

## The 'Judicial Interview' – A Right of the Child?

*To tell the court how I felt, to hear it straight from me .... I worked it out for myself, and it seemed this would be the only way the court could hear the truth, my version, the proof.* (Child quoted in Pike and Murphy, 2006).

Should magistrates and judges routinely meet with children in family law cases? Hearing children in matters affecting them has become a prominent topic in the past few years. By ratifying the UN Convention on the Rights of the Child, almost every country in the world has agreed to provide children with a 'right to be heard', including in family law proceedings. Deciding how this is to work in practice, however, tends to be controversial, particularly when it comes to accepting 'hearing' children as a right of children themselves, rather than a discretionary favour. Our instinct is often to protect children from proceedings, to let the adults get on with it instead. Yet this ignores what the research tells us about children. They usually want some involvement. They often know much more about what is going on than adults give them credit for. Regularly it is *excluding* them that causes harm.

My forthcoming book *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Routledge, forthcoming 2017) examines law and practice from all over the world when it comes to determining children's best interests. It compares the notable prioritisation of personal autonomy in areas such as medical law to the enormous paternalism in other decisions about children (such as contact and residence); arguing that courts should support and prioritise children's own choices to the extent possible – there should be a high threshold to override them. This includes choices in the matter of *how* children are to be heard.

One way in which children can be heard, of course, is by meeting directly with the decision-maker. Children are, perhaps surprisingly, often very enthusiastic about such a meeting. In a Europe-wide study on children and proceedings, it was found that: "More than anything, [children] want to speak directly to those who take decisions about them" (Council of Europe, 2010). There is increasing acceptance around the world that, although children should never be required to speak to a judge if they do not wish to, this direct meeting should be facilitated where children want it. The mood in England and Wales has shifted more in favour of such meetings also, but embedding them as a normal part of proceedings is proving a challenge. This is a pity – practice in other jurisdictions shows how well such meetings can work.

## The Judicial Interview Elsewhere Compared to England and Wales

Research demonstrates that judicial meetings are very, very successful in other countries, where they are often employed as a normal tool in family law proceedings. In particular judges find them very useful – nine out of ten family law judges interviewed in Germany felt that the hearings with children were 'very' or 'fairly' meaningful. Children display low stress levels in respect of the meeting, and both parents and children regard the meetings as a positive measure (Karle and Gathmann, 2016). Likewise, the vast majority of judges interviewed in Michigan in the US (Clarke, 2013) and in Israel (Morag, 2012) felt similarly positive about such meetings.

Yet there has been much reluctance in this jurisdiction to embrace the meeting as a regular feature of family law. In England and Wales, although it had originally been intended under the Children Act 1989 that magistrates and judges would always meet the child about whom they were taking a decision, the acceptance of the practice ultimately waned. It was emphasised in the case law in the early 1990s that such meetings would be the exception rather than the norm. A Sub-Group of the Family Justice Council when examining child participation in family law proceedings stated in 2008 that, although the practice should be encouraged, they were of the opinion that it is the role of CAF/CASS, not the judge, to ascertain the views of the child, citing rules of evidence and lack of training for judges.

There are legitimate reasons to be cautious about having children in court or judges seeing children in private. That is not to say, however, that the problems are insurmountable or that the meeting need necessarily be problematic. Practices in other common law countries demonstrate that where there is a will, there's a way. Evidence issues can be overcome by properly informing children where views cannot be kept confidential. Magistrates and judges can be adequately trained and supported to engage in these meetings.

### **The Increase in Acceptance of Judicial Interviews in England and Wales**

The argument that meetings are both possible and desirable is being increasingly accepted. The 2010 Family Justice Council Guidelines for Judges Meeting Children in family proceedings encourages judges to enable children to feel connected with proceedings in which important decisions will affect their lives, to assure them that their wishes have been understood, and to understand the nature of the judge's task. The child's guardian/lawyer should advise whether the child wishes to meet the judge and whether it accords with welfare interests. Age is relevant but will not alone determine whether there is a meeting. The judge ultimately decides whether a meeting is appropriate and should consider a brief written explanation for the child where it has been determined that it is not. The meeting is for the benefit of the child, not for gathering evidence. These are largely (though not entirely – a critique is beyond the scope of this article) progressive guidelines which indicate a shift towards perceiving the meeting as for the benefit of children rather than an evidentiary tool or something for the benefit of parents.

Further indications of the progression on thinking about these meetings are evident in subsequent developments. Sir Munby in 2014 highlighted the need for a review of these scant 2010 Guidelines, and pilots have been run in Leeds and North Yorkshire to determine, amongst other things, how the frequency of such meetings might be increased (the pilot demonstrated that children are overwhelmingly positive about such meetings afterwards). Also in 2014 then Minister of State for Justice and Civil Liberties Simon Hughes announced that children over 10 years would be supported to meet the judge in such proceedings. In 2015 a Vulnerable Witnesses and Children Working Group compared the dramatic differences in criminal law, where procedures for hearing children are highly developed, to family law where they are not; recommending new rules to emphasise the importance of the role of the child and the measures they may need to participate.

### **Hearing as a Right**

This seeming transformation in attitudes to increased participation of children generally, and the 'judicial meeting' in particular, has not been matched with resource allocation. A great deal of practical change to courts is needed to implement any reforms. As well as appropriate training, changes to court buildings will likely be required, as will changes to the management of court time.

These changes will be crucial in order to ensure that hearing a child in family law proceedings, including the judicial meeting, is considered the right of the child. I have in my book established that all too often hearing children is viewed as a discretionary activity to be conducted when it is convenient for adults, and where resources permit. It is up to the system more broadly to ensure that buildings, procedures and professionals are properly prepared and resourced for children's involvement in proceedings. Yet it is up to magistrates and judges to take an approach that children should be heard the way in which they see fit themselves.

### Conclusion

It is understandable that reluctance exists when it comes to the judicial meeting. Yet the main concerns about the meeting are misplaced: evidentiary matters are solvable. Children who do not wish to have the meeting should not have it. It works well in other countries. The main challenges are that judges and magistrates must feel adequately supported and trained, and that practical resources are in place for both training and implementation of the meeting. The judicial meeting, whilst not the only way to hear children, can be very important to some:

*... [I]t makes me so frustrated 'cos I cannot say it from my own mouth ... mum would go 'and your voice has been heard in court' and I would say 'NO it hasn't, it's only part of my voice.'* (14 year old boy interviewed in Douglas *et al.*, 2006).

The judicial meeting should be seen as the right of the child, something to be refused only where strictly necessary.