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Realising the Child's Right to be Heard in Private Child Contact Disputes: Progress in Practice?

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Introduction

In disputed contact cases in the courts, decisions are made by the judge following an examination of all relevant facts, and the best interests of the child remains the central consideration throughout the process. What is noticeably absent, however, from this decision-making process is the voice of the child, despite this emphasis on the child's best interests. The importance of realising the child's right to be heard in disputed contact cases cannot be underestimated as it can help to ensure that all of the parties to the case are adequately involved and that the judge has a good overall view of the reality to which the child is exposed on a day-to-day basis, thereby assisting the judge to reach an informed decision.

Procedural rights for parties in court are increasingly recognised as being integral to the substantive right at issue in a given case. The international legal framework, and in particular, art. 12 of the UN Convention on the Rights of the Child (UNCRC), as well as arts 23, 41 and 42 of the Brussels II bis Regulation, explicitly require that the child's right to be heard is realised in practice. Irish domestic law also points to the importance of ascertaining the child's views; this is particularly evident in the Guardianship of Infants Act 1964 (the “1964 Act”), as amended by the Children Act 1997.

Judges are afforded a great level of discretion in cases concerning contact and consistently reiterate that each case is different and must be decided on its own facts. Indeed, as Schneider points out, “... the best interests principle has been widely and vehemently attacked, essentially on the grounds that it is too little a rule and too much an award of discretion”. The importance of procedural rights thus takes on an added impetus. The evidence that the court invokes to ensure that it is in a position to make an informed decision in relation to the family before it, which is also in the best interests of the child, is crucially important and must be capable of constructing a full picture of the reality of the family's life. The combination of these factors serves to highlight the importance of the child's right to be heard in cases concerning their interests.

The child's right to be heard: research context

Research in this area points to a number of advantages of ensuring the participation of children in decisions affecting their lives. For example, on a personal level, involvement in decision-making can increase a child’s “sense of identity, self-esteem and personal autonomy”. In short, it is a lucid way of empowering the child. As Timms comments, “it enhances their sense of direction and gives them some element of control of what are often distressing and traumatic events”. When considering disputed child contact cases, for example, which may emanate from the divorce or separation of the child's parents, it is clear that the participation of children in the decision-making process may be extremely beneficial to the child in this regard. It is also
evident that children want involvement in the decision-making process in court. Sturge and Glaser considered the importance of ascertaining the child’s views in disputed contact cases with a background of domestic violence and commented as follows:

“... while this needs to be assessed within the whole context of such wishes, the older the child the more seriously they should be viewed and the more insulting and discrediting to the child to have them ignored. As a rough rule we would see these as needing to be taken account of at any age; above 10 we see these as carrying considerable weight with 6-10 as an intermediate stage and at under 6 as often indistinguishable in many ways from the wishes of the main carer (assuming normal development). In domestic violence, where the child has memories of that violence we would see their wishes as warranting much more weight than in situations where no real reason for the child’s resistance appears to exist.”

It may also help the child to adjust to new familial arrangements if his views have been heard:

“... if children have been involved in the making of a decision, they have a sense of ‘ownership’ and an emotional investment in positive outcomes, which means that plans are more likely to succeed.”

Indeed, this is a further reason for involving children in decisions affecting them and it stems from the “growing influence of the consumer”, which has seen the transfer of power to those using goods and services. This is a crucial point, particularly as regards ensuring the effective implementation of any such decisions in practice. Again, to take the example of a disputed child contact case, any decision made by a court or otherwise will directly affect the child’s day-to-day life. If the child’s views are heard in this scenario, the court will be in a stronger position to reach a decision that represents the child’s wishes and needs. This ultimately means that any decision made will be more effective in practice as the child will have had an input. Further, the child will be more aware of how and why the decision came about.

United Nations Convention on the Rights of the Child

The importance of procedural rights for children in cases concerning them is well established in the UNCRC. The text of the Convention itself, as well as the General Comments and the Days of General Discussion of the Committee on the Rights of the Child, point to this. Article 12, which concerns the child’s right to have his or her views given due weight in accordance with his or her age and maturity, is perhaps the most prominent example in the Convention itself. Further, art. 12 “constitutes one of the fundamental values of the Convention”; the Committee on the Rights of the Child identified this article as one of four general principles which must guide the implementation of every provision of the UNCRC.

Article 12, along with art.9(3), clearly establishes the obligations on states in private family law matters to ensure that the views and best interests of the child are given due consideration in all circumstances. Further, the UNCRC outlines that any decision-making in relation to the child should also empower the child, while the Committee on the Rights of the Child advocates that State Parties ensure that the child’s rights under art. 12 be “implemented from the earliest stage in ways appropriate to the child’s capacities, best interests, and rights to protection from harmful experiences”. The importance of appointing specially trained professionals with both legal and non-legal experience is also detailed as necessary in order to ensure that this right is safeguarded in practice.

Irish law, including Brussels II bis Regulation

The procedural rights of parties are provided for in the Irish Constitution, legislation and case law. Article 40.3 of the Constitution, which relates to personal rights, has been established as “a guarantee of fair procedures”, meaning that the parties to a case are entitled to be given a proper opportunity to make their case, including the right to be furnished with all relevant information relied upon in the decision-making process. In Garvey v Ireland, O’Higgins C.J. interpreted Art.40.3 as guaranteeing:

“... to every citizen whose rights may be affected by decisions taken by others the right to fair and just procedures. This means that under the Constitution powers cannot be exercised unjustly or unfairly.”
In the High Court case of FN and EB v CO, concerning issues of custody and contact, Finlay Geoghegan J. referring to Art.40.3, reiterated that parties, in respect of whom decisions of importance are being taken, have a personal right within the meaning of the Article to have such decisions taken in accordance with the principles of constitutional justice. The High Court judge interpreted this personal right as including: “… the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes…”.

Further, the Children Act 1997 introduced a number of changes concerning the procedural rights of children. Section 25 of the 1964 Act requires the court, “as it thinks appropriate and practicable having regard to the age and understanding of the child, to take into account the child’s wishes on the matter” in cases concerning guardianship, custody and access. It also outlines, however, that in such cases, it is not necessary for the child to whom the proceedings relate to be brought before the court or to be present for all or any part of the hearing unless the court, either of its own motion or at the request of any of the parties to the proceedings, is satisfied that it is necessary for the proper disposal of the proceedings. If the child requests to be present during the hearing, the court shall grant the request, giving consideration to the child’s best interests.

Brussels II bis Regulation, which is chiefly concerned with the area of parental responsibility, including custody and access orders, sets out a number of procedural safeguards which must be respected, including that the child must have been given the opportunity to be heard, unless it was considered inappropriate having regard to the age and maturity of the child.

There is currently no definitive structure in place in Ireland to ensure that children’s views are ascertained to inform the judicial or administrative decision-making process in cases affecting their lives. No provision has been made to ensure that appropriate services are available so that children going through such cases receive the necessary assistance, support and independent advocacy. As a result, children involved in family law proceedings are frequently unrepresented and may not, in fact, be involved at all. The invisibility of children and young people in court proceedings which affect them has been observed by Mrs Justice Catherine McGuinness, who commented as follows in relation to the “Baby Ann case”,

“It is perhaps striking that the one person whose particular rights and interests, constitutional and otherwise, were not separately represented, whether by solicitor and counsel or through a guardian ad litem, was the child herself…. In my personal view, … a and bearing in mind the terms of such international instruments as the United Nations Convention on the Rights of the Child, or EU Regulation 2201/Nov. 2003 (Brussels 2 bis), this situation should at the very least give pause for thought.”

In practice, when it is deemed necessary to ascertain children’s views, they are elicited through various measures: expert evidence and reports from social workers, child psychiatrists and other child experts; advocacy representation for children through a guardian ad litem and conversations between judges and children in chambers. The most common way in which the judge will attempt to ascertain the child’s views is through expert evidence or a report from a social worker, usually in the form of a section 20 report or a section 47 report. There are, however, a number of difficulties as regards invoking such reports in cases, including, in particular, delays and costs, as well as the lack of qualified personnel who are in the position to undertake such reports and attend court, if necessary, on a relatively short time scale.

In complying with the requirements under Brussels II bis Regulation as regards ascertaining the child’s views, judges of the High Court have, on a number of occasions, personally met with the child concerned in order to ascertain their views. For example, in the case of N v N [hearing a child], Finlay Geoghegan J. ruled that a child of six years of age should be heard by the court in determining whether to return the child to his habitual residence in another country in the European Union. While the judge acknowledged that common practice in the courts as regards ascertaining the child’s views involves making an order for the interview and assessment of the child by an appropriately qualified person, such as a child psychologist, it was observed that this is a matter of discretion for the court, and not pursuant to any absolute obligation. In this regard, and in consideration of arts 11 (2) and 11 (3) of the Brussels II bis Regulation, which require that the court act as expeditiously as possible in abduction cases, Finlay Geoghegan J. deemed a meeting with the child as best meeting with requirements. On this matter, Finlay Geoghegan J.
commented as follows:

“On the facts of this application, the child is aged six years and appears from the affidavit evidence of the parents to be of a maturity at least consistent with his chronological age. On those facts, I do not find that prima facie he is a child not capable of forming his own views in the sense I have outlined above. It appears to me unavoidable that a judge making such a decision must rely on his or her own general experience and common sense. Anyone who has had contact with normal six year olds knows that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life.”

This case marks an important recognition of the requirement to hear the views of the child in matters affecting him or her. It also clearly highlights one of the great benefits of a judge personally meeting with the child concerned, which relates to its ability to avoid delay, a factor which has been legally recognised as detrimental to the conduct of a case. Further, it validates the judge's meeting with the child as a means of meeting the demands of international law, and in particular, Brussels II bis Regulation.

It is evident that judges in common law countries are increasingly meeting with children who are and will be affected by decisions which they make at court, a practice which has been regularly occurring in civil law countries for many years. As Baroness Hale explained in the case of In Re D (A Child) [2006] UKHL 51,

“(i)n some European countries, notably Germany, it is taken for granted that the judge will see the child. In this country, this used to be the practice under the old wardship system, but fell into disuse with the advent of professional court welfare officers who are more used to communicating with children than are many judges”.

There is, however, no consensus yet, on either the domestic or international level, as regards the use and value of such a meeting between a judge and a child. In particular, due process concerns as well as the potential impact of such meetings on the child, require further consideration. One of the major criticisms surrounding the use of judicial interviews as a means of ascertaining the child's views is the lack of formalised standards and safeguards which are in place. Abbott J. in the High Court has attempted to address this issue by outlining a number of factors which must be taken into account by a judge when speaking with children in the case of SJO'D v PC'O'D:

1. The judge shall be clear about the legislative or forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches.

2. The judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and the judge's own experience.

3. The principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children.

4. The judge should explain to the children the fact that the judge is charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself and should assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all) determinative of the ultimate decision of the court.

5. The judge should explain the development of the convention and legislative background relating to the courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.
The court should, at an early stage ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in dispute in the litigation are likely to assist and agree on this aspect. In the absence of such agreement then it is advisable for the court to seek expert advice from the s. 47 procedure, unless of course such qualification is patently obvious.

7.

The court should avoid a situation where the children speak in confidence to the court unless of course the parents agree. In this case the children sought such confidence and I agreed to give it them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child's point of view is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case.

It is submitted that each of these factors, in turn, present important considerations for any judge who is considering meeting with a child in order to ascertain his or her views in the context of family law proceedings. The combination of these factors mark a vital step towards formalising the process, but it is further submitted that a detailed Practice Direction and Rules of Court are necessary in order to adequately address the issue, particularly given the international impact which the individual case may have in the light of Brussels II Regulation.

Empirical research method

In order to explore whether the child's right to be heard is realised in private child contact disputes in the court process in Ireland, this author carried out a series of semi-structured interviews with a variety of professionals working directly in this area on a day-to-day basis as well as with a number of separated and divorced parents who are and have been involved in private child contact disputes. More specifically, the interview sample included seventeen members of the legal profession, consisting of three District Court judges, twelve solicitors and two barristers as well as two family mediators, two guardians ad litem, one child psychiatrist, one social worker, two members of relevant child and family organisations and agencies in the voluntary sector and one family counsellor. Potential interviewees from each of the above groups were identified, all of whom have extensive practical experience as regards child contact issues in Ireland. Some of the interviewees were identified at the outset of this research as they are particularly well-known for their experience in the field of family law in Ireland, while others were recommended during the course of this research. Solicitors working for the Legal Aid Board were also interviewed.

Seven separated parents, including five unmarried fathers, one unmarried mother and one divorced mother, who were seeking contact with their children, were interviewed. Two of these cases involved a cross-border element, as the child of the parent interviewed who was seeking contact was living in another jurisdiction in the European Union. A variety of measures were used to locate separated and divorced parents. First, a notice outlining the research was displayed in the family law area where parents wait prior to court hearings in the District and Circuit Courts. Five responses were received from separated and divorced parents through this process and consequently, four of these parents were interviewed. Second, this author attended the annual fathers’ rights protest as hosted by the Unmarried and Separated Fathers of Ireland in 2009 in order to meet with and interview the organisation’s members; two members were interviewed. Finally, one unmarried father who had highlighted his contact dispute in the media was contacted directly by this author.

The interviews with the professionals and parents were semi-structured to enable the interviewees to talk in-depth about their experience and raise issues that were of most importance for them as regards the procedural rights of children in the family law courts. In short, interviewees were asked whether children's views were ascertained, and if so, how, during the court process. While this sample is clearly not representative, these interviews have proved to be pertinent as regards establishing children's needs in disputed contact cases, as the interviewees involved have identified the obstacles they encounter, on a practical level and on a day-to-day basis, to realising children's rights in such cases and situations. All research participants were informed of the aims of the research and advised that any information given would be
anonymous, thereby ensuring reliable responses. The interviewees' comments are therefore not identifiable in this research.

Ascertaining children's views in the court process: current practice

Despite the many arguments indicating the importance of ensuring that children's views are heard in decisions affecting their lives, it is clear that in Ireland there are a number of difficulties in practice as regards realising this right, due to, in particular, delays and costs, as well as the lack of qualified personnel who are in a position to undertake reports and attend court to outline the child's views. Indeed, there is also a strong lack of consensus as regards the most appropriate ways of ascertaining the child's views. According to Clissman and Hutchinson:

"[T]here does not yet appear to be a universally accepted and suitable means to elicit evidence of the views of children when these cases actually come before the courts. This, regrettably, results in an unavoidable diminution in the value of the right in substantive terms. If proper regard is to be had to the self-determination of children, a new and better method needs to be found for voicing their opinions to the forum charged with adjudicating on their future."

One solicitor in the research project commented that, currently, "children aren't involved at all… in custody and access cases the child's views are never heard." Another solicitor stated that,"… the whole family law system is not organised in such a way that the voice of the child can be brought forward". Indeed the interviewees showed a great sense of frustration at this and one judge observed that,"… the court is denied a method of accessing the child's wishes … I think that is a huge problem". The judge continued: "(t)here are distinct disadvantages… which come about when involving children in the legal process", while another judge stated that he tries to "avoid having children involved in the court as much as possible", including either attending court or participating in the process. There are a number of reasons for this, in particular, the lack of resources and also the notion of the need to balance the right of the child to have his or her views heard as against the need to avoid damaging or harming the child by involving him or her in the court process.

(i) Case-load

In practice, there are problems with case-loads and a large number of family law cases are held on a given day at court which raises concerns relating to time and delay. This makes it more difficult as regards ascertaining the child's views, as well as regards the amount of time that the judge has to spend on a particular case. As one judge interviewed for the purpose of my research commented, delay

"… is regarded as a debilitating feature and it is not to the advantage of the child… delay is damaging… Anything that adds to delay is damaging… And the court should be aware of the damaging effect of it."

It is clear that "[c]hildren rarely benefit from delay in custody proceedings". Indeed, Goldstein et al. go as far as to say that custody decisions must be treated as emergencies in order to avoid irreparable psychological injury. According to legal practitioners, a court may have to work its way through some thirty or forty cases in a single day. This clearly allows very little time for each case and raises both procedural as well as substantive issues. One solicitor in the research project commented that,

"… the judge has to run the list like he's running a train station… get in, get out, get in, get out… the judges do their best and they do try to allow time… but, it's just it's not a great vehicle. I feel there must be a better way of doing it."

A judge expressed similar concerns: "I would like, particularly in child contact cases, to have a lot more time with them, but time is at a premium given the way that the system is". A solicitor also remarked that,

"… the whole courts system gives so little time to issues of access, it's like it's the lowest issue on the rung. It's interesting that the circuit court deals with important things like property while the district court has to deal with minor issues such as guardianship and
There is an insufficient number of judges available to deal with the current case-load in the family law courts. As a result, time for individual cases is greatly limited and the child's right to participation is not respected in practice, meaning that many children are never asked their views by anyone at any stage of the proceedings. This is despite the importance of ascertaining the child's views in some form, particularly as regards safeguarding the child's rights.

(ii) Protecting children through non-involvement?

Cashmore and Parkinson have observed that, “[m]ost common law jurisdictions have taken a protective stance and are reluctant to allow children to enter the arena in terms of having any direct contact with the court itself.” In practice, in Ireland, this observation is justified, in particular, given the strong notion which exists as regards the need to avoid harming the child by involving him or her in the court process. Indeed, one solicitor interviewed for my research project referred to this as a most “delicate balance”, while another solicitor commented that, “on the one hand the court must hear the voice of the child and on the other hand, you don’t want to damage the child by having them involved in their parents’ dispute - that can do untold damage so there is a balance there.” One judge shared that view, and commented that he avoids interviewing children in chambers and tries to keep children “out of the conflict in court because it can be very, very hard and very, very upsetting and god knows there may be enough upset at home without getting involved in this aspect of matters as well.”

One separated mother commented as follows in relation to her experience of the Family Law courts:

“I have been in courts up and down the country and … most family law days are mixed with criminal proceedings so the facilities are not there to provide for children. Also its unfair as their loyalties cannot and should not be divided, as I have heard that children sometimes blame themselves for parents splitting up.”

Some interviewees were critical of the ad hoc approach to ascertaining children's views and advocated the need for a shift in perception. One solicitor commented, for instance, that, “I think we're very paternalistic about the way we treat children in court and their views. … children's voices should be heard in court. Everybody accepts that.”

Another solicitor attempted to explain the approach as follows:

“common law judges… feel that bringing the child into the dispute is the worst thing you could do for the self-esteem of the child because they feel they have to say something for or against one of their parents … But if you look at a civil law system … where children routinely have their voice sourced, they take a very different view. They take the view that under no circumstances would they ask the child to say one thing against another; the judge is there to discuss generally practicalities. The judge is making the decisions and it is made clear to the child that the judge is making the decisions.”

On this point, it is vital to emphasise that involving the child in the decision-making process does not necessarily mean that his wishes will be adhered to. Instead, the child's views are another important factor to be taken into account by the court. The crucial point is, however, that these views are heard and considered in the decision-making process. As Timms maintains:

“… even if consultation does not lead to the outcome the child would have preferred, participation in the decision-making process can still leave the child with positive feelings about himself and the fact that he has been treated with respect… it is possible to allow children to have an input into the decision-making process without burdening them with the responsibility for making the decision.”

It is clear that the child's views are not determinative in the decision-making process and this fact needs to be communicated to the child. Overall, in the decision-making process itself, the main value of involving the child is that, “… the child's perspective may encourage adults, or agencies, to think more flexibly or consider a wider range of alternatives.” As well as ensuring that the child's views are heard, it is equally important to ensure that the child is adequately informed of
all the relevant details in an age-appropriate manner. Indeed, at the core of establishing the decision-making capacity of children is the need to ensure a balance between empowering children and protecting them.

Conclusion

The right of the child, who is capable of forming views, to be heard in any proceedings affecting him or her forms the core of the procedural rights of children. The international legal framework enshrines these rights in a number of different instruments and further details the practical application of them. Incorporating the child's views in the decision-making process helps the decision-makers, such as judges, to properly engage with all of the relevant facts and circumstances and ultimately facilitate a decision which is truly in the child's best interests. Further, the value of this right for children has been well documented in research which outlines that involvement in decision-making can enhance children's sense of direction and control over their lives.

Dewar observes, referring specifically to art. 12 UNCRC, that “… it is surprising that a child-focused approach has taken so long to emerge”. Both in Ireland and internationally, particularly in common law jurisdictions, the child's views are rarely ascertained in custody and access decisions. Indeed, it is clear that provision is “variable and arbitrary”, as regards some children having the opportunity to convey their wishes and others not. In Ireland, ascertaining the child's views is extremely problematic in practice. As one solicitor commented,

“… there is definitely a huge void there in relation to children and the whole family breakdown situation… we can say we must listen to children but in practical terms, nothing is done.”

As to the effect of not hearing the voice of the child in disputed contact cases, it is clear that in the vast majority of custody and contact cases in Ireland,

“any court imposed access order is simply a decision by a judge who is a stranger to the parties and who knows very little about the child apart from what the contesting parties tell him or her.”

Bearing in mind that the courts are an adversarial setting in Ireland, it is clear that it cannot be adequate in every case for the judge to rely on what the parents say. As one solicitor commented, parties “tell diametrically opposed stories so the judge is forced to make a decision in the dark- between two warring people”

There is undoubtedly a great need to provide a system of representation for children, “which treats them as people, rather than the passive objects of parental disputes”. It is evident that if children's views are to be ascertained and considered in disputed contact cases, the court needs to be in a position to ascertain these views in a timely manner, while avoiding harm to the child and also, while being assured as regards what the child means as well as what is in the child's best interests. The importance of involving appropriately qualified and trained professionals, including judges, for dealing with cases involving children and ascertaining their views, is essential.

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This paper is based on PhD research carried out by the author in the Faculty and Department of Law, University College Cork,
1. See s.3 of the Guardianship of Infants Act 1964.


5. See s.25 of the 1964 Act as inserted by the Children Act 1997. Section 25 requires the court, “as it thinks appropriate and practicable having regard to the age and understanding of the child, to take into account the child’s wishes on the matter”. According to Birks, this is a relatively mild obligation as it leaves discretion to the court in relation to the child’s capacity to understand. Annual Review of Irish Law 2004 (Dublin: Round Hall Sweet & Maxwell, 2005).

6. See for instance, C. E. Schneider, “Discretion, Rules and Law: Child Custody and the UMDA’s Best Interest Standard” (1991) 8 Michigan Law Review 2215 at 2218: “… family law lives in a tension between according officials discretion to make decisions and limiting that discretion by requiring them to follow rules. And perhaps nowhere in family law has discretion been so controverted as in the debates over what standard to use in settling disputes over the custody of children.”; J. Dewar, “Concepts, Coherence and Content of Family Law” in Birks, PBH, Examining the Law Syllabus: Beyond the Core (Oxford: OUP 1993), pp.81-82. G. Douglas, Introduction to Family Law (Oxford: OUP 2001), p.16. In the Irish context, see F. Martin, “Judicial Discretion in Family Law” (1997) 15 Irish Law Times 226. As Martin argues, the “rule of law” theory is difficult to decipher in Irish family law cases. Hoggett comments as follows: “There are no rules of law; instead there is a discretion in which a number of factors have to be taken into account, but the underlying values, other than the primacy of the child’s welfare, have not been articulated.” See B.M. Hoggett, Parents and Children: The Law of Parental Responsibility (London: Sweet & Maxwell, 1993), p.63.

7. C.E. Schneider, “Discretion, Rules and Law: Child Custody and the UMDA’s Best Interest Standard” (1991) 8 Michigan Law Review 2215 where he comments that: “… the best interest principle has been widely and vehemently attacked, essentially on the grounds that it is too little a rule and too much an award of discretion.”


12. See for example, Buchanan et al., Families in Conflict: Perspectives of Children and Parents on the Family Court Welfare Service (Bristol: Policy Press, 2001) which reported that some 80 per cent of children expressed their desire to be involved in the decision-making process. See also, J.E. Timms, S. Bailey and J. Thoburn, “Your shout too? A survey of the views of children and young people involved in court proceedings when their parents divorce or separate” (NSPCC Policy Practice Research Series, 2007).


16. Family Justice Council, "Enhancing the Participation of children and young people in family proceedings: starting the debate", (FJC Voice of the Child Subgroup, 2008). The Family Justice Council proposes that consideration be given to increasing the involvement of children in proceedings, where appropriate.


18. The Committee on the Rights of the Child has been particularly active as regards the promotion of procedural rights for children in the court process. It has, for example, drawn up a number of general comments as well as hosted Days of General Discussion which specifically aim to guide state parties in the implementation of such rights on the domestic level. See, in particular, General Comment No. 12, The right of the Child to be heard CRC/C/GC/12; Day of General Discussion on the Right of the Child to be Heard 29/09/06. See also, General Comment No.5, General Measures of Implementation of the Convention on the Rights of the Child CRC/GC/2003/5; General Comment No.7, Implementing Child Rights in Early Childhood (CRC/C/GC/7/Rev.1; General Comment No. 9, Children's Rights in Juvenile Justice CRC/C/GC/10; Role of the Family in the Promotion of the Rights of the Child 10/10/94, all available at www.ohchr.org.

19. Article 12(1): “States Parties shall assur[e] 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”. Article 12(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 text of the convention is available at www.ohchr.org.

20. General Comment No. 12, The right of the Child to be heard CRC/C/GC/12 §2.

21. The other principles are: the principle of non-discrimination under art.2, the best interests principle as set out in art.3 and finally the right of the child to life, survival and development under art.6. UN Committee on the Rights of the Child, General Guidelines regarding the Form and Content of Initial Reports to be submitted by States Parties under Article 44(1)(a) of the Convention, UN Doc. CRC/C/5, §§ 13-14, 30/10/1991. See further, General Comment No. 12, The right of the Child to be heard CRC/C/GC/12.

22. Article 9(3): “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”. The text of the convention is available at www.ohchr.org. See also, Day of General Discussion on the Right of the Child to be Heard, 29.09.06, § 55. See www.ohchr.org.

23. General Comment No. 7 (2005), Implementing Child Rights in Early Childhood CRC/C/GC/7/Rev.1 § 14(a). Explicit reference is made to “legal proceedings” in § 14(b).


27. See FN and EB v CO (Guardianship) [2004] 4 I.R. 311 at 321-22.


30. Section 27(1) Children Act.

31. Section 27(2).

32. Articles 23, 41 and 42 of Council Regulation 2201/2003, of November 27, 2003 concerning jurisdiction and the recognition and


35. Section 20 of the Child Care Act 1991 empowers the court, during guardianship, custody and access proceedings, to order a report on the child's circumstances where it believes that a care or supervision order may be necessary. Section 47 of the Family Law Act 1995 empowers the Circuit Court and the High Court to order a report on "any question affecting the welfare of a party to the proceedings or any other person to whom they relate" either on its own initiative or on application by a party to the proceedings. Section 26 of the Children Act 1997 empowers the District Court to order a section 47 report under the Family Law Act 1995.


38. See para. 12 of this judgment.

39. See para.60 of the judgment.


41. See above parts 1-4 of this paper.


43. Solicitor, interviewee no.5

44. Solicitor, interviewee no.1.

45. District Court judge, interviewee no.6

46. District Court judge, interviewee no.6

47. District Court judge, interviewee no.15.

48. District Court judge, interviewee no. 6.


50. Solicitor, interviewee no.2.

51. Solicitor, interviewee no.1.

53. Solicitor, interviewee no.4.

54. District Court Judge, interviewee no.15.

55. Separated mother, interviewee no.1.

56. Solicitor, interviewee no.1

57. Solicitor, interviewee no.5.

58. Indeed, the UNCRC requires that the child's views be given "due weight in accordance with the child's age and maturity": see art.12 UNCRC.


60. The Committee on the Rights of the Child have continually emphasised the importance of communicating with the child in a child-friendly manner. See Day of General Discussion on the Right of the Child to be Heard, 29.09.06, § 40. See www.ohchr.org. [Last Accessed October 11, 2010].


64. Solicitor, interviewee no.11.

65. Solicitor, interviewee no.5.

66. Solicitor, interviewee no.5.