

Barriers to Seeing and Hearing Children in Private Law Proceedings

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INTRODUCTION

Private law proceedings, we are now well aware, are in clear contrast to public law proceedings in relation to the representation of children. The organisation and funding of such representation are currently under review but the principle that the child's interests should be separately represented in proceedings that concern their upbringing and well-being is well established in public law proceedings. That principle is not established in relation to private proceedings generally. It is true that assessments of the child's best interests occur through welfare reports; that the paramountcy principle operates; that the child can (with the leave of the court or if a solicitor decides she is able to act for a child) begin and defend or prosecute family proceedings without a next friend or guardian ad litem (GAL); that in exceptional circumstances the Official Solicitor may be appointed, and that s 64 of the Family Law Act 1996 may lead to regulations allowing for the separate representation of children in a new set of specified proceedings. Nevertheless, what these amount to in practice is that the independent interests of children are known and separately represented in only a small minority of cases.

The situation is not, however, as dire as that suggested by the (misprinted) title of an article on the front cover of the March 1998 edition of *Seen and Heard* (the NAGALRO journal): 'Horse and carnage – the child's solicitor'. The current debate, rather, is about the extent to which the possibilities for the involvement of children, or of their ascertained wishes and feelings, should be increased, especially in relation to disputes resulting from the separation or divorce of parents. In other words, by what procedures will more children be allowed to have their particular concerns and hopes presented to those making decisions about them – whether in court or in mediation?

But the issue is broader than this. I would argue that children are currently not 'seen' clearly in family proceedings and that, as a result, we do not know whether private law proceedings currently promote the child's best interests: the real child is often invisible.

There are three main factors which have led to the invisibility of the real child. First, talk of a family

justice 'system' (see Walsh *Working in the Family Justice System – A Professional's Guide* (Family Law, 1998)) obscures the fact that the promotion of a child's interests is usually the responsibility of one or two individual professional people at any particular time. However, the belief that there exists a system allows the assumption that somebody else in the system has responsibility and oversight. Secondly, talk about children has become too abstract: there is too little time and/or motivation to see what this particular child is like because of overriding presumptions about what is 'good' for children and what the 'risks' to children are. Such presumptions may be supported by research results at a general level but knowledge as to whether they apply to the child whose upbringing is the subject of dispute may not be sought. Thirdly, the exercise of parental responsibility is given priority over other aspects of the child's well-being. The overriding concern is to allow the family, that is the two parents, the space to make their own arrangements.

Because of the assumptions inherent in the above three factors, the majority of children are not parties to, or the subject of, private proceedings. Family proceedings as such are not, therefore, important in addressing the best interests of most children where there are disputes about their upbringing and the local authority is not involved.

THE EFFECTS OF 'SYSTEMIC' JUSTICE

Divorce

I will take, as a case scenario, the child whose mother wants a divorce and who, currently, is likely to go to a local solicitor. Clearly there are child related issues which could lead to family proceedings but who promotes the child's best interests at this stage? Research previously reported in *Family Law* (Piper 'Ascertaining the Wishes and Feelings of the Child' [1997] Fam Law 796) found that the requirement in the transaction criteria for firms franchised for family work relating to the wishes and feelings of the child caused solicitors difficulties. Solicitors basically asked the client what the child wanted. Some felt this was unsatisfactory but believed that if it 'matters', the child's wishes and interests would be ascertained by

the court welfare officer.

The solicitor's confidence is based on the assumption that 'where it matters' the court welfare officer would ascertain and convey the child's wishes. The context makes clear that for them, as solicitors, the child's views will 'matter' if there is a dispute that leads to a s 8 application. Their lack of concern is, therefore, based on a further assumption: that those cases which matter to them because they result in family proceedings are also the ones where it matters to the child that her views are ascertained to help further her best interests.

Therefore, there is no real screening at this stage to ensure that those cases where the child's interests do need promoting by the family justice system actually become family proceedings. In relation to divorce and separation this is often not the case. The factors which push cases further into the family justice system are often the intransigence of the parental dispute and the availability of state or private funds to access family proceedings. Such factors may not screen in those cases where the child's best interests are most at stake except on the basis of the presumption that intransigent parents are the worst thing that can happen to a child.

Domestic Violence

These same assumptions are evident in relation to the protection of children from domestic violence. There is no duty on solicitors to screen proactively for domestic violence, and a large proportion of the solicitors in the above research did not ask about domestic violence except in a context which will disappear – that of investigating the grounds for divorce and whether they would need to use 'unreasonable behaviour'. Solicitors believed clients would tell them or they would 'start getting a smell' if violence and abuse had occurred. Indeed, a small minority explicitly rejected such questioning on the grounds of its intrusiveness, despite there being clear research evidence that those abused find it very difficult to disclose (see Kaganas and Piper 'Divorce and Domestic Violence' in Day Sclater and Piper *Undercurrents of Divorce* (Ashgate, 1999)). Therefore, direct violence to children and the indirect abuse of witnessing it may not lead to proceedings. Even when s 1 of the Family Law Act 1996 is in force, the imperative to diminish or remove the risk of violence to parent or child in the divorce process may not have the desired effect if professionals in one part of the system continue to assume that somebody – the client or another part of the family or criminal justice systems – would have told them if it was 'important'.

Inter-disciplinarity

It is taken for granted in all training and information texts on the operation of what is now called the family justice system, that those working within it should

take a multi-disciplinary and inter-agency approach to problems and cases at all levels.

Such inter-disciplinarity has led to beneficial initiatives in professional training and collaboration: there are clearly advantages for different professionals to understand the information and evidence provided by those other disciplines which enable law to make decisions which are otherwise beyond its competence. But inter-disciplinarity has led to more than 'understanding' other disciplines. Research would suggest there is a self-denying ordinance by lawyers to try not to 'talk law' and by judges not to judge (see Bailey-Harris, Davis, Barron and Pearce *Monitoring Private Law Applications Under the Children Act: A Research Report to the Nuffield Foundation* (University of Bristol, 1998)), and unwritten rules which deem as 'good' the solicitor who wholeheartedly operates within a welfare discourse (Neale and Smart 'Good and "Bad" Lawyers? Struggling in the Shadow of the New Law' (1997) 19(4) *Journal of Social Welfare and Family Law* 377, at pp 377–402).

Within the family justice system this has largely taken place without any theoretical discussion of the nature of the multi-agency and multi-disciplinary system which has been created. Inter-disciplinarity is of theoretical interest in other practical contexts; for example in relation to business management where, in the context of knowledge generation, there is discussion of the advantages, ethics, boundaries and drawbacks of such inter-disciplinary co-operation. An untheorised approach to the sharing of knowledge and professional practices has led, in the family justice system, to wide acceptance of particular and powerful assumptions about the child's welfare which are now difficult to critique. Their disciplinary origins are not always clear and their relation to social research findings often dubious. It is now a brave or foolish person who says, in any gathering of professionals working in the family justice system, that contact or joint decision making can be 'bad' for the child. Yet it ought to be possible to say such things so that in relation to individual children that possibility can be investigated. There is a real danger that children's interests cannot be promoted if we artificially limit our gaze by our presumptions about them.

GENERALISED ASSUMPTIONS ABOUT HARM AND RISK

There are many assumptions about what is harmful and risky for children. Three, in particular, tend to obscure the needs of the actual child who is the subject of dispute.

Children need 'Sensible' Parents

What are currently presumed to be the biggest risks

to a child's happiness and well-being are parental conflict and the lack of a continuing relationship with both parents. Those parents who co-operate with the other parent and who 'sort out' their family problems without outside help are assumed to be acting with common sense and taking the sensible approach to divorce. If parents are sensible in this sense it is assumed that they are acting in the best interests of their children. Without child abuse staring them in the face, no professional in the family justice system will see any need to investigate any further the interests of the child if faced by such sensible parents.

So issues about violence by one parent directed to the other, or issues about the quality of contact as opposed to the benefits of other activities which are forgone are not always of any priority. There is in some quarters almost a belief that one should let sleeping dogs lie on the assumption that questioning about such possibilities will only lead to disruptive allegations. So, potential concerns about child protection may be lost in the need to encourage harmony, agreement and smooth process (see Hester, Pearson and Radford *Domestic Violence, A National Survey of Court Welfare and Voluntary Sector Mediation Practice* (Policy Press, 1997)).

Children are Harmed by the 'Burden' of Saying What they Want

Solicitors we interviewed were rightly concerned not to put pressure on children by asking them their views in the presence of one parent. But the presumption that children are harmed by being asked is also one found in the approaches of court welfare officers and the judiciary. It is therefore a very influential presumption. *The National Standards for Probation Service Family Court Welfare Work* (Home Office, 1994) enjoin court welfare officers to see all children and 'Wherever their age and maturity permit it children should be offered the opportunity to express their wishes and feelings' but research would suggest they are reluctant to do so because it is potentially a harmful 'burden' to children. Yet children are all different and some may be harmed by being 'left out'. The case of *Re C (Residence: Child's Application for Leave)* [1995] 1 FLR 927 was one precipitated by the belief of the 14 year old that, in the long history of proceedings between her parents after their separation, her views had never been properly communicated by the court welfare officer (at p 931).

Court is a Bad Place for Children

There is also a related presumption that engaging in court proceedings is very risky for a child's emotional welfare and should usually not be allowed. For example the fear in relation to the separate

representation of children in divorce, to quote the *First Report of The Advisory Board on Family Law* (Lord Chancellor's Department, 1998), was that it 'could drive a wedge between children and their parents, and make divorce proceedings more acrimonious rather than less' (para 4.12). That belief has led the courts to be very restrictive in relation to applications for leave by minors. The positive benefits to flow from involvement in deciding one's own future – evident in relation to at least one of the children interviewed in the research project at Leeds University – are assumed to be of little weight (see Neale, Wade and Smart '*I just get on with it: Children's Experiences of Family Life Following Parental Separation or Divorce, Working Paper 1* (Centre for Research on Family, Kinship and Childhood, University of Leeds, 1998)).

The presumptions above clearly reflect knowledge about what can be harmful to children and young people and it is difficult to argue that they are wrong. Yet the image of the child is very different in the youth justice system. The change of name from juvenile courts to youth courts (when the upper limit was raised by one year by the Criminal Justice Act 1991) was both a reflection and an encouragement of a trend to rename as 'youth' those children who offend or are suspected of such – a trend which has culminated in the Crime and Disorder Act 1998. Sections 8–16 of that Act are headed 'Youth crime and disorder' and what they deal with are parenting orders, local curfew schemes and child safety orders all of which relate to children under 10 years of age, the latter two exclusively: this is the way we have made children invisible in a different system and also, potentially, in those family proceedings courts which will be able to impose these orders on the under 10 year old.

These particular children have been given a very different image in the discussions and documents preceding the Crime and Disorder Act 1998 from those images underpinning the assumptions about children in private proceedings. In relation to the over 10s who will be dealt with in the criminal jurisdiction there is little concern about having children in court. They must be there and they must take responsibility for their wishes and actions – a responsibility that s 34 of the Crime and Disorder Act 1998 assumes is there from the age of 10 when they are no longer deemed *doli incapax*.

Likewise, the new provisions in that Act relating to reprimands and warnings (replacing cautions) are based on the assumption that a career of crime can be nipped in the bud by frightening and punishing early instances of offending, an assumption based not only on assumptions about the deterrent effect of labelling and punishment but also on the assumption that

children have sufficient understanding of what constitutes their own good for them to make rational decisions to stop offending. In sentencing terms, therefore, there is a discount for age but little more.

It is almost impossible to reconcile these very different images of children, knowing as we now do the research evidence about the abusive background of children sentenced for grave crimes and the fact that victim and offender categories are so often conflated in real life. In addition, the interviews that Carol Smart and Bren Neale have recorded with children living in separated families (above) and also the comments of the research conducted by the Centre for the Study of the Child, the Family and the Law at Liverpool University (Lyons, Surrey and Timms *Effective Support Services for Children and Young People when Parental Relationships Break Down – A Child-Centred Approach* (1998)) would suggest that many children are very perceptive about what is happening and are able to make mature choices about family issues.

At the very least therefore we need to examine our assumptions about children in both systems so that each, different, real child is responded to without preconceptions about their vulnerability or their capacity for rational wrongdoing.

THE EFFECTS OF CONCEPTS OF PARENTAL RESPONSIBILITY

Parental authority – if parents are acting jointly where relevant – is sacrosanct. It underpins assumptions about the best interests of children and is crucial to particular constructions of harm and risk in relation to children. It consequently underpins particular ideas about good and bad parenting in the context of divorce. The separated-but-continuing harmonious post-divorce family which the Family Law Act 1996 is intended to promote is seen as important not just for the children of the marriage but also for their children and for society:

'If the children of today's divorcing parents are to develop into well balanced adults, capable ... of being responsible parents, then it will be desirable to ensure that their development is not weakened by the way in which the divorce process works' (Consultation Paper (Lord Chancellor's Department, 1993), at p 16).

Only where parents are acting with sufficient irresponsibility to warrant – or potentially warrant – state intervention does parental authority not prevail. So, where there are care proceedings the child is allowed representation – the child's wishes, feelings and welfare matter because parental responsibility is itself in question. In other circumstances – that is in

private law proceedings – parental responsibility operates to obscure the child and her particular interests by being used to motivate parents to agree outcomes and to avoid the use of family proceedings. It is, in other words, used as a tool by professionals within the family justice system.

The transaction criteria (above) ask whether the solicitor has explained the legal and practical significance of the concept of parental responsibility to new clients. We asked our interviewees how they did that. Just under half of the solicitors reiterated 'definitions' based on s 3 of the Children Act 1989 but most solicitors did not stop there. As one solicitor explained, 'I don't have one set approach – depends on what needs to be said'. Where the client was a non-residential father the explanation was tailored depending on whether he was perceived as a potential nuisance or not. So, a restricted idea of involvement was alluded to in the comments of those solicitors who said they tell clients who were, or would be, the 'absent parent' that the caretaking parent always makes all the 'normal everyday decisions'. Their imaginary talk to parents therefore included statements such as, 'it's not a charter to ring up mum every five minutes' and 'it doesn't mean [you] can tell her what sort of breakfast cereal the child has'. If the solicitor thinks the client will be a 'sensible' absent parent, then the talk is in a wider non-legal language which seems to offer more: 'basically [I] convey the impression that they are both still involved and they can't take, or shouldn't take, unilateral action on important matters. There should be as much discussion and conferring as is possible'.

Solicitors were tailoring their explanations of parental responsibility with the aim of reducing conflict between the client and the other parent and of promoting what is deemed as the best interests of the child – that is the involvement of both parents in that child's life. But the explanation of involvement was a limited one which never referred to the needs of the child. The welfare of the child is not centre stage; avoidance of a dispute is.

CHILDREN IN PRIVATE LAW PROCEEDINGS

The current debate about how the interests and the independence of spirit of children can better be upheld within private law proceedings is a very positive development but there is a danger that the solution will be seen purely in terms of new rules, different funding, increased use of mediation and a redrawing of professional boundaries in relation to family proceedings. These reforms may not lead to the changes desired if the current presumptions about harms and risks to children are so powerful that they hide any sight of the actual child and they make it difficult for actual children to hear what adults say

about them.

There is also a danger if arrangements are made for children's interests to be better and more often ascertained and heard in family proceedings that they will be predicated on another presumption – that divorce is bad and that children will always be harmed by it and so need more representation. That is simply substituting one abstract image of children for another and pathological images of the children of divorcing parents are no basis for reorganising the family justice system. Indeed, if we continue to hold any one particular image of children, then the insights from research about differences between children and their needs will have no impact.

The task is to open up a range of possibilities for children to receive information and to be consulted or represented, both inside and outside the family justice system. Such a range of possibilities, what Lyons et al (above) refer to as an integrated policy, should be available for those individual children who will benefit by using them and to do that without strong assumptions about their competence, their vulnerability and their needs. These services need not be concentrated at the expensive court end of the system, nor, indeed, solely within the family justice system.

What is needed perhaps even more than particular changes to procedures and service, is a change of attitude to children. The recent formation of the National Youth Advocacy Service (NYAS), by the amalgamation of IRCHIN and ASC, has been accomplished with that aim in view. It hopes to help create a culture where children are listened to, clearly heard, and have, as often as possible, their views acted upon. This should not mean a vast expansion of the number of children being separately represented in court proceedings: research shows this is not what most children want, although some do. It would mean the opening up of possibilities for children – and not just the children of divorcing parents – to receive explanations about developments in their family life, to tell others their concerns and, where they are anxious to do so, to be involved in decision making. As parents and professionals we are going to find that difficult.

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