

# No Weight for ‘Due Weight’? A Children’s Autonomy Principle in Best Interest Proceedings

Aoife Daly

Senior Lecturer/Deputy Director, School of Law and Social Justice/European Children’s Rights Unit, University of Liverpool

Aoife.Daly@liverpool.ac.uk

## Abstract

Article 12 of the UN Convention on the Rights of the Child (CRC) stipulates that children should have their views accorded due weight in accordance with age and maturity, including in proceedings affecting them. Yet there is no accepted understanding as to how to weigh children’s views, and it is associated strongly with the indeterminate notion of “competence”. In this article case law and empirical research is drawn upon to argue that the concept of weighing their views has been an obstacle to children’s rights, preventing influence on outcomes for children in proceedings in which their best interests are determined. Younger children and those whose wishes incline against the prevailing orthodoxy (they may resist contact with a parent for example) particularly lose out. Children’s views appear only to be given “significant weight” if the judge agrees with them anyway. As it is the notion of *autonomy* which is prioritised in areas such as medical and disability law and parents’ rights, it is proposed in this article that a *children’s autonomy principle* is adopted in proceedings. In legal decisions in which the best interest of the child is the primary consideration, children should get to choose, if they wish, how they are involved and the outcome unless it is likely that significant harm will arise from their wishes. They should also have “autonomy support” to assist them in proceedings. This would likely ensure greater influence for children and require more transparent decision-making by adults.

## Keywords

Children’s autonomy principle; best interests; judicial proceedings; the right to be heard; due weight.

## 1. Introduction

CRC Article 12 states that children should be heard in all matters affecting them, and have their views given due weight in accordance with age and maturity. This was a forward-thinking provision at the time of CRC drafting, and is an acceptable approach to children’s rights in many circumstances. However it does not fit well in the context of judicial proceedings which determine the best interests of children. Such a conception of a right may suffice in politics for example where all of us have a limited say, and where all of us have our views “weighed” in accordance with various factors. However the difference with proceedings which determine children’s best interests is that they involve personal matters on which an adult, as an individual, very clearly makes their own decisions. They involve matters for example about where children will live and with whom they will have a relationship. We do not permit courts to make best interest decisions about adults, except in some circumstances where those adults are deemed to lack mental capacity.

The example of Clare's case (Tisdall and Morrison, 2012)<sup>1</sup> lends some substance to this point. Clare is 11 years old and lives with her mother. Her parents are separated and have been in a legal dispute about paternal visits for a number of years. In recent years Clare has forcefully insisted (through the court channels for hearing children) that she does not wish to continue the visits, as she does not enjoy them. At the most recent hearing the court decided that the visits should continue (though they are reduced), and Clare is very upset.

This is a decision about a personal relationship which Clare would have made herself if she were an adult, but it has entered the legal arena because she is a child, and the decision-maker adults (her parents) are in disagreement. The law is structured in such a way that courts make the decision, and children's preferences are *just one factor* of many to consider. They are not necessarily given any particular priority over other factors.<sup>2</sup> It was decided in this case that Clare's wishes were outweighed in the best interest decision by the presumed value of maintaining the relationship with her father.

In this case, as with most cases, it was not made known to Clare (or anyone else) how that process of weighing her views against other factors occurred (Tisdall and Morrison, 2012). I examine law and practice from around the world in *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Daly, 2018),<sup>3</sup> and it seems that the sidelining of children in their own proceedings is a regular occurrence. If children are fortunate enough to be heard, their wishes are frequently overridden, and there is little or no explanation provided as to how the decision was taken. Where there *are* attempts to make explanations, courts are often inconsistent, they rely on popular assumptions about children, and seem confused about what it is they are actually weighing – The child's competence? The wisdom of the decision? The accuracy of the child's perception? There is a preoccupation with children's capacity/competence, though there is little agreement on what this entails. In any case, it is not clear that a child should need to be deemed to have full capacity/competence in order to know what she wants and needs in her own life. The seeming inability of children to influence proceedings in which their best interests are being determined,<sup>4</sup> and the shaky bases on which courts deny them their wishes, points to the need for a better approach than hearing them and weighing their views – it seems that this is not working.

It seems fair that children's actual *influence on outcomes* should be considered the most important purpose of CRC Article 12, particularly in proceedings where intimate matters about their personal lives are being determined: 'none of them bothered me, just their

---

<sup>1</sup> Taken from Tisdall and Morrison, 2012: 165-171.

<sup>2</sup> See e.g. *P.-S. (Children)* [2013] EWCA Civ 223 para. 2. Norway is probably the exception here, considering the priority they place on the views of children over the age of 12 years in family law. See Ryrstedt, 2009: 195.

<sup>3</sup> In this article, excerpts are taken from Daly, 2018. The full argument in favour of the children's autonomy principle is to be found in this book, in which law, research and practice from across liberal democracies are examined, 11 in detail (Australia, Canada, England and Wales, Ireland, New Zealand, Scotland, South Africa, the US, France, Norway and Sweden – see page 3). Most case examples are drawn from England and Wales for language and practical reasons (I am based in this jurisdiction and higher courts here provide extensive judgments which can then be analysed) and case law cited is from this jurisdiction unless otherwise identified. The points made here will be relevant in all liberal democracies to a large extent, however.

<sup>4</sup> I outline in Daly (2018: 102-112) that immigration and criminal law cases are usually not decided with the best interest of the child as *the* primary consideration unfortunately, frequently leaving little room for a child's wishes. A children's autonomy principle could still be applied when children's *best interests* are being determined in those cases (as opposed to the ultimate outcome). Cases relating to international abduction are not strictly best interest decisions either as there is a presumption of immediate return, however judges have significant discretion in these cases relating to children's views, so such cases are included in the analysis though the presumption is acknowledged.

decision, what happened in the end, that's all' (11 year old boy with experience of family law proceedings, quoted in Douglas *et al.*, 2006: 56). There are other benefits to the right of children to be heard, such as ensuring their due process rights (for example attendance at proceedings), and the psychological benefits arising from feeling involved, but at the end of the day, what is "hearing" really for? It surely amounts to little if there is no actual change to outcomes as a result. It seems that it is necessary to think beyond the right to be heard, and the right to have one's views accorded due weight in this context. As the quality so valued for adults in liberal democracies is autonomy – the freedom to make one's own choices and to live according to one's own decisions to the extent possible – then this is the obvious concept to explore as a new focus for proceedings in which children's best interests are being determined. Perhaps requiring judges and others to make decisions in the framework of autonomy would shift the focus sufficiently to facilitate children to genuinely influence best interest decisions.

Autonomy is an oft-misunderstood concept. Popular misconceptions exist that autonomy is a selfish quality, because it encourages us to focus on ourselves (Childress, 1990: 12). Yet autonomy should be understood to mean respect *for others*, and to involve recognition that we can never fully understand what it is to be in another person's shoes. We should be very humble, therefore, about claiming that we know better than another person what is best for them. Courts should be very cautious before overriding a person's own wishes in their personal lives – children included. There are also claims that the autonomy concept can undermine families, because it fails to recognise how interconnected we are. Yet autonomy is, paradoxically, by its nature relational. Our choices and wishes are intimately connected to our family and community, and children's are too (Friedman, 2014; Herring, 2011: 40). There is also an argument that prioritising autonomy can lead to neglect of the vulnerable as they are abandoned to disastrous mistakes (Foster, 2009; Herring, 2016). I am not arguing that we should accept dangerous situations for children – I propose that children's wishes should be overridden where they will likely lead to significant harm (Daly, 2018). It also causes confusion that one can have autonomy in the sense of legal freedom, and "mental capacity" is the gateway to achieve it. I am not suggesting that we need to do away with the adult/child legal divide (generally crossed at 18 years), or even that we have to solve the mystery of what competence/capacity entails. Though competence/capacity is relevant, it need not and should not be the sole factor for determining children's influence on outcomes (see section 6 below and Daly, 2018: 189). Autonomy is taken here to mean the liberal ideal *that we should all have personal freedom in our lives to the extent possible*, not that we can always get what we want, nor that we should only get it if we meet some standard or measure of competence.

Adult's and children's situations are not always directly comparable of course. Infants must simply have these decisions taken for them, and some children will not want to decide. But the evidence shows that other children do indeed want to decide (Daly, 2018: 36-43). And it is not logical that they are denied that right simply because other children do not want to exercise it. Although we must of course be cautious about putting pressure on children, the other, ignored, problems are the exclusion which they experience from their own proceedings, and the coercion with which they are met if their wishes are considered not to be in their best interests. Problems around potential pressure and manipulation (by parents and others) can be overcome. The issue which requires greater attention here is that the right to be heard is not sufficiently robust to protect children's status in proceedings affecting them.

In this article, it is argued that the notion of attributing due weight to children’s views in proceedings affecting them is problematic, not least because there is no accepted understanding as to how to weigh children’s views. Case law and empirical research is drawn upon to argue that this crucial part of CRC Article 12 – weighing their views – has not led to influence on outcomes for children in proceedings in which their best interests are determined. It is children with whom the judge agrees anyway whose views are given ‘significant weight’. It is argued that great value is placed on autonomy in areas such as medical law, the rights of adults with cognitive disability and parents’ rights. It is proposed that a *children’s autonomy principle* is adopted – in legal decisions in which the best interest of the child is the primary consideration, children should get to choose, if they wish, how they are involved (process autonomy)<sup>5</sup> and the outcome (outcome autonomy) unless it is likely that significant harm will arise from their wishes. They should also have “autonomy support” to ensure that, with greater influence in proceedings, they simultaneously have additional assistance to negotiate and understand proceedings and options (Daly, 2018: 393). This, it is argued, would likely ensure greater influence for children and require more transparent decision-making by adults.

## 2. The Right to be Heard and the Notion of Weighing Views

CRC Article 12 states that children should be heard in all matters affecting them, and have their views accorded due weight in accordance with age and maturity. The inclusion of this provision was the first time at international law level that there had been an attempt to deal with the primary dilemma relating to children’s rights – that adults usually make decisions on children’s behalf. The law generally understands “children” to mean all those under the age of 18 years (as does CRC Article 1), and individuals in this group as lacking legal capacity (Alderson, 2016). CRC Article 12 is heralded as a significant step forward for the recognition of children’s rights. The noble aim of Article 12 is to account for the reality that obtaining decision-making ability is a gradual process, and that the guidance and control of children by adults should steadily decrease in accordance with this process. That children’s views will be given “due weight” implies that it is insufficient just to “hear” – children’s views must have some level of influence (Committee on the Rights of the Child, 2003: para. 12). It is useful, indeed necessary, to have a proviso which requires that courts do more than simply hear children. It seems, however, that the vagueness of this ‘weight’ element of Article 12 has contributed to problems of implementation of Article 12.

The first significant problem encountered with Article 12 implementation is that many jurisdictions are failing to perceive hearing children as a “right” of the child. It is instead overwhelmingly presented as a possibility available to the court; particularly in common law countries (Daly, 2018: 208). It is regularly considered only to be necessary in very specific circumstances, such as the most difficult of family law proceedings; and/or necessary to a limited degree (for example transmitting views via a social work report). Children will enjoy the right only if adults agree to it – judges usually have enormous discretion as to whether and how to hear children (Daly, 2018: 207). Resources must be deemed to be available, which is particularly challenging in a climate of legal aid cuts (Daly, 2018: 278).

If children are fortunate enough to have been heard, they then must overcome great obstacles where they have a preference as to the outcome of their case. The difficulties associated with

---

<sup>5</sup> See Daly (2018) for consideration of the *process* of hearing children, and how children’s choices on how they are heard could and should be improved (Chapter 4). This is not the main focus of this article, which focuses instead on children’s influence on *outcomes* in best interest proceedings.

the concept of due weight seems to have led to much focus on *hearing* children (though this may or may not happen in reality as noted above), and little on what should happen next. The vagueness of the concept also creates a situation where there appears to be no framework at all according to which decision-makers can “weigh” children’s views. Consequently how children’s views are weighed in proceedings is not transparent, it often seems inconsistent, and there appears to be little accountability according to which decision-makers, usually with enormous discretion, can be held to account via appeals or other avenues (Daly, 2018: 288-292).

Adults “hear” children, and in spite of calls to “weigh” views, nobody actually knows what this means, and consequently little trouble is taken to determine what adequate weight for children’s views should look like. Great importance is now placed on the need to understand, support and value the decision-making of *adults* where capacity is in question (Herring and Wall, 2015: 698), yet little effort is expended on trying to determine where the courts should and should not uphold *children’s* decisions. Courts generally do not concern themselves with such matters, and where they do (usually in medical law cases [Daly, 2018: 162]) the emphasis is on competence, and it is easy to determine that children do not have it, because competence is so little understood (Freeman, 2005: 211). In fact, there is an argument to be made that Article 12 has actually compounded the low status accorded to children in their own proceedings, whilst permitting adults to claim that they are committed to children’s rights because of the rhetoric of the right of children to be heard.

Children frequently report feeling that, where they have been heard proceedings, it has not made a difference: ‘They still didn’t listen and I started to go down there [to mum’s] ’cos I had to in the end’ (14 year old boy with experience of family law proceedings, quoted in Douglas *et al.*, 2006: 96. See also McLeod, 2006: 45 and Scottish Children’s Reporter Administration, 2011). They often report that being heard seems to be an exercise in tokenism: ‘But I think the outcome really – it wouldn’t have mattered much what we said, I think the outcome was pretty well set by the time we got there...it was out of our hands’ (young adult quoted in Darlington, 2006: 59, aged 13 during proceedings.) This is very visible in the fact that, in a study in England examining experiences of children with guardian representation, a very positive 74% reported feeling that they had “had a say”; but only 55% felt it had made a difference (Timms, Bailey and Thoburn, 2008: 264).

There are similarly other studies from around the world which indicate that large proportions of children feel that there has been little point to being heard (see e.g. Kilkelly: 28). In Israel 38% of children responded that being heard in family law proceedings had not helped (Morag, Rivkin and Sorek, 2012: 15) and in a study of family law cases in Scotland, for 30% of children the contact outcome was contrary to children’s wishes, in spite of the fact that all cases involved domestic violence, and all children were opposed to contact (Mckay, 2013). There is also evidence that in child protection cases children perceive (and are correct) that their wishes are frequently overridden (see e.g. Scottish Children’s Reporter Administration, 2011; Winter, 2010; Vis and Fossum, 2013; Vis and Thomas, 2009: 155 and Arad-Davidzona and Benbenishty, 2008; McLeod, 2006: 45; Thomas and O’Kane, 1999: 141-2). Children are often left upset and bewildered by proceedings which may exclude them completely, or alternatively include them only to override their stated wishes (often without explanation).

The apparent lack of influence for children, and the perception of the same by many of them, is perhaps unsurprising. As the best interest principle is currently applied, a child’s wish is generally treated as just one of many factors. Adults are not disposed to consider the

importance of autonomy for children, nor do laws and policies require them to. Considering the value placed on personal autonomy in liberal democracies, one would expect that fairness would require that a child's wishes should at least be considered the most important factor in best interest proceedings. Yet Article 12 does not require this. Instead the child's view is supposed to be given "due weight" though there is little understanding of what this means, and no methodology according to which it can be done with consistency and transparency.

### 3 How Does One Weigh Views?

Article 12 stipulates that age and maturity are to be considered when according weight to children's views, but tells us little else about how this should be done, or whether any other factors should be valued or prioritised. Many authors have highlighted the indeterminacy of the weight component of Article 12 when it comes to best interest decisions concerning children (Cordero Arce, 2015; Archard and Skivenes, 2009; Tisdall and Morrison, 2012; Trinder, Jenks and Firth, 2010: 236; Ryrstedt, 2009: 186 and Daly, 2009). So how far have we come since 1989 in terms of building on this vague instruction in Article 12; in understanding how to weigh views?

#### 3.1 The Committee's Contribution

If we turn to General Comment No. 12, we see that the Committee gives some detail on the matter of determining *capability of forming views* (Committee on the Rights of the Child, 2009: paras 20-1) – the standard CRC Article 12 deems necessary for accessing the right to be heard) – but this is not the same as *weighing* the views of a child. These two matters are frequently confused in literature, case law and practice. But they are separate, albeit overlapping, matters. On the face of it, the two phrases in CRC Article 12 should be approached separately: 1) 'child who is capable of forming his or her own views' obliges authorities to determine whether the child is capable of forming views; and 2) 'the views of the child being given due weight in accordance with the age and maturity'; obliges authorities to determine the extent to which children's views should influence the decision being made.

When it comes to the latter point – according due weight to a child's views – the Committee has little to say. In the (brief) section tackling this issue (Committee on the Rights of the Child, 2009: paras 28-31), the Committee (somewhat confusingly) starts by considering the *capacity* of the child (harking back to point 1); stating that it has to be assessed ((Committee on the Rights of the Child, 2009: para. 28) and that all personnel involved in proceedings regarding decision-making are to be trained in this regard (see e.g. Committee on the Rights of the Child, 2006, para. 41).

There are also some vague pronouncements on the nature of "maturity" and "understanding" (Committee on the Rights of the Child, 2009: paras 29 and 30) which tell us little, if anything, about how to weigh views against other factors in a best interest decision. As Article 12 emphasises weight in accordance with "age and maturity" perhaps it is inevitable that it is the competence/capacity issue which attracts almost all of the attention of the Committee on the matter of how to weigh children's views. Yet ironically courts rarely give serious attention to children's capacity/competence outside of medical law cases (Daly, 2018: 162), and in any case undue attention to competence is undesirable for many reasons, not least because we know so little about it (see further below section 3.2).

The Committee also makes a handful of further comments in General Comment No. 12 and other relevant documents, stating that listening alone is insufficient: ‘the views of the child have to be seriously considered...’ (Committee on the Rights of the Child, 2009: para. 28); that the views of all children must be accorded weight; and that views must also be ‘effectively taken into account’ (Committee on the Rights of the Child, 2005: para. 28). The Committee also states that where children can form views ‘in a reasonable and independent manner’ their views must be ‘a significant factor in the settlement of the issue.’ (Committee on the Rights of the Child, 2005: para. 44).

These are the only concrete recommendations from the Committee on the matter of weighing views. It is useful to have pronouncements that the views of *all* children must be accorded weight (sometimes courts make reference to giving “no weight” to views<sup>6</sup>); that views should be seriously considered; and that they should be effectively taken into account. But the Committee is simply providing further vague terminology, which can at the end of the day be interpreted any way that suits adults.

### 3.2 Efforts of the Courts to Give Due Weight

In the absence of any clear methodology for weighing children’s views amongst or against other factors, the language and reasoning used by decision-makers is the only indication of how judges go about their weighing process. As will be outlined in this section, the language demonstrates that what little justification courts provide for their approaches to children’s wishes is frequently confused; setting expectations for children of “rationality” and “independence” that would not be met by many adults.

#### 3.2.1 High Demands: Children Must be Mature, Competent and their Views Must be Good, Rational, Real

Consideration of “maturity”, referenced in Article 12, is a common feature of the case law.<sup>7</sup> This is somewhat ironic considering the lack of agreement on what maturity (or competence, or any of the other terms used) entails. In medical law it is now frequently referred to as capacity (see consideration and definition of the various terms in Daly, 2018: 147). There is often an assumption that it is unproblematic (Freeman, 2007: 15); one has capacity or one does not. In reality it is exceptionally difficult to negotiate this area, and this is acknowledged in the fact that for most purposes, even for adults with cognitive impairment, there is a presumption of mental capacity (in law) to make one’s own legal decision,<sup>8</sup> presumably in order to avoid undue paternalism – the antithesis of the liberal democracy. Given its importance as a concept it is striking that there is no well-accepted measure of capacity.<sup>9</sup> The notion is highly contested on the bases of being overly-subjective, unrealistically binary, and hypocritically surmountable (See for example Foster, 2009; Herring, 2016; Donnelly, 2006)

---

<sup>6</sup> See *Re M. (Children)* [2016] EWCA Civ 1059, para. 23 and *S. v S. (Child Abduction) (Child Objections)* [1991] 2 FLR 492, at 501. In Canada too the trial judge had ‘discount[ed] the child’s wishes’ (para. 10) in *Letourneau v Letourneau* 2014 ABCA 156.

<sup>7</sup> See for example *Re R. (Residence Order)* [2009] EWCA Civ 445, para. 58; *W. (Minors)* [2010] EWCA 520 Civ, para. 56; and New Zealand case *Y. v W.*, FC Christchurch, FP 009/1640/88, pp. 8-9.

<sup>8</sup> See for example the UN Convention on the Rights of Persons with Disabilities, the Mental Capacity Act 2005 in England and Wales, and in a Canadian case the court noted the need to ‘avoid the error of equating the presence of a mental disorder with incapacity.’ *Starson v Swayze* [2003] 1 SCR 722, at para. 77.

<sup>9</sup> Although in medicine the considerations are whether a patient can: communicate a choice; understand information; appreciate consequences; and reason about choices, these are all obviously very subjective concepts, and responses will be judged by a clinician who will have his/her own values, beliefs and prejudices.

in that it is easy to determine that someone lacks capacity if one wishes to (Freeman, 2005; Foster, 2009).<sup>10</sup>

States have not introduced clear legal definitions of what competence, capacity or maturity entails for children in best interest decisions, and courts likewise avoid them. We of course have *Gillick* competence in common law countries, though rather than providing answers to the dilemma around children's capacity/competence, it has in fact raised more ambiguities (Grimwood, 2010; Ashtekar *et al.*, 2007 and Day, 2007: 383-4). The test suggested in *Gillick* – that is that it should be determined whether a child has 'sufficient understanding and intelligence' to consent to the matter in question – has left persisting questions 'which vex clinicians, minors and their families' about the level of understanding children should have, and when they have it, whether they can determine treatment (Cave, 2014). It does not lay-out any clear definition (so in practice individual clinicians determine a child's competence) and in any case it was intended for the narrow context of under-16s accessing birth control.

In other best interest decisions outside medical law, courts are uninterested in a precise measurement of competence/capacity in any case. In spite of the fact that the term "competence" is often employed to denote a legal standard, particularly in medical law (as in *Gillick* competence), in the case law concerning children in family and child protection proceedings, it is almost always used colloquially, without an effort to determine whether a child has reached a particular competence milestone<sup>11</sup> such as *Gillick* competence. In *Re S. (A Child - Transfer of Residence)* for example it was (very briefly) considered whether it was lawful for court staff to forcibly remove a 12 year old to reside with his father – the boy's legal representative submitted that it was an ECHR Article 5 (deprivation of liberty) issue. The court noted that there was no authority whether such action was lawful where: 'the child concerned is a *Gillick* competent child...In this case the question of whether S is *Gillick* competent was never determined by the Court.'<sup>12</sup> There was no further consideration of this. It seems as if children's wishes in family law are simply not sufficiently important for competence to be subjected to the kind of scrutiny or rigour to be seen in the medical law jurisprudence, even where fundamental rights, such as deprivation of liberty, are explicitly invoked.

"Competence" is often used interchangeably with other terms such as "maturity" and "understanding".<sup>13</sup> Like competence, these terms are rarely if ever defined by the courts. In *Re T. (Abduction: Child's Objections to Return)*<sup>14</sup> the judge, in considering whether to take into account the child's views (the term "weight" was not used), stated that one factor was 'the degree of maturity of the child'; whilst emphasising at the same time that the judge 'would not wish to venture any definition of maturity.'<sup>15</sup>

---

<sup>10</sup> Foster (2009) outlines this well in relation to the cases of *Re L. (Patient: Non-Consensual Treatment)* [1997] 2 FLR 837; and *Re M.B. (An Adult: Medical Treatment)* [1997] EWCA Civ 1361. See further Daly (2018: 156).

<sup>11</sup> Although it is sometimes used in English law to determine whether a child can instruct their own solicitor. See *Ciccone v Ritchie (No 1)* [2016] EWHC 608, para. 46. See also *Re J.S. (Disposal of Body)* [2016] EWHC 2849 for a rare reference to the fact that the 14 year old child was "legally competent" without explaining how that determination was reached (para. 25).

<sup>12</sup> *Re S. (A Child)* [2010] EWHC B2, para. 58.

<sup>13</sup> *G. (A Child: Intractable Contact)* [2013] EWHC B16, para. 82. "Intelligence" is another term used. See for example South Africa case *McCall v McCall* 1994 (3) SA 201 (C), at 207H.

<sup>14</sup> [2000] 2 FCR 159.

<sup>15</sup> *Ibid*, at 202.



Competence/maturity then becomes confused in the case law with factors such as the age of the child (judges question whether children are as mature as their chronological age without specifying why this is important)<sup>16</sup> and the perceived rationality of their views and wishes.<sup>17</sup> Instead of weighing views, courts seek to determine whether something is a good or correct decision or view.<sup>18</sup> Yet what constitutes a good reason or decision is really just a value judgment.<sup>19</sup> The court then goes on, of course, to make it's *own* ultimate decision as to what the "correct" interpretation of the child's situation is. It seems then, that children will be competent/mature if their views on their situation concur with that of the judge, which renders weight for their wishes a moot point. What is the purpose of weighing wishes, if all that means is that the question will in effect be: how similar to the judge's determination are the wishes of the child?

There are also a range of other vague tests which children must pass to be taken seriously. Courts prefer the "rational" rather than the emotional when it comes to children's reasons for their wishes and decisions,<sup>20</sup> though children themselves may often operate on the basis of instinct like Clare: "Cos that's the annoying part because apparently I don't have a good enough reason, because sometimes you don't need a reason sometimes you just have a feeling and you have to go by your instinct" (see Tisdall and Morrison, 2012: 166).<sup>21</sup> Judges also favour views that they consider to be, as described in one Hague Convention case in Ireland, "clear" and "firm".<sup>22</sup> It seems that it is more likely that a child's wishes will be taken seriously if they are "unambiguous"<sup>23</sup> although these are proceedings – on intimate matters of fraught family breakdown – in which the feelings of *adults*, let alone children, will naturally be unclear and ambivalent at least at some points.

Perhaps most problematic is that children must also prove that their views are "real. Courts consistently consider whether 'the child's views have been influenced by some other person',<sup>24</sup> having to reassure that a view 'bears no mark of biased influence',<sup>25</sup> even where

---

<sup>16</sup> See for example *Re M. (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, para. 110; *W. (Minors)* [2010] EWCA 520 Civ; *Re S. (A Child)* [2010] EWHC B2, para. 58; Norway Supreme Court case LA-2005-136932.

<sup>17</sup> See for example *G. (A Child: Intractable Contact)* [2013] EWHC B16, para. 83; *Re K.* [2010] EWCA Civ 1546, at para. 24; *Re T. (Abduction: Child's Objections to Return)* [2000] 2 FCR 159; Skjærten (2013: 298-9).

<sup>18</sup> See for example *G. (A Child: Intractable Contact) T.* [2013] EWHC B16 para. 83 and *(Children) (Abduction: Child's Objections to Return)* [2000] 2 FLR 192, at 202-4; *Re K.* [2010] EWCA Civ 1546, at para. 24, and Skjærten (2013: 298-9).

<sup>19</sup> For a rare reference to this see *Re J.S. (Disposal of Body)* [2016] EWCH 2859 para. 31 where the judge emphasises that the case is not 'about whether JS's wishes are sensible or not.' This was a more medical law-type case however as the child, who sought to make plans for her body after death, was sadly dying of cancer.

<sup>20</sup> See for example *G. (A Child: Intractable Contact)* [2013] EWHC B16; *Re S. (Transfer of Residence)* [2010] EWHC 192; *Re R. (A Child)* [2009] EWHC B38, para. 22 and *Re R. (Residence Order)* [2009] EWCA Civ 445, para. 58. See also Scottish case *M. v M.* (2008) Fam LR 90, para. 54 and in Norway LA-2005-136932 and Skjærten (2013: 296-7).

<sup>21</sup> Tisdall and Morrison, note **Error! Bookmark not defined.** at 166-167. See also Canadian case *Millar v Williams*, 2009 CanLII 41350, in which the court held that the child's desire to be with her mother was not a good enough reason to change residence, upholding the order that she live with her father.

<sup>22</sup> *U. v U.* [2011] IEHC 268, para. 29. See also *Ciccone v Ritchie (No. 1)* [2016] EWHC 608 para. 48; *G. (A Child: Intractable Contact)* [2013] EWHC B16, and Australian case *Bell and White* 2014 FamCA 258.

<sup>23</sup> See e.g. in Norway Skjærten (2013: 298-9); RT-2006-1308, RT 1996-1684 and RT 2005-624. Similarly, in the New Zealand context see *R. v P.*, FC Hastings, FP 020/307/95, at 3, and *Thorpe v Barrett* [2015] NZHC 3344, para 88.

<sup>24</sup> *S. v S. (Child Abduction) (Child Objections)* [1991] 2 FLR 492, at 501; see also *W. (A Child)* [2016] EWCA Civ 1051; in Scotland *R. v R.* [2002] FamCA 383 and in New Zealand *H. v H.*, FC Nelson, FP 042/107/91, at 12.

genuine distress at the prospect, for example, of forced contact, is accepted to exist.<sup>26</sup> This preoccupation with “genuine” views continues in spite of the fact that both courts and professionals (Cashmore and Parkinson, 2009: 20) tend to be satisfied, generally, as to the obviousness of whether children have been manipulated or not and usually the claim is that their views *are* “their own”.<sup>27</sup> It seems then that decision-makers should be discouraged from the default position which they appear to have, one which involves suspicion of children’s views.

These incredibly high barriers for children render it unsurprising that in reality it appears they wield little influence in their own proceedings. They are being held to higher standards of rationality; consistency and independence than could ever be expected of adults.

### 3.2.2 Proving Due Weight has Been Given?

In most cases, particularly those with yes/no outcomes (for example, will a child live with her father? Will a child be forced to have medical treatment?), proving that a child’s wishes have been given ‘due weight’ will be a challenge. If the word ‘weight’ is used by the court (often it is not) it is unclear how it is to be attributed. Courts are reduced to simply using adjectives, giving “significant weight” (usually because the child is older<sup>28</sup>); “modest weight”<sup>29</sup>; “little weight” (because of the initial “ambivalence” and “young age” of the child<sup>30</sup>). In some circumstances courts believe that no weight is due to a child’s views.<sup>31</sup>

Courts occasionally face appeals on the basis that children’s views have not been accorded due weight, which is unsurprising considering it is difficult to prove that they have. One has to have sympathy for the trial judge in *Re R. (Residence Order)*<sup>32</sup> where it was found on appeal that *inter alia* he had erred in giving insufficient weight to the views of the nine year old boy in the residence dispute. The appeal judgment establishes that the lower court did not give any “real effect” to his views. However it is difficult to see how courts can really demonstrate that they are placing weight on views without actually holding those views to be determinative. The lower court had, after all ‘referred to them, accepted them...attempted to reason against [them]’ (para. 58). Without guidance on *how* to weigh views and how to demonstrate that it has been done, it is difficult to see how courts can approach the matter in a way that comes across as any more logical and fair than this. The alternative of course is to

---

<sup>25</sup> LA-2005-136932. See further Skjørten (2013: 296-7).

<sup>26</sup> See e.g. in Scotland in *White v White* 2001 SLT 485 and in Scotland *R. v R.* [2002] FamCA 383. See also New Zealand *H. v H.*, FC Nelson, FP 042/107/91, at 12; and Israeli case *Fama (Dist TA) 1167/99 R. v L.* (unreported, 3 July 2000) [INCADAT cite: HC/E/IL 834].

<sup>27</sup> See for example *Re J.S. (Disposal of Body)* [2016] EWHC 2859, para. 9. See also *An NHS Trust v A.B.C. & A Local Authority* [2014] EWHC 1445, para. 14 and in the context of a child protection case *P. (A Child)* [2016] EWCA Civ 1127 para. 23.

<sup>28</sup> In *G. (A Child: Intractable Contact)* [2013] EWHC B16, para. 85. See also Australian case *Robbins & Rosemount* [2008] FamCA 486, para. 492 and *Central Authority for the Republic of South Africa and Another v B.* (2011/21074) [2011] ZAGPJHC 191, para. 11 where the 13 year old’s “firm” views were given “considerable” weight.

<sup>29</sup> See New Zealand case *W. v N.* HC CHCH CIV 2006 409 683, para. 42.

<sup>30</sup> *Re M. (Republic of Ireland) (Child’s Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, para 88.

<sup>31</sup> See e.g. See *Re M. (Children)* [2016] EWCA Civ 1059, para. 23; *S. v S. (Child Abduction) (Child Objections)* [1991] 2 FLR 492; Canadian case *Letourneau v Letourneau* 2014 ABCA 156 (para. 10) and Israeli case *Fama (Dist TA) 1167/99 R. v L.* (unreported, 3 July 2000) [INCADAT cite: HC/E/IL 834].

<sup>32</sup> [2009] EWCA Civ 445. See also *Re M. (Republic of Ireland) (Child’s Objections) (Joinder of Children as Parties to Appeal)* [2015], para. 137 and *A. (A Child)* [2013] EWCA Civ 1104, para. 73.

move away from “due weight” and prioritise autonomy. This is considered below.

Of course, in some cases courts emphasise the importance of considering children’s wishes, even if there is no explicit reference to the term “weight”. In the Australian case *R. v R.* the judge said that court must give reasons to explain the decisions where it decides against [their] wishes.<sup>33</sup> The Supreme Court of Canada stated in 2009 that in some cases, ‘the principles of welfare and autonomy will collapse altogether and the child’s wishes will become the controlling factor.’<sup>34</sup> Yet these cases appear to be the exceptions that prove the rule, usually involving medical law cases, and children with whose views the court agrees anyway (Daly, 2018: 315), for example where children resist contact with parents of whose behaviour (often negative or violent) the court strongly disapproves.<sup>35</sup>

#### 4. Outcomes: The Right to be Heard has Benefited *Some* (Usually Older) Children

##### 4.1 The Older Child Preference

The cases in which courts demonstrate respect for children’s wishes also tend to inevitably be those in which children are “older”; usually adolescents. This is taken by courts to barely require pointing-out because it is so “obvious”.<sup>36</sup> A number of research studies indicate that the wishes of older children are preferred in best interest decisions, for example those in Norway (Skjørten, 2013: 301), Michigan (Clarke, 2013), and England (May and Smart, 2004: 315). The preference is also very clear in the case law. There are a number of cases in which a degree of reverence for the older child is evident. In *G. (A Child: Intractable Contact)* for example it was very clear that the child impressed the judge: ‘G is now 13 years old...She is an intelligent and articulate young lady.’<sup>37</sup> Younger, less articulate children will have a far lesser chance of being persuasive as is demonstrated in the impressions of 11 year old Olivia as compared with her younger sister:

*At the end he [the judge] definitely said ‘If Olivia doesn’t want to go she doesn’t have to go anymore’. But they said that Sarah has to go. I think it was ‘cos she was so small, ‘cos she is only six so she didn’t really get a choice to say whether she wants to go or she didn’t. But they said that I don’t have to go (Douglas et al., 2006: 106).*

Children’s credibility decreases in the eyes of the courts in line with their age. Research in England<sup>38</sup> and Ireland<sup>39</sup> indicates that decision-makers often feel it is acceptable to dismiss the wishes of younger children solely on the basis that children are too young to be taken seriously, without any further justification. There is much evidence that, although the wishes

<sup>33</sup> *R. v R.: Children’s Wishes* [2000] FamCA 43. Citing the Full Court in *Harrison and Woollard* (1995) 18 Fam LR 788 at 800. See also *Re L.-W. (Children) (Enforcement and Committal: Contact)* [2010] EWCA Civ 1253 at 124.

<sup>34</sup> *A.C. v Manitoba* (Director of Child and Family Services) 2009 SCC 30, para. 87.

<sup>35</sup> See e.g. *G. (A Child: Intractable Contact)* [2013] EWHC B16 paras 14 and 16; *Re M. (Republic of Ireland) (Child’s Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26 paras 85 and 94.

<sup>36</sup> *Re R. (Child Abduction: Acquiescence)* [1995] 1 FLR 716 at 731.

<sup>37</sup> *G. (A Child: Intractable Contact)* [2013] EWHC B16, para. 85. See also New Zealand case *D.G.S.W. v R.* [1997] at 371; *Re S. (Contact: Children’s Views)* [2002] EWHC 540 and Australian case *Triggs and Triggs* 2015 FamCA 538.

<sup>38</sup> May and Smart, note **Error! Bookmark not defined.**, at 315. See also in New Zealand case *Burnett v Burnett* [2017] NZHC 417, para. 84 the devaluing of the child’s views on the basis that she was aged six years.

<sup>39</sup> See for example *M.W.P. v T.K.P.* [2007] IEHC 145; *F.N., E. B. v C. O., H.O., E. K.* [2004] IEHC 54; *R.W. v C.C.* [2004] IEHC 194 considered in Daly (2009); and *F.G. v Child and Family Agency and Ors* [2016] IEHC 156, para. 46 considered in Daly (2018: 324).

of older children will not necessarily prevail,<sup>40</sup> there is a discourse that they are important, and that overriding those wishes requires justification. However with younger children there is no such discourse. There is a clear sense that it is assumed reasonable to devalue and override children's wishes simply on the basis that they are young.

It seems inevitable that, at least to some degree, older children will have greater weight accorded to their wishes. Yet children's decision-making abilities are not necessarily determined by biological age – context, information, experience, and support all combine to dictate a child's abilities in this regard. If one factor has to be chosen which is most relevant, it is probably the context in which the decision is being made and the support provided (Daly, 2018: 175-189). Yet by far the most relevant factor which the courts consider is age – the older a child is, the more 'weight' their views will have.

#### 4.2 Retaining the Status Quo for the Powerful

Courts have almost unlimited discretion as to whether to hold a child's wishes as determinative or not. When one examines the most common scenarios in which children's wishes are overridden, it appears that powerful actors – state authorities, parents, and particularly abusive parents – will be the beneficiaries of this discretion.

The right to be heard appears to be selectively employed in favour of the preferences of children in some child protection cases. It has been noted in Norway (Vis and Fossum, 2013: 2101) that judgments are most likely to be in line with children's wishes if children are in state care and do not want to move. Where children in care resist contact with birth families and where this is consistent with what professionals have deemed best, children's wishes tend to be used as "leverage" in favour of authorities' determinations (Daly, 2018: 365; Winter, 2010). In contrast, it seems that children may struggle to assert influence on the matter of retaining contact with birth families, something which they emphasise as of great importance to them (Daly, 2018: 338; Department of Children and Youth Affairs [Ireland], 2011; European Commission, 2010).

Another major factor which children struggle against is the 'contact presumption' (Trinder, 2014 and Harris-Short, 2010) in private cases – the presumption that it is always best for children to have contact with both parents. Whilst contact is of course positive for most children, Trinder highlights how unfulfilling it is for some (Trinder, 2009: 27), many of whom do not hesitate to express that it is against their wishes: 'I don't like seeing Dad when he's just like swearing at me and I don't want to go and see him anymore' (girl, aged nine, quoted in Smith, Taylor and Tapp, 2003: 205). Yet it seems that contact being unfulfilling and unpleasant is insufficient justification for the courts where children are resisting it. There is an enormous amount of evidence from various jurisdictions that children are regularly coerced via the courts into contact arrangements that they do not want (see e.g. Skjørten, 2013; McKay, 2013; Douglas *et al.*, 2006; Darlington, 2006; Smith, Taylor and Tapp, 2003).

There is palpable frustration of children who just want for proceedings to end, and for the pursuing parent to end their legal campaign: 'I really hate all this and I just want to be left alone...this is all making me feel scared and frightened' (from letter to judge of nine year boy in intractable contact dispute where he wishes not to see his father.)<sup>41</sup> Children can be

---

<sup>40</sup> See for example *P.-S. (Children)* [2013] EWCA Civ 223.

<sup>41</sup> *Re H -W. (A Child)* [2017] EWCA Civ 154, para 25.

threatened with force where they resist contact. In *Re S. (Transfer of Residence)*<sup>42</sup> where the court was considering the practicalities of implementing a court order for a change of residence (from mother to father) against the wishes of the 12 year old boy, the need for the use of force is referenced four times.<sup>43</sup> Efforts to implement the order were ultimately abandoned as the boy was left with clinical mental health problems from his experiences (he ended-up in foster care). In the US children have occasionally been imprisoned for refusing contact.<sup>44</sup> Although these are extreme examples, these cases are an ironic, though perhaps inevitable, destination of best interest proceedings which do not prioritise children's autonomy, because children's resistance constitutes contempt of court.

There is also much evidence that contact against the wishes of children is in some cases ordered even where there is domestic violence (Harrison, 2014: 382; Macdonald, 2017: 7; Kelly, 2011-2012; Holt, 2011). These kinds of cases perhaps constitute the most disturbing element of a "right to be heard" which does not prioritise autonomy in best interest proceedings. It appears to be of little assistance to children even in their efforts to escape violent relationships.

## 5. The Focus for Other Groups is on Autonomy

### 5.1 The Rights of Adults with Cognitive Impairment

Whilst in best interest decisions for children we are still stuck on hearing children and weighing their views, approaches are dramatically different in other areas of the law. One area which demonstrates well the weaknesses of CRC Article 12 is the contrasting autonomy successes achieved for adults for whom mental capacity is an issue. There has been a recent paradigm shift in favour of equality for people with disabilities (Stavert, 2015: 3), including adults with cognitive impairment because of brain injury, mental illness or learning disability. Courts are sometimes called upon to make decisions in the best interests of adults lacking capacity (Herring and Dunn, 2011), essentially in many cases engaging in substitute decisions on behalf of individuals (Donnelly, 2016), similar to what occurs in best interest cases concerning children.

There has been an enormous shift in favour of taking substitute decisions more seriously for adults (Donnelly, 2008), a focus on upholding the wishes of the individual, even a movement away from substitute decision-making in favour of *assisted* decision-making instead (Donnelly, 2016). The advent of the UN Convention on the Rights of Persons with Disabilities has had a great influence on this area. Amongst many autonomy-related provisions in that instrument are state obligations to have measures to ensure vindication of 'the rights, will and preferences of the person' (Article 12[4]). In other words, instead of making decisions about or on behalf of individuals, the ultimate goal is upholding their wishes; and efforts must be made to assist and support them in making their own decisions.

---

<sup>42</sup> [2010] EWHC 192.

<sup>43</sup> *Ibid*, paras 49, 54 and 92.

<sup>44</sup> See US cases *Eibschitz-Tsimhoni v Tsimhoni* State of Michigan 6<sup>th</sup> Judicial Circuit Court for the County of Oakland File No. 2009-766749-DM; and *In re Marriage of Marshall*, 278 Ill.App.3d 1071 (1996), where children were incarcerated for refusing to attend contact visits. See also Canadian cases *K.D.S. v G.M.P.*, 2017 ONSC 212 and *Millar v Williams*, 2009 CanLII 41350 (ON SC) where courts stated that police would be used to enforce orders.

The influence of these provisions of the UN Convention on the Rights of Persons with Disabilities is evident in many national systems. In England and Wales for example the Mental Capacity Act (MCA) 2005 requires an assumption that mental capacity exists, that efforts are made to support and help people with disabilities to make decisions for themselves, and that no unnecessary limits are placed on vindication of the individual's own preferences (see e.g. Alghrani, Case and Fanning, 2016). In practice courts in England and Wales give priority to the wishes of the adult without capacity in the best interests assessment, and significant justification is required before they are departed from (Keene and Auckland, 2015).

These international law standards which involve due process rights and prioritisation of autonomy, as well as the embracing of them at national level, seem very far removed from the vague right to have due weight accorded to views.

## 5.2 The Autonomy of Parents

The law is strongly inclined in favour of the autonomy of parents, and reluctant to interfere unless a distinctly high threshold of harm to a child has been reached (or will be reached in the future). Courts readily accept in both child protection *and* family law that children may have to experience a certain level of harm: '[e]very child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up'<sup>45</sup> and '[d]iscomfort and distress may be almost inevitable for a child whose parents are in dispute.'<sup>46</sup> A high threshold must be reached before states will interfere with the decisions of parents about their children (Burns, Pösö, and Skivenes, 2016: 2). In *Re L. (Care: Threshold Criteria)*<sup>47</sup> the court in England and Wales stated that 'diverse standards of parenting have to be tolerated' and that some children will experience 'disadvantage and harm'. For the state to protect all children from defective parenting, the court opined, was simply was not possible (para. 50).

The terminology varies between nations ("significant harm" in England and Wales; "serious deficiencies" in Norway [Skivenes, 2011]; and in the US "an imminent risk of serious harm.") yet the concept remains largely the same – before intervention is permissible, the harm or risk of harm to the child must be significant or serious. The presumption before that level of harm is reached (or deemed likely to be reached in the future) is that parents must be free to make decisions for their children and raise them as they see fit.

And yet the courts, whilst unwilling to interfere with parents causing mere harm, will override children's wishes often without even any reference to the possibility that harm could arise from those wishes. Often all that appears relevant to the courts is that the overriding of the child's wishes is apparently in the child's "best interests" (Daly, 2018: 360). There is usually not even any consideration of whether there would be significant problems if the wishes of the child were upheld. This fact makes it difficult to justify the approach of courts to children's choices for themselves. Parents are after all making decisions about or on behalf of *another* individual (their child) in relevant cases, whereas in best interest decisions, a child's wishes are about their own person.

---

<sup>45</sup> *Re E. (Children)* [2011] UKSC 27, at 34.

<sup>46</sup> Irish case *I.P. v. T.P.* [2012] 1 IR 666, para. 34. See also in Scotland *White v White*, 2001 SLT 485. Consider instances in England and Wales where courts dismiss what it accepts as children's genuine distress about contact, see e.g. *M. v B.* [2016] EWHC 1657, outlined in Daly, 2018: 359. See also Macdonald, 2017: 7.

<sup>47</sup> [2007] 1 FLR 2050.

### 5.3 Autonomy in Medical Law

Autonomy – of both adults and children – has been examined most particularly in the area of healthcare. Medical law is about fundamental life and death decisions more often and more clearly than other areas of the law (Foster, 2009: 94). A system of value pluralism exists (in common law countries at least) in the medico-legal arena that an adult may consent to or refuse treatment ‘for any reason or no reason whatsoever’ (Coggon, 2007: 239). The respect for autonomy in this arena is enormous – too much so, some argue (see for example Herring, 2016 and Foster, 2009) and there are strong arguments why the unrealistically binary approach to autonomy in medical law should change – for both adults and children (see Daly, 2018: 146-162). But ironically, children’s autonomy is given the most serious attention in life and death cases, where the stakes are highest.

In reality it seems that courts take a more loose approach to autonomy/capacity than they would like to admit (Foster, 2009; Coggon, 2007). This is to be seen most plainly when it comes to children – courts willingly circumvent the question of whether a child has capacity or *Gillick* competence if the likely harm of the option sought by the child is too great (Freeman, 2005). Children’s ability and permission to take decisions for themselves is therefore clearly linked to the nature of the risk involved. Yet even where courts are mindful to override children’s wishes to save them from disastrous outcomes, courts pay close attention to the seriousness of overriding autonomy and for example provide detailed considerations of the child’s competence/capacity and situation, and in-depth justification for the decision reached. In *Re M. (A Child) (Refusal of Medical Treatment)* for example the judge ordered a heart transplant against the wishes of the adolescent, and went to great lengths to justify his decision.<sup>48</sup>

So if an ‘autonomy save where serious harm’ approach is used for children in medical law, it should be possible to apply it in other best interest decisions too (Daly, 2018: 162-175). It would of course be a radical departure from the overwhelmingly paternalistic approach in, for example, family law, where any wish can easily be overridden in the pursuit of ostensible ‘best interests’. However there does not appear to be any obvious reason as to why the approach taken in one best interest matter (medical law) cannot also be taken in another (family law). This is not to say that the emphasis on children’s competence/capacity, which is highly evident in medical law, is helpful. However competence/capacity could be a relevant consideration in a robust consideration of a child’s autonomy rights in a family law or child protection case. The point is that the prominence of children’s autonomy in medical law should inform the approach which is currently taken to weighing children’s views in other types of best interest proceedings, where autonomy is not prioritised.

## 6. Why We Should Prioritise and Support Autonomy for Children in Proceedings

### 6.1 Overriding Autonomy is Harmful

Autonomy is accepted as inherently good for us. Research consistently shows that individuals prefer to engage in activities in which they feel they have choice, even where this is just a perception (Iyengar, 2010). Unsurprisingly then it is respect for autonomy – not an emphasis

---

<sup>48</sup> [1999] 2 FLR 1097. See also *Re A. (A Child)* [2014] EWHC 920 and in Canada *A.C. v Manitoba* (Director of Child and Family Services) 2009 SCC 30.

on reward and punishment – which has been found to achieve the best outcomes for children both at home and at school (Deci and Ryan, 2000: 54) regardless of factors such as gender, age or culture. The need for autonomy relates to the desire of individuals to perceive their behaviour as self-endorsed – as coming from *themselves* rather being controlled by others (see research synopsis in Daly, 2018: 134).

Yet courts regularly override children’s wishes when determining their best interests, and rarely acknowledge that harm may arise from this (see further Daly, 2018: 361). Children themselves describe the distress they experience when their wishes are overridden in best interests determinations:

*They still didn’t listen and I started to go down there [to mum’s] ’cos I had to in the end. It was the Saturday that I was supposed to be going down there and I went outside and basically just refused to go down there and I was shaking, trying to say I don’t want to go down there anymore* (14 year old boy with experience of family law proceedings, quoted in Douglas *et al.*, 2006: 95).

*...I was living with foster parents and I didn’t want to be with them, and no one’d listen, but then...then I started eating more and everything. And then my social worker started listening to me* (child in care quoted in Boylan and Ing, 2010: 5).

There needs to be greater and more explicit recognition that overriding a child’s wishes is very likely going to be harmful. It also needs to be recognised that it is *this* matter, rather than the adults’ perception of what constitutes harm (for example perceived harm likely to arise from the child’s “unwise” wishes such as resisting contact), which should be taken most seriously. The ready acceptance by the courts that harm to children is inevitable (see section 5.2 above) renders unjustifiable the mantra that children need protection from their own decisions. Courts are correct that harm is inevitable – but it should be children who are seen to be the primary experts on what is more or less harmful for them in their personal lives.

## 6.2 The Minimum Paternalism Necessary

The extent to which *parental* autonomy is upheld unless there is significant harm to a child is striking. Children should enjoy an equivalent level of respect for their autonomy, and “harm” should not be sufficient justification to override children’s wishes, because this will likely result in children’s wishes being overridden easily. The harm should be something exceptional to be considered significant. There will be cases in which the presumption should be set aside – if there is proven manipulation; if the child is very young; but these factors alone are insufficient (see further Daly, 2018: 372-387). To override children’s wishes it should be necessary, not just to point to any available factor, but to prove that a factor or a combination of factors are likely to cause *significant* harm, in order to take seriously the fact that autonomy denial by the courts will likely be inherently harmful to children (Daly, 2018: 380-387).

As outlined above, when determining the weight to accord to children’s wishes, judges place a premium on the extent of a child’s “maturity” or “competence”. The emphasis on competence/capacity is now being questioned in medical law (see e.g. Herring, 2016 and Foster, 2009). Adults with capacity can be vulnerable. Children can be highly capable – running households; holding down jobs; providing significant levels of care for others. Being mindful of the fact that children are more likely to vulnerable is important, but glib



stereotypes about incapable children are unhelpful. Whilst the decision-making abilities of children will always be relevant in best interest decisions, there is a need to move beyond the preoccupation with maturity/competence. Greater attention should be paid to any likely harm of the option sought by the child, and whether it is worth the harm from overriding a child's wishes. It is acknowledged in medical law that children's permission to take decisions for themselves is linked to the nature of the risk involved (see e.g. General Medical Council, 2007: para. 26) and this should happen in other areas too.

In fact, it seems that family law is an even more appropriate arena for the 'autonomy save where serious harm' approach. Somewhat ironically, most best interest decisions made by courts about children don't involve life and death choices, where in medical law the leading cases lie. Rather they involve everyday issues about children's personal lives such as who they will see and the upbringing they will experience. Contrary to medical law cases about life saving treatment, they involve situations which could later be rectified, such as relationships which could likely be later repaired if children sought this.

### 6.3 The Process of the Children's Autonomy Principle

A children's autonomy principle could be applied so that in legal decisions in which the best interest of the child is the primary consideration, children should get to choose – if they wish – how they are involved (*process autonomy*) and the outcome (*outcome autonomy*) unless it is likely that significant harm will arise from their wishes. In Daly (2018: 387-390) I outline what 'significant harm' might involve. In child protection cases where the threshold for significant harm has already been reached, for example, children's wishes would be unlikely to overcome this and outcomes would likely remain the same.

I examine other legitimate obstacles to children's wishes. There will be occasional cases where children are genuinely being harmed from manipulation (this can occasionally reach the threshold of significant harm<sup>49</sup>). There will be cases where there are genuine practical obstacles – a child may wish to live with a parent who is unable to care for the child. There will also be cases where a child may wish for an outcome that clashes with the best interests of a sibling.<sup>50</sup>

Bearing these points in mind, I suggest that the children's autonomy principle in both instances should be applied in best interest proceedings as follows:

#### Process of the Children's Autonomy Principle

1. Is the outcome being determined by what is in the child's best interests?
2. Does the child have a wish as to the outcome?
3. Does the child want this wish to prevail?
4. Is the best interest question free of legitimate obstacles to children's wishes?
5. Is *significant harm* unlikely to result from following the wishes of the child?

If the answer to all questions is 'yes', then the outcome should be in favour of the wishes of the child.

<sup>49</sup> This was possibly the case in, for example, *H. (Children)* [2014] EWCA Civ 733 and Australian case *Jevons and Jevons* 2014 FamCA 220.

<sup>50</sup> See for example New Zealand case *D. v S.* [2002] NZFLR 116, at 71.

Even where there are genuine obstacles, and where there is an inability to implement the children’s autonomy principle strictly for whatever reason, one could still take autonomy as the overriding ideal. In the face of all obstacles the main question should be – is the autonomy of this child being upheld to the extent possible? Even asking this question alone would likely lead to real change in the way that children are treated in best interest proceedings. It would encourage a movement away from the current approach in which children are frequently left unheard; and where they *have* been heard, it seems that any reason can hypothetically be employed to override their wishes apparently in their best interests.

There will always be competing reasons to override children’s wishes, and the case law demonstrates that decision-makers are very quick to rely on these; reasons such as the assumed importance of contact with a parent (even where a child does not want it). There will always be decisions which are objectively unwise (though far from outrageous); decisions which courts would like to protect children against – refusing inoculations, for example.<sup>51</sup> This is why the standard must be set high in order to ask the question: Is it really necessary to override the child’s wishes in this case, considering the importance of autonomy? If autonomy is properly prioritised, in most cases outside of child protection, the answer will likely be no.

#### 6.4 The Need for Autonomy Support

In order to embed a *children’s autonomy principle*, however, children will require ‘autonomy support’ in best interest proceedings to a degree beyond what they have had available to them thus far. I suggest that ‘autonomy support’ in the context of best interest should mean *non-controlling, impartial information and support to form and/or express views and decisions about a best interest matter*; reflecting the meaning of the term as it is employed in self-determination theory in the discipline of psychology; where “autonomy support” refers to nurturing children’s psychological needs, interests and values through, for example, facilitating them to understand their environment and to be involved in solving their own problems (see e.g. Grolnick, 2003 and Niemiec, Soenens, and Vansteenkiste, 2014). As opposed to pressuring children to behave or think a certain way, autonomy support is about identifying and developing children’s own motivations and values through non-controlling support, understanding and information provision.

The Committee on the Rights of the Child highlights the obligations of states to support children to be heard (Committee on the Rights of the Child, 2009: paras 29 and 49). Yet the legal systems in which best interest decisions are made about children have not, since the introduction of CRC Article 12, undergone any serious modifications in order to accommodate children’s involvement (Daly, 2018: 394). They are usually designed neither for supporting children to make decisions, nor for prioritising their autonomy. Such systems are inadequately funded for involving children; they focus on the positions of the (usually adult) parties; and they tend to be inflexible, turning on rules and strictures which limit options and timelines (see e.g. Stalford, Hollingsworth and Gilmore, 2017: 46-48). If children as autonomous actors are to be included more frequently in proceedings, then systems must be equipped to support and work with their specific needs.

---

<sup>51</sup> See *F. v F.* [2013] EWHC 2683 in which a 15 year old was ordered by the court to have inoculations against her wishes as her father was seeking this (mother and children were resisting it).

It may seem difficult to judges and others to see how they can apply a children's autonomy principle where the CRC does not explicitly prioritise autonomy in proceedings (although an Optional Protocol could solve that problem, Daly, 2018: 68) and where national legislative change is not forthcoming which explicitly acknowledges the importance of children's autonomy. Yet judges frequently have significant interpretative powers (Stalford, Hollingsworth and Gilmore, 2017: 57-58) and they have distinct discretion in individual "best interest" cases. An argument can be made that "due weight" for children's views should now be interpreted to mean priority for autonomy. It is after all close to three decades since the entering into force of the CRC, and thinking about children's status and abilities has changed. In any case, practitioners can still take it upon themselves to engage the *philosophy* of the children's autonomy principle in practice. Social workers, guardians, psychologists and others can (and sometimes likely do in reality) implement "autonomy support" techniques, and prioritise children's wishes.

## 7. Conclusion

When determining children's best interests, the approaches of the courts to weighing children's views have created a highly problematic situation. Maturity is a common theme, but courts will not define it, which means it will inevitably be understood to mean whatever is convenient for the judgment. Clear and consistent views are sought in circumstances where children, even adults, will be confused and unsettled and may understandably change their minds, demonstrating normal reactions to stressful events (Tisdall and Morrison, 2012: 162; Childress, 1990: 13). Adults are often ambivalent too, particularly when it comes to important and daunting matters such as healthcare decisions and their choices are nonetheless respected. Courts devalue emotion, though it is crucial for decision-making as it helps us to accord priority to our principles (Friedman, 1986) and to fix preferences (Charland, 1998: 72). Courts also demonstrate a preoccupation with manipulation; failing to accept that it is normal to be influenced by others; and that it is unhelpful to start from a standpoint, as they appear to do, that a child has been manipulated. It is little wonder then that it appears that courts only give significant weight to a child's views where the court is already inclined to decide in that direction anyway.

There is strikingly little concern on the parts of the courts or others about the likely harm to children of overriding their wishes. There is a distinct lack of consideration outside of medical law about the right of children to live their lives how they see fit, free from the pressures of parents using the courts to attempt to coerce them into arrangements they do not want. The courts have of course been at pains to avoid appearing to impose subjective values on *parents* in best interests cases, however often there appears to be a one-size-fits-all approach to the matter of children's wishes – if they do not fit with the judge's determinations, then wishes tend to be outweighed by other considerations.

It needs to be recognised that courts are making substitute decisions on behalf of children in proceedings where they are determining the best interest of the child. Although the best interest principle is positive in that it focuses the court on the position of the child rather than that of others (such as parents, Freeman: 2007); it must be recognised that best interest proceedings are a highly paternalistic endeavour to which adults are almost never exposed. Considering how much we value autonomy in other areas, "weighing" children's views should not be the only mitigating factor to protect children's autonomy in such proceedings.

It is necessary to require judges and other professionals to explicitly consider children's autonomy, as this is something which is rare in proceedings at present.

Adopting a children's autonomy principle would compel adults to take children more seriously. If systems do accord greater priority to children's wishes in the manner suggested here, distinguishing genuine instances where children need protection on the one hand from adults' assumptions about their competence and vulnerabilities on the other will be a challenge. Yet those challenges can be overcome; answers can be sought to those difficult questions around vulnerability and manipulation – this already happens in relevant cases every day (Daly, 2018: 372-380). Parents who are inclined towards such damaging approaches are already instrumentalising them and therefore these will not be new problems. Children's autonomy should not be denied just because some adults might behave badly.

A focus on autonomy will not solve all of the difficulties encountered by children in proceedings as, clearly, not all problems relate to children's wishes. Not all proceedings require a simple yes/no answer. Many cases involve the problems of highly dysfunctional families – problems that cannot be solved by autonomy. Some cases involve numerous types of proceedings – immigration, child protection, private family law – which complicates whether a child's wish can be upheld. Greater support will probably be as important for most children as will greater respect for autonomy, as without support, information and guidance, children will not be able to negotiate complicated legal systems and concepts. Yet it is important to recognise that children can be benefitted by adults adopting a deeper appreciation of what autonomy means in real terms for children in best interest cases. I am advocating a framework in which children's wishes are overridden by the state only where truly necessary – something which we adults take for granted every day in liberal democracies.

## References

- Alderson, P., *The Politics of Childhoods Real and Imagined* (London: Routledge, 2016).
- Alghrani, A., Case, P. and Fanning, J., “Editorial: The Mental Capacity Act 2005: Ten Years On”, *Medical Law Review* 2016 (24(3)), 311-317.
- Arad-Davidzona, B. and Benbenishty, R., “The Role of Workers’ Attitudes and Parent and Child Wishes in Child Protection Workers’ Assessments and Recommendation Regarding Removal and Reunification”, *Children and Youth Services Review* 2008 (30(1)), 107-121.
- Archard, D. and Skivenes, M., “Balancing a Child’s Best Interests and a Child’s Views”, *International Journal of Children’s Rights* 2009 (17(1)), 1-21.
- Ashtekar, C., Hande A., Stallard E., “How Much do Junior Staff Know about Common Legal Situations in Paediatrics?”, *Child Care Health Development* 2007 (33(5)), 631–634.
- Boylan, J. and Ing, P., “‘Seen But Not Heard’: Young People’s Experience of Advocacy”, *International Journal of Social Welfare* 2005 (14(1)), 2-12.
- Burns, K., Pösö, T. and Skivenes, M. (eds.), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (Oxford: Oxford University Press, 2016).

Cashmore, J. and Parkinson, P., “Children’s Participation in Family Law Disputes: The Views of Children, Parents, Lawyers, Counsellors”, *Family Matters* 2009 (82(1)), 15-21.

Cave, E., “Goodbye Gillick? Identifying and Resolving Problems with the Concept of Child Competence”, *Legal Studies* 2014 (34 (1)), 103–122.

Cave, E. and Wallbank, J., “Minors’ Capacity to Refuse Treatment: A Reply to Gilmore and Herring”, *Medical Law Review* 2012 (20(3)), 423-449.

Charland, L., “Is Mr. Spock Mentally Competent? Competence to Consent and Emotion”, *Philosophy, Psychiatry and Psychology* 1998 (5(1)), 67- 81.

Childress, J., “The Place of Autonomy in Bioethics”, *Hastings Center Report* 1990 (20(1)), 12-17.

Clarke, J., “Do I Have a Voice? An Empirical Analysis of Children’s Voices in Michigan Custody Litigation”, *Family Law Quarterly* 2013 (47(3)), 457-473.

Coggon, J., “Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?”, *Health Care Analysis* 2007 (15(3)), 235-255.

Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (27 Nov. 2003) CRC/GC/2003/5.

Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12.

Committee on the Rights of the Child, *Day of General Discussion on the Right to be Heard*, Forty-third session, (11-29 Sep. 2006).

Committee on the Rights of the Child, *Concluding Observations: Denmark* (24 Nov. 2005) CRC/C/DNK/CO/3.

Cordero Arce, M., “Maturing Children’s Rights Theory: From Children, With Children, Of Children” 23 *International Journal of Children’s Rights* 283 (2015).

Daly, A., *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Leiden: Brill/Nijhoff, 2018).

Daly, A., “Considered or Merely Heard? The Views of Young Children in Hague Convention Cases in Ireland”, *Irish Journal of Family Law* 2009 (12(1)), 16-28.

Darlington, Y., “Experiences of Custody Evaluation: Perspectives of Young Adults Who Were the Subject of Family Court Proceedings as Children”, *Journal of Child Custody* 2006 (3(1)), 51-66.

Day, D., “The Capable Minor’s Healthcare: Who Decides?”, *Canadian Bar Review* 2007 (86(3)), 379-420.

Deci, E. and Ryan, R., “The ‘What’ and ‘Why’ of Goal Pursuits: Human Needs and the Self-Determination of Behavior”, *Psychological Inquiry* 2000 (11(4)), 227-268.

Department of Children and Youth Affairs (Ireland), *Listen to Our Voices: A Report of Consultations with Children and Young People Living in the Care of the State* (Dublin: Department of Children and Youth Affairs, 2011).

Donnelly, M., “Best Interests in the Mental Capacity Act: Time to say Goodbye?”, *Medical Law Review* 2016 (24(3)), 318-332.

Donnelly, M., “Legislating for Capacity: Developing a Rights-Based Framework”, *Dublin University Law Journal* 2008 (30(1)), 385-438.

Donnelly, M., *Autonomy, Capacity and the Limitations of Liberalism: An Exploration of the Law Relating to Treatment Refusal* (Unpublished Ph.D. Thesis, University of Cardiff, 2006).

Douglas G., Murch, M., Miles C. and Scanlan, L., *Research into the Operation of Rule 9.5 of the Family Proceedings Rules, 1991* (London: Department for Constitutional Affairs, 2006).

European Commission, *Eurobarometer Qualitative Study – The Rights of the Child: Aggregate Report* (Brussels: European Commission, 2010).

European Union Fundamental Rights Agency, *Child-Friendly Justice: Perspectives and Experiences of Children Involved in Judicial Proceedings as Victims, Witnesses or Parties in Nine EU Member States* (Strasbourg: European Union Fundamental Rights Agency, 2017).

Foster, C., *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law* (Oxford: Hart, 2009).

Freeman, M., “Why It Remains Important to Take Children’s Rights Seriously”, *International Journal of Children’s Rights* 2007 (15(5)), 5-23.

Friedman, M., “Autonomy and the Split-Level Self”, *Southern Journal of Philosophy* 1986 (25(3)), 281-293.

Freeman, M., “Rethinking Gillick”, *International Journal of Children’s Rights* 2005 (13(1–2)), 201–217.

Friedman, M., “Relational Autonomy and Independence” in A. Veltman and M. Piper (eds.), *Autonomy, Oppression, and Gender* (Oxford: Oxford University Press, 2014).

General Medical Council, *0-18 Years: Guidance for all Doctors* (London: General Medical Council, 2007).

Grimwood, T., “Gillick and the Consent of Minors: Contraceptive Advice and Treatment in New Zealand”, *Victoria University of Wellington Law Review* 2010 (40(4)), 743- 769.

Grolnick, W., *The Psychology of Parental Control: How Well-Meant Parenting Backfires* (New Jersey: Lawrence Erlbaum, 2003).

Harrison, C., “Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence”, *Violence Against Women* 2014 (14(4)), 381-405.

Harris-Short, S., “Resisting the March Towards 50/50 Shared Residence: Rights, Welfare and Equality in Post-Separation Families”, *Journal of Social Welfare and Family Law* 2010 (32 (3)), 257- 274.

Herring, J., *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016).

Herring, J., *Family Law* (5th edn, London: Pearson Education Ltd, 2011).

Herring, J. and Dunn, M., “Safeguarding Children and Adults: Much of a Muchness? *A Local Authority v A and B* [2010] EWHC 978 (Fam)”, *Child and Family Law Quarterly* 2011 (23(4)), 528- 538.

Herring, J. and Wall, J., “Autonomy, Capacity and Vulnerable Adults: Filling the Gaps in the Mental Capacity Act”, *Legal Studies* 2015 (35(4)), 698-719.

Holt, S., “Domestic Abuse and Child Contact: Positioning Children in the Decision-making Process”, *Child Care in Practice* 2011 (17(4)), 327–346.

Iyengar, S., *The Art of Choosing* (London: Abacus, 2010).

Ruck Keene, A. and Auckland, C., “More Presumptions Please?”, *Elder Law Journal* 2015 (3(1)), 293-301.

Kelly, F., “Enforcing a Parent/Child Relationship At All Cost? Supervised Access Orders in the Canadian Courts”, *Osgoode Hall Law Journal* 2011-2012 (49(2)), 277- 309.

Kilkelly, U., *Listening to Children about Justice: Report of the Council of Europe’s Consultation with Children on Child-Friendly Justice* (Strasbourg: Council of Europe, 2010).

Scottish Children’s Reporter Administration, *The Children’s Hearings System: Understood and Making a Difference* (Edinburgh: Scottish Children’s Reporter Administration, 2011).

Skivenes, M., “Norway: Towards a Child-Centric Perspective” in N. Gilbert, N. Parton and M. Skivenes (eds.), *Child Protection Systems: International Trends and Orientations* (Oxford: Oxford University Press, 2011).

Skjørten, K., “Children’s Voices in Norwegian Custody Cases”, *International Journal of Law, Policy and the Family* 2013 (27(3)), 289-309.

Macdonald, G., “Hearing Children’s Voices? Including Children’s Perspectives on their Experiences of Domestic Violence in Welfare Reports Prepared for the English Courts in Private Family Law Proceedings”, *Child Abuse and Neglect* 2017 (65), 1-13.

May V. and Smart, C., “Silence in Court? Hearing Children in Residence and Contact Disputes”, *Child and Family Law Quarterly* 2004 (16(3)), 305-315.

McDougall R., and Notini, L., “Overriding Parents’ Medical Decisions for their Children: A Systematic Review of Normative Literature”, *Journal of Medical Ethics* 2014 (40), 448-452.

Mckay, K., *Hearing Children in Court: Disputes Between Parents* (Edinburgh: Centre for Research on Families and Relationships – Briefing 65, Jan. 2013).

McLeod, A., “Respect or Empowerment? Alternative Understandings of ‘Listening’ in Childcare Social Work”, *Adoption and Fostering* 2006 (30(4)), 43-52.

Morag, T., Rivkin, D. and Sorek, Y., “Child Participation in the Family Courts: Lessons from the Israeli Governmental Pilot Project”, *International Journal of Law, Policy and the Family* 2012 (26(1)), 1-30.

Niemiec, C., Soenens, B. and Vansteenkiste, M., “Is Relatedness Enough? On the Importance of Need Support in Different Types of Social Experiences” in N. Weinstein (ed.) *Human Motivation and Interpersonal Relationships* (New York: Springer, 2014).

Stalford, H., Hollingsworth, K. and Gilmore, S., *Children’s Rights Judgments: From Academic Vision to New Practice* (Hart, 2017).

Timms, J., Bailey, S. and Thoburn, J., “Children’s Views of Decisions Made by the Court: Policy and Practice Issues Arising from the Your Shout Too! Survey”, *Child Care in Practice* 2008 (14(3)), 257- 274.

Thomas, N. and O’Kane, C. “When Children’s Wishes and Feelings Clash with Their ‘Best Interests’”, *International Journal of Children’s Rights* 1998 (6(2)), 137-154.

Tisdall, K. and Morrison, F., “Children’s Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences”, *Law and Childhood Studies: Current Legal Issues* 2012 (14), 156-173.

Ryrstedt, E., “Separate Representation and Family Courts: Do We Need Them in the Nordic Countries?”, *Child and Family Law Quarterly* 2009 (21), 185-196.

Smith, A., Taylor N., and Tapp, P., “Rethinking Assumptions about Children’s Competence to Participate in Family Decision-Making after Parental Separation”, *Childhood* 2003 (10(2)), 201-216.

Stavert, J., “The Exercise of Legal Capacity, Supported Decision-Making and Scotland’s Mental Health and Incapacity Legislation: Working with CRPD Challenges”, *Laws* 2016 (4(2)), 296-300.

Trinder, L., “Climate Change: The Multiple Trajectories of Shared Care Law, Policy and Social Practices”, *Child and Family Law Quarterly* 2014 (26(1)), 30-50.

Trinder, L., “What Might a Child Mean by ‘Meaningful Relationship’?”, *Journal of Family Studies* 2009 (15(1)), 20-25.



Trinder, L., Jenks, C. and Firth, A., "Talking Children into Being in Absentia?: Children as a Strategic and Contingent Resource in Family Court Dispute Resolution", *Child and Family Law Quarterly* 2010 (22(2)), 234-257.

Vis, S. and Fossum, S., "Representation of Children's Views in Court Hearings about Custody and Parental Visitations: A Comparison Between what Children Wanted and What the Courts Ruled", *Children and Youth Services* 2013 (35(12)), 2101- 2109.

Vis, S. and Thomas, N., "Beyond Talking: Children's Participation in Norwegian Care and Protection Cases", *European Journal of Social Work* 2009 (12(2)), 155-168.

Winter, K., "The Perspectives of Young Children in Care about Their Circumstances and Implications for Social Work Practice", *Child and Family Social Work* 2010 (15(2)), 186-195.