

“Deconstructing the Silence: To what extent do the current divorce procedures in Northern Ireland take account of the voice of the child?”

by David McCarthy

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## Acknowledgements

There are many people whom I would like to thank for their time, effort and contribution to this project. Firstly, I would like to thank those who contributed their experiences and views on the matters central to the dissertation. I would like to thank Mat Crozier, as well as all of those who work for Include Youth, for adding their voice to a complex debate with which they are largely unfamiliar. Mat's comments as to children's experiences added a personable, immediate element to the project that would be missing without his contribution. I would also like to show my appreciation towards Judith Brown who took time out of her busy schedule and through her wealth of experience, supplied a great insight into the day-to-day workings of the divorce process. Further, I would like to thank all those other participants who wished to remain anonymous. Your contribution is well noted and this research would not be complete without your contribution.

A particular acknowledgement must go to all of those involved with the Northern Ireland Youth Forum, and in particular Leighann McConville and Michele Smyth. Your contribution was much appreciated and I hope that any research carried out in the future in this area will include accommodation of the views of NIYF.

I would like to thank all those lecturers involved in helping with the daily problems, with a special mention for Deena Haydon who accommodated room in her research seminar regarding the ethical implications in carrying out research involving vulnerable individuals. This insight was invaluable and probably helped to curb my inattentive desire to include the voice of children at all costs.

To the countless people whom have taken the time to discuss the project and forward their advice, I would like to say that the time and effort was much appreciated.

Particularly, I would like to thank my family for supporting me throughout the whole course, as well as others in the course who took the time to discuss the issues surrounding the debate.

Finally, I would like to express my particular gratitude towards Professor Phil Scraton who supervised the completion of the dissertation. His insight into all areas, be it theoretical, practical or research based, was always of great help. However, I am extremely thankful for his support in encouraging me to undertake an ambitious project I would never have thought possible at the start, especially in relation to the interviewing of such a varied collection of professionals.

## Abstract

This dissertation engages with the current procedures for divorce within the Northern Ireland context and subjects it to investigation from the perspective of the rights of the child, in particular Article 12 of the UNCRC. The dissertation engages with the theoretical construct of “childhood” and how this is developed and implemented in legal discourse. Central to this is the representation of the dependent, incompetent child as being submerged within the confines of the family whereby their voices are silenced and replaced in turn by the voices of the parents. This, it is argued, is particularly pervasive in the case of divorce where the parents, being the central figures under the current procedures, are imprudently expected to represent the views of the child in an impartial and objective manner. This dissertation thus attempts to deconstruct the silencing of the child within the family and advocates a greater role for children within their parent’s divorce. To do so, the dissertation considers both the theoretical and practical perspectives, as advocated through the participants in the research, to come to the conclusion that the legislation in Northern Ireland is in need of radical reform, in particular the procedures relating to the Statement of Arrangements and separate representation, so as to represent the increased recognition of the agency of the child advocated by those working both with and in the profession.

## Chapter One: Introduction

*“Selfishness is not living as one wishes to live, it is asking other people to live as one wishes to live.”*

*Oscar Wilde*

This dissertation will consider whether the current private law procedures for divorce in Northern Ireland give an opportunity for the voice of the child to permeate into the legal process in a distinctive manner. In particular, it will consider the extent to which legal constructions of “childhood”, “the family” and the “welfare of the child” are enforced through the current legal process, and whether these have an impact upon the U.K.’s international obligations under Article 12 of the UNCRC.<sup>1</sup> The dissertation will attempt to answer the question as to what extent the ‘child’s’ rights perspective can be aligned alongside the ‘children’s’ welfare perspective, or rather “how and in what respect the view of children as human subjects, provided with corresponding rights should be combined with the view of children as humans-to-be, primarily in need of development and guidance.”<sup>2</sup> In doing so, it will be important to consider how the various constructions of the “child,” “the family” and the “welfare of the child” have specific implications upon the relationship between these two perspectives, and further, how the law specifically attempts to deal with the various contradictions.

This dissertation is particularly valuable in considering that, in contrast to England, Wales and Scotland,<sup>3</sup> the divorce process and the issues relating to the voice of the

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<sup>1</sup> United Nations Convention on the Rights of the Child (1989) Doc. A/RES/44/25

<sup>2</sup> J. Hemrica and F. Heyting “Tacit Notions of Childhood: An Analysis of discourse about child participation in decision-making regarding arrangements in case of parental divorce”, (2004) 11(4) *Childhood* 449 Pg 460

<sup>3</sup> England and Wales are currently governed by the Family Law Act 1996 whilst Scotland is governed by the Children (Scotland) Act 1995

child are in Northern Ireland currently governed by the Children (Northern Ireland) Order 1995,<sup>4</sup> itself premised upon the now redundant Children Act 1989. As such, it is important to consider whether and to what extent the legislation, its principles and philosophy are able to respond to changing attitudes regarding the competency of children to act fully and independently in stressful circumstances, and further, to what extent parents are able or willing to enable children's views to be incorporated into the process. The issue is one of great importance in view of the changing Northern Ireland social fabric; with divorce becoming an increasingly common occurrence<sup>5</sup> and the number of children affected by its impact growing.<sup>6</sup> In contrast to academic writing already available on the issue of divorce, this dissertation will grapple with the particular implications for children in Northern Ireland, with the contrasting philosophies of the "welfare" based Children Order and increasingly "rights" based legal environment following both the Human Rights Act 1998 and the U.K.'s ratification of the UNCRC in particular.

The issues that this dissertation will explore are; whether children are viewed as competent participants in the court process and how this effects upon the law relating to divorce, whether procedures afford children the opportunity of participation in practice, to what extent has Article 12 of the UNCRC has encouraged the inclusion of children and whether legislative reform is needed to reflect a changing conception of children. To address these issues the dissertation will be structured to consider the main themes regarding "Childhood" and the "Family" and their implications for

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<sup>4</sup> Herein called the "Children's Order"

<sup>5</sup> See <http://www.divorceuk.com/pages/keyissues/divrates.php> where it states that the number of divorces in Northern Ireland "recorded in 1998 has risen by 59 per cent on the number recorded 10 years earlier in 1988."

<sup>6</sup> According to the Northern Ireland Court Service *Children's Order Quarterly Bulletin: January – March 2006* available at: [http://www.courtsni.gov.uk/NR/rdonlyres/F90DBCE1-2B24-45A6-A87E-931A21FAB2AC/0/p\\_tp\\_ChildrensOrderBulletinJan2006\\_Mar2006Prov.pdf](http://www.courtsni.gov.uk/NR/rdonlyres/F90DBCE1-2B24-45A6-A87E-931A21FAB2AC/0/p_tp_ChildrensOrderBulletinJan2006_Mar2006Prov.pdf) accessed on 2nd August 2006 there were 1245 private law divorce applications dealt with in the period January-March 2006.

individual children followed by a reflection as to how these themes implement upon the legislative framework. Chapter Two will therefore consider how theoretical constructions of “childhood” and the “family” impact upon the individual child. Chapter Three relates these theoretical constructions, based upon sociological studies and psychological theories, to the principles upon which the Children Order and its related legislation are founded and explores the implications in practice. Chapter Four will then discuss problems relating to the constructions of the child contained within the current divorce process and how, in light of the child’s rights under Article 12 UNCRC, these impact upon the voice of the child. Chapter Five will represent my chosen research methodology followed by Chapter Six which will explore the results of my research indicating what professionals working with children at various levels of the profession consider are the implications for children of the current law surrounding divorce and possible avenues of reform. This research is drawn a variety of social work and legal professionals whom regularly work with and have experience representing the views of children. It shall consist of semi-structured interviews, indicating the qualitative problems faced by these professionals in practice. Chapter Seven will then forward recommendations based upon both the theoretical and practical perspectives regarding the adequacy of the current procedures and the possibility of reform.

The focus of this dissertation is to find the locus of that which prevents the voice of the ‘competent’ child being heard within the current legal process. Thus, throughout this dissertation there will be an implied focus upon the right of participation for adolescents, though this dissertation does not necessarily confine its findings to adolescents. This implied focus is due to the recognition that, according to scientific

research,<sup>7</sup> adolescents are generally more capable to competently deal with the complex problems faced in adversarial court proceedings. This is not to diminish the value of looking at further processes to include generally younger, less competent children, as without a doubt this is an essential future development, but that topic is itself worth a greater discussion than I could give credit due to word constraints.

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<sup>7</sup> See M. Rutter & M. Rutter *Developing minds: challenge and continuity across the life span*, (New York: Basic Books, 1993). Pg 197 quoted in J. Fortin (ed.) *Children's Rights and the Developing Law, Second Edition* (London: LexisNexis UK, 2003). Pg 72

## Chapter Two: “Childhood”

*“[The] structural relation between children and adults is characterised by the institutional dependence of the former on the latter . . . believed to be an essential social arrangement . . . The relation of dependence is thus naturalised and its invariability presented as entirely benign.”<sup>8</sup>*

In beginning to comprehend the formation of the current legal process, it is important to reflect upon by what standard the capabilities of the child are to be judged; that of “childhood.” Childhood is to be understood as a centring concept, by which a formulation as to what is to be understood as the “child” is invoked, and it is by this standard that the actions of all children are to be evaluated. Thus, childhood as a concept, a model, a *construction* “provides an interpretive frame for contextualizing the early years of human life.”<sup>9</sup> However, the relationship between “childhood” and physical immaturity is not as strong as it may at first seem. Childhood has greater implications for children that extend beyond what their corporeal incapacity would indicate. Childhood is expressed as determinative of the behaviour, the capabilities and the expectations of the individual children, all of which represent the persona of the child; detached from their biological capacity. As a result, “although the biological process involved in maturation and aging are real, the pattern and meaning of these changes is structured and mediated by society.”<sup>10</sup> Rather than accepting the “naturalised” state of childhood as one of biological determinacy, James and James

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<sup>8</sup> B. Goldson , “‘Childhood’: An Introduction to Historical and Theoretical Analyses” in P. Scraton *Childhood in ‘Crisis’?*, (London: UCL Press, 1997) Pg 17 & 18

<sup>9</sup> J. Morss “The several social constructions of James, Jenks, and Prout: A contribution to the sociological theorization of childhood”, (2002) 10 *The International Journal of Children’s Rights* Pg 43

<sup>10</sup> N. Thomas *Children, family and the state: Decision-making and child participation*, (Bristol: The Policy Press, 2000) Pg 16

contest this state of nature by arguing that “childhood” is itself socially constructed. Building on the work of Aries,<sup>11</sup> they propose that “childhood” has not remained a societal constant but “must be seen as a particular cultural phrasing of the early part of the life course, historically and politically contingent and subject to change,”<sup>12</sup> revealing a “variety of childhoods rather than a single and universal phenomenon.”<sup>13</sup> Instead of accepting childhood as an organic biological period of human development, childhood is to be understood as a contextual construction, dependant upon the historical, cultural, political, social and economic circumstance for meaning and significance. There are no intrinsic features of “childhood”; no common thread of identity, no universal experience nor homogenous action. It is naturalized in a common-sense routinization of ‘childhood’ as fulfilling an intrinsic stage of life, not just that of biological development, but also societal expectations.

So how is ‘childhood’ constructed, by what (and by whom?) does it attain its meaning? The framework by which childhood has been constructed is as relative to ‘Adulthood.’ Adulthood is represented through rationality, experience, awareness of societal expectations; childhood is thus erected as that which does not imbue these qualities. With childhood defined as that which it is not, “childhood is an apprenticeship; adulthood as its logical conclusion.”<sup>14</sup> It is thus defined as a passive, innocent transitional ‘stage’ of life before reaching parity with, or rather through, the transition to the period of adulthood. Exploiting the power dynamics between children

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<sup>11</sup> This is widely recognised as the seminal piece in the recognition of childhood as a construction see A. James & L. James *Constructing Childhood: Theory, Policy and Social Practice*, (Basingstoke: Palgrave Macmillan, 2004) and P. Scraton *Childhood in ‘Crisis’?*, (London: UCL Press, 1997) but has been open to criticism. See Scraton Pg 3 for accounts as to critics of Aries.

<sup>12</sup> A. James & L. James *Constructing Childhood: Theory, Policy and Social Practice*, (Basingstoke: Palgrave Macmillan, 2004). Pg 13

<sup>13</sup> Ibid Pg 3

<sup>14</sup> E. Heinze *Of Innocence and Autonomy: Children, Sex and Human Autonomy*, (Aldershot: Ashgate, 2000) Pg 6

and adults, characterised by the dependency of the former upon the latter, it is adults who define that which is to be understood as childhood.

This inferiority is further “legitimated, reinforced and reproduced through professional discourses”<sup>15</sup> in which children’s difference and dependence has been entrenched by science with reference to the child’s teleological development.

Psychologists have recognised the inferior cognitive reasoning available to children which “is dependent on the emergence of specific metacognitive skills which are simply not available to young children.”<sup>16</sup> Sociology has further ingrained the inferiority of the child in relation to decision-making with reference to their inexperience and lack of awareness of “conventional moral values with which fully fledged members of the culture make judgments about right and wrong.”<sup>17</sup> Science has naturalised inferiority whilst, at the same time, proclaiming the values as to what is a ‘good’, a ‘safe’, a ‘balanced’ progression through ‘childhood’; a process, not a person; a means rather than an end in itself.

‘Childhood’ is thus used to normalize the behaviour of individual children, with the reflexivity of individual children existing within the context of their own lives, their own identity of “self” and “truth”, being subsumed within the homogenous construction of the child. In subsuming individual experience, understood as alternative subjective ‘truths’ as to what is to be a ‘child,’ within the construction of childhood there is “no distinction between ‘children’ as individual beings and

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<sup>15</sup> D. Haydon & P. Scraton “‘Condemn a Little More, Understand a Little Less’: The political context and rights implications of the domestic and European rulings in the Venebales-Thompson case”, (2000) *27 Journal of Law and Society* Pg 448

<sup>16</sup> M. Rutter & M. Rutter *Developing minds: challenge and continuity across the life span*, (New York: Basic Books, 1993) Pg 197 Further see J. Coleman & L. Hendry *The nature of adolescence*, Third Edition, (New York: Routledge, 1999) Pg 43-48 in relation to moral reasoning

<sup>17</sup> N. Lee *Childhood and Society: Growing up in an age of uncertainty*, (Buckingham: Open University Press, 2001) Pg 39

‘childhood’ as a historically and culturally shifting set of ideas,”<sup>18</sup> with “such a formulation not only dismiss[ing] children’s uniqueness but also, by collectivising children in this way, reduc[ing] their significance as agents with individual contributions to make.”<sup>19</sup> Whilst the child is not denied agency per se, “the standardised child emerges as the measure against which all children must be measured,”<sup>20</sup> and so “socio-historical practices of oppression and inferiority are naturalized and come to establish universal parameters of human subjectivity”<sup>21</sup> “within which particular kinds of agency are permitted to flourish while others are treated with more circumspection.”<sup>22</sup> Whilst those who subscribe to the perceived experience of childhood are able to express their agency within this context, “for those who transgress, *otherness* lies ahead in new forms of subjectivity.”<sup>23</sup> The significance of “otherness” in this context is that the ‘other’ is “the incidental, the inessential.”<sup>24</sup> As such, children’s experiences become “meaningful only in relation to adult values . . . (therefore) . . . obscur[ing] the experiences of young people by relegating them to a less significant realm than those who have reached ‘adult’ life.”<sup>25</sup>

It is here that childhood as an interpretive frame can be manipulated by adults to normalise certain mode of behaviour. In defining the normalised expectations of ‘childhood,’ recognition of children in certain contexts and discourses can be refined, with three context-specific images permeating into policy decisions. These images are

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<sup>18</sup> SD. Sclater & C. Piper “Social Exclusion and the Welfare of the Child”, (2001) 28(3) *Journal of Law and Society* 409 Pg 419

<sup>19</sup> A. James & L. James, op. cit., Pg 15

<sup>20</sup> Ibid Pg 136

<sup>21</sup> L.R. De Castro “Otherness in me, otherness in others: Children’s and youth’s constructions of self and other”, (2004) 11(4) *Childhood* Pg 471

<sup>22</sup> Ibid Pg 26

<sup>23</sup> J. Allan & J. L’Anson “Children’s Rights in school: Power, assemblies and assemblages”, (2004) 12 *IJCR* Pg 129

<sup>24</sup> S. De Beauvoir *The Second Sex*, (London: Vintage, 1997) Pg 16 and further comprehended through the reading of R. Tong *Feminist Thought: A more comprehensive introduction*, Second Edition (London; Boulder, Co: Westview Press, 1998)

<sup>25</sup> Wyn “Youth and Citizenship” (1995) 2 *Melbourne Studies in Education* Pg 52 quoted J. Mason & T. Fattore *Children taken seriously: in theory, policy and practice*, (London: Jessica Kingsley, 2005) Pg 140

children as a threat, children as victims and children as investments.<sup>26</sup> The child as threat is seen as a deviant, a harm to other children, families, communities, with the protection of society overriding any claims on the child's behalf; "it becomes a matter of protection *from* children rather than protection *of* children."<sup>27</sup> The child as victim constructs childhood as a time of absolute dependence, as "a protected time when children are to be allowed to enjoy their childhood before having to face the trials, tribulations and responsibilities of adulthood."<sup>28</sup> The child as an investment permits adults to overlook the child in the present in pursuit of the future child; not only for their own good but for that of society as a whole. This image further perpetuates the importance of the other constructions as the 'harmful child' or the 'child of harm' are deemed to grow up to be adults of concern in the future. Within different contexts the separate images of childhood can be used to normalise behaviour along societal expectations, enforcing the position that "difference risks reconstruction as deviance."<sup>29</sup>

### Role of the family

The importance of 'family' as a predominant discourse in the development of normalized children is thus brought to the fore. Discourse is the process whereby social practices, which whilst representing the heterogeneous establishment are in themselves simultaneously being constantly redefined, are legitimized and applied to influence others into following an implicit code of behaviour. This is understood to

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<sup>26</sup> See A. Skevik "Children of the Welfare State: Individuals with Entitlements, or Hidden in the Family?", (2003) 32(3) *Journal of Social Policy* Pg 426

<sup>27</sup> Ibid Pg 426

<sup>28</sup> W. Rogers "Constructing Childhood, Constructing Child Concern" in P.Foley, J. Roche and S. Tucker (ed) "*Children in Society: Contemporary Theory, Policy and Practice*, (Palgrave: Open University Press, 2001) Pg 29

<sup>29</sup> A. James & L. James, op. cit., Pg 136

represent an “anonymous, impersonal, intention-free chain of linguistic events.”<sup>30</sup>

Discourse is thus used to normalise behaviour within networks of communication and inter-dependence, which for children is predominantly within the family. The key to the fulfilment of this normalisation can be found in the theoretical model of dominance recognised by Foucault. According to Foucault,<sup>31</sup> hierarchical relations between individuals and institutions are formed by two interrelated factors; power and knowledge. This relationship between power and knowledge is self-serving in that the exercise of power will produce the emergence of knowledge. Knowledge is then reinforced through the application of power creating a regime of ‘truth’; that which may not be debased until a ‘truth’ of greater legitimacy emerges. It is this power relationship that can be evidenced within the hierarchical arrangement of the family. Within the family, the ‘truth’ as to social order is naturalized through biological ties and informed by “experience: in that all our knowledge is founded, and from that it ultimately drives itself.”<sup>32</sup> It is through the creation and preservation of the ‘truth’ through “[t]he classical tree of knowledge – systematic, hierarchical, grounded” that adults set the agenda “ . . . so that its cultivators can scrutinize its fruit, fuss over its pruning and worry about it’s felling.”<sup>33</sup> By recognising and reinforcing the subjugation of children through the primacy of their biological dependence, such power relations are embedded into the social fabric of the child’s experience and are thus accepted by the child, or rather their own ‘truth’ is reconceptualised to fit in conformity with the prevailing social practice so as to be legitimised. This is

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<sup>30</sup> Teubner “How the law thinks: Towards a constructivist epistemology of law” (1989) 23 *Law and Society Rev.* Pg 728-757 quoted M. King “Child Welfare Within Law: The Emergence of a Hybrid Discourse”, (1991) 18(3) *Journal of Law and Society* 303 Pg 304

<sup>31</sup> M. Foucault *The Archaeology of Knowledge*, (London, New York: Routledge, 1989) and further comprehended through the reading of L. McNay *Foucault: a critical introduction*, (Cambridge: Polity Press in association with Blackwell Publishers, 1994)

<sup>32</sup> J. Locke *Essay Concerning Human Understanding*, (Book 2, 1689) Chap 1 Section 2

<sup>33</sup> D. Gregory, *Geographical imaginations* (Oxford: Blackwell 1994). quoted in J. Allan & J. L’Anson “Children’s Rights in school: Power, assemblies and assemblages”, (2004) 12 *IJCR* Pg 126

particularly pervasive as according to Hart,<sup>34</sup> the normalizing behaviour is taken to ‘the internal point of view,’ a societal standard by which behavior is considered and proposed as what ‘ought to be.’ By internalizing the rules, there is a critical reflection that the behaviour is not only as it is, but that it *should be*. The family thus becomes naturalized, with practices surrounding the child’s biological dependency advocating the ‘truth,’ legitimizing the inferiority of children and their silence in, and through, the family.

The family is particularly pervasive as a socialising tool due to certain inherent characteristics. According to Schaffer, “Families are ideally suited for the bringing up of children. They are small, intimate groups, making it easy for children to acquire consistent rules of behaviour; they are linked to various outside settings . . . to which children can gradually be introduced; and they are usually composed of individuals deeply committed to the child whose security and care can therefore be guaranteed. The family is thus the basic unit within which the child is introduced to social living.”<sup>35</sup> This quote helps to emphasise two key attributes of the family that ensure the subservience of children to accommodate socialisation within the family. Firstly, the construction of the rational, loving parent, protecting the best interests of the child over all other causes, legitimises the state’s choice to leave decisions regarding the child to the family. In abdicating responsibility, the function of the family is placed firmly within the private sphere, beyond state interference. For the state, this has the benefit that children will not require the provision of state resources relating to their upbringing. The state grants upon adults ‘parental authority’, a concept “that results from a historical and cultural development in which children have primarily been

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<sup>34</sup> See H. Hart *The Concept of Law*, (Oxford: Clarendon Press, 1961)

<sup>35</sup> H Schaffer *Making Decisions about Children - Psychological questions and answers*, (Oxford, Blackwell, 1990) quoted in J. Herring *Family Law*, Second Edition (Harlow: Pearson Longman, 2004) Pg 8

considered part of a family and in that respect their parents ‘property’<sup>36</sup> which allows the parent to act in the child’s ‘best interests’, even if the child disagrees with the parent’s perception of such. However, “by choosing not to intrude, the law has permitted the existing power structure to be reinforced . . . (this) decision not to intervene should not be seen in a neutral light, but as a decision to accept the status quo,”<sup>37</sup> thus ensuring children remain as dependants, inferior both physically and structurally, within the family.

Secondly, the function of the family itself is premised around the nurturing, care and socialisation of the child into normal society. It is this normalisation of childhood which is “the raison d’être for family life, the ‘project’ around which families cohere.”<sup>38</sup> This image of childhood thus relates to the child as an investment, with their future societal and self worth dependant upon the successful transition through the family, based upon social practice related to the experience of parents and society alike. Therefore, the family, relationships and childhood itself are to be regarded as a means to an end rather than an end in itself. This focus upon the child as an investment, with the past experience of adults as the benchmark as to a successful completion of childhood, serves to silence the child within the family as “Although a preoccupation with the future is often favourably contrasted with a preoccupation with the past, the reality is that both represent an attempt to escape the present.”<sup>39</sup> This results in the loss of a present identity of the child; they are treasures of the future and images of the past but remain passive recipients of social practices, not

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<sup>36</sup> J. Hemrica & F. Heyting “Tacit Notions of Childhood: An Analysis of discourse about child participation in decision-making regarding arrangements in case of parental divorce”, (2004) 11(4) *Childhood* Pg 464

<sup>37</sup> J. Herring, op. cit., Pg 15

<sup>38</sup> C. Smart, B. Neale, and A. Wade, *The Changing Experience of Childhood: Families and Divorce*, (Cambridge: Polity Press, 2001) Pg 10

<sup>39</sup> H. Reece “The Paramountcy Principle: Consensus or Construct?”, (1996) 49 *Current Legal Problems* Pg 280

cultivators of their own. This loss is undermined through the construction of the family as the “basic unit,” as a homogeneous body, with parents as their figureheads and children as their apprentices, which serves to naturalise this arrangement, therefore ensuring that the agenda of the family is not to be challenged.

In summary, by defining the child as ‘other’ and by normalizing that which is understood to be a “child”, particularly through the use of science, adults exert great control over constructions of the child and the effects of rebellion by children. This normalisation is context specific, with adults regulating the defining characteristics of childhood within different environments. This process of normalisation is particularly pervasive within a family, a naturalised construct premised upon the relationship of power and control of adults over children; this allows adults to act as children’s representatives as *they know what is best for the child for, of course, they are their parents and the children are their’s*. It is upon this contention that I will relate the constructions of the child and the family to the current law regarding divorce and advocate a new role for children within the conception of divorce.

### Chapter Three: Policy and Law – How theory is constructed into law

According to Herring, “Family Law is usually seen as the law governing the *relationships between children and parents*, and between adults in close emotional relationships.”<sup>40</sup> Eekelaar<sup>41</sup> has suggested that the policy behind the law regarding the family has three elements. Firstly, it generates a framework of protection to ensure that, as far as possible, members of the family are not to suffer physical, mental or emotional harm. Secondly, it fulfils an adjustive function in that it helps families realign to life apart from other members of the family. Finally, it provides a means of support for families and, through its practices, encourages continued developing relationships between members of the family.

It must then be considered how does the law relate to these policy objectives and in particular how does law deal with the “Family”, the “Child” and its “Best Interests”? The unique problem concerning divorce relates to the changing role of law as the arbitrator of blame between two parties towards the desire to minimize harm between all parties. This is especially difficult for the court as it is called upon to make ‘person-orientated’ rather than ‘act-orientated’ determinations to fulfill its role. In this capacity, the court is to aptly balance the “attitudes, capacities and shortcomings”<sup>42</sup> of the prevailing actors, environments and future events. This causes great problems evidentially for the courts as there are no theories of human behaviour that can reliably predict future conduct, development nor harm. This is particularly true in cases of divorce where, due to the silencing of childhood through the family, the “law

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<sup>40</sup> J. Herring *Family Law*, Second Edition (Harlow: Pearson Longman, 2004) Pg 10 Emphasis added Whilst this may extend to relationships beyond that of the nuclear family, such as grandparents of aunts or uncles, for the purposes of divorce, the constituent relationships are that between parents and between the parent and their child.

<sup>41</sup> Ibid Pg 11 discussion on this work

<sup>42</sup> A. Diduck & F. Kaganas *Family law, gender and the state: text, cases and materials*, (Oxford: Hart, 1999) Pg 266

(only) ‘knows’ children through the parent or parents.”<sup>43</sup> In this instance, the court is often unable to gain independent, qualitative evidence to indicate the behavioral patterns of the child. Thus, to overcome these determinative and evidential difficulties, “we seek to manage social change by encouraging our ‘experts’ to establish control – by creating theories and practices that put those anxieties at one step removed.”<sup>44</sup>

It is upon this conception that Autopoietic theory is based. In this way, the “law classifies people and disputes in particular ways (‘a mother’; ‘a father’; ‘a contact dispute’; ‘a child abuse case’), applies the legal rules to it, and produces the appropriate legal response.”<sup>45</sup> In light of the indeterminacy of the options available and in considering the lack of evidence, the law reverts to judgments of past actions in the binary nature of right and wrong, rather than conceptions regarding the future. To appeal to past actions rather than prediction of future events, the law “must reduce the complexities of the modern world to manageable proportions by imposing simple (and simplistic) concepts . . . (of) *culpable and innocent conduct*.”<sup>46</sup> In this way, the law is able to reconstruct past events within its own legal discourse, and thus justify future implications based upon past events and assumptions leading from these events. This “proceduralization of truth”<sup>47</sup> allows the law to construct its own truth, through its own unique procedures, and ensure “the resolution of disputes and reinforcement of social values through the identification of the ‘rights’ and ‘wrongs’ in any given situation.”<sup>48</sup> This ‘thinking’ is not to be found in the cognitive process of

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<sup>43</sup> M. King & C. Piper *How the Law thinks about Children*, (Aldershot: Gower, 1990) Pg 48

<sup>44</sup> SD. Sclater & C. Piper “Social Exclusion and the Welfare of the Child”, (2001) 28(3) *Journal of Law and Society* Pgs 422-423

<sup>45</sup> Herring, op. cit., Pg 17

<sup>46</sup> King and Piper, op. cit., Pg 26 emphasis added

<sup>47</sup> See M. King “Child Welfare Within Law: The Emergence of a Hybrid Discourse”, (1991) 18(3) *Journal of Law and Society* Pg 304

<sup>48</sup> King and Piper, op. cit., Pg 69

the individual on the psychic level, be they judiciary or lawyers, but in the meta-narrative of the legal system itself; a societal construct engaging with the constructions of real people dealing with them in an abstract manner. These constructions are taken as granted by legal professionals as the yardstick of behaviour; the 'reasonable (wo)man', the 'best interests of the child', the 'guilty party.' These constructs thus become "“role-bundles, character masks, internal products of legal communications' existing only in the 'autopoietic reproduction of the social life of law in which human actors are not elements but constructed realities.”"<sup>49</sup>

It is in this sense that the law's relationship with other discourses, especially science, comes to the fore. Within separate discourses, contexts and language, the same situations can be engaged with differently. This is particularly important in relation to 'truths' as they are discourse specific. The implication for this is that "“Other communities using different criteria may validly reject this particular version of reality.”"<sup>50</sup> Therefore, when information is adopted from a different discourse and constituted within the legal language it may not retain its original attributes; the information is "“constituted anew”"<sup>51</sup> within the legal discourse. This is particularly prevalent in relation to behavioural sciences where the law, in attempting to deal with people rather than past actions, relies upon social and psychological "“truths”" to ensure their legitimacy.

This results in the emergence of a "“Hybrid Discourse.”"<sup>52</sup> Acceptance of social science thus reflects an attempt upon the law's behalf of bringing it closer to "“social reality.”" This allows the law to legitimize its actions in that by relying upon science to

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<sup>49</sup> G. Teubner "How the law thinks: Towards a constructivist epistemology of law" (1989) 23 *Law and Society Rev* partially quoted in King, op. cit., Pg 305

<sup>50</sup> King and Piper, op. cit., Pg 20

<sup>51</sup> King, op. cit., Pg 19

<sup>52</sup> See King, op. cit., and further J. Dewar "The Normal Chaos of Family Law", (1998) 61(4) *MLR* 467 for discussion

predicate future results, justice appears to be done. However, the law's relationship with social science goes beyond simple acceptance of what it believes are the truths of the situation. The law can only reconstruct patterns of behaviour that fit in with its own legal language, thus, "Even basic social concepts, such as 'child' or 'parent', are redefined by the law and thus given a legal meaning." This allows legal discourse to reconstruct social science in an authoritative manner, with predominant behaviour patterns taken as 'normal.' As a result "law's constructions adapt and respond to prevailing social, political and economic conditions and, in turn, are implicated in policy . . . *designed to promote and entrench those constructions.*"<sup>53</sup> However, such a policy is neither "merge[d] into a multidimensional super-discourse, nor does it imply that information is 'exchanged' among them. Rather, information is constituted anew in each discourse."<sup>54</sup> By entrenching and differentiating the legal policy's independence from sociological developments, when social science reveals a flaw in its findings, the legal construct need not adapt. To adopt a reconstructed sociological truth, the communication must undergo the procedures by which law constitutes valid knowledge and once again be reconstructed into a legal communication. This has led Teubner to comment that "What happens to constructs once they enter the legal scene is no longer in the hands of the social science."<sup>55</sup>

This is particularly insidious when you consider the contrasting roles of sociology and law. Sociology, and science generally, is controversial by nature in the sense that it is predicated on subjecting what is normalised to 'objective' criteria so as to reveal inconsistencies. However, law's authority rests upon the legal practitioner's ability to reinforce common-sense values that reinforce the current power structure within

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<sup>53</sup> F. Kaganas and A. Diduck "Incomplete Citizens: Changing Images of Post-Separation Children", (2004) 67(6) *MLR* Pg 959 Emphasis added

<sup>54</sup> Teubner *op. cit.* quoted in King and Piper, *op. cit.*, Pg 29

<sup>55</sup> Quoted in King and Piper, *op. cit.*, Pg 29

society. As a result, when scientific knowledge is accepted by the law as ‘common-sense’, understood as a normalised account of reality, “it is treated as knowledge which is able to legitimate and give weight to law’s normative accounts of reality and to decisions based on these accounts.”<sup>56</sup> Thus, “Law, as a discourse, is not interested in consequences, but in maintaining expectations that certain consequences will occur . . . regardless of and often in contradiction to any existing empirical evidence.”<sup>57</sup>

### The Law

The law regarding divorce is premised upon the basis that “When marriages cannot be saved, government should ensure that the divorce process does not make it worse.”<sup>58</sup> This sets the tone of the law regarding divorce, that as one of non-intervention with recognition that “The child’s need for safety within the confines of the family must be met by law through its recognition of family privacy as the barrier to state intrusion upon parental autonomy in childrearing.”<sup>59</sup> This distinction is based upon the premise that “In the public sector, people are presumed to be self-sufficient and able to look after themselves, whereas in the private arena the law stresses mutual co-operation and dependency.”<sup>60</sup> The key to the exercise of recognition of the public/private dichotomy is thus the extent to which the individual is understood to determine their own agency and the extent to which they are understood to be autonomous. Thus, the recognition of the autonomy of the family must not be seen as an impartial one, rather “by choosing not to intrude, the law has permitted the existing

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<sup>56</sup> King and Piper, op. cit., Pg 37

<sup>57</sup> King, op. cit., Pg 309

<sup>58</sup> s. 4.41 Home Office *Supporting Families: A Consultation Document*, (London: The Stationery Office, 1998)

<sup>59</sup> J. Goldstein, A. Freud and A. Solnit *Before the Best Interests of the Child*, (New York: Free Press, 1979) Pg 9

<sup>60</sup> Herring, op. cit., Pg 15

power structure to be reinforced . . . So a decision not to intervene should not be seen in a neutral light, but as a decision to accept the status quo.”<sup>61</sup> This is important as instead of seeing the issue as a private matter, the law could instead recognise it as one with public consequences. This could be recognised if the “State authority intervenes officially in contracts between spouses only because *it represents the child, which is the single social object of marriage*. The commitment formed between three cannot therefore be broken by two to the detriment of a third party, since this third party is, in any case the most important.”<sup>62</sup> Such an intervention should not be seen as failure to appreciate the family per se but recognition of the law’s attempt to reconcile the claims and influences within. In failing to do so, “Law’s silence did not, and does not, mean an absence of power: it meant, and means, the absence of a *mechanism to challenge power*.”<sup>63</sup> The law thus seeks to restrict its terms of engagement to the recognition of valid self-regulatory systems of communication, such as the family, whereby issues are decided according to current, internal power structures, rather than seeking to regulate the outcome of the issues itself. This has the consequence that “victory for the family might mean defeat for its most vulnerable members – historically women and children.”<sup>64</sup>

The recent law regarding the role of the state in divorce recognised the power dynamics of the family as being antithetical to the resolution of complex issues regarding its constitutive members. Art. 44 Matrimonial Causes (Northern Ireland) Order 1978 required the writing of a social worker’s report in every divorce case involving children in Northern Ireland. The purpose of this was to ensure that the state

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<sup>61</sup> Ibid Pg 15

<sup>62</sup> De Bonald quoted in G. Poussin & E. Martin-Lebrun “A French Study of Children’s Self-Esteem after Parental Separation”, (2002) 16 *International Journal of Law, Policy and the Family* Pg 313  
Emphasis added

<sup>63</sup> Roche writing in J. Brannen & M. O’Brien *Children in Families: Research and Policy*, (London: Falmer Press, 1996) Pg 35

<sup>64</sup> Ibid Pg 30

could assure that the children's wishes and feelings had been taken into consideration before decisions affecting their lives were determined. This report would incorporate the views of the child, with the expectation it would make a valuable contribution to the decision making process faced by the judge.<sup>65</sup> Although the court need not follow the report's conclusions, the provision of additional evidence was to be seen of great benefit to the judge, who had little evidence otherwise to represent the views of the child.

However, when the Children (Northern Ireland) Order 1995<sup>66</sup> was introduced, the obligation to automatically generate a welfare report was terminated and replaced, under Article 44 of schedule 9, by a redefined test whereby the court must only consider the arrangements made for the children and to determine whether it should exercise its powers under the Children Order with respect to the children. This change was made to accommodate the non-interventionist spirit contained in the Children Order, most notably Article 3(5) regarding the no-order principle, thus bringing Northern Ireland's procedures in line with those used in England and Wales.<sup>67</sup> This change was largely welcomed by practitioners within Northern Ireland as it took on average 12/14 weeks for the production of a Welfare report,<sup>68</sup> with reports often considered "to be a rubber-stamping exercise with no purpose,"<sup>69</sup> resulting in ceremonial reports lacking in detail or investigatory qualities.

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<sup>65</sup> See *Re P (A minor)(Inadequate welfare report)* [1996] 2 FCR 285

<sup>66</sup> Herein after called the "Children Order"

<sup>67</sup> In practice, they were only ordered in 49% of cases Bailey-Harris (1999b) Pg 58

<sup>68</sup> See Children Order Advisory Committee (2004) Pg 39 This length of time would be seen as exceptional in England and Wales; see R., Bailey-Harris, J. Barron and J. Pearce "Settlement Culture and the Use of the "No Order" Principle under the Children Act 1989", (1999) 11 *Child and Family Law Quarterly* Pg 58 Only in 13% of cases did the report take over 3 months

<sup>69</sup> C. Archbold, C. White, P. McKee, L. Spence, B. Murtagh and M. McWilliams *Divorce in Northern Ireland: Unravelling the System*, (HMSO: The Stationery Office Ltd., 1999) Pg 175

In its place, the court required the petitioner to fill out a Form M4 “Statement of Arrangements”<sup>70</sup> which set out the circumstances of the arrangements regarding the child’s residence and custody. This procedure had two purposes, “firstly, (it) will ensure that the parents themselves have given full consideration to the question of their children’s future welfare, and secondly, will enable the control of the court over the welfare of the children to be made more effective.”<sup>71</sup> Thus, the process granted the parents an opportunity to focus upon their child’s welfare, whilst the court retained an opportunity to consider the arrangements for children before granting the decree absolute. The process allows for the respondent to co-sign the Statement of Arrangements, but when they do not wish to do so they may either adduce their own wishes as to the arrangements<sup>72</sup> or decide not to file their views at all. However, the parental role in the decision-making process is emphasised through consideration of the no-order principle under Article 3(5) Children Order by which “Where a court is considering whether or not to make one or more orders . . . it *shall not make the order . . . unless it considers that doing so would be better for the child than making no order at all.*”<sup>73</sup> In cases where there is no conflict as to the arrangements, and with only the parent’s own Statement of Arrangements, the court proceeds upon the assumption that “Parents may be trusted, in most cases, to plan what is best for their children’s futures, and that, where they are in agreement on this, it is unnecessary and potentially damaging for the state, in the guise of the court, to intervene.”<sup>74</sup> Indeed, this assumption is so strong that it has led the Law Commission to direct that “the

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<sup>70</sup> Family Proceedings Rules (Northern Ireland) 1996 r. 2.3(2)

<sup>71</sup> Quoted from the Royal Commission on Marriage and Divorce Cmd 9678 (1956) Para 372 in G. Douglas, M. Murch, L. Scanlan and A. Perry “Safeguarding children’s welfare in non-contentious divorce: Towards a new conception of the legal process?”, (2000) 63(2) *MLR* 177 Pg 180 Whilst this quote relates specifically to the introduction of s.41 Matrimonial Causes Act 1973, the purposes of the Northern Ireland legislation are now the same. See also Law Commission, *Review of child law: Guardianship and Custody* (No. 172) (London: HMSO, 1988) Para 3.10

<sup>72</sup> In the Form M5 “Acknowledgement of service”

<sup>73</sup> Emphasis added

<sup>74</sup> Douglas et al, op. cit., Pg 183-184

courts should be kept to their proper sphere of adjudicating upon *practical disputes* . . . . They should not be pretending to adjudicate upon matters they cannot decide or in disputes which *need never arise*”<sup>75</sup> allowing the court to focus upon the “more efficient use of resources . . . directed at the cases where they are needed most.”<sup>76</sup> This leads to the creation of a process whereby the court proceeds upon the basis that “parents who agree will be allowed to do so free from court interference, while those who cannot agree will be able to invoke a number of wide-ranging judicial powers. The {1995 Order} thus privileges the *agreement/disagreement distinction as the primary axis* around which judicial intervention revolves.”<sup>77</sup>

When there is disagreement as to issues of residence or custody, it is to the Children (Northern Ireland) Order 1995 to which the courts will turn. According to the Law Commission, the principles of the Children Order are that 1) The law should intervene as little as possible; 2) In cases of dispute, it should seek to lower the stakes; 3) Court orders should reduce the opportunities for conflict and litigation in the future.<sup>78</sup> This policy, adopted in light of the research findings of Wallerstein and Kelly,<sup>79</sup> was designed to lessen conflict between parents and relegated judicial intervention to the sidelines as the legal policy. According to Wallerstein and Kelly, “Although the initial break-up of the family is profoundly stressful, the eventual outcome depends, in large measure, not only on what has been lost, *but on what has been created to take the place of the failed marriage.*”<sup>80</sup> It is upon this basis that Wallerstein and Kelly drew two key conclusions. Firstly, in recognising the role that both parents have to play in

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<sup>75</sup> Law Commission, *Family Law: The Ground for Divorce* (No. 192) (London: HMSO, 1990) Para 2.21 Emphasis added

<sup>76</sup> *Ibid* Para 3.10

<sup>77</sup> J. Dewar & S. Parker *Law and the family*, Second Edition, (London: Butterworth, 1992) Pg 356

<sup>78</sup> Law Commission (1988), *op. cit.*, Para 4.5 This applied to the Children Act 1989 upon which the Children Order is premised.

<sup>79</sup> *Surviving the break-up: how children and parents cope with divorce*, (London: Grant McIntyre, 1980)

<sup>80</sup> *Ibid* Pg 304

the child's development "where possible, divorcing parents should be encouraged and helped to shape post-divorce arrangements which permit and foster continuity in the children's relations with *both parents*."<sup>81</sup> Secondly, the understanding of conflict between parents was extended beyond the separation of parents to the "conclusion that open communication between an individual parent and child is impossible if the parents are in conflict."<sup>82</sup> These findings have had major implications upon the divorce process in relation to matters of welfare and children's representation.

### Welfare

Article 3(1) of the Children Order states that "the child's welfare shall be the court's paramount consideration." As a paramount consideration, the court makes its decisions as to the child's welfare in light of the Article 3(3) of the Children Order; the Welfare Checklist. According to Article 3(3)(a) the court shall have "regard in particular to the ascertainable wishes and feelings of the child concerned (considered in light of his age and understanding)" In this there is somewhat of a tension between the paramouncy of the welfare of the child and the child's wishes and feelings. However, the caveat regarding the age and understanding of the child has allowed the court to put an increased emphasis upon the child as characterized as "vulnerable and impressionable, lacking in maturity to weigh the longer term against the shorter, lacking the insight to know how they will react and the imagination to know how others will react in certain situations [and] lacking the experience to measure the probable against the possible."<sup>83</sup> This statement shows just how important the legal understanding, or rather construction, regarding the agency of the individual is in the

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<sup>81</sup> Ibid Pg 311 Emphasis added

<sup>82</sup> King and Piper, *op. cit.*, Pg 75

<sup>83</sup> Per Bingham MR Re S (A Minor) (Representation) [1993] 2 FLR 437, 448

weighting of opinions. Whilst under the Welfare principle courts are expected to judge the merits of each case individually without recourse to generalization,<sup>84</sup> the welfare principle “having been incorporated into and become central to the social, legal and welfare discourses of adults . . . it is now at risk of being devalued and of becoming simply a generalized and disputed socio-legal concept, rather than an important, individualized human concept.”<sup>85</sup> Thus, legal perceptions become based upon idealized, predetermined notions as to the ‘child’, with the individual child being subsumed into the conception of ‘children.’

This lack of involvement of children’s voices in Northern Ireland can be contrasted with the law in Scotland. In Scotland, under section 6(1) of the Children (Scotland) Act 1995, in relation to “Any major decision” regarding the child’s upbringing, of which issues of custody and residence must obviously be considered, the court is “to have regard as far is practicable to the views (if he wishes to express them) of the child concerned.” Whilst the section states that the court must take “account of the child’s age and maturity . . . without prejudice to the generality of this subsection *a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.*”<sup>86</sup> This seeks to emphasise the point that children are to be considered active agents within the process unless it can be proven otherwise. This process thus puts onus upon the courts to explain why, unless requested by the child, the individual child should not be heard without reference to constructions of the child as irrational nor notions of children’s involvement as being harmful to the child.

According to Coleman and Hendry “the failure of the (Children Order) to introduce a

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<sup>84</sup> Re K (Minors) (Children: Care and Control) [1977] 2 WLR 33, 35

<sup>85</sup> J. Herring “Connecting Contact: Contact in a Private Law Context” in A. Bainham, B. Lindley, M. Richards and L. Trinder (ed.) *Children and their Families: Contact, Rights and Welfare*, (Oxford: Hart, 2003) Pg 147

<sup>86</sup> Emphasis added

similar provision suggests to parents . . . that there is no need for them to consult their children, whatever their age and irrespective of the importance of the decision.”<sup>87</sup>

The importance of the relationship between law and the constructions based upon social science can be seen in considering that the “theories concerning child welfare that are currently most influential are those that focus . . . on the children’s need to know and maintain relationships with both parents.”<sup>88</sup> This construction of the child being harmed when denied contact has led to occasions where the court has been willing to marginalize the views of the child. This has led to the situation where “(t)he courts should not at all readily accept that the child’s welfare will be injured by direct contact. Judging that question the court should take a medium and long-term view of the child’s development and not accord excessive weight to what appear likely to be short-term or transient problems.”<sup>89</sup> The strength of the presumption is such that even when direct contact would be injurious to the child’s welfare, the court should nonetheless be reminded of the desirability of indirect contact over the option of no contact as all.<sup>90</sup> Indeed, contact may even be allowed where there has been previous abuse to the child if there is a perceived closeness of familial bond between the parent and child and the child appears not to have suffered any ill-effects.<sup>91</sup> However, in assuming the benefit of contact, the court’s role is considered “no more than a mechanism for the maintenance and development of relationships and the court’s powers are restricted to regulating the mechanism and do not extend to the underlying relationships.”<sup>92</sup> Thus, the focus of the court is the imposition of contact per se rather

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<sup>87</sup> *The nature of adolescence*, Third Edition, (New York: Routledge, 1999) Pg 80

<sup>88</sup> Diduck & Kaganas, op. cit., Pg 274

<sup>89</sup> Per Bingham MR Re O (Contact: Imposition of Conditions) [1996] 1 FCR 317

<sup>90</sup> Re B (Contact: Stepfather’s Opposition) [1997] 2 FLR 579

<sup>91</sup> L v L (Child Abuse: Access) [1989] 2 FLR 16 For harrowing accounts of children living with abuse through forced custody see D. Aitkenhead “The Sins of the Fathers” *G2 Supplement; The Guardian Newspaper* 8<sup>th</sup> May 2006

<sup>92</sup> Re L, V, M, H (Contact: Domestic Violence) [2000] 2 FLR 334

than the assessment as to the quality, or rather benefit of the contact, as accepted by the child.

However, following the introduction of the Human Rights Act into the legislation of Northern Ireland, the jurisprudence of the European Court of Human Rights must be taken into consideration. In *Elsholz v Germany*<sup>93</sup> the European Court of Human Rights had to consider an application from a non-residential parent in relation to the prevention of contact. In the case, the court found that there had been a breach of the father's Article 8 Right to Family Life in that it considered that the domestic court was mistaken "taking into account the importance of the subject-matter, namely, the relations between a father and his child, the Regional Court should not have been satisfied . . . by relying on the file and the written appeal submissions without having at its disposal psychological expert evidence in order to evaluate the child's statements."<sup>94</sup> Thus, without independent psychological support, the mother's assertion that the child would be harmed by contact could not be supported. However, in doing so, the court was willing to make a distinction between the resident mother's assertion that the child would be harmed by contact and the non-resident father's assertions that contact would be of benefit to the child. In relation to the father's assertion that the child would benefit, the European Court was willing to accept this position *without* the requirement of independent psychological evidence, a point which is especially important as the child's views regarding their refusal of contact was sidelined due to the assertion *without evidence* as to being unduly influenced by the resident parent. This presumption regarding contact has largely been supported by later grand chamber judgements.<sup>95</sup> This creates a double standard whereby the non-

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<sup>93</sup> [2000] 2 FLR 486

<sup>94</sup> *Ibid* Para 52

<sup>95</sup> See *Sahin v. Germany* (application no. 30943/96) and *Sommerfeld v. Germany* (application no. 31871/96)

resident automatically benefits from the assumption that custody will benefit the child whilst views contrary to this, including that of the children themselves, require psychological evidence to support their position. This results in the position that “even applying the margin of appreciation (given) that there was an Article 8 violation shows that . . . (the exclusion of contact) will only be justified on the basis of very strong evidence indeed.”<sup>96</sup> As a result, it must be considered that the incorporation of Human Rights Act 1998 into Northern Ireland legislation has ingrained the presumption of contact and has indeed entrenched the silencing of children’s views that do not meet with scientific approval.

This is not to say that jurisprudence regarding children’s voices and their opposition to contact are ignored in all circumstances. That would be to go too far. In *Re S*<sup>97</sup> Tyrer J. recognised that “If young people are to be brought up to respect the law, then it seems to me that the law must respect them and their wishes, even to the extent of allowing them, as occasionally they do, to make mistakes.”<sup>98</sup> Indeed, Wilson J. has noted that “that orders nowadays which run flatly counter to the wishes of normal children aged 16, 14 and 12 are virtually unknown to family law,”<sup>99</sup> and that it would be exception for the court to make an order contrary to the wishes of a teenager. In Northern Ireland, the judiciary have been especially quick to emphasise the importance of the voice of the child being incorporated. Most notably, Gillen J. has alluded “to what I believed was the gathering momentum of the importance of listening to children and taking account of their perspectives when decisions are being made about them”<sup>100</sup> and in particular the “important yardstick against which the family justice system in Northern Ireland must be evaluated is Article 12 of the

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<sup>96</sup> J. Eekelaar “Beyond the Welfare Principle”, (2002) 14(3) *Child and Family Law Quarterly* Pg 241

<sup>97</sup> (Contact: Children’s Views) [2002] 1 FLR 1156

<sup>98</sup> *Re S* (Contact: Children’s Views) [2002] 1 FLR 1156

<sup>99</sup> *Re B* (Change of Surname) [1996] 1 FLR 791

<sup>100</sup> *Re. E* (2005) NIFam 12

UNCRC”<sup>101</sup>; the ‘voice of the child.’ Thus, with such conflicting positions between traditional jurisprudence regarding the best interests of the child, as supported by the Human Rights Act, and recent jurisprudence supporting the breaking down of traditional assumptions regarding children alongside the emerging importance of Article 12 of the UNCRC, it must be considered to what extent the voices of children are currently heard in practice.

### Representation

The implication for children of the “conclusion that open communication between an individual parent and child is impossible if the parents are in conflict”<sup>102</sup> is that the harm to the child is understood in terms of the parental relationship, a truth external to the child. In doing this, the child is defined in relation to the parental relationship, submerged within the family, within which the parents are the representatives. This has a direct bearing upon the adversarial process regarding children in private law divorce cases. Within this procedure, parents are held as the spokespersons for the best interests of the family and its members, those being the children. Consequently, within the process, whilst parents represent the family; Solicitors represent the *parents*. Solicitors are bound by legal duties to represent the views of the parents only, and as such, the child’s views are only articulated in so much as they accord to that of their parent. Indeed, with the process framed around the centrality of parents, “professionals do not necessarily see it as their role to ensure that children’s views are

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<sup>101</sup> Ibid

<sup>102</sup> King and Piper, op. cit., Pg 75

given due regard; as a result, children do not know about nor have access to independent information, advice or representation.”<sup>103</sup>

This position relating to the child’s non-involvement is further strengthened due to their physical dependency upon their parents. In a relationship in which the parent is in a position of power and control over the child, the courts must be aware of the possibility that the child may be unduly influenced by their parents, and indeed the courts have been aware of this issue.<sup>104</sup> If the child it to be given representation, the possible harm in being granted the choice as to representation and being forced to use it to represent the interests of the manipulative parent as a result is deemed to outweigh the possibility of autonomy on the part of the child. The construction of the dependant, susceptible child overcomes the possibility of the individual child being able to express itself independently. Children are dispossessed of a voice due to the worries of adults about the actions of other adults, the child’s parents, those whom the Children Order presumes will act in the child’s best interests.

However, whilst the Children Order “reflects an assumption that the child’s interests are identical to those of its parents and that the parents will fulfil their parental obligations best if left alone,”<sup>105</sup> the legislation regarding Northern Ireland does make a limited provision for separate representation in relation to s.8 orders. According to Rule 6.2(1) of the Family Proceedings Rules (Northern Ireland) 1996<sup>106</sup> a child “may begin and prosecute any family proceedings by his next friend and may defend any such proceedings by his guardian ad litem and, except as otherwise provided by this rule, it shall not be necessary for a guardian ad litem to be appointed by the court.”

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<sup>103</sup> E. Tisdall, R. Bray, K. Marshall and A. Cleland “Children’s Participation in Family Law Proceedings: A step too far or a step too small”, (2004) 26(1) *Journal of Social Welfare and Family Law* Pg 31

<sup>104</sup> See *Re T (A Child: Contact)* [2003] 1 FCR 303

<sup>105</sup> J. Fortin *Children’s Rights and the Developing Law*, Second Edition (London: LexisNexis UK, 2003) Pg 8

<sup>106</sup> Hereafter “FPR”

However, one restriction upon this option is that a next friend or a guardian ad litem can only be appointed in the County Courts and High Courts.<sup>107</sup> This is a major limitation in that the same power of appointment is not available to the Family Proceedings Court,<sup>108</sup> which adjudicated over 92% of the private law divorce cases between January and March 2006.<sup>109</sup> As a result, there is no opportunity for the vast majority of children to be represented.

The first option to consider therefore is the appointment of a guardian ad litem. The primary role of the guardian ad litem is to ensure that the child's perspective, rather than the child's voice, is brought to the fore and vigorously defended in court. However, the guardian ad litem's role is therefore to be understood as representing the child's *interests* rather than the child's *views*, an overall role understood by the court as "essentially paternalistic."<sup>110</sup> In appointing a guardian ad litem, the court is able to appoint either the official solicitor or "some other proper person," provided they consent,<sup>111</sup> but in practice the official solicitor will represent the child unless they have declined to do so.<sup>112</sup> An application for the representation of a guardian ad litem as a party to the proceedings<sup>113</sup> can be made either "by the court of its own motion or on the application of a party to the proceedings or of the proposed guardian ad litem"<sup>114</sup> and the court can stay proceedings until the application is made by a party.<sup>115</sup> However, once the proceedings are concluded, the appointment of the guardian is terminated, with no obligation to represent the child's interests in the future.

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<sup>107</sup> FPR 6.6 read in conjunction with Article 164(1) Children Order

<sup>108</sup> Essex County Council v B [1993] 1 FLR 866

<sup>109</sup> Northern Ireland Court Service (2006) Table 1a

<sup>110</sup> Mabon v Mabon [2005] EWCA Civ 634 Para 25

<sup>111</sup> FPR Rule 6.6(1)

<sup>112</sup> See Dame Butler-Sloss L v L (Minors) (Separate Representation) [1994]

<sup>113</sup> Under FPR Rule 6.6(5)

<sup>114</sup> FPR Rule 6.6(2)

<sup>115</sup> FPR Rule 6.6(3)

Where there is conflict between the child's *interests* and the child's *views*, the child has a second option to apply to participate in the divorce process without a next friend or a guardian ad litem. Where the child is looking to be separately represented and the child already has a next friend or guardian, the child must apply to the court for leave to remove them.<sup>116</sup> Under the current divorce process, and in light of the Court of Appeal's unwillingness to grant the child party status without legal representation,<sup>117</sup> the child may begin or defend proceedings where both the Court considers the child to have "sufficient understanding to make the proposed application"<sup>118</sup> and where a solicitor considers that the child "is able, having regard to his understanding, to give instructions in relation to the proceedings"<sup>119</sup> and has as a result has "accepted instructions from the child to act for him and, where the proceedings have begun, is so acting."<sup>120</sup> Whilst the solicitor must initially make their judgement as to the child's competency, it is for the court to ultimately decide whether the child fulfils the criteria.<sup>121</sup> In both positions, the legal professional, be them judiciary or solicitor, must question the ability of the child to proceed through the process and deliver sound instructions. This has led McGaughey to comment that "In such circumstances the real issue becomes whether the child has sufficient understanding to give coherent instructions."<sup>122</sup>

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<sup>116</sup> FPR Rule 6.3(4) although under FPR Rule 6.3(8) the Court does have the ultimate directive to intervene and appoint a next friend or guardian ad litem where it is felt necessary to protect the child's interests.

<sup>117</sup> See *Re S (A Minor) (Independent Representation)* [1993] 2 FLR 437

<sup>118</sup> Article 10(8) Children Order

<sup>119</sup> FPR 6.3(1)(b)(i)

<sup>120</sup> FPR 6.3(1)(b)(ii)

<sup>121</sup> *Re S (A Minor) (Independent Representation)* [1993] 2 FLR 437

<sup>122</sup> Children Order Advisory Committee: Separate Representation Sub-committee (2005) Pg 10

According to Bingham MR “‘Gillick competence’<sup>123</sup> is the appropriate test in relation to the sufficiency of a child’s understanding under the (Order) . . . described as ‘the attainment by a child of an age of sufficient discretion to enable him or her to exercise a wise choice in his or her own interests’”<sup>124</sup> Despite this instruction, it has been commented that this direction is “not easily applied to the individual practical situation, being of a very general, and sometimes negative, nature.”<sup>125</sup> Gieve suggests that for the child to be understood to be competent; they should be able to understand the role of the solicitor, the nature of the proceedings in respect of which the child is subject, the reasons for the proceedings, what takes place at court, what other professionals think is best for the child, what the child’s parents and other parties to proceedings think is best for the child and the law which affects the proceedings.<sup>126</sup> Further, the Family Law Committee of the Law Society of Northern Ireland have provided advice as to when solicitors should consider themselves as able to act as a representative for the child; “You should only accept instructions from a child if you have the necessary training and expertise in this field; You must continually assess the child’s ability to give information; You should make sure your child has enough information to make informed decisions. You should advise and give information in a clear and understandable way. Also be aware that certain information may be harmful to the child; You should not show favour to either parent or any other party involved

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<sup>123</sup> The test of Gillick competence derives from House of Lords ruling in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 in which Lord Scarman declared that “As a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to enable him to understand fully what is proposed.” This introduced the recognition of the competency of minors provided they can prove their competency in certain circumstances.

<sup>124</sup> *Re S (A Minor) (Independent Representation)* [1993] 2 FLR 437

<sup>125</sup> C. Sawyer “The Mature Child – How Solicitors Decide”, (1997) 27 *Family Law, January*, Pg 20

<sup>126</sup> K. Gieve “Representing Children – Current issues for the practitioner”, *Children Law and Practice Conference Course Notes 2006* Pg 45

in the court proceedings.”<sup>127</sup> The legal uncertainty regarding the ‘competency’ of the child and extent of regulation has led to the situation whereby the level of representation differs from solicitor to solicitor. According to Sawyer, there are particular factors which influence the decision as to whether a solicitor is likely to deem the child competent and offer their representation, such as “forum . . . personal beliefs and values.”<sup>128</sup> This results in a situation whereby factors external to the child determine whether their competency will be recognised, with the result that “the child’s ‘right’ to be representation meant very different things according to who was implementing that supposed right.”<sup>129</sup> These elements surrounding the confusion regarding the standard of competency in practice, the tight regulation surrounding the issue and variability of legal standards has resulted in a practice whereby “it takes an extremely confident, knowledgeable, resourceful and determined child or young person to commence such proceedings”<sup>130</sup> with the effect that “children are effectively prevented from becoming legal actors in their own rights.”<sup>131</sup>

However, the case of *Mabon v Mabon*<sup>132</sup> may provide the impetus for a sea-change on judicial recognition of the issue. In the case, Thorpe LJ recognised the changing construction of the child with regard to adversarial proceedings. In recognising that previous instructions are out-of-date,<sup>133</sup> Thorpe LJ pointed out that the judiciary were more willing to “reflect the extent to which, in the twenty-first century, there is a keener appreciation of the autonomy of the child and the child’s consequential right to

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<sup>127</sup> Quoted in Children Order Advisory Committee: Separate Representation Sub-committee (2005) Pg 11

<sup>128</sup> Op. cit., Pg 20

<sup>129</sup> Ibid

<sup>130</sup> N. Lowe “Children’s Participation in the family justice system – translating principles into practice”, (2001) 13(2) *Child and Family Law Quarterly* Pg 143

<sup>131</sup> C. Smart, B. Neale, and A. Wade *The Changing Experience of Childhood: Families and Divorce*, (Cambridge: Polity Press, 2001) Pgs 165 & 166

<sup>132</sup> [2005] EWCA Civ 634

<sup>133</sup> Para 28

participate in decision making processes that fundamentally affect his family life.”<sup>134</sup>

Thus, the courts should not see representation as ‘the more articulate and elegant expression’ of what it already knows but as a need of the child to express their independent position, and their need to have this position fully advanced and represented separately. Indeed, courts in their consideration of the harm arising out of children’s participation within the process must not simply consider the harm that might arise through the child’s participation but must also “be equally alive to the risk to the emotional harm that might arise from *denying* the child knowledge of and participation in the continuing proceedings.”<sup>135</sup>

In reviewing this chapter, the position of the legal construction of the child has been brought to the fore. It is contended that the law has adopted a position where it reconstructs aspects of social science that accentuate its claims to legitimacy whilst failing to assimilate those areas contrary to the current law. This has led to a position whereby the construction of the child has led to children are being denied both a voice and representation in the dominant legal discourse, through both the legal procedures and the practical technicalities. However, there seems to be a potential change in the regard of the importance of the inclusion of both the voice of the child and separate representation in some more recent judgements that may advocate a greater role for children in the divorce process.

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<sup>134</sup> Para 26

<sup>135</sup> Para 29

## Chapter Four: Flaws in the Law

*“When we talk about children, we talk about everyone, yet there is . . . a subtle but pervasive contempt for children, often disguised with condescending words, as if they were a different species.”<sup>136</sup>*

### Breaking down the Construction

The relationship between the law and the individual, as according to autopoietic theory, is how the law constructs the ‘class’ of individual. To do so, the law reduces complex individuals, their life story and their environmental factors to simplistic constructions. Whilst these constructions may be representative of the aggregate child, it is an inevitable consequence that they do not represent all children. This is particularly true in relation to children’s welfare where “A broad range of factors, genetic, financial, educational, environmental and relational, which science would recognise as capable of affecting the welfare of the child are narrowed by law to a small range of issues which fall directly under the control of the judge, the social worker or the adult parties” resulting in the situation where “. . . the scientific discourse of child welfare in all its richness and complexity is reconstructed as

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<sup>136</sup> Kraemer quoted in L. Brooks “Mirror, Mirror on the wall” *G2 Supplement; The Guardian Newspaper* 20<sup>th</sup> June 2006

concepts which ‘make sense’ within law – that is concepts which both further the immediate demands of the law to determine guilt and responsibility.”<sup>137</sup> The problem with this reductionism is that it takes vibrant models of individuality and replaces them with static models based on the current, or past, conception of how the individual is *likely* to respond rather than assessing their actual needs. This construction allows what is to be considered in the best interests of the individual to be reduced to “*the effect of the procedure adopted to determine it*, rather than resting ‘out there’, awaiting discovery.”<sup>138</sup>

The importance of this internalisation of the child within legal discourse is that “the current, untheorized approach to ‘systemic’ family justice has led to an uncritical over-reliance on assumptions about the child’s best interests”<sup>139</sup> based upon the dominant teleological model of childhood at the time of the conception of the law. Thus, rather than accept the constructions of children within the law, it is crucial that we engage with these constructions and show that they are not representative of *all* children.

In turning to the psycho-analytical sciences, the current dominant discourse recognises that an increasingly psycho-dynamically cultured view of subjectivity is required for both the adult and the child. Within this children themselves are understood as a variable concept, with their ‘succession’ into adulthood no longer afflicted by theories of progression through stages of childhood but rather the recognition that development “is epigenetic; stages of development are not completely fixed, but include the potential for adoption.”<sup>140</sup> This has led to an acceptance of

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<sup>137</sup> M King & C. Piper *How the Law thinks about Children*, (Aldershot: Gower, 1990) Pg 43

<sup>138</sup> J. Dewar “The Normal Chaos of Family Law”, (1998) 61(4) *MLR* Pg 480

<sup>139</sup> C. Piper “Assumptions about children’s best interests”, (2000) 22(3) *Journal of Social Welfare and Family Law* Pg 272

<sup>140</sup> N. Thomas *Children, family and the state: Decision-making and child participation*, (Bristol: The Policy Press, 2000) Pg 16

developmental contextualism, whereby the child and its environment are understood to be relative, with the understanding that the child's "context of development is not just the family, but the geographical, historical, social and political setting in which the family is living."<sup>141</sup> This variety of factors leads us to question the understanding of a singular 'childhood'; developmental contextualism allows us to recognise the leading characteristics of childhood whilst reserving the autonomy of the individual. Predominant characteristics of childhood are therefore explained with reference to the 'focal model' which "suggests that at different ages, particular sorts of relationship patterns come into focus . . . but that no pattern is specific to one age only. Thus, as the patterns overlap, different issues come into focus at different times, *but simply because an issue is not the most prominent feature of a specific age, does not mean that that it may not be critical for some individuals of that age.*"<sup>142</sup> It is upon this presupposition that Lord Scarman's judgement in the Gillick<sup>143</sup> case is predicated where he stated "(i)f the law should impose on the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change."<sup>144</sup> However, as according to the Gillick decision the child has to prove their competence rather than an acceptance of a presumption regarding competence, "(t)he fact that an adolescent's legal capacity hinges on notions as debatable as understanding and maturity fundamentally hampers its effectiveness as a means of settling family disputes."<sup>145</sup>

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<sup>141</sup> J. Coleman & L. Hendry *The nature of adolescence*, Third Edition, (New York: Routledge, 1999) Pg 12

<sup>142</sup> Ibid Pg 14 Emphasis added

<sup>143</sup> v West Norfolk and Wisbech Area Health Authority [1986] AC 112

<sup>144</sup> Ibid Pg 186

<sup>145</sup> Coleman & Hendry, op. cit., Pg 82

Whilst it would be foolish to deny differences between ‘adults’ and ‘children’, the distinction between the two in terms of rational decision-making is increasingly being questioned as “Adolescents are increasingly able to cope with abstractions and to distinguish between the real and concrete and the abstract or possible. They can test hypotheses and think and plan the future . . . become self-reflective, even introspective. Their thinking is multi-dimensional, with a greater use of relative, rather than absolute, concepts.”<sup>146</sup> As a result, whilst it is possible to notice a perceivable drift in reasoning and participation skills, this is to be considered in light of the gradual process of development which is different for each individual.

Sociological sciences have also detracted from the recognition of children as human ‘becomings’, where “the child’s emptiness is filled with the knowledge they need to understand the conduct of others . . . to be recognized by others”<sup>147</sup> towards an acceptance of the greater role for children in the creation of their own active agency and autonomy. Indeed, children are increasingly being recognised as cultivators of their own culture, rejecting the formation of the “subject child as a firm, bounded entity, as opposed to an ‘environment’ that can act adversely or benignly towards developing the child’s . . . competences.”<sup>148</sup> In this situation, the child-context interaction is of importance in the sense that the child develops along the premise of ‘goodness of fit.’ Goodness of fit “takes into account the relationship between the individual and the environment in the widest sense and asks to what extent the needs and goals of the person are congruent with the context.”<sup>149</sup> This framework allows us not simply to understand children as receivers of information, but rather as active

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<sup>146</sup> J. Fortin *Children’s Rights and the Developing Law*, Second Edition (London: LexisNexis UK, 2003) Pg 72

<sup>147</sup> N. Lee *Childhood and Society: Growing up in an age of uncertainty*, (Buckingham: Open University Press, 2001) Pg 39

<sup>148</sup> L.R. De Castro “Otherness in me, otherness in others: Children’s and youth’s constructions of self and other”, (2004) 11(4) *Childhood* Pg 472

<sup>149</sup> Coleman & Hendry, op. cit., Pg 12

agents choosing societal norms so as to best complement themselves and their environment. It is through this that children's agency can be further accentuated. Children, rather than childhood, are recognised by "focusing on how children negotiate rules, roles and personal relationships; how they created autonomy and balance this with their (inter)dependence; how they operate as strategic actors in different social contexts and how they take responsibility for their own well-being and that of others."<sup>150</sup> Children, rather than being understood as dependent, irrational, weak, selfish are instead seen as independent from, and in constant contact with, their family and surrounding environment; determining, managing and surviving the challenges that face them. Indeed, children learn to adapt to practices, reinterpret them to suit their needs and, where they need help, are "able to choose to seek help, to use that help constructively and so to avert the negative outcomes to themselves and to society."<sup>151</sup> Children are socially conscious in that they are able to adapt to the context of their surroundings and the consequences therein but at the same time are able to realize the implications for themselves, and have proved themselves to do so in "situations that were sometimes highly charged emotionally and in which the children had to develop a capacity to weigh and balance a number of competing demands."<sup>152</sup> The role of children in their own 'socialisation' can be further demonstrated through peer to peer interaction. In this sense friends offer an opportunity to socialize "without adult knowledge and as the child's initiative, and they offer . . . non-judgmental, egalitarian support, along with the opportunity for a reciprocal exchange of

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<sup>150</sup> C. Smart, B. Neale, and A. Wade. *The Changing Experience of Childhood: Families and Divorce*, (Cambridge: Polity Press, 2001) Pg 12

<sup>151</sup> F. Kaganas & A. Diduck "Incomplete Citizens: Changing Images of Post-Separation Children", (2004) 67(6) *MLR* Pg 967

<sup>152</sup> I. Butler, L. Scanlan, M. Robinson, G. Douglas and M. Murch "Children's involvement in their parent's divorce", (2002) 16 *Children and Society* Pg 97

experience.”<sup>153</sup> This is important as by “viewing peers as major facilitators of children’s development, (it) can be argued to be presenting childhood as an end in itself, rather than as a training ground for adulthood.”<sup>154</sup> This allows social science to acknowledge the autonomy of children from childhood; facilitating their independence and the importance of recognition of the individual over dominant constructions.

In facilitating children as agents and breaking down the assumption that they are dependent, irrational, incompetent and asocial it is important to deconstruct the difference between adulthood and childhood; a presumption that “children are not only different from adults but inferior to adults.”<sup>155</sup> It is this positioning of children that “obscures the experiences of young people by relegating them to a less significant realm than those who have reached ‘adult’ life.”<sup>156</sup> This is especially contentious if we see what is to be considered a ‘child’ as a site of struggle, as in conflict with a dominant discourse trying to constitute a homogenous identity over a multiplicity of heterogeneous individuals, with children attempting to assert and consolidate their own social identity rather than have one cast upon them. In reconstructing childhood afresh, not as a time of becoming but a time of being, the law would be able to deal with the individual rather than the image of a ‘child.’

With recognition of a multiplicity of childhoods, it is vital that we also recognise a series of ‘adulthoods’. Having reached social, physical and cognitive maturity, adults are expected to act as rational, autonomous actors within the community. However, this represents an idealized image of adulthood; adults are often irrational, asocial and

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<sup>153</sup> B. Neale “Dialogues with Children: Children, Divorce and Citizenship”, (2002) 9(4) *Childhood* Pg 464

<sup>154</sup> L. Brooks “Being Rosie” *G2 Supplement; The Guardian Newspaper* 19<sup>th</sup> June 2006 Pg 9

<sup>155</sup> Smart et al, op. cit. Pg 8

<sup>156</sup> Wyn “Youth and Citizenship” (1995) 2 *Melbourne Studies in Education* Pg 52 quoted J. Mason & T. Fattore *Children taken seriously: in theory, policy and practice*, (London: Jessica Kingsley, 2005) Pg 140

greatly lack independence in both the physical and social sense. To destabilise the dichotomy between the childhood and adulthood we need to recognise the ambivalent vulnerabilities in adulthood rather than recognition of the irrational adult as symptomatic of pathological characteristics. Adults often make choices that come down on the side of irrationality. This is particularly true in the case of divorce where “tensions serve to challenge or undermine the common-sense belief, supported in law, that (both) parents usually know best.”<sup>157</sup>

It is often upon the child’s economic dependence that their otherness is based; a dependence, though of benefit to the child, forced upon the child by adults. However, to focus upon the child’s economic dependence in this manner is to choose to ignore the multiple realities of both adult and children dependencies in a number of manners. Examples come from those who point to “the many children . . . who care for ill or disabled parents with little or no help, the street children . . . who exhibit survival strategies equal to those of many adults, and the children who happily take on a responsible role in working parents households.”<sup>158</sup> In these situations, the child as dependent, and indeed the adult as independent, comes under investigation. Whilst these situations may not be the norm, they are far from exceptional, and as a result it helps us to deconstruct the binary assumption regarding adult’s and children’s dependency.

Rather than ignore this nature of dependency, adulthood has pathologised the dependency of adults as “discounted or circumstantial. Instances of child dependence, however, seem to be closely linked to the kind of person they are . . . So, if a child needs assistance, this is understood to be because they are a dependent kind of person. Dependence, then, is lodged within the image of childhood that follows them through

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<sup>157</sup> B. Cantwell & S. Scott “Children’s Wishes, Children’s Burdens”, (1995) 17(3) *Journal of Social Welfare and Family Law* Pg 338

<sup>158</sup> Coleman & Hendry, op. cit., Pg 75

social life.”<sup>159</sup> Rather than accept this role of the child as inherent, it is “more realistic to regard this situation as resulting from the exercise of *naked power* by adults, and to think of the status of children as a consequence of their losing out in the perpetual struggle between generations in power and the generations seeking power.”<sup>160</sup> If we accept this as part of the power dynamics between classes of individuals, we can break down the construction of the child as incompetent with the consequence that the child’s right to participation as an individual capable of rational, social and competent though is no longer conditional.

### Breaking down the Law

*“There are as many ways to understand childhood as there are children. But despite numerous attempts, the story of childhood has rarely been well told. It has always been embroidered with myth, steeped in nostalgia. And it has always reflected the prevailing anxieties of the age.”<sup>161</sup>*

In recognising that divorce does have effects upon children,<sup>162</sup> divorce can be seen as “a marker indicating the need for societal intervention to protect these children from *expectable damage*”,<sup>163</sup> legitimising the law’s attempt to resolve or at least contribute to the reduction of these effects. The first point of contact between the law and the child is through the no-order principle whereby the court will not interfere with the

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<sup>159</sup> Lee, op. cit., Pg 23

<sup>160</sup> Coleman & Hendry, op. cit., Pg 75

<sup>161</sup> L. Brooks “Being Rosie” *G2 Supplement; The Guardian Newspaper* 19<sup>th</sup> June 2006 Pg 11

<sup>162</sup> Most notably the tendency towards lower academic performance, lower socio-economic status, higher rates of crime and frequency of depression as well as lower psychological well-being. See M. Richard’ research in M. Meulders-klein (ed.) *Families et Justice* (Brussels: Bruykant 1997) Pg 543 discussed in J. Herring *Family Law*, Second Edition (Harlow: Pearson Longman, 2004) Pg 437

<sup>163</sup> Caplan quoted in M. Murch, G. Douglas, L. Scanlan, A. Perry, C. Lises, K. Bader and M. Borkowski. *Safeguarding Children's Welfare in Uncontentious Divorce*, (Cardiff Law School: LCD Research Series 7/99, 1999) Pg 6

parental authority to resolve contact and residence issues provided they are in agreement. This agreement/disagreement axis of intervention is premised upon the assertion that conflict following divorce is more detrimental than other factors relating to harm. However, following recent research, this assertion must be liable to a critical criticism of the agree/disagree distinction. Harm is now recognised through the myriad of socio-economic and geo-political factors involved in post-divorce behaviour. Thus, whilst recognising that post-divorce conflict is a cause of harm for children, research now suggests that beyond the conflict between parents, “Economic problems lead to poor ‘outcomes’ (whilst) impaired parenting capacity such as lack of support is associated with behaviour problems and antisocial behaviour.”<sup>164</sup>

Therefore, the focus of the legislation should take account of these other factors to ensure that the needs of children are met. This is not seen to be achieved through the agree/disagree distinction as the law simply leaves these other considerations to the determination of the parents. Indeed, the fundamental assumption that parents will act in a rational manner and decide what is in the child’s best interests in light of these factors seems somewhat naïve in that negotiations “invariably take place in an atmosphere of hurt and hostility between at least some of the child’s closest family members. These tensions often to serve to challenge or undermine the common-sense belief, supported in law, that (both) parents usually know best.”<sup>165</sup> Thus, reliance upon the agree/disagree dichotomy as to judicial intervention must be seen as a limited indication of harm, with the result that “from the point of view of the child, parental conflict as a distinguishing mark is an *arbitrary one*.”<sup>166</sup>

The application of the welfare principle is also liable to criticism when presented from the child’s point of view. The use of the welfare principle allows the court to

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<sup>164</sup> Kaganas & Diduck, op. cit., Pg 967

<sup>165</sup> Cantwell & Scott, op. cit., Pg 338

<sup>166</sup> Dewar, op. cit., Pg 480 Emphasis added

perform the right of the child for them rather than allowing the child to do it themselves. By viewing the child as incapable of making their own decisions, an assumption heavily criticized in light of recent research,<sup>167</sup> this permits acceptance by the judiciary of “abstract images of children as vulnerable, which legitimate the views of children being inadequately sought or views being overruled.”<sup>168</sup> Thus, welfare is used as a cloak for “bias, paternalism and capricious decision-making.”<sup>169</sup> Under the current divorce process in relying upon Statement of Arrangements without the presentation of an independent welfare report, the court must rely upon the views of the parents, or possibly even just the petitioner, for evidence as to the child’s welfare. However, to rely upon the parent in the overwhelming majority of cases at a time of such distress is to err. Not only are parents, in a time of stress and conflict, likely to be suffering a diminished capacity to focus upon the interests of the child but indeed, even for those who do, parents “seeking to avoid state interference will undoubtedly ensure that their answers disguise any distress their children are experiencing.”<sup>170</sup> Indeed, research has also indicated that children undergoing their parents divorce will often, acting in a diplomatic fashion, hold back their personal feelings in an attempt to relieve the situation and as an effective coping strategy of conflict avoidance.<sup>171</sup> Thus, the assumption of the natural parent as a fountain of knowledge, coping masterfully during an unnatural process of adjustment must come under question due to their diminished capacity and their own personal interests.

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<sup>167</sup> For example see Butler et al, op. cit., Pg 98

<sup>168</sup> SD. Sclater & C. Piper “Social Exclusion and the Welfare of the Child”, (2001) 28(3) *Journal of Law and Society* Pg 418

<sup>169</sup> S. Parker “The best interests of the child – principles and problems” (1994) 8 *International Journal of Law and the Family* Pg 26 quoted in *ibid* Pg 411

<sup>170</sup> Coleman & Hendry, op. cit., Pg 210

<sup>171</sup> See A. Mitchell *Children in the middle: living through divorce*, (London: Tavistock, 1985) Chapter 5

In light of these factors, the extent to which the judge has the requisite information regarding the child's interests must be queried. This is particularly relevant where the court is bound to make a declaration in regards to contact or residence orders.

Considering that in order to make a rational choice as to whether the interests of the child have been best served, the judge would need "to compare the expected utility of each option. To do so, the judge would need considerable information, predictive ability, and some source for the values to measure utility."<sup>172</sup> However, to meet this criteria under the current divorce process would require Solomnic judgement, "some magical powers or metaphysical endowment – an intuitive sixth sense"<sup>173</sup> on the part of the judge in light of the lack of information, and further, in light of the value-laden quality of the information they are provided with at present.

Currently, information is provided to the courts through the completion of a Statement of Arrangements form by the parents. According to Murch at al<sup>174</sup> the District Judges interviewed saw this procedure as fulfilling two main purposes; to provide information to the court and to focus the parent's decision making upon the interests of the child. However, this research showed that the current procedure fails in both senses. In relation to the procedure's ability to inform the court, 43% of the District Judges interviewed were of the opinion that the form had no strengths at all,<sup>175</sup> and that the principle problem with the form "was that it can be completed in a way which fails to convey sufficient information to the reader, either because of lack of specificity in the questions asked, or because only a yes/no answer is asked for, or because of careless completion."<sup>176</sup> This shows that the forms are of little worth on

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<sup>172</sup> Reece (1996) Pg 271

<sup>173</sup> King and Piper, op. cit., Pg 41

<sup>174</sup> *Safeguarding Children's Welfare in Uncontentious Divorce*, (Cardiff Law School: LCD Research Series 7/99, 1999) Pg 147

<sup>175</sup> Ibid Pg 152

<sup>176</sup> Ibid Pg 153

the whole in the court's assessment of the situation in relation to the child. Further, it seems that the structure of the questioning and the questions asked were of concern to the judiciary, with one District Judge stating that "There are a lot of things on the form I wouldn't bother about."<sup>177</sup> This shows that the resources used in the completion of the form could be better put to use in asking more relevant and revealing questions.

In consideration as to whether the form focuses the parents to consider the interests of the child, presumably through initiation of a conversation of the topic, only 37% of children reported being consulted over their contact arrangements, and this falls to 19% in relation to residence.<sup>178</sup> Additionally, only 16% of children felt that their views were a major determinate of their contact arrangements.<sup>179</sup> Indeed, despite the presence of the M4 form, 65% of solicitors did not advise clients to discuss living arrangements with the child.<sup>180</sup>

With the contribution of parents largely discounted, it is important to consider the extent to which professionals engaged in the process are willing to engage with children as without their contribution, the child's involvement cannot be articulated in a meaningful sense. The findings of Douglas at el<sup>181</sup> indicate that legal professionals too are unwilling to engage with child. In the research, three-quarters of the District Judges interviewed considered that the court should not hear children in any circumstance or in the absence of parental dispute, with a similar proportion of solicitors saying that they do not talk to children in divorce cases or would not in any

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<sup>177</sup> Ibid Pg 80

<sup>178</sup> A. Smith, N. Taylor, and P. Tapp "Rethinking children's involvement in decision making after parental separation", (2003) 10(2) *Childhood* 201Pg 206

<sup>179</sup> Ibid

<sup>180</sup> Murch et al, op. cit., Pg 63

<sup>181</sup> "Safeguarding children's welfare in non-contentious divorce: Towards a new conception of the legal process?", (2000) 63(2) *MLR* Pg 191

circumstance.<sup>182</sup> In light of this additional factor, it would seem that the current model for the Statement of Arrangements fails to fulfil either of its objectives.

The refusal to grant parity between parents and children is emblematic of the conception of children caught in their parent's divorce as only being harmed by the situation. This leads to the situation where, rather than simply finding ways of avoiding this harm afflicting the child, "Harm-ism is the tendency to see only harm, even when the evidence is more complex than this."<sup>183</sup> As a result, what becomes essential is the avoidance of the perceived root cause of the harm rather than consideration of the complex environmental factors affecting the child. In divorce, one aspect of this harm-ism is the construction of the child as totally dependent, incapable of independent thought. It is this constitution of incompetence and vulnerability that is "pivotal in the hegemonic definition of childhood, increases children's vulnerability to abuse through its contribution to the way children are denied language, knowledge, choice and, ultimately, power within these contexts."<sup>184</sup> The effectiveness of this construction is that where there is a conflict between it and the individual, "The validity of the rule itself is not tested or challenged: the process and ingredients are."<sup>185</sup> As a result, in divorce it is recognised that "There has been a disturbing trend to take only some young people seriously: those who 'present themselves well' or with whom we agree"<sup>186</sup> with the result that "(w)hether children's wishes and feelings carry any weight at all may well depend on how far these wishes accord with current legal presumptions about what they need."<sup>187</sup> To rationalise where

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<sup>182</sup> Ibid 45% of solicitors said they would never talk to a child in divorce cases.

<sup>183</sup> Lee, op. cit., Pg 37

<sup>184</sup> K. Robinson "Childhood and Sexuality: Adult constructions and silenced children" in Mason and Fattore, op. cit., Pg 73

<sup>185</sup> Piper, op. cit., Pg 266

<sup>186</sup> R. Holdsworth "Taking young people seriously means giving them serious things to do" writing in Mason and Fattore, op. cit., Pg 144

<sup>187</sup> Neale, op. cit., Pg 457

the child's voices counter the legal assumption, "These wishes, although recognised to some extent, are typically rationalised by social workers etc., as inappropriate psychological reactions (wanting to protect a parent etc.)"<sup>188</sup> This results in the pathologization of children when they speak out against the legal presumption regarding the infallibility of parental decision-making or the assumption regarding the benefit of contact. This is clearest in relation to the influence of a supposed manipulative parent. Whilst the possibility that parents may manipulate the voices of children to suit their own aims exists, the court must be careful not to automatically infer this in situations where the child speaks out against the other parent as "Much of what is currently perceived almost automatically as 'manipulation' of a child's views by a parent might just as appropriately be seen in this light; as a parent consciously seeking to understand their child's point of view and actively supporting them."<sup>189</sup>

Rather than see the potential harm in including the child, it is important to consider the harm of exclusion; or more purposefully, the benefit of their inclusion. Indeed, children's involvement can facilitate the removal of children from abusive situations as they may be able to provide information not available to the parents. Thus, "Granting children a voice . . . will allow for their welfare to be properly investigated and secured, thereby bringing a necessary corrective to the current balance of power between parents and the state."<sup>190</sup> The position regarding the benefit of children's participation in proceedings can be contrasted between private law and public law proceedings. In public law proceedings, children are presumed to be capable of informing a considered opinion and so are automatically granted representation in the

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<sup>188</sup> A. Griffiths & R. Kandel "Legislating for the Child's Voice: Perspectives from comparative ethnography of proceedings involving children" in M. Maclean (ed.) *Making Law for Families*, (Oxford: Hart, 2000) Pg 166

<sup>189</sup> Neale, op. cit., Pg 463 See also A. Buchanan, J. Hunt, H. Bretherton and V. Bream *Families in Conflict: Perspectives of Children and Parents on the Family Court Welfare Service*, (Bristol: Policy, 2001) Pg 93

<sup>190</sup> *Ibid* Pg 468

proceedings. This position shows that what the law regards as competency changes as regards to the situation and benefit to the process, not the individual involved. It must then be considered whether the presumption of non-autonomy in private proceedings is a legitimate one.

The findings of Lyon et al<sup>191</sup> indicate that some children want active involvement in decisions regarding their future whilst Butler et al contend that children who reported consultation or influence over the arrangements reported higher degrees of satisfaction.<sup>192</sup> Indeed, Cockett & Tripp found that the majority of children, around 80%,<sup>193</sup> considered that they should have been involved in such decisions, and further thought their involvement would reduce the tension surrounding the decision. The resilience of children caught between their parents was in particular noted by Butler et al who “were impressed by the way that most children who had experienced the worst kind of parental behaviour developed effective self protective ways of coping with it.”<sup>194</sup> In reflection of this evidence, it would seem of greater detriment to the child to be excluded from the proceedings than consideration given to their inclusion.

Related to this is an increased recognition of contact as a subjective relationship. Research has overwhelmingly concluded that in relation to contact with parents, it is the ethic of care which is paramount. An ethic of care establishes “who had held responsibility and actively established caring relationships with the children of the partnership, in the context of the actuality of a specific family life and the life of that

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<sup>191</sup> C. Lyon, E. Surrey and J. Timms *Effective Support Services for children and young people when parental relationships break down* (National Youth Advocacy and the Gulbenkian Foundation, 1999)

<sup>192</sup> Butler et al, op. cit., Pg 96

<sup>193</sup> M. Cockett & J. Tripp *The Exeter Family Study* (Exeter University and Joseph Rowntree Foundation, 1994) Pg 45 See also G. Douglas, M. Murch, M. Robinson and L. Scanlan “Children’s Perspectives and Experience of the Divorce Process”, (2001) 31 *Family Law*, May Pg 375 found that 55% of children not asked wished that they had been

<sup>194</sup> Butler et al, loc. cit.

child.”<sup>195</sup> This ethic of care highlights the quality of the contact rather than the frequency of contact, with a particular focus upon the emotional closeness of the relationship as being of benefit to the child.<sup>196</sup> In this light, the child is the best judge as to their perception regarding the benefit of contact. Thus, contact should only be considered of benefit to the child’s welfare where the child is not forced to accept arrangements or indeed any contact they do not want.<sup>197</sup>

Overall, the means to the removal from and avoidance of harm is recognition of the individuality and autonomy of children. Children who want involvement must be given the opportunity to be heard and to focus the proceedings and arrangements upon their needs. The removal of harm must therefore be associated with the voice of the child, not as heard through scientific or legal discourse; they must remain unconstructed and unpathologised. The key to this is involvement of the child whereby they are not just granted status, but considered agents in their own right with the dominant construction of the child imbuing the characters of resilience, thoughtfulness and independency with a right of participation.

However, this right of participation must be differentiated in two aspects. Firstly, the right to participation must not be confused with the right to decide. In popular argument, “Participation, which, in this formulation, is not clearly distinguished from decision-making, is deemed harmful to children, placing undue burdens of responsibility and guilt on them.”<sup>198</sup> Children’s participation means that their involvement will be given due weight but “does not require that their views will necessarily determine the question. The right of a child to be heard is therefore less

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<sup>195</sup> S. Boyd “Custody wars and family fragments”, (2002) 10 *The International Journal of Children’s Rights* Pg 117

<sup>196</sup> See P. Amato & J. Gilbreth “Non-resident fathers and Children’s Well-being: A meta-analysis”, (1999) 61 *Journal of Marriage and the Family* 557

<sup>197</sup> M. Cockett & J. Tripp *The Exeter Family Study* (Exeter University and Joseph Rowntree Foundation, 1994) Pg 62

<sup>198</sup> Neale, op. cit., Pg 468

contentious than a right to autonomy.”<sup>199</sup> Indeed, research has indicated that children will readily recognise the legitimacy of the process provided that they are given an input, and that they “distinguished between participation and choice, recognizing that compromises might have to be reached.”<sup>200</sup> This point is further emphasised if divorce is considered a process rather than an event; children too have to make it work. Thus, if they feel a part of the process then they will be more likely to accept it, especially where the arrangements are contrary to the wishes of the child, their full participation and resolution of their concerns makes acceptance of the result more palatable. However, participation within the process must ensure that children’s views are not just heard, but a response as to why the views have not been accepted must be returned to the child if they are to accept the arrangements<sup>201</sup> with the possibility of future discussion as to corrections to the arrangements to suit the changing circumstances of the child.

The second aspect of participation is that it must be optional for children. Once the child is granted the right to participation, this right also includes the option not to enforce it. This is vital in consideration of cases whereby either the child feels that they have been listened to by their parents and their voice given weight or where the child simply does not wish to express an opinion or deal with the consequences of doing so, where forcing the child to participate would likely lead to increased emotional trauma for the child.<sup>202</sup> Indeed, for many children it would be their preference that the decision remained within the family,<sup>203</sup> and so, if they are being given the opportunity to participate in a meaningful manner within the family, there

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<sup>199</sup> J. Herring *Family Law*, Second Edition (Harlow: Pearson Longman, 2004) Pg 402

<sup>200</sup> Neale, *op. cit.*, Pg 462

<sup>201</sup> See Douglas et al, *op. cit.*, Pg 374 & 375

<sup>202</sup> See C. Smart & B. Neale “‘It’s My Life Too’ – Children’s Perspective on Post-Divorce Parenting”, (2000) 30 *Family Law*, March, 163

<sup>203</sup> *Ibid*

would be no need for separate legal representation. Thus, the court can still be considered the point of last resort for the voice of the children to be heard but so long as the dynamics of the family allow for children's participation.

Nevertheless, it is important that the option of representation does remain for children as, according to Mnookin and Kornhauser,<sup>204</sup> the bargaining involved happens in the 'Shadow of the law.' The importance of the shadow of the law is that, despite the fact that the issues are not actually adjudicated within the courtroom, the influence of legal constructions are felt throughout the decision-making process. This is crucial as law's task is understood "to set the tone for private ordering, or alternative dispute resolution, rather than to confer measurable entitlements that one might expect to see enforced within a court room."<sup>205</sup> Therefore, recognition of children as active agents in the process is radiated throughout private ordering. Law thus normalizes divorce in this manner; by setting the tone of what is considered to be a 'good' divorce and setting standards as to children's participation. In this manner, the legal recognition of the child as an agent, with a right of participation, can spread beyond cases where a legal pronouncement is required, to reach the majority of cases decided by the parties themselves, with the presumption that children are due participation and that "transgressions will be penalized as the system seeks to normalize divorcing behaviour in accordance with the legislative ideal."<sup>206</sup>

#### Article 12 UNCRC

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<sup>204</sup> R. Mnookin & L. Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce", (1979) 88 *Yale Law Journal* 950

<sup>205</sup> Dewar, op. cit., Pg 474

<sup>206</sup> Ibid Pg 483

The ratification of the UNCRC<sup>207</sup> indicated the UK government's recognition of the growing importance of seeing children as rights holders. However, the UNCRC has been criticised as being primarily based upon the child's welfare rather than their own views, leading Shier<sup>208</sup> to comment that by allowing the state to weigh other factors against the views of the child, particularly under Article 3,<sup>209</sup> the UNCRC works on the level of tokenism or rather non-participation. The exception to this rule, however, must be seen to be Article 12, which places children's participation at the centre of the process. Article 12(2) of the UNCRC affirms its importance in that "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body. . . ." Article 12(1) thus places an obligation upon the state to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." This obligation to ensure that the child has the right to express themselves is commonly known as the "voice of the child." This voice "does not guarantee autonomy but refers to consultation and participation in decision-making."<sup>210</sup> In relation to participation in divorce, the implications of Article 12 are that the "law reserves the final decision to the courts fully accords with this provision, but it should also provide children with an opportunity to be heard in *any* judicial . . . proceedings affecting the child."<sup>211</sup>

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<sup>207</sup> Ratified by the UK in November 1989

<sup>208</sup> "Pathways to Participation: Openings, Opportunities and Obligations", (2001) 15 *Children and Society* Pg 113

<sup>209</sup> Article 3 of the UNCRC stresses the child's best interests are only a "primary" rather than paramount consideration

<sup>210</sup> Fortin, *op. cit.*, (2003) Pg 20

<sup>211</sup> Coleman & Hendry, *op. cit.*, Pg 198

Although the ‘voice of the child’ would seem only to indicate an obligation to listen to the opinions of the child, Lundy<sup>212</sup> disputes this minimalist assertion and advocates a greater role for the obligations for the state under Article 12. According to Lundy,<sup>213</sup> there are four aspects to children’s participation; ‘Space’, ‘Voice’, ‘Audience’ and ‘Influence.’ In relation to ‘Space’, the court must “assure” that the child is given the tools to express their rights. ‘Voice’ indicates the court’s obligation to afford to, though not oblige upon, all children simply “capable of forming a view”, a right to express this view. ‘Audience’ requires the views to be given due weight by the court, and may often involve more than simply listening to the child’s given opinion but the use of more creative techniques where children may be unable to do so.<sup>214</sup> Finally, ‘Influence’ relates to giving due weight to the age and maturity of the child. According to this, other factors should not allow children to be marginalised by authoritarian practices dismissing the competency of children but should be recognition that at some stage children should “be sufficiently mature that it is their view alone which should prevail.”<sup>215</sup>

In considering these obligations on the UK, the UN Committee on the Rights of the Child has been forceful in their assertion that the UK is not paying enough attention to their obligations under Article 12. In their first response, the Committee on the Rights of the Child stated that “greater priority be given to incorporating the general principles of the Convention, especially . . . article 12.”<sup>216</sup> Building upon this in the

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<sup>212</sup> “‘Voice’ is not enough – Conceptualising Article 12 of the UNCRC” Paper presented at the NIGALA Children’s Participation in the Court Process Conference on 13th June, 2006 in the Park Plaza Hotel, Belfast International Airport, Northern Ireland.

<sup>213</sup> Ibid Pg 5

<sup>214</sup> See the work of K. Winter Workshop held at NIGALA Children’s Participation in the Court Process Conference 13th June, 2006 at Park Plaza Hotel, Belfast International Airport, Northern Ireland

<sup>215</sup> Lundy, op. cit., Pg 7

<sup>216</sup> Committee on the Rights of the Child. Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland. Geneva: United Nations (1995) (CRC/C/15/Add.34) Para 27

2002 response, the Committee focused upon the UK's failure to provide a 'voice' for children within divorce as an area of major criticism, stating that the "legislation governing court procedures and administrative proceedings (*including divorce and separation proceedings*) ensure that a child capable of forming his/her own views has the right to express those views and that they are given due weight."<sup>217</sup> Further, the Committee specifically highlighted its concern "that the right of the child to independent representation in legal proceedings, as laid down in the Children Act 1989, is not systematically exercised."<sup>218</sup> Following the replacement of the Children Act 1989 in England and Wales, it must be considered whether the practice in Northern Ireland, still governed by the comparative Children (Northern Ireland) Order 1995, still affords inadequate opportunity for the child's right under Article 12 to be fulfilled.

Overall, there is evidence of a changing construction of the child, in part both to the influence of science and acceptance of the UK's obligations under Article 12 UNCRC. Children are no longer to be considered incompetent nor adults fully rational; there is a continuum to be acknowledged between the two positions, and as such, the law should allow for the recognition of children's participation. This needs to be recognised, not only through a change of procedures, but through an increased appreciation of the child's capabilities by those involved in the process. With the shadow of the law looming large, their participation within the family decision-making will be likely to be increasingly ensured, enabling their voices and concerns to not only remove them from harm, but also to help inform those processes intended to ensure their welfare.

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<sup>217</sup> Committee on the Rights of the Child. Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland. Geneva: United Nations (2002) (CRC/C/15/Add.188) Para 30 Emphasis added

<sup>218</sup> Ibid Para 29

## Chapter Five – Methodology

Following exploration of the theory regarding ‘childhood’ and divorce, it is important to explore through research how these themes have implemented upon the divorce process in practice and whether, if there are changing legal attitudes in relation to the recognition of the voice of the child, to what extent these have implemented upon the participation of children in the divorce process. In light of the limited writings on the issues of children in divorce in the Northern Ireland context, I believe it to be critical to interview professionals at all stages of the process which would or could engage with children to gain a fuller understanding of the issues that effect children.

To represent a range of different perspectives, my interviewees were chosen from a variety of backgrounds, each able to convey a certain perspective integral to the overall picture. The participants consisted of two social workers, three solicitors and a Judge. All participants participated by choice. I chose to interview social workers to give the social perspective on the issues with Mat Crozier from Include Youth giving his experiences regarding the views of children who were in frequent contact with the court, whilst a representative NIGALA officer with particular training in this area gave their perspective, recalling upon their experiences in relation to children involved in public proceedings. The three solicitors interviewed came from a range of backgrounds, two being prominent matrimonial practitioners in Northern Ireland whilst the third was a children’s rights practitioner. Their experiences allowed the

research to explore the formalities regarding the representation of children's views. Finally, the interview with a Senior member of the Northern Ireland Judiciary explored the issues from the perspective of the arbiter of justice in divorce cases, allowing critical reflection upon the adequacy of the information provided from their context.

For this dissertation, the research was conducted through qualitative, semi-structured interviews. This structure would allow the participant to "ramble"<sup>219</sup> about issues of particular interest to them or in which they have great personal experience. In using this method, the participants may reveal issues that were not realized in the theoretical background, thus allowing an accustomed process of refinement of the issues, and further, the research results would not be limited by the interviewer's framework of reference.<sup>220</sup> This is particularly important in consideration of the multi-disciplinary nature of the issues and the participants, with each participant's experience being expressive of a particular frame of reference. The role of the interviewer is therefore "Most important is to listen, then prompt and encourage when appropriate without "Leading", and to steer the discussion back on track if it appears to be heading down a less promising avenue."<sup>221</sup> This is especially important in consideration of the personal and private nature of the issues involved; the participants can give a perspective into insight not available to those outside the process.<sup>222</sup> The use of semi-structured interviews allowed the flexibility to raise questions not listed previous to the interview to allow greater exploration but nevertheless by asking by and large the same set of questions, allowing a frame of exploration in the recognition of key

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<sup>219</sup> A. Bryman *Social Research Methods*, Second Edition (Oxford: Oxford University Press, 2004) Pg 320 and A. Bryman, *Quantity and quality in social research*, (London and New York: Routledge, 1992) Pg 46 / 47

<sup>220</sup> Bryman (1992), op. cit., Pg 66

<sup>221</sup> P. Davies 'Doing interviews with female offenders', in V. Jupp, P. Davies and P. Francis (ed.), *Doing Criminological Research* (London: Sage 2000) quoted in Bryman (2004), op. cit., Pg 327

<sup>222</sup> Bryman (1992), op. cit., Pg 65

themes and findings.<sup>223</sup> The key themes of the research are framed in relation to the theoretical parameters alluded to in earlier chapters. This allows the results to be seen as indicative of the swell of professional opinion within the Northern Ireland context. It must however be noted that one of the limitations of this research is a failure to explore the views of the children themselves. Whilst there are several worthy services out there to help children deal with their parent's divorce, most notably Relate Teen, there does not seem to be any children's organisation taking the lead in representing the views of children in divorce that could facilitate the views of the children being sought. Without the support of such an organisation, I felt it unethical to attempt to engage with children independently without the resources and skills located within such an organisation.

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<sup>223</sup> C. Marshall & G. Rossman *Designing Qualitative Research*, Third Edition, (London; Thousand Oaks, CA: Sage Publications, 1999) Pg 193

## Chapter Six: Research Findings

Overall, there was unanimous support for the proposition that the interests of children were not being met under the current divorce procedure.

*“We don't think that the introduction of the Children Order 1995 currently affords children representation in divorce proceedings really at all . . . We would have concerns that there really is no mechanism for the voice of the child at all in divorce at the moment. Apart from exceptional circumstances where the judge does get the report, there is nothing.”*

*(Solicitor 3)*

*“I think they should have a fully involved role in their future, and so maybe, I think it could be termed as adequate but my concern is that it needs to be more than that.”*

*(Judge)*

There was support for certain aspects of the current divorce procedure. One such area of support was the philosophy behind no-order principle.

*“The no-order principle is obviously in many instances a good one . . . The no-order principle is in theory a good one – emphasising the role of parents and the role of the*

*state only to help where it is necessary”*

*(Judge)*

However, certain participants were concerned as to whether the no-order principle in practice was currently able to give concerted emphasis upon the children’s interests.

*“In divorce, I think that most of the judges would start with that position (no-order) and only if the petitioner or someone in the process draws it to their attention, I don't think judges are immediately drawn to children in the divorce.”*

*(Solicitor 1)*

The Welfare checklist in its current form was unanimously accepted as sufficient.

*“I suppose that the welfare checklist itself is probably adequate. It is a broad enough spectrum of issues for the court to look at.”*

*(Solicitor 1)*

Indeed, there was recognition of the changing importance of the welfare checklist in light of the more child-inclusive attitude adopted in dominant legal discourse in recent years.

*“Children are now persons with a separate right and entitlement to speak and to be*

*heard and to be listened to and I think there is a shift . . . We are in a rights based culture now but I think that still the rights of children are paramount and I think we are increasingly in our courts shifting towards a culture where the rights of children are to be looked at as well as this old paternalistic welfare-based approach.”*

*(Judge)*

*“They are certainly moving more towards an understanding that it is more harmful not to inform a child. Now that may only be our perception but I have seen a change over the last few years.”*

*(Solicitor 3)*

This has been accompanied by a greater acceptance of the agency and autonomy of the individual children, and as a result, an increased focus upon hearing the voice of the child.

*“I don't think they see it as a burden on the child. I think the court feels wholly sympathy with the child because they are dealing with the adults. Some judges find it very difficult to deal with divorcing parents who are warring and getting nowhere. So I think they feel sorry for the children and can empathize with them.”*

*(Solicitor 1)*

This acknowledgement has been accompanied by an increased appreciation of the

importance of Article 12 of the UNCRC in legal practice.

*“(Justice Gillen) . . . is very strongly advocating that by using the welfare checklist, the voice of the child is essential to that, and article 12 (UNCRC) is essential to the welfare checklist. You will see some very strong judgments like that coming through the high court. We certainly feel there is a very strong thread coming through that in the family and care cases.”*

*(Solicitor 3)*

There was great support for the use of Article 12 in the sense advocated by Laura Lundy,<sup>224</sup> and further, many practitioners recognised that a similar conception could be identified in practice.

*“I genuinely think there is a wind of change in the jurisprudence. That would have been so ten years, dare I say five years ago but now I think the courts are becoming increasingly aware **not only to hear, but to listen to the voice of child**. So I think that if you come into the court now you will hear much more mention of the voice of the child, not only in academia . . . but I think you will see it more in judgments.”*

*(Judge)*

*“I think that it needs to be looked at case by case and in the particular needs and circumstances of all children . . . I feel there needs to be consistency of approach and*

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<sup>224</sup> “‘Voice’ is not enough – Conceptualising Article 12 of the UNCRC” Paper presented at the NIGALA Children’s Participation in the Court Process Conference on 13<sup>th</sup> June, 2006 in the Park Plaza Hotel, Belfast International Airport, Northern Ireland

*consistency across disciplines as to how children can be **meaningfully involved.***”

*(Social Worker 2)*

To ensure that the purposeful involvement of children was to be fulfilled, all participants focused upon the importance of continuous training.

*“There is a need for everybody to be trained properly in taking instructions from children, talking to children, communicating with children really, assessing children's competence.”*

*(Solicitor 3)*

*“(After training the judge) put up his hand and admitted until five minutes ago I was one of those judges who would never speak to a child under any circumstances but now perhaps I have changed my mind, depending on the circumstance.”*

*(Solicitor 2)*

*“Yes. . . I think there needs to be education and proper training so that people are aware of the issues, challenges and skills in terms of engaging with children so that you manage expectations and you don't further damage children in the process. I say that about everybody; social workers, solicitors, that's not leveled at the judiciary but I certainly think there is room for significant training.”*

*(Social Worker 2)*

On the issue of judicial intervention, there was a contention that the courts did not simply look to the agree/disagree distinction regarding parental arrangements for the children as to when to intervene.

*“They certainly look for a greater insight than that. They certainly don't rely entirely on what mum and dad say . . . Certainly not in my court, I would not dream of deciding if there was harm for a child simply on what the mother or father said . . . But I think it is recognised that mum and dad is not enough, the question is what are the tools we should use to find out, that is a different question, not so easily answered.”*

*(Judge)*

In view of this judicial attitude, it must be considered that it is the legislation that fails to afford legal professionals the tools to adequately determine the situations when to intervene. Of singular importance was the recognition that the over-reliance upon parents as indicators of harm to the child was detrimental to children's welfare.

*“You can't ascertain harm by talking to the mum and dad without talking to the child.”*

*(Solicitor 3)*

*“They have to be told by other agencies what the harm is . . . one or other of the parties will have to say he or she shouldn’t see this child as there is a risk of significant harm, or abuse or otherwise how is the judge going to know. He can’t predict.”*

*(Solicitor 2)*

Indeed, it was recognised that one of the failures of the current process is that due to family dynamics, the child is unlikely to fully express their views to their parents, leading to a failure in the process’ ability to fully inform the court.

*“. . . children are very alert to cues, non-verbal cues. I think children are acutely aware of the tensions and divided loyalties. They are trying desperately to please both parents and I think it is fair to say they are anxious about being candid as to what they should and shouldn’t say.”*

*(Social Worker 2)*

*“. . . there may be reasons that you are not discovering that the child knows about that you don’t and it might just be an emotional bond or maybe relate to somebody or maybe a role model thing or they don’t get on with their mother or whatever the thing is, it has to be taken into consideration even if you can’t see why the child has reasons.”*

*(Social Worker 1)*

### Statement of Arrangements

Related to this, there was acknowledgment that the courts were not being provided with enough information regarding the familial situation. In particular, the procedure regarding the Statement of Arrangements was roundly denounced. The first issue of criticism regarded the placement of the form within the procedure as a whole.

*“My fear is that the present situation does not afford the statement of arrangements the necessary priority. The danger is it becomes just one more form to fill in, and the solicitor says ‘By the way, you have to fill in this statement about arrangements. Is everything going Ok?’ ‘Oh yeah fine.’ ‘How often do you see them?’ ‘Once a week’ ‘Fine’.”*

*(Judge)*

The effectiveness of the form must be seen in light of its ability to adequately meet its objectives ensuring that children are removed from harm and its ability to focus the parties upon the welfare of the child. In considering the latter, there was universal condemnation of the form’s ability to focus the parties upon the child’s interests. There was recognition that by treating the children as separate to the process, this marginalized the importance of discussing with the child.

*“... I think people are afraid to put at the start any difficulties they might have in*

*case they don't get their divorce. If they are concentrating on getting their divorce, they may see their children as separate to that.”*

*(Solicitor 1)*

*“No one is there to validate or to check that the children who are obviously old enough have an awareness of the changed family situation. I think there needs to be some provision for children to be actively involved in that process, it is a question of participation from quite early on so that they are advised as to why their parents are separating and be reassured that shouldn't alter the relationship with both parents.”*

*(Social Worker 2)*

When asked whether this led to a situation whereby children are viewed as pawns within the divorce, one participant replied

*“More or less really. It doesn't ask what the children think.”*

*(Solicitor 2)*

Indeed, one of the overarching themes of the research findings was the emphasis on parental education regarding the importance of keeping children's interests central to the divorce procedure.

*“Parents would be sign-posted to sources of guidance, support and help to help them*

*manage the separation process and keep the focus on the children . . . so that they don't get into entrenched positions where they lose sight of the children."*

*(Social Worker 2)*

In relation to the presentation of information to the court, there was much criticism leveled at both of the assumptions made regarding the presentation of information by the parties and the adequacy of the form itself. The expectation regarding the role of parents in supplying unbiased information was roundly disapproved in the practical reality of their experience.

*"I think that is a flawed premise given that inevitably there are significant tensions between parents, polarized positions and they don't always take account of the age, the views and perspectives of the children"*

*(Social Worker 2)*

*"I think that the focus is to try to potentially blame or discredit each other and inadvertently, the key information may not be presented in an objective manner."*

*(Social Worker 2)*

*"Unless the respondent is fairly active about making sure that their side of it is put forward . . . as it stands, for the less articulate respondent, it is difficult to make their concerns known."*

*(Solicitor 1)*

Further, the role of the solicitor in the completion of the Statement of Arrangements was another source of concern from the perspective of the provision of information.

*“Inevitably, it is in the interests of the solicitor to present a good case for their client, and I think the nature of adversarial proceedings don’t contribute to ensuring the best and fullest information is presented to the court.”*

*(Social Worker 2)*

Indeed, there was concern that the information on the form was limited as solicitors only recorded the information likely to find favour with the judge. This is not an uncommon occurrence as one legal practitioner considered it part of common practice.

*“Almost always. I ask the questions, they answer and I write it down in what I perceive to be language that the judge will understand and I turn it around and say sign there.”*

*(Solicitor 2)*

Further, it was recognised by those interviewed that the reliance upon the petitioner’s, rather than both parties, completion of the statement of arrangements could contribute

to a lower quality of investigation on behalf of the judge.

*“The ideal is that prior to the initiation of the proceedings, it is shared with the respondent so that there is an agreed statement that goes forward. But on many occasions there are difficulties in getting the respondent to complete it.”*

*(Solicitor 1)*

*“The statement of arrangements is filed by the petitioner. It should be served upon the respondent but routinely isn’t . . . So generally it’s the petitioner’s views and arrangements before the judge.”*

*(Solicitor 2)*

The structure of the form itself was a major source of criticism as those who worked with it on a practical level were of the opinion that the questions asked failed to address the key questions involving children’s welfare.

*“The form itself only allows a certain amount of information to be put on it . . . So it is quite perfunctory, it doesn’t allow for any room to expand on difficulties.”*

*(Solicitor 1)*

*“You just fill them out as best you can and the family judge is constantly giving off about the paucity of detail, people just say yes, end of story. What does that mean?”*

*What does that tell him about the arrangements for that child or those children.”*

*(Solicitor 2)*

The adequacy of the M4 form was further disparaged in that it replaced the system whereby a welfare report was required in every divorce concerning children.

Although none of those asked wanted a return to the previous system, noting in particular the time needed for their preparation and the quality of the reports, those questioned were of the opinion that the procedure put in its place failed to give enough protection for children.

*“We think they went probably from one extreme to the other under the Children order. Maybe (a welfare report) is not necessary in every single case but it is necessary in some cases.”*

*(Solicitor 3)*

*“Whilst people found it a bit of an intrusion, it certainly picked up on issues that are not picked up now . . . it certainly had its merit that the present system does not”*

*(Solicitor 1)*

What seemed to be required was the inclusion of a report where there seemed to be a particular issue indicating that the voice of the child has not been included. When asked whether the granting of reports in current practice was sufficient, those working

within the system recognised that although available, they were granted “*Relatively rarely these days.*” (Solicitor 2)

*“It is only really now on the request of the judge now, so it is in only certain circumstances that a social work report will be requested. Only when the judge is concerned. So it is certainly not in every case; it is only in a small number of cases.”*

(Solicitor 3)

When asked what form the procedure should take, there was an overwhelming support for the redefinition of the Statement of arrangements. There was general support for a redefinition of the questions indicating factors of greater importance to the well-being of the child rather than procedural questions focused upon the technicalities of divorce. One proposition that was of particular interest was the creation of a section for the purpose of allowing children who want to contribute to the process to put down their views regarding the arrangements.

*“Should consideration be given, I suppose, to children of a certain age having to contribute to this form, which might make their parents think about what the mechanism is about.”*

(Solicitor 1)

## Representation

In terms of participation, all of those questioned voiced concerns over the current system of representation, with those asked stating that in their experience separate representation, although theoretically available, was not accessible in practice.

*“I don't think there is, in terms of separate representation in divorce proceedings, I think it is very rare. I can't even cite you a case where I know it's happened in.”*

*(Solicitor 3)*

*“It is a very rare child who comes to court. In private proceedings I can't think of any child who has come to court . . . I can't remember ever”*

*(Solicitor 2)*

In relation to representation by a guardian, there was concern, particularly from the judiciary, whether this system, though more widely available, was able to meet the needs of the child and the court in adequately representing the views of the child.

*“I think that the real concern at the moment is 'is the voice of children being heard?' That's my key concern at the moment. I am hearing the voice of the guardian ad litem who are telling me what the children are saying. Is that really the voice of the child? I*

*am hearing the voice of social workers telling me what the child has said. Is that the voice of the child? Am I being told what is best for this child or am I being told what the child has said? That worries me . . . there is a danger that the voice of the child is relegated to the realm of 'the child is being influenced by one party' if it doesn't fit in with what the social worker, the guardian thinks is in the best interests of the child."*

*(Judge)*

Despite recognition of this limitation, in light of its role where the views of the child and the guardian were not in conflict, there was concern that this option was not available to the Family Proceedings court. This was particularly noticeable in that their use in the County and High Courts was relatively frequent and was of great benefit to the proceedings.

*"In the family proceedings courts, they cannot have representation from the official solicitor, which I think is an anomaly and something should be looked at. In the family care centers and the high court I do have an option of having them represented by the official solicitor, and that happens quite a lot."*

*(Judge)*

*"Probably the biggest problem that people are focusing upon is the family proceedings court in that there is no mechanism there for separate representation of children."*

(Solicitor 3)

One solicitor was particularly concerned as to the distinction made between the public law and the private law cases and the disproportionate effect this had upon the ability of the child to represent their views to the court.

*“There is a fine line between the two at the stage where emotional abuse being suffered in otherwise private proceedings nearly becomes as bad as, if not worse, than physical harm suffered in public law areas. There is definitely a cross over between the two areas and I don't think that any one is worse than the other because the child is suffering; full-stop.”*

(Solicitor 1)

They were of the opinion that this distinction was made upon the basis of an underestimation of the harm suffered by children going through divorce as compared to those going through public law proceedings.

*“Harm, when it is used, is a very specific term because it is related to the legislation and it has been defined over the years in any event. Children that are suffering just from the effects of their parent's divorce, that doesn't fall necessarily in the legal definition of harm in the same way as physical abuse or mental torture or things of that nature would.”*

(Solicitor 1)

When asked what form of participation would best suit the needs of the child and the role of the court, there was overwhelming support for the “Tandem” form of representation currently used in public law to be adopted in private law proceedings. This form of representation is based upon the representation of the child by both a solicitor and a guardian. This has the benefit of representing both the views of the child alongside the social work professional’s view as to the child’s best interests. This allows the court to base their judgement upon the widest provision of information.

*“The key to justice for children is a multi-disciplinary impute. That is the absolute key. No longer do judges think that they alone hold the key to solve the problems of children . . . A number of other people, other experts must be involved, and I think that is happening.”*

*(Judge)*

*“Separate representation really only arises in relation to public law proceedings. That system works really well and that tends to draw out all of the difficulties and I believe that that is a very good system of representation as you have got the lawyer and a well trained guardian who is an expert social worker in those cases”*

*(Solicitor 1)*

However, in terms of resources, there was recognition that such a form of

representation, understood to be an expensive model of representation due to the greater number of parties involved, would not be needed in every case.

*“It is not in all cases. Absolutely not . . . We think it is only in certain types of cases where certain attributes trigger and identify it.”*

*(Solicitor 3)*

*“I think we are really talking about the minority of cases, were I understand that only about 10% of divorcing parents who go to court, we are talking about a significant minority of cases but within that I think we can reduce the numbers further if we have clear guidance.”*

*(Social Worker 2)*

When asked in what circumstances they would favour separate representation, there were a range of situations that were brought up by the participants.

*“ . . . where there is a clear conflict in a residence dispute . . . Obviously in the most obvious cases of physical abuse, sexual abuse, all of that, children need separate representation. But in the 'ordinary' matrimonial dispute where it is simply your average parent fighting over the children, then it is more difficult to spot.”*

*(Solicitor 1)*

*“Contact cases are a classic case where there are serious sexual allegations against*

*the child by one of the parents, instances where there is a particular international element, and instances where the court comes to the conclusion that there is a danger that the adults are losing sight of the paramount interests of the child.”*

*(Judge)*

A complete list that would include these circumstances was forwarded by Solicitor 3, who advocated the use of the criteria for the appointment of separate representation set out by the Full Court of the Family Court of Australia in *Re K*<sup>225</sup> to which Solicitor 3 would add situations where the child was witnessed Domestic Violence and where there were intractable disputes concerning a child’s education. It would seem that these criteria would give the judge a sufficient ability to ensure that the child’s voice can be heard where it seems to them that they have not been able to, whilst at the same time ensuring that resources are not squandered where the view of the child would not add to their judgement. The use of the *Re K* criterion would further ensure compatibility with UNCRC in light of the extent to which the Family Court of Australia had given particular regard to its obligations under Article 12.

However, alongside this provision for representation, there was concern as to whether,

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<sup>225</sup> *Re K* (1994) FLC 92-461 Essentially in cases where there are allegations of child abuse whether physical, sexual or psychological, any case in which a child of mature years is expressing strong views the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent, an apparently intractable conflict between the parents, where the child is apparently alienated from one or both parents, issues of cultural or religious difference or sexual preference of the parents affecting the child, where the the parent or other person having significant contact with the children suffers significant medical, psychiatric or psychological illness or personality disorder or is alleged to be anti-social to the extent where it seriously impinges on the child's welfare, where neither parent seems a suitable custodian, where one of the parties proposes that the child will either be permanently removed to such a place within or outside the jurisdiction as to greatly restrict the possibility of access to the child or where it is proposed to separate siblings.

in light of the obligations under Article 12 proposed by Lundy,<sup>226</sup> the procedure would be adequate to accommodate a child-orientated atmosphere. Firstly, children must be educated to ensure that they have the ability to express their views satisfactorily. As such, children must be taught to recognise the options and consequences of their views.

*“One of the things about divorce proceedings when parent’s split up for children is they are very young and inexperienced often, and they don’t have models for how it’s going to work afterwards. They don’t necessarily know what the possibilities are, what the options are, and some of those should be talked through.”*

*(Social Worker 1)*

Secondly, children must be given the option of participation rather than forcing them to do so. They should not be forced to get involved in arguments that can be traced back to their parents rather than themselves.

*“The child should not be forced into court, forced to speak. I don't think that the courts see it that way but there is always the danger that the voice of the child can be used as some means of forcing the child to engage in a process when the child doesn't want to.”*

*(Judge)*

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<sup>226</sup> “‘Voice’ is not enough – Conceptualising Article 12 of the UNCRC” Paper presented at the NIGALA Children’s Participation in the Court Process Conference on 13<sup>th</sup> June, 2006 in the Park Plaza Hotel, Belfast International Airport, Northern Ireland. Pg 5

*“It is obviously something that the child is trying to express, and yet some don't want to use that voice as some are afraid of upsetting one parent or the other.”*

*(Solicitor 1)*

*“It is recognition of the importance of the children's perspective that people want to be cautious of going too far, to the point that children are in a situation of divided loyalty and feeling pressure on them to make decisions”.*

*(Social Worker 2)*

Central to this is that children are not overburdened when they are asked to express their views but that they realize their views are given due weight.

*“I think in telling children that they have a voice, they have to know they have a voice, not a decision-making power. Its involving . . . It has to be an education process whereby we let children know that they are not necessarily going to be listened to, they are not necessarily going to make the decisions . . . They have to understand that they are just another part in a bigger process.”*

*(Solicitor 1)*

The key findings of this research are that there is professional dissatisfaction with the current divorce proceedings and their potential for children's involvement. In particular, there was condemnation of both the Statement of Arrangements form, in

theory and in practice, as well as the lack of provision for separate representation. This perception was furthered in light of the unavailability of the preferred 'Tandem' form of representation. However, these shortcomings must be viewed in light of a professional environment increasingly receptive to the needs and views of children due to acceptance of both the agency of children and the court's obligations under Article 12 UNCRC.

## Chapter Seven: Conclusion

*“One can trace over the last half century a progressive withdrawal from any attempt to scrutinise divorces, at the same time as the demand for more care to be taken of the children’s interests has grown.”<sup>227</sup>*

Before the adoption of the Children Act 1989 in England and Wales, the Court’s role in ensuring that the child’s perspective was brought to the fore was described as largely “symbolic and incidental.”<sup>228</sup> It must then be asked to what extent the current law in Northern Ireland still reflects the symbolic and incidental intervention. Children’s involvement in the process whereby arrangements are made as to their custody, residence and well-being can at best be considered sparse, or at worst non-existent. They are minimised within the process, with their best interests vested alongside the parent’s, with their potential for harm found in their involvement. This preclusion from involvement leads to confusion surrounding the child, to an increased potential for harm without their contribution and can lead to “dangerous misunderstandings and needless anxieties putting stress on children’s emotional wellbeing.”<sup>229</sup> It must be recognised that the child’s participation in some form is essential in light of the overwhelming evidence regarding the benefits of including children in the process. To do this requires a reconstruction of the child as an agent –

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<sup>227</sup> G. Douglas, M. Murch, L. Scanlan and A. Perry “Safeguarding children’s welfare in non-contentious divorce: Towards a new conception of the legal process?”, (2000) 63(2) *MLR* 177 Pg 179

<sup>228</sup> Law Commission, *Review of child law: Custody* (No. 96) (London: HMSO, 1986) Para 4.10

<sup>229</sup> Douglas et al, *op. cit.*, Pg 193

to forge an enlightened image of the child as a competent being, not defined by their biological development but as actors with a contribution to be made.

This is particularly important in a mass divorce society; where the courts are overburdened by the increasing rate of divorce. The recognition of a 'settlement culture', as typified by the 'no-order' principle, whereby decisions are made externally from the legal process must not be seen as an "abandonment by law of its duty to provide justice and its equally important duty to ensure that the interests of the child prevail."<sup>230</sup> Rather, in these circumstances, the law must set the correct tone for the private proceedings to advance, with recognition of the role that children must play within the process. In this sense, the shadow of the law must loom large upon the horizon, unequivocally supporting the centrality of the views of the child.

### Reform

Having interviewed those who are engaged with the divorce process, it is clear that their views advocate a greater role for children within the divorce process, both theoretically and in practice. Through increased recognition of both the rights of the child under the UNCRC and the increased appreciation by scientific discourses of the potential of children, there has been assimilation between those advocating the rights of the child and those advocating the primacy of the welfare of the child. This has led to the position whereby the importance of children having a central role in the resolution of issues surrounding their contact and residency, issues of critical importance in their lives, is recognised as necessary in ensuring that children are not harmed by their parent's divorce, and further, that the arrangements made are tailored

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<sup>230</sup> M. King "Future Uncertainty as a Challenge to Law's Programmes: The Dilemma of Parental Disputes", (2000) 63(4) *MLR* Pg 526

to suit their interests. What has become apparent in light of the professional recognition of the agency of children is that that which is currently inhibiting children from presenting their views is a conceptual legislative problem rather a professional issue. There is vast support from professionals advocating a greater role for children but it is clear that they feel that the legislation precludes them from ensuring children's involvement. In light of this professional dissatisfaction, and further in consideration of recent jurisprudence increasingly promoting the views of the child, it must be seen that legislative reform is needed to allocate a greater role for children within the process and to facilitate the increased professional recognition of the child. The minimalist assertion would be an increasingly child-focused practice which creates the "environment that supports the disputing parents in actively considering the unique needs of each of their children."<sup>231</sup> In light of the criticisms forwarded in earlier chapters, this would involve a redefinition of the Statement of Arrangements form, with purposeful questioning as to what consideration has been made for the children, allowing the court to make a decision as to whether the child's wellbeing and developmental needs are being fulfilled. Such questions should include "has the child's behaviour at home altered . . . if so, what steps have been taken to help? Does the child have a clear understanding of what has happened and what will happen? How is the child coping with contact arrangements?"<sup>232</sup> This would oblige parents to give greater consideration to the interests, and the views, of the child whilst advocating a purposeful investigation on the court's behalf as to the welfare of the child.

However, to fully comply with Article 12 UNCRC the process must develop into a child-inclusive rather than simply child-focused practice. This would mean

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<sup>231</sup> L. Moloney & J. McIntosh "Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions", (2004) 10(1) *Journal of Family Studies* Pg 72

<sup>232</sup> Douglas et al, op. cit., Pg 188

developing the choice of direct participation into the model of divorce. As stated in the research, this could be quite easily incorporated into the Statement of Arrangements as a separate section reserved for the views of the child. However, beyond this, it would be important to advocate a greater role for children's participation in courtroom proceedings. One development must be the greater provision of separate representation. The rules regarding separate representation must be clarified and made suitable for application in practice and any representation available to the child in the High Court and County Court must be available to the child in the Family Proceedings Court. The form of representation must not be dependent upon the Court with which they are faced, especially in that the vast majority of cases are resolved in the Family Proceedings Court. Additionally, with the benefits of tandem representation being recognised in public law cases, and the definitive distinction between the merit for imposing such a distinction between public law and private law cases questioned by practitioners, it is essential that in certain circumstances tandem representation is available to the child for both the benefit of the child and the court. These would allow for a range of options to be available to the judge so that the process can be tailored around the characteristics, wishes and feelings of the individual child. In light of the increasing recognition of the child's agency, failure to ensure their voice is heard must be seen to sow the seeds of isolation and misunderstanding. As a political issue, the silencing of children remains submerged within the family. To ease this burden the legislature must provide the law with the tools to deconstruct this silence and to ensure that the individuality of the child is recognised. It is only through doing this that the burdens placed upon children through their parent's divorce can be alleviated and that recognition of the child as an active agent can be fulfilled.

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