



JUDICIARY OF  
ENGLAND AND WALES

**Sir Nicholas Wilson**

**‘The Ears of the Child in Family Proceedings’**

**The Hershman / Levy Memorial Lecture to the  
The Association of Lawyers for Children**

**28 June 2007**

1. I got a lump in my throat last week. For I came across a copy reference which I had written in 2001. It said simply: “In that I confidently expect Mr David Hershman to become President of the Family Division in about 2025, I think it slightly follows that I support his application to become a Recorder”. It was David’s advocacy in care proceedings and particularly on behalf of children which had so impressed me. He exuded such easy authority and thoughtful wisdom as to make his submissions almost irresistible. Allan Levy established an entirely different but equally distinguished profile. He prided himself on being the outsider, without judicial aspiration. He preferred the big, difficult cases in which, on behalf of the man in the street or the child in the playground, he tested the boundaries of the law; and, complementary to such a practice, he was the ready media commentator, always in measured terms, upon a wide range of issues relating to children in the law. As with David, so with Allan: it was particularly as an advocate for children that I remember him. He was as courageous in court as he was in his personal life and was rightly impervious to any attempt by judges to cut him short before he was satisfied that they had understood his submission. In 2000 he appeared on behalf of the National Youth Advocacy Service in the Court of Appeal in *Re A (Contact: Separate Representation)*<sup>1</sup> and secured the court’s general

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<sup>1</sup> [2001] 1 FLR 715

seal of approval to the future appointment of NYAS as a child's guardian ad litem in private law proceedings under Rule 9.5 of the Family Proceedings Rules 1991, at any rate to the extent that CAF/CASS, then about to be established, might prove unable – or occasionally unsuited – to fill that role. NYAS confirms to me that *Re A* was the foundation of its arrival into family proceedings as a child's guardian under Rule 9.5, buttressed by its legal department's contract with the Legal Services Commission and by the first specialist quality mark awarded to a not-for-profit organisation. Allan's achievement in securing that unprecedented ruling is of itself a hugely valuable legacy bequeathed by him to children caught up in private law proceedings and, indirectly, to all of us who work in the family justice system.

2. So, as I wondered about what to say tonight, it became clear to me that it was almost a compulsory reflection of my memories of David and Allan that my address to you, arranged indeed by the Association of Lawyers for Children, should in some way be about the role of the child in family proceedings.
3. First of all, unsurprisingly, I pondered on the *voice* of the child in family proceedings. Is the child's voice sufficiently articulated in all types of such proceedings? How is it best articulated? Does the court listen to it with sufficient care? Does the court penetrate behind what the child says to what the child means? Does it give due weight to the child's voice in its appraisal of the child's best interests? Such was the first outline map of my address; and, because my answer to those questions was going to be "not often enough", my provisional title was "The Conduct of Family Proceedings in Relation to The Child: Hamlet without the Prince?" Was my title neatly apt? Or a barren cliché? It is now irrelevant. For, as I thought more deeply, I decided that my address, albeit occupying some of the same ground, should have a different emphasis. My title, ladies and gentlemen, is "The Ears of the Child in Family Proceedings". I have decided to make the focus of my presentation to you not upon the need for the court to understand the child. Rather it is upon the need for the child to understand the court.
4. The voice and the ears are directly connected. By the Eustachian tube, so my daughter tells me. How can children express views, in which I include, most importantly, their wishes for the future, save upon a platform of some understanding of the nature of the proceedings? But the need for them, to an extent appropriate to their age, to

understand the proceedings surrounding them goes far wider than a need to provide them with a platform for the effective expression of their views. We who work in the family justice system need to be more imaginative about the nature and depth of the perplexities, frustrations, worries and fears of children who are the subject of family proceedings. Of course we also need to be imaginative about the situation of the parents. Although, like doctors, we judges need to develop a professional skin which will protect us from being drawn emotionally into their tribulations in such a way as to compromise our objectivity, we need, on an intellectual basis, regularly to remind ourselves of the strain which the system imposes upon the parents. In court, however, we often have only to look at their faces, to watch their behaviour and to hear them speak in order to receive that necessary reminder.

5. But what about the strain on the children, of which the judges have no such visible and aural reminder? What do the children know about the proceedings? About the way in which they develop? About their time-scale? About the nature of the issues? Or about the range of possible results? Children's understanding of legal proceedings, if any, may well be derived largely from criminal trials on television or from information, probably misinformation, from friends and older siblings. They may ask themselves questions like: "Will there be a jury? Will Mum or Dad be sent to prison? Will it be my fault? Who is this guardian? Will I have to live with her? Will I be taken into care? Will any one want to have me? Will I ever see Mum and Dad again? Will they split me from my sister? Can my Nan adopt me?" Even such children as realise that they do not face possible removal from their family may ask themselves questions like: "What will happen to the parent I won't be living with? Will I have to move home? Will I have to change school? Will I be able to see my friends? Can I keep my cat? Will we have enough money to live on?" As the proceedings continue, further questions may arise, such as: "Why is it all going on so long? Why can't it be decided today? What are they up to? How can they do this to me? Will they come for me in school in front of everyone?" And then, at the end of the proceedings, they may wonder: "What have they decided? Why have they decided it? Did they listen to what I told the lady? Did I tell her the right thing? Will Mum be furious with me? What happens next? Can they make me?"

6. I suggest that our system, of which in general we have much to be proud, is largely oblivious of the damaging bewilderment of children caught up in family proceedings. The stress upon their fragile minds must in some cases be awful; and it is by no means all necessary. Quite independently of the burning question whether children presently have a sufficient voice in our proceedings, there is an urgent need to devise a system by which, not just in some but in all types of family proceedings, we can dispel such of the fears of children as can honestly be dispelled, inform them to some extent about the nature of the proceedings raging above their heads and answer some of the questions which are likely to beset them. The report<sup>2</sup> submitted to the DCA by Cardiff Law School in February 2006 upon the operation of Rule 9.5 suggested that children caught up in family proceedings should have what was well described as a “passage agent” who would help them to pass with minimum stress through the proceedings into their newly arranged life. The revised purpose of my address is to call for more professional support for children who are the subject of family proceedings; to endorse the demand for more systematic provision of information to them about the proceedings; to discern the situations in which it is currently provided; and to generate debate about the optimum way to improve the situations in which it is not currently provided. The situations in which such information is – or can reasonably be expected to be – currently provided must primarily be those in which a guardian and a solicitor are made available to children; and so my discussion needs to include some survey of the extent to which they are made available to them. You will realise that I speak not in any judicial capacity; what I will say is simply the private view, conveyed rather impressionistically and anecdotally, of someone who sat in the Family Division for 12 years and who continues to regard himself primarily as part of the family justice system.

7. We start with that most widely ratified international instrument of all time, the UN Convention on the Rights of the Child, which came into force in 1990 and which the U.K. ratified in 1991. We are thus committed by its Article 9.2 to providing children with an opportunity to “participate” in family proceedings and by its Article 12.2 to providing such children as are capable of forming views with the opportunity to “be heard” in proceedings which affect them. Although it would have been preferable for the children’s right to *receive* information about such proceedings to be specifically

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<sup>2</sup> “Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991.” Final Report to the DCA, by Douglas, Murch, Miles and Scanlan, Cardiff Law School. ISBN 1 84099 071 6

addressed in the U.N. Convention, there is, as I have already suggested, no sensible opportunity for children to “participate” or “be heard” in proceedings until they have been appropriately informed about them. The language of both paragraphs more naturally conjures the idea of active representation of children in the proceedings than of the mere transmission of their views to the court by the report of a neutral professional; but my view is that, in some but certainly not all cases, a report of the views of children under s.7 of the Children Act 1989 probably suffices to meet our obligations under that instrument.

8. Then, however, we must note the intended development of the obligations under the UN Convention for EU states, all of which have ratified it, in the European Convention on the Exercise of Children’s Rights 1996. When we learn that the UK has not signed, still less ratified, the European Convention, our suspicions arise that, no doubt for economic reasons, we are not committing ourselves to acceptable procedures for enabling children to exercise their rights. Such scepticism is born of dispiriting experience of the failure of our governments to give reasonable priority to family justice; but in this respect it may be misplaced. Other EU states, including France, have also failed to ratify the European Convention and, in the words of one commentator, it has “gathered nothing but dust”.<sup>3</sup> For it is, on analysis, an ambiguous document which does not amount to much. At least, by Article 3, it spells out the right of children with sufficient understanding to *receive* all relevant information about family proceedings in relation to them as well as to be consulted and express their views upon them. It also requires each state, by Article 9, to afford the court the power to appoint a special representative for a child in family proceedings and, by Article 4, to afford a child a “right to apply” for such a representative. In a coruscating critique of the European Convention<sup>4</sup> Caroline Sawyer suggested that it is unclear whether, upon application by the child, Article 4 provides that a special representative must be granted. In my view the absence of an express duty to grant the child’s application must mean that no such duty is intended. In short I am not convinced that our refusal to ratify the European Convention betrays disinclination on our part to adhere in principle to the limited standards which it has set.

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<sup>3</sup> [www.crin.org/docs/Right\\_to\\_Expression\\_Geary.doc](http://www.crin.org/docs/Right_to_Expression_Geary.doc)

<sup>4</sup> “International Developments: One Step Forward, Two Steps Back ...” (1999) 11 CFLQ 151

9. I turn to consider the circumstances in which our system presently provides an appropriate vehicle for the communication of information to the child about the proceedings as well, of course, as to the court about the child's views, wishes and feelings. There is so much to like about the Act of 1989 but, even after 14 years of heavy use on my part, the reference in s.1(3)(a) to "feelings" as well as to "wishes" always pleases me. While in other areas the law has been chary of attaching significance to mere "feelings"<sup>5</sup>, here in the family jurisdiction we boldly put them at the forefront of matters which must be considered in every case; and my only surprise is that, probably because a child's communication of wishes is effected verbally, a perception seems to have arisen that it is only feelings communicated verbally, and thus feelings only of children able to communicate verbally, which the subsection requires to be taken into account. Feelings discernible for example in the manner in which young children relate to parents are surely just as significant as – indeed arguably more significant than – those which they manage to express verbally.
10. Our system often, by default, leaves it to parents to communicate information to children about the proceedings but it is surely usually inappropriate that it should expect them to do so, Many parents will themselves have an inadequate understanding of aspects of the proceedings, such as its likely course and the procedure likely to be followed; and, even if their understanding of the procedure is adequate, their likely emotional investment in a particular result makes it profoundly difficult for them to give to the children any explanation of the issues and of the parameters of the possible results with the necessary objectivity. Indeed, if the parents are themselves in conflict, each is likely to be motivated to give it with the different spin reflective of their conflicting positions. All the more are parents motivated not to explain such matters neutrally if they know that the views of the children are professionally to be collected and may well have a crucial bearing on the result. So, although I accept that no doubt some parents may in combination summon the necessary reserves of wise dispassion in their explanation of the proceedings to the children, we surely need to look elsewhere, indeed to the professionals, for the better discharge of this duty. Apart from that rare bird, the solicitor instructed directly by the competent adolescent, those best placed to shoulder the duty are, surely, the guardian and the solicitor for the child, where they are in post; or, I suppose, the maker of a report under s.7, although an officer of the local

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<sup>5</sup> *Addis v. Gramophone Co* [1909] AC 488

authority would be less likely to be able to impart information in this regard than a CAFCASS officer and even the latter, probably seeing the child alone only once or twice, would scarcely have an adequate opportunity to do so; or the judge; or a combination of them.

11. Another of the achievements of the Act of 1989 must be the provision, by s.41, of a Children's Guardian in all *public* law proceedings, now replicated for adoption proceedings<sup>6</sup>. Until preparing this address I had assumed, particularly in the light of the way in which so much of the Act of 1989 was crafted in order to comply with what was then only the U.K.'s treaty obligation to observe the principles of the European Convention on Human Rights 1950, that the right of children under Article 8 to respect for their private and family life necessitated the provision of a guardian in public law and adoption proceedings. I took it as read that the court in Strasbourg would have held that, in circumstances in which the potential interference with their right was as profound as their prospective removal from their biological family, including into an adoptive placement, the only proportionate discharge of the state's positive obligations under the Article would be, as we do, to make the children parties to the proceedings and to cause them to be represented by qualified independent people. To my surprise I find that the Strasbourg court has not so held. Nor, on the other hand, has it held otherwise. Surely it is only a question of time before that fairly obvious construction of Article 8 is reached. NYAS tells me that such was certainly Allan's construction of it.
12. In public law proceedings the role of the children's guardian, in tandem with their lawyer, can perhaps be summarised under four headings: to support the children, in particular by enabling them, in a manner apt to their age, to understand the proceedings and thus to cope with them less uncomfortably; to collect their wishes, discern their feelings and report thereon; to test in court the evidence said to justify the drastic course suggested by the local authority and, equally, the evidence marshalled against it; and to offer a neutral, professional overview of all matters relevant to the court's determination of where the children's best interests lie. My subject tonight relates directly only to the first of those four functions. I would add, however, that in my experience the wishes and feelings of children in care proceedings – the reporting of which is the subject of the second suggested function – tend to carry less weight than

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<sup>6</sup> Rule 59, Family Procedure (Adoption) Rules 2005.

they do in private law proceedings. There may be two main reasons for this: first that a care order can be granted only upon proof of significant harm suffered or likely to be suffered by the children, with the result that considerations referable to their protection must often, sadly, override the significance which can be attached to their wishes and feelings; second that care proceedings usually relate to children much younger than those who are the subject of private law proceedings. Sixty percent of care proceedings relate to children under the age of six and, although I lack a comparative statistic, I am confident that the average age of children who are the subject of private law proceedings is much higher.

13. The issue in relation to the procedural rights of children in public law proceedings relates not to their position in legal theory but largely to the problems encountered by CAFCASS in appointing a Children's Guardian at a sufficiently early stage. The longer I conducted the substantive hearing of care cases in the Division, the more I came to realise the crucial importance, for the entire result of the case and thus for the whole shape of the child's likely future life, of the first hearing, which had taken place at least several months previously, usually in the family proceedings court or the county court, at which the decision had been made whether to make an interim care order upon a plan that the child be taken into short-term foster care. I often considered that that court had faced a far more difficult decision than I did. But is the guardian in place by the time of that hearing? If so, has the guardian had sufficient time to meet the child and to conduct necessary research, by interview and investigation, into the circumstances and history? Where a guardian is appointed, it is for him or her to appoint a solicitor for the child. Where no guardian is appointed, the court can appoint a solicitor from the approved panel. But, where a solicitor alone is in position on behalf of the child at the interim hearing, how satisfactory is it for him to be required to make submissions about the child's best interests without instruction from a guardian and without the benefit of the guardian's prior investigation? Although panel solicitors have far greater insights into the needs of children than I ever had as a young barrister, I am reminded of the instructions in briefs to me from the Official Solicitor in the early 1970s: "Counsel will make such submissions on behalf of the child as appear to counsel to be in the child's best interests". One tended to make it up as one went along. District Judge Crichton tells me that the family proceedings court in Wells Street operates a scheme designed to mitigate some of these difficulties, namely one which ensures the



presence on duty at court every day of a CAFCASS officer, whom the children's solicitor who lacks a guardian can at least consult. But he says that the scheme, though useful, is a stop-gap and no substitute for a guardian who is properly in post and has done the work. Under the direction of Anthony Douglas the performance of CAFCASS in the prompt appointment of Children's Guardians has recently improved. In the year to March 2007 the allocation of a CAFCASS officer to act as guardian in care proceedings within two days of reference from the court took place in 55% of cases across the country; but in London the percentage was only 20%. Within 28 days the guardian will almost always now have been allocated, including in London; but even if, which I fear is a naïve assumption, the date of allocation to a guardian is the date when she or he starts work, a delay of 28 days makes it usually too late for effective participation at the interim hearing. Anthony tells me that the target for the current year is that all cases be allocated within two days, even if the constraints of resources upon CAFCASS remain such that the downside of such front-loading were to be some extra delay at a later stage. If such swift allocation can be reflected in the ability of the guardian actually to do the work in time for that hearing, then in my view such is unfortunately a price worth paying.

14. Do our courts operate a sufficient procedure for professional communication not only from but to the child in residence, contact and other *private* law proceedings between their parents and, occasionally, others? In such cases discharge of these twin functions is generally conducted by an officer of CAFCASS or the local authority, who writes a report pursuant to s.7 and is usually answerable for it in the witness-box. The question is whether nowadays that is enough. If it is not enough, the court – but unfortunately not yet the family proceedings court – has the power under Rule 9.5 to appoint a guardian to represent the child. The current issue surrounds the proper extent of the use of that power.
15. Five years ago the government accepted the need to provide resources which would have enabled more frequent provision of a guardian for a child in private law proceedings. By the Adoption and Children Act 2002<sup>7</sup> it inserted into the Act of 1989 a power to make a rule in effect to render all private law proceedings specified proceedings under s.41, with the result that, had such a rule been made, the whole

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<sup>7</sup> s. 122(1) Adoption and Children Act 2002.

apparatus of guardians and lawyers would have applied as much to private as to public law proceedings. In 2002 Ms Winterton, then the minister with responsibility for family law in the Lord Chancellor's Department, explained to the House of Commons<sup>8</sup> that "children should have access to separate representation more frequently than they do at present". Of course no such rule as was then enabled has ever been made; and its making now seems light years away. What we have seen since 2002 has been governmental retreat, for no child-centred reason, from its stance at that time; and, by contrast, a growing perception by the court that children in private law proceedings require the services of a guardian more frequently and thus its increasing use of the power in Rule 9.5 to appoint one for them. The famous Practice Direction<sup>9</sup> issued by the former President, Dame Elizabeth Butler-Sloss, on 5 April 2004 was, so she tells me, a reaction to a perceived growth in appointments of guardians under the rule which, in that it identified no criteria, was proceeding haphazardly across England and Wales. The purpose of the direction, to the terms of which the government agreed, was not to reduce the number of appointments – Dame Elizabeth was firmly of the view that in a significant minority of cases they were valuable and should be encouraged – but rather to identify the circumstances in which they should be made. As it happens, her ten guideline criteria were significantly reflective of suggestions which your Association had made in 1998<sup>10</sup>. Following the introduction of the criteria, the number of appointments of guardians under Rule 9.5 continued to rise. At that time CAFCASS was struggling and in many cases the appointments found their way to NYAS; and the resultant charge to the Legal Services Commission, inclusive of course of the services of the NYAS guardian as well as of the advocate, was soon alarming government. The view was taken that in particular district judges were promiscuous in the appointment of guardians; and this led to the controversial interim guidance by Dame Elizabeth in February 2005 that save in exceptional circumstances only circuit judges should make the appointments. Unsurprisingly district judges regarded the guidance as an insult as well as an inconvenience. Anyway since February 2005 the increase in appointments has continued regardless; there were, for example, 17% more appointments of CAFCASS guardians under Rule 9.5 in the year to March 2007 than in the preceding year.

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<sup>8</sup> Hansard, col 108, 4 November 2002.

<sup>9</sup> "Representation of Children in Family Proceedings ..." [2004] 1 FLR 1188.

<sup>10</sup> The Future of Representation For Children (1998) Family Law 403.

16. Presently, of course, the reform of Rule 9.5 is under consideration. The Department of Constitutional Affairs issued a consultation paper on the Separate Representation of Children in September 2006<sup>11</sup> which has rightly attracted substantial criticism. Its central suggestion, namely that the separate representation of a child should be required only where there are legal issues to be resolved, for example where the child has evidence to give or a legal submission to make which cannot be given or made by an existing party, was extraordinarily superficial. The consultation ended in December 2006 and the department's response to it was due to be published in March 2007. But it has been progressively delayed and is not even available for our consideration this evening. I trust, however, that the DCA's suggestion will be withdrawn and that, while children in private law proceedings will not all be provided with guardians, Dame Elizabeth's criteria will remain.
17. So far I have assumed – confidently – that the combination of guardian and solicitor provides the ideal support system for children during the proceedings. But I must enter a word of caution. In 2003, under the title “Your Shout!”<sup>12</sup>, the NSPCC published a survey of the views of children in care. 166 children, or 37% of those who answered the question, said that during the proceedings no one had explained to them what was happening. These were therefore children who had been represented by a guardian and a solicitor. Although it was a reasonably large sample, I am sure that this surprisingly high percentage of negative responses should be treated with caution. The responses were only from children who chose to complete the questionnaire; their memories of the time when the proceedings were continuing may have dimmed or been unconsciously put to one side for greater peace of mind; and, in saying that no one had explained things to them, they were not necessarily saying that they had been of an age at which things could reasonably have been explained to them. Nevertheless in my view the report flashes a light at guardians and solicitors that they should adhere to clear procedures in order to ensure that this explanatory function is discharged. Another arresting statistic in “Your Shout!”, albeit derived from only 50 responses, is that more than twice the number of children thought that their solicitor had been helpful to them than thought that their guardian had been helpful. Perhaps it is the solicitor, with intimate knowledge of the family justice system, who is in principle better able than the

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<sup>11</sup> CP/20/06.

<sup>12</sup> “Your Shout!”, by Timms and Thoburn, NSPCC, March 2003.

guardian to help the children to the balanced if limited understanding which is my subject.

18. This leads me briefly to acknowledge the uniquely difficult role of guardians and solicitors – and indeed reporters under s.7 – in family proceedings. At some early stage these professionals have in effect to administer two warnings to the children along the following lines. First: “Although we want you to be really upfront with us, we have to tell the court everything important that you say; so we’re sorry but you can’t tell us things in secret and you must remember that the court, and therefore also Mum and Dad, will probably get to know what you tell us”. Second: “Although it’s a big part of our job to represent you, to find out what you want for the future and why you want it and to tell the judge about that, we also have to tell him what *we* think is best for you and that might be different from what *you* think is best for you”. Although the professionals will put that stuff to them in far better terms, I can hardly imagine information, however well presented, which is more likely at that early stage to inculcate in the children feelings of disappointment, distance and even distrust towards them. It crosses my mind that, in their eagerness to facilitate a dialogue with the children, the professionals may occasionally find themselves underplaying those two features. But that would be to set the children up for later betrayal and is a temptation to be resisted at all costs.
19. The court’s decision whether summarily to return children to a foreign country in which they have been habitually resident, to be made pursuant to the Hague Convention 1980 and the Child Abduction and Custody Act 1985, is of course only a preliminary decision. It is not to identify the country in which they should permanently live nor the parent with whom they should live nor the contact which they should have with the other; it is only to identify the court, whether foreign or English, by which those matters should be determined. Sometimes operation of the Convention requires direct focus on the views of the children, in particular where the defence is that children of an appropriate age and degree of maturity object to being returned abroad; in such circumstances, as we have long recognised, an interview with them by a CAFCASS officer is essential. But there are other cases under the Convention in which the decision falls to be made by reference to matters entirely unrelated to the children’s views, for example whether under the law of the foreign country the left-behind parent

had rights of custody of which their removal was in breach or whether he (for the left-behind parent is usually the father) consented to or acquiesced in the removal. I do not forget that, even where the father's consent or acquiescence is established by the abducting mother, the court retains a discretion nevertheless to direct the children's return abroad, in the exercise of which their interests will be one relevant factor; but one cannot say that, in the type of enquiry which I have identified, the Convention permits any significant consideration by the court of the children's views. Thus in my opinion to collect views from the children in such situations is often seriously to mislead them into thinking that their views will have a bearing on the case which the law very largely precludes. Such is the background to my concern about Article 11.2 of the Brussels II Revised Council Regulation 2003<sup>13</sup>, which provides generally that in proceedings under the Convention children should be given the opportunity to be heard unless such appears inappropriate having regard to their age or degree of maturity. In *In re D*<sup>14</sup>, decided in the House of Lords last year, Baroness Hale, for whom I have profound respect, suggested<sup>15</sup> that there was no good reason for our courts, when required by Article 11.2 to collect the views of the children in the case of abductions from EU states, not also to be required to do so in the case of abductions from elsewhere and that therefore the court's obligation to hear the children, usually by means of a CAFCASS report, extended generally to all proceedings under the Convention. No doubt with the type of defence to which I have referred in mind, Baroness Hale conceded that the relevance of the child's views to the issues in an application under the Convention might be limited; but, so she said, there was a growing understanding of the importance of listening to children in family proceedings. Perhaps you expect me to welcome this introduction of CAFCASS officers generally into proceedings under the Convention on the basis that such would at least afford some limited means of professional communication to the children of information about the proceedings and perhaps particularly – although it might be hard to help some children to look at them in that way – about their limited compass. But it is the indiscriminate emphasis on the voice of the children even in proceedings in which the law affords it no real place which offends me. Let our necessary development of children's procedural rights in family proceedings be guided by logic and reason; not propelled by some mantra, thought no doubt to reflect the *zeitgeist* of children's autonomy, which

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<sup>13</sup> Council Regulation [EC] No 2201/2003

<sup>14</sup> *In re D (A Child) (Abduction: Rights of Custody)* [2006] 3 WLR 989

<sup>15</sup> Paras [57] – [58].

misleads children into believing that their views are relevant when they are irrelevant and which draws the resources of CAFCASS away from situations in which there is a real need for improvement in the quality of the service which it provides to children in family proceedings.

20. I turn to the hot topic of whether judges should more often see children privately. No one suggests that such would be an appropriate occasion for the judge to collect the evidence of children about historical matters, such as alleged abuse. Two other reasons, however, are advanced in favour of judges seeing children. They are, first, that there is no better way for the judge accurately to collect the views of children, in particular their wishes for the future, than by his speaking to them directly; and second that a meeting with the judge, either during the proceedings or upon their conclusion, contributes importantly to the children's understanding of them. In the poor DCA consultation paper dated September 2006 the two reasons are advanced in the opposite order, as follows:

“Nevertheless, consideration ought to be given to judges speaking to children as it would help redefine their perceptions of “scary” judges and the “punitive ethos” of the court environment. More importantly, it would help the judge obtain an informed picture of the case without the interpretation of a CAFCASS officer, even if the child's views cannot be submitted as evidence.”

21. I strongly disagree with the argument there said to be the more important, namely that a judge's interview is an appropriate vehicle for the court's collection of the views of children. In my opinion there are a multitude of objections to it. The guardian, if there is one, and the reporter under s.7, if there is no guardian, are far more appropriate gatherers of that important material. They have training in talking to children, in enabling them by various strategies to express themselves and in gauging the significance of what they say and how they say it; and it is simply not good enough for us judges to protest that we ourselves are mostly fathers or mothers and, in a few cases, also grandparents. A friend in Australia tells me that, following her interview alone with a boy and her later judgment in court, an aggrieved father swore an affidavit in which he falsely alleged that, during her interview with the boy, she had promised a

different result. Unless the father was lying about what the boy had told him, the boy had – for whatever reason – lied to the father. In deciding how to respond to the affidavit my friend was in a very difficult situation because she certainly did not wish to state or even imply that the boy was a liar. So, if only for protection from that sort of eventuality, the judge would need the presence during the interview of another adult, perhaps the judge’s personal clerk or a court clerk; but the addition of a second adult, also probably unknown to the child, might add an extra layer of uncomfortable formality upon the occasion.

22. In my view, moreover, the short interview with the judge would be likely to present the children with a wholly inadequate opportunity for them to air their views and to convey their wishes. There would be insufficient time in which for them to develop the necessary psychological platform. It would be a short, stilted set-piece in a strange environment between a nervous child and possibly an almost equally nervous judge, who would need to begin with the problematical twin warnings to which, in the case of the other professionals, I have already alluded. Then, were the purpose of the interview to have been the collection of the views and in particular of the wishes of the child, its content would have to be disclosed by the judge to the parties in court. In jurisdictions, such as Germany, in which the approach to decision-making of this sort is truly inquisitorial, the judge, as the gatherer of the material, is under no such duty to convey everything to the adult parties. But, although at times we describe our system as quasi-inquisitorial, it remains fundamentally accusatorial; and this means, as Lord Justice Wall pointed out in 2005 in *Mabon v. Mabon*<sup>16</sup>, that all relevant evidence, including any expression by the child to the judge of his or her views and wishes, must be placed in court for all to appraise and debate. Indeed I have always regarded it as a particularly amateur aspect of our procedure that, where the judge has been persuaded to collect such evidence from the child by personal interview, his reporting of it in court takes the form of an impromptu summary, in relation to which he would certainly not welcome the hard questioning often usefully administered to guardians and reporters about their reports of interviews with children. In my view adult parties should be entitled, as they are in most U.S. states, to read a transcript, if not to watch a videotape, of any such interview on the part of the judge with the child, if not, indeed, to observe it live by

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<sup>16</sup> [2005] 2 FLR 1011 at [38].

video-link; but, of course, any such recording arrangement would place an even greater degree of formality upon the interview and thus perhaps of stress upon the child.

23. It is the other argument in favour of judges seeing children more frequently which attracts me; and it resonates perfectly with my subject tonight. I speak not of an interview designed to elicit material from the child but of a meeting designed to enable the child better to understand what will happen in the proceedings or, in particular, what has just happened in the proceedings. I do not suggest that such a meeting should become the norm: were it to do so, it would draw upon such a degree of judicial time as to create serious extra delays in the despatch of family business. I also consider that the time when the substantive hearing is in progress would be a particularly inappropriate moment for the meeting to take place because it would be so easily misconstrued, by the adults as well as by the child, as the judge's opportunity for collection of material relevant to the imminent decision. I believe, rather, that it is occasionally prior to the substantive hearing, but in particular immediately after the hearing, that a meeting may be appropriate.
24. In relation to the communication of children with the judge prior to the substantive hearing, I consider that forms other than face to face meetings should be encouraged but that, in the case of reasonably mature children who firmly want it, such a meeting perhaps ought to be arranged, at any rate with any judge to whom the case has been firmly assigned. There is already the obvious facility for the children, often with the help of the guardian or reporter, to write a letter or note to the judge, which can be appended to the report. CAFCASS has recently developed two forms, one for older and one for younger children, headed "My Needs, Wishes and Feelings", which, if they wish, can be completed by them, or by the CAFCASS officer upon their behalf, and, again, appended to the report. Indeed would it be asking too much of CAFCASS, or indeed of NYAS, that, if reasonably mature children are keen that a short part of their interview with the officer should be audio-taped or videotaped, so that the judge can hear or see them, such should be arranged? If so, then such children might even depart from interview format and make a short address to the judge directly into the tape-recorder or to the camera.



25. I suggest however that the more important area for development of our practice is, in the case in particular of children who lack a guardian, for a face to face meeting with the judge as soon as possible after the decision has been made. In the Division I found myself at times convinced of the need to attempt to communicate directly with such children after I had made a decision, particularly with older children after I had made a decision contrary to their wishes. In particular I remember two cases, both about boys aged about 12 who were refusing to have contact with their fathers which I was ordering or was proposing to order in the future. In one case I drafted a letter for me to send to the boy and appended it to my judgment. In the draft I told him that I had taken his views carefully into account but that, having heard his parents give evidence at length, I was convinced that it was in his interest to continue to see the father; that at an adjourned hearing in six months' time I would probably be ordering it; and that I strongly hoped that he would feel able to accept my decision. The idea really was to get him used to the prospect, however unpalatable, of seeing his father again and to show him that I had a degree of respect for him, in the hope that he might reciprocate it. For some extraordinary reason, however, I stated in the judgment not just that I would welcome the parents' views on the letter but that it would not be sent in the absence of their consent; and in the event the father, who in particular stood to benefit from despatch of the letter, inexplicably objected to my sending it<sup>17</sup>. I resolved never to make such a mistake again. In the other case I had, frankly, a fairly uncomfortable meeting with a polite, intelligent but entrenched boy, to whom I attempted to explain in straight-forward terms the process of reasoning behind my order for contact. Neither boy had been represented by a guardian; the work of the reporters under s.7 had been completed and they had not remained in court to hear the judgment and therefore could not be asked to explain it to the boys; and so I had taken the view that there was no one more appropriate than myself to try to explain my decision to them. I am sorry to reflect upon the number of occasions upon which I concluded private law proceedings relating to children not represented by a guardian without my having given thought, still less having promoted discussion, about how they should best be acquainted with my decision and my reasons for it. I now believe that it should be a normal feature of a judge's conclusion of such proceedings to promote such a discussion.

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<sup>17</sup> In the event it was good that I did not send the letter, for I had given insufficient reasons for my decision and the Court of Appeal transferred the case to another judge: *In Re T (Contact: Alienation: Permission to Appeal)* [2003] 1 FLR 531.

26. Do you remember the decision of the Court of Appeal in 1995 in *Re B (Change of Surname)*<sup>18</sup> in which three children, aged 16, 14 and 12, wanted to assume the surname of their stepfather even for official purposes such as the entry on their passports and in which the Court of Appeal dismissed the mother's appeal against the judge's refusal to allow them to do so? I am afraid that upon that appeal it was I, who, then as a judge of the Family Division helping out temporarily upstairs, gave the only substantive judgment, with which the Lord Justice simply agreed. In the judgment I acknowledged that it was almost unknown for a court to flout the wishes of children of that age. Recently, in the course of as yet unpublished research, Catherine Williams at Sheffield University caused about 2,500 members of the public to be polled about the decision in *Re B*. No less than 85% of them said that they disagreed with it. In the face of criticism on that scale, it is hard for me to defend it. As it happens, I still have great difficulty in accepting that courts should sanction demands by teenagers to be allowed to eliminate their fathers from their identities even in that last residual respect. Be that as it may, in retrospect I really should – at their ages – have offered to speak to those children and at least to try to explain to them why we had reached our decision. Its presentation to them by the mother and stepfather was surely no more than that it was ridiculous.
27. I refer briefly to children who want to be present in court at the hearing. Competent adolescents who have been made parties and are directly instructing solicitors are clearly entitled to be present throughout. In relation to other children, however, my line has been hostile to their presence on the basis that they should be protected from the sight of dirty washing and from the shrill sounds of parental and other conflict. I now consider that the issue is more complex than that. Unfortunately many children will already have seen and heard far worse from the top of the stairs. I now think that the decision whether to allow them to be present should be more carefully made in the light of their age and maturity, of the nature of the issue before the court and of the oral evidence likely to be given.
28. I turn to quite the most enjoyable aspect of the work of the family judge at trial level; and it is directly related to my subject tonight. I speak of the occasion when, following his making of an adoption order, the judge meets the child and his or her new, adoptive,

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<sup>18</sup> [1996] 1 FLR 791

parents, often with other members of their family. The purpose of the judge's adoption meeting is, of course, to celebrate the start of a new life for the child, and indeed for the adopters, in a manner designed to enable the child to understand, to a greater or lesser extent, the effect of the order and indeed perhaps even in later life vaguely to recollect the occasion. It seemed to me that, since they were by way of celebration, these meetings had to be parties. On my way into court on the day of the hearing I would go to Queensway, buy a chocolate cake and a pink candle and get the *pâtissier* to pipe on to it the words "Melanie gets adopted"; and, with drinks and things, the cake would form the centrepiece of the party. Sometimes I also bought a present for the child, perhaps, if very young, one of those appalling soft toys that are knitted to look like owls with spectacles and Rumpole-type wigs. Then, after the party, I would write a letter to the child just on one side of the paper so that, as I suggested, she could stick it into her life-story book, and in which I said what an important day it had been for her and what a wonderful party we had had. At the risk of sounding presumptuous, I suggest that a letter for the life-story book is not a bad way of marking the day for the child in a fairly permanent way.

29. There was one occasion when I embarked on the adoption hearing only to find counsel for the Official Solicitor submitting, firmly but unexpectedly, that it should be adjourned in order that further efforts be made to locate the biological parents in Ukraine. But, ladies and gentlemen, how, in all honesty, could I grant an adjournment? ... I had bought the cake. On another occasion in Birmingham, following my making of an adoption order in contested proceedings, the biological parents, who were of Chinese – Hong Kong ethnicity, wanted to say goodbye to the child before they flew home. The social worker suggested that the child, the adoptive and biological parents and he and I should all have supper together in a Chinese restaurant, at which the biological parents might guide us as to what was best to eat, give the child some presents and say farewell. Of course I had first to extract from their counsel an unequivocal confirmation that they did not propose to appeal. I will not pretend that the supper was easy, particularly because they hardly spoke English and because the child was not very friendly towards them; but I nevertheless considered that the social worker had found an imaginative way, from the point of view of the child and also of the four adults, of our marking the end of her old life and the beginning of her new.

30. I loved adoption parties partly because they were genuinely good fun and partly because they were so gloriously unrelated to the practice of the law. But, frankly, they were proving mildly expensive and in a rash moment I decided to make a claim to deduct the cost of them from my taxable income. Never before or since has any entry on my tax return attracted the attention of the Inspector. He rang from Cardiff and gently asked me to explain what adoption parties were. Upon my doing so, he said that, having been adopted himself, he thought that they were a delightful idea. It sounded to me as if he was entirely human. His emollient words, however, were followed by assertions that I would be wholly unable to demonstrate that the cost of my parties was necessarily incurred as part of my duties and that in his view my claim was entirely out of order. At once I backed off; withdrew my claim; and humbly promised never to venture another in future years.
31. About six of the children whom I ordered to be adopted still correspond with me. I treasure their continued communication with me, even though, oddly, their letters almost always arrive just prior to their birthdays.
32. We should not forget one further, final stage at which a request may be made for information about proceedings by those who were the subject of them. I refer to adults who wish to discover what was said in family proceedings which took place in relation to them when they were children. Their first port of call will probably be their solicitor, if they had one, or the local authority, if they were made the subject of a care order. They may however approach the court and ask to inspect the file. The initial question would be whether the file was still available for inspection. District Judge Waller, the Senior District Judge at the Principal Registry, tells me that files relating to family proceedings are supposed to be kept at his court for 15 years and thereupon, subject to some filleting, they are taken elsewhere for storage for a further 50 years. Subject to a limited right for those who, as children, had been parties to the proceedings, whether represented by a guardian or otherwise, to inspect specified documents, adult applicants would under present rules need the district judge's leave to inspect the file relating to them, if available<sup>19</sup>. I find it hard to imagine circumstances in which leave could properly be refused. Of course, however, even if a transcript of the court's judgment had ever been prepared, the court file might well not contain a copy of it. Last

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<sup>19</sup> Rule 10.20(1) and (3), FPR 1991.

week the Ministry of Justice announced<sup>20</sup> a proposal to remedy this. It is that in all public and some private law cases a transcript of the court's judgment should routinely be prepared, kept – whether on the court file or elsewhere – and made available to children who were the subject of it upon their request once they have become 16 or 18. I strongly support the proposal.

33. I summarise my suggestions to you in this way. I believe that many of us who work in the family justice system, probably in particular the judges and lawyers, tend, without in any way meaning to do so, to underrate the intelligence of children who are the subject of the proceedings. We certainly tend to forget the profound strain under which many of them labour while the proceedings continue as well as during their aftermath. Some of the strain is unavoidable while they wait for decisions, often of profound importance for them, to be made. But of many of their grimmer nightmares the children can, and should, more quickly be relieved. Regardless, however, of how soundly they sleep, these children have a right to be enabled to understand, to the extent that is appropriate to their age and maturity, the issues raised in the proceedings; the manner and time-scale in which the proceedings are likely to develop; the different roles of the participants in the proceedings; the paramountcy of their own welfare in the court's determinations; and, as a large part of that, the respect which it pays to their views. At the conclusion of the proceedings they also have a right promptly to understand not only the nature of the outcome but the main reasons for it. These rights run parallel to their right to express their views to the court but they have been less fully discussed and are thus perhaps more easily forgotten. Insofar as we judges may come more frequently to see the children face to face, we must leave our pomposities in our wig boxes; file away our verbal conceits; take time; not patronise; and, above all, never mislead. This will be the first brush of most children with the law; if we so conduct ourselves that they develop some respect for it, it may be more likely to be their only brush with it. But all the professionals engaged in the proceedings on behalf of the children – not only the judges but the guardians, the solicitors and the reporters – should aim to convey to them, directly or indirectly, a fair image of our system, namely – as I hope – one which is operated by friendly, professional people who are aware of the strain under which the children labour; are concerned to minimise their strain and to support them in their passage through the proceedings; and are

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<sup>20</sup> “Confidence and confidentiality: Openness in family courts – A new approach” Cm 7131, 20 June 2007.

committed to achieving the best result for them, and for them alone. Such are the ways, so I suggest, by which we demonstrate appropriate regard for the Ears of the Child in Family Proceedings.

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