The Collaborative Process: A “Mechanism” to Hear the Voice of the Child?

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Introduction

The publication on Tuesday, February 16, 2010 of the revised wording for the proposed Twenty-Eighth Amendment to the Constitution brings a new era of hope for children’s rights in Ireland.

Traditionally, in Ireland, matters relating to custody, access and the welfare of the child have been dealt with by adults.

“… children have tended to be regarded as objects rather than subjects both in conceptual and practical terms. As far as family law is concerned, notwithstanding the entrenchment of the welfare principle, children’s futures have historically been decided upon by the views of adults-that is parents and professionals.”¹

The Constitutional preference² given to the family unit as a whole in Ireland has added to this issue for children, in that the

“marital family was ideologically defined and constitutionally protected as being more than the sum of its parts. When family breakdown occurred that unit was not legally divisible into autonomous sets of interests”³

Under the proposed new Art.42 of the Constitution, children are recognised as individuals with natural and imprescriptible rights, namely, the right to protection and care; the right to education; the right to have their welfare and best interests respected in all disputes concerning guardianship, custody, care and their upbringing; and the right to be heard in any judicial and administrative proceedings affecting them, having regard to their age and maturity.

While this is a most welcome development, it is notable that in her address at the press release, the Chairperson of the Joint Committee on the Constitutional Amendment, Mary O’Rourke TD said:

“The Committee was concerned that parents in particular would be assured that their rightful authority and pivotal role in relation to their children would not in any way be undermined by any proposed amendment. The continued existence of Article 41 will provide this
assurance."

Will Art.41, the Constitutional preference for the family, overshadow the proposed amendment? How will matters be decided by the courts when a conflict occurs? These are matters that will, no doubt, be debated once a date is set for the proposed referendum but may only be fully tested once an appropriate case comes before the court. It is imperative that the proposed Constitutional amendment is a genuine attempt to progress children's rights and not just an appeasement of children's rights campaigners and the UN Committee on the Rights of the Child. It would be unfortunate if, after waiting so long for a recognition of children's rights, Art.41 continued to overshadow these rights.

The focus of this article will be on the right of the child to be heard, how we deal with this issue at present and what the proposed amendment will mean for children. It will put forward the view that the collaborative law process may be a settlement process which could ensure that children are given a "mechanism" through which to be heard.

What are our obligations at present to hear the voice of the child in family law proceedings in Ireland?

Under our divorce law, as it stands, there is no specific provision for the voice of the child to be heard. If a case comes before the court, any party to the proceedings or the judge can request a section 47 report under the Family Law Act 1995, where an appointed probation officer, social worker or other "suitably qualified" person is instructed to investigate any question relating to the welfare of any party to the proceedings. The main concern with these reports, apart from the obvious issues of the delay in obtaining the reports and the costs associated with their preparation, is that their purpose is to advise the court of the child's welfare and not his/her wishes. This may mean that the report can be heavily influenced by the person who is preparing the report. There is no statutory provision to ensure that the person preparing the report speaks directly with the children, whether this happens in practice will largely depend on the approach taken by this particular person in each case.

Section 28 of the Children Act 1997 provides that any child under 14 who is considered capable of giving an intelligible account of evidence may give direct unsworn evidence in court. However, this has not generally been considered as an appropriate way of hearing the voice of the child in family law matters as it may involve children having to express preference for one parent over another in open court and may, therefore, prove too traumatic for a child.

"The nature of a court hearing in which a child can be asked effectively to 'choose' between two loved parents and then await a decision about his or her future can significantly impact on emotional well-being, and can lead to breakdown in relations between a parent and a child."

Alternatively, a judge may speak privately to a child to try to ascertain their wishes but this is left to the judge's discretion in each case with no clear guidelines. Many judges are reluctant to speak directly to children. In the case of A.S. (or A.B.) v R.B., Keane C.J., while urging caution in relation this practice because of the fact that such evidence is not under oath or in the presence of the other parties, was of the view that such interviews may help the judge in determining the wishes of the child.

Section 28 of the Guardianship of Infants Act 1964 provides for the appointment of a Guardian Ad Litem in private law proceedings. The Guardian Ad Litem (GAL) is to be an independent representative appointed by the court to represent the child's personal and legal interests in proceedings. While many issues were clarified in the Children's Act Advisory Board Report on the Guardian Ad Litem service in terms of the qualifications required to act as a guardian and the parameters of the service that the guardians provide, this has little relevance in private law matters as s.28 of the Guardianship of Infants Act has not yet been commenced and, therefore, it is not possible to instruct a GAL in private law matters at present.

Section 25 of the Guardianship of Infants Act 1964, as inserted by s.11 of the Children Act 1997, provides that in custody, access and guardianship proceedings that the court shall, as it thinks "appropriate and practicable" having regard to the age and maturity of the child, take the child's
wishes in to account.

This has been applied in cases where the court has considered that children were of a sufficient age and maturity. In Cullen v Cullen, the wishes of a 17-year-old girl played an important part in the court's decision to award custody to her mother. It could be argued that at 17 it was clearer for the court to consider her opinion than if she was younger, but similar decisions were made in the case of W. v W., where the views of two boys aged 11 and 14 were taken into account. In that case, the boys had indicated that they would run away if they were forced to live with their mother. Again, more recently in 2004 in the case of F.N. and E.B. v C.D., H.D and E.K., Finlay Geoghegan J. held that children aged 13 and 14 were of sufficient age and maturity to have their wishes taken into account.

The United Nations Convention on the Rights of the Child

The ratification by the Irish Government of the United Nations Convention on the Rights of the Child in 1992 marked a significant development for children's rights in this country, but we have been constrained by what Geoffrey Shannon refers to as Ireland's “dualist approach to international law generally” which makes international human rights treaties binding on the State, but not on the courts, and therefore, this treaty has not been incorporated into Irish law.

Article 12 of the Convention on the Rights of the Child states:

1. States Parties shall assure to the child who is 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 European Convention on the Exercise of Children's Rights 1996 provides the procedural element of how these rights under art. 12 were to be implemented. Article 1(1) of the Convention provides that the object of the Convention is to:

promote children's rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority.

Ireland has signed this treaty but it has not yet ratified it. As noted by Dr Ursula Kilkelly, “without making provisions for separate representation for children in proceedings, Ireland is not in a position to ratify the Convention on the Exercise of Children's Rights”.

General Comment No.12.

Up until July 2009, states could argue that there were no clear guidelines as to how the provisions of art. 12 were to be interpreted or implemented. On July 1, 2009, the UN Committee on the Rights of the Child, by means of General Comment No. 12, provided state parties with a legal and literal analysis of art. 12 and provided clear guidelines as to what is expected in terms of implementation of the child's right to be heard.

The Committee has emphasised that the words “shall ensure” in the text of art. 12... is a legal term of special strength, which leaves no leeway for State parties’ discretion. Accordingly, State Parties are under strict obligation to undertake appropriate measures to fully implement this right for all children. States are further required to make sure that there is a mechanism in place to enable the voice of the child to be heard and that due weight be given to their views. At para.48 the Comment outlines that there is an obligation on State parties “to review or amend their legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support, and if necessary feedback on the weight given to their views, and procedures for complaints, remedies or redress”.
The Comment goes on to state clearly that every child “capable” of forming a view shall have a right to be heard and that children should be presumed to have the capacity to form their views and to express them. It is not up to the child to prove his or her capacity. Recognition must be given to the role of non-verbal forms of communication used by younger children, their views often being expressed through play, painting, etc. The Committee failed to specify who should ultimately determine when a child has the required capacity and have only stated that: “Good practice for assessing the capacity of the child has to be developed.”

In this regard, para.49 of the Comment outlines that states are under an obligation to:

“provide training on article 12, and its application in practice, for all professionals working with, and for, children, including lawyers, judges, police, social workers, community workers, psychologists, caregivers, residential and prison officers, teachers at all levels in the education system, medical doctors, nurses and other health professionals, civil servants and public officials, asylum officers and traditional leaders”.

Specific training is long overdue for professionals dealing with issues such as this—in that lawyers dealing with family law matters in Ireland have been treading cautiously in to the area of psychology as they attempt to assist their clients with the emotional issues of the breakdown of relationships, and judges, for their part, have no training or guidance on the best way of interviewing children to ensure that children's voices are heard without any party to the proceeding’s rights being compromised.

The Comment goes on to set out, in paras 40-47, the steps for implementing the child’s right to be heard. They set out five steps which can be summarised as follows:

1. Preparation: Children should be given information about their right to express a view, should receive information about the option of communicating directly or through a representative, must be made aware of the consequences of his/her choice, the impact that the expressed views will have on the outcome, and the child must be prepared for the hearing.

2. The hearing: The person hearing the views of the child must be enabling and encouraging so that the child is assured that they are listening to his/her views, in a setting where they are, if possible, assured confidentiality, preferably not in open court.

3. Assessment of capacity: Once the decision-maker is satisfied that the child is capable of expressing his/her views, these views must be a significant factor in settlement of the issue.

4. Information about the weight given to the views of the child (feedback): The child must be informed as to the outcome of the process and how their views were considered. This will assist the child in making any amended proposals or, if necessary, file an appeal.

5. Complaints, remedies and redress: States are under an obligation to enact legislation to provide children with a complaints procedure and remedies in situations where their right to be heard has been disregarded or violated or that views expressed have not been given due weight.

Accordingly, under art. 12, children have the right to participate or to choose not to; to participate through a representative or directly to the court should they choose to do so; are presumed to have the capacity to form a view and once this is established their views are to be given weight; and be informed of the outcome and the effect that their views had on the ultimate decision.

The proposed Constitutional amendment, while not as strong as the wording of art. 12, would strengthen the position of children and give them a rights base from which to insist that their voices be heard. It does not state that children have a "right to express their views freely in all matters affecting the child”, nor does it state that opportunity be provided “either directly or through a representative body”. The concern will be how the right to be heard will be interpreted.
by the Irish courts, what guidelines if any will be given as to how these rights are to be interpreted, and what mechanism will be put in place to ensure that every child is given an opportunity to be heard. Being listened to, for the sake of complying with our obligations under the UN Convention will not necessarily ensure that children are heard, unless their views are considered in the overall decision being made and given due weight and consideration.

Divorce/separation in Ireland

How then are we to deal with the issue of the child's view in separation/divorce proceedings in Ireland and will the proposed amendment to the Constitution be sufficient to ensure that we comply with our obligations under art. 12 and General Comment No. 12?

While much of the commentary on children's right to be heard has focused on the structure provided in a court setting, most cases do not reach an actual court hearing.

It can be seen from the research carried out by Dr Carol Coulter that 90 per cent of separation/divorce cases settle, either early in the proceedings or on the steps of the court. Some of these settlements might have been achieved in very amicable settings; many other parties will have battled wills for a number of years.

The report produced by Dr Coulter in Spring 2007 where she reported on one month's (October 2006) decisions in the Circuit Court in Dublin shows that there were 161 cases dealt with over the month, of which 16 cases went to full hearing.

Of the 16 cases that were fought, 11 involved children. There is no mention in her report as to whether the children's wishes were taken into account in any of the cases that fought. She does, however, state that of the 68 cases that were settled where consents were filed in court, 21 cases involved children with detailed arrangements being handed in to court for custody and access. She records that, "[i]n one case the children's wishes were mentioned in relation to access."

It is clear then that the majority of children do not even get to a stage where they have the opportunity to express their views.

What about the 90 per cent where cases are settled? Are we not obliged under art. 12 to hear their voices, their parents being involved in judicial proceedings that affect them? Is there a mechanism for children to be heard during the settlement process? The answer would appear to be no. As Shannon has stated:

"The absence of a facility for children in Ireland to articulate their views, particularly where a case is settled in advance of the hearing, is a serious problem."

The lawyers involved, while ethically obliged to consider the welfare of the children, are acting for their parents and the children are not their clients. Parents will often just advise their lawyers that "arrangements have been made" for the children. Murch and Keenan note that, "the parents' solicitors, although key gatekeepers to the family justice system, do not see it as part of their role to see or involve the children."

Most parents make these arrangements with the best interests of the child in mind and the arrangements are probably the best solution that can be reached in most instances, but often times even the parents may not be aware how the conflict is affecting the child. From the outside all may appear well, the children may be performing well in school, for example, but, unknown to the parents, the children may have questions or concerns. These concerns, if not addressed appropriately may be exacerbated by lack of information, explanation and consultation. A report on Children's Experiences of Parental Separation was carried out by the Children's Research Centre at Trinity College Dublin in 2002. This research confirmed that how children coped with parental separation largely depended, amongst other issues, on how they were told about it, what reassurances they had received from their parents, the level of communication that existed between them and their parents and whether the conflict continued after the separation. Where conflict continued after the separation this was found to be "upsetting for children and exacerbated their sense of being different from other families."

While the overall findings of the research carried out at Trinity College Dublin differed from other similar research carried out (Smith & Gollop, 2001) in that most of the children stated that they did not wish to be consulted or be involved in the decision-making, amongst those that
indicated that they did wish to express an opinion, one girl aged nine remarked: “I remember when the court case was going on, I asked my mummy, ‘Why don’t they talk to me?’ because I was the one they were fighting over.”

How then are cases settled?

Cases, as stated above, can be settled at any stage of the proceedings. Separating parties will consult their respective solicitors and the solicitors may settle the case. Children will have no involvement.

Before proceedings are issued either under the Judicial Separation and Family Law Reform Act 1989 or the Family Law (Divorce) Act 1996, solicitors representing the parties are obliged, by statute, to inform their client of the options available in terms of counselling and alternative dispute resolution and to file a certificate in court confirming that the parties have been so advised. Up until recently the only alternative dispute resolution method was through mediation. While mediation may be very effective in the resolution of disputes, it can be seen from the report prepared by Dr Coulter to the Board of the Court Service that only 3 per cent of cases in 2006 were dealt with through the Family Mediation Service. Some parties may have used private mediators to resolve their disputes and this would not be reflected in these figures; however, even allowing for an element of private mediation, it would appear that only a small percentage of cases are dealt with through mediation. It is difficult to know whether this is because solicitors, while obliged to discuss alternative methods with clients, may have reservations themselves about the process and are not encouraging clients to engage in mediation or whether clients themselves are concerned about the process.

What role do children have in the mediation process?

It can be seen from the research carried out by Sinead Conneely between 1997 and 1999 that according to the statistics held by the Family Mediation Service, children attended their service in 6.6 per cent of cases. According to the information supplied by the clients of the Family Mediation Service to Dr Conneely during the course of her research, children attended in only 2 per cent of cases. Further research was carried out by Dr Elaine O'Callaghan between 2006 and 2009 and it was found that, “while the child’s information needs are addressed in some cases, the child is not given an opportunity to express his or her wishes or concerns as regards any new familial arrangements or to participate in any way in the decision making process.” It is clear, based on this research, that children are rarely involved in the mediation process. Mediators feel that allowing children to be part of the process puts an unfair burden on the children and on the process of the mediation itself, pointing out that the mediator then runs the risk of having to abandon his or her neutral role and become an advocate for the child. This can also cause difficulties as it can lead the mediator into the role of providing therapy, which they are not qualified to do.

Whether there are benefits in involving the child in the mediation process has been the subject of much debate. Research has shown that parents’ views of what children think can differ considerably from what the children themselves think. Research carried out on child-inclusive mediation in both Australia and New Zealand has shown that a child-inclusive model can be very beneficial for the children themselves and for their parents.

The collaborative process—what is it and how may it assist to hear the voice of the child?

The collaborative law process is a new method of dispute resolution used primarily, but not exclusively, in family law. The process originated in the US in the early 1990s. It was developed by a lawyer called Stuart Webb, who as a result of dealing with family law matters through the adversarial system, became increasingly frustrated with the acrimonious nature of the proceedings and decided that there had to be a better way to deal with conflict in family law.

He developed the collaborative law model. In essence, this model provides a structured framework for the resolution of family law matters where the threat of going to court is removed from the equation. The separating couple themselves, with the assistance and guidance of their lawyers, negotiate settlement of the issues between them by means of scheduled, face-to-face,
four way meetings. Each party and their lawyers meet around a table, agree on an agenda and set out their aims—what they hope to achieve from the process, e.g. agreements in relation to custody and access, division of assets, etc.

At the outset, both the lawyers and the clients sign a participation agreement in which they agree to negotiate settlement by means of scheduled four way meetings and to provide full disclosure. What is unique about the process is that the parties and their lawyers as part of this participation agreement agree to a disqualification clause. The significance of the disqualification clause is that, in the event that settlement cannot be reached, the lawyers and any experts employed have to withdraw from the case and are disqualified from representing the clients in any future court proceedings arising out of the separation. Stuart Webb, the founder of the collaborative model, believes that it is this disqualification clause that makes the process work. He believes that it provides a "safe and effective environment for settlement" because the clients do not have the fear that the opposing lawyer will be in a position to use things they have said during the course of the four way meetings in any possible future litigation. Also, the disqualification clause discourages the parties from ending the settlement process prematurely and rushing to court, as by doing so the parties have to instruct another set of lawyers and the lawyers lose their clients.

Clients wishing to engage in the collaborative process are screened as to their suitability. For example, cases involving issues of domestic violence or prolonged drug or alcohol addiction, may not be suitable for the collaborative process. All clients wishing to engage in the process have to fully aware of the commitment involved; they have to be prepared to act honourably with a view to coming to a better settlement for the benefit of their family. There is little point in clients who are not genuinely prepared to work towards a solution taking part in this process, because breakdown of the process has significant cost implications for the parties. It is not to be considered an easier way to divorce. Engaging in four way meetings can be difficult for separating parties, and in a lot of ways it would be arguably easier to go the traditional route and let your lawyer deal with all the confrontation, but the aim and hope is that by engaging in this process separating parties will have a more workable, family friendly resolution of the issues between them which will allow them to communicate effectively, if only for sake of their children.

The initial model developed by Stuart Webb was the “lawyer only model”. This has now been developed to include an interdisciplinary model, the collaborative law process or collaborative divorce where collaborative coaches, neutral financial experts and neutral child specialists are used. The collaborative law method is relatively new in Ireland. The interdisciplinary model or the collaborative process, where the separating parties would have access to counsellors or “divorce coaches“ as they are referred to in the US, during the course of a separation or divorce may perhaps be viewed with cynicism in Ireland as an American idea. Culturally, Irish people, known better for keeping their cards close to their chests may be less inclined to engage in a process such as this. The concept of full disclosure may be of concern to some parties. While there has been some criticism of the collaborative process, particularly in relation to the disqualification clause and the pressure that puts on parties to settle, the collaborative process is the first settlement process with a specific regard for hearing the voice of the child in family law matters in a non-adversarial, non-judgemental way.

During the collaborative process, the parties have the opportunity to instruct a child specialist. The child specialist is a licensed mental health professional with particular training and experience in family systems, child development, and the needs of children during and after a divorce. The role of this child specialist is to talk to the children, ascertain their views and concerns and bring any issues that the children would like addressed, with their consent, to the attention of their parents in a neutral way. The input from the child specialist is short-term and focused with a view to assisting the child through the separation/divorce process. This avoids a situation where children feel that they have to choose or take sides and empowers them, should they wish to avail of the process, by making them feel that they are working with their parents towards a solution rather than them perceiving, through lack of information and consultation, that they are part of the problem.
What are the benefits of engaging a child specialist?

1. The child specialist is specifically trained to talk with the child and this avoids a situation where well-meaning lawyers or mediators stray in to a field that they are not qualified to deal with.

2. Children are given a chance to express their views, should they wish to do so, in a safe environment.

3. The child specialist elicits the child's view but is not involved in providing psychotherapy. If the child specialist has concerns that there are issues that may need to be addressed through therapy, these can be brought to the attention of the parents.

4. Issues that are of concern to the children may then be brought to the attention of the adults in a structured way that is not seen as judgmental or accusatory and may assist the adults in altering their behaviour towards the child, towards each other or towards practical matters like custody and access.

5. Children are given a say without being forced to choose.

6. Formal written reports are not prepared and the feedback is given to the adults during the course of the overall settlement of the case so that the parties are not affected by the delays involved in getting written reports.

Could this model ensure that we comply with our obligations under art. 12 and our Constitutional obligations if the proposed amendment is passed by referendum later this year?

It would appear that it would go a long way towards ensuring that children were given a voice and ensuring some role for children within the settlement process.

Conclusion

Writers on the collaborative process have expressed views that it may be more practical in cases that can be settled to do so by “cutting to the chase” within the traditional process and, from a practical point, this is more straightforward rather than having to deal with the human emotions and the structure involved in the collaborative process. Also, in terms of the time and commitment required by the parties themselves and by the lawyers, the collaborative process may seem somewhat onerous, but from the point of view of the well being of the client and the family involved, is it time well spent in the long run?

It would appear that using a child specialist as part of the collaborative process would go a long way towards ensuring that children were given a voice and that they have a role within the settlement process. The engaging of a child specialist would provide children with a suitably trained, independent person to talk to, to enable them to express their wishes in a safe and confidential manner, knowing that with their consent the child specialist may address specific agreed issues with the child's parents in an effort to ensure that the child's wishes are heard and respected.

In an article entitled, “The Divorce is Over- What About the Kids?” the writers outline seven “rights” which children should have as follows:

1. Each child has the right to understand that the decision to divorce is a parental decision and not his or her choice and/or fault.
Each child has the right to be free from acting as messenger, spy, scapegoat or mediator and free from interrogation about the other parent's private life.

3. Each child has the right to maintain independent relationships with each parent and to respect the individual differences in parenting styles and personal differences in each home.

4. Each child has the right to be free from witnessing parental conflict and from the burden of having to side with one parent or develop exclusive loyalty towards a parent.

5. Each child has the right to have regular access and consistent time spent with each parent.

6. Each has the right not to hear disparaging comments made by one parent about the other parent.

7. Each child has the right to maintain loving relationships with maternal and paternal extended family members.

These seven “rights” are not going to be set out in any statute or as part of any Constitutional amendment, but they are “rights” which we should strive to provide for children in situations of family conflict.

With the publication of the proposed amendment to the Constitution and the possibility of a referendum being held next year, it is imperative that we have mechanisms in place to enable the voice of the child to be heard, not just in the courts but for the 90 per cent of children whose parents’ cases are settled. The collaborative process, as developed to date and expounded above, offers one possible, practical model to provide children with such an opportunity.

This journal may be cited as e.g. [2005] 2 I.J.F.L. 1 ([year] (Volume number) I.J.F.L. (page number)]


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3. Article 41 of the Constitution of Ireland 1937.


12. Section 28 of the Guardianship of Infants Act 1964, to be inserted by s.11 of the Children Act 1997, this section is not yet in force.

13. Formerly s.17(2) see s.11 of the Children Act 1997 (No. 40 of 1997).


15. Unreported, Supreme Court, June 1975.


20. UN Committee on the Rights of the Child, General Comment No. 12 (2009), The Right of the Child to be Heard. UN Doc UNCRC/C/GC/12 July 1, 2009.

21. UN Committee on the Rights of the Child, General Comment No. 12 (2009), The Right of the Child to be Heard. UN Doc UNCRC/C/GC/12 July 1, 2009 at para.19.

22. UN Committee on the Rights of the Child, General Comment No. 12 (2009), The Right of the Child to be Heard. UN Doc UNCRC/C/GC/12 July 1, 2009 at para.48.

23. UN Committee on the Rights of the Child, General Comment No. 12 (2009), The Right of the Child to be Heard. UN Doc UNCRC/C/GC/12 July 1, 2009 at para.20.

24. UN Committee on the Rights of the Child, General Comment No. 12 (2009), The Right of the Child to be Heard. UN Doc UNCRC/C/GC/12 July 1, 2009 at para.44.

25. UN Committee on the Rights of the Child, General Comment No. 12 (2009), The Right of the Child to be Heard. UN Doc UNCRC/C/GC/12 July 1, 2009 at paras.40-47.


45. A participation agreement sets out the ground rules for the process. The main issues it sets out are the goals of the process, the commitment to resolving matters out of court, the commitment to full disclosure and integrity, negotiating in good faith, the disqualification clause and confidentiality.


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