

Seen, Heard, and Valued: Embedding Children's Voices in Legal Proceedings

Article 12(2) of the United Nations Convention on the Rights of the Child outlines the right for children to be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child. Within the UK, the Children Act 1989 mandates that the welfare of the child is the paramount consideration (section 1(1)), within which it also requires courts to consider the child's ascertainable wishes and feelings (s.1(3)(a)). While English law therefore acknowledges children's views, it does so within a paternalistic framework that prioritises judicial discretion, and does not fully satisfy Lundy's model of participation. As such, I will argue that reform is needed in legal decisions relating to children in order to give greater and consistent weight to their views. This will aid the law in moving away from tokenism and towards more meaningful rights protection.

The Legal Framework:

To begin with, a child's right to be heard is protected both by international law and English law. In 1991, the United Kingdom ratified the United Nations Convention on the Rights of the Child (UNCRC), which came into force in 1992. With this international law, governments are intended to implement the UNCRC, and all public bodies and those who make decisions and policies that affect children should consider the Convention.

On the domestic level, family law relating to disputes about children is subject to the Children Act 1989. Section 1 of the Act outlines what is known as the 'welfare principle'. Section 1(1)(a) provides that when a court determines questions with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration. Within this article, paragraph 3 outlines what is known as the 'welfare checklist' – in other words, factors the judges should consider when determining whether something is in the best interests of the child's welfare. Section 1(3)(a) explicitly outlines the ascertainable wishes and feelings of the child, subject to their age and understanding, as a factor. As such, article 12 UNCRC is embedded within domestic law.

However, there is an important distinction between UK and UN treatment of children's welfare. In article 3 of the UNCRC, children's welfare is a **primary** consideration, while in section 1 of the Children Act, welfare is **paramount**. This distinction means that under the UNCRC, welfare is one of several important considerations, balanced against the child's autonomy and participation rights. In contrast, UK law prioritises welfare above **all** other factors, making it the decisive consideration in judicial decision-making. In light of this, it follows that UK law places more limitations on the weight given to children's views. Since welfare is the ultimate determining factor, courts may override a child's expressed wishes if doing so is believed to serve their long-term best interests.

Nevertheless, this does not fully justify the current approach to children's right to be heard, given the UK's international legal obligations under the UNCRC. While this essay will not argue against the paramount nature of welfare, it will argue that increasing the weight given to children's views would in fact increase a child's welfare.

Lundy's Model:

In order to strengthen the application of article 12 of the UNCRC, Professor Luara Lundy created the 'Lundy Model of Participation'. Within this model, she provides a conceptualisation of the right to be heard which focusses on four elements: space, voice, audience and influence.

Under the 'space' heading, she explains that children must be given safe and inclusive opportunities to form and express their views. Within 'voice', Lundy explains that children must be facilitated in expressing their views. With regards to 'audience', she explains the view must be genuinely listen to, and finally under 'influence' this view must be acted upon as appropriate.

Since 2007, Laura Lundy's model of child participation has been adopted by national and international organisations, agencies and governments to inform their approach towards children's participation in decision making. For example, Ireland's National Strategy on Children and Young People's Participation in Decision-Making 2015-2020 directly made reference to Lundy's model.

While English law arguably satisfies the first two headings of 'space' and 'voice', there remains a need to strengthen the 'audience' and 'influence' headings. The 'audience' is limited because judges currently hold a wide discretion in their approach towards the welfare checklist. Waite LJ in *Southwood LBC v B* referred to the factors on the welfare checklist as an aide-memoire, while Staughton LJ in *H v H* held that it was not 'the list of checks which an airline pilot has to make', meaning we do not have to go through each point of the checklist. On the other hand, Baroness Hale in *Re G* did acknowledge it would be helpful to go through each item of the checklist. As such, it is clear that judges take different views towards the checklist and retain a great deal of discretion. Therefore, it is not always clear to what extent a child's views will be given an audience within the courts.

With regards to 'influence', the way in which children's views are acted upon is limited by section 1(3)(a) subjecting the ascertainable wishes of the child to their age and understanding. For example, *B v B* held that the child's wishes are only one of the factors to be taken into account, but where the child is mature it is likely to be the most important factor. While 'influence' does not necessitate that a child's view is decisive, I will argue that the law incorrectly qualifies the child's views on age, and instead 'age' is treated incorrectly as a synonym for 'competence'. I will thus argue we should move away from an age-focussed assessment, and instead work more closely with social workers to determine an individual child's understanding and competence.

Main Objections to Increasing the Weight of Children's Views:

As stated above, under English law, the welfare of a child is considered paramount. Likewise, the welfare checklist includes a range of factors outside of the views of the child, including the child's physical or educational needs, as well as any harm they may suffer. In favour of welfare, there are three main objections to increasing the weight given to children's views: the child's limited competence, the negative long-term effects their decision may have on their welfare, and children's vulnerability to have their views corrupted. I will take each objection in turn and explain how the law can still protect welfare without undermining a child's right to effective participation under the UNCRC and Lundy's model.

I. Competence:

Children are unique subjects of the law, as their needs and participation in the world evolves with their age. As children grow, their competence shifts greatly. While a newborn baby and toddler are fully dependent on their parents, older children begin to form their own personalities, views and independence. As such, there has been push in the law to recognise the evolving capacities (as per article 5 UNCRC) of children. It would be unfair to treat all under 18s in the same manner, regardless of age.

However, age is also not always the best demarcation of competence and understanding. This was best illustrated in the medical case of Gillick. Here, it was held that children under the age of 16 could potentially consent to their own treatment. Lord Scarman posited a test that if a child can demonstrate 'sufficient understanding and intelligence to understand fully what is proposed', they may be able to consent to the medical treatment. As such, Lord Scarman recognised that competence may not be based just on reaching the age of legal adulthood.

On the other hand, the debate around Gillick was expanded in Bell, a case concerning a child's access to puberty blockers. Here, the court did not see itself as fit to decide on competence and instead left the question to clinicians. The Divisional Court pointed out that as the treatment is experimental a young person may not have sufficient understanding of the risks and benefits associated, thus not being able to lawfully consent to the treatment. The court went on to discuss age categories, suggesting under 13s are highly unlikely to be able to achieve Gillick competence, while 14 and 15 year olds had more possibility but were highly doubtful. The Court of Appeal overturned the High Court judgement and ruled that the court should not have issued guidance on the Gillick test, however. Nevertheless, they reflect the attitudes of some judges that are rooted in age-based assessments.

However, age is an unreliable proxy for competence. Research by Smith, Taylor and Tapp suggests instead that competence depends more on contextual factors such as family environment and attachment styles, or the availability of a support system. As such, a move from the language of 'in light of his age and understanding' to 'in light of his competence and

understanding' should be made in section 1 of the Children Act. This leaves room to recognise that younger children may not be as competent, while not strictly barring any child's views on an arbitrary number basis.

This is somewhat reflected in the case law already. For instance, *Re S* (Change of Surname) in deciding whether a child's views should be taken into account, held that the court will consider whether the child is competent. Likewise, in *Re H* the young age of the 12 year old girl did not mean her wishes were ignored, albeit here the circumstances were extreme as she threatened to take her own life if she was not allowed to live with her father.

However in *Re H*, it was held that full and generous weight should be given to mature children's wishes. The focus on maturity is clear in the case law, but perhaps competence is more fitting. By demonstrating competence, we move away from arbitrary status quo of chronological age. Presuming adults are generally better placed to determine the best interests and welfare of the child by virtue of their older age is harmful. Parents do not always wholeheartedly consider their child without considering also themselves – a feuding couple is more likely to attach their own sentiments to their previous spouse to the decision than a child who is younger and has had a much different relationship with their parents. A child would perhaps be better placed to provide an untainted view of their parents involvement in their life, regardless of how they behaved as spouses to each other. A child may thus be less likely to have pre-existing negative biases towards either parent, and thus their views should be given greater weight in disputes concerning their upbringing.

II. Long-term Effects:

Another key concern in listening to children's views is that their views may change in the future, and that their current stance may not account for the long-term effect of the decision. For instance, in *Re C* 1993, the concern that children may put undue weight on short-term gains and not take a long-term view of their welfare was raised. Likewise, *L v L* explained that the wishes and feelings of mature children do not carry any presumption of precedence over any other factors in the welfare checklist, nor is the court bound to follow them. MacDonald J went on to say that where the adherence to these wishes may seriously compromise their long-term welfare, the court may override those wishes.

In *Re M (A Minor) (Family Proceedings: Affidavits)*, the court 'very seriously deprecate[d]' the attempt to involve the 12-year-old daughter in support of her father's application for a residence order. However, the decision to attach little weight to her expressed wishes to live with her father was based not on her age but on the Welfare Officer's evaluation that she 'certainly had not put her mind to the consequences'. She would only occasionally visit her father while ordinarily staying with her grandparents, and the court held the occasional visits did not paint a real picture of life with the father.

Recognising the validity of these arguments, I suggest that children's views should still be respected insofar as children should be informed throughout the whole process, with decisions being explained to them by the judge to help them understand how their views were taken into account but overridden. This was seen in the famous letter by Mr Justice Peter Jackson to a boy following custody decisions and was greatly welcomed by children's rights scholars such as Ton Liefwaard.

Likewise, the language of section 1(3)(a) speaks of 'ascertainable' wishes – the best way to ascertain a child's wishes is through speaking to them directly. Likewise, welfare of a child, which is the paramount consideration, is very well impacted by their views. A court ignoring the child's wishes may in fact harm their welfare, as it in essence takes away any control they have over their lives and tells them their views do not matter. Therefore, involving children, to the extent that they are willing and able to do so, in proceedings would better protect their welfare.

III. Corruption of views:

Finally, there is a concern regarding the possibility of children's views being corrupted by their parents or other factors. For instance, in *Puxty v Moore*, the desire of a 9.5 year old to live with her mother was influenced by the fact her mother had bought her a pony. Likewise, in *Re M* 2006, the views of the children were corrupted by the malignancy of the views with which they have been 'force fed' by the father over many years. The issue of potential parental alienation arises here – a child may be isolated from their parent and 'corrupted' against them. This area of law is still very new, but there is a trend in domestic abuse cases for the opposing side to plead parental alienation, as such judges will need to have increasing regard for such concerns.

I recognise this concern and as such defend Booth J's comments in *Re H* which suggest that where undue parental influence is accepted, we should consider whether 'the influence [has] been so intense as to destroy the capacity to give coherent and consistent instructions'. The strong language of 'destroy' is however a high threshold, perhaps recognising that children may be able to recognise the biased nature of the information they were given by their parents. Additionally, the possibility of corruption in some cases does not mean there should be an automatic undermining of children's views altogether.

Conclusion:

In conclusion, the current approach is promising, but could be further strengthened to meet Lundy's model for 'audience' and 'influence'.

Firstly, in order to strengthen 'audience', the views of the child should ***always*** be taken into account when a decision is made regarding their upbringing. Making the wishes and feelings of the child a mandatory factor on the welfare checklist would better ensure that true audience is given to children's views, moving the law away from mere tokenism to actual rights protection.

Secondly, CAFCASS and social workers should first discuss with children their views and assess the child's maturity and understanding of the case facts, focussing not on their age but on their personal contextual circumstances. Where corruption or influence from the parents is suspected, the courts should apply Booth J's test to see the influence of these views with the help of social workers. The court can then accordingly weigh the child's views into its consideration.

Finally, in making a decision, judges should explain to the child exactly how they came to this conclusion and how their views were considered. This will better increase the influence of children's participation, while still acknowledging that welfare considerations may at times mean the wishes of the child change the decision. This explanation will, if views were overridden, reassure the child that their views were still respected and given dignity. This will give the child a greater sense of autonomy and participation, thus boosting their welfare further. This will allow the court to make fully-informed decisions, factoring in concerns of welfare and 'corruption', while still respecting the rights of the child to be heard.