‘Giving Children a Voice in Litigation: Are we there yet?’

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The good old days

In *Re Agar-Ellis* [1878] 10 Ch Div 49 CA, a husband who had agreed that the children would be brought up as Catholics subsequently changed his mind. His wife defied him and the children remained Catholics. The husband’s response was to threaten to take all the children from their mother and place them in the care of a protestant priest. Sir R Malins VC stated:

> ‘I am very sorry to find that she has thought herself justified in going to such an extent as this, that she has set at defiance the authority of the father over the children, and has so far instilled these principles into the children; and I cannot but express my regret that she has done so, seeming to have entirely forgotten that by the laws of England, by the laws of Christianity, and by the constitution of society, when there is a difference of opinion between husband and wife, it is the duty of the wife to submit to the husband. I am also sorry to find she states in the petition that, unknown to her husband, she has had two of the children baptized contrary to his wish and knowledge in the Roman Catholic faith.
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> I do not wonder that he marked his sense of displeasure, for I cannot imagine a more lamentable state of things. Under these circumstances, I have the painful duty to decide what ought to be done. The principles of this Court are the principles of common sense and the principles of propriety that the children must be brought up in the religion of the father. The father is the head of his house, he must have the control of his family, he must say how and by whom they are to be educated, and where they are to be educated, and this Court never does interfere between a father and his children unless there be an abandonment of the parental duty.
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> There is one point I have not mentioned. My reasons for not seeing the children were that, in the view I have taken, it would be useless because I am convinced I must act upon the principle which Lord O’Hagan acted on and say that they must be brought up in the religion of the father.’

There was little or no progress between then and 1909. In *Re H’s Settlement* [1909] 2 Ch 260 a 17-year-old boy had been intended for the army but, ‘*gave so much trouble, and in particular staying out at night, that his tutor declined to keep him any longer’*. The boy was made a ward of court but, ‘persistently neglected to obey the directions made for his education by the judge’. Worse still, without permission he married in church having lied about his age. The judge, Warrington J, committed the young husband to Brixton hoping that ‘*it would be a salutary lesson to this boy and teach him that he, as well as the rest of us, must obey the orders of those who are in authority or run the risk of serious personal discomfort.*’

It was another 60 years before the first signs of creeping change were seen in the Family Law Reform Act 1969, which reduced the age of majority from 21 to 18 and provided that a child of 16 or over could consent to medical treatment without the consent of a parent. Notwithstanding this radical development, somewhat bizarrely, it was not until the passing of the Guardianship Act 1973 that a mother had, for the first time, equal rights and authority with a father even though the Guardianship of Minors Act 1971 had introduced the concept of the welfare of the child being paramount.

Then came the watershed decision in *Gillick v West Norfolk and Wisbech Area Health Authority*

and Another [1986] AC 112, [1986] 1 FLR 224. Mrs Gillick asked for a declaration that the advice the DHSS gave GPs to the effect that young people, in certain circumstances, could be given contraceptive advice and treatment without their parents' knowledge or consent was unlawful. The House of Lords declined to grant the declaration saying:

> 'that parental authority yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.'

Referring back to *Re Agar-Ellis* Lord Fraser said:

> 'It is an archaic view which is quite out of line with 20th-century reasoning and its importance is confined to legal history.'

Up until this time care proceedings were arcane – they were conducted in the juvenile courts under s 1 of the Children and Young Persons Act 1969. Parents were not parties to the proceedings. Although they could be represented, they had no right of appeal. The parents were presumed to represent the interests of the child in the proceedings although, in certain circumstances, that could be determined not to be the case and a guardian ad litem was then appointed. Only if contact (then access) was to be terminated by the local authority could the court make an order regulating future arrangements.

By the mid-1980s wardship proceedings were routinely used as the only means of having a proper welfare-based hearing and, for the first time, High Court judges became involved in what we now call 'care cases'. Towards the end of the decade, out of the blue came the explosion of reported sexual abuse in Cleveland: 125 diagnoses of child sexual abuse in Cleveland of which 78 had been made by Dr Higgs and 43 by Dr Wyatt. On 9 July 1987, a statutory Inquiry was established to look into the arrangements of dealing with suspected cases of child abuse in Cleveland from 15 January 1987. The Inquiry was chaired by Lady Justice Butler-Sloss. Counsel to the inquiry was one Mr Matthew Thorpe QC. On 6 June 1988, the Report of the Inquiry into Child Abuse in Cleveland 1987 (Cleveland Inquiry1987) was published. This was the first time that children's accounts as to what had happened to them was examined and the approach to how they should be 'heard' considered. Chapter 12 was called 'Listening to the Child' and dealt with issues such as interviews and so called disclosure work.

By the time of the report, a Government White Paper had been published proposing the wholesale revision of care proceedings, which eventually found its way into the statute books in what we now know as the Children Act 1989. The first paragraph of the first volume of guidance states:

> '1.1 The Children Act 1989 brings together in a single coherent legislative framework the private and public law relating to children. It aims to strike a balance between the rights of children to express their views on decisions made about their lives, the rights of parents to exercise their responsibilities towards the child and the duty of the state to intervene where the child's welfare requires it.'

The same guidance describes the role of the guardian ad litem as being, inter alia, '*the representative and spokesperson for the child'*. In addition the Children Act, for the first time, provided a route whereby a child might himself/herself be allowed to question decisions taken about his upbringing by making his or her own application. This led to extravagant press reports that the Act allowed children to 'divorce' his or her parents. My own experience as a knock-about junior at this time was that the very few cases that came before the court tended to be about children wanting to be able to see a brother or sister from whom they were separated. In 1990 the UK become a signatory to the United Nations Convention on the Rights of the Child (UNCRC). Article 12(1) UNCRC enshrines the right:

> 'of the child who is capable of forming his or her own views… 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.'

This was followed in 1991 by the Children Act 1989 coming into force and in 1992 the UNCRC became part of UK law.

After the Children Act

So what has happened in the ensuing 25 years since the Children Act became law? Quite a lot – however I will look briefly at:

- Children as parties or being separately represented;
- Judges seeing children;
- Children giving evidence;
- ABE interviews;
- Reform?

In *Re F (Children)* [2016] EWCA Civ 546, [2016] Fam Law 943 it was held that all these need to be considered against the backdrop of Art 12 UNCR and Art 11(2) of Council Regulation (EC) No 2201/2003 Brussels IIA, which identify the obligation on the court to ensure that the child is given the opportunity to be heard.

Representation of children and children as parties

The FPR 2010, r 16.2 and PD16A paras 7.1–7.5 govern when a child should become a party to proceedings. Rule 16.2 says simply:

> '(1) The court may make a child a party to proceedings if it considers it is in the best interests of the child to do so.'

There has been a recent flurry of cases about joinder of children. *Re LC (Reunite: International Child Abduction Centre Intervening)* [2014] UKSC 1, [2014] 1 FLR 1486, was a Hague case where the issue as to whether the child should be joined was considered. As to how r 16.2 is to be approached, Lord Wilson said ([45]):

> 'If, and only if, the court considers that it is in the best interests of the child to make her (or him) a party, the door opens upon a discretion to make her so. No doubt it is the sort of discretion, occasionally found in procedural rules, which is more theoretical than real: the nature of the threshold conclusion will almost always drive the exercise of the resultant discretion.'

Re LC emphasised that there is no different or special approach to be adopted in Hague cases (although much that is found in PD16 para 7 which accompanies the rule is particularly apposite in Hague cases). Lord Wilson was clear however that PD16 para 7 should not be taken as endorsing '*any routine grant of party status to older children objecting to their return to the requesting state in Convention proceedings*' ([53]).

A further important aspect of *Re LC* is that it makes it abundantly clear that grant of party status to a child still leaves the court with a wide discretion to determine the extent of the role which the child should play in the proceedings, including whether he or she should be present in court during all or part of the hearing [55]. This is a particularly useful observation, as it reminds courts that they should not refuse party status to a child for fear that she or he may see, read or hear something which would be disturbing and contrary to his or her best interests. Such difficulties can be managed by the court by way of case management directions. Having said that, many of the authorities following *Re LC* underlined Lord Wilson's observation at [48]:

> 'The intrusion of the children into the forensic arena, which enables a number of them to adopt a directly confrontational stance towards the applicant parent, can prove very damaging to family relationships even in the long term and definitely affects their

> interests.'

In *Cambra v Jones (Contempt Proceedings: Child Joined as a Party)* [2014] EWHC 913 (Fam), [2015] 1 FLR 263 the President (sitting at first instance) allowed a 16-year-old girl to be joined as a party in the committal proceedings brought against her mother. The President rehearsed what Thorpe LJ had said in *Mabon v Mabon* [2005] EWCA Civ 634, [2005] 2 FLR 1011 at [28], saying that the point is so important it bears repetition:

> '[We] must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare.'

In *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, [2015] 2 FLR 1074, in a masterly judgment Black LJ, in relation to child's objection Hague cases, articulated what might be thought as being the understatement of the decade when she said: 'It seems to me that some of the older jurisprudence is infected by confusion.' Happily for all of us, she then proceeded to sort it all out. This case is essential reading for anyone who does Hague work. Black LJ however also deals with the joinder of children to appeal hearings ([139] onwards). She reminds us that it is imperative that consideration is given at the earliest opportunity in Hague cases as to whether the appropriate parties are before the court. Black LJ having worked through the jurisdictional minefield concluded by saying [155]–[156]:

> 'Children need to know that their views are being listened to and that their particular concerns are not being lost in the argument between their parents but it must be recognised that direct participation in proceedings can be harmful for children. As Lord Wilson said at [48] of *Re LC*, "I therefore contemplate that it may be necessary for a litigation friend to guide and regulate the child's own participation in the proceedings, just as a guardian would. He or she will no doubt determine which documents filed in the proceedings should be shown to the child and take decisions, in consultation with the child, about whether the child should attend the court hearing. In the very unlikely event that an intractable issue arises between the litigation friend and the child, there may be no alternative but to ask the court to give directions, but I would expect such a situation to be extremely rare. What I do not think a litigation friend can do is provide a welfare assessment for the court in relation to the child as a guardian would do. However, where the litigation friend is the child's solicitor, as I anticipate will be so in the vast majority of cases, he or she will no doubt assess the case and guide and support the child in their approach to the litigation, as any solicitor would do for an adult client."
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> I end this section of my judgment with a cautionary note. It should not be expected that an application for children to be involved in proceedings, either as appellants or as respondents, for the first time in the Court of Appeal will be received sympathetically. By the time the matter reaches the Court of Appeal, it is usually far too late in the day to address this sort of issue.'

She went on to talk of the importance of the role of a litigation friend to '*guide and regulate*' the child's participation, in the same manner that a guardian would, with the only difference that a litigation friend cannot provide a welfare assessment for the assistance of the court.

Sir James Mumby P (The President) recently reviewed the law in respect of the child's participation in proceedings in *Re F (Children)* [2016] EWCA Civ 546. In it he speaks of the sea change there has been in attitudes in relation to children's participation in proceedings over the last decade [41] and quoted from *Re D (A Child) (International Recognition)* [2016] EWCA Civ 12, [2016] 2 FLR 347 where the rights of the child to be given the opportunity to be heard were said to be, '*fundamental principles of universal application reflected in our legislation, our rules and practice directions and our jurisprudence'* [39]. The President concluded by expressing the view that in future there will be '*more cases than hitherto*' where the child either gives evidence, without being joined as a party, or is joined as a party.

Black LJ was back in form in relation to the joinder of children in *Re W (A child)* [2016] EWCA Civ 1051, [2017] FLR (forthcoming and reported at [2017] Fam Law 54). The case related to a girl who constantly absconded from her foster home and took up residence with her grandmother. The child had instructed her own solicitor in the original care proceedings. The issue was now about the role in the recovery proceedings taken by the local authority. PD16, Part 4.7 sets out the guidance for making children parties to proceedings, emphasising that it will only happen in a minority of cases including an issue of '*significant difficulty'*. At the hearing it was agreed that the proper test to establish whether a child should instruct his or her own solicitor, as opposed to being joined as a party was, unsurprisingly, that set out in FPR 2010, r 16.29(2) which provides:

> '(2) If a solicitor appointed as mentioned in paragraph (1) considers, having taken into account the matters referred to in paragraph (3), that the child –
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> (a) wishes to give instructions which conflict with those of the children's guardian; and
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> (b) is able, having regard to the child's understanding, to give such instructions on the child's own behalf,
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> the solicitor must conduct the proceedings in accordance with instructions received from the child.
>
> (3) The matters the solicitor must take into account for the purposes of paragraph (2) are –
>
> (a) the views of the children's guardian; and
>
> (b) any direction given by the court to the children's guardian concerning the part to be taken by the children's guardian in the proceedings.'

It was confirmed in *Re W (A Child)* that if the guardian's solicitor considers (having taken into account the matter specified in r 16.29(3)), that the child wishes to give instructions which are at odds with the guardian and that the child is able, having regard to his or her understanding, to give such instructions, once r 16.29 is engaged then the solicitor must follow the child's instructions and not those of the guardian. The appeal was allowed and it was held that he judge at first instance had confused the child's '*welfare'* with her '*understanding'* when applying the test at r 16.29(2). Too much regard was had to the parents' unsatisfactory influence over her and not enough to her age, her history of instructing her own solicitor in the original care proceedings and the views of that solicitor that she was more than capable of giving instructions.

Judges seeing children in private

Judges have always seen children in their rooms although it has been something that has, during the 37 years that I have been involved with child care work, gone in and out of fashion. There was a phase when, in '*custody'* disputes as they were then called, children were often collected from school and brought along to tell the judge what he or she 'wanted'. Such a crude approach was fortunately not universal. I remember doing a very difficult case in front of Wall J (as he then was) shortly after the Children Act came in. It involved sexual abuse within a very religious and academically brilliant family. Arrangements were made for the 15-year-old boy to come to court; orange juice, Kit Kats, and a chess set were procured and Wall J played three games of chess with the young man as a vehicle for getting him to relax and to understand that the judge, and only the judge, could make decisions about his future and also, given the boy's formidable intellect, to respect the judge and his decision.

By 1994 there had been a sea change and Wall – now LJ – in *B v B (Minors Residence and Care Disputes)* (1994) *The Times*, May 13 urged caution on judges when considering whether to see a child:

> ‘It follows that the discretion should be exercised cautiously: it should in no sense be automatic or routine. It should also only be exercised after hearing submissions from the parties. There had to be a good reason for the judge to see a child and it had to be perceived by the judge that it was in the interests of the child to see him.’

In April 2010 the Family Justice Council produced *Guidelines for Judges Meeting Children who are subject to Family Proceedings* [2010] 2 FLR 1872. The guidelines were approved by Sir Nicholas Wall who was by then the President of the Family Division. The guidelines certainly did not provide for playing chess, (think of the resource implications of that!) but their purpose was identical to that which saw Wall J arrange for that young boy go into his judge’s room in Barnsley 10 years earlier, namely:

> ‘… 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 themselves an opportunity to satisfy themselves that the judge has understood their wishes and feelings and to understand the nature of the Judge’s task.’

This message is reinforced in the guidance itself where it says, ‘It cannot be stressed too often that the child’s meeting with the judge is not for the purpose of gathering evidence’. The Guidelines, now subject to further refinement, have proved invaluable to courts dealing with cases on a day-to-day basis at family courts around the country.

In *Re KP (Abduction: Child's Objections)* [2014] EWCA Civ 554, [2014] 2 FLR 660, the Court of Appeal considered the Guidelines in the context of a case where the judge at first instance had sought to ‘*probe’* the child’s wishes and feelings in an interview which lasted over an hour with the child being asked some 87 questions. This was, as was to be expected, held to be well beyond the passive role which should be that of the judge in such meetings. The decision in *Re KP* was in the context of Hague cases where the question of the judge meeting the child is often raised due to the need for the court to evaluate a child’s objection to returning to his or her country of habitual residence under an ‘Article 13’ defence. Moore-Bick LJ, having reviewed the authorities to date, went on to speak of the courts, ‘*feeling their way forward in order to determine how best to hear the voice of the child in Hague cases*’. Moore-Bick LJ went on to emphasise that the Guidelines are precisely that – guidelines. He went on to draw together a number of themes. (While Black LJ later in *Re M* contextualised parts of Moore-Bick LJs judgment it was not in relation to this part of his judgment in *Re KP*):

> ‘[53] With those caveats in mind, it is possible to draw together a number of themes which are common to each of the authorities to which we have made reference:
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> a) There is a presumption that a child will be heard during Hague Convention proceedings, unless this appears inappropriate (*Re D*);
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> b) In this context, 'hearing' the child involves listening to the child’s point of view and hearing what they have to say (*Re D*, paragraph 57; *JPC v SLW and SMW*, para 47);
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> c) The means of conveying a child’s views to the court must be independent of the abducting parent (*Re D*, para 59);
>
> d) There are three possible channels through which a child may be heard (*Re D*, para 60):
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> i) Report by a Cafcass officer or other professional;
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> ii) Face to face interview with the judge;
>
> iii) Child being afforded full party status with legal representation;
>
> e) In most cases an interview with the child by a specialist CAFCASS officer will suffice, but in other cases, especially where the child has asked to see the judge, it

may also be necessary for the judge to meet the child. In only a few cases will legal representation be necessary (*Re D*, para 60);

f) Where a meeting takes place it is an opportunity (*JPC v SLW*, paragraph 47; *De L v H*, paragraph 45; *Re J* [2011], paras 31 to 40):

i) for the judge to hear what the child may wish to say; and

ii) for the child to hear the judge explain the nature of the process and, in particular, why, despite hearing what the child may say, the court's order may direct a different outcome;

g) A meeting between judge and child may be appropriate when the child is asking to meet the judge, but there will also be cases where the judge of his or her own motion should attempt to engage the child in the process (*Re J* [2011], para 31).'

Should the child give evidence?

Perhaps this is the area to which there has been a seismic shift in the approach of the courts. As recently as 2007 Smith LJ in *LM v Medway Council and YM* [2007] EWCA Civ 9, [2007] 1 FLR 1698 said at[44]–[45]:

> 'The correct starting point in my view (in accordance with past Court of Appeal guidance) is that it is undesirable that a child should have to give evidence in care proceedings and that particular justification will be required before that course is taken. There will be some cases in which it will be right to make an order. In my view, they will be rare.
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> In considering whether to make an order, the judge will have to balance the need for the evidence in the circumstances of the case against what he assesses to be the potential for harm to the child. In assessing the need for oral evidence in the context of care proceedings, the judge should, in my view, take account of the importance of the evidence to the process of his decision about the child's future. It may be that the child's future cannot be satisfactorily determined without that evidence. In assessing the risk of harm or oppression, the judge should take heed of current research into the effect on children of giving evidence and should not rely only upon his impression of the child, although that will of course be relevant.'

This approach was in stark contrast to the position in the criminal courts where, for many years, children have given evidence although now evidence in chief is in the form of an unsworn video interview. A child will always be '*called*' to give relevant evidence unless it appears that the child is incapable of giving coherent testimony.

This increasingly controversial issue came before the Supreme Court in the landmark case of *Re W (Children) Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485. Baroness Hale set aside the old presumption of the family courts which had been against a child giving oral evidence and said that the court in each case has to weigh each of two considerations namely:

(i) The advantages that calling the child will bring to the determination of the truth: and
(ii) The damage it may do to the welfare of this, or any, child.

Baroness Hale went on to consider a number of factors to be taken into account when considering the advantages in calling the child on the one hand, and in assessing the risk of harm to the child if he or she is called on the other. She endorsed the view that an unwilling child should rarely, if ever, be called – summarised as follows.

When considering the advantages of calling the child:

- The issues that are required in order to determine the case;
- Does the child need to give evidence to determine those issues?
- The quality of any ABE interview;
- The nature of the challenge made against the child's evidence;
- The age and maturity of the child;
- The length of time since the events occurred.

Factors relevant to the risk of harm to the child in giving evidence:

- The age and maturity of the child;
- The length of time since the events occurred;
- The support (or lack of it) that the child has from family and other sources;
- The child's wishes and feelings about giving evidence;
- The potential for delay;
- Where the child may be giving evidence in criminal proceedings, the potential for harm in also giving evidence in the family proceedings may be increased.

During the course of the next 5 years there were a number, of mainly High Court cases, in which the issue was whether or not a child should give evidence, each of which turned on its facts. In 2012 Guidelines in relation to Children Giving Evidence in Family Proceedings, endorsed by the President of the Family Division, were issued by the Family Justice Council. Clearly there is a difference between these guidelines and the 2010 Guidelines in relation to judges seeing children it makes clear that there must be clarity as to the purpose for which a child is attending court – is it to see the judge or is it to give evidence?

The issue came before the Court of Appeal again, this time before McFarlane LJ in *Re E (A Child) (Evidence)* [2016] EWCA Civ 473, [2017] FLR (forthcoming). In his judgment McFarlane LJ held that the judicial analysis of the formal and properly presented *Re W* application made by the appellant was so wholly inadequate, in effect, it simply was not undertaken. McFarlane LJ introduced his analysis by saying at[46]–[47]:

> 'As is well known, children, even children of a very young age, who have made allegations of abuse which are subsequently the subject of criminal proceedings, are required to give live evidence within the criminal process. It is understood that some 40,000 do so during the course of each year. The child will typically be protected from full exposure to the court room by the use of special measures, for example, answering questions over a live video link. Conversely, for many years the practice and culture in family proceedings was that such children, even if aged in their late teens, would never be required to give live evidence in the Family Court.
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> The issue of children giving live evidence in family proceedings was considered in depth in the Supreme Court in the case of *Re W* (above). The Supreme Court held that the practice and culture of the Family Court that had hitherto applied, which amounted to a presumption against a child giving evidence, could not be justified and should be replaced by the court undertaking a bespoke evaluation in each case on the question of whether a complainant child should or should not be called to give live evidence.'

He concluded this part of the judgment with this forceful reminder (the President described it as *an acidic observation*' in *Re F*):

> '[48] I make no apology for quoting so extensively from Baroness Hale's judgment, which would seem to have gone unheeded in the five or more years since it was given. The need to give appropriate consideration to a child giving evidence in a case where that issue arises will soon be given further endorsement by amendments to the

> FPR 2010 and Practice Directions in accordance with recommendations from the President's working group on children and other vulnerable witnesses. In the meantime the decision in this case should serve as a firm reminder to the judiciary and to the profession of the need to engage fully with all that is required by *Re W* and the Guidelines.'

The case is important as it not only deals with the application of *Re W* but also of a number of other important issues:

(1) The weight to be given to defects in both the process and the content of ABE interviews conducted with child victims and witnesses ('Achieving Best Evidence in Criminal Proceedings', Ministry of Justice: March 2011);
(2) The approach to be taken by those representing a child in family proceedings where that child is himself accused of being the perpetrator of abuse;
(3) The basic requirements of due process necessary to meet the Article 6 fair trial rights of such a child during the investigation and any subsequent Family Court proceedings, where he or she might properly be regarded as either a perpetrator or a victim, or both.

There has not however been complete unanimity in the views from the Court of Appeal. In *Re S (Children)* [2016] EWCA Civ 83, [2017] FLR (forthcoming), the majority of the court dismissed an appeal against an order that a child who had made allegations of sexual abuse should not give evidence; the child was said to be vulnerable and unwilling to give evidence. Gloster LJ gave a strong dissenting judgment expressing the view that the decision not to call the child breached the father's right to a fair trial in that he was being deprived of the opportunity to mount an effective challenge to what was, in reality, the only evidence against him.

ABE interviews

Where does the ABE (Achieving Best Evidence) interview fit in all of this? Any joint child abuse interview conducted by the police must follow the guidance in Achieving Best Evidence in Criminal Proceedings Guidance, Ministry of Justice, March 2011, a document in respect of which Sir Nicholas Wall, when President, described as, '*self-evidently required reading for all practitioners in the field, be they interviewers, prosecutors, advocates or judges'*. Even when the police are not involved the underlying principles of the Memorandum should still apply. Often, when a child has been the subject of an ABE interview but was then called to give live evidence, there will be extensive cross examination as to the manner in which the interview was carried out. Failure to follow the guidelines does not however, in itself, mean the evidence of the interview should be entirely disregarded.

In *TW v A City Council* [2011] EWCA Civ 17, [2011] 1 FLR 1597 a very strong Court of Appeal (Wall, Wilson, Aikens LJJs) heard an appeal where it was accepted that the ABE interview in question was significantly flawed. The issue before the court was whether the extent and implication of its unreliability were properly taken into account by the judge. The discussion at [41] onwards is well worth reading. The court found the inadequacies in the interview to be manifest and concluded that the ABE interview was of no evidential value. Despite that conclusion, the Court of Appeal said that the judge could still have made the findings sought notwithstanding the deficits in the ABE interview but only after a comprehensive review of the evidence and having heard oral evidence from relevant witnesses.

In *Wigan Borough Council v M and Others (Veracity Assessments)* [2015] EWFC 8, [2016] 1 FLR 126, Jackson J recently considered the use of what are described as '*veracity assessments*'. In that case permission had been given to instruct a psychologist as the court requires assistance with regard to the veracity of the detailed ABE interviews and further their capacity to give evidence. Jackson J confirmed that there is no bar to the admission of expert evidence as to whether evidence

is or is not likely to be true. However, he went on to say, that as FPR 2010, r 25.4 dictates that expert evidence can only be adduced if it is '*necessary'* to assist the court to resolve the proceedings, the fact that expert evidence is admissible and might be relevant, or even helpful in a general way, is not enough. He concluded:

> '[9.3] in my view, cases in which it will be necessary to seek expert evidence of this sort will nowadays be rare. While the decision must rest on the facts of the individual case, judicial awareness of these issues has greatly increased, from the Cleveland Inquiry in 1987 to the most recent iteration of the principles of Achieving Best Evidence in 2011. In the two decades since *Re M and R* (above), understanding has naturally moved on. The process continues to evolve, with the final report of the Children and Vulnerable Witnesses Working Group set up in 2014 by the President of the Family Division expected shortly. The overall result is that judges have been trained in and are expected to be familiar with the assessment of evidence of this kind. The court is only likely to be persuaded that it needs expert advice if it concludes that its ability to interpret the evidence might otherwise be inadequate.'

As already mentioned, McFarlane LJ also considered the weight to be given to defects in both the process and content of ABE interviews in *Re E (A Child)*. McFarlane LJ was critical of the way the judge dealt with the interviews at first instance saying that the (undoubted) departures from the ABE guidance required the judge to engage with a thorough analysis of the process in order to evaluate whether any of the allegations that the children made to the police could be relied upon. It looks therefore that veracity assessments are now likely to be largely a thing of the past; that does not however lessen the need for scrutiny of ABE interviews and, crucially, it must also be remembered that the ABE interview is but one part of the evidential picture.

Need for reform?

I turn now to the report and subsequent proposed reforms advertised in cases such as Wigan BC. In his 12th '*View from the President's Chamber'* published in [2014] Fam Law 978, the President set out a number of aims for the reform of the family justice system. Among other things, he said that it was time to review the Family Justice Council's April 2010 *Guidelines on Children Giving Evidence in Family Proceedings* [2012] Fam Law 79, particularly in light of the Court of Appeal's decision in *Re KP (Abudction: Child's Objections)* [2014] EWCA Civ 554, [2014] 2 FLR 660. In February 2015, the Vulnerable Witnesses and Children Working Group ('VWCWG') led by Hayden J and Russell J published its final report and recommendations, see [2015] Fam Law 443. The report focused on the need to modernise the family justice system, by, inter alia, making room for more active participation and inclusion of children and young people in family proceedings which directly concern them.

Summary of draft proposals

The draft proposals provide for the insertion of a new Part 3A in the FPR, bringing together recent developments in the law. The proposed new Part 3A is complemented by Practice Directions 3AA and 3AB. Part 3A.4, specifically refers to the court's duty to consider whether it is necessary to make directions:

- To ensure the child is given the opportunity to express his or her views;
- What the child should be told about the proceedings including the outcome;
- In relation to the child giving evidence.

The proposed new rule resonates with recent developments in the case law and the general shift towards creating a more inclusive environment for children within the family justice system. For example, Peter Jackson J recently gave judgment in *Lancashire County Council v M and Others* [2015] EWFC 9 which he wrote in such a way as to ensure that the children concerned could read

and understand it. For example, here is his *Lucas* direction and his explanation as to why children are taken away from their parents:

> '[7] Another thing is that children are not taken away from their parents simply because the parents have lied about something. Even if they do tell lies they can still be good enough parents.
>
> [8] People can tell lies about some things and still tell the truth about other things.
>
> [9] Also, children are not taken away because parents are rude or difficult or because they have strange views, even if those views offend people. The only reason to take children away is because they need protecting from harm.'

Part 3A is intended to be supported by two Practice Directions: PD3AA and PD3AB. PD3AA deals with children's written and oral evidence and child witnesses in family proceeding. If approved, the Practice Direction will supersede the previous Guidelines for judges meeting children who are subject to family proceedings of April 2010 and the guidance contained in the Working Party of the Family Justice Council Guidelines (Children Giving Evidence in Family Proceedings) of December 2011, both of which will no longer apply.

The proposed PD3AA is divided into two parts:

- PD3AA-1 deals with the child's written and oral evidence; and
- PD3AA-2 deals with children meeting judges.

The Practice Direction is structured by way of a definition section and preamble applicable to both parts of the guidance, followed by specific provisions in relation to the child's evidence and the child seeing the judge.

The second proposed new Practice Direction PD3AB relates to vulnerable persons: participation in proceedings and giving evidence. Although of importance as it will often be of most application to parents and witnesses, this practice direction does not relate to the children who are covered by PD3AA. The intention was that the rules and there after the Practice Directions would come in force simultaneously.

The Draft Rule and Practice Directions went before the Rules Committee on 10 October 2016. The public minutes of the meeting record that the Minister has made a decision which allows matters to proceed in respect of the Vulnerable Witness Practice Direction (PD3AB) but not the Children Practice Direction (PD3AA). It would appear from the minutes that the Minister's reservations centre around the '*resource impact*' of the Children's Practice Direction, the implementation of which the Deputy Director of MoJ Policy said has, as currently drafted, '*a resource impact which is significantly bigger than that of the Vulnerable Witness Practice Direction'*. The Committee has accordingly agreed that the two Practice Directions should be separated and proceed on separate timetables.

So it looks like the Children Practice Direction is on the back burner – one suspects indefinitely. However, bear in mind that much of the content of PD3AA was to have been codification of the recent case law touched on in this article. Even if we have to do without the new rule and PD3AA in this brave new resource driven world – nevertheless, thanks to the hard working judges and the practitioners who represent parents and children all over the country, the voice of our children is increasingly heard in our courts even without the codification which was to have marked the significant progress made since the Children Act was passed 25 years ago.

Post Script

Quite recently, the High Court handed down its judgment in *Re JS (Disposal of Body)* [2016] EWHC 2859 (Fam), [2017] FLR (forthcoming and reported at [2017] Fam Law 56). Unfortunately, I did not cover this in my keynote address to the ALC conference in Bristol because the second part of the judgment (which was handed down in three parts in total) was only handed down on 19 November 2016. In *Re JS*, a 14-year-old girl ('JS') who was diagnosed with a rare form of

terminal cancer had expressed the wish to have her body cryogenically preserved. JS was supported by her mother in her application but her father had vehemently opposed it. Jackson J said at [13]:

> 'I have read a note of the meeting, which reviews all the practical aspects of the plan and shows the careful thought that the Trust has given to the matter at a senior level. The outcome is that the hospital is willing to do what it properly can to cooperate for the sake of JS, because the prospect of her wishes being followed will reduce her agitation and distress about her impending death. The decision centres entirely on what is best for JS.'

The judgment of Jackson J is interesting in that it demonstrates how far we have come since *Re Agar Ellis*. It appears that we have moved beyond paying lip service to children's views and we are on our way to accepting that the principle of paramountcy cannot be fully applied without not just lip service, but proper consideration of the wishes of a child.

Before we ride off into the sunset in a haze of self-congratulation, I add my own note of caution – as Baroness Hale said as long ago as 2007 in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] 1 FLR 251:

> 'These days, and especially in the light of Art 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so.'

The courts must guard against the danger of being so acute to the need to hear the voice of the child that it abrogates its responsibility to make the right welfare based decision for that child. Not infrequently, the decision made by the court will be different from that sought by the child, and that is inevitable, the judge listens to the child but the decision is always, and must be, that of the judge and not the child. The judge alone must bear the responsibility of deciding what is in a child's best interests.

Every judge, of whatever level, who hears cases involving children carries this heavy burden, each one of them deserves our thanks and gratitude.