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## **Plenary 2, Item 1:**

'ABE Interviews, children's testimony and hearing the voice of the child in family cases: Are we barking up the right tree?'

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*'In 1991, the United Kingdom agreed to be bound by the United Nations Convention on the Rights of the Child (UNCRC), with its emphasis on the importance of the voice of the child in the family justice system. Article 12 of the Convention states:*

*'You have the right to say what you think should happen when adults are making decisions that affect you, and to have your opinions taken into account.'*

The Family Justice Review, Interim Report, March 2011, para. 2.22

In light of the Family Justice Review, this paper suggests ways in which the family court might hear 'the voice of the child' when the child is a witness<sup>2</sup>. It begins by briefly describing our criminal justice system (CJS) police interview guidance and 'special measures' legislation for vulnerable witnesses, including children. It considers lessons for the family justice system (FJS) from what we know about children's testimony in the criminal courts. This paper sets out a vision for FJS special arrangements to enable the child witness to give best evidence whilst minimising the potential harm from giving evidence; it is submitted that FJS special arrangements should not simply be CJS 'special measures' by analogy.

### **Children's testimony in family cases: Where do we go from here?**

No one has written a book about child witnesses in the family courts; probably it would be a very short one indeed. Until 2010 lawyers and judges presumed that children did not give testimony directly to the family court, rather children were (and still are) heard in other ways. The family court has regard to 'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)<sup>3</sup>. In family cases the child's wishes and feelings are very often

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<sup>2</sup> Note that when the child 'is a witness' covers a range of possibilities and thinking should not be limited to the child coming to court to give live evidence. Direct testimony from the child could be taken, for instance, in the form of pre-recorded testimony, by remote live link, through a third party relaying questions etc.

<sup>3</sup> When the family court applies the Children Act 1989 'welfare checklist' it pays regard to a number of matters including the wishes and feelings of the child. See Section 1, (3) (a).

expressed through a social worker's, guardian's or Cafcass<sup>4</sup> officer's report and in fact any witness in the proceedings may tell the family judge what the child has said or done. In a minority of family cases there is also evidence by way of a recording of the child's interview with police from related criminal proceedings, if any.

The Family Justice Council points out in its response to the Family Justice Review that the child's voice can be heard by 'writing letters to the judge, interview with Cafcass officer, visiting the court, speaking to the judge'.<sup>5</sup> Are there any circumstances when a child should be a witness in family court? Most family lawyers would have said 'No' until March 2010 when the Supreme Court in *Re W*<sup>6</sup> said we should not presume that a child should not give evidence. Our thinking must shift: A child's evidence can be given indirectly to the court and relied on for the truth of its contents<sup>7</sup>, but it isn't always appropriate for it to be given in this way. Are there any circumstances when a child should give evidence directly, that is, as a witness in family court? The answer now is 'Yes'<sup>8</sup> but what special arrangements should be in place to make the process fair while minimising the potential harm to the child?

At present a family judge is out on a limb when granting an application to hear evidence directly from the child because there is no scheme of special arrangements or resources to support this. Arrangements would have to be made 'ad hoc'; this really is quite extraordinary for a part of the justice system which is concerned with the best interests of children.<sup>9</sup> Very little published research is available on children's experiences in the FJS however, in keeping with CJS research, what there is tells us children want to be heard and listened to. How that should happen depends on the particular child and the circumstances of the case.<sup>10</sup> Pointers about how a family court could hear directly from a child witness are to be found in our CJS and the wealth of material that has been written about children's testimony there.<sup>11</sup>

### **Lessons from ABE interviews and children's testimony in criminal courts**

The background to the CJS approach to children's testimony is marked by a weddedness to the general principle of orality, that is, having witnesses (including child witnesses) at court, in front of magistrates or judge and jury, to give their evidence and be cross-examined. On cross-examining a child witness, Dame Elizabeth Lane wrote in 1985 that 'it is always a difficult task which must be performed with tact and

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<sup>4</sup> Children and Family Court Advisory and Support Service.

<sup>5</sup> FJC response to Question 3 of the Family Justice Review, Interim Report, Questionnaire

<sup>6</sup> *Re W (Children)* [2010] 1 WLR 701, [2010] Fam Law 449, [2010] 2 All ER 418, [2010] UKSC 12, [2010] 1 FLR 1485, [2010] PTSR 775, [2010] 1 FCR 615

<sup>7</sup> Children (Admissibility of Hearsay Evidence) Order 1993 SI 1993/621.

<sup>8</sup> *Re J (Child Giving Evidence)* [2010] EWHC 962 (Fam); [2010] 2 F.L.R. 1080; [2010] Fam. Law 915 is just such a case. The judge permitted a boy (aged about 13 according to the mother or about 17 according to the local authority) to give evidence in the care proceedings about his mother's abusive behaviour towards him.

<sup>9</sup> Really the issue is bigger than how to deal with children's testimony in family proceedings; English law makes no special arrangements for vulnerable witnesses in any civil proceedings. Northern Ireland has recently looked at its lack of provision. NI Law Commission consultees who responded 'were virtually unanimous in supporting the Commission's view that special measures should be extended to civil proceedings' to quote from a paper by The Honourable Mr Justice Bernard McCloskey, Chairman of the Northern Ireland Law Commission, in a paper to the Four Jurisdictions Conference, Edinburgh, 6<sup>th</sup> 8<sup>th</sup> May 2011. See [http://www.nilawcommission.gov.uk/index/completed\\_projects-2/vulnerable-witnesses-in-civil-proceedings.htm](http://www.nilawcommission.gov.uk/index/completed_projects-2/vulnerable-witnesses-in-civil-proceedings.htm). In short, it recommends that children should give evidence over live TV link unless they opt out but there should be video-recorded evidence in chief in family proceedings. Other 'special measures' would also be available such as screens, intermediaries etc.

<sup>10</sup> See Office of the Children's Commissioner consultation response to the Family Justice Review, 'Do more than listen. Act.' July 2011, [www.childrenscommissioner.gov.uk](http://www.childrenscommissioner.gov.uk) and see also, unpublished, 'You get lost in it', children and young people's views about CAF/CASS services in the South East, Feb 2007 - April 2008, contact <http://www.triangle.org.uk/>. No one in this latter survey knew what CAF/CASS stood for though they knew a lot about what it did, p3

<sup>11</sup> See for example the recently published handbook of psychological research and forensic practice, M Lamb, D La Rooy, L Malloy & C Katz (eds), *Children's Testimony*, (John Wiley & Sons, 2<sup>nd</sup> edn, 2011)

gentleness. Yet the child must be questioned to show, if possible, that her complaints are not correct.<sup>12</sup>

Tact and gentleness have not always been compatible with defence counsel's duty to 'put their client's case' nor their desire to push home their client's case to the jury. Consider Prof. Ray Bull's description of a 1994 child-sex gang trial: One 11 year old was cross-examined for six days and 'frequently broke down in tears'.<sup>13</sup> Bull, writing in 1996, describes how research by psychologists helped debunk myths about children's evidence and show that children could provide reliable accounts so long as they were interviewed properly. In 1991 Bull produced the first draft of the Memorandum of Good Practice for interviewing children. It was revised and published by the Home Office in 1992. He has described it as a guide 'on how to do the easy ones'<sup>14</sup>. In subsequent years the Memorandum was revised and developed into Achieving Best Evidence interview guidance. *Achieving Best Evidence: Guidance on interviewing victims and witnesses, and guidance on using special measures* (MoJ, 2011), or ABE as it is known, now amounts to 243 pages. Though a police guide to interviewing and handling vulnerable witnesses at a criminal trial, it is referenced by the family court when determining whether or not the recording of a child's ABE interview should be relied on in family proceedings.<sup>15</sup>

Important changes regarding children as witnesses in the CJS included the abolition in 1988 of the statutory ban on convicting on the uncorroborated evidence of unsworn children and the introduction (via the Criminal Justice Act 1988) of live link. In 1988 the Home Office set up a committee chaired by His Honour Judge Thomas Pigot QC and the committee's report<sup>16</sup> resulted in children's pre-recorded interviews replacing their evidence in chief.

A statutory scheme of 'special measures' was introduced by the Youth Justice and Criminal Evidence Act 1999 (YJCEA). Special measures for vulnerable or intimidated witnesses (as defined in s.16 or s.17, YJCEA) aim to enable them to give their best evidence. Section 16 defines 'vulnerable witnesses' as those who are broadly either vulnerable on account of their age (child witnesses) or by virtue of mental disorder or physical disability. Special measures are: screening the witness from the accused (s.23), evidence by live link (s.24), evidence given in private (s.25), removal of wigs and gowns (s.26), video recorded evidence in chief (s.27), video recorded cross-examination or re-examination pre trial (s.28), examination through an intermediary (s.29 and discussed below) and use of communication aids (s.30). Pre-recorded cross-examination ('section 28' also sometimes referred to as 'full Pigot') has never been implemented but the MoJ is now taking steps towards seeing if the provision can work in practice.

For there to be a 'special measure' in place it must be approved by the court following an application by the party who is calling the witness or on the court's own initiative (s.19). The court must first decide whether any available special measure or combination of them would be likely to improve the quality of the evidence given

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<sup>12</sup> In her autobiography HEAR THE OTHER SIDE, Audi Alteram Partem, The Autobiography of England's first Woman Judge, (Butterworths, 1985), p.118

<sup>13</sup> R Bull, The Effect of Child Witness Research on Legislation in Great Britain in B Bottoms & G Goodman (eds), *International Perspectives in Child Abuse and Children's Testimony*, (Sage Publications, 1996), p 97

<sup>14</sup> Ibid

<sup>15</sup> See for instance *Re M (A Child)* [2010] EWCA Civ 1030 when the ABE interviewer had not meticulously followed the guidance nevertheless the family judge was entitled to take the interview into account and *TW v A City Council & Ors* [2011] EWCA Civ 17, [2011] 1 WLR 819 when the ABE interview was manifestly inadequate and should not have been relied on by the family judge. See also P. Cooper, 'New Achieving Best Evidence Guidance', *Family Law*, August 2011, Vol. 41, pp 871 – 873

<sup>16</sup> Report of The Advisory Group on Video Evidence, Home Office, December 1989, usually simply referred to as 'the Pigot report'.

by the witness. If it decides that quality would be improved, it identifies the special measure(s) and then makes an appropriate direction.<sup>17</sup>

Notwithstanding the legislation, there is some way to go before it can be said that the testing of children's testimony in the criminal courts is a good model. Lawyers are not trained in how to question a child in a developmentally appropriate way. The result is that some questions will baffle the child and give rise to meaningless answers. But training lawyers in child communication will not entirely solve this since cross-examination aims to cast doubt on the witness's testimony not get the child's best evidence. This adversarial method of proof (involving cross-examination by the opposing legal representative) has built into it a conflict with steps that might be taken to reduce the harm to the vulnerable witness. Researchers have found that many young witnesses have poor experiences and a fifth of young witnesses were unable to tell the court everything they wanted to say.<sup>18</sup> They also conclude that 'the reality faced by young witnesses in court fell short of the standards set out in government policies' and that young witnesses 'continue to be denied full access to justice'.<sup>19</sup>

The Lord Chief Justice in *R v Barker* [2010] EWCA Crim 4 gave guidance to advocates cross-examining children in criminal cases.<sup>20</sup> The Bar is still in the early stages of working out how advocates might be trained to properly handle child witnesses.<sup>21</sup>

There was no intermediary for the 4 year old witness in *Barker*; very probably one could have assisted the cross-examination. Intermediaries<sup>22</sup> facilitate communication between the witness and others in the legal process, for example the police, judge and lawyers. The MoJ has recruited and trained 'Registered Intermediaries' (RIs) for the CJS and they provide assistance communicating with the witness before trial and during the witness's evidence. Best Practice is set out in the Registered Intermediary Procedural Guidance Manual (MoJ, 2011). If a police officer has identified that a witness is vulnerable and communication might benefit from the use of an RI, the RI can assess the witness and help the police officer plan the best means of communicating in the ABE interview. The RI then writes a report for court thus enabling the trial judge to set the now obligatory<sup>23</sup> 'ground rules' with the advocates

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<sup>17</sup>For a more detailed discussion on where we are now in respect of child witnesses in the criminal courts see A Brammer & P Cooper, 'Still waiting for a meeting of minds: Child witnesses in the criminal and family justice systems', *Criminal Law Review*, forthcoming, December 2011.

<sup>18</sup> J Plotnikoff & R Woolfson, *Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings*, (The Nuffield Foundation and the NSPCC, 2009)

<sup>19</sup> J Plotnikoff & R Woolfson, *Young witnesses in criminal proceedings – A progress report on Measuring Up?* (The Nuffield Foundation and the NSPCC, 2011)

<sup>20</sup> 'When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources.' The Lord Chief Justice of England and Wales, para 42

<sup>21</sup> See the 2011 ATC Working Group report on vulnerable witnesses and defendants - *RAISING THE BAR: The Handling of Vulnerable Witnesses, Victims and Defendants in Court* at <http://www.advocacytrainingcouncil.org/>

<sup>22</sup> Please note that the use of the generic 'intermediary/ies' and specific term 'Registered Intermediary/ies' in this paper is deliberate. The terms are not interchangeable.

Registered Intermediary refers to a 'professional communications specialist who has been recruited, selected and accredited by the Ministry of Justice, and whose details are recorded on the *Intermediary Register*, the WIS's national database. Such an individual will be known as a Registered Intermediary (RI). The Witness Intermediary Scheme (WIS) is the scheme set up by the Ministry of Justice's Better Trials Unit to implement the intermediary special measure and through which Registered Intermediaries operate. Please note the lower case spelling of the word *intermediary* in the context of the YJCE Act legislation.' Email from Jason Connolly, Vulnerable and Intimidated Witnesses Section, Victims and Witnesses Unit Justice Policy Group, MoJ, 30 August 2011.

<sup>23</sup> See 'APPLICATION FOR A SPECIAL MEASURES DIRECTION (Criminal Procedure Rules, rule 29.3 and 29.10)' form at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedurerules/criminal/docs/CrimPR-Part29-3-29-10-application-for-special-measures.pdf>

regarding how to question the witness. The vulnerable witness usually, though not always, gives evidence from the court's live link room rather than the actual courtroom.

The writer has previously suggested that intermediaries could assist in family proceedings.<sup>24</sup> In some cases they do<sup>25</sup> where the court finds it is necessary for a fair hearing.<sup>26</sup> An intermediary can advise on the child's communications needs and also on the package of arrangements that would help the witness give their best evidence e.g. frequency of breaks, avoiding the use of leading questions/abstract concepts etc.<sup>27</sup> Section 104 of the Coroners and Justice Act 2009 will allow for certain vulnerable defendants to give evidence with the assistance of an intermediary however its implementation has been deferred by Ministers. Meanwhile vulnerable defendants must rely only on the court's inherent jurisdiction to ensure a fair trial when seeking special measures.<sup>28</sup>

Recently in *AS, R (on the application of) v Great Yarmouth Youth Court*<sup>29</sup> Mr Justice Mitting quashed the decision of the youth court to refuse the defendant, who had ADHD, the benefit of an intermediary when the justices' reasoning included that the intermediary report "does not show [the claimant] to have any greater difficulties in this than many other youths who appear before the court".<sup>30</sup> Just because many other witnesses have similar difficulties does not mean that it is OK for this witness to have them too.

### **The impact of *Re W* and going beyond special measures by analogy**

The decision in *Re W* has probably resulted in 'an increase of applications for permission for children to be cross-examined'.<sup>31</sup> HM Courts and Tribunal Service does not keep information on children called as witnesses in the family justice

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<sup>24</sup> Cooper, P. 'Child witnesses in family proceedings: Should intermediaries be showing us the way?', pp 397 – 403, *Family Law*, April 2011, Volume 41. For a discussion on the use of intermediaries in England and Wales and other jurisdictions see also L. Hoyano and C. Keenan, *Child Abuse Law and Policy Across Boundaries*, (Oxford University Press, paperback edn, 2010), pp 663-671.

<sup>25</sup> See the writer's 2010 Registered Intermediary Survey: [http://www.city.ac.uk/data/assets/pdf\\_file/0006/92499/Tell-Me-Whats-Happening-2-RI-Survey-2010-FINAL-VERSION-14062011.pdf](http://www.city.ac.uk/data/assets/pdf_file/0006/92499/Tell-Me-Whats-Happening-2-RI-Survey-2010-FINAL-VERSION-14062011.pdf)

<sup>26</sup> Getting assistance from an intermediary in a family court is not as straight forward as getting assistance from a Registered Intermediary in a criminal case. Registered Intermediaries have been available in all 43 police forces and CPS areas in England and Wales since 2008. The police fund the use of Registered Intermediaries at the investigation stage and the CPS fund their use at the trial stage. However there is no provision beyond the YJCEA for using Registered Intermediaries. Where the judiciary has used its inherent powers to grant the use of an intermediary (for example for a defendant) the MoJ says that 'the appointment of a Registered Intermediary has only been made when doing so has not impacted upon their provision for those for whom the legislation was intended.' The MoJ position with regard family cases is that 'it will agree to assist in the provision of a Registered Intermediary only where there is a direct linking to a criminal case in which the witness is involved and where one has already been provided through the Witness Intermediary Scheme.' (Email from Jason Connolly, MoJ, 30 August 2011). A party in a family case can find and engage an intermediary through other channels. Registered Intermediaries and other professionals offer their services as intermediaries for children and vulnerable adult witnesses who fall outside the current provisions of the YJCEA, for example vulnerable defendants and vulnerable witnesses (including children) in the family courts. See for instance <http://www.triangle.org.uk/what-we-do/intermediaries> and <http://www.communicourt.co.uk/>. Intermediaries would be acting as non-registered intermediaries engaged outside the MoJ's Witness Intermediary Scheme.

<sup>27</sup> Children's communications needs are not always obvious and are probably more prevalent than many of us realise. Following the 'The Bercow Report' (2008) it is now thought that approximately 7% of children entering school in England have significant difficulties with speech and/or language and 50% of children and young people in some socio-economically disadvantaged populations have speech and language skills that are significantly lower than those of other children of the same age.

<sup>28</sup> See *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin), [2010] 1 All ER 73, where it was held that since the special measures legislation did not cover defendants, the court could use its inherent jurisdiction to ensure a fair trial to make a direction for the Defendant's communication to be assisted by an intermediary. See also the endorsement of the use of intermediaries in *R v Walls* [2011] EWCA Crim 443, Lord Justice Thomas: 'There are available to those with learning disabilities in this age, facilities that can assist. Consideration can now be given to the use of an intermediary under the court's inherent powers as described in the *Sevenoaks* case, pending the bringing into force of s.33BA (3) and (4) of the Youth and Criminal Evidence Act 1999 (added by the Coroners and Justice Act 2009).' para 37 (ii)

<sup>29</sup> [2011] EWHC 2059 (Admin)

<sup>30</sup> *Ibid*, para 7

<sup>31</sup> Anecdotal reports suggest this. See His Honour Judge J Mitchell, *Children Giving Evidence: The Practical Implications of *Re W**, *Family Law*, August 2011, Vol 41, pp 817 – 826 at p 817, and see also the draft Guidelines in Relation to Children Giving Evidence in Family Proceedings, FCJ11/01/04, para 6.

system<sup>32</sup> so there is currently no tracking of applications for children to give evidence or the outcomes.<sup>33</sup> I suspect, but do not know, that the applications being made are for the child to give evidence live, either face to face or over a live TV link.

I doubt that any family judge would wish to risk a child being subjected to the sort of cross-examination one associates with a jury trial.<sup>34</sup> However research from the CJS suggests that a child witness in the FJS might have to wait anxiously (possibly for months) for the hearing only then to be brought to court and suffer further anxiety on the day (note there is no FJS equivalent of the Witness Service which provides witness support in various way in the CJS) and then face a confrontation with a barrister, possibly over technically poor live link facilities.

Fortunately the FJS leans towards an inquisitorial approach and is not wedded to the principle of orality in the way that the criminal system is. The family court is concerned with the best interests of the child and the 'game of adversarial litigation has no point'.<sup>35</sup> Hearing directly from a child in a family court does not have to mean live in court nor does it have to mean cross-examination by lawyers. Though *Re W* concerned an application for a child to come to court to give evidence, Lady Hale spoke of innovation when hearing from the child witness:

'There are things that the court can do but they are not things that it is used to doing at present. It is not limited by the usual courtroom procedures or to applying the special measures by analogy. The important thing is that the questions which challenge the child's account are fairly put to the child so that she can answer them, not that counsel should be able to question her directly. One possibility is an early video'd cross examination as proposed by Pigot. Another is cross-examination via video link. But another is putting the required questions to her through an intermediary. This could be the court itself, as would be common in continental Europe and used to be much more common than it is now in the courts of this country'.<sup>36</sup>

### **How to hear the voice of the child witness in the family court**

When I reflect on hearing the voice of the child and the criminal justice system, the phrase 'I wouldn't start from here', springs to mind. Not that the CJS hasn't made great strides, it has, but is it a model for how the FJS should hear from child witnesses? *Re W* tells us we don't have to start from here. The FJS has a blank sheet of paper and if I were to start writing the law on it<sup>37</sup>, it would reflect the need to put special arrangements in place to enable children to give their best evidence. Arrangements could include utilising the communication skills of an intermediary to

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<sup>32</sup> Email from Adam Lennon, Head of Family Operations Team, Civil, Family & Tribunals Directorate | HM Courts & Tribunals Service, 8 September 2011

<sup>33</sup> This is just one 'data gap' but the Family Justice Report Interim Report, March 2011, at Annex L lists many others.

<sup>34</sup> It is suggested that in light of the vast body of psychological research in recent years on witness testimony, lawyers should question whether cross-examination really is as Lord Denning said in *Freedom Under The Law*, (Stevens & Sons Limited, 1949) ,p 62, 'a most valuable instrument in ascertaining the truth' or rather an 'impoverished' instrument - see E Loftus, D Wolchover and D Page, General Review of the Psychology of Witness Testimony, p 20, in *Witness Testimony*, A Heaton Armstrong, E Shepherd, G Gudjonsson and D Wolchover (eds), (OUP, 2006).

<sup>35</sup> *Oxfordshire County Council v M* [1993] EWCA Civ 31, Sir Stephen Brown P endorsed the words of the trial judge, His Honour Judge Harold Wilson: 'The game of adversarial litigation has no point when one is trying to deal with fragile and vulnerable people like small children. Every other consideration must come second to the need to reach the right conclusion if possible.'

<sup>36</sup> *Re W (Children)* [2010] 1 WLR 701, [2010] Fam Law 449, [2010] 2 All ER 418, [2010] UKSC 12, [2010] 1 FLR 1485, [2010] PTSR 775, [2010] 1 FCR 615, para 28

<sup>37</sup> There is a gaping hole where a statutory scheme of special arrangements for vulnerable witnesses in the civil courts should be. I would welcome a Law Commission consultation and report on the matter and would like to see proposals for legislation taken to Parliament and debated. However I do not believe that the FJS should do nothing while it waits for that to happen.

facilitate communication (as they do in the CJS) or to relay the questions and answers<sup>38</sup> (as they do in some countries in continental Europe). They could also include pre-recording the child's testimony. The type of special arrangements would depend on the individual child. Special arrangements would enable us to hear children's testimony clearly and to minimise the potential harm.

In appropriate family cases a fair hearing will mean hearing evidence *directly* from the child, that is, the child becomes a witness. Without legislation for a scheme of special arrangements to cater for this, the applicant seeking a special arrangement is relying on the judge's inherent powers to order them. The judge will no doubt be conscious of, and limited by, the absence of allocated resources. Until there is a scheme, the decision in *Re W* represents a largely<sup>39</sup> pyrrhic victory for the voice of the child.

The Family Justice Review represents a golden opportunity to address how we can hear the voice of the child as a witness.<sup>40</sup> It is hoped this review will recommend legislation for special arrangements for children<sup>41</sup> and Family Procedure Rules which would reflect the court's and the parties' obligation to consider, from the outset of a case, how best to hear the voice of the child concerned.

*The writer would like to express her ongoing thanks to Jason Connolly, Ruth Marchant, Joyce Plotnikoff and David Wurtzel.*

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<sup>38</sup> This role was called 'the interlocutor' in the Pigot Report, p 24, and was the only recommendation of the report upon which the committee was not unanimous. Miss Anne Rafferty, Barrister, (as she then was) dissented.

<sup>39</sup> 'Largely' because a developmentally normal 15 year old might be heard as a witness because it is felt he can go to court to give live evidence. But what hope for the 15 year old with Asperger's and ADHD who wants to be heard but needs an intermediary and should have his evidence pre recorded for the family court? Without a scheme to support this child giving evidence either the child is denied the opportunity to be heard or is heard in a way that means he cannot give his best evidence, thus almost certainly breaching his right to a fair hearing (Article 6, ECHR) and right not to be discriminated against (Article 14, ECHR) and possibly also, depending on the facts of the case, his right to respect for his private and family life (Article 8, ECHR).

<sup>40</sup> *The Family Justice Review* also talks of 'the need for children to understand what is happening, to have the opportunity to put their views forward and to know that, although decisions might be taken that are not what they want, their voices have been heard. Our evidence is that this does not happen enough at the moment.' See also para 2.44 and paras 3.1 to 3.15 on hearing the voice of the child.

Note the full wording of Article 12 of the UNCRC: '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.' Note also Article 2: '1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'

<http://www2.ohchr.org/english/law/crc.htm> The UNCRC is not incorporated into our domestic law but 'By agreeing to undertake the obligations of the Convention (by ratifying or acceding to it), national governments have committed themselves to protecting and ensuring children's rights and they have agreed to hold themselves accountable for this commitment before the international community. States parties to the Convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child.' - <http://www.unicef.org/crc/> Whilst the UNCRC is not part of domestic law The European Convention on Human Rights (ECHR) is (Human Rights Act 1998) and for a discourse on UNCRC / ECHR ('the Convention') interplay see A Daly, *The right of children to be heard in civil proceedings and the emerging law of the European Court of Human Rights*, *The International Journal of Human Rights*, 15:3, p 441 – 461, '[the child's right to be heard] is compatible with the Convention and there is strong indication that the Court will acknowledge it as a Convention right if and when a relevant case is taken', p 442

<sup>41</sup> There are vulnerable adult witnesses to consider as well.