

PRESENTATION FOR LEGAL AID BOARD FAMILY LAW CONFERENCE 2013.

THE VOICE OF THE CHILD IN FAMILY DISPUTES

I've been asked to address the issue of the voice of the child in family law disputes within the overall theme of this conference.

This topic has to be seen within the context of the recent referendum, the impending establishment of the Child and Family Support Agency and the proposed creation of a new Family Law structure.

In this exciting period of reform and change, it is my intention to identify some of the issues that need to be addressed in the hope that they may be considered in the currency of the present reforms.

The thirty first amendment of the Constitution was passed on the 10 November 2012 by a majority 58.01% on a turnout of 33.5%.

Article 42a states as follows:

1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.
2. 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.
- 2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.
3. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.
4. 1° Provision shall be made by law that in the resolution of all proceedings—
 - i. brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
 - ii. concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.
- 2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

The Thirty-First Amendment of the Constitution (Children) Bill 2012, which will repeal Article 42.5 and insert a new Article 42A is presently being challenged and President Higgins cannot sign the Bill into law unless the challenge is unsuccessful.

I'll discuss this topic on the assumption that it will be signed in the near future.

From a childcare perspective this change will be more likely cultural rather than have any real impact on the application of the law, considering the various provisos that are contained in the new proposed article and the present limitations on the State's finances.

In discussing the proposed amending Article, it is worth noting however the following key phrases:-

The interference by the State in the lives of families is to be exceptional,
That such interference should be proportionate
That due weight should be given to the views of a child
Who is capable of forming his/her views
As far as practicable.

This amendment is a direct progression from Article 3(1) and Article 12 of the UN Convention on the Rights of the Child, which was expanded in the European Convention of the Exercise of Children's Rights in 1996.

The view/wishes of the Child already do have an existing statutory basis in Family Law.

In Private Law family proceedings under the Guardianship of Infants Act, 1964 (as amended by the Children Act, 1997), Section 25 provides that ***"in any proceedings to which Section 3 applies the Court shall as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter."***

Regrettably it still remains that the enabling sections section 26 and section 28 have not been implemented.

In Public Law family proceedings, the voice of the child is more developed in the Child Care Act 1991 as amended. A child can attend Court (Section 30) , a child can be made a party to the proceedings, a child can be separately legally represented (Section 25), or a Guardian Ad Litem can be appointed on behalf of the child (section 26).

Although more developed, the circumstances and the criteria applied by the Courts in determining whether any of these sections should be applied remain unclear. Serious concerns in relation to the lack of consistency as to their application continue.

It is hoped that standardisation of criteria in relation to these issues creating greater consistency is a matter that will receive immediate attention by the new Child and Family Agency, and later when the new Family Court structure is introduced.

The separate representation of children was been described by the Honourable Alistair Nicholson, Chief Justice of the Family Court of Australia in a keynote address in 1995 as "a Cinderella area of law"*.

This was to highlight the then poverty of understanding in this area and further implied that it was an area in transition and transformation. In Ireland we are still at the early stages of this change.

In the very comprehensive article “Access to justice for children: the voice of the child in access and custody disputes” * Christine D. Davies Q.C. sets out advice to lawyers in New Zealand representing children as follows:-

- (1) They should talk less and listen more;
- (2) Relate to children at their level;
- (3) Get to know children and their background;
- (4) Ask better questions and provide more feedback to children;
- (5) Keep things confidential;
- (6) Be happy and cheery;
- (7) Not scare children; and
- (8) Relate to children as people.

In Court proceedings involving children it is worth recognising that there can be several parties claiming to represent the voice/view of the child.

The importance and benefit of the voice of Child is that it gives the child a stake or ownership in the proceedings, it ensures the child is listened to and heard, it does not exclude the child, and it better informs the Court in enabling it to make practical child centred suggestions/directions/orders.

Each of these parties may further seek to trump the voice of the child by claiming ownership of what is in the interest and welfare of the child.

Now that the courts are obliged to give due weight to the views of a child as far as practicable, the question arises how is this to be done while satisfying all the competing interests that already exist?

In the English case of Re PCA Minor (Education), (1992), 1 F.L.R. 316 at 32, Butler Sloss L.J. referred to this difficulty and stated

“We are dealing with the welfare of a 14 year old boy. The courts over the last few years, have become increasingly aware of the importance of listening to the views of older children and taking into account what children say, not necessarily agreeing with what they want, not, indeed doing what they want, but paying proper respect to older children who are of an age and the maturity to make their minds up as to what they think is best for them, bearing in mind that older children very often have an appreciation of their own situation which is worthy of consideration by, and the respect of, the adults and particularly including the courts.”

“As a matter of practical day-to-day experience, the problem in this area usually relates to the ascertainment of the wishes of the child and their interpretation and assessment in the face of conflicting evidence. Against that background, the court will attach varying degrees of weight to a child’s stated wishes depending upon, amongst other factors, the strength and duration of their wishes, their basis and the maturity of the child, including the degree of appreciation by the child of the factors involved in the issue before the court and their longer term implications. Ultimately, the overall welfare of the child is the determinant... The application of that principle will be influenced by the social background of the times and...it appears to us that recent social forces have indicated that more realistic weight should be attached to the wishes of the children than may have been the practical realities in years past.”

Both the 1964 and 1991 Acts confirm that the first and paramount consideration for the Court is the **welfare of the child**, consequently other issues and factors need to be taken into account in determining the welfare principle. Regrettably this tension of competing factors was not adequately addressed in the recent referendum discussion/debate.

I believe that these factors should be set out and clarified resulting in clear and unambiguous guidelines being published. Other common law jurisdictions have struggled with this complexity but have progressed matters.

In the article “Voice of the Child in Court Proceedings” by Linda Tippet-Leary* set out the criteria that Judges in Canada should consider when assessing the significance of child’s wishes, were summarised as follows:-

- i. Whether both parents are able to provide adequate care.
- ii. How clear and unambivalent the wishes are.
- iii. How informed the expression is.
- iv. The age of the child.
- v. The maturity level of the child.
- vi. The strength of the wish.
- vii. The length of time the preference has been expressed for.
- viii. Practicalities.
- ix. The influence of the parent (on the expressed wish or preference).
- x. The overall context.
- xi. The circumstances of the preference from the child’s point of view.

It is my experience that the wishes of the child may not necessarily be compatible to a child’s welfare, this can outlined in the following examples.

- Children (particularly young children) can often express a wish to return to their parents in circumstances where it has been proven that they have been abused and/or neglected in a significant manner, and the circumstances have not changed whereby good enough parenting could be provided.
- Where a child is near the age of maturity, that child’s wishes are often reluctantly respected by the Court even though it may not be in the child’s welfare. Examples of that are in circumstances where the child is over seventeen and no longer wishes to remain in the foster placement and wishes to return to his/her parent in circumstances where the difficulties in the parent child relationship has not been resolved and therefore the recurrence of the original difficulties that lead to the care application continue.
- Another example of where the wish or the voice of the child can trump the welfare is in a case I was involved in for a mother who’s daughter had been in care from in or around the age of thirteen due to difficulties in controlling her behaviour, in particular her daughter engaging in inappropriate sexual activities, abusing of substances and the engagement in criminal activities.

At the age of sixteen, this girl requested to have her contraception bar removed, this was opposed by my client the child’s mother/guardian, due to concerns that her daughter would end up having an unwanted pregnancy which would be more

probably be taken into Care. There was no evidence to support that this girl had stabilised and matured enough to merit this change.

The child was in long term care and the HSE supported the removal of the contraceptive bar stating she was 16 she had the right to choose. She did become pregnant and when that child was born, that child then ended up being received into care as regrettably predicted.

Once a child is over sixteen, and particularly over seventeen, practical rather than welfare considerations in my experience take prominence.

This twilight area of when a child is still legally a child but is of an age when his/her wishes need and must be respected causes great difficulty for parents and the Courts in knowing that it's scope of influence is diminishing on a daily basis.

The Court often has little or no choice in these circumstances and has to decide not what is in the child's interest and welfare but what the least detrimental alternative is.

The questions that we, as professionals in this area, and society need to ask are:-

- what age should a child be when his/her wishes should be taken into account?
- what age should a child be to be entitled to separate representation?
- what age should a child be in order to attend Court to give evidence and how should this be accommodated?

Further questions then arise :-

- what are the best options for a child's voice be heard?
- what weight should the court give to this evidence?

The options available for the Court seem to be as follows:-

- i. Judicial interview.
- ii. The child as a Witness.
- iii. A letter written by the child
- iv. A statement made by the child either to a parent, social worker or other witness.
- v. An Assessment, ie Guardian Ad Litem in public and by an agreed professional either psychologist, social worker or otherwise in private law proceedings.

In the recent excellent paper "Challenges in Family Law Proceedings"* by Mr. Justice Michael White, the above questions were addressed within the present legal framework.

In particular Mr. Justice White refers to the decision of Keane CJ in the case of AS (otherwise DB v RB (2002) 2. IR 428, in which the jurisprudence of a judge speaking directly to children is discussed

“the only matter on which this Court was asked to rule was as to whether it was appropriate for RO to be seen by the trial judge in his chambers. While I can understand the approach adopted by the trial judge to this matter in proceedings of this nature, the fact remains that as a matter of principle the only evidence which a trial judge, in family law

proceedings as in other proceedings can receive is evidence on oath or affirmation given the presence of both the parties or their legal representatives.

It has long been recognised that trial judges have a discretion as to whether they will interview children who are the subject of custody or access disputes in their chambers since to invite them to give evidence in Court in the presence of parties or their legal representatives would involve them in an unacceptable manner in the marital disputes of their parents. Depending on the age of the children concerned, such interviews may be of assistance to the trial Judge in ascertaining where their own wishes lie and that would undoubtedly have been the case with R.U. in these proceedings.”

Further Mr. Justice White refers to the decision of OD v OD 2008 1 EHC 468, where Abbott J. stated at paragraph 10 as follows:-

10. Talking with the children

10.1- it is important to explain the approach of the Court as regards talking with children in these cases. The Brussels II bis Regulation requires that judge's are trained in the work of hearing cases regarding parental control and I am fortunate since my appointment as judge I have had the opportunity of training relating to this area through networking and conferencing with judicial peers I have taken a number of guidelines from such training when speaking with children which are as follows:-

- i. The Judge shall be clear about the legislative and forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches.
- ii. The Judge should never seek to act as an expert and should reach the conclusion from the process as may be justified by common sense only and the Judge's own experience.
- iii. The principles of a fair trial and natural justice should be observed by agreed terms of reference with the parties prior to relying on the record of the meeting with the children.
- iv. The judge should explain to the children that the fact that the judges are charged with resolving issues between the parents of the child, and the judge should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself, and should assure the child that while the wishes of the children may be taken into consideration by the Court their wishes will not be solely (or necessary at all) determinative of the ultimate decision of the Court.
- v. The judge should explain the development of the convention and legislative background relating to the Courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.
- vi. The Court should at an early stage ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in dispute in the litigation are likely to assist and agree on this aspect. In the absence of such agreement then it is advisable for the Court to seek advice from the Section 47 procedure, unless of course such a qualification is patently obvious.
- vii. The Court should avoid a situation where the children speak in confidence to the court unless both parents agree. In this case the children sought a confidence and I agreed to give it to them subject to the stenographer and register recording same. Such a course where very desirable from the child's point of view is generally not consistent with

the proper forensic progression of a case unless the parents in the litigation are informed and do not object as was the situation in this case.

The above statements are most helpful but this writer is aware that these principles are not being uniformly applied or understood on a consistent basis through the various tiers of the family law courts.

Again guidelines in this area should be published and formal training to enable Judges to fulfil the task of interviewing children should be commenced as soon as practicable.

I would concur with all of Mr. Justice White recommendations and in particular that “ancillary services be required by family courts to enable reports to be procured on any aspect of the welfare of a child, if necessary without cost to the parties to the proceedings.”

However while appreciating the value of such reports, greater consideration and examination needs to be undertaken in relation to the suitability and competence of such professionals providing such reports.

Further it would be advisable if the format of these reports be standardised so as to ensure that these reports stay within the remit of the professional’s competence and comply with fair procedures.

In dealing with reports and assessments the issue of reports being prepared in a timely manner, being furnished to the parties in advance of the hearing, and their admissibility are all issues that require further consideration and discussion.

How much weight the Court attaches to such reports is not an exact science and is one that requires ongoing vigilance of all parties, particularly the Court.

Finally, it is worth noting that in any discussion relating to the voice of the child, it must be remembered that the most significant period of time for a child is widely accepted as the child’s first two years. This is a period of time where the voice of the child cannot be properly heard or at all and where welfare protection is at it’s most acute.

It is essential that the significance of this period is understood so that processes/procedures be put in place so that the Court can be fully informed as to how the care of a child is being managed.

During the debate in relation to the referendum, and subsequently in relation to the discussion in relation to the creation of the Child and Family Support Agency, the importance of early intervention has been repeated by several commentators and opinion formers, it is hoped that that the future changes proposed will reflect this principle in a real and properly resourced manner.

In discussing the importance of the voice of the child, it is worth reminding our policy makers that if we could get things right from the start by top loading services and systems into pre birth and the first two years of a child’s life, our systems would follow and reflect the differing stages of a child’s development thus ensuring the voice of the child would be properly placed within that framework.

Recommendations for improvement

1. Clear Guidelines as to the factors that Judges should consider when assessing the significance of as child's wishes to be published
2. Clear Guidelines as to what age should a child be when the child's wishes should be taken into account, to be entitled to separate representation, to attend Court to give evidence?
3. Clear Guidelines as to how best to access the child's wishes.
4. Clear Guidelines as to how judges talk to/interview children.
5. Clear Guidelines on suitability/competence of professional reports.
6. Clear Guidelines on format, service and admissibility of reports.

More General Recommendations

7. Early intervention to be defined and made the starting point of child law, proper family support to be provided with and the front loading of services.
8. That aftercare is put on a statutory footing.
9. That the Court's jurisdiction be extended to allow Supervision Orders to be available to the unborn Child in exceptional circumstances.
10. That the Court's jurisdiction be extended to allow Care Orders for children up to 18 years be extended to 21 years in exceptional circumstances.
11. That a holistic view as to what is in the interest and welfare of a child be enshrined in practice, thus obliging the Courts to ensure :-
 - That Orders placing children in care should be as short as possible a period,
 - That clear, detailed and understandable care plans be prepared for all children in care,
 - That they should be constantly reviewed,
 - That the relationship of the parents should be encouraged, maintained and resolved where possible ,
 - That when a child leaves Care that proper practical and meaningful supports are put in place.

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Articles referred to

* “a Cinderella area of law”- the Honourable Alistair Nicholson, Chief Justice of the Family Court of Australia in Keynote address at Child Representative’s Training Programme, Legal Aid Commission of Victoria, Melbourne, Nov. 1995 cited by W.J. Keough in, “The Separate Representation of Children in Australian Family Law - Effective Practice or Mere Rhetoric? (2002), 19 Can. J. Fam. L. 371.

* Voice of the Child in Court Proceedings by Linda Tippet-Leary
<http://www.justice.gc.ca/eng/fl-df/spousal-epoux/topic-theme/voi1.html>

* Challenges in Family Law Proceedings By Justice Michael White Barnardos 29th May 2013 Croke Park

<http://www.barnardos.ie/assets/files/Advocacy/Family%20Lay%20May%202013/Mr.%20Justice%20Michael%20White%20-%20Challenges%20in%20Family%20Law%20Practice%20Background%20Paper.pdf>

* ACCESS TO JUSTICE FOR CHILDREN: THE VOICE OF THE CHILD IN CUSTODY AND ACCESS DISPUTES- Christine D. Davies Q.C-

<http://www.lawcom.govt.nz/sites/default/files/speeches/2004/04/Session%205B%20-%20Children%20-%20Davies.pdf>