



## Discussion

## The voice of the child in family law: A discussion paper



Stephanie Holt

School of Social Work &amp; Social Policy, University of Dublin, Trinity College, Ireland

## ARTICLE INFO

## Article history:

Received 22 October 2015

Received in revised form 11 July 2016

Accepted 11 July 2016

Available online 12 July 2016

## 1. Introduction

Ascertaining the discernable wishes and feelings of the child<sup>1</sup> is not a phrase which could be described as tripping ‘easily off the tongue’ (Piper, 1999: 77), but has certainly come to occupy a position of considerable prominence in academic and policy discourse on children, childhood and family life in recent decades. This contemporary trend of listening to what children have to say is evident across a number of domains (for example family law, children in care) (Mantle et al., 2007) and across a number of jurisdictions (Birnbaum, Bala, & Cyr, 2011; Kjørholt, 2002; Smart, 2002). A key driver in this regard has been the UNCRC (1989), which under Article 12:74<sup>1</sup> explicitly calls for children to be granted the right of participation in legal proceedings that affect them. Indeed the ethos of the Convention upholds children’s status as ‘rights-holders and as such deserving of respect as children, not in terms of the adults they will become (Kilkelly, 2008: 8).

The philosophical rhetoric underpinning the UNCRC reflects a construction of childhood that appreciates children as competent social actors (Emond, 2008), whose thoughts and opinions are worthy of consideration (Bosisio, 2012). Arising from theoretical developments in the study of childhood, the lens of sociological interest has shifted from viewing children as ‘mere objects of enquiry’, to dynamic and key participants (Powell & Smith, 2009). This acknowledges not only their capacity to operate within ‘adult-centred socially constructed meanings of citizenship’, but also their capacity to influence them as well (Bacon, 2014: 22). In more recent years, the issue of engaging with children and involving them in private law proceedings in order

to afford them a ‘voice’ in their parents’ divorce, has developed considerable impetus (Buchanan, Hunt, Bretherton, & Bream, 2001). This reflects an empirically grounded awareness that this involvement is not only a right, but also that such participation can improve children’s skills and self-esteem, inform decision-making and as such promote children’s safety and welfare (Alderson, 2000; Ewing, Hunter, Barlow, & Smithson, 2015; Powell & Smith, 2009; Sinclair, 2004).

However, despite legal obligations under the UNCRC and an evolving consensus that recognizes children as social and competent actors, this rhetoric has struggled to achieve translation into meaningful practice reality (Butler, Scanlan, Douglas, & Murch, 2002; Masson, 2003; Skjorten, 2013); remaining controversial for a number of reasons (Neale, 2002). Not least among these is the tension between two of the three ‘P’s’ at the very heart of the UNCRC, those of the right to participation and that of protection (Kjørholt, 2002). This tension is also encapsulated in the rights versus welfare debate centred on a particular concern that rights to participation risk over-burdening children with responsibility and thus potentially jeopardises their right to protection while simultaneously denying them their ‘childhood (Morrow, 1999). Cossar, Brandon, and Jordan (2014) challenge the extent of that tension arguing that participation can in fact be protective for children in reducing risk.

This paper will consider these issues in greater depth, locating this debate within the domain of family law. The discussion will begin by seeking to explore and appreciate how children are viewed and understood in modern day society. It will also deliberate over the welfare versus rights debate and consider the relative merits of children’s participation in cases of family breakdown. The various methods of ascertaining children’s wishes in family law proceedings will be presented, concluding with a reflection on what research with children has identified ‘what works’ for them.

## 2. Methods

A comprehensive search of identified databases (Arts & Humanities Citation Index; BMJ Journals Online; CINAHL; Internurse; ISI Web of Knowledge; JSTOR; Psychological and Behavioral Sciences Collection; PsycINFO; PubMed; Social Science Citation Index) was conducted using the key words “voice of the child,” “family law” “child participation”. This search was augmented with a review of the bibliographies of related articles. This yielded a vast literature of over 1000 articles in the initial search, from which online abstract and bibliographic information was used to identify selectively the material that directly concerned

E-mail address: [sholt@tcd.ie](mailto:sholt@tcd.ie).

<sup>1</sup> Article 12:74 states: ‘parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law’.

the issue of how children's participation is facilitated in the family law arena. Key seminal texts were also included for review.

### 3. Constructing childhood

Over a quarter of a century ago, Dyer (1993): 1) argued that 'how we are seen determines in part how we are treated, how we treat others is based on how we see them; such seeing comes from representation'. The invisibility of childhood in the research literature, until more recently, is perhaps as a result of a representation of it as unimportant (relative to adulthood) and, as such, merely a 'quarantine' period for adulthood (Christensen & Prout, 2005). Smith, Taylor, and Tapp (2003) have surmised that while interpretations of the meaning of childhood have fluctuated greatly over time, with children's roles distinguishable across different historical periods and cultural domains (Morrow, 1999); a western developmental perspective has nonetheless dominated our perceptions of childhood. This understanding of children has been achieved by looking through a traditional developmental lens to see how children are formed by social life, according to age-related competencies, how they reach their full and mature potential as adults; reflective of a sense of 'becoming' rather than 'being' (Hogan, 2005; James & Prout, 1990; Mayall, 2000).

However critics of this approach posit that this age-related competency focus ignores the subjective meaning of children's lives, rendering the child essentially epiphenomenal and incomplete; and much less 'expert' when it comes to their own lives (Christensen & Prout, 2005; James, Jenks, & Prout, 1998). As such, universal laws regulating development operate on the assumption that the child can be understood in isolation from the context in which they live. This perspective also presupposes a certain predictability about children's development along an inevitable developmental path (Hogan, 2005). James and Prout (1990, 1997) argue instead for a need to move beyond models of childhood grounded in psychology towards a social constructionist understanding of childhood. This 'new sociology' of childhood focuses on children as current social actors as opposed to potential adult players in social life; as interactively influencing their social life and not simply empty vessels to be influenced by it; and being an active part of society rather than silent and watchful bystanders to it (Christensen & Prout, 2005). Echoing this, Skjorten (2013) argues that children's understanding and capacity cannot be determined simply on age or development grounds as their experiences, supports and the context within which they live all influence the child's capacity and understanding.

Appreciation of the importance of context is of course hardly a new phenomenon, with the earlier work of Brofenbrenner (1979) highlighting the critical importance of understanding children in the context of their social worlds, both in terms of the different influences different social contexts have on children, and the critical role that children play as active agents in shaping their own lives (Hogan, 2005). These constructions of childhood also play an obviously important role when considering children's involvement in decision-making after separation or divorce, and indeed the manner in which their voice is captured and represented. The twin perspectives of children as 'experts' in their own lives and of the value accorded to their subjective experiences at the core of the UNCRC, has substituted the notion of 'the vulnerable and dependent child' with that of the 'competent child' who is given the right to participate (Kjorholt, 2002: 64). This perspicacious sensitivity to children's rights includes the right to hold and express an opinion; to have that opinion taken seriously and respected; the right to be consulted in all matters that affect them and to participate in decisions that impact on their individual lives. Taylor (1998) however asserts that while the new paradigm of childhood has significantly impacted upon the expansion of social research with, as opposed to on, children, this stands in stark contrast to the responses in family law proceedings to these same concepts. In fact, how this theorised perception of competency and rights is translated into the reality of children's lived experiences of their parents' separation and divorce is another matter

entirely. Birnbaum and Saini (2012a): 261) review of qualitative studies concerning children's experience of parental separation concluded that the gatekeeping roles performed by adults and professionals involved in the process of decision making post-separation, renders children silent.

#### 3.1. Constructing the child in family law

A number of assumptions about what is generally believed to be good or bad for children have emerged as influential in private family law proceedings, and are identified by many experts as setting the scene for child welfare or assessment reports in this context (Herring, 2014; Piper, 2000; Roche, 1999). The most influential of these assumptions, concerns the idea that children need two parents to co-operate with each other and maintain their parental relationships and responsibilities. Herring (2014) posits that one could argue that this presumption upholds the non-resident parent's right to their child at the expense of the child's welfare being fully considered. A second powerful assumption concerns the belief that participation in decision making in family law is harmful for children. Exploring this latter hypothesis further, there is also evidence that children's competence to participate is questioned, with restrictions imposed on that participation on the grounds of age and maturity (Cossar et al., 2014; Kjorholt, 2002). Underpinning these conjectures is a belief in, and commitment to, family life and a concern that conferring equal rights on children would challenge the authority of that institution (Kilkelly, 2008). So what are the implications of this for children's participation?

Many authors consider assumptions problematic as they limit the practice of deciding what is best for each individual child in their unique circumstances, by applying knowledge (albeit informed by research) about an abstract or universal child's needs and interests to each and every individual child, without attending to the needs and wishes of the child in question (Bailey-Harris, Barron, & Pearce, 1999; Herring, 2014; Piper, 2000). Indeed Buss (1999) comments that developmental psychology in providing general indicators or age and stage capacity, does not give the definitive absolute information and guidance that lawyers need, only a general picture. Echoing this concern about the power of that 'general picture', James, James, and McNamee's (2004) research examined a random sample of 481 contact court files in three different county courts in the United Kingdom, and concluded that interviewing each child appeared unimportant and unnecessary because the professional already 'knew' what was best for the child based on assumptions of universal knowledge. Strict adherence to a 'single voice of childhood' (Roche, 1999: 33) may prevent a child ever being heard, particularly if the child's views diverge from universally held assumptions. Herring (2014): 20) argues that it might be useful to indicate generally what is in a child's best interest if we were considering a child pick 'at random' from the population, about whom we had no specific knowledge. However, the population of children who come before the court represent a 'highly unusual' case rendering the knowledge we have about 'usual' children of little significance. James et al. (2004) concluded that children can be ordered to engage in contact because it is perceived to be in their best interests and is seen as their right to have a relationship with their father. This particular construction of the legal concept of the child's right to contact, James et al. (2004) suggest, negates their equivalent right not to have contact. According to Stanley (2006): 148) conceptions of gender and gender relations can aggravate this situation, leading to a situation where children are listened to if they want contact, but overridden if they do not, on the grounds that they have been unduly influenced by their mothers. Assumptions that the woman's own agenda can preclude her representing her child's needs have resulted in the formation of a 'barrier to attending to children's voices and misinterpretation of the relationship between women and children' (Stanley, 2006: 148). Eriksson and Nasman (2008) further contend that a child's competence may be judged on the views they express: as such if their views concur with the adult views or the dominant assumptions, they are deemed competent and if they do not, they are deemed immature and deviant.

Download English Version:

<https://daneshyari.com/en/article/345790>

Download Persian Version:

<https://daneshyari.com/article/345790>

[Daneshyari.com](https://daneshyari.com)