

Guidelines for Judges meeting Children in Family Proceedings: Avoiding the Chinese Whisper

As the Family Justice System's future becomes less clear, the increase in judicial comment may be more than mere coincidence, with judges electing to use their judgments as political platforms to put forward the idea that the judiciary should be given more power in the court room to the latest guidelines for judges to talk to children in court, as published by the Family Justice Council in May.

It is these guidelines that appear to join the ranks of progressive family law, at first glance offering much needed change to the culture surrounding children in the system, not unlike Mrs Justice Black's decision to allow a five year old girl's wishes and feelings to be taken into account in a recent family law case here in England and in so doing made legal history. And as the judiciary continue to blaze a trail within the embers of the family courts, the burning question may be, can they save the system; can they raise the phoenix from the ashes?

The Guidelines themselves are divided up into three sections, the first of which outlines the purpose of the directions with the second section acting as a preamble and the final section being the actual guidelines themselves.

According to the document, its purpose is to encourage judges to communicate with children so that they can feel more involved in the family court process without feeling as if they are responsible for the outcome or in any way come to believe they shoulder that responsibility. There is also the rather astute observation that children need to feel the judge has understood their wishes and feelings and to that end, those sentiments should be conveyed. But how capable are our judges of finding the delicate balance described in this section and how powerful are the tools at their disposal to really get to the heart of the matter?

It's a tall order by anybody's standards and whilst a DVD has been made available to judges there is no suggestion that the DVD includes material on how to talk to children, understand them or even gain a superficial knowledge of child psychology. For those judges who are naturally attuned to children, these new guidelines must be a welcome extension of their role and will doubtless increase understanding all round and allow children to feel accounted for. For those judges who prefer chess to children, there may be a problem.

That problem manifests itself in the Preamble. The first bullet point explains that in England and Wales, a child's wishes and feelings are placed before the court in a written report which is prepared by a Cafcass officer and that under no circumstances are the Guidelines meant to replace or undermine that responsibility. There is a certain diplomacy to this sentence; the legal world is highly political, like any other and no-one wants to appear, at least not overtly, to be treading on anyone else's toes. The more alarming aspect of this sentence rests in the sentiment that these Cafcass reports will be used as vehicles for children's wishes and feelings. This is currently where these alleged wishes and feelings can be found, but for those parents and children who have found themselves inside the system, many know only too well that these reports can be lacking in essential information or simply an end product of a system whose levels of competence have been continually questioned and which led our former Secretary of State for Justice, Jack Straw, to place the entire system under review. Where relaying of accurate information is so important, how will our judges cope when faced with Chinese Whispers and can they spot a sentiment lost in translation?

The Guidelines are really an extension of the Preamble and start with the expectation that lawyers and Cafcass officers will advise on whether the child wishes to meet with a judge and the context in which that meeting might be appropriate. Other parties to the case will also be allowed to make representations on any proposed meeting before the judge decides whether or not the meeting should take place. This last element seems baffling. In Section 1 (iii) of the Guidelines the judge would be briefed on whether such a meeting would be appropriate and further to this, in Section 3 the age of the child is also called into question as a determinative factor in working out whether a meeting should take place. The final piece of this bemusing puzzle is found at Section 4; where a judge decides that such a meeting would be inappropriate, he should consider writing a brief explanation to the child.

To a parent, these sections might seem a little off the mark; with children, there is no halfway house when it comes to expressing their feelings. Our judges have boldly elected to take on the role of Human Being in a system which up until now has forged them more in the image of Darth Vader than Dr Seuss; to refuse to see any child would be tantamount to destroying any progress in the system and to destroy the promises hinted at in the Guidelines. After all, if a five year old child has got the gumption to tell lawyers and Cafcass officers he wants to speak to a judge, why shouldn't he and what are our judges afraid of? Revenge of the Two Foot People? The added conundrum of factoring a child's welfare into this particular context also seems at odds with the ethos of the Guidelines. It may be that I have overlooked certain scenarios and would be happy to accept this if pointed in the right direction but at this point, I cannot see how a willing child wanting to talk to a judge would in any way be against their welfare, unless of course, the judge in question had a thing for mint humbugs, in which case, the Cafcass officer may need to keep an eye out for judge and child bouncing off the Chamber's walls on a sugar and e-number induced high.

And what of the written explanation, which a judge does not even have to, as of right, provide to every child he turns away? These conflicting approaches may send out an unfortunate message; the judges will listen to you but only if they think you're worthy of their time. And with children, that kind of faux pas comes at a very high price.

Whilst I am not making any suggestion that babies' oral wishes and feelings should be given unfettered weight, or that judges should not be realistic about the allocation of their time, there can be no piecemeal process when it comes to the voices of our children. If the judges do not have the time to sit and listen to the concerns of all the children who grace their court rooms, then perhaps the role of listener should be given to other organisations outside of the system, who are fully trained to deal with children and who are not a part of the highly political environment that our judges and Cafcass officers are. Section 6 also explains that anything a child says to a judge will be relayed back to his parents and other parties so that there is no element of confidentiality, making it highly unlikely that any child will wish to speak to a judge and leaving everyone lost for words, myself included.

Yet Section 5 is where the crestfallen may gather; it's certainly where I hung my head and placed my hands to my mouth in pensive depression. The end of this section reads "It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence.... [but] to

enable the child to gain some understanding of what is going on and to be reassured that the judge has understood him/her”.

So, are these Guidelines nothing more than a metaphorical pacifier, designed to convince children that the system knows what’s best for them and to relieve some of the pressure stemming from public criticism, or is there room to make a difference? Whilst I remain a little unsure of their power, I hope that the more passionate judges will seize the guidelines and use them to really push forward the best interests of the children who come before them, by listening to their concerns and acting upon them if necessary and not just focusing on explaining the mechanics of a hearing. After all, when a child can have the family court process explained to him by his parent or carer, why would he want to talk to a judge?