

Children: The Voice of Reason

The spousal power struggle within the family unit is a phenomenon that is not new; whether we think of women in the home prior to their emancipation or today's stay-at-home fathers who are now fighting for the right to be viewed as primary carers, the notion that roles within the family are diverse is a fascinating one.

Although men and women's roles have varied in relative degrees throughout history and in different countries, the role and rights of the child have always come a distant second in this evolutionary cycle. As legislation has primarily been used to protect and to conserve fundamental human rights, it is a helpful place to start when considering a child's status not just in society but in the breakdown of a relationship.

In the past, the courts traditionally supported the notion that children were the property of the father and with this highly paternal philosophy being cemented in court, mothers were relegated to mute observers in the system and children the silent victims of an unenlightened era.

As is often the case in the courts, once it became apparent that this approach was not in the best interests of the children that came before them, the legislative pendulum swung violently the other way and mothers were considered to be the primary carers as of right, rendering fathers almost completely redundant, except as a means to maintain the fractured family.

Today, seemingly unable to learn from its aggressive knee-jerk reactions to Group pressures and economic constraints, the pendulum in the Family Courts again continues to swing maniacally from mother to father without reasonable explanation. The pressure that the Courts have felt under due to Father's rights groups have also had an effect on how the courts have reacted to the concerns raised by disgruntled fathers and again mothers who have given birth to children out of wedlock have also placed a great deal of pressure on the courts, so that today men who father children out of marriage are still not considered fathers in the legal sense thereby entitling them to have contact with their children in a way that reflects their parenthood. These crude concessions do not do justice to the varied forms of parenting we see in practice today nor do they take into account the most important person in a vulnerable family: the child.

The desire to protect children can be a double-edged sword: on the one hand, our belief as adults that we know best can sometimes work in favour of a child but by the same token, if we were to just allow children, with their finely honed instincts, the right to voice their concerns and their perception of their own dilemmas, we might just learn something. Children and their well-being incite a strong reaction in most of us and in 1989 the United Nations adopted the Convention on the Rights of the Child. This piece of legislation is the most widely implemented document of its kind and came into force in 1990. Just one year after that, Britain ratified the Convention and has also now begun to shift its attention towards the child's right to be heard, a truly wonderful step forward for the courts.

However, Britain is not at the forefront of recognising the voice of the child by any means and although they have adopted many laws that emphasise not just the best interests of the child but the need to include the voice of the child in that process, other countries are pragmatically pioneering the way forward, rather than just paying lip service to it.

In 2003, Israel began to look in-depth at the child's place in family law proceedings and not just with a view to allowing these children the ability to express their desires in relation to contact and other agreements involving them but also to give their sentiments the long overdue weight they deserved. The new regulations in place in Israel state that the Family Court "will give children the right to express their feelings, opinions and desires in the matter before the court.....and will accord them the proper weight in its ruling, in keeping with the child's age and maturity". The legislation in Britain echoes these sentiments but one distinct difference is visible: the extent to which the voice of the child may be heard. In Private Family Law proceedings, the consensus is that a child would probably need to reach nine years of age before their views would be considered (and here consideration does not mean that the child's wishes will be granted as of right). The President of the Family Division, Sir Mark Potter is himself of the view that the age limit would do well to encompass six year olds and upwards (and those of us who are parents are well aware that most children can talk for England at an even younger age and with dogged clarity), but again, it is Israel at the forefront of this age limit and they have already enthusiastically taken on-board 6-18 year olds as part of their new pilot scheme to improve the decision making process in their family courts. Both Israel and England then have understood the significance of establishing the child's right to be heard but for now, Israel has steamed ahead with its highly innovative regulations.

This however, is by no means the beginning of the end; allowing more verbal input of any kind into a process which relies heavily on statement based evidence does carry with it problems. Many parents are anxious about whether the process will impinge on their parental authority. There are already cases which are causing parents to feel that England has turned into a Nanny State, with the advent of laws allowing children of a certain age to acquire medical advice without their parents' consent. Some parents are also worried that the other parent involved may try to manipulate the child into expressing feelings that are not actually their own and where children are considered too young to speak (either because they are not yet nine or because they still dribble when you point to the fruit basket and say "Apple!") there is the fear that the child's needs will get lost within the combative nature of the process. Add to this the lawyers' concerns about the legitimacy of evidence which not only comes from a small child but as in Israel, may one day be acquired in the Judge's chambers and therefore despite being recorded appears on the surface to offer no immediate indication as to the weight the conversation had on the judge's ruling and at once a new dimension of concerns become apparent.

Much like any complex system, for the voice of the child to be effectively heard, free from manipulation and ill conceived assumption, the courts themselves need to run smoothly and once again, the Family Courts in England, heavily burdened with an enormous case load and no visible streamline to its copious departments finds itself struggling to fully implement these new regulations.

Sir Mark Potter gave a very insightful speech in May, 2008 which he named "The Voice of the Child: Children's Rights in Family Proceedings". In this speech, he explained how the United Kingdom was doing its best to champion the voice of the child and continued on to mention the effort the Family Courts were making to achieve this and with great honesty, the continuing difficulties our courts face in relation to putting the child's best interests first. Sir Potter acknowledged that in both Private and Public Family Law, the desire to protect children in the court process coupled with the adversarial nature of the courts meant that the voice of the child was not given due weight and was in fact stifled by the current court

climate. Sir Potter also astutely recognised the need, especially in Private Family Law proceedings, for judges to speak face to face (or face to knee, depending on the age of the child) with the youngsters involved rather than to rely on CAFCASS reports as a general starting point. This would have a dual effect; the child in question would get to meet the person deciding their future, which would lend a personal and positive quality to the experience and give the child a relative feeling of control and it would also allow the judge to gain a deeper understanding of children. Well, who wouldn't want to see a judge wearing a Cowboys and Indians outfit and throwing paper peas at the ten year old who has just finished his chat in chambers?

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