Hearing the voice of the child

Gerard Durcan

Subject: Family law

Keywords: Child abduction; Children; Constitutionality; Ireland; Parental rights

Legislation: Child Care Act 1991 (Ireland)

This is an amended version of a paper which was first presented at the conference of the Medico-Legal Society of Ireland, held on January 21, 2012 entitled "Medicine, Children and the Law".

The Historical Perspective

It may be thought that the practice of courts ascertaining and having regard to the wishes of children in regard to matters which affect them is a relatively recent development in our law. A brief survey of the law reports shows that this is not the case. As early as 1732, in the case of Ex Parte Hopkins, which concerned an application by parents for the return of children to their care, Lord Chancellor King sought the views of the eldest child, a thirteen-year-old girl, who was in court, as to where she wished to live. Having ascertained that she did not wish to return to her parents, but rather to remain in the home of her late uncle where she had lived for some time, the Lord Chancellor dismissed the petition but directed that the father and mother should have access to and see their children at all reasonable times. Some 160 years later in the case of R v Gyngall, Lord Justice Kay stated the practice to be as follows:

"When one comes to consider what it is that the Court of Chancery had to determine and what the main consideration in exercising its jurisdiction was, viz., what was really for the welfare of the child, whose interests were being discussed, it is obvious that, if the child were of any reasonable age, the Court would hardly desire to determine that question without seeing and speaking to the child and ascertaining its own view on the matter. So again and again in such cases, where the child was not of very tender years, the practice has been that the Judge himself saw the child, not for the purposes of obtaining the consent of the child, but for the purpose, and as one of the best modes of, determining what was really for the welfare of the child."

That case concerned an application by a mother for the return of her fifteen-year-old daughter to her care, but the application was refused in circumstances where she wished to remain in a home where she had resided for a period of at least three years. In his concurring judgment in the case, A.L. Smith L.J. pointed out:

"The age of this girl, nearing as she is the age of emancipation, has great weight in leading me to the conclusion that she should be left where she is."

Seven years later in an Irish case, In re O'Hara, FitzGibbon L.J. approved of the approach of Kay L.J. in Gyngall's Case but pointed out that:

"The wishes of a child of tender years must not be permitted (to the use of words of Lord Campbell) to subvert the whole law of the family, or to prevail against the desire and authority of the parent, unless the welfare of the child cannot otherwise be secured."

Another of the judges in the Court of Appeal, Holmes said that:

"... little regard ought to be paid to the personal wishes of a child of eleven as against what seems to be for her welfare."

In the particular circumstances of the case, the court ordered the return of the eleven-year-old girl to the care of her mother, contrary to her wishes.

In the case of In re Kindersley, a Divisional Court of the High Court determined an application for habeas corpus by a father which was designed to facilitate the attendance of his son at Eton College,
a course of action opposed by the child's mother because of the war conditions in England. The
members of the Divisional Court did not interview the child because they were of the view that such
an interview would be futile. However, Mr Justice Gavan Duffy, giving the judgment of the High Court,
expressed the general situation as follows:

“We have not questioned Gay himself, as one ordinarily would do, on a habeas corpus application, at
his age.”

In the case of *In re Frost, Infants*, the Supreme Court per Sullivan C.J. approved the principle that a
court hearing an application for habeas corpus was entitled to interview the children concerned.

This very brief review of some older case law in regard to disputes concerning children makes clear
that the courts have traditionally recognised the desirability of having regard to the views and wishes
of children in determining such disputes, and have also recognised the right of a judge to interview
children for the purposes of ascertaining such views and wishes. Before proceeding to look at the more recent case law, it is necessary to examine the international and domestic legal context in which such cases have been determined.

**International Context**

A number of treaties and international instruments acknowledge and protect the rights of a child to be
heard in regard to matters which concern him or her. Perhaps foremost among such instruments is
art.12 of the United Nations Convention on the Rights of the Child, which provides:

12.1 State 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.

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 their procedural rules of national law.

Article 24 of the European Union Charter of Fundamental Rights also recognises the rights of children
to express their views freely and to have such views taken into consideration on matters which
concern them in accordance with their age and maturity. Article 13 of the Convention on the Civil
Aspects of International Child Abduction gives a discretion to a court to refuse to return a child to the
place of his or her habitual residence based on the child's objections to such a return where the child
has attained an age and degree of maturity at which it is appropriate to take account of its views.

Article 11(2) of Regulation 2201/2003 (the “Brussels II A Regulation”) provides that when applying
arts 12 and 13 of the Hague Convention, a child must be given an opportunity to be heard, unless this
is inappropriate having regard to his or her age or degree of maturity. As will be seen later, much of
the recent case law in regard to hearing the views of children, and the weight to be attributed to such
views, has taken place in the area of child abduction law.

**Domestic Legislative Context**

The last 30 years has seen very significant legislative developments in regard to the obligation to hear
children and to have regard to their views. The Child Care Act 1991 (the “1991 Act”), which provides
for the making of care orders and supervision orders in respect of children in need of care or
protection, provides at s.24:

24. In any proceedings before a court under this Act in relation to the care and protection of a child,
the court, having regard to the rights and duties of parents, whether under the Constitution or
otherwise, shall -

(a) Regard the welfare of the child as the first and paramount consideration, and

(b) Insofar as it is practicable, give due consideration, having regard to his age and understanding, to
the wishes of the child.

Section 25 of the 1991 Act gives power to a court to join a child as a party to proceedings and to
appoint a solicitor to act on his or her behalf. Section 26 further gives power to a court in proceedings
under the Act to appoint a guardian ad litem to act on behalf of a child in such proceedings.
While the 1991 Act is the principal piece of legislation governing public law litigation in regard to children, private litigation between parents in regard to their children is mainly governed by the provisions of the Guardianship of Infants Act 1964 (the “1964 Act”), as amended. Section 25 of the 1964 Act, as amended, provides:

25. In any proceedings to which section 3 applies, the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter.

Section 28 of the 1964 Act, which gives power to a court hearing an application under the Act to appoint a guardian ad litem for a child, has never been brought into effect.

Obviously these statutory provisions were designed to, and to some degree have had the effect of, increasing the extent to which a court has regard to the views and wishes of children. However, in my experience, the effect has been much greater in public law litigation under the Child Care Act 1991 or under the inherent jurisdiction of the High Court than in private litigation between parents or third parties under the provisions of the 1964 Act, whether as stand alone litigation or as part of judicial separation or divorce proceedings. The simple reason for this difference is that in the public law litigation, the cost of representing the interests of the child is discharged by the Health Service Executive, while in private litigation, the parties will in most cases be unable to discharge such cost.

*M.L.J.I. 23 Recent Case Law--The Constitution

In the important case F.N. and E.B. v C.O. (Guardianship), Finlay Geoghegan J. considered the question of whether the provisions of the Constitution required that the views of a child should be taken into account in determining an application pursuant to s.3 of the Guardianship of Infants Act 1964, as amended. She set out her conclusions in the following paragraph:

"It is also well established that an individual in respect of whom a decision of importance is being taken, such as those taken by the courts to which s. 3 of the Act of 1964 applies, has a personal right within the meaning of Article 40.3 of the Constitution to have such decision taken in accordance with the principles of constitutional justice. Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964 applies. Hence s. 25 should be construed as enacted for the purpose of inter alia giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of the child."

It seems clear from this passage that the right of a child to be heard in matters concerning his or her welfare has not only a legislative origin, but also arises pursuant to the provisions of Art.40.3 of the Constitution and the requirement to comply with the principles of constitutional justice. Given the constitutional nature of such right, it would appear that it must also apply in proceedings other than those pursuant to the provisions of the 1964 Act, at least where such proceedings involve important decisions which will affect the child.

Recent Case Law--Child Abduction

As I have previously mentioned, the objections of a child constitute a ground upon which the return of a child may be refused pursuant to art.13 of the Hague Convention on Child Abduction. Having regard to the difficulty of successfully defending such proceedings on other grounds, it is hardly surprising that it is in the area of child abduction proceedings that there has been significant developments in the case law both here and in the United Kingdom (and indeed in other Hague Convention countries) in regard to the circumstances in which the views of children should be taken into account. The evolution of approach in regard to the importance of the views of children in child abduction cases was described as follows by Baroness Hale in the decision of the House of Lords in In re D (A Child) (Abduction: Rights of Custody) :

"But there is now a growing understanding of the importance of listening to the children involved in children cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors
in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views."

In a later child abduction case, Re M (Abduction: Zimbabwe), Baroness Hale in the House of Lords returned to the issue of the weight to be given to the views of a child when she said:

"46. In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 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. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

The Supreme Court in this jurisdiction has recently agreed with this analysis in the case of UA v UTN which was a case involving the objections of two children, aged respectively nine years and seven years, to their return to New York from which they had been wrongly abducted by their mother. The Supreme Court upheld the decision of the trial judge, Mr Justice Birmingham, to refuse to order their return having regard to their objections.

Threshold at which the Views of Children May be Taken into Account

A number of Irish cases, again in the area of child abduction, address the issue of when the views of children may be taken into account. In M.N. v R.N. (Child Abduction), Finlay Geoghegan J. said:

"32. 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 know that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life."

The Supreme Court in B.u. v B.e. (Child Abduction) approved the approach of Finlay Geoghegan J. and stated:

"15. While not setting a rigid rule, the High Court considered in M.N. v. R.N. (Child Abduction) [2008] IEHC 382, [2009] 1 IR 388 that prima facie it was inappropriate for a court to hear a child under the age of six. This is not an inflexible rule but will depend on all the circumstances of the case."

In the case of UA v UTN, the Supreme Court again approved the approach of Finlay Geoghegan J. in M.N. v R.N., stating that, "... it was fundamentally addressing the issue of the maturity of a child's views. As such it is helpful. The court upheld the decision of the trial judge that a report from a psychologist who had interviewed the child contained material which showed that they were sufficiently mature that regard should be had to their views. The Supreme Court indicated that the psychologist's report gave "an impression of serious, intelligent children who are well capable of forming and articulating their own views. Further, that these views were clear and well considered".

The Weight to be Given to the Views of a Child

As a general proposition it can be said that the older the child, the greater the weight that is likely to be given to his or her views and wishes. However, as can be seen from the case law, age alone, while an important factor, is not a determinative one. A court will consider how far the views of the child coincide with his or her welfare, as determined by the court.

In another child abduction case, Youth Care Agency and V.B. and C.B. and the Health Service
Executive, the Supreme Court upheld an order for the return of a fifteen-and-a-half-year-old girl to the country of her habitual residence, the Netherlands, even though she strongly objected to that course of action. The court indicated that while the child's views were to be taken into account, they were to be accorded such weight as appeared to the court to be appropriate in all the circumstances, and that the court would look at the views expressed when judging the maturity of the child. The court was satisfied that there were "powerful arguments and factors present that militate against those views" and which indicated that the fulfilment of her wishes would not be in her interests. On the other hand, that court in *U.A. v U.T.N.* was willing to act in accordance with the views and wishes of the children, who were only nine years and seven years of age, where other evidence in the case supported the view that what they wished to occur was in their interests.

**Application of these Principles**

Even though much of the recent case law in regard to the views of children has taken place namely in the context of child abduction, I believe that the principles set out in those cases are likely to be of general application in other types of litigation involving children, such as custody cases and applications for care orders. I cannot see why the principles contained in the child abduction cases with regard to maturity and the weight to be given to the evidence of children should not equally apply in other types of cases where the result of the case will fundamentally affect the lives of children.

These principles can be summarised as follows. As a general rule:

*M.L.J.I. 25*

(1) In determining a matter which affects a child, a court will have regard to the views of the child if the child is sufficiently mature to reach a considered view.

(2) Such views are a factor to be taken into account but are not determinative of the issues before the court.

(3) A court is unlikely to have regard to the views of a child under the age of six years.

(4) In assessing the weight to be given to the views of a child, a court should have regard to any relevant evidence to establish the maturity of the particular child. An assessment of an expert would be of particular importance in this regard.

(5) The court will seek to ascertain whether the child has been influenced and if so, less weight is likely to be given to his or her views.

(6) The older the child the greater the weight that will be given to his or her views.

(7) A court must consider, having regard to the totality of the evidence available, whether the views of the child are in accordance with his or her best interests.

**Parental Rights**

While a court dealing with the matter which affects a child will have regard to the views of the child in accordance with the principles set out above, the court will also have regard to the rights and duties of the child's parents. Under our constitutional regime, parents have primary responsibility for the upbringing and welfare of their children and are entitled to make decisions in regard to such upbringing and welfare. The State may override such decisions in the exceptional circumstances where there has been a failure of duty by the parents. It is clear from the judgment of the Supreme Court in *North Western Health Board v H.W.* that an unwise or ill advised decision by a parent will not warrant intervention by the State, but rather such intervention will only be warranted where it is necessary to protect the life or health of the child from serious threat.

In some cases, the views of the child and the views of his or her parents may coincide, which may be an important factor in how the court decides the case. One parent may agree with the views of the child while the other may disagree; this would often be the case in custody disputes between parents or in child abduction proceedings. Finally, the views of the child may conflict with the views of the parents, in which case, unless the view taken by the parents would seriously imperil the life or health of the child, their view may well prevail. However, as the child gets nearer to his or her majority, the principle that parental rights may wane and that the child's autonomy may increase will become of greater significance.
The Methods by which the Views of the Child may be Ascertained

There are a number of ways in which a judge may attempt to ascertain the views of a child. Traditionally, this was done by a judge interviewing the child in chambers. An example of this approach would be the case of *M.W. and D.W.*, where Mr Justice Kenny records in his judgment that he interviewed the two children who were aged fourteen-and-a-half-years and eleven-and-a-half-years in the Four Courts for a period of three quarters of an hour. Looked at from the perspective of the rules of natural and constitutional justice, the concept of a judge having regard to material which neither party has an opportunity to challenge may seem open to question. However there is clear, and relatively recent, authority in the Supreme Court that a court is entitled to adopt such a procedure. In *R.B. v A.S. (Orse A.B.)* Keane C.J. sets out the legal position as follows:

“It has long been recognised that trial judges have a discretion as to whether they will interview children who are the subject of custody or access disputes in their chambers, since to invite them to give evidence in court in the presence of the parties or their legal representatives would involve them in an unacceptable manner in the marital disputes of their parents. Depending on the age of the children concerned, such interviews may be of assistance to the trial judge in ascertaining where their own wishes lie and this would undoubtedly have been the case with R.u. in these proceedings.”

While, on occasion, I believe that judges still may be inclined to interview children directly, I think the preference in more recent times, certainly in regard to younger children, is that their views should be obtained by way of an interview with a psychologist or social worker who in turn provides a report and/or gives evidence to the court. With regard to teenagers, a judge may be more willing to directly meet the child, and while traditionally such a meeting may have taken place in the judge's chambers, again, in more recent times, the interview may well take place in a court so that there will be a digital recording of what has transpired. Normally, the interview will take place in private with perhaps only the registrar and the *M.L.J.I. 26* judge present, but often the judge will afterwards pass on the thrust of what was said to the lawyers and the parties at a resumed hearing.

In the case of *S.J.O.D. v P.C.O.D.*, Mr Justice Abbott set out principles which would be applicable where a judge was considering, or had decided, to interview children without the presence of the parties or their lawyers. These principles are as follows:

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.

6. 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 to 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.”

On occasion, but in my experience very rarely, children may actually give sworn, or perhaps unsworn,
evidence in court and be questioned by the lawyers for each party.

As has been indicated, the trend in recent years has been to obtain the views of the child through the intervention of an expert third party. In cases under the Child Care Act 1991, or where relief is sought pursuant to the inherent jurisdiction of the High Court, this may well be through the medium of a guardian ad litem who has been appointed to act on behalf of the child. A guardian so appointed will prepare a report, and if necessary give oral evidence, setting out the views of the child but also setting out his or her expert opinion as to what course of action will best promote the interests of the child. In child abduction proceedings, the views of children are often obtained by means of an interview with a psychologist who provides a report, and, if necessary, gives oral evidence, setting out such views and also giving his or her assessment of the maturity of the child and whether such views have been influenced by the parents. Finally, in private litigation between parents as to custody or access, sometimes a report in regard to the welfare of the child will be sought from a suitably qualified expert pursuant to s.47 of the Family Law Act 1995 and in the course of such report, and sometimes oral evidence, the expert will normally set out the views of the child.

The Issues in Regard to which the Views of the Child may be Obtained

In principle, the views of a child may be relevant and may be obtained in regard to a very wide range of issues which touch upon his or her welfare. In private custody disputes between parents, the central issue in regard to which the court may wish to obtain the views of the child is in regard to where he or she wishes to live and/or the level of contact which he or she wishes to have with each parent. However, one can easily anticipate a wide range of other issues which may arise, such as educational arrangements or contact with third parties. In child abduction proceedings, the focus in regard to the views of the child will clearly be on whether there is an objection to return, and if so the reasons for such objection. In child care cases under the 1991 Act, the views of the child may centre on questions of his or her perception of the level and quality of care and protection which has been provided by the parent.

This latter category raises an important issue. In many cases, the views of the child are likely to be accompanied by a significant volume of factual material which gives rise to and explains the child's views. Significant legal issues and complexities may arise if there is a dispute as to the factual accuracy of such material. This is particularly the case if the material is put before the court by way of a report or oral evidence from an expert who has interviewed the child. In some cases it may be unnecessary for the court to form any view as to the factual accuracy or otherwise of such material, while in others the admissibility of the evidence and the weight to be given to it may be determined in accordance with the provisions of Pt 3 of the Children Act 1997. There is one particular aspect of the welfare of children--that is, the question of medical treatment--which merits consideration, in particular the question of the extent to which a court will have regard to the views and wishes of a child in regard to such treatment.

Medical Treatment

If a patient is a minor, then consent to medical treatment may be given on their behalf by parents or guardians. Section 23 of the Non-Fatal Offences Against the Person Act 1997 (the “1997 Act”) allows a minor who has attained the age of 16 years to consent to any surgical, medical or dental treatment which would otherwise be a trespass to him or her. It seems clear from the decision in the North Western Health Board v H.W. and C.W. that the High Court retains a residual discretion and power to overrule a decision of the parents and/or the child in regard to medical treatment. However, the threshold at which the court would intervene to so overrule a decision of parents in regard to medical treatment was set at a relatively high level in that case. Mrs Justice Denham (as she then was) instanced “a surgical or medical procedure in relation to an imminent threat to life or serious injury”, while Mr Justice Murray indicated “that there must be some immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically, morally or socially, deriving from an exceptional dereliction of duty on the part of parents”, and Mr Justice Murphy suggested that to justify intervention, the failure of parental duty “must be exceptional indeed” and involve “such a degree of neglect as to constitute abandonment of the child and all rights in respect of it”.

It is clear that a court would have regard to the views of a child, in accordance with the general principles set out above, in deciding whether a particular medical treatment should or should not take
place. It is reasonable to believe that the views of an older child, particularly one who is old enough to consent to treatment pursuant to s.23 of the 1997 Act, but refuses to do so, are likely to carry significant weight. The relevant test was put in the following terms by Balcombe L.J. in the English case of *In re W (A minor) (Medical Treatment: Courts Jurisdiction)*\(^4\) where he said\(^5\):

“It will normally be in the best interests of a child of sufficient age and understanding to make an informed decision that the court should respect its integrity as a human being and not likely override its decision on such a personal matter as medical treatment, all the more so if that treatment is invasive.”

However, he went on to point out\(^6\):

“Nevertheless, if the court's powers are to be meaningful, there must come a point at which the court, while not disregarding the child's wishes, can override them in the child's own best interests, objectively considered. Cleary such a point will have come if the child is seeking to refuse treatment in circumstances which will in all probability lead to the death of the child or to severe permanent injury.”

A striking example of where the wishes of the child were overridden by the court is to be found in the case of *Re M (Medical Treatment: Consent)*\(^7\), where Johnson J. authorised a hospital to carry out a heart transplant operation on a fifteen year old girl even though she was not agreeable to that procedure. The judge was of the view that the risks inherent in the procedure and the further risk that the girl would resent what was done to her were overridden by the certainty of death should the transplant operation not take place. It is interesting to note in a somewhat similar situation in 2008, a thirteen year old girl, Hanna Jones, succeeded in persuading a Care Trust to drop High Court proceedings which sought authorisation to carry out a heart transplant contrary to her wishes. The girl subsequently changed her mind and a successful operation took place.

On a number of occasions, the High Court, *M.L.J.I. 28* pursuant to its inherent jurisdiction, has been asked to make an order authorising the carrying out of medical treatment on a child contrary to his or her wishes. Unfortunately, a combination of the requirements of speed and privacy tends to bring about a situation in such cases where no written judgment is delivered by the judge dealing with the matter. However, of the cases of which I am aware, one concerned cancer treatment for a child and the other concerned steps connected to a possible liver transplant for a girl who was seventeen years of age. In both cases, the court was willing to restrict the liberty of the child in question to allow the necessary steps in connection with the medical treatment to take place.

**Conclusion**

While the courts have traditionally been willing to interview children to ascertain their views, developments over the last 30 years, both internationally and domestically, in legislation and case law have brought about a greater understanding of the importance of those views and a greater sophistication with regard to the manner in which the views are obtained. In the recent case of *E (Children)*\(^8\), the Supreme Court of the United Kingdom summarised the situation as follows\(^9\):

“We now understand that although children do not always know what is best for them, they may have an acute perception of what is going on around them and their own authentic views about the right and proper way to resolve matters.”

M.L.J.I. 2012, 18(1), 21-28

---

1. [1732] 3 P. WMS 152; 24 E.R. 1009.
2. [1893] 2 Q.B. 232.
3. At p.251.
6. At p.240.
7. At p.258.

8. At p.120.


10. At p.25.


12. Which was inserted into the Act by s.11 of the Children Act 1997.


17. At para.46.


20. At para.32.


22. At para.15.


24. At para.23.

25. At para.29.


27. Unreported, Supreme Court, August 18, 2010.

28. At para.34.


30. See the decision of Denham J. at 726.

31. See for example Health Service Executive v G.H. and Others where the judge decided that a child should be placed in secure care in an institution which was favoured by himself and by his family rather than an institution favoured by the HSE.

32. See in this regard the decision of *Lord Denning in Hewer v Bryant* [1971] Q.B. 357, where he states at p.368 that the legal right of a parent to custody of his child ends at his or her 18th birthday, “and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice”. This principle was endorsed by McKechnie J. in *D. v The Health Service Executive*, unreported, High Court, May 9, 2007.

33. Unreported, High Court, June 6, 1975.


35. At p.456.


37. At p.9 of the judgment.

38. Which, at ss.23 to 25, deals with the admissibility of, and the weight to be given to, the hearsay evidence of children.

40. At p.727.
41. [1993] Fam. 64.
42. At p.88.
43. Again at p.88.
45. Unreported, June 10, 2011; Supreme Court of the United Kingdom [2011] UKSC 27.
46. At para.16 of the judgment of the court delivered by Lady Hale and Lord Wilson.