

The Voice of the Child: Children’s “rights” in Family Proceedings*

By

Sir Mark Potter**

Introduction

I am both honoured and grateful to have been invited to deliver this year’s Lionel Cohen Lecture, which is, I understand, the first to be addressed to a topic of family law.

My principal qualification for being chosen for this honour, which, in the light of the topic I have chosen, is by no means negligible, is to be found in the observation of the essayist Charles Lamb, that “even lawyers were children once”. Happily, in childhood I never experienced the trauma, and for many children it is indeed traumatic, of being involved in family proceedings, but, had it been so, I know that I would have wished to have my say. And I have seen enough in my time on the family bench to convince me of the need to listen to the voices of children of appropriate age and understanding who nurse or express the desire to be heard in proceedings which concern them.

In 1989 the United Nations adopted the Convention on The Rights of the Child which has since become the most widely ratified international instrument of all time. It came into force in 1990 and was ratified by the United Kingdom in 1991.

The importance of the Convention on the Rights of the Child is that, by its almost universal ratification,¹ with the notable exceptions of Somalia and the

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1 The State of Israel signed the Convention on 3.7.90 and ratified it on 4.8.91.

United States of America, it is evidence of a consensus in the international community about the rights of children and the obligations of the state and the international community to observe and protect them. Universal practice, in accordance with the provisions of the Convention, is of course a very distant prospect. Not only can states be depressingly slow in moving to legislate in accordance with its provisions, if only for bureaucratic reasons; but Article 2(1) provides that the rights under the Convention are provided for all children *without discrimination of any kind*. That is itself a principle likely to be slow in realisation given the inequalities of treatment within many countries based on gender, religion or ethnic origin.

The Convention is largely a compendium of the many fundamental human rights which require recognition in respect of children just as they do for adults, that is to say as human beings – vulnerable human beings- in the modern world. It deals with rights to nationality, identity, privacy and liberty; it deals with economic and social rights in relation to healthcare and social security. It also sets out the protective rights which are necessary to protect children from violence, drugs, abduction and other forms of exploitation.

However, this lecture is not addressed to the vindication of such fundamental human rights. In the United Kingdom a network of legislation recognises and regulates those rights and such legislation is conscientiously applied by courts interpreting the various provisions in the light of their purpose. No doubt in Israel it is the same.

The topic of this lecture is a less basic and more nuanced right than those to which I have referred; it is a right less fundamental than the right of the child to be protected from harm and exploitation. The right is itself predicated and consequential upon proceedings which are founded on concern for the child; it is the right of the child not merely to be the object of such proceedings but to be heard within them. It is specifically dealt with in the Convention, and in the past decade has become the subject of considerable debate among the judiciary and other professionals involved in the Family Justice system under the rubric “the Voice of the Child”.

I understand that has also been the case in Israel and that, in 2003/4 the Rotlevi Committee, as part of its wide review of the treatment of children within your justice system, published a report entitled “The Child and his Family” which recommended a proposed law listing various methods by which the child

might be heard and be supported in family court proceedings,² and that presently a pilot project is proceeding in the Family Courts in Jerusalem and Haifa.³ In that respect, Israel is ahead of the United Kingdom and, to family lawyers in my audience who are familiar with the work of the Rotlevi Committee and the detail of the project now afoot, an exposition of the United Kingdom position may appear familiar and well-trodden ground. To you I apologise, but it may be nonetheless that for you, and certainly for others less familiar with the debate, the United Kingdom perspective will prove of interest.

Article 3(1) of the Convention on the Rights of the Child provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be a primary consideration.

Article 12 goes on to provide that:

1. State parties should 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 view 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

- 2 For discussion of the recommendations of this Committee, see in this volume, Rhona Schuz, *The Rights of the Child to Participate: Theory and Practice in the Israeli Family Law Courts* (Hebrew), 2 THE FAMILY IN LAW p. 207 (2008a) (hereinafter: "Schuz 2008a"); See also Rhona Schuz, *The Voice of the Child in the Israeli Family Court*, THE INTERNATIONAL SURVEY OF FAMILY LAW 185, 188-189 (2008) (hereinafter: "Schuz 2008b"); For a general explanation of the work of the Rotlevi Committee see Rhona Schuz, *Surrogacy and PAS in the Israeli Supreme Court and the Reports of the Committee on Children's Rights*, THE INTERNATIONAL SURVEY OF FAMILY LAW 247, 264-268 (2004).
- 3 For details of this project, see Schuz 2008a, *id*, at p. 244-248; and Schuz 2008b, *id*, at p. 190-192.

representative or an appropriate body, in a manner consistent with procedural rules and national law.

The first point to be made, perhaps, is that while the UK has recognised the Convention, it has not been incorporated into English law, so that individual children cannot themselves seek remedies based on its provisions in the English courts. In any event, the provisions of Article 3(1) and Article 12 are not framed so as to confer autonomous rights upon children in respect of the matters covered; they are a directive to states to secure for the child the right to express the child's views in matters which affect him⁴ and in particular the opportunity to be heard in judicial proceedings.

In the United Kingdom there has been a ready assumption in relation to the process in our family courts that there is no further legislative, or indeed judicial, step which needs to be taken in order to comply with the obligations to which I have referred. So far as Article 3(1) is concerned, the obligation that in actions concerning children the best interest of the child shall be a *primary consideration* is plainly vindicated by the provisions of section 1(1) of the Children Act 1989 which provides that when a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's *paramount consideration*.

So far as Article 12(1) of the Convention is concerned, s.1(3) of the Children Act provides that, whether in Private Law Proceedings between the parties in relation to residence, or contact, or in Public Law Care Proceedings taken by a Local Authority for the purpose of placing a child in care or under supervision, the court shall, among the various considerations listed, have regard to:

The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding).

As to Article 12(2), the provisions of the Children Act provide, in Public Law Proceedings, for the automatic joinder of the child as a party and the appointment of a welfare officer as the child's guardian instructing a lawyer on the child's behalf and, in Private Law Proceedings, for a power in the court to order a welfare report in respect of a child the subject of those proceedings where the parents may not be reliable reporters for that purpose. These provisions have

4 The masculine form includes the feminine throughout the lecture.

hitherto been considered to be sufficient to afford the opportunity to the child to be heard *through a representative*, and thus to comply with Article 12.

As already noted, Article 12(1) of the Convention stops short of giving even mature children autonomy rights enforceable on the child's own account. While the child is to be afforded a right to express his view freely on all matters affecting him, and must have the opportunity to be heard, the only obligation upon the court is to give the child's views *due weight* in accordance with his age and maturity. This is wholly in accordance with the approach of the United Kingdom in family proceedings which has historically been paternalistic. There is, so far as I am aware, no statutory provision of UK law nor (outside the field of consent by a mature child to medical treatment)⁵ is there any judicial decision, which has recognised any autonomous right of a child to make a decision for himself which is itself dispositive of the court's decision in cases of parental dispute or intervention by a public authority.

As a brief historic diversion, we have of course come a very long way since the nineteenth century, when the common law accorded the father the position of having near absolute rights over his children, who were essentially treated as his property, over which he could exercise control without consideration for their welfare.

As made clear by Professor Stephen Cretney in his masterly history "Family Law in the twentieth century"⁶ in the absence of intervention by the court, the father of a legitimate child was exclusively entitled to exercise parental authority over that child and the child's mother had no legal right to custody or care and control.

Thanks to the efforts of militant women's organisations early in the twentieth century and the part played by women in the First World War, leaders of the political groups dominating the coalition government gave an election pledge to remove "all existing inequalities of law as between men and women". However, when, in pursuance of that pledge, the Guardianship of Infants Act 1925 was passed, the substantive provisions of the Act still denied a wife equal legal authority over her child during marriage permitting her only to obtain such authority by seeking a court order.

5 Gillick v. West Norfolk And Wisbech Area Health Authority & Department of Health And Social Security, [1986] 1 A.C. 112 (U.K.).

6 STEPHEN CRETNEY, FAMILY LAW IN THE TWENTIETH CENTURY: A HISTORY §16 (Oxford University Press ed., 2005).

The great step forward, however, from the point of view of both women and children, was that the 1925 Act provided that, if a wife made application to the court for an order concerning the child's custody or upbringing, then in reaching its decision, the court was to regard the child's welfare as the *first and paramount consideration* and should not take into consideration whether, from any other point of view, the claim of the father was superior to that of the mother or the claim of the mother was superior to that of the father. Thus, although wives did not obtain the full equality they had been promised, the requirement of the court to have regard to the child's welfare as the first and paramount consideration, and to treat the parties equally, enabled the courts freely to award custody, care and control, or orders for contact to the mother, rather than the father, which no doubt usually reflected the wishes of the child.

It was not until a landmark decision of the House of Lords in 1970,⁷ followed by Statute in 1973,⁸ that the law gave each parent of a legitimate child equal and separately exercisable rights so that the legal position of married parents in relation to their children was truly equalised. Thus, by the end of the 1980s, when the Children Act was passed, the courts were already treating the welfare of the child as the paramount consideration in the sense that all the circumstances of the case were weighed in the balance to determine what order should be made in the best interest of the child.

However, as already noted, neither the measures I have mentioned, nor the decisions of judges in relation to disputes involving or concerning children, are based on any concept or recognition of children's *rights*, but rather on the duty and responsibilities of parents and the court to protect and further children's *interests*. As a matter of history therefore, it is the welfare principle which has been applied so as to dilute and regulate parental rights and authority, but without conferring on children autonomous or substantive rights, and in particular any right to be heard by the court which decides their fate. The courts have proceeded on the basis of paternalism rather than autonomy.

Nonetheless a substantial step forward in judicial attitudes was marked by the decision of the Court of Appeal in *Mabon v Mabon* in 2005,⁹ a private law dispute, in which the court highlighted a growing acknowledgment of the autonomy and consequential rights of children and stressed that, in situations

7 J v. C, [1970] A.C. 668 (H.L.) (appeal taken from Eng.) (U.K.).

8 The Guardianship Act, 1973, c.29 (Eng.).

9 *Mabon v. Mabon*, [2005] 2 F.L.R. 1011.

where a child has sufficient understanding of the issues involved, the court should recognise the child's right to freedom of expression and to participate in the decision-making process which may so fundamentally affect their lives.

In so stating, the court was doing no more than reflect a continuum of research studies which consistently showed that children wished to be more closely involved in cases concerning their future.¹⁰

There is, of course, considerable debate about the age at which, as a rule of thumb at least, it is appropriate to regard children as mature enough for that purpose. Children and their levels of perception and articulacy are infinitely variable, and the question is less the age at which they can express their wishes and feelings (which may be as young as three) than the age at which the court should give weight to those wishes and feelings in coming to its welfare-based decision. The UK Private Law Programme¹¹ which contains the Framework for the proper conduct of private law cases concerning children, provides that nine is a suitable age for a child to attend court for the purposes of the first conciliation appointment at which the parents and the child will be seen by a welfare officer in an attempt to broker agreement without a full court hearing. My personal preference would be to adopt seven rather than nine as a rule of thumb. However, I would leave the decision to the court in the individual case, whilst recognising that no unwilling child (and there will be many) should be *required* to attend court or play any part in its process. The same is true of any child who, though willing, may in the opinion of the court, suffer damage or distress by reason of such experience.

10 Ian Butler, Annette Catherine, Mervyn Murch, Margaret Robinson and Frank Fincham, *Children's Perspectives and Experience of the Divorce Process*, E.S.R.C (2000); CAROL SMART, BREN NEALE AND AMANDA WADE, *THE CHANGING EXPERIENCE OF CHILDHOOD: FAMILIES AND DIVORCE* (Oxford Polity Press ed., 2001); Mervyn Murch, 'The Voice of the Child in Private Family Law Proceedings in England and Wales', the Anglophone/Germanophone Judicial Family Law Conference (8-11.9.2004); Carol Smart & Vanessa May, *Silence in court? Hearing children in residence and contact disputes*, 16(3) CHILD AND FAMILY LAW QUARTERLY 305-316 (2004); Judith E. Timms & June Thoburn, *Your Shout*, NSPCC (2003); Judith E. Timms, Sue Bailey & June Thoburn, *Your Shout too*, NSPCC (2007).

11 THE PRIVATE LAW PROGRAM: GUIDANCE ISSUED BY THE PRESIDENT OF THE FAMILY DIVISION (2004), available at www.dca.gov.uk/family/plpguide.pdf.

I should perhaps make a further diversion before proceeding to the substance of my address, by referring to the European Convention on Human Rights as a vehicle for the development of children's rights. Because its origins were in the period shortly following the Second World War when the concept of children's rights was undeveloped and the Convention was principally focused on protecting the civil and political rights of adults, the Convention makes no explicit reference to the rights or requirements of children as such.¹² And it gives no guidance on reconciling the rights of adult parents to family life and to exercise authority over their children free from state interference, established under Article 8 of the Convention, with the concept of children's own rights to make decisions, to speak for themselves, or develop their lives independently of their parents' wishes before they achieve their majority.¹³

Applications to the European Court of Human Rights have led to the recognition of the rights of a child to protection from corporal punishment¹⁴ and to have contact with **each** of the child's parents; however, the majority of the court's decisions have emphasised parental autonomy and authority which itself carries a potential to **damage** rather than promote the rights and interests of children who *within the family* experience repression or neglect. Indeed, in certain quarters, mainly academic,¹⁵ it has been suggested that the unqualified paramountcy accorded to the child welfare principle by United Kingdom Law is non-compliant with the requirement under the European Convention to respect the parents' right to family life. However, the United Kingdom judiciary have

12 See also Brenda Hale, *Understanding Children's Rights: Theory and Practice* 44(3) FAM. CT. REV. 350 (2006) (hereinafter: "Hale"); and in Hebrew translation in THE FAMILY IN LAW Vol. 1, 13 (2007).

13 J.M. Eekelaar & R. Dingwall, Report on the replies of governments to the enquiry under Article 57 of the European Convention concerning the implementation of the European Convention on Human Rights in respect of children and young persons placed in care or in institutions following a decision of the administrative or judicial authorities, Strasbourg, Council of Europe (1987); Jane Fortin, *Rights Brought Home for Children*, 62(3) MLR 350, 354 (1999).

14 See Hale, *supra* note 12.

15 Jonathan Herring, *The Human Rights Acts and the Welfare Principle – Conflicting or Complimentary?* 11(3) CFLQ 223 (1999); Sonia Harris-Short, *Family Law and the Human Rights Act 1998: Judicial Restraint or Revolution?*, 17(3) CFLQ 329 (2005).

found little difficulty in rejecting that suggestion.¹⁶ Furthermore, and while starting from a different standpoint, the view of the European Court of Human Rights appears now to have moved close to the United Kingdom position, it having been stated in *Yousef v. Netherlands*.¹⁷

That in judicial decisions where the rights under Art 8 of parents or those of the child are at stake, the child's rights must be the paramount consideration. If any balancing of interest is necessary, the interest of the child must prevail...

Thus, so far as UK law is concerned, it is the articulation in the Children Act 1989 of the paramountcy of the welfare principal and, in particular, the duty of the court to take into account the ascertainable wishes and feelings of the child, interpreted in the light of the provisions of the Convention on the Rights of the Child, which underpin the recognition which English courts now give to the need to hear and to heed the Voice of the Child who is mature enough to express his or her wishes and feelings.

All that said, recognition in principle is one thing and implementation in practice is another. Let me turn to a brief summary of our present procedures in this respect before making some suggestions as to how I feel they could be improved.

First, in Public Law Care Proceedings where the state, by a Local Authority, intervenes in the family life of parent and child to protect the child from harm, the child is automatically made a party to the proceedings and represented by a guardian ad litem who is a specialist social worker from the Children and Family Court Advisory and Support Service (CAFCASS) who in turn instructs the lawyer on behalf of the child.¹⁸ The evidence and representations of the children's guardian constitute the Voice of the Child in those proceedings. The guardian has close contact with the child, ascertains his or her wishes and feelings and fully reports on them to the court. However, the guardian's *recommendations* to the court do not necessarily reflect the views of the child;

16 See, for instance, per Wall J in *Re H* (contact order) (No 2), [2002] 1 F.L.R. 22, para. 59; See also per Lord Nicholls in *Re B* (adoption: natural parent), [2002] 1 F.L.R. 196, para. 31.

17 [2003] 1 F.L.R. 210, para. 73; See also *Sahin v. Germany*, [2002] 1 F.L.R. 119, para. 42.

18 Family Proceedings Rules, 1991, r4.11A(1).

they are the product of the guardian's own professional opinion as to what is in the child's best interest. Rules provide that the duty of the solicitor representing the child is to do so in accordance with instructions received from the guardian unless the solicitor, having taken into account the views of the guardian and any direction made by the court, considers that a child of sufficient age and understanding wishes to give instructions which conflict with those of the guardian. In that case, the solicitor has a duty to conduct the proceedings in accordance with instructions received from the child.¹⁹

It is extremely rare, even in the case of a relatively mature child who wishes to do so, for children to give oral evidence in public law care proceedings. In cases of alleged sexual abuse, where evidence will generally have been taken by means of police video-taped interviews conducted in accordance with guidance issued for the purposes of criminal proceedings by the Home Office,²⁰ the taped interview will be admitted as evidence, the video and transcripts studied, and the weight of the evidence assessed, occasionally with the assistance of a child psychologist. But it is virtually unknown for the family court to direct that a child (of whatever age) give evidence in the case.²¹ The lack of the facility for the party against whom allegations are made to ask questions of the child has to be factored in to the court's decision when coming to its conclusions. The view is almost universally taken that to require a child, or even to permit a willing child, to be submitted to questions on matters of supreme sensitivity from lawyers obliged to advance opposing cases, (including suggesting that things a child may know to have happened to him did not happen to him and that he is mistaken or even lying) is contrary to the welfare of the child. Quite apart from the direct effect of the experience upon the child, the process draws him or her into the forensic arena, and may well bring the child into conflict with close

19 *id.*, r4.12(1).

20 HOME OFFICE COMMUNICATION DIRECTORATE, ACHIEVING BEST EVIDENCE IN CRIMINAL PROCEEDINGS: GUIDANCE FOR VULNERABLE OR INTIMIDATED WITNESSES, INCLUDING CHILDREN (2000), available at www.homeoffice.gov.uk/documents/ach-best-evidence/guidance-for-witnesses?view=Binary.

21 In Israel, under The Evidence Amendment (Protection of Children) Law 5715-1955, the Youth Investigator decides whether the child should give evidence in such cases and will often himself report the child's testimony to the court instead of the child.

family members other than the alleged abuser, and forever damage long term family relationships.²²

So far as Private Law proceedings are concerned, that is to say parental disputes over what used to be called 'custody' and 'access', but which the Children Act now terms 'residence' and 'contact'²³ again, it is extremely rare for children to give evidence within the forensic process. There are two levels of participation so far as the child is concerned. First, although there is no automatic joinder of the child as a party as there is in public law care proceedings, it is open to the judge under Rule 9.5 of the Family Proceedings Rules to order that a child be made a party to the proceedings, appointing a Cafcass Officer or some other proper person to be the guardian ad litem of the child with authority to take part in the proceedings on the child's behalf²⁴ as in public law proceedings.

Rule 9.5 itself is shortly stated. The test of its application is simply whether it appears to the court that it is in the best interests of the child to be made a party to the proceedings. Ideally, it would be much more widely applied than it is. However, pursuant to a President's Direction of 2004 based on considerations of cost, complexity and delay, it is made clear that the decision to make a child a party should only be taken in cases of "significant difficulty". Nine guiding criteria are set out. First, is that where a Cafcass officer has notified the court that in his or her opinion the child should be made a party. The remainder are largely cases involving particular complexity. However, two of the criteria refer to the position where the child has a standpoint or interest which is inconsistent with, or incapable of being properly represented by either of the adult parties, and where the views and wishes of the child cannot be adequately met simply by a report to the court. As such the criteria are reflective of a "Voice of the Child" based approach.

22 See per Wilson L.J. in *Re LM and Medway County Council and RM and YM* [2007] E.W.C.A. Civ. 9.

23 Children Act, 1989, § 8.

24 In Israel, the Court also has discretion to appoint a guardian ad litem to represent the child, by virtue of section 68(a) of the Legal Capacity and Guardianship Law § 5722-1962. For an in depth analysis of the limited use made of this discretion and recommendation for reform which will increase significantly the number of cases in which children are separately represented, see the Report of the Rotlevi Sub-Committee on Separate Representation of Children in Civil Proceedings (Jerusalem, 2004).

Research into the operation of Rule 9.5 and the President's Direction²⁵ has shown, however, that reported case law generally reflects a judicial view that the primary rationale for granting separate representation is the court's desire to ensure that a conflict of interest between parents does not obscure the real needs of the child. Such desire appears to be motivated less by a concern to hear the Voice of a Child than the need to explore conflicts of evidence between the parties, or to hear arguments from a guardian which neither parent wishes to put forward.

I referred to two levels of participation by the child in private law cases, because it remains the procedure in the vast majority of such cases that, where the court considers that the child's views and feelings may not be made sufficiently clear by the parties, it orders a welfare report from a Cafcass officer in the course of which the reporter will ascertain and report on the child's views, being required also to explain his report to the child in a way which is appropriate to the child's age and understanding.²⁶

One area in which it has been suggested that a child should more often be made a party within parental disputes, is that of financial proceedings between divorcing couples, in particular relating to or involving the proposed sale of the former matrimonial home.²⁷ It is a common feature of such cases that they cause enormous worry to children, who in consequence face an inevitable move to a new home, neighbours and environment as well as to new school and friends, and become separated by distance from other members of the family such as grandparents, to whom they may be close. In such cases, parents who are agreed on the decision to sell what has for years been the child's home are unlikely to communicate the strength of a child's contrary feelings to the court. But it is rare indeed to order separate representation for children. This is largely because of the difficulties in obtaining public funding for such representation as well as a

25 GILLIAN DOUGLAS, MERVYN MURCH, CLAIRE MILES & LESLEY SCANLAN, RESEARCH INTO THE OPERATION OF RULE 9.5 OF THE FAMILY PROCEEDINGS RULES 1991: FINAL REPORT TO THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (2006) (hereinafter: "DOUGLAS, MURCH ET AL."), available at www.dca.gov.uk/family/familyprocrules_research.pdf.

26 Children Act, 1989, § 7; Family Proceedings Rules, 1991, 4.11b (1).

27 Williams David & Blain Simon, *Voices in the Wilderness: Hearing Children in Financial Applications*, 38 FAMILY LAW 135 (2008), available at www.4pb.com/uploads/files/dir37/dir1/13_0.php.

desire to avoid adding to the costs of the parties in a situation where they can ill afford it. Again, for reasons of cost and delay and because of overstrain upon the resources of Cafcass, welfare reports are seldom called for in financial cases, the court being prepared to proceed on the basis that the representations of one or other parent and the instincts of the court will be sufficient for the court to give appropriate weight to the concerns of the child as a factor in the final decision.

A special word is necessary about child abduction proceedings under the Hague Convention which are an increasing feature of the business of our family courts and, in particular, the High Court, which so far has reserved to itself the hearing of Convention cases in the light of their international context and for the development of a consistent jurisprudence. However, many such proceedings are brought by parents whose children have been removed to or retained in the United Kingdom from another country within the European Community. In such a case, article 11(2) of the Brussels II Revised regulation which governs such proceedings requires that, when applying articles 12 and 13 of the Hague Convention:

It shall be ensured that the child is given the opportunity to be heard during the proceedings, unless this appears inappropriate having regard to his or her age or degree of maturity.

This is, of course, of particular importance in cases where the abducting parent raises the so called defence of "child's objections" under Article 13 of the Hague Convention. In such cases the court invariably calls for a report from a Cafcass Officer for an expert assessment of a child's age and maturity, and a summary and assessment of the nature detail and strength of the child's objections. The proceedings are of a summary nature, conducted on the basis of affidavit evidence so far as the parties are concerned and, again, it will be rare indeed for the child to be separately represented. Nor generally will the child be heard orally.²⁸ It is the function of the Cafcass Officer to report on the maturity of the child and to bring the child's wishes and feelings to the attention of the court. The Cafcass Officer is the child's "representative or appropriate body" for the purposes of Article 12(2) of the United Nations Convention on the Rights of a

28 For discussion of the practice of Israeli courts in such cases, see Schuz 2008a, *supra* note 2, at p. 248-253; Schuz 2008b, *supra* note 2, at 190-192.

Child, and it is the Officer who will be asked to give oral evidence and answer questions in elaboration of their report.²⁹

In a recent House of Lords decision,³⁰ Baroness Hale expressed the view in an abduction case from a country outside Europe that the principle expressed in Brussels II Revised “is of universal application and consistent with our international obligations under article 12” of the UN Convention on the Rights of the Child.

A warning has to be sounded however that, because the Hague Convention proceeds on the basis of the broad statutory assumption that it is in the welfare interests of the child to be returned to the jurisdiction from whence it came, so that the local courts may determine the dispute over custody involved, the court is not at liberty to apply the straightforward **paramountcy** welfare test set out in the Children Act, so that it frequently feels itself bound, in a case where otherwise it might not be disposed to do so, to ignore the wishes of the child as conveyed to the court by the welfare officer in favour of an order for return. It is important therefore to avoid raising false expectations in the mind of the child by reason of his or her right to express his or her wishes, feelings and objections and, in particular, it is of importance, as I suggest further below, to explain to a child of appropriate age and understanding why the court is constrained to make an order for return which not infrequently causes considerable distress.³¹

As already indicated, now that it is generally accepted that the Voice of the Child should be heard in proceedings which concern that child’s future, the focus of the debate has shifted to practical considerations of how this may best be achieved in the manner of most benefit to the child. It goes without saying that the necessity to consider and be guided by the child’s welfare interests applies to this question, like any other, in the context of proceedings affecting children.

As will be clear from the summary I have already given, in the United Kingdom we have depended principally upon professionals listening to children and reporting to the court. Generally we do not give children the opportunity of being heard directly by the judge. Indeed, unless they are mature and have a firm

29 Compare the view of Schuz 2008a, *supra* note 2, at p. 218.

30 *In Re D* (a child) (abduction: custody rights), [2007] 1 A.C. 619, para. 58.

31 It remains to be seen whether, following the observations of Baroness Hale in *Re D*, and the decision of Potter P *In AF v. MB-F* [2008] E.W.H.C. 272 (Fam), courts may in future feel somewhat less constrained in ‘child’s objection’ cases.

wish to be there, we do not like their being in court at all during the course of the proceedings, though it is of course a matter for the judge in each case.

In the last few years, and not least because of certain views expressed by myself upon becoming President, vigorous debate has developed as to whether judges should not be speaking more frequently to children of sufficient age and understanding in appropriate circumstances, in order to hear their views directly, as opposed to leaving it to the expertise of the welfare officer or, in complex cases, to a psychiatrist. I should say at once that, in any case where it is appropriate for a psychiatrist to be involved, I would not dream of suggesting judicial involvement in that process, unless requested by the expert and consented to by the parties. But in cases where the Cafcass Officer is routinely involved in Private Law Proceedings for the purposes of reporting to the court, the position seems to me to be different.

In *Mabon v. Mabon*,³² to which I have already referred, the court commented that the traditional reluctance of the English judge to talk to children in private, as is regularly done on the Continent of Europe, is rooted in our Rules of Evidence and the adversarial mode of trial; in the fact that what is said in private by the child to the judge cannot be tested in evidence or in cross examination; and that the judge cannot promise confidentiality to the child, because of his duty to inform the parties of issues that trouble him as a result of what the child has said, so that the parties may address them before judgment. Nonetheless, as I have made clear, it is my view that, in an effort to ensure the welfare and happiness of children and to listen to their voice at first hand, we should be encouraging judges to talk privately to children who wish to do so, trusting the judge to retail to the parties the burden of his concerns or any change of perception having heard the child.

The conversation with the child should preferably be held in the judge's private room, with the parties' solicitors (but not the parties) present, unobtrusively in a corner, at liberty to take notes, but playing no part in the dialogue.³³ Thus the burden of deciding in what terms to report to the parties the content of the child's views as expressed to the judge would rest upon the

32 *Supra* note 9.

33 Compare *Schuz 2008a*, *supra* note 2, at p. 226-227; and the practice under the Israeli pilot scheme under which the parties' lawyers are not present at the meeting between the judge and the child and the protocol of this meeting is kept confidential, *id.*, at p. 245; and *Schuz 2008b*, *supra* note 2, at 191.

representatives rather than the court and the advocates will have the opportunity to address the court in the light of what they are told. I would add, however, that, despite the need to observe natural justice vis-à-vis the parties, I would recognise the right of the judge, in unusual cases where it appears necessary, to see the child in complete privacy, the judge reporting to the parties and their representatives the substance of the conversation, whilst respecting the confidence of the child in sensitive areas which (if made known) might damage rather than improve the child's relationship with either parent.

When I first expressed my views, they caused considerable concern in certain quarters. In particular, on the basis that judges, with insufficient training, with little opportunity for preliminaries, with only a short time at their disposal, and with varying degrees of approachability, sensitivity and caution in respect of their task may (a) form untrustworthy impressions or (b) unfairly seem to place the burden of dispute resolution upon the child.

I understand those concerns very well, but I believe they could be met by appropriate judicial training. The difficulty in this regard exists in persuading government to provide the necessary budget to the Judicial Studies Board. I have made clear that I do not propose a **requirement** (whether by Practice Direction or otherwise) that judges in all, or indeed most, cases talk directly to the child, but rather that they consider **receptively** whether it is a desirable course in **every** case. In the majority of cases, I do not doubt that it will remain unnecessary for the judge to see the child personally, where a Cafcass officer has recorded the child's views and the veracity of the report as to the child's stated views is not challenged by the parents. Furthermore, many (indeed probably most) children, having expressed their views to the Cafcass officer will have no desire to see the judge. Most families and children find the court process very difficult and in my experience most children simply want the dispute to go away, let alone that they should have to participate in it. Finally I have also made clear that I do not consider that a judge should press to see any child who does not wish to see him.

Nor should any child be **persuaded** (whether by parents, advisors or a social worker) to ask to see the judge where the child does not wish to do so. However, they and the judge should consider in **every** case whether there will be a positive benefit to both the child and the court from seeing the child. Further, where the judge receives a letter or becomes aware of a request from the child to see the judge, the judge should assume such positive benefit in the absence of expert advice to the contrary. Equally, if the suggestion comes from the child's guardian, solicitor, or court – appointed specialist that the child should see the

judge, he should do so in the absence of good reason to the contrary. I also consider that, if there is a concern on the part of the judge that the child's views may not have been fully or correctly represented in the evidence of the parties or the welfare report he should encourage the child to express his view personally. We tend to forget that children themselves are experts in their own wishes and feelings.

Finally, when considering the question of positive benefit to the child, the judge should not confine himself to the question of whether or not it will assist him to come to his decision, but should consider the potential benefit of affording to the child the chance to feel that he has participated in the process of deciding his own fate and has had his own "shout" whatever the outcome. It may provide an important memory to be carried forward into later life. More significantly, if denied, it may lead to a lasting and corrosive sense of disappointment or resentment of an unfeeling system.

The widespread doubts among my fellow judges centre upon a number of practical features and the potential for divergence of practice. The doubters emphasise the difficulties of giving general guidance as to the age and understanding of the child; the real purpose of seeing the child; how to be sure the child understands that the judge cannot guarantee confidentiality in the sense that the gist of what the child says will have to be passed on; the mechanisms for ensuring that any views expressed by the child are authentically conveyed to the parties; the need to avoid appearing to burden the child with a decision which must be shouldered by the judge; and the need to train judges in the various skills necessary to communicate with the children who are often quite damaged and have complex needs, frequently including learning difficulties. It is also considered that such training should cover the difficult question of assessing the degree to which the child may be talking to the "script" of one of the adults.

It has to be said that only a minority of judges share my view, (though it is a view also recently expressed by Baroness Hale in a speech and article entitled "The Voice of the Child")³⁴ that there may be occasions when the circumstances justify the judge seeing the child in private without the parties or representatives present, provided the judge makes clear to the child before the matter starts that the judge will have to report back to the parties the gist of the evidence in appropriate terms. I am nonetheless unrepentant.

34 INT'L L. J. 171 (2007).

A matter upon which the judges are unanimous is that ultimately the decision in any given case must be left to the discretion of the judge, having invited the views of the Cafcass officer or other child expert involved in the case on the wisdom of such a course.

In moving forward in this difficult area, it is in my view important to adopt a positive rather than a negative approach, given the growing appreciation of all those involved in the family justice system that, as stated by Lady Justice Hale (as she then was) as far back as 2001:³⁵

The evidence is now quite clear that children whose parents are separating, especially if the parents are in conflict with one another, need a voice. Someone who is able to listen to anything they wish to say and tell them what they need to know.

This aspect of matters was amply demonstrated by some important research commissioned by the Department of Constitutional Affairs (DCA)³⁶ and conducted into the attitudes of parents and the children in cases where separate Rule 9.5 Representation had been granted to the child for one reason or another. The researchers concluded;

what really stands out is the importance to the child of having a person from the family justice system who can establish a positive trusting relationship with them; a neutral person who explains things clearly and checks that it is properly understood; a person who keeps the child informed as the vagaries of the litigation develop. When such a supportive relationship can be established, the effect can be experienced as strengthening. In his absence, the child can feel lost and confused. It is clear that is the quality of the professionals – whoever they are – as skilled and trustworthy persons that matters the most to children, not the label they are given or the legal role under which they work.

The research showed that where the children had established effective supportive relationships with their guardian or solicitor, they reported that they felt more confident, not only in terms of being able to get their views over to the court, but also by the experience of being treated with respect and, in the case of teenagers,

35 *Re A (Contact: Separate Representation)*, [2001] 1 F.L.R. 715.

36 DOUGLAS, MURCH ET AL., *supra* note 25.

as young people capable of having their own independent view. Some even expressed their amazement that at last someone official was taking them seriously.

However, as already mentioned, Rule 9.5 appointments of children's guardians in private law cases are comparatively rare. In 2005/6, there were around 1000 such cases, whereas there were over 26,000 in which Cafcass officers were simply asked to report, a situation in which the welfare officer's role is usually too transient for a mentoring relationship to be feasible.

It is against that background that judges should be prepared to look at the matter and to meet the child **regardless** of whether or not it will actively assist the judge in his decision.

I share the view of Lord Justice Wilson, expressed in his recent Hershman/Levy Memorial lecture to the Association of Lawyers for Children,³⁷ that it should become the norm for a judge, when concluding proceedings in which the child lacks a guardian, to offer the child the opportunity of a face to face meeting should the child wish to take it up.³⁸ Whether or not the outcome is likely to coincide with the wishes of the child, specialist family judges should be willing to see the child and, within the limits of good sense and propriety to explain the judicial process and the judge's reasons, if only so as to reconcile the child to an unpalatable decision and encourage him on his way.

In this connection, I hope I may say without arrogance or severe rebuke from the experts to whose researches we owe so much, that I sometimes think that we judges are inclined to short change ourselves and to take refuge in reservations which are unduly self-critical. Many children whose welfare we have to consider and whose fates we decide are, as I accept, damaged children, contact and communication with whom should be left to welfare officers or other experts, and we should act on their advice. On the other hand, I detect a tendency among the professionals to underrate the resilience of many children and, in particular, their capacity to relate to or communicate directly with a judge. I venture to think

37 Wilson Nicholas, 'The Ears of The Child In Family Proceedings', The Hershman / Levy Memorial Lecture To The Association Of Lawyers For Children (28.6.2007), available at www.judiciary.gov.uk/docs/speeches/wilsonlj28062007.pdf.

38 Under the pilot project being conducted in Israel, all children over 6 involved in family proceedings, which come within the project, are given the opportunity to talk directly to the judge. For details, see Schuz 2008a, supra note 2, at p. 244-248; and Schuz 2008b, supra note 2, at 190-191.

that, sensitively handled, most children are well able to see the judge as a decent and concerned person charged with the task of decision making in a parental tug of war. In my experience, the kind of child or adolescent who holds firm views and wishes to be involved in the proceedings or, indeed, who simply wishes to meet the judge out of sense of curiosity, is not such a sensitive plant that exposure to conversation with the judge is likely to be damaging rather than substantially beneficial.³⁹

In order to encourage interdisciplinary discussion and to make progress in this difficult area, the UK Family Justice Council which I chair has recently produced an article for publication in *Family Law*, the principal (monthly) periodical dealing with contemporary issues, in order to seek consensus, or as near consensus as possible, upon the nature and extent of children's involvement in the court process. The article acknowledges that the needs of individual children vary greatly and no "one size fits all" guidance is possible. It also notes that about 30% of children in care have a learning difficulty and a substantial number are not fluent in English. Furthermore, some 60% of children in care proceedings are under 6 and thus too young on any view for direct participation in proceedings. It anticipates that many children will be content for a Cafcass officer or social worker to represent their views, but that some more mature children, whether in public or private law proceedings will wish to participate not simply by completing a "needs, wishes and feelings statement" but to meet the judge to whom their case has been assigned before the hearing. The child may also wish to attend the proceedings.

The article acknowledges that, whether an individual judge decides to see an individual child must remain a matter for judicial discretion, but suggests that, where the child wishes to have a meeting and the appropriate professionals involved with the child consider it would be beneficial to do so, then, if the judge declines to meet the child, he should give reasons for that decision which could be conveyed to the child.

The article suggests four good reasons why judges should be less reluctant than formerly to meet children in both public and private law cases. First, to enable the child to have a picture of the judge in their mind as the decision maker in their case where they do not wish, or it is not appropriate, for them to attend. Second, to enable the child who wishes to do so to tell the judge directly of his wishes and feelings in respect of the issues arising in the case. Third, to reassure

39 See also Schuz 2008a, *supra* note 2, at p. 225-226.

the child that they are or have been at the centre of the decision making process and that the judge has understood and taken into account what they have said or has been said on their behalf. And fourth, following the judgment, to enable the judge to explain the decision to the child, thereby helping the child to understand the process and hopefully assisting the child to accept the outcome.⁴⁰ Surely these reasons speak for themselves.

In seeking judicial consensus on these lines I am encouraged to have received a week ago from Judge Boshier, the Principal Family Court Judge in New Zealand (and, if I may say so, a constant source of progressive thought in the field of family justice), guidelines recently formulated in New Zealand on the topic of judges speaking to children, in which standards of judicial practice are formulated to enable children involved in family proceedings to be given reasonable opportunities to express their views. The guidelines emphasise that the extent and manner to which they are implemented in any individual case will be at the sole discretion of the judge who will be guided in all cases by the age and maturity of the child when deciding whether or not to adopt the guidelines.

The guidelines state that the judge shall be entitled to expect that the lawyer for the child will advise the court whether or not the child wishes to meet the judge; that the lawyer will meet the parties and advise the court whether or not they consider that the judge should meet the child; that the lawyer will make his or her own recommendation whether or not the judge should meet the child; and will advise the purpose of any proposed meeting. While that guidance assumes the child's representation by a lawyer, I see no reason why those tasks should not be carried out by the relevant Cafcass Officer in United Kingdom proceedings.

The New Zealand guidance goes on to provide that, if the judge decides not to meet the child in any given case, he or she shall record in the judgment the reasons for such decision. If the judge decides that he or she will meet the child then the judge shall decide the time of the meeting (i.e. prior to or following the hearing): the venue for the meeting (i.e. the judges chambers, the courtroom or elsewhere); whether and how a record of the meeting is to be taken; and how any record of the meeting is to be conveyed to the parties.

40 Under the Israeli pilot project, provision is made for the decision to be explained to the child by the judge or by a social worker in the Assistance Unit of the Court, see Schuz 2008a, supra note 2, at p. 245; and Schuz 2008b, supra note 2, at p. 191.

It provides that the meeting with the child should take place in the presence of the lawyer for the child and that, before the meeting starts, the judge must make it clear to the child that a record may be taken and conveyed to the parties.

At the same time the guideline does recognise, as I have advocated, that there will be occasions when the welfare and best interest of the child may outweigh the requirements of natural justice so that the content of any meeting between the child and the judge may be kept confidential. Finally, it is provided that the judge may decide if he or she will tell the child the outcome of the hearing and make arrangements accordingly.

I can only say that in my view, the procedure proposed represents an admirable model towards which to work in the United Kingdom. Of course, there are bound to be difficulties in reaching a working consensus among a far larger number of judges in the United Kingdom. Old habits die hard. Further, because of the problems of continuity which exist in our overcrowded family lists and the pressure on resources, the practice envisaged in New Zealand would mount a difficult challenge to the organisation of business in our courts. The assumption of the New Zealand guidelines seems to be that the judge who gives the preliminary ruling or makes the preliminary directions on the participation of the child in the trial will usually do so at a separate preliminary hearing and will be the same judge who hears the trial itself. While continuity of judge is the conscious aim of a number of administrative improvements being made in court centres in the United Kingdom, the prospects for its achievement in the near future given the constraints on judicial resources are, I fear, not good. I am nonetheless confident that progress can be made upon this front.

I shall be interested to learn while I am here of the progress of the pilot scheme in Jerusalem and how far it resembles the New Zealand solution. I suspect that, not surprisingly, in whatever jurisdiction one finds oneself, the considerations taken into account and the conclusions reached by those concerned to amplify the Voice of the Child will be along similar lines. Perhaps we can all move forward together.

Thank you.