that the wishes and feelings of a child is part of a court's decision-making process.

He brought an interesting case to my attention: ***Re D (A Child) (International Recognition)* [2016] EWCA Civ 12, [2016] 2 FLR 347**. In it the Court of Appeal considered Art 24 of the UN Charter. The court was concerned with a Romanian court order and the question of whether this should be enforced in UK where a child was not given 'an opportunity to be heard' on parental responsibility (i.e. in where he was to live. In the search for 'fundamental principles' Ryder LJ started with Children Act 1989 and the check-list of factors for considering court-ordered arrangements for children:

> *S 1(3) [When the court is considering making an order about a child it] shall have regard in particular to –*
> *(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);*

Ryder LJ said that Section 1(3) (a) was a 'fundamental principle' on which the court's discretion is founded and which no 'parent can seek to avoid'. It therefore went further than 'a check-list factor'. It was, said Ryder LJ, *'plainly an example of domestic jurisdiction giving force to a fundamental principle of procedure'*. 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'*.

He continued:
[44] '*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.'*

[35] See article 6.4.18 "Hearing the Child in the Family Court' https://dbfamilylaw.wordpress.com/2018/04/06/hearing-the-child-in-family-courts/.

I think the issue here is in what way the family court believes the child is able to participate and that we are unduly protectionist when it comes to older children.

In private law cases children are not automatically joined as parties. The Family Proceedings Rules (FPR) 2010, r 16.6(3) says a child can conduct proceedings: first, if the court gives permission (r 16.6(3)(a): which must assume that a child is permitted to make their own application to a judge); or, secondly, if a solicitor is willing to be instructed and they 'consider that the child is able, having regard to the child's understanding, to give instructions in relation to the proceedings' (r 16.6(3)(b). In the main, if parents are in dispute it is they who remain the sole parties. If a child is involved and the dispute concerns where it is to live and who it should see a s 7 report will be ordered from a CAFCASS officer or independent social worker (ISW) who will meet with the parties and see the child. That officer will convey the wishes and feelings of the child in the context of competing options and will make recommendations to the court as to disposal. The CAFCASS officer or ISW are also able to attend court hearings to report directly to the Judge. However, they are not a child's advocate; and they are of course unable to respond on a child's behalf to evidence as it unfolds.

Separate representation and joining a party to proceedings has historically been relatively unusual in private law children disputes. 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.

In the majority of cases, 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.

In the high-profile case of ***Ciccone v Ritchie (No 2) [2016] EWHC 616 (Fam),*** the 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 interest.

In public law proceedings the child is automatically joined as a party. Regardless of age, all children involved in public law proceedings are made parties as public law (or care) proceedings are 'specified proceedings' with the meaning of s 41(6) of the Children Act 1989. 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 child's guardian must advise the court on the following matters:

(a) whether the child is of sufficient understanding for any purpose including the child's refusal to submit to a medical or psychiatric examination or other assessment that the court has the power to require, direct or order;
(b) the wishes of the child in respect of any matter relevant to the proceedings including that child's attendance at court;
(c) the appropriate forum for the proceedings;
(d) the appropriate timing of the proceedings or any part of them;
(e) 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
(f) any other matter on which the court seeks advice or on which the child's guardian considers that the court should be informed.

The solicitor acts on the guardian's instructions unless there is a conflict between what the guardian may recommend and what the child wants. If the child wishes to give instructions and the child is able, having regard to his understanding, to give instructions on his own behalf, the solicitor must conduct the proceedings in accordance with the child's instructions: FPR 2010 r 16.29(2). In that case the solicitor acts for the child on their instructions and the guardian continues in the case outside their fold: see Family Procedure Rules 2010, r 16.29(2).

It will be recalled that Art 12 of the UN Convention states that:

1. 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.
2. For this purpose, 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.

When one looks at Art 12 the right to be heard includes being heard directly or through a representative or body. Have we developed a practice in the UK family court whereby a default position is taken paternalistically on behalf of the child, even one of mature years and understanding, that they should have their voice heard through the filter of a guardian and thence a solicitor?

A child who is capable of having an opinion on their experiences and their future will always be given the chance to express those views to their Guardian. The Guardian will place those views in the context of the evidence she gathers overall. The Guardian will then make recommendations to the court, which may or may not accord with the child's wishes, on the basis of what the child's welfare requires. The child's wishes will indeed be recorded. There will be transparency because the child's wishes and feeling will be specifically sought out and put into the final report.

But how often do the Guardian and solicitor fall back onto the default position that the child's views can adequately be presented to the court through the medium of the guardians report rather than actively considering whether the child should be given the right to be heard directly and telling the child of that option? How often is the child told of their right as opposed to it lying dormant until a party (normally a parent) says the child is not being heard and suggest separate representation; usually to be met with the response by the solicitor that s/he and the guardian 'have the matter under active review'? They 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 directly 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?

Whether a child is told of their right to instruct their solicitor directly may depend on the age and assertiveness of the child and the particular approach to the representation of child clients that the solicitor has. Should it be a matter that becomes an issue only if a conflict between the guardian and child arises? 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 outsider's point of view? How often do children who are instructing their solicitor directly participate to the point of coming into court hearings? How would the court deal with that situation?

In ***Mabon v Mabon*** **[2005] EWCA Civ 634, [2005] Fam 366** parents of six children were engaged in residence order proceedings relating to the three older, boys aged 17, 15 and 13. A CAFCASS report was prepared, and the CAFCASS officer was appointed as the guardian of all six children, who were joined as parties. Following a fact-finding hearing the older children wanted to instruct a solicitor to represent them for the hearing to resolve where they should live. The judge refused to grant the application for separate representation (now under FPR 2010, r 16.6(5)). On appeal, Thorpe LJ (at [28]) stressed the importance of an individual child's right to respect

for family life (European Convention 1950, Art 8) and of UN Convention on the Rights of the Child, Art 12, that 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'* ([29]).

Moreover, Wall LJ stressed the need to approach questions as to a child's involvement in court proceedings from the 'child's perspective' not that of the adults involved (e.g. judge, parties, legal representatives).

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'* ([40]). 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'* ([35]).

In Re W (A Child) [2016] EWCA Civ 1051, the court made plain that in applying the test in FPR 2010 r 16.29 (2) the court should not allow a concern that if given permission to instruct his solicitor directly the child would become a 'mouthpiece' for his parents' views was not sufficient to grant him that right.

Closing remarks

I have found this a challenging lecture to write as my preconceptions of how well we, as child care professionals, are doing to respect and give expression to the voice of the children in our cases was challenged by recognising how few times I and my colleagues come across serious cases where older children do not have a solicitor acting for them in court when their wishes and feelings run counter to recommendations on their behalf and in how few cases judges see children. Without figures to test personal experience against it is difficult to know whether my experience and those of silk and senior junior barristers is or is not out of step with other practitioners. I know of many fine judges, particularly at County Court level, who go out of their way to give their child subjects confidence in them as their decision maker. One judge in Leeds invites every child over 10 who she is deciding the future of to her chambers room along with their solicitor and guardian (and sometimes into her court room and lets them sit in the position she would be as a judge and where the witness stands and where their parents sit) and she explains roles in court. Moreover, she writes a short letter to each child after their case has concluded in child friendly language telling them what she has decided and why. That is exemplary conduct and I'm sure there are many other shining examples of child focused conduct but, reflecting on the recommendations of the WG in 2015. I am left with a sense of unease that many excellent suggestions have not yet been implemented. There is no room for complacency and good reason for action.

With hindsight I rather agree with Mr Burrows when he says that *'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'*.[36]

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[36] July 2017 https://www.newlawjournal.co.uk/content/child-s-play-pt-3

Next lecture: 24.5.2018, 6:00PM - 7:00PM Barnard's Hall Inn
Transparency in the Family Court: What Goes on Behind Closed Doors?'

Who does the story belong to: the family or society? Where and how are the lines drawn? 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. The aim was to improve public awareness of the court process and to increase confidence in its actions. 'Transparency' was the watch word of the day. Has it worked?

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