

Are we nearly there yet?

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Lady Hale, Deputy President of the Supreme Court

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No-one who has ever gone on a car journey with a child can have failed to hear the often repeated question – are we nearly there yet? My husband tells me that his invariable answer was ‘only another five hours’. Was that an act of cruelty or kindness? Lying to a child or admitting either that the child had no right to know the answer or that the adult also didn’t know? Of course his children knew that it was a game, a game in which both adults and children knew that the journey would take longer than any of them wanted it to take and that its precise duration was always a matter of guess work. The same has traditionally been true of care proceedings. Is it any different in the brave new world of 26 week deadlines?

You will know the answer to that far better than I. I feel a real fraud coming to address an audience of family lawyers. It is over 16 years since I looked down from the bench in court 45 at the Royal Courts of Justice and told a mother that her children would be taken away from her for good. It is 12 years since I last addressed the Association of Lawyers for Children. Most of my time since then has been spent on things other than family law, so you must forgive me if I am way out of touch with what really goes on. Part of my reason for being here is to find out more. But 12 years ago my theme was whether children should be seen but not heard. My conclusion was that they should indeed be heard and more often than they were then. So my theme today is to go back to that talk and see how much has changed over the past 12 years.

So let's start with all the reasons I gave then why children's voices should be heard in cases affecting their futures. These came from Dr David Jones, in a paper for the President's Interdisciplinary Conference that September.

First, children want to communicate. If the lines of communication are not opened up for them at difficult times, then sooner or later they will wish they could have had their say, and that someone had asked them to do so earlier.

Second, children have a right to know what is going on around them and to understand important matters about themselves.

Third, children need protection from present or likely harm, so they need to be able to tell people about this, and people need to be able to pick up on the signs and ask them about it.

Lastly, children need protection from the harm which may come to them in future if they are kept in ignorance of or are unable to talk about important matters in their lives.

Not all of those four reasons are directed at courts as opposed to child care professionals but the second and third undoubtedly are relevant to what courts have to do to protect children from harm. Courts cannot just think of children as the object of the proceedings. They have to think of children both as witnesses to the facts and as participants in the decision-making process about their own futures.

When I was in the Family Division we were very reluctant to involve children in the proceedings in either capacity. We knew, of course, that the Children Act had introduced an express requirement to take into account 'the ascertainable wishes and feelings of the child, considered in the light of his age and understanding' when deciding what was best for him. There was,

however, some scepticism about the value of children's views. As Jane Fortin and others have put it, 'There is an obvious temptation to discount the views of relatively young children – on the basis that they are too young to have any real opinions, that any views they express are not informed by any real insight into their situation, or that their ideas are shaped by those with whom they spend most of their time' (*Taking a longer view of contact*, 2012, p 246). For a long time there was certainly a tendency to discount the views of children involved in child abduction cases, on the ground that they were almost bound to side with the abducting parent. But the findings of Fortin's study of separated children when they grew up gave no support to the suggestion that their views when children were unduly influenced by the views of the parent with whom they were living. Some of them even thought you were likely to get more sense from a younger than an older child:

'When it gets to over 13 they'll come up with silly ideas I think to suit them, to play, to get out of it as much as they can, but the younger ones come out with more sense, the younger ones are cleverer than you think and they're the ones that have got the most sensible ideas.' (p 252)

Most of them could draw a distinction between listening to a child – a good thing - and letting the child decide – not such a good thing.

This is reflected in article 12 of the UN Convention on the Rights of the Child:

'1. States parties shall assure to the child who is capable of forming his or her own views [have you ever met a child who is not capable of forming his or her own views?] the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’

The procedural rules in England and Wales left it to professionals to communicate with the child and pass on that communication to the court. In private law proceedings, it was done through Cafcass reporting officers and in care proceedings it was done through the children’s guardian with the help of the child’s lawyer.

We did not even like having the child in court. Presumably we still don’t, as the current Rule 12.14(3) of the Family Procedure Rules is if anything in even stronger terms than the equivalent rule in the old Family Proceedings Rules:

‘Proceedings or any part of them *will* take place in the absence of a child who is a party to the proceedings if (a) the court considers it in the interests of the child, having regard to the matters to be discussed or the evidence likely to be given, and (b) the child is represented by a child’s guardian or solicitor.’

Certainly in my day there were many who shared the views of Mr Justice Waite, as he then was, in Re C (A Minor) (Care: Child’s wishes) [1993] 1 FLR 832, about the presence of a 13 -year-old girl in care proceedings in the Magistrates' Court, and then on appeal to him. He remarked that

‘[she] is young for her 13 years and for most of [the] hearing.....she seemed preoccupied, and who can blame her, with her toys and colouring books.’

And why not? My husband, who has occasionally sat in the public benches in the Supreme Court, reports that some of those junior lawyers, sitting behind counsel and apparently industriously typing notes, are in fact playing solitaire or doing their emails. The Guardian had wanted her to be there, and at the end of the hearing the judge asked the Guardian whether it had been a good idea for the child to be there. The Guardian said yes, that it had been a good idea for the child to be there. She may not have taken in much of what was going on, but at least she felt she knew that decisions were being made about her when she was there.

The judge thought otherwise:

‘Most of the children concerned in care proceedings have only become involved in the first place because of some past or anticipated experience which threatens the stability and lightness of heart which could be called the natural birth-right of every child. I would have thought myself, that to sit for hours, or it may even be days, listening to lawyers debating one's future is not an experience that should in normal circumstances be wished upon any child as young as this.’

It seemed to me then, as it seems to me now, that this assumption that even a 13 -year-old, who wants to be there, and whose Guardian thinks should be there, should not be in court was a backward step. I am old enough to remember care proceedings under the Children and Young Persons Act 1969. The child had physically to be brought before the court, unless he or she was five or under. Children of course are present at children's hearings in Scotland. We know from cases in the European Court of Human Rights that it is standard practice for them to be present at least some of the time in children's cases in Germany. If all these courts can cope, why can't we?

We were also very reluctant to see children in private. When I was a Family Division judge, we were mostly accommodated in a rather grim, dour building called the Queen's Building in the Royal Courts of Justice. A more unsuitable place for hearing family cases it is hard to imagine. The court rooms are large. The bench is half way up the wall. The wood is dark and gloomy. But the great thing about it from the judges' point of view was that our private rooms were just behind the courtroom that we normally sat in, unlike most other courts in the Royal Courts of Justice, where you have to walk miles to get from your room to the court. The reason for this, I was told by a senior Family Division judge, was that in wardship proceedings the judge had to be close to the courtroom so that he could see the child in his room. So the assumption in the olden days was that this was the right thing to do.

But by and large the assumption in my time was that it was not the right thing to do. Before the Children Act, magistrates were told that they had no power to see the children in private in private law proceedings (Re T (an Infant) (1974) 4 Fam Law 48, *The Times*, 16 January). After the Children Act, in Re M (A Minor) (Justices' Discretion) [1993] 2 FLR 706, Mrs Justice Booth observed that the substantive law had changed, because the court was now obliged to consider the child's wishes and feelings, but she

'had come to the clear conclusion that where a Guardian-ad-litem is appointed to act on behalf of a child, or where a Welfare Officer is requested to supply a report to the court in the course of which she would ascertain the wishes of the child, it should not be necessary, and is not in general desirable, for justices to see the child. Any questions they may have as to the child's strength of feeling, or as to the reasons which he has for the wishes he expresses, should properly be put by the court, or by representatives of the parties, or the parties themselves, to the Guardian-ad-litem, or the Welfare Officer concerned. That procedure enables evidence to be given into court as to what may be a

very important factor indeed, that is the wishes of the child, and as to which there may be substantial issues. In my judgment, it should only be in rare and exceptional cases where a Guardian-ad-litem or Welfare Officer is so involved, that the justices should themselves see a child in private’.

Those were the words of a very wise judge. But if magistrates cannot see a child in private, it is harder to justify judges seeing children in private. Why should there be any distinction? So my impression is that, whatever the practice had been in days gone by, it happened less and less.

There were other reasons for this. In *Mabon v Mabon* [2005] EWCA Civ 634, [2005] 2 FLR 1011, Lord Justice Wall explained that the reluctance of the English judge to talk to children in private was in part rooted in the rules of evidence and the adversarial mode of trial. If we see the child in private, we cannot give her a guarantee of confidentiality. We have to explain that if we hear anything which might influence our decision, we shall have to tell the parties, so that they can have a proper opportunity of dealing with it, by evidence or argument.

But it seems to me that these problems apply just as much to professionals’ seeing the child in private as they do to the court doing so. The only person who can give the child a guarantee of confidentiality is her own lawyer. The other professionals cannot give the child that guarantee any more than the court can. Skill is needed both in eliciting the child’s views and in interpreting them. Care is needed in preserving the rules of natural justice while enabling the child to speak freely. We cannot deny the existence of these problems by delegating the task to professionals whose direct work with children we never see. Parents do complain that the reporter or guardian has not accurately reported what the child has said. Too often, it is said, he has put his own interpretation or spin upon it. Yet counsel know that they face an uphill struggle and a hostile court if they try to cross-examine the reporter or guardian along these lines. When the Official

Solicitor used to represent children before the High Court, his case workers, despite or perhaps because of their not being trained social workers, used to give an almost verbatim account of what the child had actually said.

But another problem with judges seeing children is that some judges may simply not be suited to direct communication with children. They may have little experience of it, even about ordinary matters such as ‘what would you like for tea?’ But without that necessary bridge, it can be very difficult to communicate with a child about more difficult things. Those judges who do feel able to do this may be even more dangerous. They may fail to see the pitfalls that a professional would see. They may not understand the ways in which children are different from as well as the same as adults. They may not realise how terrifying they can be. They also need to understand the ways in which adverse life experiences may have affected the child’s own communication skills. If you come from a family where you are not allowed to speak out, particularly to criticise your parents’ actions or decisions, you will have difficulty voicing your feelings to anyone, let alone a judge. If you have been abused in any way, you will have negative feelings about yourself, which will affect your self-esteem and confidence in your right to have a view. On the other hand, if you have been given too much power in the family, it may be harmful for outsiders to reinforce that power.

So there were all these respectable reasons to be cautious about having children in court or judges seeing children in private. In my day, the idea that children might be live witnesses in these cases was almost unheard of. The Children Act had dispelled any doubts about the admissibility of hearsay evidence in non-wardship proceedings. The videoed interviews could be admitted. It was the closest most of us got to seeing the child in person (apart from the photos which many parents used to bring).

But then the reluctance began to be questioned. One reason was increasing awareness of the UNCRC and the concept of children's rights generally. Another, more powerful, reason was the Human Rights Act. In two cases from Germany, a chamber of the European Court of Human Rights decided that there had not been sufficient procedural protection for the father's right to respect for his family life with his child when he had been denied contact. In one case the court had not interviewed the 5 year old child personally (because the psychologist had counselled against this) and in the other the court had relied upon the strongly expressed views of a 13 year old child without getting an up to date psychological report (interesting that the complaint was of insufficient protection for the *fathers'* rights rather than the children's, but of course the children's right to family life with their fathers was also at stake). The cases went up to the Grand Chamber, which held that 'it would be going too far' to say that the national court was always obliged to hear directly from the child or to have an up to date psychological report (*Sabin v Germany* [2003] 2 FLR 671; *Sommerfeld v Germany* [2003] 2 FCR 619). But the expectation clearly was that both would be the normal practice.

These cases did lead our senior judiciary to think that there might be policy issues for the government and judiciary to consider here. *In Re T (Contact: Alienation: Permission to Appeal)* [2003] 1 FLR 531; [2003] 1 FCR 303, Lord Justice Thorpe asked whether judges should see children to ascertain their wishes and feelings and if this were to become the norm, what training should they receive? People like me began to argue, in places like this Conference, that there were positive advantages in judges seeing children.

In my 2003 speech to this Conference, I argued that there were at least five advantages. First, the judge will then see the child as a real person, rather than as the object of other people's disputes or concerns. Children are often moral actors in the conflicts raging around them. They may have a clear idea about what they think is right. Secondly, the court may learn more about the child's

wishes and feelings than is possible at second or third hand. Thirdly, the child will feel respected, valued and involved, as long as the child is not coerced or obliged to make choices that she does not wish to make. Fourthly, it presents an opportunity to help the child understand the rules. Just as the parents will have to obey the court order whether they agree with it or not, so will the child. Hopefully, a child who has been involved in the process may feel more inclined to comply with the decision than one who feels that she has been ignored. Finally, parents too may be reassured that the court has been actively involved rather than simply rubber-stamping the professionals' opinions. This might also have the effect of sharpening the professionals' practice.

The President of the Family Division at the time, Sir Mark Potter, was a supporter. In April 2010, the Family Justice Council issued *Guidelines for Judges Meeting Children who are subject to family proceedings*. The purpose was 'to encourage judges to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives and to give them an opportunity to satisfy themselves that the Judge has understood their wishes and feelings and to understand the nature of the judge's task'. That looks very like what I was saying.

Last year, however, the President highlighted the need for a review of the 2010 Guidelines as part of a wider review of how the family court hears the evidence and views of children and young people. There have been pilot projects in Leeds and York seeking to put meetings between children and the judge or magistrates on a more routine and structured footing, by offering suitable children the opportunity of a meeting and providing them with information and the participant professionals with guidance. The reports contain a few interesting pointers: (i) quite a high proportion of children were deemed unsuitable for a meeting with the judiciary, usually because of age but sometimes because of other factors; (ii) of those deemed suitable, quite a high proportion did not want to see the judge; (iii) there was only limited feedback from the children themselves, but most seemed to find it positive; (iv) the feedback from Cafcass

practitioners was positive; (v) there were some practical problems in making the arrangements, particularly with magistrates; and (vi) the judges would welcome more guidance about what the purpose of these meetings is.

The reports both assume that one purpose is to enable the child to tell the judges about her wishes and feelings. The ‘Top tips for children’ in the Leeds report, for example, begin ‘it is important to remember that the meeting is to make sure that your wishes and feelings have been heard and that you have been listened to’. The overall conclusion of the York report was that the opportunity of meeting with a judge is beneficial for the children, but it is not the only way in which they can communicate their wishes and feelings to the court. They would encourage a national roll-out, but with ‘standardised process and documentation’ (see H Barrett, HHJ Hillier, A Johal, *Children and Young People Meeting Judges and Magistrates, Evaluation Report of the West Yorkshire Project*; HHJ Finnerty, M Gittims, P Scatcherd, *Children and Young People Meeting Judges and Magistrates, Evaluation Report of the York and North Yorkshire Project*; both May 2015, FJYPB, Cafcass, HMCTS).

The normalisation of the process would certainly be an improvement. But there does need to be clarity about what the purpose is, and it would not be helpful if the children wanted it for one purpose (to tell the judge their views) and the courts offered it for a different one (to tell the child about the court). Since the 2010 Guidance was issued, the conceptual purists have drawn a hard line between (a) evidence of what the judge needs to know in order to answer the question before the court, which includes evidence of the wishes and feelings of the child and (b) what is basically a public relations exercise in enabling the child to see the court and meet the judge who will decide her fate, enabling her to understand the decision-making process but not giving her a real role in it.

In 2003, we had not really considered the role of children as witnesses of fact. Not surprisingly, we did not like the idea of children being treated as witnesses in our adversarial system of court hearings. But again the Human Rights Act forced us to reconsider matters. In *Re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 WLR 701, the Supreme Court held that where a child was making allegations against a parent, it was wrong to have a presumption against that child giving live evidence in court. The rights of all the parties, to a fair trial and to respect for their family lives, had to be balanced against one another.

Some may see this as a bad thing – requiring a child to give evidence about the abuse she has suffered could turn the proceedings which are designed to protect her into a further abuse.

Others may see it as respecting the child as a real person with her own account to give of what has happened to her. Hearing the authentic voice of the child must on occasions include finding a sensible way of assessing the reliability of what she has to say. This need not mean giving the parties a free hand to cross-examine the child in whatever way they think will most effectively destroy her. Child psychiatrists cannot understand why they, and police or social workers conducting videoed Achieving Best Evidence interviews, are not allowed to ask leading questions, while cross-examining advocates ask nothing else. There have to be ways of enabling the child to give her best evidence in court.

My view in *Re W* was that it was simply not fair either to the child or to the alleged abuser to presume that the child should not give evidence. The child's evidence might well be rejected on the basis of an inadequate ABE interview when it would have been so much more powerful if given live. But the child's evidence may not have been adequately tested in that ABE interview and there have to be mechanisms for ensuring that it is. Testing the evidence, if done in the right way, may well strengthen it. In *Re B (Child Evidence)* [2014] EWCA Civ 1015, the *Re W* approach to the evidence of a child about what had happened to her and the other children in care

proceedings was applied in private law proceedings to the evidence of an older child about alleged incidents of domestic violence between her mother and her step-father.

A lot more has happened since *Re W*. In December 2011, the Family Justice Council issued its *Guidelines in relation to Children giving Evidence in Family Proceedings* [2012] Fam Law 79. These contain a lot of good sense, as far as they go. The principal objective should be to achieve a fair trial. The court should carry out a balancing exercise between (i) the possible advantages that the child being called would bring to the determination of truth, against (ii) the possible damage to the child's welfare from giving evidence. It then sets out a list of factors to be taken into account, which start with the child's own wishes and feelings, but also make the normative statement that 'an unwilling child should rarely if ever be obliged to give evidence'. There is a section on 'alternatives to the child giving live evidence at a hearing', which considers the option of further questions being put to the child outside the hearing. Even more valuable is the section on what to do once it has been determined that the child should give evidence. These include the use of 'special measures', but also advance judicial approval of any questions to be put to the child and agreement as to the proper form and limit of any questioning and the identity of the questioner. Also valuable is the section on how child witnesses are to be examined, 'with a view to enabling the child to give the best evidence of which they are capable'. This has some lovely points – avoid suggestion or leading, including tag questions; avoid a criminal or 'Old Bailey' style cross examination; avoid restricted choice questions; don't assume the child understands.

This is all very commendable when children's evidence is essential for making findings of fact as to what has gone on in the past. But does the same apply to ascertaining the child's wishes and feelings as to what should happen in the future? I had thought that this was something which a judge could explore – in a private but transparent meeting with the child, just as the professionals routinely do. But the conventional view these days is that this should not happen.

In *Re KP (A Child) (Abduction: Rights of Custody)* [2014] EWCA Civ 554, the Court of Appeal stated very firmly that a meeting between the judge and a child involved in abduction proceedings should not be used for the purpose of obtaining evidence. When listening to what the child has to say (as opposed to explaining the nature of the court process) the judge should largely be a passive recipient and should certainly not seek to probe or test what the child says. We refused permission to appeal to the Supreme Court in that case. Having seen a transcript of the judge's exchanges with the child, I can quite understand why the court said what it did. The judge in question was a formidable cross-examiner when she was at the Bar and entered into the task with gusto. It cannot have been a pleasant experience for the child. On the other hand, I have just been reading the judgments in *Re N (Child's Objections)* [2015] EWCA Civ 1022, where no criticism at all was made of His Honour Judge Bellamy's meeting with the children so as to give them an opportunity of telling him their views.

But if wishes and feelings are to become a matter of evidence, just like anything else, does that mean children should be called to give live evidence far more frequently than happens at present, even routinely? I don't know how often children are now called to give live evidence in family proceedings (I do know that the trial judge did not in fact hear from the child in *Re W*). The *Final Report of the Vulnerable Witnesses and Children Working Group*, chaired by Mr Justice Hayden and Ms Justice Russell, published in February this year, points out that 'thousands of children and young people go through the criminal justice system [as witnesses] every year but the direct evidence of children is seldom heard or rarely available in the family courts'. In 2012, there were 33,000 child witnesses in criminal cases. We simply do not know how many there are in family cases.

That report is a very radical document. It has taken seriously on board the views of the Family Justice Young People's Board. Simply meeting the judge, it says, 'will not provide the increased

role that should be played by young people and children now the family courts have entered the 21st century'. 'It is their wish to be included and *listened to* and to know that that was part of what happened in their case.' 'To hear a child must mean to hear his or her evidence and if the child/young person is not going to give oral evidence there must be provision for their evidence to be heard as directly as possible without interpretation by court appointed officers or others.'

Basically, this was saying that evidence of the wishes and feelings of the child should come directly from the child herself, rather than through the mediation of professionals, and certainly not through a private meeting with the judge. Making them feel part of the proceedings and understanding how the legal process works is one thing. Their evidence, both of what they have suffered or seen, and as to their wishes and feelings, is another thing altogether (para 23). 'It is not part of the judicial function to evidence gather so wishes and feelings expressed at the meeting cannot properly be taken into account when decision making' (para 24). But what if the children want to tell the judge about their wishes and feelings? Are we to tell them that they cannot do so? Or that the only way they can do so is by giving evidence in front of everyone in court (even if through a video link)?

The Working Group were struck by the fact that criminal courts have been trying to accommodate, not only child, but also other vulnerable, witnesses for a long time now. They simply cannot let the perpetrators of abuse of children and mentally disordered or disabled people go unpunished. So they have had to adapt the criminal process to accommodate them. The evidence of tiny children is admissible, provide that they can understand the questions and provide understandable answers to them. The old requirement that they understood the special nature of the obligation to tell the truth (actually in olden days that they understood the divine sanction for disobeying the witness oath) has gone. Now there is a variety of ways in which the courts can make the process more comfortable for vulnerable witnesses. They are still called

‘special measures’ which suggests that they should only be used in exceptional circumstances, when in fact they should be (and in some cases are) routine.

So the criminal justice system has developed tools for educating judges. It has developed tools for educating advocates. So why shouldn’t the family justice system do the same thing? Why shouldn’t it abandon its traditional reliance on hearsay and professional evidence in favour of direct evidence from the child? Why not make the child the primary witness, both as to what has happened to her and as to what she wants to happen in the future, and provide ‘special measures’ to enable her to do so?

There is a lot to be said for the family court having the power to adopt the so-called ‘special measures’ when it thinks appropriate. We are not just talking about children here but also about the many parents involved in family, especially care, proceedings who are almost as vulnerable as their children. We need special measures for both. But resources are a big problem.

The Working Group recommended new Rules and Practice Directions, right at the beginning of the Family Procedure Rules. The object is to ‘give prominence and emphasis to the treatment of children and parties in family proceedings; to emphasise the importance of the role of the child and the need to identify the necessary support/special measures for vulnerable witnesses and/or parties from the outset of any proceedings or at the earliest opportunity’. There should be added (to Rule 1.2) an obligation to make provision for vulnerable parties and witnesses and children to assist them in improving the quality of their evidence and to participate fully in the proceedings. There should be a new Rule 3B dealing with the assistance to which a party or witness in family proceedings ‘must be considered entitled’ on grounds of age, incapacity, fear or distress. They envisaged an early case management hearing at which the need for the child to give evidence

should be considered and if so what assistance the child may need to give the best evidence of which she is capable. If the child is to give live evidence 'ground rules', like those being introduced in criminal proceedings, should establish who does the questioning and about what and how.

The Family Procedure Rules Committee has now consulted on a new draft Part 3A. It does not include any addition to Rule 1 but some members of the committee obviously thought that the child should be included in the overriding objective. The draft Part 3A does require the court to consider whether a child party, or subject or affected, should participate in the proceedings, considering any views the child has expressed about taking part (Rule 3A.2). If the court decides the child should take part it must consider how and whether to make directions about how she should do so, including any of the measures of assistance listed (in Rule 3A.7), again considering the child's views (Rule 3A.3). Various considerations are listed for the court to take into account (Rule 3A.6). The measures of assistance listed are preventing a party or witness from seeing the other party; participating in hearings and giving evidence by live link; parties' participating and witnesses being questioned with the assistance of an intermediary; and anything else provided for in a Practice Direction. If a measure directed is not available where the court is sitting the case must be transferred to the most convenient location where it is available. But the court is not allowed to direct that public funding be made available for the purpose (Rule 3A.7). The idea that certain people are entitled to this assistance has, perhaps unsurprisingly, been dropped. But the court is to be expected to give consideration to all of this at the earliest possible stage.

I am not sure what my brother, Lord Wilson, would think of encouraging courts to hear directly from children more often. In *Re LC (Children)* [2014] UKSC 1, at para 55, he took the view that a 13 year old girl should have been made a party to child abduction proceedings, but that 'it would surely have been inappropriate' for the judge to receive oral evidence from her in court. He

might have asked counsel to ask age-appropriate questions of her, recorded on video-tape. But the reasonable course would probably have been to confine her participation to a witness statement by her, or a report from her guardian, her advocate's cross-examination of the claimant mother, and her advocate's closing submissions. Whether it would have been appropriate for her to be in court he could not tell.

I did not comment on this aspect of the case in my own judgment, but I did comment that inquiring into the child's perceptions of where he was habitually resident 'accords with our increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents' decisions' (para 87), or, I might add, of anyone else's decisions, including courts'. I am glad to see that the subject is now firmly on the agenda but less than clear about exactly where we are heading and whether it is in the right direction. Your views would be most welcome!