

Hearing children in family law proceedings

By Michelle Fernando



This article critiques the methods by which courts commonly hear children's views in family law disputes, and advocates the more direct approach of meetings between judges and children in the presence of a family consultant. Such meetings can give judges a better understanding of the needs and interests of individual children and give children an appropriate voice in decisions that affect them.



A Family Court judge told me in 2009:

'Children's proceedings are unlike any other civil litigation in this land. I mean, where else do you have the principal party, about whom the action is and the orders will affect, who doesn't have an audience?' This statement rings true. Children

involved in family law disputes are almost never given an opportunity to directly communicate their views or feelings about their future care arrangements to the court.

In making parenting orders for children following family separation, the Family Law courts must hold the 'best interests of the child' as

the 'paramount consideration'.¹ In determining what is in a child's best interests, the court must consider, *inter alia*, 'any views expressed by the child'.² However, children's views are generally communicated to the court by third parties who report their interpretation of those views. Article 12 of the *United Nations Convention on*

the Rights of the Child gives children a right to express their views and to be given the opportunity to be heard in proceedings affecting them. This right is not replicated in the *Family Law Act*. Children have consistently reported that they are unhappy with their level of participation in decision-making following family separation and want to have a greater 'say'.³

The two main methods employed by the Family Law courts to hear children's views are via a report from an expert, and evidence led by an independent children's lawyer. It is also common for the court to hear evidence of children's views through the accounts of parents and other witnesses who report what the child has said to them. A statutory exception to the rule against hearsay,⁴ such evidence is usually approached with caution because it lacks reliability and probative value.⁵ Children can be joined as a party to proceedings or appear as witnesses, but this is very rare and not well regarded due to a general belief that involving them so closely in adversarial proceedings between their parents is detrimental to children.⁶

THE EXPERT REPORT

In many cases a court will request a psychologist or social worker with expertise in children's welfare, called a family consultant, to prepare a report. The consultant will meet with the child and each parent and observe the child's interactions. The report will contain the views of the child and the consultant's recommendations for the care arrangements they believe will be in the child's best interests. Due to the report writers' expertise, reports are highly regarded and the final decisions of the courts are generally consistent with the report writers' recommendations.⁷

Expert reports allow children's views to be articulated by a professional who is sensitive to how the presentation of those views may affect parent-child dynamics.⁸ However, the filtering of children's views through a third party in this manner might mean that the children's views are heard only with qualifications and caveats.⁹ Children

are not routinely shown a copy of the report and might not be aware of how their views were presented or have the opportunity to object.

Children have expressed dissatisfaction with expert reports, commenting that they are not happy with the techniques employed by report writers, the lack of confidentiality and privacy, the feeling that their views were not properly understood or taken seriously, and the filtering and reinterpretation by the report writer of what they had said.¹⁰

Given the demonstrated value of expert reports to the outcome of decisions, it is important that this continues to be a standard method of presenting evidence of children's views. However, it is clear that children are not satisfied that this method adequately ensures their views have been heard and additional means of hearing from children should be considered.

THE INDEPENDENT CHILDREN'S LAWYER

In some cases the court will appoint an independent children's lawyer (ICL) who acts in accordance with what they consider to be the child's best interests. An ICL is usually appointed in more complex cases, such as those featuring allegations of child abuse or where the parents are in serious conflict.¹¹

An ICL is not the child's legal representative and is not obliged to act on any instructions given by the child.¹² It is part of the ICL's role to ensure that any views expressed by the child are put before the court¹³ but this is often satisfied by ensuring that the child has spoken with a family consultant who has included the child's views in a report.

Because the ICL is a 'best interests' advocate and not the child's legal representative, if the child's views do not accord with what the ICL believes is in the child's best interests, the ICL must advocate against the child's views. This contradicts the understanding of many children, who expect that 'their lawyer' will represent their views,¹⁴ and children have expressed disappointment and frustration with their failure to do so.¹⁵ ICLs can play a

Children do not routinely see expert reports and might not be aware of how their views were presented or have the opportunity to object.

valuable role in assuring children that their views are important in the court's deliberations. They can explain ways in which children can express their views or give feedback to children about the outcome of the hearing and how their views were taken into account. However, recent research has shown that there are significant differences in individual approaches to the role,¹⁶ including whether or not ICLs meet with children, their interviewing style in ascertaining children's views, how much they explain to children about their role, and whether they inform the child of the position they intend to take in the proceedings, especially when this conflicts with the child's views.

JUDICIAL MEETINGS WITH CHILDREN

One way in which judges can ensure that children's views are heard and that children are given a direct voice is to meet with children directly. While this is within the discretion of the court, the practice is extremely rare and there are only a handful of cases where it is recorded that a judge met with a child. When judicial meetings with children have occurred, they have most often taken place in a closed court or in the judge's chambers and in the presence of a family consultant who reports back to the parties on what occurred.¹⁷

In 2010, I surveyed all family law judicial officers in Australia about their experiences and views of meeting >>

Many children have expressed a particular desire to speak directly with the judge who is to make decisions for their parenting arrangements after family separation.

with children. Of the 92 judicial officers hearing children's matters at that time, 44 responded, constituting a response rate of nearly 50 per cent. The results confirmed that meetings between judges and children are very rare, with 86.4 per cent of respondents indicating they had never met with a child for the purpose of hearing their views. Of the six respondents who had met with children in the past, most had done so only once or twice. This differs markedly from the New Zealand experience, where 65 per cent of judges who responded to a 2009 survey said that they often, very often or always meet with a child who is the subject of a parenting dispute.¹⁸

Many children have expressed a particular desire to speak directly with the judge who is to make decisions for their parenting arrangements after family separation.¹⁹ In a study by Parkinson, Cashmore and Single, the authors interviewed 35 children who had been the subject of parenting matters in Australia. Eighty-five per cent of the children interviewed said that children should have the opportunity to talk to the judge if they wished to do so.²⁰ The main reasons children gave for wanting to speak directly with judges was that they wanted to have a say in decisions and have their views heard by the decision-maker. They wanted to have themselves and their views

acknowledged and thought that this would result in better decisions being made. Interestingly, only a minority assumed that by talking to a judge, a decision would automatically be made that accorded with their views. Most expressed a fair level of trust and hope that the judge would do what he or she thought was best and right for the child.

Judges, too, have expressed the view that there are benefits in hearing direct evidence of children's views without filtering by third parties. Many judges see meeting with a child as an important recognition of the child's right to be heard.²¹ Having the opportunity to see and interact with a child may better equip judges to focus on the individual child's needs²² and make a decision that promotes the child's best interests.

This was demonstrated in a case recounted in an article by Justice Benjamin of the Family Court. A group of about five children aged between eight and 16 had parents who had been involved in litigation for about eight years. His Honour was very concerned about the current living arrangements which had the elder children travelling to school every day by catching two buses and walking several kilometres. While he was very concerned about this arrangement, his Honour decided to meet with the children before making any changes to their living and transport arrangements. His Honour recounted his interaction with the 14-year-old child:

[The child said:] Mate, you aren't thinking of changing how I get to school?

I replied: The thought had crossed my mind. Why? What do you think? The child said: That's the best part of my day, that's when I have got my friends, I do my homework and it is really good, plus I carry a bit of weight and [pointing at my stomach] you know what I mean.

From my perspective, I thought this transport arrangement had been a burden for the children, but for the children it was actually a very good part of their day. By taking this evidence, the court had a better

understanding of the impact of an order which I had considered would have on the children and as a result I did not change the transport arrangements.²³

Of the 44 judges who responded to my survey, nearly half agreed that meeting with children could provide judges with useful evidence of children's views. Significantly, nearly 40 per cent agreed that meeting with children could give judges a better understanding of children's needs and best interests than the other methods of hearing children's views.²⁴

Despite judges acknowledging the potential benefits of hearing from children directly, the fact that judicial meetings with children do not occur more frequently indicates that they have concerns about the practice. My survey results indicated that the majority of judges believe that judicial officers lack the skills and/or training to speak with children and interpret their views. This is the case even where a family consultant is present throughout to assist with the meeting and with speaking with the child.²⁵ This result is consistent with the view generally accepted in Australia that judges lack the expertise to speak with children²⁶ or to draw out and interpret their views.²⁷ Furthermore, a vast majority of respondents to my survey (84.1 per cent) expressed concern that judicial meetings may encourage parents to manipulate or pressure their children.²⁸

Literature in this area often raises two further issues with which my survey respondents were not overly concerned: how to ensure due process, and what do to with 'confidential' disclosures from children. A judicial meeting that takes place in the absence of the parties means that a judge will hear and possibly give weight to evidence that is unseen and untested by the litigants. However, the majority of survey respondents were satisfied that a model whereby a family consultant is present and reports back to the parties on what happened satisfies the principles of due process and natural justice. Most also said that they would be able to deal, on a case-by-case basis, with a situation where

a child makes a disclosure and then requests it be kept 'confidential' (in the sense that it not be disclosed to their parents). Individual approaches varied depending on whether the information disclosed affected the final decision and whether it concerned an allegation of child abuse.²⁹

Lingering concerns held by judges could be addressed by some initiatives that I have previously proposed,³⁰ including:

- offering opportunities for judges to have further education in children's development and how to speak with children;
- the promulgation of guidelines for judges in how and when to meet with children; and
- relying on the expert assistance of the family consultant to ensure that the child feels comfortable with the process, to offer opinion on whether the child's views are genuinely held, and to communicate an accurate report of the meeting to the parties to the litigation.

CONCLUSION

As the Chief Justice of the Family Court acknowledged:

'It is apparent... that the Court does take children's views into account. However, available research tends to suggest that this is not well understood by children and young people.'³¹

Children have a right enshrined in the *United Nations Convention on the Rights of the Child* to participate in judicial and administrative proceedings. This right needs greater acknowledgement in our family law processes; it could be as simple as a judge listening to what a child has to say. This would ensure that the child's voice is heard and, importantly, that the child is aware that their voice is heard. ■

Notes: **1** *Family Law Act 1975* (Cth) s60CA. **2** *Ibid*, s60CC(3)(a). **3** Australian Law Reform Commission and Human Rights and Equal Opportunity Commission ('ALRC and HREOC'), *Seen and Heard: Priority for Children in the Legal Process* (Report No. 84, 1997), [13.55]; Dale Bagshaw and others, 'The Effect of Family Violence on Post-Separation Parenting Arrangements: the Experiences and Views of Children and Adults from Families Who Separated

Post-1995 and Post-2006', (2011) 86 *Family Matters* 49. **4** *Family Law Act 1975* (Cth) s69ZV. **5** *Reynolds v Reynolds* (1973) 47 ALJR 499, 502 (Mason J). **6** Diana Bryant, 'The Role of the Family Court in Promoting Child-Centred Practice' (2006) 20 *Australian Journal of Family Law* 127, 135. **7** ALRC and HREOC, above n3, [16.36]. **8** Patrick Parkinson and Judy Cashmore, *The Voice of A Child in Family Law Disputes* (Oxford University Press, New York, 2008) at 61. **9** *Ibid*. **10** Judy Cashmore, 'Children's Participation in Family Law Matters' in C Hallet and A Prout (eds) *Hearing the Voices of Children: Social Policy for A New Century* (Routledge Falmer, London, 2003) 158 at 164; Patsy Henderson, 'To Heed the Child's Voice', (2000) NZLJ 267, 268; Parkinson and Cashmore, above n8, 149. **11** *Re K* (1994) FLC 92-461, 80, 774. **12** *Family Law Act 1975* (Cth) s68LA(4). **13** *Ibid*, s68LA(5)(b). **14** ALRC and HREOC, above n3, [13.57]; Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law* (Commonwealth of Australia, August 2004), [1.53]. **15** ALRC and HREOC, above n3, [13.57]. **16** Nicola Ross, 'Independent Children's Lawyers: Relational Approaches to Children's Representation' (2012) 26 *Australian Journal of Family Law* 214, 223-31. **17** See, for example, *Painter v Morley* [2007] FamCA 283 (Unreported, Benjamin J, 29 March 2007); *A v D* [2004] FamCA 879 (Unreported, Guest J, 26 August 2004); *Lachlan v Lachlan* [2008] FamCA 455 (Unreported, Le Poer Trench J, 25 June 2008). **18** John Caldwell, 'Common Law Judges and Judicial Interviewing' (2011) 23 *Child and Family Law Quarterly* 41, 57. **19** Cashmore, above n10, 167. **20** Patrick Parkinson, Judy Cashmore and Judi Single, 'Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia' (2007) 21 *International Journal of Law, Policy and the Family* 84, 89. **21** See, for example, *N and N* (2000) FLC 93-059 (Mullane J). **22** Judge Peter Boshier,

'The *Care of Children Act 2004*: Does it Enhance Children's Participation and Protection Rights?' (2005) 9(2) *Children's Issues* 7; Joan Kelly, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice', (2002) 10 *Virginia Journal of Social Policy and the Law* 129, 153. **23** Justice Robert Benjamin, 'Judges Receiving Evidence Directly from Children' (2012) 2 *Family Law Review* 99, 101. **24** Michelle Fernando, 'What Do Australian Family Law Judges Think About Meeting with Children?' (2012) 26 *Australian Journal of Family Law* 51, 60-1. **25** *Ibid*, 65. **26** Richard Chisholm, 'Children's Participation in Family Court Litigation', (1999) 13 *Australian Journal of Family Law* 197, 203. **27** Cashmore, above n10, 167. **28** Fernando, above n24, 67. **29** See further Fernando, above n24, 68-73. **30** Fernando, above n24. See also Michelle Fernando, 'Proposed Guidelines for Judges Meeting with Children in Family Law Proceedings' 2 *Family Law Review* 213 and Michelle Fernando, 'Conversations between Judges and Children: An Argument in Favour of Judicial Conferences in Contested Children's Matters', (2009) 23 *Australian Journal of Family Law* 48. **31** Bryant, above n6, 137.

Dr Michelle Fernando is a Senior Lecturer at the School of Law, University of South Australia. Her research into children's participation in Australian family law has been published in national and international journals including *Australian Journal of Family Law*, *Family Court Review*, *New Zealand Law Review* and *University of New South Wales Law Journal*.

EMAIL michelle.fernando@unisa.edu.au.

ASSOCIATE PROFESSOR GEOFFREY M BOYCE, NEUROLOGIST DETAILED FILE REVIEW SERVICE

Dr Geoffrey Boyce specialises in large and difficult brain, spinal cord and peripheral nerve issues. His clients have included government departments, large hospitals and health departments and he acts for both plaintiff and defendant law firms.

Dr Boyce offers a comprehensive, independent clinical opinion in relation to complex medical negligence matters and clinical cases. He has served on seven different government tribunals and is currently a member of the Australian Institute of Judicial Administration. He can offer solutions in many difficult cases and a file compilation service for medical records that is logical, sequential and indexed.

Contact: admin@nrneurologist.com.au