CHILDREN'S LAW CENTRE
INAUGURAL ANNUAL LECTURE
2006

Making Children's Rights Real

The Right Honourable Baroness Hale of Richmond DBE,
Lord of Appeal in Ordinary

Chair
The Honourable Mr Justice Gillen

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Welcome

May I on behalf of all the staff, young people and management committee of the Children's Law Centre welcome you to the Centre's Inaugural Annual Lecture. May I extend a particular welcome to the Lord Chief Justice and the members of our Judiciary who are with us today.

My name is Paddy Kelly and I am Director of the Children's Law Centre.

We are absolutely delighted that Baroness Hale has agreed to deliver today's lecture. My colleague Tara Caul, who is our Head of Legal Services, and I had the pleasure of hearing Lady Hale speak in South Africa last year. We found her so inspirational that we immediately hatched a plan to invite her to deliver today's lecture. We were extremely encouraged when she readily agreed. You are very welcome Baroness Hale. I am sorry the weather is not as good as Cape Town but we can assure you of a very warm welcome and an appreciative audience.

We were also very pleased when, not for the first time, Mr Justice Gillen has lent his support to the work of the Children's Law Centre, by agreeing to Chair today's event. Mr Justice Gillen's continued support for the work of the Centre is very encouraging and reassuring.

Before I hand you over to Mr. Justice Gillen I would like to explain very briefly what we actually do in the Children's Law Centre. We are a charity set up nearly 9 years ago. Not only are we a relatively young charity, we are also a very small charity.

We are founded on the United Nations Convention on the Rights of the Child and in particular Art 2 – non discrimination, Art 3 – the best interest principle and Art 12 – the right of the child to have their voice heard and listened to in all matters concerning them. Art 12 is a real challenge for us all. I know Lady Hale will eloquently articulate that challenge very shortly.

One of the ways in which CLC tries to deliver on Art 12 is through youth@clc, which is our young people's advisory group. For those of you who have not met youth@clc or experienced their presentations let me say they have a strong voice, strong views and are very determined to be heard.

So what else do we do at the Centre? We produce information on children's rights and the law for adults and child friendly information for children and young people. Most of our information is on our web site www.childrenslawcentre.org. We undertake training on children's rights and the law. We advise decision makers on children's rights and work with them to ensure legislation, policy and practice is compliant with the United Nations Convention on the Rights of the Child, the Human Rights Act 1998 and s75 of the Northern Ireland Act 1998.

We provide a specialist legal information, advice, and representation service including a free phone advice line, CHALKY. The service is targeted at children. The child is our client. We represent children in, for example, special education needs and expulsion tribunals.

Under our waiver from the Law Society, we operate a strategic case work approach. We represent in a small number of cases which we believe raise significant children's rights points. This is mainly through judicial review but we also act as as third party interveners.

We organise Lectures.

Thank you for joining us this afternoon you are very welcome. I would now like to hand you over to Mr. Justice Gillen.

Paddy Kelly

CHILDREN'S LAW CENTRE INAUGURAL ANNUAL LECTURE

Introduction

The title of Baroness Hale's address today "Making Children's Rights Real" resonates with issues which are not only of great contemporary importance to everyone within the family justice system, but are essential to any understanding of the concept of respect for human dignity and the fundamental worth of human life which underpins modern human rights. The observance of human rights, including the rights of children, is a hallmark of a democratic society because it demonstrates that that society values each member and each child as an individual. The discourse on the rights of children is manifestly entering a new phase. Increasingly professionals and non-professionals within the family justice system are questioning whether our compassion for children has shaded into unthinking condescension. Are we part of a system that potentially renders children passive in their dependency and where speaking out threatens the ethos of failure in the care system in which so many other children have become compliant. The paternalism of protecting children implies that decisions affecting them will be taken for them by others whilst the concept of rights visualises that children will either take their own decisions or at least have a strong say in matters affecting them. As the past President of the Family Division in England and Wales said recently, "We continue to think of children largely in terms of needs and welfare without sufficient thought of their rights. Do we approach their best interests with adult notions?"

Children could have no more powerful advocate on their behalf than our distinguished speaker. Coursing through many of her judgments which I have had the privilege to read is the recognition that in our court system children of every age need a voice, someone who is able to listen to anything they wish to say and tell them what they need to know.

Baroness Hale became the first woman 'Lord of Appeal in Ordinary' in January 2004, after a distinguished career, first as an academic lawyer, then as a law

reformer, and then as a judge. After graduating from Cambridge University in 1966, she taught law at Manchester University from 1966 to 1984, also qualifying as a barrister and practising for a while at the Manchester Bar. She specialised in Family and Social Welfare Law, publishing textbooks on Mental Health Law, Parents and Children, The Family, Law and Society (with David Pearl) and Women and the Law (with Susan Atkins). Her many other publications include the 1995 Hamlyn lectures, From the Test Tube to the Coffin – Choice and Regulation in Private Life. From 1984 to 1994 she was a member of the Law Commission, leading the work which ultimately led to the Children Act 1989, the Family Law Act 1996 and the Mental Capacity Act 2005. In 1994 she became a High Court judge, and in the course of a stellar rise on the Bench was elevated to the Court of Appeal in 1999 and the House of Lords in 2004. Among her many other interests, she has been a founder member of the Human Fertilisation and Embryology Authority, Chair (and now President) of National Family Mediation, President of the Association of Women Barristers, and President of the United Kingdom Association of Women Judges.

She retains her links with the academic world, principally as Chancellor of the University of Bristol and Visitor of her old College, Girton. She holds several honorary degrees and is also an honorary Fellow of the British Academy. Aneurin Bevan said "why peer into the crystal ball when you can read the book". In a characteristically innovative and creative step, the Children's Law Centre, the staunchest standard bearer of the rights of children, have brought you the book.

The Honourable Mr Justice Gillen.

Making Children's Rights Real

Baroness Hale of Richmond DBE

Before we can talk about making children's rights real we have to have some idea of what children's rights are. This is not straightforward. One way of finding out is to go to the Children's Law Centre's excellent website and click on the CHALKY poster. This tells you all about when you are old enough to do certain exciting things like have your ears pierced, leave school or get married. This is important information. But it is concentrating on when children have the right to do the same things that adults can do. We adults need to remember that children also have rights even if they are not yet old enough to do the things that adults do. Where do we go to find these?

One place is the principal international instrument defining children's rights, the United Nations Convention on the Rights of the Child, 1989. This has been ratified by the United Kingdom and all but two of the member states of the United Nations. Articles 6 to 40 spell out a great many rights, beginning with the right to life and ending with the rights of children accused of crime. Some of them may seem obvious and unnecessary to state in a society like ours, but are absolutely crucial once one thinks about it. Article 7, for example, insists that 'the child shall be registered immediately after birth'. Effective registration systems are the key to everything else. Without them a child can be forgotten, dispensed with, sold into slavery or sexual exploitation, and denied an education or whatever basic sustenance and health care is available. When some of us were in South Africa for the World Congress on Family Law and Children's Rights last year, we learned that this is a real problem in many places in sub-Saharan Africa, where many children are never registered and simply never gain an official identity. With registration, however, every child becomes a real person in her own right and much less easily forgotten or ignored. The rest of the Convention aims to secure for every child the conditions necessary for her eventually to develop into a fully functioning member of adult society.

We can discern at least three strands in the Convention's scheme. The first is that everyone – parent, court, or public authority – is expected to have the welfare of the

child as their primary concern. Article 3 requires 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 18 recognises that parents 'have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern'.

Another strand is that while the primary responsibility for bringing up children lies with their families, the State has an obligation to help families to do this and to step in when families are unable or unwilling to do it for themselves. Article 18 requires States Parties to give appropriate help to parents in performing their child-rearing responsibilities and to ensure the development of institutions, facilities and services for the care of children. They are also required to protect children from all forms of physical or mental violence, injury or abuse, neglect, ill-treatment or exploitation (article 19) and to ensure alternative care for children deprived of or who have to be removed from their family environment (article 20). Other articles deal with the special needs of disabled children (article 23), health care (including the abolition of traditional practices prejudicial to the health of children) (article 24), social security (article 26), help for parents who need it in order to secure 'the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development' (article 27), education (articles 28 and 29), and even recreation and play (article 31). These are things which we take for granted in a developed welfare state like ours. In much of the developing world they can only be aspirations, but aspirations towards which the States Parties are committed.

The third, and I think the most important strand for us, is that children are not just the passive recipients of other people's concern for their best interests – they are moral actors in their own right with a point of view of their own which should be heard. Article 12 requires that 'the child who is capable of forming his or her own views' be assured 'the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'. In particular this must include the opportunity to be heard in any judicial and administrative proceedings affecting her. Other articles protect the child's right to freedom of expression (article 13), to freedom of thought, conscience and religion (article 14), and to access to information and the media (articles 13 and 17).

To make children's rights real we have to put all of these ideas into practice. How

good are we at doing this? I fear that we are not always as good as we ought or even would like to be. Dame Elizabeth Butler-Sloss highlighted some aspects – mainly in the care and criminal justice systems – in her Paul Sieghart Memorial Lecture in 2002. I would like to highlight some other ways in which we may not always look at a legal question from the child's point of view.

Making children's interests our primary concern

It is remarkable how easy it is for the adult world to forget that some questions are not about the adults but about the children. Once one looks at a legal issue from the child's point of view it begins to look completely different. I can illustrate this from three recent House of Lords' cases. The first was R (Williamson) v Secretary of State for Educations and Skills [2005] UKHL 15; [2005] 2 WLR 590. Parents and teachers at a number of independent Christian schools challenged the law (now contained in section 548 of the Education Act 1996) which prohibits corporal punishment in all schools, whether run by the State or independently. They argued that this was an interference with their right to manifest their religious beliefs, protected by article 9 of the European Convention on Human Rights. Their claim was dismissed in the High Court, the Court of Appeal and the House of Lords. But the reasoning at each level was very different. The trial judge held that this was not a manifestation of a religious belief at all, even though the parents and teachers based their views upon a number of well known biblical texts and could ground their case on a well worked out philosophy of the best way to educate children. One member of the Court of Appeal took the same view, while the other two did not. But all three of them held that there was no interference because the parents retained the right to discipline their children themselves. So they could still manifest their belief that to spare the rod is to spoil the child, albeit rather less conveniently than by delegating the task to the school.

The disturbing thing about the case so far was that the Government raised all these quibbles to resist the claim for a declaration that the statutory ban was incompatible with the parents' and teachers' Convention rights. In neither the High Court nor the Court of Appeal did it not seriously argue that the ban was justified in order to protect the rights of the children. But that was what the case was about. Why else had the ban been imposed than to protect the rights of children in general and these children in particular? Should we not start from the assumption that children have

the same rights as adults not to suffer the assaults of others? There may be reasons to make some exceptions for their own good, but these are what require justification, not their basic right. One member of the Court of Appeal doubted whether children did have a right not to be assaulted, because parents have the right to inflict reasonable chastisement upon them. But that is a defence to what would otherwise be a perfectly good claim, and a defence which has now quite strict limits. In any event, it was a defence no longer available to school-teachers. So children already had the right not to be assaulted by teachers, except in all the other circumstances, such as self defence and the defence of others, that justify violence between adults.

Fortunately, when the case got to the House of Lords, the Government had woken up and mounted a serious justification of the ban in the interests of children. But they stopped short of relying on the UN Convention. I can only speculate why this might have been. The UN Committee on the Rights of the Child (in its Concluding Observations on the United Kingdom's first report on its compliance with the Convention, 1995, para 16) had been critical of the UK for not banning corporal punishment in private schools. But it has also criticised the continued existence of the parental right of chastisement, and recommended the abolition of both (paras 31 and 32). In its second review, in October 2002, the Committee welcomed the ban in all schools, but maintained its recommendation that all corporal punishment in the family also be prohibited (paras 35 and 36). This is, of course, much more controversial. The Government had consulted on the subject in 2000 but concluded that there was no need to change the law. The Court of Appeal had conveniently interpreted the reasonable chastisement defence so as to exclude punishment which would contravene the ban on inhuman and degrading treatment or punishment in article 3 of the European Convention (see R v H (Assault of a Child: Reasonable Chastisement) [2001] EWCA Crim 1024; [2001] 2 FLR 431). So the law was Strasbourg proof. Drawing our attention to the UN Convention might have been embarrassing. Fortunately, we can look it up for ourselves. In the House of Lords we were able to accept that the practice was indeed the manifestation of the parents' (and teachers') religious beliefs, and that the ban was an interference with this, but we held that it was justified in order to protect the rights of the children.

A second example of the lack of child-centred thinking is the child support scheme. This is so controversial and so disliked by parents on both sides of the argument – those with whom the children live and those with whom the children no longer live – that they are both inclined to see it as a battle – either with the agency or between

themselves or often both. All three of the adult parties to the triangle can easily forget that the object of the scheme is to ensure that children have enough to live on.

Many of us would agree that the courts had not been very effective in identifying and enforcing child support before the 1991 Act. In theory, by taking over both the assessment and the enforcement, the child support scheme could do better. But was it necessary or justifiable to throw the baby out with the bathwater and remove the right of the parent with care to enforce the claim if the agency failed to do so? In R (Kehoe) v Secretary of State for Work and Pensions [2005] UKHL 48; [2006]1 AC 42, the mother claimed that this was a breach of her right under article 6 of the European Convention to have her civil rights and obligations determined and enforced by a court. This all depended upon whether there was a civil right in the first place. Before the House of Lords, the mother argued that the 1991 Act itself gave her civil rights for this purpose. She failed in this, as I think she was bound to do. The Act makes it clear what her rights are, and they are only to apply for the agency to make an assessment and then to enforce it. Under the Act she is not a party to the enforcement proceedings.

But if, on the other hand, one asks oneself whether the children have a right to the support of their parents while they are growing up, to my mind the answer is that they clearly do. How can any civilised state argue that they do not? Lawyers who know their legal history are well aware that the common law was very bad at enforcing this right and that statute had to step in. But statute has stepped in and made it quite clear that both parents have a duty to support their children: it is a duty which they owe to the State but it is also a duty reflected in the powers of the courts to make financial provision for children. Rather like the defence of reasonable chastisement, the operations of the child support scheme depend upon that duty and merely superseded the courts' powers in certain respects. To my mind, they did not take away the fundamental underlying right, so basic to humanity that Blackstone called it a natural right. To leave the children without any effective way of enforcing that right was, to my mind, a breach of their rights under article 6. Unfortunately, none of my colleagues agreed with me. But I felt better for saying it. For what it is worth, I might also have pointed out that it is a breach of article 27 of the UN Convention; this begins with the obvious proposition that parents have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. But it goes on to require States Parties to take all appropriate measures to secure the recovery of maintenance for the child from the parents.

In a case currently under consideration in the House of Lords, Smith v Smith and Secretary of State for Work and Pensions (on appeal from [2004] EWCA Civ 1318), counsel has argued that article 8 of the European Convention, in guaranteeing the right to respect for family life, must require the state to have an effective means of enforcing the obligation of parents to support their children if they can. This would certainly be consistent with the UN Convention. But it is much more difficult to spell out of the European Convention. This was more concerned with protecting family relationships against invasions by the State than with identifying and enforcing obligations within the family itself.

The third example is a case in which I was concerned in the Court of Appeal and therefore not in the House of Lords. Do social workers and doctors who are involved in the processes of child protection owe a duty of care to the children or to their parents? In the four cases collectively known as X v Bedfordshire County Council [1995] 2 AC 633, the House of Lords had held that social workers and doctors do not owe either the child or her parent a duty of care when they are considering or implementing child protection measures. But then the European Court of Human Rights had decided that there might be positive obligations to intervene to protect children from serious harm and that families had to be properly involved in the processes of intervention. So in three cases known as D v East Berkshire Community Health NHS Trust [2003] EWCA Civ 1151; [2003] 4 All ER 796, the Court of Appeal thought that this gave us a good reason to rethink the policy reasons which had led the House of Lords to consider that there was no duty of care. We decided that social workers and doctors did owe a duty of care towards the child but not towards the parents. Social workers had positive duties towards the child and for the doctors the child was their patient. These duties should not be clouded by duties towards the parents which might very well be in conflict with one another.

Four out of the five members of the House of Lords agreed with us: [2005] UKHL 23; [2005] 2 All ER 443. The interesting point for my argument is that the senior Law Lord did not. He would have held that there were duties both to the parents and to the child. But this was on the basis that it can generally be assumed that the interests of parents and children are the same. We in the family law and child protection world are well aware of this. Mostly it is in the best interests of children as well as their parents that they should grow up within their own families. Their families have something very special to offer them which no-one else can do. It is also the fundamental principle underlying the whole of the UN Convention and article 8 of

the European Convention. But when the very point at issue is whether the family is putting the child at risk, then to my mind it is quite clear that there is a conflict of interest between parent and child. Do not a whole series of inquiries into failures of child protection dating back to the death of Maria Colwell in 1973 make this crystal clear? The professionals who are charged with protecting the child from harm should only have one client in mind – the child. If they carelessly diagnose child abuse where none exists, then they may be liable to the child; if they carelessly fail to diagnose it where it does exists, then they may be liable to the child. These two obligations balance one another. But an obligation towards the parents can only confuse the issue. The child may suffer harm from a wrong decision either way. The parent will only suffer harm from a wrong decision to intervene, not from a wrong decision to decline to intervene. (There is the additional point that our conventional concepts of damage are much better able to recognise the psychological harm that a parent who is wrongly accused of child abuse may suffer than the psychological harm that a child who is separated from her parents may suffer.)

All of these cases were, one way and another, about the child's welfare and the child's rights: not to suffer harm at the hands of others and to be afforded the basic means of survival. All of these cases were, one way or another, conflicts between the children and one or both of their parents. We must begin with respect for the right of families to bring up children in their own way. It is a vital part of a western liberal democracy to respect the diversity and individualism that this entails. But if we look at these from the point of view of the child rather than the adults, we may end up with a very different result from the one we would otherwise have reached.

Children as moral actors

So the first step is to try to see things from the point of view of a child rather than an adult. The next and harder step is to try and ascertain the point of view of an individual child. We do need to see the child as a real person rather than an abstraction. As Dame Elizabeth Butler-Sloss famously and unforgettably put it, the child is a person not an object of concern. In none of the cases I have just discussed were the interests of children as a whole, let alone the interests of the individual children involved, separately represented before the court. It is understandable that the individual children were not separately represented, because these were primarily disputes

between their parents and emanations of the state. But I would have greatly welcomed a public interest intervention from a body such as the Children's Law Centre. Even in the family courts, where the very object of the proceedings is to make decisions about the future of children, we are not as good as we should be at looking to the children as people with a vital story to tell in the story of their whole family.

One of my father's little phrases when we were growing up was that 'children should be seen and not heard'. He didn't mean it. I had the privilege of growing up in a family where children were liked, as well as loved, and they were respected and listened to. Sadly, that is not so for many children, and perhaps particularly for those who come to the attention of the family courts. One thing that the family court system could try to give them is the experience they may not have had before, of being liked, of being respected, and being listened to.

Children want to communicate. If they are not given ways of doing so at difficult times in their lives, then sooner or later they will wish they could have had their say, and that someone had asked them earlier. Second, children have a right to know what is going on around them and to understand important matters about their lives. If we try too hard to protect them from painful truth they may imagine something much, much worse. Third, children need to be able to tell other people, and others need to know when to ask, if they are suffering harm. Lastly, children may suffer harm in future if they are kept in ignorance of or are unable to talk about important matters in their lives.

So a child involved in court proceedings needs a voice, a channel through which to communicate with the decision-makers; she may also need a champion, someone who can conduct an independent factual investigation on her behalf or help the warring adults to see things from their child's point of view; but she also needs a friend, someone who can explain to her what is going on and why, and above all what the decision is and why. We cannot always rely on the warring or grieving adults to get this last thing right. Perhaps we judges could make a start by producing a version of our decision which is understandable and makes sense to the person most closely affected by it.

In England and Wales, and in Northern Ireland, we have had a specific obligation to ascertain and give due weight to the wishes and feelings of the child in adoption proceedings since the Children Act 1975 and the Adoption (Northern Ireland)

Order 1987 respectively. There is now an equivalent obligation in all proceedings about a child's upbringing and care in the Children Act 1989 and the Children (Northern Ireland) Order 1995. Children are automatically parties to care proceedings which may take them from their families and may be made parties to proceedings between their parents or other individuals who want to look after them. If made a party they will usually be represented by an independent guardian and a solicitor. If not a party, their views can be ascertained through a Cafcass reporting officer. They may also be allowed to make applications about their own future. All of this was devised before the United Kingdom became party to the UN Convention but represent our attempt to comply with the obligations of article 12. How effective are they in doing so?

There is undoubtedly a tension between the principle of parental responsibility and the principle of involving the child. Front-line Cafcass officers hold different views about which they should put first. They are not alone. We in the courts do not want to intervene unless we have to. Our law tries to discourage parents from seeking court orders about their children's future at all. Most family judges believe that it is much better if parents can be helped to agree between themselves what will be best for their children. The parents are more expert about their own children than any judge could hope to be. They also know better than we do what will make practical common sense. Conflict and delay, which invariably result if the case has to go before a judge to decide, are both bad for children. So of course we want parents to agree, either between themselves, or between their lawyers, or with the help of skilled mediators. But there is always a risk that these agreements are made without properly consulting the child. The child will be giving each parent the message which that parent wishes to hear. Her independent voice is lost. So one of the challenges we currently face is how the child can be involved before a case ever gets to court, either by the parents themselves when they make their decisions or when they are helped to do so by mediators or others. But this is still a very new idea to family mediators. There is not much about it in recent texts on family mediation, although national family mediation has been working on models of child involvement.

Once a case is taken to court, the court still tries to get the parents to agree. In court conciliation is a briefer and more task-focussed intervention than independent out of court mediation. It may be highly effective in avoiding the need for the court to resolve the issue but it does little to address the underlying co-parenting problems. In England and Wales, the Private Law Programme initiated by the President of the

Family Division in 2004 provides for an early First Hearing Dispute Resolution Appointment. Models vary; in some places, the judge and the lawyers are very much in control, although a Cafcass officer may be asked to see the parents or the children during the process; in others, a Cafcass officer takes the lead in discussing things privately with the parents before the appointment. Some places are experimenting with inviting or even requiring children of nine and over to attend at court, although not necessarily the hearing itself. Parents and professionals are divided about whether this is a good thing. They may well learn things from the child that they did not know. But on the other hand, our courts are not the most welcoming and friendly places for adults let alone children to attend. The model in the Principal Registry is to require them to come to court but only to consult them if the parents cannot agree. Although the intention is good, some might think that that was the worst of all possible worlds.

Once there are issues which the court may have to decide, the principle of involving the child is firmly acknowledged, but we still have debates about how this should be done and by whom. Specifically, is it a job for professionals or for the courts or for both? We have tended to rely more and more upon the professionals who report to the court. Often these reports have concentrated as much on the history and the views of the parents as they have on the wishes and feelings of the child. Yet once a case gets to court, the judge can read the parents' statements and hear their oral evidence. The one thing the court rarely does is hear directly from the child. So we really want the Cafcass officer to do the thing that we cannot – or should not be able to do as well as he can: to ascertain and report upon the wishes and feelings of the child. The best ones do this very well. Most children like their officers and think they have been taken seriously, even though most of them would have liked to be more involved in the court process.

But there are criticisms. One is that reporters tend to concentrate on wishes rather than feelings: I have read reports which say that 'Susie is only three years old, so too young to have her own views'. But we all know that three year olds have very pronounced views, however necessary it may be to thwart these. More importantly, any judge needs to know something about the child's feelings, the quality of the child's attachments to the adults around her. This can best be achieved by methods of communication which are not open to a judge in a court room, however friendly its design. A judge can neither do nor interpret the Bene Anthony family relations test.

Another criticism, which features regularly in intractable contact disputes, is that the officer has not accurately reported what the child has said. Too often, it is said, the officer has put his own interpretation or spin upon it. Yet counsel know that they face an uphill struggle and a hostile court if they try to cross-examine the officer along these lines. When the Official Solicitor used to represent children before the High Court, his case workers, despite or perhaps because of their not being trained social workers, used to give a very full account of what the child had actually said. We are now considering a practice of asking Cafcass, not for a full report on the whole case, but for a 'wishes and feelings statement'. This sounds like a good idea, although one would not want to inhibit the officer from expressing an expert view on how such a statement might be interpreted. At least then the distinction between communication and interpretation would become transparent.

The system of separate representation in public law cases is altogether more elaborate and expensive. Hence it is not often used in private law cases, but where it is used, both the children and their parents could identify the benefits which it had brought, both for them personally and to the resolution of the case. But when the President of the Family Division published a practice direction in 2004, indicating no less than 10 types of case in which separate representation might be appropriate (President's Direction, 5 April 2004, Representation of Children in Family Proceedings Pursuant to Family Proceedings Rules 1991, Rule 9.5), there was such a dramatic increase in its use in some places that she had to produce a further direction that only circuit judges and above could order it (President's Guidance, 25 February 2005, Appointment of Guardians in accordance with Rule 9.5 and the President's Practice Direction of 5 April 2004). The legal aid and Cafcass budgets had been placed under severe strain. Even the public law system of which we are so proud is under pressure and ways are being sought to curtail it.

Where does the judge or magistrate come in all of this? We have no consistent view about the presence, let alone the participation, of the child in the hearing about her future. Under the old Children and Young Persons Act 1969, the child who was brought before the court in care proceedings had literally to be there unless she was under 5 or the court ordered otherwise. The old juvenile courts seemed to be able to cope with this, perhaps because they were lay people rather than professional lawyers. But under the Children Act 1989, the court can proceed in the absence of any party, and routinely does so in the absence of the child. The tone was set by the Court of Appeal case of Re C (A Minor) (Care: Child's Wishes) [1993] 1 FLR 832,

CA. The judge commented on the presence of a 13 year old girl in court:

"[she] is young for her 13 years and for most of [the] hearing.....she seemed preoccupied, and who can blame her, with her toys and colouring books."

Well why not? The guardian had wanted her to be there and thought that it had been a good thing: she might not have taken in much of what was going on, but at least she knew that decisions were being made about her when she was there. The judge thought otherwise:

"I would have thought myself, that to sit for hours, or it may even be days, listening to lawyers debating one's future is not an experience that should in normal circumstances be wished upon any child as young as this."

We can all agree that court proceedings can be boring and even appear pointless to people who are not as used to them as we are. But surely the choice should be the child's rather than the court's unless real harm will be done by her presence?

In the old wardship procedure, the child would not usually be in court for the whole hearing, but it was standard practice for the judge to see the child in private. That is why the Family Division judges' rooms in the Royal Courts of Justice were so close to their court rooms. The High Court and county courts still have a discretion whether or not to see the child in private. But it became less and less common to do so. One reason may have been that there were now more professionals involved in doing this and the court was content to accept their accounts and interpretations. Another may have been that the higher courts were reluctant to allow lay magistrates to see a child in private (see Re M (A Minor) (Justices' Discretion) [1993] 2 FLR 706). As magistrates, county and High Court judges now have concurrent jurisdiction in children's cases, there was a view that their practice should so far as possible be the same. A third reason, given by Lord Justice Wall in Mabon v Mabon [2005] EWCA Civ 634; [2005] 2 FLR 1011, was the rules of evidence and the adversarial mode of trial. If a judge sees the child in private, he cannot give her a guarantee of confidentiality. He has to explain that if he hears anything which might influence his decision, he will have to tell the parents, so that they can have a proper opportunity of dealing with it, by evidence or argument.

Nevertheless, that reluctance to see the child is now being called into question. One

reason is increasing awareness of the UN Convention and the concept of children's rights generally. Another is the European Convention. It is standard practice in some European countries for the judge to see the child. (These tend to be countries where judges are rather younger than they are here and many of them are women.) In Sahin v Germany [2003] 2 FLR 671 and Sommerfeld v Germany [2003] 2 FCR 619 a chamber of the European Court of Human Rights decided that the denial of contact between father and child had not given sufficient procedural protection to the father's right to respect for his family life with his child. In one case the court had not interviewed the 5 year old child personally (because the psychologist had counselled against this) and in the other the court had relied upon the strongly expressed views of a 13 year old child without getting an up to date psychological report. Both cases went to the Grand Chamber, which held that 'it would be going too far' to say that the national court was always obliged to hear directly from the child or always to have an up to date psychological report. Nevertheless it did seem that the procedural rights of the parent would require the court reliably to ascertain the wishes and feelings of the child. We, I hope, would have seen this as the procedural right of the child.

There are many advantages in the court being more willing to see the child. First, the court will then see the child as a real person. Children often have a clear idea about what they think is fair, whether or not it is what they want. Secondly, the court may learn more about what the child actually wants than is possible at second or third hand. Those of us who have been closely involved in bringing up our own children and grandchildren have had to learn how to ascertain their wishes and feelings and then to give them such weight as they deserve in the circumstances. Thirdly, the child will feel respected, valued and involved, as long as she is not coerced or obliged to make choices that she does not wish to make. Many children, especially the older ones who are loyal to both parents, simply do not want to be asked to choose. But it is just as important that they be enabled to say that, as it is that they be enabled to express a choice if they have one. Fourthly, it presents an opportunity to help the child understand the rules. Just as the parents will have to obey the court order whether they agree with it or not, so will the child. Hopefully, a child who has been involved in the process may feel more inclined to comply with the decision than one who feels that she has been ignored. Finally, parents too may be reassured that the court has been actively involved rather than simply rubber-stamping the professional's opinion. This might also have the effect of sharpening the professionals' practice.

But of course there are also risks and disadvantages. Some judges may have little experience of direct communication with children, even about ordinary matters such as 'what would you like for tea?' Without that necessary bridge, it can be very difficult to communicate with a child about 'difficult' things. Those judges who do feel able to do this may fail to see the pitfalls that a professional would see. We do need to understand the ways in which children are different from as well as the same as adults. We also need to understand the ways in which adverse life experiences may have affected the child's own communication skills. If you come from a family where you are not allowed to speak out, particularly to criticise your parents' actions or decisions, you will have difficulty voicing your feelings to anyone, let alone a judge. If you have been abused in any way, you will have negative feelings about yourself, which will affect your self esteem and your confidence in your right to have a view. On the other hand, if you have been given too much power in the family, it may be harmful if outsiders thoughtlessly reinforce that power. Children are just as good at misusing power as adults are. And perhaps the main disadvantage is that it could increase the risk of coaching. Parents already put pressure on their children to tell the Cafcass officer what the parents want them to say. Would it not be worse if the court became more regularly involved?

It seems to me that most of these problems, especially the coaching and the confidentiality risks, apply just as much to professionals seeing the child in private as they do to the court doing so. The only person who can give the child a guarantee of confidentiality is her own lawyer. The other professionals cannot give the child that guarantee any more than the court can do. Skill is needed both in eliciting the child's views and in interpreting them. Care is needed in preserving the rules of natural justice while enabling the child to speak freely. We cannot deny the existence of these problems by delegating the task to professionals whose direct work with children we never see.

So courts are now becoming less resistant to the idea of seeing children. There are three situations in which I think it should definitely be done (and I am not alone in this). The first is where the child has asked for leave to make her own application to the court. The court can only grant that application if satisfied that the child has sufficient maturity to make it. Seeing the child is not only some check upon this, but also an opportunity to explain to the child what direct participation in the proceedings entails. The second is when there is a dispute about whether the professionals have accurately reported the child's views to the court. The third and

most important is where the child has asked to see the judge. I do not remember ever having refused to see a child who asked to see me, as long as I was reasonably confident that the child had indeed asked. I always enjoyed it. I sometimes learned something that I did not already know. And I usually felt better able to predict how things would go in future, for better or for worse. But even if it was of no benefit to me in making the decision, I would still think it the child's right to be heard if that is what she wants. We are not doing this simply as an aid to our own decision-making but in recognition of the child's status as a person not a parcel.

Conclusion

The message I have been trying to convey all along is that to make a child's rights real you have to make the child real. We should no more think of calling a child involved in legal proceedings 'it' than we should think of calling an adult 'it'.

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