

## CHILDREN AT COURT

Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) 1989

1. State Parties shall 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.
2. For this purpose, the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or indirectly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Ratified by the UK but not incorporated into Domestic Law

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Children and young people were historically protected from the courtroom due to their legal disability (age) and were dependent on the adults in their lives when it came to civil litigation. The tendency was to view the child as the passive object of concern and not the active subject in the proceedings.

In ordinary civil litigation e.g. personal injuries, children are usually required to commence and conduct proceedings through an adult known as “next friend”. In children’s proceedings, prior to the Children (NI) Order, children’s views were recorded in the welfare reports by the court welfare officer (as they were known then). The Official Solicitor was sometimes appointed in wardship proceedings although they did not have the power to initiate proceedings on behalf of the child.

This all changed with the commencement of the Children (NI) Order 1995. The Children’s Order provides children and young persons the ability to ask for permission of the court to commence and conduct certain proceedings in their own right or where a solicitor considers the child, having regard to their understanding, can give instructions in relation to the proceedings.

## **THE LEGAL FRAMEWORK –**

### **CHILDREN (NORTHERN IRELAND) ORDER 1995**

**Article 10.** — (1) In any family proceedings in which a question arises with respect to the welfare of any child, the court may make an Article 8 order with respect to the child if—

(a) an application for the order has been made by a person who—

(i) is entitled to apply for an Article 8 order with respect to the child; or

(ii) has obtained the leave of the court to make the application; or

(b) the court considers that the order should be made even though no such application has been made.....

Article 10 (8) Where the person applying for leave to make an application for an Article 8 order is the child concerned, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application for the Article 8 order.

Rule 6.3 Family Proceedings Rules (NI) 1996 – Certain minors may sue without the next friend

Rule 6.6 Family Proceedings Rules (NI) 1996 – separate representation of children in proceedings other than Children Order Proceedings.

Re Arthur (Non-Molestation proceedings by a child) [2009] NI Fam 17

### **Representation of child and of his interests in certain proceedings (*specified*)**

**60.**— (1) For the purpose of any specified proceedings, the court shall appoint a guardian ad litem for the child concerned unless satisfied that it is not necessary to do so to safeguard his interests.

(2) The guardian ad litem shall—

(a) be appointed in accordance with rules of court; and

(b) be under a duty to safeguard the interests of the child in the manner prescribed by such rules.

(3) Where—

(a) the child concerned is not represented by a solicitor; and

(b) any of the conditions mentioned in paragraph (4) is satisfied,  
the court may appoint a solicitor to represent him.

(4) The conditions are that—

- (a) no guardian ad litem has been appointed for the child;
- (b) the child has sufficient understanding to instruct a solicitor and wishes to do so;
- (c) it appears to the court that it would be in the child's best interests for him to be represented by a solicitor.

(5) Any solicitor appointed under this Article shall be appointed, and shall represent the child, in accordance with rules of court.

(6) In this Article "specified proceedings" means any proceedings—

- (a) on an application for a care or a supervision order;
- (b) in which the court has given a direction under Article 56(1) and has made, or is considering whether to make, an interim care order;
- (c) on an application for the discharge of a care order or the variation or discharge of a supervision order;
- (d) on an application under Article 58(4);
- (e) in which the court is considering whether to make a residence order with respect to a child who is the subject of a care order;
- (f) with respect to contact between a child who is the subject of a care order and any other person;
- (g) under Part VI;
- (h) on an appeal against—
  - (i) the making of, or refusal to make, a care order, supervision order or any order under Article 53;
  - (ii) the making of, or refusal to make, a residence order with respect to a child who is the subject of a care order; or
  - (iii) the variation or discharge, or refusal of an application to vary or discharge, an order of a kind mentioned in head (i) or (ii);
  - (iv) the refusal of an application under Article 58(4); or
  - (v) the making of, or refusal to make, an order under Part VI; or

(i) which are specified, for the purposes of this Article, by rules of court.

(7) The Department may by regulations provide for the establishment of panels of persons from whom guardians ad litem appointed under this Article must be selected.

(8) Paragraph (7) shall not be taken to prejudice the power of the Lord Chancellor to confer or impose duties on the Official Solicitor under section 75(2) of the Judicature (Northern Ireland) Act 1978(1).

## FAMILY PROCEEDINGS RULES (NORTHERN IRELAND) 1996

### **Appointment of guardian ad litem**

**4.11.**—(1) As soon as practicable after the commencement of specified proceedings, or the transfer of such proceedings to the court, the court shall appoint a guardian ad litem, unless—

(a) such an appointment has already been made by the court which made the transfer and is subsisting, or

(b) the court considers that such an appointment is not necessary to safeguard the interests of the child.

(2) At any stage in specified proceedings a party may apply, without notice to the other parties unless the court directs otherwise, for the appointment of a guardian ad litem.

(3) The court shall grant an application under paragraph (2) unless it considers such an appointment not to be necessary to safeguard the interests of the child, in which case it shall give its reasons; and a note of such reasons shall be taken.

### **Powers and duties of guardian ad litem**

**4.12.**—(1) In carrying out his duty under Article 60(2), the guardian ad litem shall have regard to the principle set out in Article 3(2) and the matters set out in Article 3(3)(a) to (f) as if for the word “court” in that section there were substituted the words “guardian ad litem”.

(2) The guardian ad litem shall—

(a) appoint a solicitor to represent the child unless such a solicitor has already been appointed, and

(b) give such advice to the child as is appropriate having regard to his understanding and, subject to rule 4.13(1)(a), instruct the solicitor representing the child on all matters relevant to the interests of the child, including possibilities for appeal, arising in the course of the proceedings.

(3) Where the guardian ad litem is the Official Solicitor, paragraph 2(a) shall not require him to appoint a solicitor for the child if he intends to act as the child's solicitor in the proceedings, unless—

(a) the child wishes to instruct a solicitor direct; and

(b) the Official Solicitor or the court considers that he is of sufficient understanding to do so.

(4) Where it appears to the guardian ad litem that the child—

(a) is instructing his solicitor direct, or

(b) intends to, and is capable of, conducting the proceedings on his own behalf, he shall so inform the court and thereafter—

(i) shall perform all of his duties set out in this rule, other than duties under paragraph (2)(a) and such other duties as the court may direct,

(ii) shall take such part in the proceedings as the court may direct, and

(iii) may, with leave of the court, have legal representation in his conduct of those duties.

(5) The guardian ad litem shall, unless excused by the court, attend all directions appointments in and hearings of the proceedings and shall advise the court on the following matters—

(a) whether the child is of sufficient understanding for any purpose including the child's refusal to submit to a medical or psychiatric examination or other assessment that the court has power to require, direct or order;

(b) the wishes of the child in respect of any matter relevant to the proceedings, including his attendance at court;

(c) the appropriate forum for the proceedings;

(d) the appropriate timing of the proceedings or any part of them;

(e) the options available to it in respect of the child and the suitability of each such option including what order should be made in determining the application;

(f) any other matter concerning which the court seeks his advice or concerning which he considers that the court should be informed.

(6) The advice given under paragraph (5) may, subject to any order of the court, be given orally or in writing; and if the advice be given orally, a note of it shall be taken.

(7).....”

Rule 11 and Rule 12 Magistrates’ Court (Children (Northern Ireland) Order 1995) Rules (Northern Ireland) 1996 equivalent to Family Proceedings Rules (NI) 1996.

(England and Wales – Refer to Practice Direction 16A – Representation of Children) (Does this help or hinder?)

At the time these provisions were considered ground breaking. The emphasis shifted from the courts accepting reports/affidavits on what adults opined to be in the child’s best interests to the court hearing the child’s views and wishes and these views were recorded. If certain criteria were met, the child could represent their own views and instruct their own solicitors to do so. This is not to be confused with investigations into the child’s best interests.

Early enthusiasm in England and Wales was curtailed by the Practice Direction in 1993, which indicated that such applications for leave to issue proceedings by a child had to be made to the High Court and secondly by case law which held that the applicable test to determine whether a child should be granted leave to bring an application in private law proceedings was not only to show that the child had the capacity to form and express an opinion but also that the child could understand and cope with the pressures of litigation, in order to be successful in securing independent legal representation. Even if the Children’s Court found that the child did have sufficient understanding the Court could exercise its discretion and decide not to grant leave to the child to make the application.

So, if children were granted leave they could initiate Article 8 private law proceedings. This was and remains quite rare. The High Court and the County Court has the power to request the assistance of the Official Solicitor to appear for the children if the Court believes that this is in the child’s interests in private law proceedings issued by other parties, but no such power exists for the Family

Proceedings Court. Courts may direct Article 56 investigations in private law applications and Guardian Ad Litem's may be appointed for the investigation and any public law applications that the Trust issues because of the investigation.

Changes have continued over time but one matter that I believe to be striking is how children can be declared criminally responsible from the age of 10 in the United Kingdom. Therefore, in the criminal youth justice system children are assumed capable of participating in the criminal proceedings if they are charged with a criminal offence but in children order proceedings, capacity is assessed.

In specified proceedings under the Children (NI) Order, (i.e. proceedings which involve public intervention in the family aka public law proceedings) Guardian ad Litem's are appointed for the child unless the Court is satisfied that it is not necessary to do so to safeguard the child's interests. If they are deemed to have sufficient understanding, the child(ren) may instruct their own solicitor to represent their own views and wishes.

It appears from Rule 4.13 (Family Proceedings Rules (NI) 1996, that it is the solicitor's consideration of the child's understanding that is material, but the Guardian ad Litem must inform the court of the issue either in their report or a C2.

“It is noted that under this Rule (4.13) it is the primary duty of the solicitor to determine whether or not the child is competent to give instructions. S/He may seek advice from the guardian at litem, or a medical or other suitably qualified expert on the matter but the decision is ultimately one for the solicitor and should not be taken lightly.” – The Law of Children in Northern Ireland – The Annotated Legislation 2<sup>nd</sup> Edition – Long and Loughran page 315.

If there remains an issue, this decision may be reviewed by the Court.

### **SPECIFIED PROCEEDINGS – representation of the child**

The statutes do not provide guidance regarding the criterion or tests used to determine a child's ability to give instructions on their own behalf.

#### CASE LAW

Re H (A Minor) (Care Proceedings): Child's Wishes) [1993] 1 FLR 440

Thorpe J held that the test that a child has sufficient understanding to instruct their own legal representation was lower than Section 38(6) of the Children Act (child's refusal to submit to a medical or psychiatric examination).

At paragraph 449A of the judgment, Thorpe J held that in relation to a child's capacity to make an informed decision to refuse to submit to a psychiatric examination, "the level of understanding that enables a child to make an informed decision whether to refuse to submit to a psychiatric examination is in all practical senses a much higher level of understanding that is required to enable him to give instructions to a solicitor on his own behalf."

In relation to capacity to give instructions to a solicitor, the test was whether the child had the sufficient rationality and understanding to instruct a solicitor. This may not be so where the child is suffering from intense emotional disturbance which could remove the necessary degree of rationality that leads to coherent and consistent instruction. If there is no agreement about the child's rationality or there is a real question as to whether the child's emotional disturbance is so intense that he could not give instructions the Court should seek an expert opinion on the matter, (preferably from an expert already involved in the case)

Re M (Minors) (Care Proceedings: Child's Wishes) [1994] 1 FLR 749.

Wall J held that it was important that the Court was made aware as soon as possible as there may be an issue about the capacity of the child to give coherent and consistent instructions and therefore expert evidence may be required to resolve the issue, the court has a duty to ensure that the proceedings are disposed of promptly and in the most effective manner, the other parties, particularly the child's parents have a right to know at an early stage how their child is to be represented in the proceedings and what view their child is expressing and it is important for the court to know in advance whether or not the child and the Guardian ad Litem are to be separately represented so that the Judge when reading the papers in advance is alert to the issue.

RE CT (A Minor) (Wardship: Representation) [1994] Fam 49, [1993] 4 All ER 518, followed and approved the Master of the Rolls in the Court of Appeal

decision of *Re S (A Minor) (Independent Representation)* [1993] 3 FLR 347. This was a residence dispute between parents.

Different children have different levels of understanding at the same age. And understanding is not an absolute. It must be assessed relatively to the issues in the proceedings.

The Master of the Rolls raised the following issues to be considered in the case of *Re S* –

- Guard against the possibility that the child is being used as a mouthpiece for another party in the proceedings
- Is the child impressionable to such a degree as to cast in doubt any apparent ability to give a rational and consistent instruction?
- Can the child weigh the longer term against the shorter term?
- Does the child have the insight to know how they will react to certain situations which may arise in the future because of decision taken in the proceedings or otherwise?
- Does the child have the imagination to know how others will react to such situations?
- Does the child have the experience to measure the probable against the possible?

*Re P (Representation)* [1996] 1FLR 486 (more than one child involved).

This is a case management decision and about good practice. Normally the original solicitor will remain with the competent child but in the case of *Re P* involving 7 children in total and only 1 was deemed competent, a new solicitor was instructed for the competent child and the original solicitor remained for the 6 other children.

The issue of a child's participation in children's proceedings has evolved since the early to mid-1990's. Recently these issues have received attention from the higher Courts and the earlier authorities must be now be read considering the following –

Mabon v Mabon [2005] EWCA Civ 634

Re K and H [2007] 1 FLR 2043 - Thorpe LJ stressed with regard to an older child who opposed the stance taken by his children's guardian: "It is very important that the court heeds their wishes and feelings. It is difficult for the court to do that if their professional representatives are urging removal. It is impossible for them to feel that their views are being properly and eloquently put to the court if that is their only representation."

Guidelines for Judges Meeting Children who are subject to Family Proceedings [2010] 2 FLR 1872

Re KP [2014] EWCA Civ 554 - meeting children

Re W (Children) (Abuse: Oral Evidence) [2010] UKSC 12, [2010] 1 FLR 1485  
– a child may be called to give evidence of fact in proceedings.

Family Justice Council – Working Party – Guidelines in relation to children giving evidence in Family Proceedings December 2011

Family Justice Council- Report of the Vulnerable Witness & Children Working Group – final report of March 2015

In re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] UKSC 1, [2014] 2WLR 124

**Re W (A child) (Care Proceedings: Child's Representation) Practice Note [2016] EWCA Civ 1051, [2017] 1 WLR 1027.**

The message on separate representation from the English Court of Appeal appears to be do not confuse welfare with a child's understanding.

In this case, the child who was the subject of a care order, disagreed with her Guardian ad Litem. The child's solicitor rather strangely remained with the Guardian ad Litem and not the child, but the child instructed her own solicitor. Later the child left her foster home and went to her grandmother's house. The Local Authority applied for a recovery order. The child wished to oppose the recovery order and wanted to make her own application to discharge the care

order. The GAL was reappointed, and the GAL reappointed the original solicitor who appeared in the first proceedings. The child therefore could not appoint her own solicitor and so the original solicitor instructed a psychiatrist to report on competence/capacity to instruct a solicitor and conduct proceedings separately from the Guardian ad Litem. The child preferred to revise for exams than see the psychiatrist and so her solicitor (second) appeared pro bono.

The Judge made the recovery order and at a later hearing refused the child's application to discharge the care order. Further the Judge did not allow her to be separately represented. The child appealed the decision.

The central issue of the appeal was whether the Judge should have permitted the child to part company with her children's guardian and instruct her own solicitor in the public law proceedings, namely the recovery order and her own application to discharge the care order.

The Court of Appeal allowed the child to conduct the appeal without a litigation friend.

During the care order hearing, the Court determined that there had been physical and emotional abuse of the children and that they were controlled by their father. The child in these proceedings did not accept the finding of the court and wanted to go home. For the welfare hearing, the Court was given a report from Great Ormond street Hospital department of child and adolescent mental health and the "Executive summary" of the report contained the following paragraph: -

"The children have been brought up in an environment where there has been an expectation that they will remain subservient to their parents and their parents' wishes at all times. Due to this the older children have been unable to develop their own sense of autonomy and self-belief."

Care orders were made with the care plan that the children be placed in foster care. The subject child ran away, and the Local Authority applied for a recovery order. She also applied to discharge the care order as a litigant in person. The Judge appointed a GAL for the recovery order proceedings. The child wanted to instruct her own lawyer and not the lawyer appointed by the Guardian, but the legal aid certificate was granted in favour of the solicitor appointed by the Guardian, therefore at the hearing there was no one to argue the case for separate representation but a draft application was with the Court. The Court heard submissions from the local authority and the Guardian and heard that both the Guardian and the solicitor appointed by the Guardian concluded that the child

was unable to hold independent views as she was being used by her parents to conduct the litigation and therefore she did not understand the risks and she lacked sufficient understanding of the issues in the proceedings and could not have capacity to instruct her own solicitor directly. The trial judge agreed and refused separate representation and granted the recovery order and dismissed the application to discharge the care order.

The Court of Appeal considered Rule 16.29 of the Family Proceedings Rules 2010 (E & W) and Practice direction 16 and noted that the rules do not provide a definition of a child's understanding.

Lady Justice Black reviewed the following cases: -

Mabon v Mabon [2005] EWCA Civ 634- Private law proceedings were the children were joined as parties to the proceedings with a guardian acting on their behalf. The older children aged 17, 15 and 13 wished to act without a guardian and applied under the 1991 Family Proceedings Rules, Rule 9.2A for the removal of the guardian. The court considered various earlier case law which suggested that each case depended on each individual child and that understanding is not absolute but is assessed relatively to the proceedings. Thorpe LJ looked at the scenarios encountered in the family court, namely the disturbed child, the child whose views are influenced or manipulated by the family and cases in which there was "litigation disturbance."

Thorpe LJ said at paragraph 28 onwards: -

"28.... although the tandem model (Children's guardian plus solicitor instructed by the guardian) has many strengths and virtues, at its heart lies the conflict between advancing the welfare of the child and upholding the child's freedom of expression and participation. Unless we in this jurisdiction are to fall out of step with similar societies as they safeguard Article 12 rights, we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare.

29. In testing the sufficiency of a child's understanding, I would not say that welfare has no place. If direct participation would pose an obvious risk of harm to the child, arising out of the nature of the continuing proceedings and, if the child is incapable of comprehending that risk, then the judge is entitled to find that sufficient understanding has not been demonstrated. But Judges must be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings."

Lady Justice Black also considered the earlier case law as well as the case Re F (Children) [2016] EWCA Civ 546, Re W (Children) (Family Proceedings: Evidence) [2010] UKSC 12, Re LC (Children) [2014] UKSC 1 (*looked at a child's state of mind when considering habitual residence*).

Regarding the proposition that the child's views were that of her parents, Black LJ noted that the fact that a child's view coincides with a parents' view does not necessarily mean that it is not her view and she notes that most people hold views that are influenced by some person one way or the other.

She pointed out the fact that "the child's views may be considered misguided in some way does not necessarily mean the child does not have sufficient understanding to instruct a solicitor. Self-evidently, the question of separate representation will normally only come up if the child materially disagrees with the guardian's view about his or her welfare, but that disagreement with an independent professional assessment of what is good for him or her is not sufficient to lead to a conclusion that the child lacks sufficient understanding. In so far as a lack of understanding is perceived to arise from the child's unwillingness to accept the findings already made, it has to be remembered that adults with full understanding adopt similar positions."

Lady Justice Black warns all at paragraph 35-

"There is a danger that, when considering the degree to which a child has been influenced in his or her thinking or otherwise manipulated and/or when looking at the harm that may be caused by direct participation, a judge strays into a welfare assessment when the question for determination is not, in fact governed by the child's best interests. Furthermore, as in this case, there will often be a risk of harm not only from participating in litigation but also from not participating."

At paragraph 36 she reiterates the court's role regarding the use of expert opinion on the question of the child's understanding.

"Understanding can be affected by all sorts of things, including the age of the child, his or her intelligence, his or her emotional and or psychological and or psychiatric and or physical state, language ability, influence etc. The child will obviously need to comprehend enough of what the case is about (without being expected to display too sophisticated an understanding) and must have the capacity to give his or her own coherent instructions, without being more than usually inconsistent. If the Judge requires an expert report to assist in determining

the question of understanding, the child should be under no illusions about the importance of keeping the appointment with the expert concerned.”

Lord Justice Tomlinson summarised the trial judges error as follows: -

“She confused welfare with understanding”

The issue of the child’s views and representation of those views have been considered in child abduction cases –

In the matter of E (Family Law Act 1986 Enforcement: Foreign Orders: Hague Convention: Residence Order: Voice of Child) [2005] NI Fam 12 – Gillen J allowed a child to apply for a residence order to allow her to stay with her grandmother.

In re M (Children) (Abduction: Rights of Custody) [2007] UKHL 55.

Baroness Hale at paragraph 46 –

“These days, and especially considering article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child’s views. Taking account does not mean that those views are always determinative..... Once the discretion comes into play, the court may have to consider the nature and strength of the child’s objections, the extent to which they are “authentically her own” or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But this is far from saying that the child’s objections should only prevail in the most exceptional circumstances.”

Separate representation was considered in the abduction case, In the matter of LC (Children) (No 2) [2014] UKSC 1.

And finally, for those of you who are inspired here is some further light reading:-

“Speaking when they are spoken to: hearing vulnerable witnesses in care proceedings.” Child and Family Law Quarterly Vol 26 No, 2 2014.

“ Where do I stand? Assessing children’s capabilities under English Law” Dawn Watkins – Child and Family Law Quarterly Vol 28 NO 1 2016.

Re A (Letter to a Young Person) [ 2017] EWFC 48 Peter Jackson J

Ciccione v Ritchie [2017] 1 FLR 795

Gillick v West Norfolk and Wisbech [1985] UKHL 7, [1986] a AC 112.

Gráinne Murphy

7<sup>th</sup> March 2018