

Children and Lawyers Acting for Children in Legal Proceedings – What does a child’s right to be heard in legal proceedings really mean?

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Decisions about children in family proceedings are likely to be better if the particular child’s point of view is taken account of. Children have a major interest in the outcome of such decisions. The 1989 United Nations Convention on the Rights of the Child guarantees children the right to express views in matters that affect them and equally importantly gives children the right to be heard in the proceedings. Practice standards for lawyers appointed to act for children whilst premised on the need to hear the child’s voice do not deliver this. A re-think of these practice standards is needed if the child’s voice is to be heard in family proceedings. This paper shows where the practice standards deviate, why we are reluctant to hear the child’s voice, the importance of the child’s voice and explains what hearing the child’s voice means. The paper concludes with a new practice code and how it would apply in the case of the “alienated” child.

Current Confusion

Lawyers have been appointed to represent children in family proceedings long before the 1989 Convention on the Rights of the Child came into being.

The focus and practice of the role has not been clearly agreed upon.¹ In simple terms there is division between those who believe the role of counsel acting for children is to act on the child's instructions and those who believe the role is to do what they believe is best for the child based on their "objective" view of what is best for children. The dichotomy is not quite as black and white as portrayed. Many lawyers believe they can carry out both roles with no contradiction between them.

Codes of ethics in fact require lawyers to act in the "best interests" of their clients. This means that the lawyer works with the client to formulate the most beneficial position for the client. In doing that there is always the potential for the lawyer to use their knowledge of the system and their perceived authority to influence the choices the client makes. Sarat and Felstiner² show through their study of divorce lawyers and clients that lawyer/client relations are "sites of conflict" where "power is manifest in struggles over whose view of reality should be accepted and whose partial and contingent understandings should be treated as adequate". The ability and opportunity to dominate the client's view becomes stronger where children are involved.

In 2004³ an e-mail survey was carried out on the 310 lawyers who act for children in New Zealand. One hundred and ninety eight responded to the questions. Sixty three percent of those who responded ranked the task of "**investigating and assessing the child's best interests**" as "very important". Twenty one percent ranked the task as "important" and 11% ranked the task of "some importance". Only 1% ranked the task of "little importance". This is not surprising given that when counsel are appointed to represent children by Family Court Judges in New Zealand they are given a judicial brief which invariably asks counsel to "investigate and assess the child's best interests".

¹ Elrod, "Counsel for the Child in Custody Disputes: The Time is Now" (1993) 26 FLQ 53 Guggenheim, "A Paradigm for Determining the Role of Counsel for Children (1996) 64 Fordham LR 1399.

² *Divorce Lawyers and Their Client's Power and Meaning in the Legal Process*, Oxford University Press, 1995, 142.

³ Conducted by John Caldwell and the New Zealand Law Society for the purposes of a workshop on Advanced Counsel for the Child. October 2004, www.lawyerseducation.org.nz

Sixty two percent of the respondents ranked the task of “**advocating the child’s views and wishes**” as “very important”. Twenty nine percent ranked the task as “important” and 6% ranked it of “some importance”. The judicial brief to counsel for children commonly asks them to “ascertain and put before the Court the views and wishes of the child” so it is not surprising that the vast majority ranked the task as important.

By way of marked contrast only 17 percent ranked the task of “making recommendations at the hearing as to outcome” as “very important” and 40% ranked it of “importance” with 32% ranking it of “some importance” and 7% ranking it of “little importance”.

Only 29% of those surveyed felt positive about the clarity of the role of acting for children. Seventy one percent were somewhat unclear about the role. Lawyers are hearing two voices. One voice is the voice of the Court in the form of the written brief asking for certain tasks to be performed. The lawyer, as a professional, feels duty bound to respond to the Court’s demands. The other voice is the voice of the child, which the role of the lawyer as agent for the child demands to be advocated for.

Two significant differences from a similar survey carried out in 1998⁴ show that the ambiguity and confusion in the role has become more heightened. In 1998 only 89% saw the task of making contact with the particular child as an essential part of the role of acting for children. This figure at the time was a significant increase from the days when lawyers acting for children were encouraged to be case managers and manage the cases from their desks by organising expert assessments for the child and talking with the lawyers for the adult parties. By 2001 100% saw the task of making direct contact with the child as essential to their role.

Assessment of the child’s interests was seen by 80% in 1998 as an essential part of the role. In 2004 98% saw assessing the child’s interests as essential to the role.

⁴ *The Role of Counsel for the Child: Research Report* (New Zealand Department for Courts, 1998).

More lawyers appointed to act for children see the children than before, at the same time more see assessment of the child's interests as crucial. Yet a notably different proportion, only 17%, see the traditional role of making submissions to influence the outcome as very important. With adult clients it can confidently be predicted that making submissions to influence the final outcome would be seen as very important in 100% of cases.

Lawyers acting for children do not generally see themselves in the same role as acting for adult clients in the Family Court process. With other clients there is no judicial brief on what the Court wants but rather instructions from the client after consultation and advice from the lawyer. Because the child is not a party to the proceedings the way lawyers acting for children become appointed is through the Court's brief. The Court's brief must comply with the law.

Section 7 of the Care of Children Act 2004 (which comes into force in New Zealand in July 2005) gives the Court power to appoint a lawyer to "act for" a child who is the subject of proceedings under the Act. Apart from exceptional circumstances in order to facilitate the performance of the lawyers' duties and to comply with s6 of the Care of Children Act which says that "a child must be given reasonable opportunities to express views on matters affecting the child" the lawyer must meet with the child. The lawyer acting for the child may call any person as a witness and can cross-examine witnesses called by the other parties or the Court. Section 143(2) of the Care of Children Act 2004 gives a child "to whom the proceedings relate" a right to appeal. Further recognition of the child's independent status in the proceedings.

Section 27 of the New Zealand Bill of Rights Act 1990 prescribes that everyone has the right to the observance of the principles of natural justice by any tribunal which has the power to make a determination about a person's rights or interests protected or recognised by law. A child's welfare interests are at stake in family proceedings. Natural justice guarantees the right to a fair hearing which includes the right to a lawyer. Article 12 of the United Nations Convention on the Rights of the Child gives a child a right to express views and have those views heard in legal proceedings.

The Court's brief must be consistent with a lawyer acting "for" the child as opposed to assisting the Court. The brief must be such that the child's rights both in domestic legislation and international obligations to express views, and have an independent lawyer are heard, not compromised.

Practice Note

The current practice note in New Zealand for practitioners who act for children in Family Proceedings came into effect on 1 February 2001. The note was issued by the then Principal Family Court Judge Mahony after a review of the role was carried out by a working party on behalf of the Department of Courts. The introduction to the practice note signals that the role and practice of it is to be "guided by the United Nations Convention on the Rights of the Child". The practice note begins with a child's rights focus – there is recognition of the child's right to be given the opportunity to be heard, the child's right to be treated with the same respect as clients who are adults and the child's right to have "competent representation" from skilled and experienced lawyers.

The child's independent voice is recognised by imposing a duty on counsel to put the child's wishes and views before the Court, it is watered down and potentially drowned by "a further duty to put before the Court other factors that impact on the child's welfare". This dichotomy between "views" and "other factors" impacting on welfare is not how adult clients are seen and treated. Adult clients will have "views" when they come to the lawyer but the lawyer will work with the client to put those views into the context of the system. Lawyers work as a filter and reality check for their clients. The client's views and best interests are not separate matters. The lawyer advises and works with the client so that there is agreement on the final position.

The practice note recognises that there may be conflict between the child's view and "other factors that impact on the child's welfare". Counsel is obliged to attempt to resolve the conflict with the child and where the conflict cannot be resolved,

“anticipated to be rare”) and counsel “as a matter of professional judgement can only advocate the child’s wishes, invite the Court to appoint counsel in respect of the best interests issue”. Adult clients would have their lawyer disciplined if the Court was invited by their lawyer to appoint a “best interests” lawyer in their case because the lawyer disagreed with them.

The bottom line of the practice note is that lawyers appointed to represent children have discretion to exercise their professional judgement when acting for children and not feel bound by a “formulaic approach”. The distinction between views and best interests made in the practice note is the source of the confusion for New Zealand lawyers about their role.

The *Family Court of Australia Guidelines*, whilst making reference to Article 12 of the United Nations Convention on the Rights of the Child, emphasise that lawyers acting for children must be “... unfettered by considerations other than the best interests of the child,” and that the role is one of a “skilful, competent and impartial best interests advocate.” The question is “best interests” determined by who – by the child and lawyer together, fine, by the lawyer alone then the child’s voice is lost.⁵

ABA Standards

In 2003 the American Bar Association Section of Family Law issued *Standards of Practice for Lawyers Representing Children in Custody Cases*.⁶ The emphasis is on acting for the child as a “client” “independent from the Court and other party in the litigation.” “Establishing and making a relationship with the child”, is described as the “foundation” of representation. The introduction to the Standards highlights that; “children’s lawyers have had to struggle with the very real contradictions between their perceived roles as lawyer, protector, investigator and surrogate decision-maker. This confusion breeds dissatisfaction and undermines public confidence in the legal system.” The ABA answer is to distinguish between two distinct types of lawyers for

⁵ Cases such as *In the Marriage of Bennett* (1990) 14 Fam LR 405 and *Re K* (1994) 17 Fam LR 537 at 549 show that the courts in Australia endorse the lawyers prerogative to determine what is best.

⁶ Reproduced in (2003) 37 FLQ 131-163.

children. The lawyer for the child (the child's attorney in American terms) is to act in a traditional lawyer-client relationship, "giving the child a strong voice in the proceedings." The "Best Interests Attorney" is a quite different and separate role "independently investigates, assesses and advocates the child's best interests."

Notwithstanding these laudable foundations and a clear desire to remove lack of clarity a close reading particularly of the commentary sections of the ABA Standards show that contradiction still lurks and the "strong voice" of the child is in danger of not being heard.

The child's attorney is told to focus on the "needs" and "circumstances" of the individual child. The "child's point of view" is seen as separate from the "child's needs" revealing that needs are determined by the attorney not the child. The attorney for the child is asked to take the child's point of view "into account," but cautiously because the "child's stated views and desires may vary over time or may be the result of fear, intimidation and manipulation". Lawyers are told they "may need to collaborate with other professionals to gain a full understanding of the child's needs and wishes." There is danger if other professionals are used too readily that the child's voice becomes diluted. It is crucial where other professionals are brought in that their focus is on the child's voice not what they professionally believe is best for the child.⁷

The child's attorney is to act on the child's instructions to the extent the child is "competent" to give them.⁸ The child's voice is at the mercy of the attorney's assessment of the child's competence – such a subjective assessment is likely to vary considerably between lawyers as there is no objective test for measuring competence. Competence is measured in terms of the ability to give instructions to a lawyer. The onus should be on the lawyer to understand the client rather than the client having to measure up to a vague standard of competence. Earlier in the code a "child-centered" approach is emphasised and that "non verbal children can reveal much about their

⁷ Commentary to II E of the *Standards of Practice for Lawyers Representing Children in Custody Cases* (2003) 37 FLQ 135-136.

⁸ Supra note 7 at 143-144.

needs and interests through their behaviours.”⁹ A signal that all children are competent to have a “voice” on what is important to them.

The child’s voice in the ABA Standards is not the child’s unique voice from the child’s perspective but rather a means to determining what is called “the child’s position in the case.”¹⁰ The child’s voice is heard only to the degree the child is able to determine positions with regard to particular issues in the case. The problem is highlighted by Sarat and Felstine¹¹ when dealing with adult clients:

Clients often seek to expand the conversational agenda to encompass a broader picture of their lives, experiences, and needs. In so doing, they contest the ideology of separate spheres that lawyers seek to maintain. Lawyers, on the other hand, passively resist such expansion. They close down the aperture; they are interested only in those portions of the client’s life that have tactical significance for the prospective terms of the divorce settlement or the conduct of the case.

The ABA Standards recognise the power dynamics inherent in adult/child relationships, but only in the context of the child’s relationship with the child’s family rather than with the lawyer. Too strong an emphasis on the issues as determined by the Court or the lawyer for the child has the potential to silence the particular child’s ability to talk about what is important for him or her. Where the child does not express positions on issues the child’s attorney is given permission to make a “good faith” effort to determine the child’s wishes and advocate according to those wishes.¹² The voice the Court hears is not the voice of the particular child but the voice of the attorney speaking on behalf of the child.

The ABA Standards say that where a child does not have a view, the lawyer acting for the child can put forward submissions on the legal interests of the child. In New Zealand for example the Care of Children Act 2004 (which comes into force on July

⁹ Supra note 7 at 142-143.

¹⁰ Supra note 7 at 144.

¹¹ Supra note 2 at 144.

¹² Supra note 7 at 144-145.

2005) places the child's welfare and interests as first and paramount. The Act sets out general principles of guidance on what welfare and interests mean; continuity and preservation of family relationships, responsibility and co-operation over the child, the importance of making decisions within a child's sense of time, the principle of preserving the child's culture, language and religious identity and the principle of the child's protection.

Inevitably the application of these principles will result in clashes between them. A lawyer acting for a child without the child's perspective cannot be totally neutral in putting forward the child's legal interests as the ABA guidelines suggest. The lawyer for the child is likely to emphasise some principles over others based on their own views of what is best for the child. This cuts across a major concern of the ABA guidelines that lawyers should not be making decisions for their clients. The commentary gives the example of a child having no opinion because of loyalty conflicts or the desire not to hurt one of the parties. Surely that is the child's view and should be respected as such. Instead the commentary goes on to say that "the lawyer is free to pursue the objective that appears to be in the client's legal interests" in such cases.¹³

Where the child does express a voice on particular issues there is still no guarantee in the ABA Standards that the child's voice will be given the same degree of advocacy as an adult voice: "If the child's attorney determines that pursuing the child's expressed objective would put the child at risk of substantial physical, financial or other harm, and is not merely contrary to the lawyers opinion of the child's interests, the lawyer may request appointment of a separate Best Interests Attorney and continue to represent the child's expressed position, unless the child's position is prohibited by law or without any factual foundation."¹⁴ The exception does emphasise the "substantial" nature of the harm and does say the child's attorney is to continue to act for the child's position. Once recommendation is made for a Best Interests Lawyer that is a clear signal to the Court that whatever is advocated by the lawyer for the child must be scrutinised through the lenses of another lawyer. In the

¹³ Supra note 7 at 144.

¹⁴ Supra note 7 at 145.

guise of pursuing a model of pure legal representation the child's voice is compromised.

The example given in the commentary is of an abused child who wants to remain or return to a home the attorney for the child believes is unsafe. The analysis of what is safe/unsafe is a subjective one where the attorney's values and perceptions of the world determine the outcome. Children can be harmed in houses believed to be safe. If there is clear unequivocal evidence the child would be unsafe then the response is to discuss that with the child. The ABA commentary allows for the lawyer to "attempt to persuade the child to accept a particular position" but not to "overbear the will of the client."¹⁵ If the child insists, notwithstanding discussion with the lawyer, then the lawyer knows two things for sure – the child clearly wants to be with a particular parent even though that parent may do harm to the child. The lawyer needs to help the child articulate reasons for the decision. It may be to protect a sibling, or that the option of living elsewhere is worse than being hit. By doing this the Court can address those reasons and the child will know they have been heard.

A Brooker prize winning novel *The Bone People*¹⁶ by New Zealand author Keri Hulme analyses this very situation. The young eight year old foster child, Sim, wants to live with Joe who physically abuses him from time to time. The reason Sim wants to be with Joe is that Joe is the only person who has loved Sim notwithstanding Joe physically overpunishes him when he misbehaves. Sim's voice is clear – while Joe beats him sometimes, Joe does love him and no-one else has. Sim's lawyer following the ABA Standards would recommend a Best Interests Lawyer which would be saying to the Court whatever I advocate for Sim will do him substantial harm. It would be better if the lawyer for Sim told the Court the reasons why Sim wants to remain with Joe. The Court then has to decide if Sim can be protected while in the care of Joe.

¹⁵ Supra note 7 at 142-143.

¹⁶ Picador Press. 1st ed 1986, 2nd ed 2001.

A lawyer acting for any client whether adult or child can breach client-lawyer confidentiality if there is a serious threat of imminent harm to a person whether it be their client or others.

The ABA Standards are a laudable attempt to hear the particular child's voice. They are the most comprehensive standards internationally on the issue. The underlying rationale for the Standards is that "nothing in a lawyer's current training qualifies a lawyer to make decisions on behalf of a client, especially a child client." If the rationale were followed to the letter the child's voice would indeed be strong.

Why Are Child Clients Seen And Treated Differently Than Adult Clients?

So far attempts to put child clients on the same level as adult clients have failed even when practice standards have declared that as their prime purpose. Why is this? It is our perception of children.

We perceive children may be harmed if their voice becomes central to the decision-making process. We do not want to make children responsible for the decision. We fear that may expose them to pressure from their parents and divide their loyalties to their parents. Robert Emery has written that "children are burdened by being asked to choose between parents".¹⁷ In a similar vein Robert Warshak has written – "all but the most radical child advocates understand that children do not always know what is best for them, the more weight given to their wishes, the greater the risk of pressure and manipulation".¹⁸

We perceive as the ABA Standards say that children's views "vary over time" that they are transient and fluctuating. We also believe as the ABA Standards warn that children's views "may be the result of fear, intimidation and manipulation".¹⁹

¹⁷ Emery R.E. "Easing the pain of divorce for children: children's voices, causes of conflict and mediation" (2002) 10 Virginia Journal of Social Policy and the Law 164-178.

¹⁸ Warshak R. "Payoffs and Pitfalls of Listening to Children" (2003) 52 Family Relations 373-384.

¹⁹ Supra note 7 at 135-136.

The Consequence of Common Perceptions About Children

If we believe and accept the common perceptions about children which emphasises their vulnerability based on both internal (lack of “mature” judgement) and external (pressure from others) then the logical response is not to pretend that lawyers are appointed to represent the child’s voice and that children clients are to be treated with the same respect as adult clients. If we also accept as the ABA Standards say that “nothing in a lawyer’s current training qualifies a lawyer to make decisions on behalf of a client, especially a child client,” then we should scrap the whole idea of a lawyer being appointed to act for children.

What Children Say

Studies from a range of jurisdictions, which have focused on children’s views of family break-down, have a common theme to them. Children do want their voices to be heard about issues that are relevant to their lives rather than issues that are relevant to the law. Carol Smart in her study found that children primarily wanted to be given a voice in the family rather than a voice in legal proceedings which are very much an adult arrangement. The family is a major part of the child’s world and the child does not want to be isolated from it.

Jake (aged 11), one of the children in Carol Smart’s study²⁰ gives a child’s perspective on how matters should be resolved when families break-up:

“I think there should be some kind of agreement between him and his parents as to what should happen rather than him just deciding who he wants to live with. I think the people who are involved should get to decide, not by themselves, but by helping each other to reach some kind of agreement as to what would be best.”

²⁰ Carol Smart “Children and the Transformation of Family Law” in Dewar and Parker (eds) *Family Law Processes, Practices, Pressures* Hart Publishing 2003.

A New Zealand study²¹ where children who had had a lawyer to represent them in family proceedings, came up with the consistent theme that they wanted to be listened to on their terms rather than be interviewed about legal issues and positions which are not part of their world.

Here are samples of what the children said:

“Listen. Not blab on all the time.”

(Natalie, 11)

“They need to listen heaps cos like you have to really listen.”

(Justine, 14)

“Listen to their views. Just let them (the child) talk if they want ot instead of blabbering on.”

(Charlotte, 13)

“Think on their level their time. Don’t be in a hurry. And just sort of think the way they’d think.”

(Daniel, 15)

Talk to them like they’re children not adults.”

(Fiona, 13)

A recent study of sixty children aged 12-19 carried out in Australia²² found that 37% wanted a greater say in the living arrangements after a family breaks up. Half the children in the study said they had no say in the living arrangements. Only thirteen out of the sixty were of the view that the child should choose where they live. Those who did have a say said they were happier with the arrangements. They mostly wanted the adults to see the issues through their eyes.

²¹ Taylor, Gollop, Smith, Tapp “The Role of Counsel for the Child”, New Zealand Department of Courts 1999.

²² Parkinson, Cashmore, Single (2004) Faculty of Law, University of Sydney.

Thomas and O’kane²³ asked several groups of children to rank in order of importance their reasons for wanting to be involved in decision making. The children put at the top of the list “to be listened to”, “to let me have my say” or “to be supported”. “To get what I want” was consistently at the bottom of the children’s lists. By way of contrast where adult social workers were asked to rank the statements through what they saw as the children’s perspectives several groups of them believed children would rank “to get what I want” at the top of the list.

Taking a Child’s Right to be Heard Seriously

The foundation stone for lawyers appointed to represent children in family proceedings must be Article 12 – the child’s right to express views and be heard. If Article 12 is to have any meaning it must be the expression of views by the particular child on the particular child’s terms, as the particular child sees their world.

A rights based approach to lawyers appointed to represent children shifts the focus from the lawyer to the particular child – this child has a right to express their views and for those views to be heard in the adult world of decision-making.

Landsdown²⁴ argues persuasively that there is a tendency to rely too heavily on a presumption that children are biologically and psychologically vulnerable when developing legal policy and practice. Landsdown exposes that it is precisely children’s lack of civil status that creates their vulnerability.

Qvortrup captures eloquently²⁵ why adult systems of decision making do not listen to children and what the consequences are:

²³ Thomas N. and O’Kane C. “When children’s wishes and feelings clash with their “best interests”” (1998) 6 *International Journal of Children’s Rights* 137-54.

²⁴ Landsdown G. *Children’s Rights* in B Mayall (ed) *Children’s Childhoods: Observed and Experienced* (1994) London. The Falmer Press 33-44.

²⁵ Qvortrup J. “A voice for children in statistical and social accounting: A plea for children’s rights to be heard” in A. James and A. Pront (eds) *Constructing and Reconstructing Childhood: Contemporary issues in the sociology of childhood* London, The Falmer Press 1990 79-80.

“Children are seen as having to have “matured before they obtain freedom to act on behalf of themselves ... protection [of children] may be suggested even when it is not strictly necessary for the sake of children, but rather works to protect adults or adult social orders against disturbance from the presence of children. This is exactly the point at which protection threatens to slide into unwanted dominance.”

In a New Zealand study of judicial conceptions of childhood in access cases carried out by the writer and Pauline Tapp²⁶ it was found that the dominant judicial conception was the importance for a child’s welfare of the child maintaining contact with both parents. In *C v D*²⁷ Judge Boshier said that “recognition that contact with both parents is by and large important for reasons of familial and psycho-social development is reflected in boundless cases.” The case dealt with an application for access by a father, who had had a sex change operation and was living as a woman, to two children aged seven and fourteen. The fourteen year old boy did not want contact with his father because he felt uncomfortable with the sex change. Judge Boshier reflected: “To postpone access here might be to merely cause enduring injury. Whatever short term difficulty there is, in my view, regrettable, but perhaps inevitable.” Access was ordered to occur only after the children had received appropriate therapy, with access initially to be supervised by the therapist. The boy never agreed to see his father and the father, to his credit, listened and did not pursue the matter.

Acceptance of generalised conceptions of children and what is best for them fails to consider the importance for a child’s well-being of having their views listened to and seriously considered. Article 9 of the 1989 United Nations Convention on the Rights of the Child, the right to contact, is not an absolute, it is subject to whether that is best

²⁶ M. Henaghan and P. Tapp “Judicial and legislative conceptions of childhood and children’s voices in family law” in A. Smith, M. Gollop, K. Marshall and K. Nairn (eds) *International Perspectives on Children’s Rights*, University of Otago Press 2000, 64-83.

²⁷ 1991 8 FRNZ 338.

for the particular child. If Article 9 is read absolutely then Article 12, the child's right to express views and be heard becomes meaningless.

Emma Parsons and Pauline Tapp²⁸ cite the case of *Re J (Abduction: Child's Objections to Return)*²⁹ as an example of how establishing a good relationship with a child by their lawyer can encourage a child to explain the reasons for their views. This was crucial to the outcome of the case as once the Court heard the reasons, the child's objections were upheld and no order for return was made.

“[J, 11 yrs, said to his solicitor] that whilst he had explained to the [Court Report Officer] that he did not like his school in Croatia, he did not tell her about the problems that he had had at school there. [His lawyer] asked why not and he replied that he thought that he had told her more than what was in the report but that he was ‘a bit nervous’ when he first met her and did not tell her the whole story. He said he just told her a bit, and that she did not ask anymore” per Wall LJ *Re J (Abduction: Child's Objections to Return)*”

The Court Reporter's approach meant the Court had no idea what the child was objecting to and why the child was objecting notwithstanding that under the Hague Convention the child's objection is a clearly recognised defence to returning a child. In *VP v A*³⁰ Judge Doogue ruled that in Hague Convention cases “that for children to have the possibility of interpreting their own interests they required representation independent of that from counsel who represent their parents.”

How Hearing Children Can Make a Considerable Difference

²⁸ “The Hague Convention in the 21st Century – An Issue of process. A Case Note on *VP v A*, 14 September 2004, Judge Doogue” to be published in the [2005] New Zealand Law Journal.

²⁹ [2004] 2 FLR 64 at 77.

³⁰ 14 Sept 2004, FC Waitakere Fam 2004-090-197.

The case of *K v K*³¹ shows how a child's views and the reasons for those views when overlooked in the decision-making process can lead to outcomes which do not benefit the particular child.

The child was an 11 year old boy in the middle of a long and bitter custody dispute between his parents. There was a shared custody order in place which had to be reinforced by warrant at times. The young boy expressed a consistent wish that he preferred to spend the majority of time with his father because the home atmosphere was more relaxed, his older brother lived there, and his friends, hobbies and sporting interests were in the area (which was about 10 kms from the city area where his mother lived). The father described himself as a devout Roman Catholic and did not accept the mother's action in leaving the family home. The father was very bitter that the Family Court had granted a separation order.

The social worker and child psychologist who reported to the Court did not ascertain the child's views because they felt the child should not be asked to choose between his parents. McGechan J interviewed the boy and found him to be intelligent and able to express a clear view to be with his father. McGechan J dismissed the child's wishes as "hedonistic and immature" based on what the child thought now rather than a long term view of his needs. Custody was given to the mother with the father to have contact after a two week period so the boy could settle in. In the following passage McGechan J summarises why ignoring the child's views would do the child no harm. The passage bristles with a clear animosity by the Judge to the father and his beliefs:

No child should be brought up to believe he not only can but must disobey the law if it appears to him to be against his religion. Further, while as with all authority, there is room for balanced criticism of the judicial system, there is no room for the upbringing of a child in absurd beliefs that the courts of this country indulge in lies, favouritism, racial and religious bigotry, and corruption. I have the greatest concern at the prospect of an impressionable child being brought up in an atmosphere in which attitudes of this kind are

³¹ No 1 [1988] 5 NZFLR 257, No 2 [1988] 5 NZFLR 283.

expressed and accusations of this nature made. To do so would be entirely contrary to his welfare in a major respect.³²

The child in this case can rightly feel unheard. There is nothing in the passage about the particular child's reasons for wanting to be with his father. Unsurprisingly, three months after the order was made the Department of Social Welfare (the government child protection agency in New Zealand) asked for them to be reviewed because the boy was suffering in his mother's care. The outcome was that the boy was placed with his father.

An Australian pilot study³³ involved 26 parents from thirteen families and 28 children. The model involved a single individual consultation with school-aged children conducted by a trained child interviewer who was not involved in the parents' mediation. Children were given the opportunity through discussion, play and drawings to explore what the separation of their parents had been like for them. Their parents were then given feedback in a separate session and during mediation the mediator actively attempted to incorporate themes and issues from the child's feedback into the mediation. A control group of parents went through mediation with no input from their children.

Parents from the child-inclusive group reported that their children had gained from the mediation process even if the parents were not positive about mediation. The children were seen as having a chance to "off-load", find some solutions for coping with the parents' conflict, have their questions listened to, and most importantly feel listened to. Parents from the control group rated the benefits of mediation to their children much lower. Forty two percent of parents whose children had not been seen reported no short term gain for their children whereas only 4 percent of the child-inclusive group reported no gains for the children. The following comments from these parents explain the benefits to the children in their words:

³² *K v K*, No. 1, 1988, p279.

³³ "Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study" Jennifer McIntosh, (2000) 18 *Mediation Quarterly* 55.

They both came out happy – they were more themselves than they had been in ages.

He was more open afterward and bubbly, and ever since he's shown more insight into it all and understanding of what's going on.

She wanted to go back again. She had a chance to express how she saw things in a nonthreatening environment where she could even have fun.

It was invaluable for our son to have a place to debrief. Afterward, he breathed a huge sigh of relief.

They felt they could talk with this person without putting either of us down.

The kids felt they had to edit what they say to us, but not to them.

The kids need to understand things that we haven't been very good at explaining to them.

Most significantly, the children's voices and feedback lead to parental behaviour and actions which the parents believed would not have occurred without it:

I learned why my children didn't want to live with me. I was desperate for information I could trust and found this. Now I know how to handle it and make it better for the kids [non-residential father].

I was surprised that the kids were worried about all sorts of things about me, like where I was living, that I was upset, how could we split when we used to be in love. Now I do things differently with them, and I'm more aware of how I handle things with them. I had to re-explain stuff to them and also stop talking about money with them. I see my kids as more human now and that they have a right to some answers [non-residential father].

I think it was really invaluable. It gave us some information we may not have had otherwise, and also it was like a confirmation that we were on the right track. It became crystal clear what the girls wanted, and it removed the emotion that happened when my husband and I tried to talk it through on our own or with them [residential mother].

It was such a relief to me to hear that the kids were coping okay, and we learned about a few things we had no idea about [residential father].

Only two (brothers aged 7 and 9) of the 17 children aged between 5 and 16 who were interviewed felt the interview had not helped them because they were “doing okay” anyway.

Adult decision-making processes are always going to be dominated by adult conceptions of what is best – in such a system a particular child’s voice can easily be lost. Without the child’s voice as part of the process children are used as means to the ends of others rather than ends in themselves who have to live with the consequences of the decision.

What Does Representing a Child’s Voice Mean?

The Care of Children Act 2004 s4(2) emphasises that when decisions are made about children the welfare and best interests of the *particular child in his or her particular circumstances* must be considered. The emphasis on the “particular child” makes it crucial that lawyers appointed to act for children work very closely with the child. Representing a child’s voice is not simply a matter of simply presenting to the Court what the child says. The child will not feel heard by their lawyer if any statement they make is taken literally and then repeated to the Court. As with any client the lawyer needs to reflect with the child on the views and the reasons for those views. Lawyers are often reality checks for their clients – the child may not have thought about the consequences for ongoing relationships if a particular stance is taken. The child may be asking for something which in the lawyer’s experience the judge is

unlikely to give so there may need to be a compromise which is discussed with the child to ensure the child feels heard.

The lawyer needs to deliberate with the child – ask questions that are likely to be important for the particular child and not just questions that may be in dispute in the particular case. The lawyer is trying to work out with the child what is in the best interests of the particular child. This is quite different from a lawyer forming an independent view of best interests based on the lawyers own world views.

The key is establishing sufficient rapport and trust with the child for the child to feel safe to say what they really are thinking. In that way if the child is feeling pressurised by a parent, the lawyer will hear that and work with the particular child to address it in a way that will work for that child. The issue of competence is not one for the child but for the lawyer appointed to represent the child to be competent in talking with, listening to and understanding each child they represent.

A Code for Lawyers Appointed to Act for Children

The ABA Standards set out in excellent detail what the lawyers role is, the importance of independence, the initial tasks, meeting with the child, pre, during and post trial responsibility and how to counsel the child. All these are endorsed. This code varies on the issues of the child's decisions.

1. The rationale for appointing lawyers to act for children is that each child has a right for their view of things to be heard on matters that affect them.
2. The lawyer for the child must see each child as unique and must focus their efforts on creating an environment where the child feels listened to and is able to express their views in a way appropriate for the particular child.
3. It will take patience, rapport, trust and excellent listening skills to find out what is important for the particular child. It is essential that lawyers acting for children have excellent child interviewing skills.

4. The lawyer for the child must then deliberate with the child in a sympathetically detached manner on the reasons and consequences of their perspective. The lawyer can counsel the child on what the lawyer believes is best for the particular child but must not overbear the child.
5. Once the lawyer for the child has formulated with the child the best interests for the particular child, then it is the role of the lawyer for the child to advocate those interests in proceedings without fear or favour or compromise even if the lawyer personally does not think it is the best position for the child.
6. Where the child says he or she does not want to express a view on any or all matters that must be respected by the lawyer and the lawyer cannot substitute their views for that of the child.
7. It is a myth to believe that very young children do not have a voice. As Pugh and Selleck³⁴ put it:

Listening to very young children does not necessarily mean taking all their utterances at face value, but it does mean observing the nuances of how they exhibit stress, or curiosity or anxiety, or pleasure in a manner which is congruent to their maturity ... Although most infants do not learn to talk until their second year, their “voices” are there to hear from birth.

The issue is not the child’s competence to express views but the adult’s competence to elicit them. The Care of Children Act 2004 (which comes into force in July 2005 in New Zealand) has removed the phrase “if the child is able to express them” from the statute. A clear signal that all children have views. The Act has removed the formula that children’s views are only to be given

³⁴ G. Pugh and D. Selleck, “Listening To and Communicating With Young Children” in R. Davie, G. Upton and V Varne (eds) *The Voice of the Child: A Handbook for Professionals*; London, The Falmer Press 1996.

weight according to the age and maturity of the child. Lawyers acting for very young children may want to seek expert help in determining what a particular young child's views are. The emphasis must be on the particular child in their particular circumstances, not on needs as determined by the expert.

8. Where the lawyer believes the child or any other person in the family is subject to an anticipated crime involving physical injury it is mandatory for the lawyer, whether acting for the child or adult client, to disclose the information to the police³⁵. Where the lawyer believes that there is a serious or imminent risk to the health or safety of the child, the lawyer may disclose the information to a child protection or health agency.

In essence the Code agrees with the rationale of the ABA Standards. The major difference is that the lawyer cannot substitute their view for the child at any point in the representation process. Child protection is best dealt with by immediate action rather than appointment of a "best interests" lawyer.

Application of the Code to the Alienated Child

The so-called "alienated child" is well recognised in family break-up literature. Richard Warshak³⁶ says there are three elements for the alienated child – persistent rejection or denigration of a parent, the alienation is not a reasonable response to the alienated parent's behaviour, the behaviour is partially the result of the non-alienated parent's influence.

An alienated child's view will be a desire to remain with the non-alienated parent and desire not to see the alienated parent. It is very tempting in this situation if acting for the child in a general best interests manner to take the position that the child needs to spend time with the alienated parent. Richard Garner³⁷ says that the best solution for

³⁵ Rule 1.08 Rules of Professional Conduct for Barristers and Solicitors in New Zealand.

³⁶ Richard Warshak "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence" (2003) 37 Family Law Quarterly 273-301.

³⁷ *The Parental Alienation Syndrome* 2ed 1988.

the child is to change custody. A 1991 ABA study³⁸ provides evidence that the threat and implementation of environmental modification against the child's wishes lead to positive changes for the child in 90% of the cases. Janet Johnson and Vivienne Rosenberg³⁹ explains that alienated children's development takes place within a web of parental conflict. They say that to forcibly remove children is harmful because it intensifies the problem – "We collude in the process of rendered children unseen and unheard in custody disputes that are fought fraudulently in the name of the child." Carol Bruch puts it equally as powerfully⁴⁰ – "A child's chance for healthy development requires that parents, judges and experts face the realities of the child's situation."

The reality is that a label such as the "alienated child" lumps a whole group of children together and silences their individual voices. Each so called "alienated child" is not the same. One may be manipulated by a parent, but that manipulation is their reality. Another may be reflecting the circumstances of the broken parental relationship. Another may be expressing a reaction to a parent which is based on the fact that parent has abused them.

The lawyer for the child's task is to hear and work with each particular child's reality and to ensure the Court is aware of that reality and the reasons for it. The Quebec Court of Appeal in *F(M) v L(J)*⁴¹ held that the role of the lawyer is to represent the child's views, even where the lawyer believes those views are the result of alienation. The lawyer can advise the child of the consequences of their views and what the lawyer believes is best but cannot simply interpose what the lawyer believes is best into the court process. Any other position would leave the child unheard in the proceedings.

³⁸ Clanar and Rimlin, *Children Held Hostage*. Court in New Zealand – *L v Q* [2003] NZFLR 440, *C v C* [2003] NZFLR 689 and the UK *Re S* [2004] 1 FIR 1279 have tended to enforce contact.

³⁹ *In the Name of the Child* The Free Press, 1997.

⁴⁰ C Bruch, *Parental Alienation: Getting It Wrong in Child Custody Cases* (2001) 35 *Family Law Quarterly* 522.

⁴¹ (2002) 211 DLR (4th) 350.

Conclusion

As John Eekelaar has said⁴² “hearing what children say must therefore lie at the root of any elaboration of children’s rights.” In order to make this a reality Eekelaar says “adults attitudes and social structures” must be “seriously adjusted towards making it possible for children to express views, and towards addressing them with respect.” Michael Freeman⁴³ says Article 12 “is significant not only for what it says, but because it recognises the child as a full human being, with integrity and personality, and with the ability to participate fully in society.” Practice codes are moving in the right direction but need to move further if children are to be fully heard and respected in family proceedings. At present practice codes split the child between the child’s views and what the lawyer thinks is best for the child. It is this split which causes confusion and provides an environment where children are not likely to feel heard. Lawyers are human and inevitably have personal views of what is best for a child based on their own personal views and experiences. They must be aware of this natural bias and not let it dominate their role of acting for a particular child in particular *circumstances*. The practice codes are written for lawyers by lawyers. Children would write them differently - the emphasis would be on “we just want to be heard”. The House of Lords,⁴⁴ the Ontario Court of Justice⁴⁵ and the New Zealand Court of Appeal⁴⁶ very recently have ruled that lawyers are no longer immune from being sued for their conduct of civil proceedings. This is a strong incentive for lawyers acting for children to listen to their clients carefully.

⁴² John Eekelaar, “The Importance of Thinking That Children Have Rights” in P. Alston, S. Parker, J. Seymour, *Children, Rights and the Law*, Clarendon Press, 1992, 220 at 228.

⁴³ “Taking Children’s Rights More Seriously” in *International Library of Essays on Children’s Rights* (ed M. Freeman 2004) 175.

⁴⁴ *Arthur JS Hall (a firm) v Simon* [2000] 3 All ER 673.

⁴⁵ *Children’s Aid Society of SJ Thomas (City) and Elgin County v S* (2004) 46 RFL (5th) 330 costs were awarded against the Office of Children’s Lawyers, representing the child in protection proceedings.

⁴⁶ *Lai and Lai v Chamberlains* CA 17/03 CA 15/03 8 March 2005.