



Courts and Tribunals Judiciary

The Challenges in Hearing the Authentic Voice of the Child in Public and Private Family Law Proceedings

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INTRODUCTION

In *Re D*,¹ Baroness Hale provided the following, seminal, articulation of the importance of listening to children in the context of litigation that touches and concerns their lives:

"There is a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more reason for failing to hear what the child has to say than it is for refusing to hear the parents' views."

In the jurisprudence on listening to children in the context of litigation concerning their welfare, Baroness Hale has also emphasised, in *Re M and Another (Children)(Abduction: Rights of Custody)*,² the need to give emphasis to the requirements of Art 12 of the United Nations Convention on the Rights of the Child (UNCRC), to which both our jurisdictions are signatories.

Art 12 of the UNCRC enshrines the cardinal right of the child to participate fully and directly in the formulation of their own destiny. The child's right to participate pursuant to Art 12 arguably articulates with the greatest clarity the status of all children as equal members of human society, able to hold and exercise rights. A key element of the process of securing children's rights is ensuring their participation in accordance with their age, development and understanding.

This much is well established. But the topic that I have been asked by Geoffrey to speak on today adds an extra, and very important, dimension to the vital exercise of hearing the voice of the child in private law proceedings (as between family members) and public law

¹ [2007] 1 AC 619.

² [2008] AC 1288.

proceedings (as between the State and the family). Namely, the challenge of establishing the *authentic* views of the child caught up in litigation between his or her parents or his or her parents and the State. What are the hurdles to establishing that the wishes and feelings expressed by the child are reliably and genuinely the child's own?

THE CHALLENGES

The challenges to hearing the authentic voice of the child in proceedings before the court can, I think, be divided broadly into the general and the specific. The general challenges apply to both public and private law proceedings. In addition, there are challenges specific to the private and public law categories of cases. The general challenges centre on issues of child development, demographics, complexity and ambiguity.

Developmental Factors

It is a cardinal principle of listening to the voices of children in the context of proceedings that the weight to be attached to those wishes and feelings is dependent on the child's age and level of understanding.³ The operation of (as opposed to the existence of) the right to participate through the ascertainment of his or her authentic views is calibrated to the child's level of development.

Self-evidently, however, childhood is not a single, fixed and universal experience between birth and the age of majority. Arising out of this general observation, in seeking the authentic views of the child it must be further recognised that there is enormous variation between children in terms of their understanding and intelligence. A common difference between individual children concerns their general level of understanding and intellect. Given the link between a child's general level of intelligence and language ability,⁴ these differences are manifested in terms of both speech and language and a child's reasoning ability.⁵ As such, chronological age and developmental age will not necessarily coincide, with no inevitable exponential link between increasing age and the ability to form clear, considered views on a given subject.

A further challenge in the context of the child's development is that that development introduces subtleties relevant to the authentic views of the child. For example, as summarised by Jones,⁶ children aged 10 to 11 years are more susceptible to social pressures because of a wish to please and a vulnerability to adult authority. Older children and adolescents have an increasingly sophisticated understanding of the social consequences of speaking on a subject. These more subtle factors will also affect the extent to which the authentic views of the child are capable of being ascertained but, once again, will also differ from child to child.

The first general challenge then, in hearing the authentic voice of the child, is that whilst some broad principles can be identified (for example, that older children will have greater knowledge of the world and more sophisticated communication skills than younger children)

³ See for example the Children Act 1989 s.1(3)(a) and Art 12 of the UNCRC.

⁴ Jones, D.P.H. (2003) *Communicating with Vulnerable Children*, p.23, London: Gaskell.

⁵ *Ibid.*

⁶ *Ibid.* p.30-31.

and incorporated into statute, increasing age and development is not by itself a very nuanced predictor of increasing understanding and reliability. Many other physical, psychological and social factors will impact on the formulation and expression of the child's views. In these circumstances, in seeking the authentic voice of the child it is vital to consider the *individual* child and his or her *individual* circumstances when ascertaining, and deciding what weight to give, that child's wishes and feelings. As Jones observes⁷ in calling for a broad base of experience and knowledge for those who seek the authentic voice of children in proceedings:

“This is one of the reasons why knowledge of one's own children, grandchildren or those of friends is simply insufficient and can lead to misleading generalisations.”

Demographics, Diversity and Difference

Identity is the condition of being a specified, identifiable person both as a unique separate individual and as a recognised member of a group.⁸ Identity also has an important cultural component and is essential for relationships between each individual and the rest of society and for his or her understanding of the outside world and his or her place in it.⁹

Within this context, another challenge when seeking the authentic voice of the child in private and public law proceedings is created by the increasingly diverse demographic of subject children who come before the courts. The demographics of the population of children with whose welfare the court is concerned increasingly comprises children and families from other jurisdictions. As the Family Presiding Judge for London, the courts over which I preside serve a population in which 46.2% of residents identify with Asian, black, mixed or 'other' ethnic groups, and a further 17.0% with white ethnic minorities.¹⁰ There are over 300 different languages spoken in the city.¹¹

Ethnicity¹² and cultural¹³ background are key contexts in which communication with children involved in proceedings takes place and cultural conventions are likely to influence exchanges with children who come from different ethnic and cultural backgrounds.¹⁴ Children from minority ethnic backgrounds can experience more economic hardship and higher levels of racism. Refugee children arriving in our jurisdiction may have had adverse experiences that can significantly affect their development, adjustment and psychological functioning. These difficulties may be compounded by linguistic issues that can be subtle. Whilst bilingual

⁷ Ibid. p.32.

⁸ Jenkins, R. *Social Identity* (2004) Routledge.

⁹ Dissenting judgment of Judge Cancado Trindade in *Serrano-Cruz Sisters v El Salvador* IACHR 1 March 2005 Series C No 120.

¹⁰ England and Wales 2021 Census.

¹¹ London Assembly MQT, 21 February 2006.

¹² Meaning, in this context, the group sense of coherence and belonging of persons who have a common geographical, cultural and historical background and interest.

¹³ Meaning, in this context, the rites, traditions, values, beliefs and customs that are shared by a group of people.

¹⁴ Jones, D.P.H. (2003) *Communicating with Vulnerable Children*, p.50, London: Gaskell.

children often appear fully confident in their second language, subtle difficulties in communication ability and level of understanding may occur.¹⁵

In these circumstances, in seeking the authentic views of children in public law and private law proceedings, it is important that those seeking to ascertain the authentic views of children from diverse ethnic and cultural backgrounds develop an awareness of race and culture, understand the child's perspectives and needs arising out of his or her ethnic and cultural background,¹⁶ and that any discriminatory attitudes or prejudices are addressed.

This in itself can be a challenge in circumstances where the child will often be separated in space and time from the place where he or she formulated a personal history from birth and the place of his or her race, culture, religion and language. This means that those who are seeking authentic views of the child, from social workers to judges, often do not have first-hand knowledge of the social, geographical, cultural, religious and linguistic traditions that underpin the child's identity and views on given topics.¹⁷ In these circumstances, it is all the more important that issues of culture, race and ethnicity are not treated simply as factors to be accounted for in communicating with the child, but rather that they are integrated into, and permeate, the whole effort to ascertain, understand and act on the authentic views of the subject child.¹⁸

The court is often required in both public and private law proceedings to seek the authentic views of children who have a disability. Certain disabilities may impact directly or indirectly on the child's ability to communicate his or her views, the term 'disabled' covering a wide range of physical impairments, learning disabilities and sensory and communication difficulties. In seeking the authentic views of the child however, it should not be assumed that the principles of good practice guiding the ascertainment of a child's views within the context of proceedings needs to be different for disabled children.¹⁹ In seeking to establish the authentic views of a disabled child, it is important not to misjudge abilities and make unwarranted assumptions based on stereotypical ideas, whilst being alive to difficulties in communication consequent upon a particular disability.

Once again, seeking the authentic voice of the child it is vital to consider the *individual* child and his or her *individual* circumstances when ascertaining, and deciding what weight to give, that child's wishes and feelings.

Complexity

In seeking to hear the authentic voice of the child in public and private family law proceedings, the complexity of the cases that the court is required to deal with in the modern world can also present challenges.

¹⁵ Ibid. p.23.

¹⁶ Which may include determining the extent to which the child may have been exposed to racism, information on cultural, religious or linguistic matters and information on family history and cultural heritage (Jones, D.P.H. (2003) *Communicating with Vulnerable Children*, p.54, London: Gaskell).

¹⁷ MacDonald, A. *The Weight of Memory – Children's Rights in a Changing World* [2018] Family Law Journal.

¹⁸ Jones, D.P.H. (2003) *Communicating with Vulnerable Children*, p.53-54, London: Gaskell.

¹⁹ Ibid. p.57.

An aspect of seeking the authentic view of the child on an issue or subject is the need to investigate the views of the child by reference to the specific situation in which they find themselves. In the lists of the Family Division and the lists of Family Courts in our jurisdiction can now be found cases involving allegations of child trafficking and modern slavery, cases of alleged child sexual exploitation, applications for orders designed to protect from female genital mutilation or forced marriage and cases in which the allegations centre on the risk of radicalisation or abduction to zones of armed conflict. Judge's, practitioners and professionals are increasingly concerned with cases that arise from surrogacy arrangements between individuals, litigation arising out of IVF treatment and cases in which a dispute has arisen between a child's parents and the doctors treating that child about where his or her best interests lie in the context of life limiting conditions.

This situation can result in the need to establish the child's view of the complex and often difficult and emotive issue in dispute. It is vital that the child participates in decisions of a gravity that can have a lasting and serious impact on him or her. However, the complexity of those decisions gives rise to a tension between participation and the age and understanding required to deal with and form a view on such complexity. These challenges are multiplied if the child has needs that can make understanding and communication more difficult. All this requires a difficult balance to be struck between avoiding an overly paternalistic and protective approach towards the child and ensuring that his or her welfare is sufficiently safeguarded in the context of complex situations not many people are required to face and give a view on.

Ambiguity

Finally with respect to challenges of a general nature, a related, but in my view often overlooked, challenge in seeking the authentic views of children is the question of ambiguity. An important element in hearing the voice of the child that I think is often missed is that the child may not know with clarity, or sometimes at all, what they think about a given action or decision.

Just think for a moment about how many issues you may have an equivocal view on, or indeed no view on at all. Whilst the adults in the court room may perceive the issues in dispute to be of the utmost importance, the subject child may take a very different view of the importance of the issues, or indeed a different view on what the issues in fact are.

In seeking to hear the voice of the child, we must be careful to ensure that we do so with a realistic appreciation of the fact that children will not have a view about everything and that, where they do have a view, their views may be equivocal or changing. Accordingly, in some cases, we need to be comfortable with ambiguity. There should be no assumption that the child will *always* have a settled view on a given topic. They may be, as are many adults, entirely undecided on the issue.²⁰ This is particularly the case where the situation in which they find themselves is complex or multifaceted.

²⁰ MacDonald, A. *Foundations of Family Law in Justice for Children and Families – A Developmental Perspective*, Ed. Shaw, M. and Bailey, S, (2018) Royal College of Psychiatrists.

Nature of the Proceedings

Moving from the general to the specific, in identifying the challenges in seeking the authentic voice of the child in private and public law proceedings, the circumstances that tend to give rise to those two types of proceedings can themselves present difficulties. Here, particular challenges in seeking the authentic views of the child can further complicate the general challenges I have outlined.

Private Law

With respect to private law, the nature and intensity of the parental dispute, and the generally less intensive involvement in such proceedings by statutory agencies, means there is a greater risk that the views expressed by children will be influenced by the adults involved in the dispute, either inadvertently or, in some cases, deliberately. The latter cases present a particular challenge and can range from attempts by a parent to influence what a child says about the nature and extent of the relationship they wish to have with the other parent, to attempts by the parent to engineer false allegations of abuse by the child.

More recently, there have been arguably unhelpful attempts by certain groups to codify these behaviours impacting on the authentic views of the child into a so-called syndrome, namely 'parental alienation syndrome'. Great caution is required with this concept. In noting that family judges in England and Wales have, for some time, regarded as unhelpful the label of 'parental alienation' and the suggestion that there may be a diagnosable syndrome of that name, in *Re C (Parental Alienation; Instruction of Expert)*²¹ the President of our Family Division endorsed the following passage from the Skeleton Argument of the Association of Clinical Psychologists UK:

"Much like an allegation of domestic abuse; the decision about whether or not apparent has alienated a child is a question of fact for the Court to resolve and not a diagnosis that can or should be offered by a psychologist. For these purposes, the ACP-UK wishes to emphasise that "parental alienation" is not a syndrome capable of being diagnosed, but a process of manipulation of children perpetrated by one parent against the other through, what are termed as, "alienating behaviours". It is, fundamentally, a question of fact."

Public Law

With respect to public law cases, one of the key challenges is that presented by the need to elicit wishes and feelings from children who have suffered harm significant enough to lead to State intervention in their family life.

As Jones points out,²² children who have been exposed to maltreatment or adverse experiences can be significantly affected in their development, adjustment and psychological functioning by those experiences, which in turn will have an impact on the child's ability to communicate. This can have a major impact on the success of attempts to communicate with

²¹ [2023] EWHC 345 (Fam).

²² Jones, D.P.H. (2003) *Communicating with Vulnerable Children*, p.38-41, London: Gaskell.

the child.²³ For example, achieving the authentic views of a hyperactive child, a child who is emotionally disturbed or reluctant or uncommunicative can be very challenging and require professional assistance. There is, of course, an acute need to ensure that participation by the child in the decision concerning him or her does not lead to re-traumatisation.

Methodologies

In England and Wales we have a number of methodologies for seeking the authentic view of the child that endeavour to meet the challenges I have summarised. These comprise a report from a Family Court Adviser (a social worker from the Children and Family Court Advisory and Support Service), party status for the child in the proceedings, child inclusive mediation and, subject to what I will come on to say, judges meeting with children. These methodologies, however, also each have their challenges.

As Voltaire observed, “the way to be boring is to say everything”. In the circumstances, I wish to concentrate on just two areas of challenge. Namely, the challenges that arise when judges meet children and the challenge of hearing the child’s authentic voice in the context of ADR or mediation.

Judges Meeting Children

It is increasingly common for a judge to receive a request to meet the child who is the subject of proceedings. We have formal guidance dealing with this issue in the form of *Guidelines for Judges Meeting Children who are Subject to Family Proceedings*.²⁴

There are a range of challenges and difficulties that arise in the context of a judge meeting the children who are the subject of proceedings but one particular challenge is the question, which I think remains to be resolved, of how we treat the information that judge’s inevitably gather when meeting children. Our 2010 Guidelines contain the following injunction:

“It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence. That is the responsibility of the Cafcass officer. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her.”

Against this, in obiter comments made Baroness Hale in *Re D*, a face to face meeting between the subject child and the judge was included as one of the methods of conveying the views of the child to the court. What then is permissible in our jurisdiction?

There is at least one example in the authorities of the latter approach being taken. In *De L v H*,²⁵ a decision of a past President of the Family Division, the court took account of the information gathered when meeting the child reaching its substantive decision on the merits.

The contrary position was seen in *Re KP*²⁶ (which cited *Re D*, including the passage of Baroness Hale’s judgment that contains the reference to a face to face interview). In that case, the Court

²³ Ibid. p.43.

²⁴ [2010] 2 FLR 1872.

²⁵ [2010] 1 FLR 1229.

²⁶ [2014] EWCA Civ 554.

of Appeal identified a firm line between a process in which the judge and a young person simply encounter each other and communicate in a manner which is not for the purpose of evidence gathering, and a process in which one of the aims is to gather evidence. This injunction against using meetings with children for the purpose of gathering evidence was endorsed in the *Report of the Vulnerable Witnesses & Children Working Group* in February 2015.

Whilst the injunction against using information gained by a judge when meeting a child appears to stand, and may be said to have a legitimate procedural and forensic foundation in the need to ensure fairness between the parties and to maintain the fundamental precepts of natural justice, it does present challenges.

Upon meeting a child, a judge begins to form an impression of the child, to see how the presentation of the child compares to that contended for by the parties and hears “that which she may wish to volunteer to the judge”. What is heard by the judge may, in turn, be relevant to the issues the court is tasked with adjudicating. This is a predictable, and unavoidable consequence of meeting and talking to children. Indeed, it is a predictable and unavoidable consequence of all human interaction. Within this context, it may be said that the injunction against using a meeting with the child as a means of gathering evidence of their authentic views is far easier to articulate in theory than it is to apply in practice.

The current position also presents challenges to the child. My experience of meeting children is that they consider that they are coming to see me to provide me with information that will inform my decision, whatever the lawyerly characterisation of the meeting may have been. As recognised in *Report of the Vulnerable Witnesses & Children Working Group*, one might seek to explain to a child that this is not the purpose of the meeting. However, in reality, I suspect that this will often be entirely unsuccessful in dissuading a child from his or her settled view that they are coming to see the judge to tell him or her things that will inform the court’s decision.

The Child’s Voice in ADR and Mediation

The final challenge in seeking the authentic voice of the child, and one of increasing relevance as ADR and mediation come to the fore, particularly in the context of private law, is hearing the child’s voice in the context of mediation and ADR. This challenge is now increasingly being met using child inclusive mediation.

The rules of procedure in England and Wales includes a requirement for the court to encourage the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure. In circumstances where children and young people have the right to be heard in all matters concerning their needs, interests and futures, it is important that children can have input into the mediation process. The Family Mediation Council Code of Practice²⁷ requires that all children and young people aged 10 and older be offered the opportunity to have their voices heard directly during mediation.

²⁷ Family Mediation Council Code of Practice, FMC, September 2024.

The concept of child inclusive mediation provides an opportunity for the child or young person to be heard and for the child's parents to hear feedback. Anything the child or young person says is available only to the parents during mediation *only* with the child's permission. Where a child or young person is invited to become involved in the mediation, they can choose *not* to accept that invitation.

CONCLUSION

As a jurisdiction, we endeavour to establish the authentic views of the child caught up in litigation between his or her parents or his or her parents and the State, both to ensure fidelity to the child's right to participate in decisions affecting him and her and to ensure fidelity to the principle that the child's best interests are the court's paramount consideration. Only by ensuring the authentic views of the child are before the court can we be sure that the child's welfare is properly located at the centre of the decisions we make. Challenges, however, remain. The exchange of views and experiences at valuable events such as this offer crucial opportunities to examine and consider solutions to those challenges.

MacDonald J

9 November 2024