

## 'Seen but not heard?'

Mr Justice Cobb

*This article is based on a presentation to the Association of Lawyers for Children's Annual Conference, Bristol, November 2014.*

'In silence I must take my seat  
And give God thanks before I eat; ...  
... I must not speak a useless word  
For children should be seen, not  
heard ...'<sup>1</sup>

This morally-instructive verse illuminates an austere Victorian attitude to the standing of children in family life. But this dogma was neither the creation nor the preserve of the Victorians; it had been embedded in custom for centuries. A collection of fifteenth century homilies make reference to an old English saying that 'A mayde schuld be seen, but not herd';<sup>2</sup> in their turn, John Locke<sup>3</sup> in the seventeenth century, and John Stuart Mill<sup>4</sup> in the nineteenth, each explained and rationalised this accepted notion in their writings. This societal attitude was reflected in an essentially paternalistic and protective jurisdiction of the civil courts responsible for decision-making in relation to children, a jurisdictional principle which continued right up until the end of the twentieth century.

In contemporary society, the increasing autonomy and moral authority of young people is more widely recognised; its influence over and contribution to our lives is genuinely welcomed. Surely our forebears would not for one second have contemplated that a Nobel award, recognising an extraordinary contribution to global rights of young people, could be

made to a 17 year old, as it was in 2014. Remarkable and inspiring though that achievement is, it does not disguise the fact that many young people feel that they are *not* appreciated, they are *not* heard, even on matters which affect their daily lives, and which materially and adversely affect their emotional and physical well-being. Consider two recent reports which attracted much national media interest, as examples of this: Anne Coffey's report<sup>5</sup> *Real Voices* published at the end of last month contained some extraordinarily distressing stories of child sexual exploitation in Manchester and Rochdale, which for many years went unacknowledged and not addressed; many young people felt that the 'suits and uniforms'<sup>6</sup> did not hear what they were saying. Last week the Commons Health Select Committee<sup>7</sup> published its report on children and adolescent mental health, which gave prominence to the range and seriousness of mental health problems affecting young people in England and Wales. Practitioners in the field of family justice (particularly those practising in public law children work) readily recognise the strong connection between mental health problems and social disadvantage, with children and young people in the poorest households three times more likely to have mental health problems than those growing up in better-off homes.<sup>8</sup> Mental health conditions, including depression, anxiety and conduct disorder, which are suffered by about one in ten young people in this

1 Table Rules for Little Folk (nineteenth Century, anonymous).  
2 Mirk's Festial, circa 1450: 'Hyt ys old Englysch sawe: A mayde schuld be seen, but not herd'.  
3 'Locke: Essay Concerning Human Understanding (1689): Tabula Rasa' or 'Blank Slate' connoted that a child's mind was like a blank sheet of paper, void of all reason and knowledge.  
4 Mill 'On Liberty' (1859).

5 Real Voices: Report by Anne Coffey MP <http://anncoffeyp.com/wp-content/uploads/2014/10/Real-Voices-Final.pdf>.  
6 Young people 'spoke out about their fear of speaking to "suits" and "uniforms" in the agencies that are supposed to protect them, but which they feel look down on them' p 7.  
7 5 November 2014 <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhealth/342/342.pdf>  
8 Department of Health, Chief Medical Officer's annual report 2012: *Our Children Deserve Better: Prevention Pays* chapter 10, p 2.

country, are often a direct response to what is happening in their lives;<sup>9</sup> in many instances, this is because these young people are in different contexts – whether at home or at school – not being ‘heard’.

By the title of this conference, and of this keynote address, the question is posed for you: To what extent are children playing a direct part, and being ‘heard’, in twenty-first century family justice? The recent extensive reforms of the family justice system – affecting both substance and procedure – were significantly inspired by the 18-month *Family Justice Review* (FJR) conducted by a distinguished panel chaired by David Norgrove; this panel emphasised that the family justice system must be ‘one that provides children, as well as adults, with an opportunity to have their voices heard in the decisions that will be made’.<sup>10</sup> Three years on from that report, it is indeed timely to ask whether children are truly being heard, not just seen, in the decision-making in the family courts. In addressing this topic I raise below, and hope to answer, a number of key questions.

### Does our legislative framework adequately provide for the voice of the child to be heard?

The Children Act 1989 has been extremely effective, in my view, in responding to societal change and expectation over the last 23 years. The paramountcy principle<sup>11</sup> has proved robust, and the welfare checklist<sup>12</sup> adaptable to accommodate (indeed embrace) the manifold different permutations of family life with which it has had to grapple. In any welfare review, prominence is given – by virtue of its position at the head of that statutory checklist – to the ‘ascertainable wishes and feelings of the child concerned . . . in the light of . . . [his/her] age and understanding’. When the Law

Commission<sup>13</sup> considered child law reform in the late 1980s it debated (but in the end rejected) the option of giving this particular provision its own free-standing position in the forthcoming Act;<sup>14</sup> the Commission resolved the debate by concluding that there were dangers in giving the children’s views too much recognition, or that in doing so children would feel responsible for the court’s eventual decision. The Commission added two further concerns: that children’s views ought always to be discovered in such a way as to avoid embroiling them in parental conflict (addressed in the main through Cafcass), and secondly that the reliability of the views should always be tested (and in this regard it specifically incorporated reference to the views being evaluated by reference to their ‘age and understanding’).

I believe, as a former practitioner and now judge in this field, that judges, lawyers and professionals have found the ‘views of the child’ the most potent and challenging of the checklist factors to work with in practice. Judges not infrequently wrestle with the exquisite tension between the powerfully held views of an older child operating in conflict with the wider ‘best interests’ assessment. These cases can cause real challenges when orders come to be enforced, generating frustration and distress for all concerned, including the child.<sup>15</sup> How important it is then for the court not to just ‘have regard to’ the views of the child, but to communicate to the child that he or she has indeed been listened to; if the ultimate decision does not accord with the child’s wishes, their distress may be avoided, or at least mitigated, if he or she knows that they were involved and ‘heard’.

<sup>13</sup> *Review of Child Law, Guardianship and Custody* (Law Com No 172) (1988) paras 3.22 and 3.23; *Working Paper on Custody* (Working Paper No.96) (1986) paras 6.40–6.44 and 7.37).

<sup>14</sup> Para 3.22–3.24 Law Commission No 172.

<sup>15</sup> Para 3.22–3.24 Law Commission No 172.

<sup>15</sup> By way of illustration see *Re S (Transfer of Residence)* [2010] EWHC 192 (Fam), [2010] 1 FLR 1785, FD; *Re S (A Child) (Transfer of Residence: Judge’s Discretion)*, *S (A Child)* [2010] EWCA Civ 219 (unreported) 21 January 2010, CA; *Re S (A Child)* [2010] EWHC B2 Fam (unreported) 1 March 2010, FD [2010] EWCA Civ 325, [2010] All ER (D) 305 (Mar), CA; *Re S (Transfer of Residence)* [2011] 1 FLR 1789.

<sup>9</sup> Source: Mental Health Foundation.

<sup>10</sup> Family Justice Review (FJR) Final Report §2.6.

<sup>11</sup> Children Act 1989, s 1(1).

<sup>12</sup> *Ibid*, s 1(3).

Since the implementation of the 1989 Act, the significance of s 1(3)(a) has, I suggest, been materially buttressed by the ratification of a number of international conventions and instruments which give particular prominence in court process and administrative decision-making to the child's views. Indeed, the Children Act 1989 was only 2 months old when the UK signed the United Nations Convention on the Rights of the Child (UNCRC), enshrining as it does in Art 12 the valuable 'assurance' of 'the right to express . . . views freely'. Added to that important right are the complementary rights enshrined in Art 6 and Art 8 of the European Convention on Human Rights (ECHR); these themselves are reinforced by the 2010 Guidelines on Child-Friendly Justice (advocated by the Committee of the Ministers of the Council of Europe which give European Governments guidance on enhancing children's access to and treatment in justice, in any sphere – civil,

administrative or criminal<sup>16</sup>). Separately and importantly, Brussels IIR<sup>17</sup> 'ensure[s]' the child is given the opportunity to be heard in inter-jurisdictional disputes concerning parental responsibility. This readily identifiable and coherent arrangement of international instruments should have the effect of giving prominence to the child's view, as the courts here comply with our domestic statutory obligations to give paramount importance to the child's welfare.

Unlike our arguably more progressive neighbours across the Severn from here in

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16 Committee of Ministers of the Council of Europe (2010): NB 3[44]–[49], including 'Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question . . .'

17 Council Regulation (EC) No 2201/2003 (Brussels II revised) Replacing Regulation (EC) No 1347/2000.

Wales,<sup>18</sup> the UNCRC has not however found its way explicitly into any primary or secondary legislation in England; that is not to say, however, that it has not gained status in domestic jurisprudence – far from it. The Supreme Court, following the lead from its current Deputy President, conscientiously refers to and draws upon it, and has done so repeatedly in a number of recent decisions following *Venables and Thompson*<sup>19</sup> setting a precedent – perhaps not sufficiently followed in practice – for lower courts to follow. Significantly, the Minister for Justice in his speech to the Voice of the Child conference in London in July 2014 indicated the government's commitment to giving due consideration to the UNCRC when developing new policy and legislation hereafter. It should only therefore be a matter of time, I hope, before we see in England legislative provisions equivalent to the Rights of Children and Young Persons (Wales) Measure 2011 and the Social Services and Well-Being (Wales) Act 2014.

In public law cases, as I shall discuss in a moment, the combined effect of primary and secondary legislation ensures party status for a child, and therefore an obvious mechanism for the voice of the child to be heard. In private law, the same provision is not routinely available. The Private Law Working Group (which I chaired in 2013–14) sought to reinforce the expectations of primary legislation in the Child Arrangements Programme (CAP), by expressly placing the child at the centre of decision making in and out of the court arena; in that regard we specifically considered and addressed how the child's contribution to decision-making could be achieved. When drafting the CAP, we took the Family Justice Young People's Board's

(FJYPB) Charter,<sup>20</sup> and incorporated it as far as we could into the Practice Direction – in some respects to the letter, but in any event overall in spirit.<sup>21</sup> We even included the web-link to the charter in the Practice Direction itself, so as to provide ready access to the Young People's message. We further, specifically, spelt out the ways in which we felt that a child's views may be communicated to the court, highlighting the role of Cafcass, the value of letter writing to the judge, direct participation by party status, and by the judge meeting the child

Taking all of these points together, the answer to the first question is, in my view, Yes; though perhaps more can, and I hope will, be done to give status to the UNCRC in primary or secondary legislation in England as it is in Wales. The more difficult questions follow.

### Are effective mechanisms in place to 'hear' the child who is the subject of family dispute . . . out of court?

There are many children who experience parental separation or family dispute who, at that stressful time, don't come anywhere near a court or a professional. The extent to which their voice may be heard when the family disintegrates depends on the extent to which their parents are able or prepared to listen. The significant down-turn in private law applications to court following the implementation of LASPO 2012, and the simultaneous down-turn in mediation referrals, inexorably lead to the conclusion that many children who prior to 2013 would probably have had their own situation considered by either a judge and/or Cafcass and/or another professional are no longer receiving that sort of attention. While recognising that family law litigation brings with it many disadvantages for children, I nonetheless have a concern that those former private law cases on the cusp of public law (where there are safeguarding elements) are escaping without scrutiny, potentially exposing children to the risk of

18 See Rights of Children and Young Persons (Wales) Measure 2011, and the Social Services and Well-being (Wales) Act 2014.

19 *R v Secretary of State for the Home Department, ex p Venables and Thompson* [1997] 3 WLR 23 at 49F and H; *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 FLR 961; *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35 at §20, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, *Re E (Children)* [2011] UKSC 27, *Re B (Child)* [2013] UKSC 33, [2008] 2 FLR 141.

20 [http://www.cafcass.gov.uk/media/179714/fjypb\\_national\\_charter\\_1013.pdf](http://www.cafcass.gov.uk/media/179714/fjypb_national_charter_1013.pdf)

21 Child Arrangements Programme (FPR 2010 PD12B) §4.1–4.5, and §14.3.

harm. For this category of child, the answer to the question, I fear, is No.

It is well-recognised that managed and professionally-steered non-court dispute resolution is generally, indeed invariably, better for families with more durable outcomes, than litigation. Unsurprisingly, therefore legal aid reform in 2012 was accompanied by a powerful driver to direct families to mediation with the message that this would in any event provide a more suitable forum for dispute resolution than going to court. But there remains a question about the extent to which the child is 'heard' in the processes encompassed by the different brands of non-court dispute resolution.

'Traditional' mediation (if I may so call it) primarily engages with the adults in the resolution of disputes; mediation which directly involves the child occurs (it appears) less frequently, but has much to commend it. Indeed the FJR actively supported child-inclusive mediation, recommending that it should 'be available to all families seeking to mediate, provided that it is appropriate and safe and undertaken by well trained practitioners'.<sup>22</sup> However, as Janet Walker and Angela Lake Carroll comment in their recent article,<sup>23</sup> there remain no consistent frameworks for children to participate in non-court dispute resolution processes: fundamental questions arise as to the best model: Should child-inclusive mediation involve more than one mediator – ie one specifically to work with the child? Should a psychologist or a specialist in child counselling be involved (as at Devon Family Solutions, where they employ a Child Resource Worker)? Moreover, it is one thing for parents to sign up to mediation as an essentially confidential process, but where does that leave the child? What is the status of what he or she says? Can what the child says subsequently be reported if the case goes to court? As a mediator, the instinctive response to the last of those questions

would be no; as a child lawyer, the instinctive response may be the opposite. These are real problems which give of no easy answers. I recognise that mediation professionals are conscientiously grappling with them; reassuringly, the Government too seems to be 'on board' with this issue, and has started a dialogue with the family mediation profession about how it can assist in ensuring that the voice of the child and young person becomes a central part of the process of family mediation.<sup>24</sup>

Unaware of any particular data in relation to child-inclusive mediation, I would like to suggest that there may well be a case for some urgent independent research into the views and experiences of children (and their parents) whose family disputes are being or have been resolved in mediation, in which the children themselves both have, and have not, been included. This may well inform and maximise good practice, and provide some answers as to the optimal model for child-inclusive interventions. In answering this question, for these children it is far from assured that they will be 'heard' in the dispute, but it is reassuring to note that their contribution is being actively addressed. But what if the case goes to court?

### **Are effective mechanisms in place to 'hear' the child who is the subject of family dispute . . . at court?**

The FJR in 2011 implicitly acknowledged that not enough was then being done to hear the voice of the child in family court process; it referred to the fact that 'many children and young people may not even be aware that a case is underway, let alone have their views heard as part of it.'<sup>25</sup> the panel was not however explicit in making recommendations about how best to address this. It spoke of giving children 'a menu of options' – 'laying out the ways in which they could be heard should they wish',<sup>26</sup> inferentially independently from their parents. The effectiveness of the available options is in my opinion currently pretty variable.

<sup>22</sup> FJR Final Report §4.106.

<sup>23</sup> 'Hearing the voices of children and young people in dispute resolution processes: promoting a child-inclusive approach' [2014] Fam Law 1577 (November).

<sup>24</sup> Rt Hon Simon Hughes MP: Speech to the Voice of the Child Conference: 24 July 2014.

<sup>25</sup> FJR: Final Report §4.132.

<sup>26</sup> Ibid, §2.27.

- (1) Cafcass: Cafcass remains the primary ‘eyes and ears’<sup>27</sup> of the court and will remain the primary front line service for children and families in the court system; a pilot just launched in Kent will find Cafcass operating a triage service for families outside of litigation – a valuable role and a suitable complement to their mainstream work. The work of Cafcass is valuable to the court, and will continue to be valuable to children provided that in each case they continue to see the child, and accurately and faithfully report the child’s views. That value will be enhanced if Cafcass respond to the FJYPB plea for time for each child to ‘build a relationship with their Cafcass worker’, and to have a dialogue up to and including the preparation of any report.
- (2) Party status: As I mentioned earlier, while direct participation of the child in proceedings is assured (by way of party status) in public law proceedings,<sup>28</sup> there is no similar provision in private law, notwithstanding that ‘[i]n a significant number of these cases, serious child welfare and safeguarding concerns are raised, to a level that may well trigger investigation by local authorities.’<sup>29</sup>

The FJR was not unsympathetic to those who had argued that children in private law cases should be enabled to have ‘separate representation as a matter of course’, adding, and in this particular respect I agree, ‘[t]here is less clarity and consistency in the opportunity for children to make their voices heard in private law.’<sup>30</sup> The FJR predicted that the number of r 16.4 appointments (appointment of a Guardian for a child joined to the proceedings) may well increase once legal aid had been removed from the bulk of private law work.<sup>31</sup> At the time of the report, children

were being joined as parties and separately represented in cases involving an issue of significant difficulty, in around 3.5% of cases;<sup>32</sup> although the number has risen when expressed as a percentage of the total (there being fewer private law applications going through the courts) actual r 16.4 appointments have in the period since LASPO so far remained more or less static.

It is ultimately the judge’s responsibility to assess whether a case is right for the child to be joined, and be represented pursuant to FPR 2010, r 16.4; this responsibility is all the more onerous and acute in an environment in which the parties to private law litigation are, in the main, unrepresented. A real concern is that these appointments are made far too long after the proceedings have commenced: currently, the statistics show that these applications are made on average 42 weeks after the case has commenced (June 2014 figures<sup>33</sup>). The increasing numbers of unrepresented parties does not necessarily help judges to identify the 16.4 cases earlier, but as CAP makes clear, judges need to ‘be vigilant’<sup>34</sup> in recognising these cases earlier, and ideally no later than the FHDRA.<sup>35</sup>

If children are joined as parties in their own right and without a guardian (r 16.2), the court is vested with a wide discretion to determine the extent of the role which he or she should play in the proceedings<sup>36</sup> including whether the child should sit in court for, and if so for what parts of, the hearing (there being a presumption neither for or against their attendance),<sup>37</sup> whether they should file evidence, and if so in what form and so on. This flexible approach discussed in two recent cases (*Re K* and *Re LC*) has the considerable benefit of ensuring the engagement of the young person in the proceedings in the most real sense, but at the same time offering some

27 *Re R (Residence Order)* [2009] EWCA Civ 445, [2010] 1 FLR 509, and *R and Others v Cafcass* [2012] EWCA Civ 853, [2012] 2 FLR 1432, *R v Cafcass* [2011] EWHC 1774 (Admin), [2011] 2 FLR 1206,

28 FPR 2010, r 12.3.

29 FJR: Interim report §3 and §106.

30 FJR: Final report: §4.142.

31 *Ibid.*, §4.143.

32 *Ibid.*, §4.139.

33 Source: Cafcass.

34 FPR 2010 PD12B (CAP) §18.1.

35 *Ibid.*

36 *Re LC (Reunite: International Child Abduction Centre Intervening)* [2014] UKSC 1, [2014] 1 FLR 1486, at para [55].

37 *Re K* [2011] EWHC 1082, *sub nom A City Council v T, K and J* [2011] 2 FLR 803, at paras [33]–[35].

degree of insulation from the worst parts of the conflict. Media presence in court, the subject of ongoing consultation to which I turn later, may have a material bearing on a child's willingness to sit in the courtroom and/or play an active part in the case. I am confident that the Children and Vulnerable Witnesses Working Group will consider these points carefully.

- (3) Judges seeing children: Many of you may remember that in care proceedings brought under the Children and Young Persons Act 1969 it was a requirement under the rules for the tribunal to see the children in question during the hearing. I recall one memorable day in the late 1980s when I appeared at the Gravesend Magistrates Court, which then occupied the Old Town Hall – bearing witness to many 'Dickensian' court room dramas, one of which no less involved the trial of William Henry Piggott who was arrested in Gravesend under suspicion of being 'Jack the Ripper', perpetrator of the infamous Whitechapel Murders. The children in question were ushered into the intimidating dark-panelled court, and were coaxed nervously towards the front of the room. The Chairman of the Bench leaned forward over the desk, and said in a tone which although not intentional was ominous and admonishing (causing a chill to run down the spine of all the most hardened advocates present) 'we are going to be sitting here for three days to hear all about you'. The children burst in tears and fled. Mercifully this process was abolished with the passing of the new legislation and supporting Rules.

What is of greater interest now is the potential for a more informal discussion with the judge, I do not recall the practice as being particularly prevalent when I first started at the Bar in the mid-1980s.<sup>38</sup> In a judgment delivered in 1994<sup>39</sup> Wall J described the practice as a 'complete

departure' from normal forensic process;<sup>40</sup> he warned those who were minded to see a child for an informal discussion to undertake this 'cautiously', adding that it should not be either 'automatic or routine' and only undertaken for 'good reason'. The caution expressed in that judgment, by a judge who was well-respected for his accessible and child-friendly approach in handling family cases, reflected a deep-rooted respect for the rules of evidence and the essentially adversarial nature of court process even in the field of family justice.

Perhaps deterred by his cautionary judgment, there is little evidence of the practice of judges seeing children (certainly by reference to the specialist *Law Reports*) for the best part of 10 years. The subsequent shift in approach, in my view, can be traced to, or is certainly illustrated by, the Court of Appeal's pronouncement in *Mabon v Mabon* in 2005,<sup>41</sup> in which Thorpe LJ referred to 'the growing acknowledgement of the autonomy and consequential rights of children, both nationally and internationally'. In the following year, the House of Lords decided the case of *Re D*,<sup>42</sup> in which Baroness Hale reflected the 'growing understanding of the importance of listening to the children involved in children's cases', emphasising a point of importance – that '[i]t is the child, more than anyone else, who will have to live with what the court decides'. The then President of the Family Division Sir Mark

38 Though it plainly happened – see *B v S (Formerly B)* (1973) 118 Sol Jo 219.

39 *B v B (Minors) (Interviews and Listing Arrangements)* [1994] 2 FLR 489.

40 'The procedure represents a complete departure from the normal forensic process. What a child says to the judge is material which cannot be tested in cross-examination in court. It follows, in my judgment, that the discretion to see children should be exercised cautiously: it should in no sense be automatic or routine. It should also only be exercised after hearing submissions from the parties; there must be a good reason for the judge to see a child, and it must be perceived by the judge that it is in the interests of the child to see him.' (p 496)

41 [2005] EWCA Civ 634, [2005] 2 FLR 1011.

42 *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 FLR 961, at para [57].

Potter commended the practice in two separate Hague Convention cases in 2007<sup>43</sup> and 2009.<sup>44</sup>

These judicial views prompted, or at least coincided with, the initiative of the then newly-formed Family Justice Council Voice of the Child committee under the inspiring chairmanship of Nicholas Crichton to work up Guidelines on judges seeing children. In 2008<sup>45</sup> Thorpe LJ took an opportunity in a judgment which considered the wishes of teenage children to preview the work of the FJC sub-committee announcing that ‘the committee is strongly in favour of judges seeing children much more frequently than has been our convention’. Wilson LJ and Charles J, sitting with him on that occasion, were overall more circumspect.

The Guidelines were then produced in 2010. When Thorpe LJ had occasion some two years later in *Re A*<sup>46</sup> to review their operation he remarked that the Guidelines ‘... are there to help judges to achieve greater confidence in meeting children and in involving them in the proceedings’, and I believe that, on the whole, when deployed, they achieve that double objective.

The Children and Vulnerable Witness Working Group is currently looking at this Guidance; and I would not want anything I say now to cut across their work. My personal view is that the 2010 Guidelines, in their core principles, are essentially ‘fit for purpose’. However, I would make one plea about their operation. More conscientious attention should be paid by all those in the field to observe the first and important expectation in the Guidelines, namely that: ‘[t]he judge is entitled to expect the lawyer for the child and/or the Cafcass officer’ to advise the Judge whether the child wishes to meet the Judge; and if so, to explain from the child’s perspective, the purpose of the

meeting; to advise whether it accords with the welfare interests of the child for such a meeting take place; and to identify the purpose of the proposed meeting as perceived by the child’s professional representative/s. In practice, I do not see this happen, or certainly happen often enough. Some judges need a nudge in this direction.

I need no persuading of the value of judges meeting with the children who are subject of the court process, and consider that it would be right to do so in many cases. I have found it a valuable experience on the occasions I have had the opportunity; I believe (and have been led to believe by advocates for the child, and indeed by the parents) that it has been valuable for the children too. That said, I also recognise that a meeting with a judge will not be appropriate for some children; for much younger children, and children who through learning or other disabilities may not make sense of the event. It would not be right to impose a meeting on those who don’t want it, and there should be no expectation of a meeting imposed on the child.

But even if a face-to-face meeting between a judge and child is not to be arranged, that does not mean that children should not have some direct communication with the judge in another way: through letter (to which I would expect a judge to reply), through an informal pre-recorded video message perhaps prepared by Cafcass (altogether more vivid and natural for a child to communicate in this way). Wilson LJ in *Re W* proposed that an older child may find it valuable to be sent the Cafcass report and invited to provide written comments upon it, if any, for transmission unedited to the judge. Any communication of this kind would be appropriate, and valuable.

There is a good case for embracing the FJYPB Charter in its expectation that: ‘[e]very child over the age of sufficient age and ability should have the opportunity of meeting with a member of the judiciary overseeing their case’, that ‘[e]very child should have the opportunity through the Cafcass worker/social worker of submitting their views directly to the judge in writing’,

43 *JPC v SLW and SMW (Abduction)* [2007] EWHC 1349 (Fam), [2007] 2 FLR 900.

44 *De L v H* [2009] EWHC 3074 (Fam), [2010] 1 FLR 1229.

45 *Re W (Leave to Remove)* [2008] EWCA Civ 538, [2008] 2 FLR 1170.

46 *Re A (Fact-Finding Hearing: Judge Meeting with Child)* [2012] EWCA Civ 185, [2012] 2 FLR 369.



and that '[a]ll children should be able to communicate their wishes and feelings with a judge'. But in respect of these laudable objectives, I have a number of observations.

First, judicial continuity: if we, the judges, are to see children, then we have to be conscientious about observing the good practice (indeed the expectation in all children cases now) of judicial continuity. Last month I published a set of three judgments in a case called *Re A and B*.<sup>47</sup> I brought to an end a 6-year private law battle, which concluded with a range of public law as well as private law orders. I was the fourteenth judge to have handled the case in that 6-year period. A, a young teenager, had a talent for art; she produced for the r 16.4 guardian in the case a graphic and revealing caricature of the court scene, with the portraits of my 13 predecessor judges hanging on the wall behind the bench where I am portrayed as sitting, the protagonists (family members) lined up on either side of the dispute. A large clock hangs on the wall.

The first point is that it was extremely valuable to have this message in a medium (art) with which the child felt comfortable in expressing herself. The artwork is illuminating; the message was a powerful one for me, underlining what was important to 'A', none the least of which (up until that point at least) was her exasperation at the length of the process, and the impotence of the judge – this latter point picked up by Dr Mark Berelowitz (consultant child and adolescent psychiatrist) who described it thus: 'There is the idealised on the right, the denigrated on the left; the impassively useless in the middle. There have been 14 of them in the middle'. As I say, a powerful message indeed. I heard it. As it happens, A then asked to meet with me. I agreed. I have not reproduced the note of the meeting in my published judgment. But I can tell you, as I told the parties, that she asked me,

pointedly, whether I was going to be the judge who finally would decide her case. I told her that I would. And I did.

A had seen a large number of professionals. She had had no fewer than three guardians;<sup>48</sup> she had doubtless told her story to many people. This sad experience underlined an important message – that listening to a child's views in family proceedings is a *process*, not an *event*; the child's view may develop over time, it may of course change, or may simply be better understood by the adults as it is repeated and elaborated. The meeting with the judge is likely to be but one occasion when the child articulates his or her views: so it is important that children are re-assured that the judge who decides the case is the one who they meet.

Secondly, training. I feel comfortable, or reasonably comfortable, in meeting with children. I have children of my own. I meet their many friends. My children are not backward in telling me when I am being embarrassing or awkward; so I have some pretty good tutors, although am sure I have much to learn. But in order that we get it right, consistently, and nationally, there needs to be good quality judicial training involving young people. This is already part of the Judicial College programme in public and private law, and I understand it will be reviewed once the Children and Vulnerable Witnesses Working Group has finally reported.

Thirdly, the risk of contamination. This is one area in which the judges are nervous. Thorpe LJ in *Re A*<sup>49</sup> indicated that while it is useful for the judge to hear the child's views about their future, there is a 'risk of contamination' if discussions turn to the past disputed events which are the subject of the enquiry.<sup>50</sup> We Judges therefore need to be careful, in an endeavour to achieve resolution of family disputes in the most child-focused way that we do not achieve

47 [2014] EWHC 818 (Fam). But see also [2013] EWHC 2305 (Fam), and [2013] EWHC 4150 (Fam) for the two earlier judgments in the same case. For a summary of the length and cost of the case, and the case management failures in the litigation generally, see §7 [2013] EWHC 2305 (Fam).

48 See [2013] EWHC 2305 (Fam) §7.

49 *Re A (Fact-Finding Hearing: Judge Meeting with Child)* [2012] EWCA Civ 185, [2012] 2 FLR 369.

50 *Ibid*, at para [52].

the opposite. There are three Court of Appeal judgments in the last two years (two of them in the last 6 months) which discuss the very issue of what happens when conscientious (and if I may say so well-respected family) judges overstep the reasonably faintly drawn boundary between hearing the child, and eliciting information from the child in a way which ultimately fashions judicial analysis, opinion and/or findings – see *Re A* (above), *Re KP*<sup>51</sup> and *Re A*.<sup>52</sup> The 2010 Guidelines are clear: it cannot be stressed too often: the child's meeting with the judge is *not* for the purpose of gathering evidence; that is the task for Cafcass or others expertise in the field. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her. Judges should be reasonably 'passive recipient[s]'<sup>53</sup> of the child's views, and should not set out to 'probe or seek to test'<sup>54</sup> what the child is saying – a process which in *Re KP* the child was said to have found 'intimidating'.<sup>55</sup> As a guide, the Court of Appeal have suggested that the meeting should not ordinarily last for more than 20 minutes or so – not the hour in *Re KP* – in order that it retains proportion within the process.

It is therefore important that we judges strike carefully the delicate balance between respecting the Art 6 rights of the participants to the litigation in what remains an essentially adversarial (although increasingly inquisitorial) process by not taking evidence, as against ensuring that the child has felt included and listened to. At all times, we must act in a manner which is compatible with legal principle and in compliance with Art 6: 'to ensure a process whereby evidence upon which the judge will, in due course, rely is only admitted as part of a process in which all parties are

involved and through which the evidence can be tested on behalf of each litigant'.<sup>56</sup>

Without care, training and strict adherence to the Guidelines, I am conscious that meetings between judges and children can be counter-productive; this was hinted at in *Re KP* and even more obviously demonstrated in the recently reported decision of *Re K*<sup>57</sup> – a case in which the boys (aged 14 and 12) who had experienced considerable conflict at home, and had fallen out with their representatives in the court process, were said to have left a judicial meeting purportedly conducted in line with the Guidelines 'distressed and apparently even more convinced in their view that no-one was prepared to listen to them'.<sup>58</sup>

One final and important point. There is an identified concern – evidenced by the research recently commissioned by the ALC and NYAS – that if the media are to have greater access to court documents and hearings as proposed in the 'Next Steps' consultation, children may choose not to engage so fully (if at all) with professionals<sup>59</sup> and the court. I believe that this reflects a genuine fear about their private lives being opened for to a more public audience, and needs (as I am sure it will be) to be considered carefully in the evaluation of consultation responses.

### What does it mean to be 'heard'?

Communication is a two-way process. It is important that when we communicate with children we (as judges, lawyers or professionals) do so in a language they understand: 'clear, understandable and age appropriate',<sup>60</sup> and 'jargon'-free. This is, frankly, the only respectful approach.

While we must be vigilant not to overload or burden children and young people with

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

52 See again *Re A (Fact-Finding Hearing: Judge Meeting with Child)* [2012] EWCA Civ 185, [2012] 2 FLR 369.

53 *Re KP (Abduction: Child's Objections)* [2014] EWCA Civ 554, [2014] 2 FLR 660, at para [53].

54 *Ibid*, at para [53].

55 *Ibid*, at para [41].

56 *Ibid*, at para [38].

57 *Re K (Breakdown of Arrangements: Urgent Hearing)* [2014] EWCA Civ 1195, [2015] 1 FLR (forthcoming).

58 *Ibid*, at paras [43] and [49].

59 See para.9.10.

60 FJYPB Charter §6:  
[http://www.cafcass.gov.uk/media/179714/fjypb\\_national\\_charter\\_1013.pdf](http://www.cafcass.gov.uk/media/179714/fjypb_national_charter_1013.pdf)

information, we must recognise that the message which children give *us* will only be authentic and informed, and therefore have meaning, if they themselves possess sufficient relevant information to form a view. We need to respect young people's wishes to have relevant information at all stages of the proceedings (a key element of the charter<sup>61</sup>); we should pay heed to the views of the young people who took part in Julia Brophy's recent research who complained that the paternalistic approaches of the court were not necessarily or always in their interests: young people want more honesty from professionals and more accurate information about processes and decisions regarding their lives.<sup>62</sup> Striking the right balance in each case is a challenge.

As for feedback, faithful to the expectation that the child or young person should feel that their needs, wishes and feelings have been considered in the court process, it is incumbent on us – judges, lawyers, professionals – to feed back in an age appropriate way what has happened. I have written letters to children (as is evident from my final judgment in *Re A and B*) to advise them of the outcome of the proceedings and my reasons, adding my own hopes for their futures.

Interpreting or translating what a child is saying is another challenge. Communication is not just verbal. It is well recognised that over 50% of communication is non-verbal. Professionals who receive views from children in some cases need particular and expert skills to interpret the message. The reduction in the availability of public funds to the parties in private law inevitably has had (and continues to have) an impact on the facility to instruct an expert when this is necessary; it is important that the child's message is not lost, simply because we don't have the expertise available to understand it.

As I earlier mentioned, 'hearing' a child does not mean that courts do what they say. As

<sup>61</sup> *Ibid.*

<sup>62</sup> *Safeguarding, Privacy and Respect for Children and Young People* (ALC / NYAS, 2014).

Baroness Hale memorably said in *Re D*<sup>63</sup> '... 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'. It was acknowledged in that case that at 4½ years old, D was not of an age where a court would accept that he had 'attained an age and degree of maturity at which it is appropriate to take account of its views'. But the time of the appeal when he was at 8, it was a different story; so the court listened more carefully. That said, there is no threshold below which a child cannot be sufficiently mature for the purposes of the child's objections defence, nor are there even any presumptions although, as a matter of common sense, one will be able to say, for example, that an infant will not be old enough and a normal 15 year old is likely to be.<sup>64</sup> This year, the Supreme Court developed the point further – it's not just the articulated objections; in the more mature child, one is looking at the perception of her situation: 'The relevant reality is that of the child, not of the parents. This approach accords with our increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents decisions'.<sup>65</sup>

The expanding jurisprudence in Hague Convention proceedings which has grown up over the Art 13(b) 'child's objections' exception has provided a context for the courts to look at children's views, age and understanding, maturity and immaturity; the jurisprudence has undoubtedly in my view helpfully influenced the ways in which judges consider 'wishes and feelings' under the 1989 Act.

So a child benefits from knowing that their views have been heard, and more so by reassurance that the views have been understood. A meeting with a judge fulfils (or should fulfil) this objective immediately

<sup>63</sup> *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 FLR 961, at para [57].

<sup>64</sup> *Re W (Abduction: Acquiescence: Children's Objections)* [2010] EWHC 332 (Fam), [2010] 2 FLR 1150.

<sup>65</sup> *Re LC (Reunite: International Child Abduction Centre Intervening)* [2014] UKSC 1, [2014] 1 FLR 1486, at para [87].

and vividly. But if no meeting takes place, it is perhaps even more important that at the conclusion of a case, or after a critical decision has been made, a direct message is sent to the child – ideally from the judge – whether by letter or otherwise, explaining what has happened and why.

### Are processes appropriate to allow the child as complainant to be effectively 'heard'?

So far, I have concentrated on issues around children's participation in family processes – particularly private law – where there is a risk that the clamour of adult conflict can cause them to be ignored, or drowned out. Different considerations apply to the child as complainant. As this is an area also currently under review by the Children and Vulnerable Witnesses Working Group,<sup>66</sup> it is not appropriate or timely for me to comment on this issue at length; the interim report of the Working Group published in July 2014 plainly acknowledges the need to ensure that the Art 6 rights of all concerned should be protected while recognising the particular vulnerability of the child as complainant, reflecting the essential message of the relevant 2011 Guidelines<sup>67</sup> and the Supreme Court's decision of *Re W*<sup>68</sup> which prompted them.

The 2011 Guidelines specifically invite the court to consider as part of the balancing exercise the possible damage to the child's welfare from giving evidence i.e. the risk of harm to the child from giving evidence; having regard to an extensive (22-point) checklist including the child's wishes and feelings; in particular their willingness to give evidence (with the acknowledgement that an unwilling child should rarely if ever be obliged to give evidence).

It is important that the child as complainant is given the best chance to be heard, the advocacy should be adapted to enable the child to give the best evidence of which he or she is capable.<sup>69</sup> New measures were announced by the Government two months ago,<sup>70</sup> designed to give extra support to victims in court; this was in many respects a victory for the NSPCC's Order in Court campaign. The Advocacy Training Council has done much to address the concerns expressed by young people, and reflected in the NSPCC Research that many were unable to understand the questions they were asked in court. In this regard, may I commend the Advocates Gateway<sup>71</sup> which provides an excellent and practical guide to advocates – and is likely to improve not just the experience of the young people giving evidence, but importantly the quality of justice?

The 2011 guidelines make clear that 'A child should never be questioned directly by a litigant in person who is an alleged perpetrator';<sup>72</sup> in the criminal courts there are protections against this happening.<sup>73</sup> This unpalatable situation may however arise in the context of a family dispute on identical facts, and has been the subject of recent judicial commentary, including from the Designated Family Judge here in Bristol.<sup>74</sup> The President, in a suite of recent cases dealing with public funding issues (two of which originated here in the Family Court in Bristol<sup>75</sup>) considered that there was within the new legislation scope for providing such representation at the expense

66 <http://www.judiciary.gov.uk/wp-content/uploads/2014/08/pfd-consultation-interim-report-of-children-vulnerable-witnesses-working-group.pdf>.

67 *Guidelines in relation to children giving evidence in family proceedings* [2012] Fam Law 79.

68 *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485, and further considered in *Re KP (Abduction: Child's Objections)* [2014] EWCA Civ 554, [2014] 2 FLR 660, at para [51]: 'any process must respect the ECHR, Art 6 rights of the parties and must accord with the "overriding objective" in Family Procedure Rules 2010, r 1.1'.

69 *R v Barker* [2010] EWCA Crim 4, para 42, and Guidelines §20.

70 <https://www.gov.uk/government/news/a-bold-new-vision-for-the-treatment-of-victims>.

71 <http://www.theadvocatesgateway.org/toolkits>.

72 2011 Guidelines ([2012] Fam Law 79) at §17.

73 Sections 34 and 38(3) of the Youth Justice and Criminal Evidence Act 1999.

74 *D v K and B (By Her Guardian)* [2014] EWHC 700 (Fam), [2014] Fam Law 1094. Referring also to the judgment of Roderic Wood J in *H v L and R* [2006] EWHC 3099 (Fam), [2007] 2 FLR 162.

75 See *Re D (Non-Availability of Legal Aid)* [2014] EWFC 39, [2015] 1 FLR (forthcoming and reported at [2015] Fam Law 32) and *Q v Q; Re B; Re C (Private Law: Public Funding)* [2014] EWFC 31, [2015] 1 FLR (forthcoming and reported at [2014] Fam Law 1398), at paras [45]–[49].

of the court, ie HMCTS.<sup>76</sup> I hope, in this way, there has been identified in the relevant legislation a significant protection for child complainants.

### Are children being 'heard' on the formation of family law policy?

This is a topic all of its own and I cannot give it proper attention in the context of the wider consideration of the issue this morning. But it deserves brief comment. In a relatively short period of time, the FJYPB has in my view become an extremely influential body concerning itself with ensuring that young people should be heard on issues of the formulation of family law policy. It is also keen that this policy should continue to enhance their voice. Separately, the NYAS Young People's Participation Group have done a considerable amount with other children in care, on the issues of transparency, and in training adults in working and communicating, with children.

On the single most pressing policy issue of the moment for young children, I propose to say just this, and I add that these are my views not the views of the judiciary as a whole. The Report jointly commissioned by this Association with NYAS on 'Safeguarding, Privacy and Respect for Children and Young People – Next Steps in Media Access'<sup>77</sup> contains powerful opposition to the current transparency consultation ('Transparency – Next Steps') published in August 2014. As the Children's Commissioners for England and Wales jointly observe in their foreword, children are not involved in family proceedings by choice; they cannot protect themselves and

are doubly vulnerable as a result of the difficulties that brought their families to court.

It is important that children are heard, and that they are listened to in this debate. I am confident that they will be, for it will surely be recognised that just as an outcome of family court process is deficient if the ascertainable wishes and feelings of the child are not taken into account and attributed weight according to their age and understanding, so too will be the outcome of this consultation if the reasoned and deeply-held views of children and young people not given due consideration.

### Where next?

There is no doubt that significant strides have been made in the last 10 years to listen to, engage with, and respond to the child in family proceedings. But in very large measure, the Family Court and its key players are still feeling their way in relation to striking the right balance between direct engagement of the child in relevant family proceedings, while offering, where relevant, a degree of paternalistic protection. We must hope that the aspirations of the FJR, and of the Minister's more recent pronouncements, translates into real-time events and action. As mentioned earlier, I would regard it as a positive development if the UNCRC were to find its way explicitly into upcoming legislative activity.

The Children and Vulnerable Witnesses Working Group propose the creation of a new set of rules which should require that the judge will recognise the role of the children and/or needs of children at the outset of proceedings either as participants in proceedings who should be given the opportunity of communicating with the judge; and/or as witnesses and consider the how best to provide for their participation and support. This is welcome. The FJR encouraged that the separate representation of children in private law 'is clearly an area that will need to be kept under review and where further research would be

<sup>76</sup> Section 31G(6) of the Matrimonial and Family Proceedings Act 1984, set out in Sch 10 to the Crime and Courts Act 2013, which came into effect on 22 April 2014 ('if the criteria in section 31G(6) are satisfied, and if the judge is satisfied that the essential requirements of a fair trial as required by FPR 1.1 and Articles 6 and 8 cannot otherwise be met' the effect of the words 'cause to be put' in s 31G(6) is to enable the court to take this important step at the expense of HMCTS.

<sup>77</sup> [http://www.familylaw.co.uk/system/redactor\\_assets/documents/1789/NYAS\\_ALC\\_Report\\_-\\_CHILDREN\\_SAFEGUARDING\\_AND\\_THE\\_NEXT\\_STEPS\\_-\\_MEDIA\\_ACCESS\\_TO\\_FAMILY\\_COURTS\\_-\\_July\\_2014.pdf](http://www.familylaw.co.uk/system/redactor_assets/documents/1789/NYAS_ALC_Report_-_CHILDREN_SAFEGUARDING_AND_THE_NEXT_STEPS_-_MEDIA_ACCESS_TO_FAMILY_COURTS_-_July_2014.pdf)

beneficial'.<sup>78</sup> While I am not hopeful in times of austerity that this could be achieved, such a review would surely be sensible.

Further work needs to be undertaken to fully scope existing child-inclusive practice in mediation, and determine and implement best practice in order to provide a coherent blueprint for hearing children's voices in non-court dispute resolution. What is, or is not, the appropriate channel through which a child is heard will differ from case to case,

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78 FJR Final Report §4.143.

and the manner in which the task is undertaken will depend upon the developing skill and understanding of the judge and the other professionals involved. The Court of Appeal in *Re KP*<sup>79</sup> felt that '... [o]ur 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'. We all owe it to children to do what we can to encourage the effective development of this important work in all its forms.

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79 *Re KP (Abduction: Child's Objections)* [2014] EWCA 554, [2014] 2 FLR 660, at §52.