JUDGES RECEIVING EVIDENCE DIRECT FROM CHILDREN

Robert Benjamin – May 2011

The practice of judges speaking directly with children continues to be debated amongst Australian judges. It is the subject of strongly polarised opinions and views.

Patrick Parkinson and Judy Cashmore, in their article *"Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges"*[1] attribute the continuation of the debate and discussion to the *"two related developments that occurred at about the same time in 2004"*.[2] The first being the changes to the provisions of the *Family Law Rules 2004* (Cth) ("the Rules") which enabled the evidence obtained in interviews with children to be admissible and gave conditions under which such interviews were to be conducted, and the second being the introduction of the Children's Cases Programme (CCP), which began operating as a pilot programme in the Sydney and Parramatta registries of the Family Court of Australia in 2004.

The purpose of this paper is to examine the concept of obtaining children's views directly. There is a misconception between the need to obtain the views of children directly (often as an addendum to other methods of ascertaining those views) and interviewing a child for example by a social scientist for the purpose of a report. The two are fundamentally different concepts or undertakings, and it is the former process towards which this paper is addressed.

It is trite but apposite to remind ourselves that the fundamental objectives of a court in determining parenting proceedings are set out in s60B. The section

[1] International Journal of Law, Policy and the Family, (2007), 21(2) 160-189 at 161.
[2] Ibid.

provides that when dealing with children's issues there is an obligation to ensure that a child's best interests are met by:-

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

In furtherance of those objectives, a court is required to regard the best interests of the child as the paramount consideration. The Act then sets out how a court determines what is in the child's best interests. In s60CC(2) the legislation reiterates and summarises the legislative objectives in ss(2)(a) and (2)(b). These essential and fundamental considerations provide that courts must consider:-

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Invariably in difficult parenting cases, it is the tension between these factors which comprises the dispute.

The section goes on to provide that in determining the child's best interests, a court must to have regard to a child's views, subject to other factors including the child's maturity or level of understanding.

The Act at s60CD provides a number of ways that a court may inform itself of a child's views. The Court may have regard to evidence in the form of a family report[3], it may order the appointment of an Independent Children's Lawyer to represent the child and/or children's interests[4], or it may obtain the child and/or children's views by any other means it considers appropriate, subject to the Rules. Parents are rarely shy in expressing their understanding of the views of their children; teachers and health professionals sometimes provide evidence in this regard.

Notwithstanding these methods, s60CE of the Act provides that a child and/or children cannot be required to express their views in respect of any matter. In addition, s60CC(3)(a) imposes a duty upon a court to have regard to a child's views, subject to other factors including the child's maturity or level of understanding.

Since 1976, Family Court judges have been generally reluctant to see children to ascertain their views.

Why should judges speak directly with children?

The legislative intention of Part VII of the Act is for the Court to make orders that it believes are in the best interests of a child and/or children. Therefore, it is essential that judges have the best evidence available to them when making decisions about where a child and/or children should live. There are many ways in which evidence about a child's views can be obtained, for example, through the child's parents, a report from a family consultant who has spoken with the child, a child's grandparents and school teachers.

Despite this generally comprehensive approach to obtaining information about a child and/or children's views, this is indirect evidence and, for various

[3] Section 62G(2) of *the Family Law Act* 1975 (Cth).
[4] Ibid at section 68L.

reasons, can be unreliable and lacking in probative value. In *Reynolds v Reynolds*[5], Mason J said at 325:-

> *"The probative value of the statements … depends on a comprehensive evaluation of the circumstances in which, and the motives with which, the statements are made. In general their probative value is slight when it is compared with other available means of establishing the wishes and attitudes of a child. …"*

One of the best ways for a judge to obtain information or evidence about children's views is to speak with them directly. It allows judges to hear their views directly, *"without interference or filtering by a third party"*.[6] Evidence presented at a hearing can be flat, colourless and cold. Speaking to children makes the evidence real. In the words of Evatt CJ, Watson SJ and Ellis J, it *"enables the judge to form an impression about the children and their personalities and characteristics"*.[7]

Another benefit is being able to explore possible options for parenting arrangements with the child before the judge makes final orders. Some things seen through the eyes of an adult are not the way they are seen through the eyes of a child.

In furthering this discussion, I have extracted some examples of proceedings where I have seen children or a child directly.

Example 1

In one matter the Court was concerned about parenting arrangements for a group of about five children aged between eight and sixteen, who had been

[5] (1973) 1 ALR at 318 at 325.
[6] Michelle Fernando *"Conversations between judges and children: An argument in favour of judicial conferences in contested children's matters"* (2009) 23 Australian Journal of Family Law 48-70 at 50.
[7] *In the Marriage of Ryan* (1976) FLC 90-144 at 75,706.

involved in litigation for eight years or so. The particular proceeding was their third defended Court hearing.

The father was unrepresented, the mother was legally represented and the children had the benefit of an Independent Children's Lawyer. The views of the elder children were likely to be of significant weight and as such, with the consent of the parties and the Independent Children's Lawyer, I saw all the children as a group and then one at a time. A family consultant had prepared a number of reports and she was also present. She interviewed the children as a group and individually, in my presence, to enable their views to be expressed.

One issue which had attracted my attention and concern was that two of the elder children needed to go to school via two bus rides then a one to two kilometre walk.

I was concerned that this was a burden for the children, and raised it with them, individually. A thirteen/fourteen year old child responded;

> "Mate, are you thinking of changing how I get to school".

I replied:-

> "The thought had crossed my mind, why what do you think"

The child said:-

> "That's the best part of my day, that's when I have got my friends, I do my homework and it is really good, plus I carry a bit of weight and (pointing at my stomach) you know what I mean"

From my perspective, I thought this transport arrangement had been a burden for the children, but for the children it was actually a very good part of their day. By taking this evidence, the Court had a better understanding of the

impact of an order which I had considered would have on the children and as a result I did not change the transport arrangements.

Example 2

Another matter involved two children, a girl aged twelve and a boy aged fourteen, who lived with their father after their mother had become dependent on alcohol. The question was whether the children should be returned to their mother (after living with their father for about eighteen months). The mother asserted that she had overcome or at least managed her alcohol dependence, and that there were some concerns about the father. The parents lived some distance apart and the change of residence would have involved a change of school. A family report was prepared.

I saw the children with the Independent Children's Lawyer and the family consultant. This was to gauge their views in this finely balanced case. During the course of the interview with the younger child, she disclosed to the family consultant and to the Court that her brother had been capturing and torturing birds. That information was not otherwise known and led to further investigation, the impact of which was significant in terms of the eventual outcome.

Example 3

This matter involved an allegation by a parent that the other parent had sexually abused a child over a long period of time. There was a clear issue about whether the allegations were falsely raised by the parent, including whether it was mental illness or mischievous. There was strong evidence that there was no sexual abuse.

The evidence of the experts was that the child would suffer permanent psychological harm if left in the care of the mother given her continuation of

the allegations. Further evidence of the psychologist was that the child would likely suffer significant psychological harm if placed in the full time care of the father.

After some discussions with the Independent Children's Lawyer and counsel for each of the parties, the parties and the Independent Children's Lawyer agreed to an experiment letting the child live with the father for three months (the mother living in Tasmania and the father living in Victoria). The single expert psychologist suggested that the judge inform the child of the putative arrangement to reassure the child that it was a test and not a permanent arrangement.

It was a difficult experience for all involved; the child was reluctant to move and was distraught. However, the child agreed to try three months with his father on the basis that the matter would come back to the Court and a determination would then be made.

The child in fact went to the father for three months and a subsequent family report showed that the child adapted very well. The mother maintained close contact with the child and the allegations of abuse ceased. Eventually, final orders were made that the child live with the father and spend significant and substantial time with the mother.

Example 4

Speaking to a child and/or children in circumstances of urgency, or where no family report is available or justified, is another beneficial way of obtaining direct evidence from children. An example of this is where an application came before the Court in a duty list, in circumstances of a very sick mother (who asserted she was facing death in the relatively near future). The mother wanted to spend time with her thirteen year old son. The child lived with his

father and the mother's previous care of the child had placed the child at risk. The father opposed any contact between the child and the mother.

There was some issue as to whether the mother would be able to survive for more than two or three weeks. The proceedings were stood over for a few days and I saw the child with a family consultant. I saw the child in court and the interaction was recorded. The family consultant interviewed the child in my presence. During the interview the child said that he "just wanted to see his mum". He understood the concerns of his father and showed how he had taken steps to deal with those concerns.

When the matter came back before the Court and evidence was given by the family consultant about what had occurred. The dynamics changed from whether the child would see his mother to how it would occur in a safe and secure way.

The child's evidence and his views were powerful and constructive. It gave light to the family report which was later provided to the parties by way of oral report in evidence by the family consultant.

Another benefit of judges speaking directly with children is that it enables them to update information on the views of the children in circumstances where the information available to the Court may be out of date. By the time a matter comes to trial, the information contained in the family report may be outdated and a judge speaking directly with the children shortly before the trial will allow their updated views to be obtained without the need for a further updated family report to be prepared.[8]

[8] Parkinson and Cashmore op.cit at 176.

A further benefit of judges speaking with children and ascertaining their views is that "*it may also act as a tool for settlement*."[9] Speaking with a child and reporting the child's views to the parties may allow the parties to explore settlement options in a more meaningful way. In the study undertaken by Parkinson and Cashmore, one judge reported on the benefits of speaking to a child on the eve of a trial:-[10]

> "Now, I have thought that the best time to do that is on the afternoon or evening before the last court event starts. So I would give the parties every opportunity to resolve the case and quite often the family report of the expert's report will be the catalyst for settlement. So that it's only a last resort that I'll speak to the children. So we've been through all the process – they've signed all their affidavits, we've had the family report, it's not resolve, I've allocated two days to finish the case and on the evening before I'll see the children and report to the parties. It's another tool, I felt maybe a good tool to help the parties resolve. Also, to be able to tell them on the morning of the first day, "well I saw your children and this is what they told me"".

Another benefit identified as a consequence of judges speaking directly with children is the child's entitlement to be heard. Carefully and thoughtfully involving the children in the process enables the child to have an opportunity to "have a say in what goes on, even if the final decision does not necessarily reflect their views".[11] In noting this it must be made clear to the child that he or she is not being asked to decide between parents, that is a matter for the parents, or if they are unable or unwilling to do so, it is a matter for the Court.

Involving a child and/or children directly in the process can also be seen as a way of showing respect for the child. Those who have been involved appear to be able to better accept and adopt decisions about their living arrangements.

[9] Ibid.
[10] Ibid at 178.
[11] Fernando op.cit at 58.

They are less likely to suffer negative consequences arising from the separation than children who are not invited to participate.[12]

Why are Judges reluctant to obtain direct evidence from children by speaking with them?

Despite the benefits of children directly speaking with judges, this rarely occurs. The reasons for this are varied but one of the main concerns, in regard to this process, is that judges are not trained as counsellors or social workers to speak with children. One judge said:-

> *"To my mind, [the prospect of meeting with a child for a forensic purpose] is just about as scary as handing me a scalpel and saying, "Just a bit of brain surgery before lunch please, Judge". It almost gets into that realm for me. I'm terrified of it."*

Another judge said:-

> *"Some of our court counsellors are just so good at it and not only can they tell you the children have expressed these wishes but they can also give you an insight as to whether those wishes are contaminated … what concerns me, if I'm ever asked to interview children is that I just don't have that skill".*[13]

I am not trained to interview children. The interview is done by an expert who is trained. From my perceptive, what it does enable me to do is see the evidence directly and give the child and/or children a real ability to express their views.

Another concern is the importance of the Court being seen to be facilitating due process and preserving natural justice. When a judge meets with a child and/or

[12] Ibid.
[13] Parkinson and Cashmore op.cit at 167.

children it is in the absence of the parties and their solicitors (albeit in the presence of the family consultant or the expert and the Independent Children's Lawyer). There is concern that this may undermine the parties confidence in the process, and that perhaps it will be viewed as the Court receiving and acting on evidence which is unknown and untested. In the study undertaken by Parkinson and Cashmore (supra), they found that:-

> *"there was a universal acceptance among judges about the fundamental principles of due process, that the parties have a right to know about the basis on which judges are making their decisions and should have the opportunity to lead evidence, conduct cross-examination and make submissions on all matters that might be germane to the judge's final decision".*[14]

A further concern is the possibility of a child making a disclosure during the meeting. My view on this is that it is exactly the same as a disclosure being made to a family consultant; they are obliged to tell the Court. Notice should be given and protection is taken. The difference with a judge having a disclosure made to him or her (in a very rare instance) is that they can immediately take protective steps and collect evidence about the nature of the disclosure, which of course would be on record. It is not a problem; it is a solution.

Another concern is that it may be intimidating or harmful to the child and/or children. In the study undertaken by Parkinson and Cashmore (supra) there was concern that children will be exposed to undue pressure.[15] There is also a risk that a child and/or children may be exposed to greater parental conflict, and feel pressured or coached by one parent to put forward a particular view if they participate in a meeting with a judge.[16] Children may feel as though they

[14] Ibid at 165.
[15] Ibid at 170.
[16] Richard Chisholm *"Children's participation in Family Court Litigation"* (1998) 13 Australian Journal of Family Law 1-22 at 19.

have been placed in a position of compromise between their parents or feel that they are required to take sides in their parent's dispute. Other concerns are that children might try to benefit from the situation that they find themselves in by trying to manipulate the parents who are caring for them.[17]

Undue pressure and coaching by a parent will always be a problem, whether to a family consultant, an expert or to a judge. However, these would be some of the factors that would need to be considered in determining whether, in the particular circumstances, the child would be interviewed in the presence of the judge. It is of course open for the judge to ask questions.

Various Approaches adopted by different Courts

The Courts in the United Kingdom, New Zealand and Canada adopt a similar approach in proceedings involving children, as the Family Court in Australia. These Courts all treat the welfare or best interests of the child as the paramount consideration in parenting proceedings. They also require the Court to take into account the views, wishes, feelings or preferences of the child and/or children. In New Zealand and Scotland, judges frequently meet with children where as in Canada, England and Wales[18] such meetings are rare.

Judges in Germany meet with children as a matter of judicial practice.[19] In Germany, judges have an inquisitorial role and can investigate any matter that they consider relevant, including the appointment of witnesses and the presentation of evidence.

[17] Ibid.
[18] Guidelines have recently been introduced in England and Wales and came into effect in April 2010 to encourage meetings between Judges and children - Family Justice Council, *"Guidelines for Judges Meeting Children who are subject to Family Proceedings"*.
[19] Judge E Carl, *"Conducting Proceedings in Custody and Access Cases before the German Family Court"* (paper presented at the 11th National Family Law Conference, Gold Coast, September 2004.

Pursuant to Article 12 of the UN Convention on the Rights of the Child, a child who is capable of forming his or her own view is "assured the right to express those views freely in all matters involving that child". The child is given the opportunity to be heard either directly of indirectly, or through a representative or appropriate body in proceedings involving the child.

For the purposes of this paper, I examined the approach adopted by the Family Court in New Zealand. The jurisdiction of the Family Court of New Zealand is much broader than our Court. It has jurisdiction over children in both private and public family law matters including adoption. In Australia, these remain under the jurisdiction of each Australian state or territory.[20] Section 6(2) of the *Care of Children Act* 2004 (NZ) *("the Care of Children Act"*) provides that:-

> *"a child must be given reasonable opportunities to express views on matters affecting the child; and any views the child expresses (either directly or through a representative) must be taken into account"*.

This section accords with the wording of Article 12.2 of the United Nations Conventions on the Rights of the Child (UNCRC). There is no equivalent section in our Act and a child's views are just one of many factors that are taken into account by the judge in determining where and with whom a child should live.

In our Courts, the maturity or level of a child's understanding determines how much weight will be given to a child's views.[21] In New Zealand the *Care of Children Act* does not make provision for this, although the Family Court of New Zealand's *"Judges' Guidelines – decisions with children"* recommend

[20] The only exception to this is that the Family Court of Western Australia has the jurisdiction to deal with both private and public family law matter, including adoption, but not child protection matters.
[21] Section 60CC(3) of *the Family Law Act* 1975 (Cth).

that a judge should be guided by the age and maturity of a child, but only with regard to considering whether or not to adopt the guidelines.[22]

There is nothing in the New Zealand legislation setting out the method by which children's views are to be ascertained. However, their views are obtained in a similar way to our Courts by including indirect evidence from parents, teachers and others, through the child's lawyer and by a meeting between the judge and the child.

Rule 54 of the *Family Court Rules 2002* (NZ) makes specific provision for judges to speak with children, including when and where they will ascertain the child's wishes[23]. The Rules also allow a judge to exercise his or her discretion in respect of excluding lawyers or other persons representing a party or a child from the hearing.[24] However, their position in respect of speaking with children is the same as our Courts as there is nothing in the New Zealand Rules which compels a judge to speak with a child.

The Family Court of New Zealand's guidelines to assist the judiciary in respect of speaking with children were approved by, the Principal Judge of the New Zealand Court, P Boshier, in July 2007. The guidelines are:-

> *"intended to outline the procedure and establish recommended standards of Judicial practice to assist the Court in fulfilling its functions pursuant to s6(2)(a) of the Care of Children Act 2004, namely, to enable children to be given reasonable opportunities to express any views on matter affecting them".*[25]

[22] Family Court of New Zealand, *"Judges' Guidelines – decisions with children"* (2007) Guideline 4.
[23] Rule 54(a).
[24] Ibid.
[25] Family Court of New Zealand, *"Judges' Guidelines-decisions with children"* op.cit Guideline 1.

The guidelines set out that a judge will be entitled to expect that the child's lawyer will advise the Court whether or not the judge should meet with the child, whether the child wishes to meet with the judge, the purpose of the meeting and the party's attitude to the meeting.[26]

The guidelines also recommend that if a judge decides not to meet with a child then they should record their reasons for not doing so in their judgement.[27] The guidelines set out where and when the meeting will take place, whether a record is to be taken and how it is to be conveyed to the parties.[28] The guidelines state that the child should be informed, prior to the commencement of the meeting, that a record of the meeting may be taken and conveyed to his or her parents.[29]

The guidelines also recommend that the parties be given an opportunity to respond to the content of the meeting between the judge and the child by oral evidence or submission.[30]

The guidelines recognise that:-

> *"there will be occasions when the welfare and best interest of the child may outweigh the requirements of natural justice so that the content of any meeting between the child and the judge (or any part thereof) shall be kept confidential".*[31]

If a child makes a request for confidentiality, the judge must consider this and decide whether that record (or part of it) will or will not be made available to the parties.[32]

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[26] Ibid Guideline 5.
[27] Ibid Guideline 6.
[28] Ibid Guideline 8.
[29] Ibid Guideline 10.
[30] Ibid Guideline 14.
[31] Ibid Guideline 11.
[32] Ibid Guideline 13.

Whilst providing the judiciary with an *"extremely principled basis"* upon which to meet with children, it is important to note that the guidelines are not statutory rules or practice notes. The extent and manner in which the guidelines, or any of them, are to be implemented by the judge they are discretionary.[33]

My approach to the Process

I believe I have devised a relatively robust structure; however, I am open to revision and adaption of the process.

Either I ask the parties and the Independent Children's Lawyer, or they ask me, whether I should or should not speak with the child and/or children. I am not bound by their views but I am significantly influenced by them. I have to date undertaken the process by consent.

In each case so far, there has been an Independent Children's Lawyer representing the child and/or children. I have not yet seen a child yet without an expert report, and would be reluctant to see a child in the absence of a report.

Before the process starts, the child and/or children must be informed by the Independent Children's Lawyer and their consent is absolutely necessary; they must not or ought not be forced or pushed if they are reluctant. The child and/or children should be briefed in appropriate language beforehand as to the following, that:-

- they do not have to attend;
- they do not have to say anything; and

[33] Ibid Guideline 2.

- the decision is that of the judge, hopefully in collaboration with the parents or the parents in collaboration with the judge or the judge alone. It is not the child's decision.

If I have some questions I know I want to ask the child and/or children I try and raise those with all counsel and/or parties before I see the child.

The child should give evidence in a court environment but not in an intimidating environment. The Court is set up in an informal way. I do not wear a wig or a gown. Normally I will wear a suit, shirt and tie, sometimes without a jacket. If there are a group of children, I will see them initially as a group and then individually.

When the child and/or children come in, I will normally introduce myself (I have reflected recently as to whether I should use name tags). I introduce everybody and normally give the child and/or children a tour of the courtroom. During the tour of the Court, I tell them that I am the decision maker in the process, not them, and I show them that our conversation will be recorded.

I reinforce that by telling the child and/or children that they don't have to be there and if they want to leave they can, that they don't need to speak if they don't want to and that whatever is said will be recorded and a transcript will be available to their parents. I make this clear to them at the commencement of the process.

I also make it clear that I am not asking them to choose between their parents; that decision is mine and mine alone.

Neither the parents, nor their lawyers, are present.

Because the evidence is recorded it may be we all sit around the bar table, or as in one case, we all sat at the bench. We normally sit in a circle and questions are directed to the child by the Independent Children's Lawyer, the psychologist or family consultant (the psychologist or family consultant would simply repeat the material that they had asked the child in their reports and confirm the matters contained therein). The expert interviews the child. The Independent Children's Lawyer could also ask questions requested by counsel for each of the parties. I do ask questions and I invite comment, but I do not interview the child and/or children as such.

Once I have finished hearing the views of the child and/or children and have given them an opportunity to speak to me, they leave. As soon as possible, I reconstitute the Court and the psychologist/counsellor gives evidence of what happened, including whether they thought that the child was being coached.

I generally order a transcript and place it on the file. The parties are provided with a copy of the transcript.

From my point of view the process, if handled well and thoughtfully, is good:-

- There has never been an occasion where I have not received some beneficial evidence or information that has assisted in putting in place arrangements for the child and/or children;
- It is a child-focused process but is seen as part of the curial role and not a therapeutic role;
- To see a child and/or children and hear what they say in the context of questions from the expert/counsellor adds colour and vibrancy to the evidence which you cannot get by simply reading reports or hearing from the experts; and

- It helps in the process of understanding that these are not just names and dates of birth; they are real human beings who are left to deal with the consequences of our orders.

Conclusion

Speaking with children directly to obtain evidence is not interviewing children. It is having access to first hand evidence from children. While I concede the objection by judges that they are not social workers or therapists, there is an exception to this because judges are very good at assessing witnesses and we hear information from counsellors, psychologists and other professionals, and for some children, giving direct evidence may be the best way to have their views heard and considered.

It is not a panacea and is not useful in all cases, but it seems to me to be an effective tool in some parenting cases.