

Rethinking children's involvement in decision-making after parental separation

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Introduction

This paper¹ examines how perceptions and assumptions about childhood influence the ways in which children are allowed to participate in family and legal decision-making settings after their parents separate. Our main argument is that children are a great deal more competent than has been assumed in traditional child development theory. Children's resilience to the stress of parental separation is furthered when they are treated as competent actors and can communicate with the other people making decisions in their lives. Competence, we suggest, develops within supportive familial, educational and legal contexts. With such support, children's capacity to become active partners in decision-making increases. Children generally do not want to make decisions alone (although some do), but they can be helped more to formulate their views, express them, and have those views taken into account and acted upon.

We question the implicit assumption within family law that it is a burden of responsibility for children to be involved in decisions about their living arrangements after their parents separate. Another strand of our Centre's research programme concerning children's perceptions of their rights in school (Smith, Nairn, Taylor & Gaffney, in press) also supports the view that children and young people value being informed and having the opportunity to express their views. Thus their quest for voice and participation is consistent across different contexts and decision-making processes.

In our view sociocultural theory, the sociology of childhood and the United Nations Convention on the Rights of the Child provide a useful framework within which to challenge existing presumptions and practices concerning children's competence within the family law field. We discuss this theoretical approach and then outline key findings from our socio-legal research programme.

Constructions of Childhood

When reflecting on children's role in decision-making after divorce, interpretations of the meaning of childhood play an important part. Constructions of childhood have differed greatly over time and in different cultural contexts (Hendricks, 1997). Ideas about childhood have been dominated by a Western child development perspective of development as a pathway towards rationality (Mayall, 2002; James & Prout, 1990).

¹ This paper is based in part upon the following forthcoming publication: Smith, A., Taylor, N. & Tapp, P. (in press). Rethinking children's involvement in decision-making after parental separation, *Childhood*, 10(2).

Much child development research, however, has undervalued the importance of context and has tended to study children as dependents rather than agents (Morrow, 1994; Richards, 1996; Woodhead, 2000).

Assumptions based on these specific notions of childhood and on the principle of the best interests of the child, have been incorporated into family and legal knowledge (Piper, 2000), while children's interpretations of their own childhood experiences have often been ignored. Yet, 'children are not only relevant and competent witnesses to the process of their parent's divorce, they are also the most reliable witnesses of their own experience' (Butler, Scanlan, Robinson, Douglas & Murch, 2002: 99). The authority of these assumptions, however, often goes unchallenged and is taken for granted without critical scrutiny, and transferred into the discursive context of the law and family policy. Piper is concerned that:

...solicitors and judges in particular may respond to increased pressures on their time by referring to assumptions about the best interests of the child instead of further enquiry about the wishes and needs of the child in question. (Piper, 2000: 265)

She suggests that professionals should 'approach each case as in a position of uncertainty, respecting the complexity and ambiguity of a client's life' (2000: 302). That children, even within the same families, have very different experiences and feelings after parental separation is demonstrated by a growing number of studies (Hogan, Halpenny & Greene, 2001; Neale & Smart, 2000; Neale, 2001; Smith, Taylor & Gollop, 2000).

Expectations about children's level of competence seem slow to change. It often surprises people that, when they do listen to children, they discover how sophisticated and thoughtful their views are (Davie, 1996). Constructions of children have a major influence on the degree to which they are listened to, and to how much their views are taken into account:

Where the assumption is that children are rational and entitled to have a say, the likelihood is that more children will 'volunteer' a view; where the assumption is that children are vulnerable and should be protected from decision-making, then it may be that only the more assertive will even get to articulate their view. (Trinder, 1997: 302).

Constructions of childhood are, however, evolving over time. An increasingly important influence on how we view childhood is the United Nations Convention on the Rights of the Child (UNCROC). In New Zealand, after a slow start, UNCROC is now being taken seriously by government agencies and professionals working with children, particularly within the family law and family policy arenas. Article 12, the linchpin of the Convention (Freeman, 1996), states that children should be able to have their views heard in matters affecting them, though these views are to be given weight in accordance with children's age and maturity. This recognition of the importance of children's perspectives is crucial although even here this recognition is still overly influenced by the traditional stance of child development theories about the influence of age.

The Competent Child in a Sociocultural Context

We suggest that alternative conceptualisations of child development are helpful in rethinking children's competence and role in decision-making (Smith, 1998; Smith, 2002; Tomasello, 1999; Vygotsky, 1978). Sociocultural perspectives view children's development as profoundly affected by interactions with other people, the specific culture inhabited by the child (especially through the domain of language), and through social institutions and history. Development, instead of unfolding in a predictable fashion from infancy to adulthood, is seen to come about through a gradual acquisition of knowledge and understanding of the world through activities in cultural settings or 'communities of practice' (Wenger, 1998). It is argued that the greater the richness of interactions in which children participate, the greater the child's understanding and knowledge. Thus, adult and child are seen jointly to construct understanding and knowledge.

Children's competence is challenged and extended interactively and this progressively extends competence. Then direct support can be gradually withdrawn as children's independence increases. Guidance and interactional support is the scaffolding which permits the child to do as much as s/he can by his or herself, while what cannot be done alone is supported by others. Children take an active, inventive role and reconstruct tasks through their own understanding rather than passively absorbing the views of surrounding adults. Hence children who are involved in activities before they are fully competent actually acquire more competence in the process.

From this perspective, children are seen to behave more skilfully in situations where they are given social support and guidance, and where they feel secure and comfortable with people. This sociocultural model of learning is one in which people serve as resources for each other, build on the ideas of others, and take varying roles and responsibilities according to their understanding and expertise.

Children's Competence to Participate in Decision-Making

From this standpoint, we question the assumption that children lack sufficient competence to be involved in family and legal decision making. Children in our view are able to contribute meaningfully to discussions and decisions being made about their living arrangements (residence and contact) after their parents separate. The unfair burden of responsibility has been frequently raised as a primary reason for keeping children out of family disputes. Yet, encouraging children's participation in family and legal processes does not necessarily mean that children's views alone should be determinative or that children should be given sole responsibility for the decision. Children generally have some awareness of the problems facing their families and listening to what they have to say can allow any distress, anxiety or uncertainty to be properly voiced and dealt with. Participation by children may help them to accept decisions made about them and may facilitate their growth towards mature and responsible adulthood. However, it must be acknowledged that some children, although old or mature enough to understand and take part, may not wish to do so (Gollop, Taylor & Smith, 2000; Smart & Neale, 2000). Other children may be too inexperienced to participate formally, but their age should not prohibit all communication with them or sensitive observation of their relationships within their families.

Children's Issues Centre Socio-legal Research Programme

Over the past six years the Children's Issues Centre has been involved in three research projects concerning socio-legal issues:

- children's perspectives on separation/divorce and residence/contact;
- children's perspectives on the role of counsel for the child; and
- family members' experience of and satisfaction with Family Court proceedings in residence and contact matters.

1. Children's Perspectives on Families after Separation

This study looks at children's views on decisions and processes that take place when parents separate, and their interactions within family and legal contexts (Gollop, Taylor & Smith, 2000; Gollop, Smith & Taylor, 2000). The participants were 107 children from 73 families all over New Zealand whose mean age was 12.9 years (the range was from 7.4 to 18.7 years). We interviewed the children and young people's about the initial break-up, their ongoing relationships with both parents, and living and contact arrangements between children and their parents. 86% of the children lived with their mothers, 8% lived with their fathers, and 6% were in joint custody. Participants were recruited through letters sent out to parents on our behalf by the Family Court in the 5 districts, and by advertisements in community newspapers.

a) Satisfaction with Parental Contact: The children were generally very positive about contact. Almost half of the children (44%) liked the contact a lot; a further 41% liked it, while 13% gave it a neutral rating. Only two children (2%) did not like access activities and wanted less frequent visits. Around 85% of the children were positive about the things that they did on contact visits. Just over half of the children (52%) thought that the frequency of contact with their non-custodial parent was just right. In the main, the rest of the children would have liked to see their non-custodial parent more often (34.7%) or a lot more often (11%). About two thirds of children thought that the length of contact was just right, while about a third wanted it to be longer (Smith and Gollop, 2001a).

The children discussed the importance of relationships, the value of quality time, inconsistencies between different homes, the inconvenience of moving between homes and difficulties with relationships with step-parents. The quality of relationships is one key to satisfactory contact from children's perspectives. They valued affection, emotional support, and having their parents take an interest and active involvement in their lives in a meaningful way. They avoided hostile, coercive, distant, or detached relationships. If non-resident parents were grumpy or uninterested in them, they often reported not wishing to see the non-custodial parent. Two contrasting descriptions of relationships given to us during our interviews reflect how different children's experiences can be:

'I get on really well with my Dad as well. Yeah, I'm a Daddy's girl...just generally being with him. I love him heaps. We have these kind of personalities where we don't fight, I mean he's a really placid kind of man... I always run to Dad and have a cry to Dad...he's always the one on the side there for me when I'm all upset, and it's always been like that, when I'm upset, I always run to Dad.' (Petra, aged 17)

‘Sometimes Dad makes me upset by swearing at me. But sometimes he drops us off and he just doesn’t even care. He just walks off without saying sorry...I don’t like seeing Dad when he’s just like swearing at me and I don’t want to go and see him any more.’ (Freya, aged 9)

Contact could be difficult when children were angry with their non-resident parent, either over the separation or about their parent’s subsequent behaviour. Resentment about the lack of input their non-resident parent had in their lives and feelings of rejection were also sources of anger and hurt. Being let down or disappointed by their non-resident parent was another issue which had a negative effect on their enthusiasm about contact. Some children became bored by the pursuit of organised entertainment with their non-resident parents.

Even though conflict over contact arrangements was a problem for a minority of the children (about a fifth), where it did occur it was clearly a source of pain and unhappiness. There were examples of conflicts over arrangements, or at changeover time, and of parents “bad-mouthing” the other parent. The metaphors used by children included terms like “an elastic band”, “a tug of war”, “the eye of a cyclone”, and “being in the middle of World War Three”. These terms are evocative of how children can feel torn by their parents’ ongoing conflict. Children talked of retreating from the conflict by strategies such as going into their rooms and closing the door or by watching television.

For the majority of children contact with their non-resident parent was a valued and important part of their lives, and most would have liked more frequent and longer contact. Children’s descriptions of contact time, however, suggest that as well as providing them with important continuity of parenting, contact could place children under some stress.

b) Consulting Children about Arrangements: We also looked at the degree to which children were consulted about, and involved in, residence and contact arrangements (Gollop *et al.*, 2000). We asked children about whether they had been consulted about their initial arrangements, what type of involvement they had had, and their views about, and experiences of being consulted. Very few children (fewer than one-fifth, 19%) reported being consulted about their initial residence arrangements. There were more children (over one-third, 37%) who mentioned being consulted about their initial contact arrangements. With the exception of those aged 13 years and over, children were much more likely to be consulted about contact than about residence regardless of age. Even in the teenage years fewer than half were consulted about residence or contact.

The contact arrangements for just over a quarter of the children (28%) were fully determined by parents, while a further quarter of the participants had their contact arrangements mostly determined by parents. Just over half (52.3%) of the children had a little input into contact decisions. A relatively small percentage (almost 16%) felt their views were the major determinant of their current contact arrangements. Hence, a minority of children were consulted about residence and a slightly larger minority were consulted about contact.

The amount of involvement in family decisions that the children both had and wanted, varied. Some appreciated being given the choice of who to live with and not being forced to see a parent they did not want contact with. Others thought having to make such a choice would be difficult. The most common type of involvement was for the children to have some input into at least some of the decisions that affected them. While they may not have made the final decision about residence or contact, the children nevertheless appreciated and valued having their views sought. They also liked having sufficient flexibility within their arrangements such that modifications could be made according to their changing needs. Even if they were not initially consulted, just knowing there was the potential to instigate changes, and feeling reassured that their views would be listened to, appeared to be very important to the children.

c) Advice Children Would Give To Parents: We also asked children what advice they would give to parents who were separating (Smith & Gollop, 2001b). The most common response given by half of the children who answered this question involved the importance of consulting children. This category included such comments as: listening to the child; giving the child the choice about their residence/contact arrangements; letting the child make decisions about their living arrangements; letting children have their say; and checking that arrangements made for children suited them. Other advice from children included parents not fighting or arguing in front of the children, avoiding conflict and trying to co-operate, and not letting conflict impact on children, or get in the way of children having a relationship with both of their parents. The children wanted parents to listen to them, to ask them what they wanted, to not be forced into arrangements that they did not want, and to be given information about what was going on:

‘Parents, listen to your kids. Just make sure that you’re listening to them and not having any preconceptions about what you think they want and make sure you listen to them and that you tell them what’s going on.’ (Kayla, aged 16)

Our research, and that of a growing number of other researchers (Butler *et al*, 2002; Hogan *et al*, 2001; Smart & Neale, 2000), suggests that children are indeed competent social actors who reflect and devise their own ideas and strategies for coping with family life after their parents separate. This research challenges the prevailing assumptions about children’s incompetence and reinforces the view that even quite young children have sensible ideas to offer. In the current climate in New Zealand where parents’ (especially fathers’) rights and well-being are such a dominant part of public and professional discourse, it is timely to consider the rights of children to have their views heard and taken into account. While the principle of ‘the best interests of the child’ has long been the key consideration in the aftermath of separation/divorce in legal contexts, this idea has been strongly dominated by professional (welfarist) assumptions about what is good or bad for children. We suggest that the ‘best interests’ principle needs to be reframed to take better account of children and young people’s own contributions to these decision-making processes.

2. Children’s Perspectives on the Role of Counsel for the Child

To assist with a policy review on the role of Counsel for the Child, initiated by the Principal Family Court Judge in 1997, the Department for Courts commissioned the

Children's Issues Centre to conduct a study examining children and young people's perspectives about their contact with the lawyer appointed to represent them under the Children, Young Person's and Their Families Act 1989 and the Guardianship Act 1968 (Taylor, Gollop, Smith & Tapp, 1999; Taylor, Gollop & Smith, 2000). The study was undertaken during 1998 in two Family Court districts as a small scale, in-depth, qualitative research project. Twenty children and young people ranging in age from 8 - 15 years, and the twelve lawyers appointed to represent them took part in the study.

The study confirmed the importance for children of establishing positive relationships with their lawyers before they could talk about sensitive family matters. The children liked lawyers who were friendly, trusting, respectful and child-centred:

He's just like a really good friend. That's all I think of him of anyway. (Susan, 11, care and protection case)

Yeah, I like [lawyer] cos he's such an easy going guy. (Craig, 13, custody case)

Well, she's always really kind and stuff and like she always listens really hard and she's really good at what she does ... We get everything out and we know that we can trust her. (Michelle, aged 10, custody case)

He's got a sense of humour and he's funny. (Matthew, 13, care and protection case)

Children appreciated having a lawyer who made a conscious effort to listen to what they were saying, who made it easy for them to talk and who regarded them as partners in a joint endeavour:

When you want to say something she's concentrating. She's not like going off sorting other things or rustling around in her desk for something. She's listening and concentrating. ... She somehow always understands. (David, 12, care and protection case)

I reckon I could just about tell [lawyer] anything. ... I say he's done an excellent job. ... He's always there when you need him. ... You know ... he won't make it like he's a business man. ... [He] gave me a number of options ... sort of like a maths problem. Cos there's problems, and you get three or four answers and you have to find the right answer. ... He'll just round up a few possibilities and then I'll choose the best for me, the best possibility that would suit me. (Craig, 13, custody case).

I feel that I've let out my feelings while he's been here, and he's just made me really confident ... it's probably just like encouraging me and letting me talk about it to him. ... He just helps me - like if I don't know what I want to do, he'd let me think about it and then he'd come back and ask me. He would tell me the choices and what things would be good about the choice and everything. (Susan, 11, care and protection case).

The research showed that children are capable of understanding and appreciating the concept of legal representation. They are able to form views on matters of significance to them and are particularly able to express these in the context of a relationship with a sympathetic lawyer who takes the time to listen to them, inform them of options, respect and understand their views, and advocate for them. Those few children who expressed feelings of active dislike for their lawyer related this to the lawyer being opposed to their views or to the inconvenience and tediousness of having to see counsel. A quarter of the children expressed strongly positive feelings about the role of their counsel for the child, and half were neutral or mildly positive about their experience. Areas identified as being in need of improvement concerned greater explanations to children about legal and court processes, and feedback on the decisions made.

The policy review culminated in the publication of the *Counsel for the Child Code of Practice* issued by the Principal Family Court Judge in November 2000. The Code requires Counsel for the Child to meet with the child and attempt to build a relationship of confidence and trust. Counsel then has a duty to put the wishes and views of the child before the Court. As counsel cannot give evidence in Court this duty is usually fulfilled by ensuring that the expert reporter has ascertained the child's wishes and gives evidence in relation to those wishes.

3. Custody and Access Matters: Families, Dispute Resolution and the Family Court

The Children's Issues Centre is currently undertaking a qualitative study exploring families' experience of and satisfaction with Family Court proceedings in custody and access (residence and contact) matters, and the relevance for them of court proceedings over time (Taylor, 2002). The families were recruited via the Family Courts in Auckland and Christchurch, and via family lawyers in Dunedin. All had made an application to the Family Court in relation to custody and/or access matters and their case had recently concluded. Twenty-two parents and seven children are participating in the research (including seven former couples). The family members were initially interviewed in 2001, with follow-up interviews one year later (2002) to ascertain whether there were any changes to the custody and access agreements and orders initially reached. The interviews were focussed around the parents' perspectives on the range of Family Court processes they utilised to resolve the custody and access arrangements for their children – legal negotiation, counselling, judge-led mediation and defended hearings. The children were interviewed about their knowledge and experience of the Family Court proceedings. Focus groups were conducted with Family Court professionals (judges, lawyers, specialist report writers, counsellors, co-ordinators and managers) to check out the clients' perspectives with the general experience of the professionals.

Parents' had a range of responses when asked whether their children were aware of the Family Court proceedings. Several felt that one parent had told the children too much:

He was very aware of it because she [child's mother] was telling him. She would tell him all the time – 'you're coming back soon, you're coming back to me.' (Stella, aunt seeking custody and additional guardianship of nephew).

They did know a lot about the process and even the court appointed psychologist said that it was obvious that their father had told them a lot. So it was very difficult. I tried really not to talk about it with them and they were actually quite anti talking about it generally anyway. But if they asked me questions about it I used to say ‘well, look, there’s a proper way to do things and we’re trying to do it the proper way.’ And when they said ‘well, Dad says we are going to go and live with him’ I’d say ‘well, we have to follow the proper procedures. It’s not your decision – it’s Dad and me and we get a lot of help from people who are experts who help make the right decision about it.’ ... But I did feel that it would have been good with the Family Court if they were able to put down very strict guidelines for both parents. You know, saying to [ex-husband] ‘look, if you say things like this to the children it’s effectively harming them because it’s giving them the wrong message.’ (Libby, mother seeking shared custody of her two children).

Others felt that they had been ‘reprimanded’ by their lawyer or counsel for the child for giving their children too much information:

I had to sit down and tell them that their mother wanted to walk out the door and leave us behind. ... I also told them that their mother wanted to sell our house and take various household items. ... And then my lawyer said ‘oh, you shouldn’t say that to the kids.’ I said ‘why? Let them realise what sort of cow their mother is.’ She said ‘it would only stress the kids out and upset them.’ I said ‘they can’t be more stressed out and upset than they have been!’ (Robbie, custodial parent of 4 children).

Some parents made a point of not mentioning anything about the proceedings to their children:

I don’t mention it to them. I just said like ‘I’m doing this because I want to see you more often.’ (Tina, non-resident mother seeking access to her two children).

I keep them out of it. Because I don’t say anything about court in front of the children. I keep it completely separate you know.’ (Tom, non-resident parent of three children).

The children who were interviewed were able to give very clear accounts of their parents’ separation and the nature of their custody and access arrangements (previous, current and future). However, when asked about the Family Court, they were generally unaware of the role of this agency in helping their parents’ determine the post-separation living arrangements. This was so despite the fact some children had actually been interviewed by counsel for the child or a specialist report writer appointed by the court.

Eliza (8) said she “never knew” about the Family Court – “I didn’t know anything about decisions cos Dad didn’t want me to know and neither did Mum until today [the day of the research interview].” However, Eliza did remember talking with her lawyer “about ten times” and writing down important things she wanted to tell him about her father’s treatment of her. Eliza would like to have known more about the Family Court – “why do adults go there, and what is the Family Court?” She also thought that:

The lawyers should listen to people ... Listen to what the children have to say and some of their ideas about what might happen with access and custody and things. And then let the children know what's happening. ... Lawyers should always listen to the children or the parents because if they don't listen they could go to court and the judge could say 'what did this girl tell you?' And he'd go 'uhm, I can't remember because I didn't listen to the little girl.' ... Like write down some things before you go to the Family Court so then you won't forget what to say. (Eliza, aged 8)

Even when the children did know the Family Court was involved they had no understanding of the different range of interventions within the court, and they attributed responsibility for all the decision-making to the judge. Yet in all the families in which children were interviewed the custody and access decisions were made by the parents through Family Court counselling or mediation – none reached the defended hearing stage where the case would indeed have been decided by a judge.

Callum (11) knew the Family Court was involved in helping to resolve the custody and access arrangements for him and his younger sister because:

Dad told me. And then these people would come around, sort of doing stuff - like they were from the Family Court.... I sort of understood what happened, but I wasn't entirely sure about it so I just answered the questions. ... Each parent's lawyer would discuss what their client would want to happen. And then they'd tell the judge, and then the judge would have listened to both cases and he would decide what he thought with, like, both of the things that they said. And he'd decide what he'd think would be best for the child ... because he's got the final say. ... I thought it probably would have been better if I actually got to go to the Court, so I could actually say it in my words to the judge what I wanted. Because then he'd actually really understand what I wanted, not just what someone else relayed from me. ... Some children might get a bit scared being there seeing their parents argue over something. But I'd be fine going there because at least I'd know it would be what would be best for me. Someone should ask the children if they do want to go or not - they should have the choice if they want to go. ... Cos if you're not going there you don't notice it. All you do is you just get asked questions. (Callum, aged 11)

This study suggests that children in families engaged with the Family Court receive very little (or no) information about the legal and court proceedings. Even if they are told some information they can find this confusing because it tends to reflect that parent's perspective. Children in such families are in a particularly difficult situation, since they have very little or no access to an independent person who can listen to them, view the situation from their perspective, and help them to reflect on their possible future care arrangements. If they are fortunate enough to have counsel for the child, then it is possible that he or she can fill this role for children, but such appointments are only made in the most litigious cases. Sociocultural theory suggests that guidance and support are essential for children to be able to understand and to be active participants in decision-making within their families. Clearly, however, more needs to be done to ensure that those children whose families do interact with the Family Court have a better understanding of its role, range of services and decision-

making processes. Children currently have a very marginal place within the Family Court despite the fact their best interests are paramount within it.

The Changing Legal Context of Divorce/Separation in New Zealand

The voices of the young people in our research reinforce the message that they see themselves as social actors rather than just acted upon by the adult world. Children are actively involved in their construction of their childhood as well as their rights. An image of themselves as subjects and agents is more salient for them than as vulnerable victims in need of protection, or as requiring services. The findings of this study reinforce the findings of a great deal of research (eg. Mayall, 2002; Moss & Petrie, 1997; Nairn & Smith, 2002; Piper, 2000; Smart & Neale, 2000; Smith, Gaffney & Nairn, manuscript in preparation; Smith, Nairn, Taylor & Gaffney, in press; Taylor, Smith & Nairn, 2001) which challenges the predominance of the image of young people as victims.

In guardianship, custody and access matters the New Zealand courts have been required, since 1968, to ascertain the wishes of children and to take them into account to the extent the court thinks fit having regard to the age and maturity of the child (s23 (2) Guardianship Act 1968). The child's views are ascertained and made known to the court either by counsel appointed to represent the child, or by a specialist report writer who will provide the court with a medical, psychiatric or psychological report on the child (ss 30 and 29A Guardianship Act 1968). The appointment of counsel is mandatory if a case appears likely to proceed to a defended hearing, unless the court is satisfied that the appointment would serve no useful purpose. These appointments are state funded, although the court has a discretion to require the parties to make a contribution to the costs of the lawyer or the reporter. In the 1970s and 1980s it was not uncommon for a judge, especially High Court judges, to speak personally with the child. This practice waned with the establishment of a specialist Family Court in 1980 and the Court's increasing reliance on the views of the specialist report writer as to the wishes and interests of the child.

Despite the statutory framework, even where counsel was appointed to represent the child, the lawyer did not always speak with the child. The common practice was to represent the child's interests rather than the child's views. Where a child's views were placed before the court they were all too often discounted because the child was seen as a dependent (Tapp & Henaghan, 2000; Tapp, Taylor & Henaghan, 2001). Ultimately, the New Zealand Court of Appeal had to go so far as to remind the courts and the profession that it was a "reviewable error" – in other words legally incorrect - not to ascertain the wishes of the child (*M v Y*, 1994).

More recently, New Zealand's ratification of UNCROC in 1993 has had a considerable effect on how children are regarded and treated in the New Zealand family law system. An increasing number of judges are again speaking with the child in custody and access matters:

My purpose in seeing the children was not to question them about items of disputed evidence, but simply to size each of them up and to listen to whatever [the children] might wish to tell me about what they wanted to happen. (Per Judge Inglis QC in *Payne* (1994), p. 256).

There is a growing recognition of the child as a person and as a partner in family endeavours whose perspective must be factored into a decision if it is to be respected by the child and is to assist the family to move forward. In *DGSW v R* (1997) Judge von Dadelszen, in acknowledging the young person's strong wish not to have contact with her mother, commented:

I think it would be entirely inappropriate that this Court should be seen as foisting [contact] on her against her will. That would send quite the wrong message to this mature almost 15-year-old girl: that, not only is she not listened to, or, even if she is, her wishes are not respected. (p. 371)

A judge has actually refused to proceed with the hearing of a case set down for a defended hearing because Counsel for the Child had not been appointed and the expert reporter had not ascertained the child's views [*N v W* 25/6/99].

Judges are becoming increasingly aware of the importance of experience, rather than mere chronological age, in determining the appropriate weight to give to a child's views:

But Mindy, who will shortly be 10, and who has experienced both forms of schooling, I thought was rather a perceptive child – there is no doubt at all what she wants. She wants to continue schooling for the entire day ... I would have to say that Mindy, whilst not voicing it specifically, showed a marked disinclination in her body language and expressions about continuing to be schooled at home.' (Judge Cavanagh in *Millist* [2001] p. 1095)²

It is suggested that a greater focus by the system on the child and an acceptance of their role as a partner in family matters might assist parents to resolve child care disputes without recourse to emotionally and financially draining litigation. Such a focus would result in earlier appointment of counsel for the child and the specialist report writer (who are not currently appointed until the primary dispute resolution processes of conciliation counselling and judicial mediation have been completed). Both should be given the time to develop a relationship with the child so that the child has the information and support they require to fully understand the ramifications of the issues involved and to form and express their views. Currently, both counsel for the child and the reporter are given very specific, time limited briefs by the court. Children and parents have both expressed the view to us that children have not been given the time to develop trust and confidence in their counsel or the reporter and so have not always revealed what was really important to them (Taylor, 2002; Taylor, Gollop, Smith & Tapp, 1999). There is now a growing realisation by some Family Court professionals of the value of a child-focussed process with an early specialist assessment of the views and needs of the child (Doogue & Blackwell, 2000).

We suggest that existing legal provisions for the ascertainment of children's views should be fully utilised so that children's voices become a regular and commonplace

² This case concerned a dispute between the parents in which the mother wished to home school the children, while the father preferred the children to attend a state school. An order was made that the children attend a state school.

feature of family and legal decision making, commencing as early in the process as possible. We are critical of the 'escape mechanisms' promulgated by an overly strong reliance on concepts of age and maturity in our statutory framework governing children's wishes and views (e.g. s23(2) Guardianship Act 1968; s5(d) Children, Young Persons and Their Families Act 1989). Proposed reform of the Guardianship Act 1968 will, we anticipate, significantly alter this in New Zealand (Wilson, 2002), and better reflect contemporary professional practice. As well, a group of enlightened judges are becoming much more respectful of children's views, and influencing the Family Court towards an assumption of competence independent of an age-related threshold. A key issue in enhancing children's competence and agency is the facilitation which is provided for children by family members and Family Court professionals. It is clear that when children are given the opportunity to participate, their competence and capability as social actors in actively coping with family problems and in assisting with the legal resolution of family disputes is enhanced.

Support for Children's Emerging Voice

It is important for parents and legal professionals to look more critically at their assumptions about children's competence and to be more aware of the crucial role adults have in nurturing children's capacity to participate in decisions. Our research suggests that almost all children are able to express what is important to them. Even babies do this non-verbally (Alderson, 2000). The issue of children of any age expressing their views is, we argue, not so much one of the child's ability to provide information, as it is of the adult's competence to elicit (or observe) it in the context of a trusting, supportive and reciprocal relationship.

One implication to emerge from sociocultural theory and research is that the support and respect of adults makes an important difference to children. Effective and respectful communication is a key issue. Adults can ensure that children understand why they are participating, explain that what they contribute will be taken seriously, but that they will not necessarily get what they want. Ethical procedures (including confidentiality) are particularly important when children are talking about things they have never discussed publicly before. Listening to children's views seriously, letting them know about why things are happening within their families, and providing them with feedback and genuine avenues for complaint and access to advocacy, are crucial components of the process.

Developing an effective procedure for finding out children's perspectives and establishing a trusting relationship takes time. Rather than one-off interviews, it may be necessary to talk to the child several times or to talk while participating in their normal everyday activities. It is useful if children have some freedom to contribute and initiate ideas without being entirely constrained by the nature of the tasks (such as standardised interview formats).

The subtleties of family relationships may not be captured by such a brief and alien intervention in which children may apparently be quizzed on their views for the first and only time in their childhood. (Smart and Neale, 2000: 168)

Children's perspectives are just one piece of the jigsaw puzzle and, of course, other pieces should be assembled to provide a fuller picture. Children's views and feelings

can only ever be part of the overall equation – both within family life and within the court system. Like Butler *et al* (2002), we would not necessarily want to allow children's accounts to dominate, but to be given an appropriate balance and weight.

Conclusion

The assumption that there is harm to children in involving them in discussions and decisions about their post-separation living and contact arrangements is not borne out by the research evidence. Children should be viewed as competent social actors rather than invisible, voiceless victims. Both the legal and family contexts can subdue children's voices and deny or inhibit their rights to be heard and taken seriously in family and legal processes. While there is plenty of opportunity for adult participants to state their views, it is important to ensure that children's rights are respected in a similar way.

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