4 The Wishes and Feelings of the Child

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Introduction

'The ascertainable wishes and feelings of the child' is hardly a phrase which trips easily off the tongue. Yet it has become increasingly prominent in discourses about the family, in the 1990s, since its assumed creation by the Children Act 1989. The Children Act provided the courts, for the first time in the UK, with a welfare checklist on which one item to be taken into account is the child's wishes and feelings. That Act also placed duties on local authorities and voluntary bodies to do likewise in a range of specified situations) Nevertheless, neither the phrase nor the professional practice it implies was an invention for the purposes of the Children Act 1989 or the Children (Northern Ireland) Order 1995.

As Brenda Hoggett - then a Law Commissioner and now Mrs Justice Hale - pointed out, section 1(3)(a),[2] the sub-section setting out the requirement to 'have regard' to ascertainable wishes, 'mirrors a provision which has been part of adoption law for some time' (Hoggett, 1993, p.175).[3] In Scottish legislation the phrase can be found in the Social Work (Scotland) Act 1968 section 20 which imposed a duty on social workers and voluntary organisations north of the border similar to that imposed 21 years later on the English and Welsh. In addition, the power, if not the duty, to consult a child to ascertain her views is to be found, as Roche pointed out in the previous chapter, in legislation as far back as the Custody of Children Act 1891, section 4. Even a brief 'crash course' publication by the College of Law over 20 years ago includes, as point five of 10 'guidelines' in the law of custody and access, the statement that 'the child's wishes can be taken into account in deciding what is best for his welfare' (Lowe, 1975, p.15). The weight to be given to children's wishes generally and in particular circumstances has, therefore, been the subject

of reported cases from the English and Scottish[4] courts long before the Children Act 1989.

The Welfare Context

These pre-Children Act provisions from legislation and case law can clearly be placed in the context of widening the range of 'further and better particulars' in order to determine the best interests of the child concerned. What has raised the profile of 'wishes and feelings' is, as Roche's chapter made clear, the development of an international children's rights discourse, with an emphasis on the voice and the autonomy of the child. Legislators in the UK had incorporated Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction into the Child Abduction Act 1985, allowing for an authority to refuse to order the child's return to a particular jurisdiction if `the child objects [and it is] appropriate to take account of its views'.[5] Parliament was, therefore, mindful not only of complying with Article 12 of the United Nations' Convention on the Rights of the Child but also the recommendation of the Council of Europe in that body's document, *Parental Responsibilities* (1984 Part II), that there should be an independent duty on the court to take account of the child's views in all matters affecting the child (see the Law Commission (1988, p.20, n.66)).

Discussion about legislative change in the 1980s revolved around the perceived polarities of child welfare or parental autonomy as against child rights. For example, the Law Commission had discussed the matter of the wishes of the child in its Working Paper on *Custody* (Law Commission, 1986, paras 6.40-6.44), asking consultees about two issues: whether the duty to ascertain and consider the child's wishes should be part of a welfare checklist or a separate duty and whether the duty should apply only to contested cases. In its Report the Law Commission (1988) said that, whilst consultees had been almost unanimous in favour of statutory recognition of the child's views, the concerns about the 'dangers in giving them too much recognition' (para 3.23) `all point towards including the child's views as part of a statutory checklist, which in practice will be limited to contested cases' (para 3.24).

And so the Children Act 1989 and the Children (Northern Ireland) Order 1995 impose the duty to 'have regard to' the 'ascertainable wishes and feelings of the child' or to ascertain and 'give due consideration to' the child's

wishes on, *inter alia*, the courts via a checklist (in section 1 and Art 3(3) respectively) which is used to apply the welfare paramountcy requirement.' As the former Lord Chancellor, Lord Mackay of Clashfern, has since stressed,

> While the Act provides for the court taking account of the views of children, giving them weight according to the circumstances, it does not put the children in a position to decide on those matters. That is an important point to underline in connection with the philosophy of the Children Act.'

Therefore, whilst the inclusion of references to the child's wishes has been seen as a development which 'marks an important adjustment in the balance of power between children and adult society' (Bainham, 1993, p.60), its symbolic importance - in the law of England, Wales and Ireland - is in the addition of the child's perspective to the operation of the welfare test. Whether it affects power differentials depends on how it operates in practice: a question this chapter will address.

This dominance of a welfare discourse in relation to the child's wishes and feelings is in contrast to the approach of the Scottish Law Commission (1992). That Commission not only discussed the different implications of using the terms 'wishes and feelings' or 'views' and 'maturity' or 'understanding' (paras 2.60-2.64),[6] but also stated quite firmly that 'the child's own views ... we believe, ought to be taken into account in their own right and not just as an aspect of welfare' (para 5.23). They argued against limiting the provision's scope to contested private law proceedings as in the Children Act 1989: 'It seems to us that it would be difficult to justify a provision which appeared to regard the child's views as of less importance merely because an application was, or ended up being, unopposed' (para 5.26). Four years earlier the (English) Law Commission had had no such difficulties: 'If the parents have agreed on where the child will live and made their arrangements accordingly, it is no more practicable to try to alter these to accord with the child's views than it is to impose the views of the court' (1988, para 3.23).

In contrast to Scotland, therefore, participation by the child in decision-making in the rest of the UK has been located firmly within a welfare discourse linked only to a 'caretaking' version of children's rights. Participation - this new right to a conversation - has side-stepped, but not resolved, the tension between liberty and welfare rights (Roche, in this volume).

The Family Law Act 1996

Marriage Saving and Child Saving

The Family Law Act 1996, as clearly as the Children Act 1989, locates the wishes and feelings of the child in a welfare context. Contributions made by members of both Houses of Parliament, in debates and in the committee stages of the Bill, reveal that most saw the ascertaining of views as being part of their project to protect the child from the dangers of divorce. **In** the House of Lords, within the context of a widely expressed view that 'divorce is a disaster under any circumstances for any child', and a professed belief that 'children should come first' in the provisions of the Bill (Baroness Faithful and Lord Irvine of Lairg respectively, Hansard, HL vol 568, col 813, 22 Jan 1996), the aim was to ensure that all involved should be 'constantly vigilant as to the welfare of the child' (Lord Simon of Glaisdale, Hansard HL vol 568, col 911, 23 January 1996). Perhaps they endorsed concern generated by research which showed that the child's ability to adjust to change on divorce is affected by feelings of powerlessness that they may have in relation to the process and outcome of divorce.' But there was also evident in the debates a clear strand of thinking that linked this 'child saving' approach to 'marriage saving'. The Law Commission Report (1990, para 2.19) and the Consultation Paper on divorce reform (1993, para 5.11) noted that 'The children themselves would usually prefer the parents to stay together' and the following contribution - made in the debate on proposed amendments that would have imposed duties on, *inter alia,* parents and a new court children's officer to take account of the children's views - clearly rests on this assumption:

> It is surely not impossible that if there is a clear and definite obligation laid by the Act on the need to take account not only of the interests but of the views of a child ... it may be just possible that it could make the warring parents address themselves to this enormously important aspect of their marriage and pay just a little more attention to it. If, by putting this on the face of the Bill, we produced in only a handful of cases a balancing factor which perhaps tipped the couple away from divorce, then I believe that that in itself would totally justify the amendment ... (Lord Murray of Epping Forest, Hansard, HL vol 568, col 913, 23 Jan 1996).

When the Bill finally returned to the House of Commons, the government - to

`save' the Bill - accepted, *inter alia*, a new clause which became section 11.[10] Considering wishes and feelings was then presented as part of a clear child-saving reform: `[The amendments] provide for even greater protection of children's interests - and children are, of course, the innocent victims of divorce' (Mr Streeter, Hansard HC col 591, 17 June 1996)."

Section 11

Section 11, replacing - except in relation to nullity proceedings - section 41 of the Matrimonial Causes Act 1973 (MCA), places a duty on the divorce court to `have particular regard', inter alia, to 'the wishes and feelings of the child' (s11(4)(a)). Perry argues that section 11 of the Family Law Act 1996 'is the first time that provision has been made for the child's views to be taken into account whenever the court is considering the arrangements for children at divorce' (1996, p.13). Whilst this is true there are grounds for querying the exact scope - and therefore significance - of section 11.[12] On a strict reading it would appear that the welfare principle and the checklist (sections 11(3) and (4)) apply only to the decision" - which currently can be made under section 41 of the MCA - whether to take the exceptional course (see Bromley and Lowe, 1992, p.36'7) of not granting a divorce until the children arrangements are `approved'.'

However, the parliamentary debates on this provision would suggest that the intention (though not adequately conveyed in the wording of the Act) was to apply the checklist to the decision - now in section 11(1)(b)'[3] - as to whether to exercise Children Act powers (Bird and Cretney, 1996, pp.79-82). This decision is not currently subject to a checklist.

There may be some difficulty in implementing the checklist. As a result of the Family Proceedings Rules 1991 the current procedure relating to the MCA section 41 is largely a paper exercise completed by the district judge. The latter has the power to ask for further details or a welfare report but the decision whether to do so is done on the information in the statement of arrangements provided to the court. For the procedure to remain as a paper exercise in the majority of cases, the statement of arrangements would have to include information about the wishes and feelings of the child, begging the question as to how they would be ascertained and recorded. One of the possibilities being considered by the Lord Chancellor's Department is to require a parent to state in his or her application for a divorce order whether the children of the family have been consulted (Bird and Cretney, 1996, p.81).

If the court decides it should exercise its powers under the Children Act in respect of 'any children of the family' then a further question is raised. The court can make orders (for example, section 8 residence or contact orders) of its own motion in family proceedings - which now include proceedings under the 1996 Act - but, again strictly speaking, the checklist in the Children Act does not apply.[16] However, it is likely that the Children Act and Family Law Act checklists will be influential, given the recent statement of the Court of Appeal that the Children Act checklist 'remains a most useful aide-memoire' in cases where consideration of the checklist is not mandated."

Encouraging Parents

The duty imposed on the court by the Family Law Act to have regard to the child's wishes is symbolically important because neither the Children Act 1989 nor the Family Law Act 1996 impose a statutory duty similar to that in the Children (Scotland) Act 1995 section 6(1), whereby those with parental responsibility making major parenting decisions should have regard to the views of the child.' Instead, 'Nile primary strategy deployed in the Family Law Act is for professionals to encourage parents to consider children's wishes and feelings' (Trinder, 1997, p.292). This encouragement is to be undertaken at several stages.

First, the regulations relating to information meetings must make provision for information to be given to parent(s) about 'the importance to be attached to the welfare, wishes and feelings of children' (s8(9)(b)). Secondly, a solicitor may have a similar duty: the Lord Chancellor is empowered to make rules requiring a legal representative of a party to a marriage to inform the party that 'in relation to the arrangements to be made for any child the parties should consider the child's welfare, wishes and feelings' (s12(2)(a)(iii)). Thirdly, there are also specific duties on state funded mediators: the Code of Practice for mediators funded by the Legal Aid Board must require them 'to have arrangements designed to ensure that the parties are encouraged to consider - the wishes and feelings of each child' and whether the child should attend mediation to express those wishes (s27(8)). In addition, those mediators subscribing to the Code of Practice of the UK College of Family Mediators, ' must encourage the participants to consider their children's own wishes and feelings' and may discuss with parents 'to what extent it is proper to involve the children themselves in the mediation process in order to consult them about

their wishes and feelings' (Code of Practice, 1998, para 4.16).

The extent to which professionals ascertain children's views or encourage parents to do so is, therefore, crucial to the influence of the Act in promoting the idea that children should be heard, so it is to professional practice that the next section of this chapter turns. In the light of the operation of similar provisions in the Children Act 1989, how likely is it that the child's wishes will be heard and considered under the Family Law Act 1996?

Practice under the Children Act 1989

The Court

The main focus of the duties in the Children Act 1989 is the court. In contested section 8 applications the judge must be made aware of the child's wishes and can ascertain this directly or ask a probation officer to report on matters relating to the welfare of the child.' In addition, under section 41 the court can, but rarely does (Monro and Forrester, 1995, chapter 15), appoint a *guardian ad litem* who, under Rule 11 of the 1991 Rules, must ascertain the child's wishes.

The judiciary have not generally been encouraged to ascertain wishes themselves: `[T]he judge can see the child in his or her private room, but this is a procedure which must be adopted with caution' (Balcombe **Li,** 1994, p.11). Whether or not with caution, some judges do see children.

> Booth **J** has recently stated judicially that justices should hardly ever see a child privately ... I do not know what status the doctrine of precedent in English law affords these observations, but they will be bold magistrates who decline to follow them. Perhaps anomalously, a judge has greater freedom. Personally, I will always agree to see a child, of whatever age, if the child has expressed a wish to see me. ... For my part I think, unfashionably, that judges and magistrates should see children more often and not be intimidated into thinking that only trained experts should be allowed direct access to their minds (Collins, J, 1994, pp.396-397).

It would, however, be an unusually bold *child* who would ask to see a judge, even if in a position to do so. It is, therefore, usually the court welfare officer who is asked to provide information about the welfare and wishes of the child. However, 'a common refrain' of research results and academic critique has

been the inadequacy of court welfare officers in their role as advocate of the child's views (Trinder, 1997, p.293). Research conducted in the early 1990s found the question of ascertaining the wishes and feelings of the child to be 'a thorny and delicate issue and one that generates frequent disagreement amongst welfare officers both within and between areas' (James and Hay, 1993, p.96) to the extent that, in one research area, officers saw children alone in only 4% of cases (p.101).[20] This may have been due to a lack of clear guidance (Jones, 1992) which has been at least partially remedied by the *National Standards for Probation Service Family Court Welfare Work* (Home Office, 1994). These state that, in the course of compiling welfare reports, 'All children should be seen by the court welfare officer unless there are strong grounds for not doing so' (para 4.17).

Recent research is more favourable: 42% of respondents always, and 47% mostly, saw children at the report stage and, when children were consulted, 87% were seen separately from their parents (Hester *et al,* 1997, pp.30-31). However, there were differences in the weight given to the child's views - a finding supported by a small scale qualitative study which found that, despite a high degree of verbal agreement on certain key principles, consensus broke down into two very different approaches (Trinder, 1997, pp.294-301).[21]

As the previous chapter has pointed out, in section 8 proceedings very rarely are these deficiencies and problems circumvented by the child being separately and directly represented in court by a solicitor (see Piper, 1998; Sawyer, 1995 and 1997) or by the appointment of a guardian *ad litem* for the child.' As a result, despite positive changes in the 1990s, 'The methods provided whereby children's wishes are conveyed to the court are so inefficient and arbitrary that it is almost a matter of coincidence whether the court receives a clear idea of what these are' (Fortin, 1998, p.168). Many court welfare officers would, of course, contest the underlying assumption of that statement that the child has a clear view to be discovered and communicated. My concern is, rather, that, for the majority of children whose parents separate it is irrelevant whether or not a court requests a welfare report and how that request is complied with. Only a small proportion of parental disputes over residence and contact lead to the compiling of a welfare report and yet, as the next section will argue, in the current system for managing divorce, the potential for a court hearing leads to a belief among solicitors that the child's wishes are not their concern.

Solicitors

It is accepted that solicitors are currently the first port of call for those seeking divorce but there is a widespread view that this dominant role will, or ought, to be reduced when the Family Law Act divorce provisions are implemented. However, there are also compelling arguments for the view that they will retain a significant role (Cretney, 1997; Cretney and Masson, 1997, pp.374-383). Only the parent intending to make a statement of marital breakdown must attend an information session (though the other parent must attend if he wishes to contest matters regarding their child). Mediation will not be compulsory for privately funded clients whilst clients seeking Legal Aid funding may be deemed unsuitable for mediation and be granted Legal Aid for representation, as, indeed, might those suitable for mediation.' For the foreseeable future the solicitor may therefore remain as the main or sole professional contact for one or both of the parents involved and may, consequently, be the main conduit for ideas about the importance of the child's views. There is no duty on the solicitor to ascertain or take into account the child's wishes within the Children Act 1989 or its Regulations and section 11 of the Family Law Act 1996 places the duty on the court only though, as noted above, the Lord Chancellor may make rules requiring a solicitor to encourage clients to take note of their children's wishes. The development of 'franchising' of firms for family law work by the Legal Aid Board is, however, placing a non-statutory pressure on solicitors.

A growing number of franchised solicitors are subject to the transaction criteria imposed by the Legal Aid Board. The requirement to note the views of the child in relation to proposed arrangements for residence and contact on divorce first appeared in the checklists for 'Getting Information from the Client' and 'Advising on This Information' (Sherr *et al,* 1992, pp.14 and 19). This can now be found in the criteria in Part 4 of the Family Transaction Criteria (Issue No. 2, February 1995) - for use when 'arrangements for residence/contact of children affected by the relationship under s8 of the Children Act 1989 are not agreed': 'Unless the child(ren) are very young (pre-school age), does the lawyer have any understanding of the child(ren)'s views as to the current/proposed arrangements for contact/residence?' (para 128, see also para 132.1). The criteria also impose a comparable duty in relation to a negotiated agreement (para 153.2).

There is a dearth of empirical evidence for evaluating the role of solicitors specifically in relation to this issue" and so this section will rely on

the Brunel University research which did aim, *inter alia*, to shed light on solicitors' attitudes to the acquisition, use and influence of children's views." That research" included interviews with 22 solicitors who worked **in** firms franchised for family work and 14 who did not. The franchised solicitors were asked whether the requirement to record the views of the child in relation to residence and contact 'caused difficulties' for them and they were asked to explain the reasons for their answers. The remaining solicitors were asked whether and why they did or did not usually ask clients about the views of their children.

The results showed that over two-thirds of the franchised solicitors felt the requirement caused them difficulties. A handful of franchised solicitors expressed either ignorance of or hostility to the requirement or felt guilty that they ignored it, but most solicitors commented on how they fulfilled the requirement. Surprisingly their explanations were very similar whether or not they had initially said the criterion caused them difficulties. In other words, solicitors explained it was a difficulty because they were (only) recording the parent's view of the child's wishes or that it was not a difficulty because they simply recorded the client's views. Similarly they either did not feel the need to take the requirement too seriously because it would be done by the court welfare officer or they felt unhappy at ascertaining wishes because it was `properly' the court welfare officer's job.

(i) Relying on the Views of the Parent All but five of the franchised solicitors said that they mostly recorded only the views of their client and some of these clearly found this quite unproblematic: 'No [it doesn't cause a difficulty] ... I mean, parents are usually forthcoming with that'. Five of the 14 non-franchised solicitors also indicated a lack of concern on this issue: recording the views of the client was hearsay 'but there we are', 'there's always going to be an element of bias'. Other solicitors expressed their dislike of having to rely on 'asking the client what somebody else's views are': 'you're very reliant on your client (a) being *aware* of what the children's views are and then (b) being totally upfront about it.' The remaining non-franchised solicitors were also uneasy about recording information they believed to be unreliable because of the inability of children to tell parents what they 'really' wanted or the potential for deliberate distortion by parents:

> [W]hat happens is, you know, the ... children come in with the mother - or their

> father - and they're simply going to go along with the parent that's come in to see me.
>
> [Y]ou get the parent saying this but ... I approach it on the you know 'Well you would say that wouldn't you' syndrome that the parents tends to reflect what they think, what they want, the child to say.

A revised statement of arrangements in line with the provisions of section 11 [87] of the Family Law Act 1996 would, on the basis of this research, result only in solicitors recording - without query - parental views of the wishes and feelings of the child.

(ii) Relying on the Court Welfare Officer Over half the franchised solicitors justified their reliance on parents' views by explaining: 'No [it doesn't cause difficulties] I simply ask the client what his or her views are ... obviously the court welfare officer will be appointed later'. Their answers, together with those of the non-franchised solicitors, were predicated on the belief that the child's wishes were not 'needed' until the court had to adjudicate and a welfare report was ordered: 'I think the court welfare officer will get to the bottom of the position so far as the child is concerned'. They believed that legally 'usable' information about the child's wishes, that is information that was 'true' and `unbiased', could only be collected by the court welfare officer: 'the only way I can give it any *serious* consideration is through an independent person such as the court welfare officer' and 'I would have to rely on the court welfare officer to determine objectively what those wishes would be'.

In addition, what could be detected in almost half of the responses" was an anxiety about apparently ever-changing professional boundaries.

> I think one has to be clear about what you're doing - who you're acting for. If you're acting for one of the parents and you start embarking upon a quasi-legal counselling, therapy, God knows what, session with a child, where do you finish up? What does it do to your professional relationship with the parent? I think there are very good professional reasons for being *extremely* cautious.

Though some expressed concern that interviewing children was 'really hard', for others this lack of confidence and/or appropriate skill was not the source of anxiety: 'I'll interview the children in Children Act cases - I'm a member of the Children's Panel so I don't have a problem with that. ... [in matrimonial cases]

I'm acting for the client not the children.' They fear having, in effect, two clients with conflicting interests.

(iii) Welfare But Not Wishes There is no question that 'the new cadre of specialist family lawyers who are characterised as "good"' (Neale and Smart, 1997, p.378) is concerned to promote the welfare of the child. They may even prejudice their ability to retain clients by their insistence that the child's welfare requires an agreed parental solution and contact with both parents: 'I was acting for mum, but I came very close to losing her because she didn't want to hear what I was telling her' (Neale and Smart, 1997, p.394). This particular construction of welfare - what Roche referred to in the previous chapter as 'a strong professional preference for a particular outcome for children' - has led lawyers and social workers to internalise fears of harming the child and undermining parental responsibility by seeking the views of the child. These fears have not only been recurrent themes in criticisms of the views of child liberationists since the 1970s (Fortin, 1998, p.5) but they have also fed into political agendas. Particular notions about harming children have given impetus to the child-saving element of the divorce reform debate - so necessary for the passage of legislation. The concern not to undermine parental control has buttressed political ideas about personal responsibility and the family - the ideological framework for reducing state intervention and expenditure. Given, therefore, that professional concerns have been strengthened by interaction with the political and moral discourses of the last two decades, it is not surprising that these fears have become an almost insuperable obstacle to ascertaining the views of children.

Don't Ask the Children

Wishes as Harmful

The problem flagged up by the Law Commission - that the benefit to the child of being heard will be outweighed by the burden of expressing wishes" - has constituted a powerful argument against asking the child for her views.

> Obviously there are dangers in giving [the child's views] too much recognition. Children's views have to be discovered in such a way as to avoid embroiling

> them in their parents' disputes, forcing them to 'choose' between their parents, or making them feel responsible for the eventual decision (Law Commission, 1988, para 3.23).[30]

This is also echoed in the *National Standards for Probation Service Family Court Welfare Work:* 'Children should never be made to feel as if they are taking responsibility for decisions about them which properly belong with adults' and officers are enjoined to 'be alive' to any pressure being placed on the child (Home Office, 1994, paras 4.17 and 4.18). Others have argued that this balancing exercise is too difficult to achieve. For example, a solicitor and court welfare officer have asked: 'How does the practitioner explain to the child that he is willing to listen to his opinion but simultaneously reassure him that adults are responsible for the ultimate decision?' (Bennett and Armstrong Walsh, 1994, p.93). Solicitors are also unenthusiastic: 'Sometimes clients will bring their children in - I don't recommend that because I think it puts undue pressure on the children ... "go on, tell her Billy .. tell her you want to live with me" - but I think that's to be discouraged' (Piper, 1997, p.799).

A twist on this argument is that ascertaining views and then not acting upon them may be even more damaging to the child than exclusion entirely from the decision-making process. Mrs Justice Booth points to a further pitfall: `But a child may also impart some new information to a judge which that judge is bound to pass on to the other parties ... To the child that may well seem a nasty breach of confidence ...' (1993, p.652).

As the previous chapter and earlier sections of this chapter reveal, it was a concern for the child's welfare, not rights, which led to the inclusion of the child's wishes and feelings in checklists tied to the welfare paramountcy principle in both the Children Act and the Family Law Act. This welfare context for ascertaining views, together with a dominant construction of the risk of harm to the child of divorce (see Kaganas in this volume), has created the need for a decision as to whether the child is sufficiently mature (and the family situation is one appropriate for an expression of the child's views) that he or she will be 'empowered' and not burdened by expressing views. As we have seen, solicitors, judges and many court welfare officers avoid having to make this distinction.

Parental Responsibility

The Law Commission's recommendation that the duty to consider the child's wishes should be restricted to contested court hearings was in line with the growing political importance of a concept of parental responsibility. The parental 'right' to make decisions is now very strongly supported by norms upholding the 'rightness' of the exercise of parental responsibility and incorporating the idea that the exercise of parental responsibility is, of itself, beneficial for children. There is a consensus that the exercise of parental responsibility and, in particular, its exercise in the pursuit of 'joint' decision-making, is a major, if not the main, factor in promoting the welfare of the child. An early formulation of what was then a new idea is to be found in the following statement by two probation officers:

> Our philosophy is quite simple: we believe that the basis of a child's best interest lies in an agreement between the parents regarding the arrangements for their child. ... This philosophy entails fundamental shifts in practice: it involves ... a shift from the welfare officer deciding between who or what is best towards parental agreement (Howard and Shepherd, 1982, p.87).

This shift has been achieved: 'The best interests of the children are served by getting the parents to agree. It's as simple as that' (court welfare officer quoted in James, 1995, p.266). There is, in effect, a 'presumed logical sequence in the [Children] Act which places parental responsibility first' and only where there are disputes 'the hitherto unassailable notion of parental responsibilities is progressively eroded by the best interests of the child, perhaps directly articulated by the child as his or her "ascertainable wishes"' (Simpson, 1991, pp.392-393).

This particular normative construction of parental responsibility has gained strength from the dominant message about the harm caused by divorce. There is almost a presumption that children *will* be harmed by divorce. A recently published poem by a mediator about 'lonely, frightened, tearful' children makes the parents' potential culpability very clear:

> And in this the children suffer,
> Lose foundations, world in tatters,
> Fearful, lost with loveless future,
> These the victims, little children. ...

> Have we something better for them?
> Can we give them hope and future
> Talking with their warring parents? ...
> But in the end it's their decision:
> - Nurse their hurt, or love their children.
> (Mottashed, 1998).[31]

What this piece also makes clear is that, in the dominant story about children and divorce, the extent of the potential harm depends on whether their parents manage the divorce 'properly'. 'All hope is not lost. Many researchers believe that in some cases children have emerged self-reliant, compassionate, and courageous if parents handle the divorce responsibly' (Bias, 1996, p.113). Parents must act firmly, together, and in agreement and this must not be jeopardised by 'interference' from the views of their children.

What this means in professional practice is indicated by a case described by two court welfare officers. They refused to see a child separately to ascertain his wishes and feelings but talked to him only in front of his parents who they therefore felt were forced to accept responsibility and make a decision themselves (Cantwell and Scott, 1995; see also Piper, 1998). In effect the court welfare officers constructed the family meeting - where the child was present but not asked directly about wishes and feelings - as a site of expression of views. In professional practice, therefore, the expression and consideration of the child's views are sidestepped because the welfare context for ascertaining the child's wishes is taken to justify its subordination to the rights and wishes of parents.

Mediators May Consult the Children

The 'old' divorce professionals, whose practice has so far been described, often do not ascertain and consider the child's wishes: the expectation - evidenced in professional documents and parliamentary debates - is that the mediator, the `new' divorce professional, will do so. This belief has hastened the development of techniques and processes through which to consider children's views in mediation (NFM, 1994) and a theoretical solution has been found to the 'conceptual impasse' caused by the need to admit the voice of the child into a parent-centred process (Fisher, 1996, p.14). The solution is consultation[32] (Roberts, 1997, pp.141-142), either directly within mediation or indirectly by mediators helping parents with ways to listen to their children. Not all

mediators wish to use direct consultation - '*On occasions* it may also be appropriate for children to attend in order to voice their feelings on possible future plans which will affect their lives' [emphasis added] [33] so techniques to encourage two-way communication between parents and children are also under development, drawing on practices used by professionals in child care and child health (NSPCC, 1997)."

However, mediators work within the same discursive constraints as the 'old' divorce professionals: parental responsibility and particular notions about the risks of talking to children 'inappropriately' again provide barriers to asking children what they think. Despite the optimism of some of our legislators, listening to children and allowing them to influence outcome will not automatically occur in the new divorce process. As Roberts summarises the NFM (1994) research findings:

> All mediator respondents, despite strong differences of approach, were agreed that the decision-makers were the adults, not the mediator nor the children, and then an approach of caution in relation to children was appropriate (Roberts, 1997, p.145).

Conclusions

This chapter, and that by Roche in this volume, explore the two theoretical contexts for the idea of ascertaining and considering the child's wishes - that of rights and that of welfare/best interests. In most of the UK children's views are heard firmly within a welfare discourse. The Children Act 1989 and the Family Law Act 1996 provide a legal framework which means that views are ascertained as part of process **in** which adults decide what is best for the child and, within the context of divorce, try to protect the child from a particular set of perceived risks of harm. Those risks, predicated on the influential image of the child as vulnerable victim of divorce, whose present happiness and future stability is seen to depend on harmonious joint parenting, can be reduced or removed only by the encouragement of parental decision-making and control.

It is not, therefore, surprising that the messages surrounding the issue of ascertaining and considering the wishes and the feelings of children in relation to arrangements being made for them by adults are confusing ones. At one level, as evidenced by the speeches of politicians, by professional guidance, by the signing of Conventions and by the proliferation of books and courses,

there is apparent adherence to a conceptual framework of children's rights. At the level of talk about divorce however, the views of the child have been placed firmly within a child-saving agenda which itself has sometimes been used to pursue marriage and money saving agendas. The impression has been given that children and their wishes are a top priority in divorce and indeed Mr Llwyd, the MP who was a promoter in committee of the amendment which eventually became section 11, wanted that to be so: 'It is therefore vital that children's voices are heard loudly - not in a peripheral manner or as an afterthought, but central to the process' (Hansard HC col 586, 17 June 1996). The problem is that the current political, moral and professional ideologies make that very difficult. This undercurrent of non-engagement with the children of divorce whilst the rhetoric suggests something different, must be brought to the surface before there can be any real hope that more than a very small minority of children feel they have been heard.

Notes

1. For example, the Local Authority must give due consideration to the child's views in decisions about the child being 'looked after' by the Authority (ss 20, 22 and 26) as must voluntary organisations and children's homes under sections 61 and 64; police constables have 'to discover' the views of the child who has been taken into police protection under section 46(3)(d). Similar provisions are to be found in the Children (Northern Ireland) Order 1995 in, *inter alia,* articles 21, 26-28 and 45.
2. The comparable provision for Northern Ireland is in Art 3(3) of the Children (Northern Ireland) Order 1995. The Child Care Act 1991 imposes a similar duty on the courts (section 24) and health boards (section 3.2(b)) in the Republic of Ireland.
3. Now Adoption Act 1976 s6.
4. See Scottish Law Commission, 1992, p.53.
5. For a discussion of the operation of this provision see Sachs, 1993.
6. In the Republic of Ireland there is no statutory welfare checklist but there is a general duty on the courts to apply the paramountcy principle and 'to give due consideration' to the child's wishes (Child Care Act 1991 section 24).
7. Hansard, HL Vol 576 No 29, Col 1091, 11 December 1996 in a debate on a motion 'to call attention to the role of the family' moved by Lord Northbourne.
8. See Roche in this volume.
9. See Simpson (1991) for a discussion of the findings of research which was based on interviewing children of divorced parents about their feelings of distress, anger etc. Whether the publicised findings are an accurate reflection of the generality of research in this area, however, is debatable in relation to the 'powerlessness' of the child. McLoughlin and Whitfield used an interview sample from which it might not be

possible to generalise but, in that sample, 67% of the adolescents said that they had been kept informed of what was going on and 81% believed their views had been given sufficient consideration (1984, p.164). The debate on the detrimental effects of divorce on children also has not always reflected the generality of research findings (Piper, 1994).

10. See Read and Marsh (1996) for a discussion of voting patterns in the passage of the Family Law Bill.
11. The measure included no duty to seek out the views of the child but, as Eekelaar (1994, p.60, n51) points out, Article 12 of the United Nations Convention on the Rights of the Child, does not impose such a duty.
12. Subsections 1 and 2 of section 11 reproduce the effect of provisions in the amended section 41 of the 1973 legislation: it is subsections 3 and 4 which are new.
13. The new power is in section 11(2) which lists the situations when the court 'may direct that the divorce order or separation is not to be made until the court order otherwise'.
14. This interpretation is based on the fact that section 11(3) states: 'In deciding whether the circumstances are as mentioned in subsection 2(a), the court shall treat the welfare of the child as paramount', and section 11(4) states, 'In making that decision, the court shall have particular regard' to the checklist. Subsection (2)(a) says 'the circumstances of the case require [the court] or are likely to require it to exercise any of its powers under the Children Act 1989 with respect to any such child' but that section **(11(2))** deals with the decision to delay the making of a separation or divorce order. It is section 1(1) which deals with the decision simply to exercise Children Act 1989 powers or not.
15. Section 11(1) states that 'In any proceedings for a divorce ... the court shall consider ... whether ... it should exercise any of its powers under the Children Act 1989'.
16. The section 8 order would not be the result of a contested application, and a direction under 37 (for the local authority to investigate the child's circumstances) is not an order under part **IV** (see Children Act 1998 section 1(4)). Whilst the sl(3) checklist does not strictly apply, the Lord Chancellor assumed it would in relation to residence and contact (see Bird and Cretney, 1996, p.82).
17. *Re B (Change of Surname)* [1996] 1 FLR 791. Conversely, it is not clear that all parts of the checklist are given specific consideration (in disputed applications) in the light of a further Court of Appeal statement in *B v B (Residence Order, Reasons for Decision)* where it appeared to be necessary to affirm that, 'It is certainly not a good reason for not carefully considering all the matters in the checklist, simply that neither party makes "complaints" against the other' ([1997] 2 FLR 602 at 608).
18. Unlike the Law Commission (1988) the Scottish Law Commission found majority support from their consultees for such a duty to be placed on parents (1992, paras 2.64 and 2.65).
19. Using the power in section 7 of the Children Act: See Rule 13 of the Family Proceedings Court (Children Act 1989) Rules 1991.
20. A similar view of Swedish practice is given by Saldeen: Tor example there have been instances where the [court welfare] investigator has only met the child once or not met the child at all' (1996, pp.447-448)).

21. The two teams researched who were working within a systemic family therapy framework aimed to shield the child from the burden of decision-making and encourage instead parental decision-making, believing in any case that children could not convey their 'real wishes' because of the context of inter-parental hostility. The remaining two teams believed, by contrast that it was 'vital' to see the child separately to ascertain her needs and to 'allow the child to let off steam' (p.298). Both approaches were, therefore, working within a welfare context.
22. In the small minority of cases where a guardian *ad litem* is allocated their role is now governed by Standard 5 of the *National Standards for the Guardian ad Litem and Reporting Officer Service* (1995, Department of Health/Welsh Office) which states that the *Guardian* must 'make explicit efforts' to ascertain the child's wishes' (para 5.6).
23. Those applying for Legal Aid for representation and found to be suitable for mediation must then decide, with the mediator's 'help', 'whether instead to apply for mediation' (section 29).
24. See Piper (1996b) for a review of research on divorce solicitors generally. See also Neale and Smart in this volume and research by Sawyer (1995, 1997). Research currently underway and not fully reported includes that by Sara Mclean for the Legal Aid Board and that by Bristol University in relation to section 8 applications, funded by the Nuffield Foundation (see Bailey-Harris *et al*, 1998).
25. This research is reported in Piper (1997).
26. See Kaganas and Piper in Chapter 9 of this volume for details of the sample and methodology.
27. 'Parenting plans' are currently being piloted by the Lord Chancellor's Department. These entail more detailed information from parents.
28. From 11 solicitors working in franchised firms and 5 in non-franchised.
29. As Fox Harding expresses it: 'The ambivalence in child liberationist writing about whether the enlargement of children's rights should, or could, be accompanied by a commensurate increase in their responsibilities has also created an unfortunate space in which it is possible for children to have inappropriate responsibility for themselves thrust upon them by default' (1996, p.148).
30. See also the Scottish Law Commission (1992, para 5.27).
31. Bill Mottashed is a mediator with the Somerset Mediation Service.
32. See Best (1995) for a discussion of training modules.
33. From an information leaflet distributed by a team of mediators trained by the Family Mediators Association, whose front page 'title' - 'A sensible approach ...' - is indicative of the way that mediation is being portrayed and promoted.
34. The techniques used to focus on and consult with children may put more psychological pressure on one parent than the other with a consequent effect on power differentials within mediation (Piper, 1993, pp.191-201).

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