

Representing Children in Private Law Proceedings: Hearing the Children and Clarifying the Role

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"It felt good but it took quite a while for people in court to listen to me. At first, they just thought you were just saying that to get your own way. But after a while they started to listen ... When the judge listened I felt very happy that things were actually working my way now ... It was kind of good to have someone else to talk to 'cos I wanted to talk ... 'cos I think when you talk to someone it kind of makes things a bit better. Talking to people makes me feel better. I don't know for anyone else, but for me talking to someone always made me feel a bit better."

Olivia



The legal basis of separate representation in England and Wales

- FPR 1991 r 9.5
 - 'if in any family proceedings it appears to the court that it is in the best interest of any child to be made a party to the proceedings, the court may appoint' –
 - A CAFCASS officer
 - (if he consents) the Official Solicitor
 - (if he consents) some other proper person,
 - to be the guardian ad litem of the child with authority to take part in the proceedings on the child's behalf
- *Mabon v Mabon* [2005] EWCA Civ 634
 - 'in the 21st century, there is a keener appreciation [than hitherto] of the autonomy of the child and the child's consequential right to participate in decision making processes that fundamentally affect his family life.'



The working of r 9.5

- Extent of use: Directions to CAFCASS
 - 2003-4 549
 - 2004-5 1,141
- Regional variation:
 - 'High' use (e.g. Yorkshire/Humberside) – up to 10%
 - 'Medium' use (e.g. South West) – up to 5%
 - 'Low' use (e.g. North East) – up to 2%



President's Direction 2004 para 3.1

- Where a CAFCASS officer has notified the court that in his opinion the child should be made a party ...
- Where the child has a standpoint or interests which are inconsistent with or incapable of being represented by any of the adult parties.
- Where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute.
- Where the views and wishes of the child cannot be adequately met by a report to the court.
- Where an older child is opposing a proposed course of action.
- Where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child.
- Where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court.
- Where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of a CAFCASS officer.
- Where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position.
- Where there is a contested issue about blood testing.'



Types of case

- The 'intractable'
'Where courts are faced with serious case of implacable hostility, parents' intractable position means r 9.5 is the only way forward.'
'Children's voices are being lost amongst adults' hostility and inability to prioritise.'
'In almost all of my cases, r 9.5 has been involved when there is implacable hostility and the children appear to have been exposed to emotional abuse as a result. Generally, the situations appear to relate to families where the children have been damaged, sometimes seriously, by the parents' attitude to each other.'
- The 'complex'
'The realisation that some cases are so complex and difficult that a referral to CAFCASS alone and a report will not suffice.'
'Complicated issues – residence abroad, immigration issues and religious issues.'
'Complexity of cases especially where expert evidence from psychologists is required.'



Age of children separately represented, CAFCASS public law teams

Age of child	Number
Under 1	23
1 – under 5	126
5 – under 10	320
10 to under 16	199
16 or 17	11
TOTAL	679



Court records survey and interviews

- Five 'high use' courts
 - 121 cases
 - 224 children (101 (45%) boys, 123 (55%) girls)
 - Average age 8.2 years at time of first court application
 - 32% aged 10 – 18
 - 48% aged 5 – 10
- 15 interviews with children
 - 8 boys, 7 girls
- 23 interviews with parents/carers
 - 10 fathers (4 with residence)
 - 12 mothers (10 with residence)
 - 1 aunt



The children's views and experience

- Having their say
- *"because sometimes if you tell your parent something ... and they tell the court, the court might not really believe them ... but if you tell a part of the court's staff then they've got evidence of what you've said ..."* (Brian)
- *"Well I wanted people to ask me because ... I just wanted my, not my say like ruling everything, but I wanted a say in it to help me... it might have helped, it might have made it worse, but I'd have felt good that I had a word in it and I'd made a difference if it was good or bad because if it turned out to be bad, that's their decision and if they've made a wrong one."* (Elizabeth)



- Going to court

- *"I wrote a letter saying that I'd like to meet the judge because ... he'd never met us, he didn't know anything about us, so he shouldn't really be able to make that without meeting us, but I don't think we ever heard anything back."* (Jane)
- *"It might be a good idea if the judge could actually meet the children so he could see their personalities and if they have got quite a strong personality he might know that what they are saying can't be influenced by anyone else."* (Kathryn)



Fear of courts

"He might be a bit afraid" Um, something like his parents getting sent to prison like um, locked up for, like, ages."

Ian

"Take off their ugly wigs 'cos it's scary! And don't have the big hammer 'cos that's scary as well."

Fiona

"I don't really know, I would have kind of liked to know what was going on a bit, but it seemed kind of a bit scary....It was kind of good that I never went to court 'cos probably if I did I would have been worrying about things more ... Maybe if you are a bit older say, like 14 or something like that, for some people it would be good that maybe they could go once in a while, 'cos they probably understand things more, but when you are like seven or something it wouldn't be a good idea."

Olivia, who was quoted above



Distinguishing the role of the guardian?

"I don't know, he just came round and spoke to us." (Gareth)

"He was a man and asked us questions as well".... I think he was someone called CAFCASS. ... Sometimes he wrote down some stuff that we said". (Holly)



The skills and qualities of guardians and others

Adam

- “He [independent social worker] was a very ordinary sort of person. If I'd be playing one of my games, when I barely had enough money to buy a game, I loved robot games and he'd be like 'we'll play a bit of this and then we'll get down to it...oh get him, get him' like that, and then he'd say 'if you don't mind could we talk now'. He was the best.”
- “She [CAFCASS guardian] was more the type of person...this is going to sound harsh...but she got her work done to get the big fat cheque at the end of the month. She'd seen a distraught kid but 'oh well it's another kid, as long as I get my cheque at the end of the week I'm happy'. But Mr. H was like...he wouldn't enjoy that cheque unless he helped them and earned it.”



Good and bad

- “I had to wait there [in the court waiting room] and she had to speak to me and she was like...everything I said she turned around and making it look like I was the bad one for some reason. ... me and her were just sat there talking and I said something to her and she turned around and backfired at me like I was being the bad one, which I didn't understand why, she denied it later.” (Craig)
- “She [NYAS Guardian] came to the house whereas with CAFCASS we went down to their offices, but NYAS came here and spoke to me and I told them the whole thing and they went off and tried to...I think they did the same thing with my sister and they seemed to help get things back together. ... CAFCASS seemed to treat you as if you were a little kid in a way even though I was 12 at the time, but NYAS sort of treat you the age you are really.” (Mark)
- “She [guardian] asked me about...if I was happy about like the court...not the court system but what was happening between my parents and stuff and then she...it was quite upsetting actually for her to say 'it's a new year, try and turn over a new leaf' because you can't just wipe your memory of everything that's ever happened so... she made me feel confused 'cos she was like, said one question, let me answer them, moves totally on to a sort of different subject ...and she made me feel angry and sad a bit 'cos like I've just ...I think she stepped over the line by saying turn over a new leaf 'cos you can't just do that and that made me feel angry as well.” (Elizabeth)



Trust and confidence

- “I sort of did say to her 'I wasn't happy at all with the decision you made and everything that was said in that conversation that I thought was confidential'. When we were actually having contact with my dad she told him everything. So I burst into tears and came to my mum because I thought that was ... I thought that was meant to be confidential and she didn't even tell me she was going to tell my dad” (Elizabeth)
- “I think it gave us more confidence as well that someone actually might do something about it because the judge might not necessarily listen to just the child but there is more chance that they will get their point across by an adult.” (Kathryn, referring to her solicitor and barrister)



Conclusions

- Children's need for reliable information
- Meeting children's support needs
- Giving the child a voice in court
- Clarifying the role of separate representation
 - Ascertaining voice of the child
 - Moving the dispute toward resolution
 - Providing children with information and support – the 'passage agent'
- Clarifying the role of the court
 - Adjudication
 - Managing the dispute
 - (Re M (Intractable Contact Dispute: Court's Positive Duty))
- Quality, not role or label

