

Parents' and Children's Views on Children Talking to Judges in Parenting Disputes in Australia

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Judicial interviews with children in chambers used to be an accepted practice in common law jurisdictions, and continue to be a common means of ascertaining the wishes of children in some North American jurisdictions (Starnes, 2003). Other methods of hearing the voices of children have emerged as preferable alternatives – in particular, reports from independent social science experts. Not only are such professionals regarded as better able to interview children, but they are also seen as better qualified to interpret their views in the light of all the circumstances (Bala, 2004; Kelly, 2002).

Recently, however, renewed discussion of the potential benefits of judicial interviews with children has focussed on the possible role for judicial interviews *in addition* to hearing children's voices through a court report by a counsellor, psychologist or psychiatrist (Lyon, 2000; Nicholson, 2002; Hale 2006; Tapp, 2006).

The current study explores children's and parents' views about this issue, an area that has been largely unexplored. It involved 47 children, ranging in age from 6 -18, together with 32 of their parents from 28 families. Just over half the children (25/47, 53%) had experienced contested proceedings, and 22 had not. A further 58 parents were interviewed but did not give permission for their children to be interviewed.¹ Most of the mothers (39/43) were resident parents; the fathers were mostly non-resident parents (32/47).

First, the findings in relation to children's views. Children who had been the subject of contested proceedings had a quite different perspective on talking directly to judges than most who had not. They were much more likely to want to speak directly to the judge, whereas children who were not the subject of contested proceedings generally saw it as unnecessary or too formal and intimidating, preferring to talk to their parents and to keep it within the family. In both cases, their preference was to talk directly with the decision-maker: the judge in contested matters and the parents in cases that are not contested (Bretherton, 2002; Smith, Taylor & Tapp, 2003).

Children who wanted to talk to the judge or to the court directly gave several reasons for wanting to do so. The first was that they wanted to say things to the judge without their parents knowing. The second reason was so that the judge would know exactly how they felt without misinterpretation or filtering by counsellors or lawyers or their parents. Third, some wanted to be acknowledged; they wanted the judge as decision-maker to know whose future they were deciding, and some also wanted to see who was making the decision. Most of these children had experienced indirect methods of participation in contested proceedings – having been interviewed by an independent expert and having a

legal representative - and found them unsatisfactory. They also had strong views, which seemed reasonably based, as a result of alienation from a parent due to violence and abuse.

Parents' views were also mixed, with just over half (54%) preferring that children talk with a counsellor or other independent person than to a judge. The main difference among parents, however, was associated with their role as resident or non-resident parents, not whether the matter was contested. Resident parents were twice as likely as non-resident parents to be in favour of children being able to talk with the judge, perhaps together with a counsellor or 'interpreter'. Their reasons were the importance of hearing what children have to say, both to get a fuller picture first-hand and to acknowledge and respect children's views, and for some, children's right to be heard. Resident and non-resident parents who disagreed with the idea of judges talking with children said that it would be too intimidating, and that judges were not best placed to do so in a short one-off 'event'. Underlying the two opposing views, however, were sometimes clearly expressed views about the 'nature' of children. A number of parents who were against judicial interviews referred to the danger of children being manipulated or pressured, of them playing parents off against each other or, in one case, lying. A number who were in favour commented that 'children are not stupid' and often have a better idea of what is going on than their parents. Parents across the board recognised children's difficulty in telling their parents what they wanted, for fear of hurting them.

Implications

The implications of these findings concern the feasibility and role of judicial interviews. Children's wish for confidentiality is problematic in most common law jurisdictions and would offend Australian understanding of due process. But there are several purposes for a judge having a 'conversation' with a child in chambers (Tapp, 2006) that are not evidence-gathering per se but fit within a broader conception of the judicial role.

Firstly, such a conversation might assist the child or young person to understand and accept the decision, thereby making it more workable. Particularly where a child or young person has a strongly held view and for various reasons the judge considers that it is necessary to depart from that view, a judicial 'conversation' may help them to understand the judge's decision, and to know that their views were carefully considered even if it was not what they may have wanted. This could also indicate real acknowledgement of the child's view and show respect for the child or young person.

Secondly, it may be helpful for the judge to gauge the likely impact of going against the firmly held wishes of an older child or young person. This would not be basing the decision on evidence which was not otherwise available to the parties but may reaffirm the judge's tentative conclusion or it may influence him or her to change the contemplated orders.

Any judge must of course be aware of the pitfalls, as well as the benefits of such a practice (Warshak, 2003). Children's views may be unduly influenced by a parent, and need to be assessed in the context of all the family relationships. Such conversations are not a substitute for expert interview and evaluation and may be contra-indicated in some situations. Where a child or young person wants to talk to the judge, however, and this is supported by the counsellor or child representative, it may be a valuable supplement to the report of an expert assessor. It may be beneficial not only in allowing children to be heard in the decision-making process, but also so they know that they have been heard. Whether they talk to a judge or not, involving children in the process must include appropriate information about the process, what they can expect, and how they can be involved and might like to be involved (Butler, Scanlan, Robinson, Douglas, & Murch, 2002). It may also require acceptance that judges may need to engage in a therapeutic, as well as an adjudicatory role if their judgments are to be efficacious in resolving the parenting issues.

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ⁱ This was part of a wider study on children's participation that included interviews with parents, counsellors and mediators involved in family dispute resolution, family lawyers, children's representatives, and judicial officers.