



Children's participation in family law decision-making: Theoretical approaches to understanding children's views

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ABSTRACT

The aim of this paper is to explore children's views about their involvement in the post-separation arrangements that were made in their families and via the court process in the light of three theoretical models. It distinguishes between various aspects of children's participation, a term that carries a number of meanings and is used in various ways. In particular, it examines children's reasons for wanting to be involved or not, and the association between the amount of say children thought they had had, how much say they wanted, and the perceived fairness of the arrangements and their happiness with them.

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1. Introduction

Notions of children's participation rights have been used to build a moral case for the inclusion of children's views and perspective in various aspects of (adult) decision-making affecting children (Hale, 2006; Lister, 2007) but particularly those involved in their care and protection, and their residence and contact arrangements after parental separation and divorce (Butler, Scanlan, Robinson, Douglas, & Murch, 2003; Neale, 2002; Taylor, 2006). A number of reasons, in addition to the moral and rights based arguments, have been put forward for taking children's views into account (Chisholm, 1999; Lansdown, 1995). These include the twin rationales of 'enlightenment' and 'empowerment' (Mannion, 2007; Warshak, 2003). The enlightenment rationale is that children can provide important information about their perspectives and experience that can contribute to more informed decisions and potentially more positive and workable outcomes. In short, they are the 'experts' on their own views and experience of living in their family and can provide important perspectives about the arrangements that might best suit them. The empowerment rationale is that children benefit from being involved in several ways: by learning to make decisions, and by having a greater sense of control and self-esteem that comes from recognition and respect and from being acknowledged as a person with interests in and perspectives on the decision rather than simply being the 'object of concern' (Smart & Neale, 2000; Warshak, 2003).

Several theoretical perspectives expand upon these rationales. The first of these, the 'traditional' instrumental procedural justice model, focuses on the perceived fairness and 'justice' of decision-making. This model argues that people's judgments about the fairness of the process and their satisfaction with the outcome depend on the level of control they have or perceive themselves to have. Thibaut and Walker's (1975) instrumental model distinguished between control over the outcome ('choice') and control over the presentation of information to the decision-maker ('voice'). In relation to family law decisions, where the decisions are made by a third party (a court) or by their parents, children and adolescents should therefore see decisions as fairer, be happier with them and more likely to comply with them if they have had some involvement, at least in terms of being heard or consulted—by having a 'voice', if not 'choice'.

Building upon the procedural justice model, Tyler and Lind (1992) argued that people's relational concerns, such as their standing with and their trust in the decision-maker, are more important than the level of control they have, or think they have had. In families in which decisions are being made about the care of children and adolescents, Tyler and Lind's model would predict that what matters most to children and young people is the extent to which they trust their parents and have standing with them – care and respect – rather than the level of control they have over the process or the outcome. In an empirical study to test this model, Tyler and Degoe (1995) found that in the family, judgments about trustworthiness and standing were significantly more important than perceived control, or judgments about the neutrality of the decision-maker. Not surprisingly, it seems that people do not expect family members to be neutral in their stance. There is, however, little empirical work testing procedural justice ideas with children.

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A third theoretical approach by Smart, Neale and Wade (2001), based on Gilligan's (1993) theory of moral reasoning, takes these relational concepts beyond the focus on fairness in procedural justice models. Smart et al. (2001) discerned three concepts in children's "moral conversations" about their families and the arrangements for them after their parents separated: an "ethic of care" and an "ethic of respect", in addition to an "ethic of justice" or "fairness". The "ethic of respect" concerned children's expectation that they would be treated respectfully, and their views taken into account and acknowledged within "a web of relationships and interdependencies" (Smart et al., 2001, p. 97). On this basis, it might be expected that children's happiness with the outcomes would be based more on their assessment of the relationships than on whether or not they had some control over the decision or the process, and that it might vary with the context, including the quality and risk to those relationships.

The aim of this paper is to explore children's views about their involvement in the post-separation arrangements that were made in their families and via the court process in the light of the three theoretical models. The paper also makes a distinction between various aspects of children's participation, a term that carries a number of meanings and is used in various ways (Thomas, 2007). In particular, it includes children's views about the extent to which they believe they have had some say and the extent to which they wanted more say. It includes their reasons for wanting to be involved or not and whether or not they thought that it was appropriate for them to do so. It also explores the association between the amount of say children thought they had had, how much say they wanted, and the perceived fairness of the arrangements and their happiness with them.

2. Method

The study involved interviews with 47 children and young people and 90 parents in families that had engaged lawyers and resolved matters in the preceding 12 months either by consent, mediation (non-contested matters) or court-related processes (contested matters). The children and their parents were recruited for the study through family lawyers who were asked to write to former clients in matters that had resolved within the last 12 months.

2.1. Children and young people

The 47 children and young people from 28 families included 10 sibling groups of two to four children and ranged in age from 6 to 18 years, with a mean age of 11.8 years ($SD = 3.1$) at the time of the interview. Their ages at the time that their parents separated ranged from 5 months to 16 years, with a mean age of 7.1 years ($SD = 4.6$). Three-quarters of the children were living with their mother ($n = 35$, 74.5%), just over 20% with their father ($n = 10$), and two boys were in shared alternate week arrangements.

Just over half the children (25/47, 53%) had experienced contested proceedings, and a family report or an expert report was prepared at some stage in all except one of these matters. An independent legal representative for the children was appointed in about half of these matters. In nine families affecting 19 children, either the parent or the child(ren) made substantive allegations of some form of family violence (between the parents or abuse or neglect); most of these matters were contested.¹

The interviews concerned children's understanding of and participation in decision-making about residence and contact issues following their parents' separation. Children were given the choice

of talking directly with the interviewer or of responding to a specially designed computer-assisted interview with a mix of closed and open questions on a laptop computer. Most children (29/47, 62%), especially those 12 years of age and younger (23/29), elected to use the computer-assisted interview. The interviews were tape-recorded with the children's consent, and transcribed including their comments and conversation as they responded to the computer-assisted interview.² Thirty-five children were re-interviewed 18–30 months after the first interview, to explore any changes in their arrangements and in their views about being involved in making or changing those arrangements.³

3. Results

The analyses are both qualitative and quantitative, with a focus on the extent to which the results were in accord with any of the particular theoretical explanations.

3.1. How much say did children say they wanted? How much influence did they have?

Sixty per cent of the children (27/45) said they had had some say (either 'a bit' or 'a fair bit') at some stage in the arrangements about where they would live and when they would see their parents after the separation. No children said 'a lot'. For some children, especially those who had been very young, this was not in the immediate aftermath of their parents' separation but some years later when circumstances changed or the children wanted them to.

In about half the families, in a proxy measure for their actual exercise of influence or agency, both parents and children reported that at least one of the children had been instrumental in changes to either the residence or the contact arrangements (18 children in 14 families). Changes in residence, less common than changes in contact, were initiated or influenced by children in two main ways: either by direct and uncontested changes from one household to the other or as a result of court action following children's disclosures of abuse and violence, calls to the police or running away. In several families, adolescent girls changed residence without contest by remaining in or moving back to the family home with their father after the separation so that they could be close to their school and their friends; within 12 to 18 months, however, they decided to move to their mother's home but their relationship with their father remained close and they felt they had been listened to. In three other cases, the change of residence to the father was contested and difficult, following evidence of abuse or neglect and/or abduction by the mother and her partner. All three cases involved children who were quite young at the time of the separation and the matters returned to court on several occasions.

² Some children used the "extra" confidentiality offered by being able to type in their comments. However, the main difference between the type of comments children made via the computer-assisted interview and the direct interview was that they tended to be shorter and they also required some "translation" because of the use of SMS-type text and some "creative spelling".

³ The relevant trigger questions at the first interview were: Who was involved in making decisions about where you would live and how often you would see [your other parent]? Who would you like to have been involved? How much say did you have (on a 4-point rating scale (1 = 'no say at all', 2 = 'a bit of a say', 3 = 'some say' and 4 = 'a lot of say'))? Did you want to have more, or less say, or were you happy with the way things were arranged? Do you think it is fair to ask you what you want, or do you think it puts you in a difficult position? Why is that? Are you happy (using a scale of 1 = 'very unhappy' to 5 = 'very happy') with the way things have worked out? Do you think the arrangements about where you live are fair to you (using a scale of 1 = 'very unfair' to 4 = 'very fair')? To your mother? To your father? To your siblings? Do you think the time you spend with [your other parent] is fair (to you)? Is there anything you would like to change? And at the second interview: Do you feel any differently now about the way things were decided, compared with how you felt several years ago? Do you wish you had been more involved in the decisions? Are you happy now with the way things have worked out? Is there anything you would like to change?

¹ The high level of contestation in these matters is consistent with the findings of a recent study by the Australian Institute of Family Studies (Moloney et al., 2007) which reported that more than 50% of a court-based samples of cases were accompanied by allegations of violence, child abuse or neglect.

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