The child’s voice in child and family social work decision making: the perspective of a guardian ad litem

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INTRODUCTION – FROM BEING SEEN TO BEING HEARD

The idea that children might have a contribution to make to decisions about their own welfare is a relatively new one. ‘Children should be seen but not heard’ was a Victorian adage with a familiar ring to those of a certain age! There are fearful examples, even in recent history, of children’s views being totally disregarded, as, for example, in the cases of child migrants, sent from children’s homes in Britain to Australia and Canada and other parts of the old British Empire:

‘... I asked, ‘Did you want to come to Australia?’ She looked at me incredulously. ‘I thought I was going on holiday, said I would be away for six weeks. I didn’t know where Australia was.’ ’ (Humphreys 1995: 15).


Until comparatively recently legislation reflected the fact that children were considered to be the property of their parents. The concept of the ‘welfare of the child’ does not appear in legislation until the 1933 Children and Young Persons Act.

Legislation dealing with the removal of children from their parents concentrated on the deeming of parents as ‘unfit’. Parental rights were either all powerful or they were extinguished under Parental Rights Resolutions. The emphasis was on proving fault in the parent, not on looking to the interests of the child, still less in assessing the child’s own wishes and feelings in the matter. In private law proceedings, including adoption and divorce, these assumptions about parents or substitute parents speaking for children are still dominant.

However, there has been a general movement towards the consultation of children in matters that affect them and this is reflected both in the 1986 Gillick Judgement and in the United Nations Convention on the Rights of the Child. Writing about the Gillick Judgement, Lansdown (1992: 34) argues that

‘... there is increasing acceptance of the principles established in the Gillick case that the rights of parents derive ... from their responsibility to protect their children’s rights, and that children are empowered to make decisions about important things for themselves, once they are judged to have acquired sufficient understanding.’

The UN Convention on the Rights of the Child was signed by the UK government in 1991.

ABSTRACT

This article shows how the voice of the child has come to prominence in decision making, against the background of changes in emphasis between family rights and child protection viewpoints, reflected in 20th-century legislation on family matters. It argues that the role of the guardian ad litem, the historical development of which is charted, is central to the evaluation of the child’s views; these are not always straightforward and they must be viewed in tandem with a professional assessment of the child’s best interests. The article concludes that the child’s voice cannot be the deciding factor in decision making; adults cannot abrogate their responsibility to make reasoned decisions, based both on children’s wishes and feelings and on other factors which children, in their immaturity, cannot appreciate.

Keywords: age and understanding, best interests of child, communication, independent representation, wishes and feelings
Article 12 states that those who have ratified the Convention

‘shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given weight in accordance with the age and maturity of the child . . .’.

This has fundamental implications for those who work with children and for those who set out to represent the interests of children, in the arena of the court, in education, in health and in public policy.

The influence of the voluntary body Childline in drawing attention to the views of children and appointment of local authority Children’s Rights Officers to ensure that children are properly informed of their legal rights and status illustrate the growing importance accorded to the child’s voice. The Children Act 1989, section 1(3), takes note of this shift in view by placing the child’s wishes and feelings at the top of the Welfare Checklist, which the court must consider in any proceedings concerning children. All practitioners in this field are aware of cases where a child’s firm wish for a particular outcome in court proceedings has been the deciding factor in the making of the final decision.

As the child’s voice has become more central in public law proceedings it is more noticeable that the voice is relatively absent in other arenas. It is salutary to reflect that, in the areas of immigration, criminal prosecutions, housing, health and education, the ‘paramountcy principle’ of the child’s welfare above other considerations does not apply. As an example, a child was recently expelled from school as a result of public criticism she had made of her teachers.

THE DEVELOPMENT OF INDEPENDENT REPRESENTATION FOR CHILDREN

The 1948 Children Act gave local authorities the responsibility of furthering the child’s best interests and emphasized the importance of keeping families together. It is significant that this legislation followed the Curtis Committee’s report into the death of the child Dennis O’Neill in foster care. It is from the 1948 Act onwards that the stress on the child’s need for his/her natural family grew, in tune with the development of attachment theory (beginning with Bowlby’s 1951 review of evidence for the World Health Organization and refined in further work by him and by others) and work done by the Robertsons (1977) on documenting the effects on small children of separation and loss. The Guardianship of Infants Act 1963 gave local authorities the responsibility of keeping families intact by using resources to prevent children from coming into care.

Whilst this was the thrust of the legislation and of literature about children there was little consideration given to the child having a voice separate from that of his/her family. A gradual change of emphasis from the 1969 Children and Young Persons Act onwards heralded a more proactive role for the state in protecting children, and influential publications (Freud et al. 1973; Rowe & Lambert 1973) stressed the need for local authorities to plan purposefully for children in their care. The emphasis on ‘permanency planning’, which came to be synonymous with removing children permanently from their families of origin, was a reaction against the importance accorded earlier to the ‘blood tie’.

The advent of the guardian ad litem in public law proceedings concerning children was a result of the growing emphasis on the voice of the child. Independent social workers existed prior to the creation of panels of guardians ad litem. Cooper (1985) saw the rise in interest in the legal representation of the child’s viewpoint as a consequence of the move in emphasis from voluntary care to the legally controlled status of children in care, which, in turn, interested lawyers in the business of family proceedings. IRCWH (Independent Representation for Children in Need) was registered as a charity in 1981. During the period 1975–84, when the sections of the 1975 Children Act relating to the appointment of guardians ad litem remained largely unimplemented, independent social workers were often employed by lawyers seeking to represent children in public law proceedings. A major drawback of the independent social workers’ role was their lack of access to local authority records and other documents in the case. Lawyers, however, were relieved to have social work expertise available to them when dealing with the needs and wishes of children and, in the main, were keen to urge the advantages of this partnership when guardian ad litem panels were established. Goldstein et al. (1986: 179) describe evidence given by James and Joyce Robertson in the case of a child represented by a lawyer only:

‘ . . . we realised the disadvantage to the young child of having only legal representation. Each of the other parties sat behind their counsel, and as evidence was led they could offer comment and correction which their counsel could use. But the child was not in court, and there was no one to tug at her counsel’s sleeve; and of course he was not equipped to perceive matters through the eyes of a child.’
Murch & Hooper (1992: 69) outline the shift in opinion leading to separate representation for children as follows:

'Two factors led to a climate of opinion that children involved in child care proceedings needed special representation to safeguard their interest and to voice their wishes and feelings; first professional scepticism of what was sometimes contained in welfare reports; second, increasing public awareness, fuelled by a succession of child abuse tragedies, that the realities of local child care practice often left much to be desired.'

In 1973 David Owen introduced a private member’s bill into the House of Commons, providing for separate representation for children in proceedings which concerned them. In the following year the Committee of Inquiry into the death of Maria Colwell, who was returned home from foster care and subsequently died at the hands of her stepfather, considered that 'had the views of an independent social worker been available to the court, it would have had the assistance of a second opinion which might or might not have endorsed the conclusions and recommendations in the social worker's report.' (Department of Health and Social Security (DHSS) 1974).

There was also in the report a specific reference to the failure to listen to Maria’s voice:

'One aspect of Maria’s story which has naturally given rise to concern is the extent to which the social workers directly involved in the case … were able to communicate with Maria about her feelings, both during the period of transition and after her return home.' (DHSS 1974: para. 209).

From 1984 onwards local authorities were obliged to set up panels of guardians ad litem who would be available to be appointed by courts in the cases of children who were the subject of care and related proceedings and in contested or complex adoption applications. (The same panels were to supply reporting officers for courts to appoint in adoption proceedings, where independent verification of a parent’s wish to consent to the making of an adoption order was required.)

The role of the guardian ad litem in highlighting the effects on the child of proposed courses of action served to emphasize the importance of children in proceedings, which, in the past, had often seemed to have been commenced for the purpose of revealing parental shortcomings. Guardians ad litem were to 'have more extensive responsibilities than those hitherto appointed in adoption hearings. Not only must they be independent of the local authority bringing the case, but they have an overriding duty to safeguard and promote the interests of the child.' (Murch & Bader 1984: 6).

It should be noted that, in adoption proceedings, the child still does not have party status. It is also the case that, other than in exceptional circumstances, the child is not represented by a guardian ad litem in adoption applications if the parent agrees to the making of an order. In circumstances where all the adults agree on the outcome the child’s view is not sought by someone independent of the application. The Adoption Agency is obliged to complete a full report in any adoption (Schedule II report), but, as this agency is responsible for the child’s placement and, often, for the approval of the adoptive parents, this cannot be seen as an independent opinion; the child’s wishes and feelings are frequently only sketchily addressed, being inferred, for example, by his or her positive demeanour in the home.

The role of the guardian ad litem was extended in the Children Act 1989 and this was widely seen as a further emphasis on the importance of the voice of the child:

‘Children now move centre stage and guardians ad litem move with them, to occupy a pivotal role in the successful implementation of the Act.’ (Department of Health 1992: 4).

**WHY GUARDIANS AD LITEM?**

Why was it necessary for a new role to be created for the voice of the child to be heard in legal proceedings? Was it not part of the social worker’s remit to understand and communicate the wishes and feelings of the child? Many social workers were understandably angered and puzzled by the introduction of guardians ad litem who would focus exclusively on the child, when they felt that such had been their focus over many years. Part of the answer to these questions lies in the shifts in emphasis between the principle of non-intervention in family life and the principle of children’s rights to adequate care and protection. The legislation relating to children bears witness to the prominence of first one and then the other of these principles. A series of inquiries into child deaths in the 1970s and 1980s saw social workers castigated in the national press for failing to protect children from their parents. An editorial in The Guardian newspaper, following the Jasmine Beckford Inquiry, stated:

‘… the social workers in the Beckford case were applying the wrong assumptions. They treated the adults, Jasmine’s parents, as their real clients, seeing the children
only as appendages. They systematically ducked their responsibilities (which in this case were overriding) to the children. They shirked their obligation to exert their legal authority if it was necessary (as, in this case, it undoubtedly was). And, in doing so, they appear to have reflected the conventional mores of their profession and their training.’ (The Guardian, 4 December 1985).

Another influence at work may have been the move to generic social work and its reflection in the creation of Social Services Departments from the old Children’s, Welfare and Mental Health Departments. This reorganization in 1971 led to a degree of administrative confusion and to a loss of specialism in children’s work. As a social worker who lived through that particular period of change, I would say that there were gains from the generic approach, but it is undeniable that there was a loss of expertise in and focus upon work with children which has had serious consequences for the protection of some children. Rowe et al. (1984) found that there was little contact between social workers and the children for whom they were responsible, and Aldgate & Simmonds (1988: 6) make the following comment on this finding:

‘While Rowe et al. (1984) found that nearly two-thirds of social workers reported seeing the children for whom they were responsible in the previous year, this is hardly an inspiring record. However, on further investigation it became apparent that a far smaller number of these children reported seeing their social worker alone than the social workers themselves had reported, something that was significantly supported by a number of foster parents in the sample.’

The Family Rights Group, as well as solicitors who had gathered experience in working with independent social workers, pressed for children who were the subject of public law proceedings to be represented by social workers who would be truly independent of the local authority. There were concerns that local authority social workers might be led by resource constraints to recommend outcomes counter to the child’s best interests and that years of involvement with a whole family might prevent a social worker from looking afresh at the needs of an individual child within it.

In short, dissatisfaction with the level of protection afforded to children and past failure to listen to the child’s voice created a climate of opinion which allowed the role of guardian ad litem to come into being.

THE GUARDIAN AD LITEM SERVICE

It is now more than 13 years since guardians ad litem were first appointed to cases and their advent has influenced both the prominence in court proceedings of the child’s voice and practice within Social Services Departments. It was not uncommon 13 years ago for a guardian ad litem to find that an application to court had not been discussed with the child concerned. I remember an adoption application, concerning a child aged 12; when I discussed the application with the child she told me that she had no wish to be adopted and, in fact, wanted to trace her natural parents and make sense of her early life. It is hard to imagine such a situation now when everyone concerned in children’s cases is so clear that the child’s view must be heard and taken seriously.

Local authority practice has, in my experience, improved markedly in relation to children coming before the court, some fear at the expense of other less ‘high profile’ work. The measures taken by most local authorities to live up to the rise in expectations of the local authority care plan, now required when a court order is sought, constitute an example of improved practice; this has been a consequence of the enhanced role of the guardian ad litem required by the 1989 Act and of the guidance issued to social workers subsequently. If the local authority wishes to have a care order on a child it must now provide detailed evidence about the intended plan, the timescale for its implementation and contingency plans in the event of a particular arrangement breaking down (see Children Act 1989 Guidance and Regulations, 1991, section 2.62.) The original guidance has been added to by case law, in particular Re J (Minors) (Care: Care Plan) [1994] 1FLR 253 FD, Wall J. This has led to a clear improvement on earlier practice when the local authority had no obligation to provide any detail as to the way in which a care order would be used.

There is an inevitable and proper tension between the guardian ad litem and the social worker as both seek to act in the best interests of the child. Parliament has given to the guardian the power and duty to inspect the work of local authorities in relation to children and courts take this function seriously. Mr Justice Wall of the Family Division at the annual workshop of Panel Managers stated:

‘The guardian ad litem is the child’s protection against poor social work practice.’ (Wall 1997: 22).

Whilst the local authority social worker has a range of matters to consider as well as the welfare of the child – the policy of the authority, available resources, the likelihood of continuing to work with a family, pressures from foster carers, and many more – the guardian ad litem has a sole perspective – the best
interests of the child and the understanding and communication of his or her wishes and feelings.

The advantage for the guardian ad litem in being outside the local authority framework (although many would argue that the degree of independence is unduly limited by the local authority’s duty to set up and maintain panels) is that she or he is not limited by council policies in general but can consider the child’s position with the widest possible perspective. This becomes especially important if the child is too young to express an opinion or even to have any understanding of the events leading to a court hearing. For example, Elgar & Head (1997) found that some local authorities have a clear policy that accommodated children under a certain age, who cannot be rehabilitated with their natural family, will be placed for adoption. The guardian ad litem is required to look more widely at the situation and advise the court if the child’s best interests could be better met, for example by remaining in foster care with on-going contact with the natural family. It is difficult to focus exclusively on the child’s wishes in this situation as young children rarely have the knowledge or sense of long-term outcomes which would enable them to express a view on such a complex issue. The guardian ad litem needs to be aware of research findings and the views of adults who have reflected on decisions made when they were children, which have called attention to the lifelong importance of natural family ties. It is the role of the guardian to give the court a balanced view of losses and gains to the child of different options. The older child can, however, express views on his or her wish to remain or be placed together with siblings and to keep in contact with parents and other relatives.

The Children Act 1989 retained the principle of ensuring a child’s representation by a combination of guardian ad litem and lawyer. This partnership or ‘tandem’ (see Timms 1997) is unique to British law. The system provides for the lawyer and guardian ad litem to part company if the solicitor judges that the child is capable of giving his or her own instructions and if the child disagrees with the guardian’s assessment of his or her best interests. Thus the child’s own view will be put to the court in these circumstances, even if the appointed guardian does not recommend that the court follow the child’s wishes. Where a child can instruct his or her solicitor, the guardian is free to put the child’s views in the context of other significant matters and it is then for the court to decide how much weight to give to the various factors, including the child’s own wishes.

**DISCUSSION**

The exclusive focus of the guardian ad litem on the child has led to accusations that recommendations are made to courts on behalf of children which are unrealistic and take no note of what is achievable. By contrast, it is argued that the guardian begins with what appears to be the best option obtainable for the child and then presses the local authority to say why this is not achievable; tensions in this area are likely to increase as local authorities struggle with the constant restrictions on their funding. The court is the final arbiter between the pressures from the guardian to have the best care plan made for the child and the local authority’s resource constraints.

Although the guardian ad litem service has been set up with the intention of giving the child a clear voice in court proceedings, there are criticisms of the child’s lack of voice in the process of appointment:

‘There is nothing in the Children Act, or accompanying Guidance and Regulations, about the right of young people (if of sufficient age and understanding) to choose their guardian ad litem nor does it give young people the legal right to be provided with a guardian of the same culture, language or religion. And what if a young person does not wish to have a guardian ad litem, or is unhappy with her services?’ (Dalrymple & Hough 1995: 56).

These are issues which guardian panels are likely to have to address in future. One cannot give children’s voices greater priority and then ignore messages that children may give about the service they receive. Panels across the country are looking at the question of consumer feedback on the work of guardians ad litem, so that this should become part of a regular process of appraisal. As Timmis (1996: 242) concludes in her study of professional views of the guardian ad litem service: ‘Independent does not imply unassessable …’.

The central dilemma in the role of the guardian ad litem is to reconcile the child’s wishes and feelings with a professional assessment of the child’s best interests. This echoes the divide between the perspective of the state as protector of children and intervenor in family life and the state as supporter of children’s rights and the privacy and self-sufficiency of the family, reflected in statute which has swung from one perspective to the other. Few would argue that a child needs rescue if his or her life is in danger from adults but, in less extreme situations, there is little consensus on the weight to be given to the child’s voice. A child who can demonstrate that he or she is of sufficient ‘age and understanding’ has the
right to have his or her views put to the court by a solicitor, irrespective of the views of the guardian ad litem on the question of 'best interests', but it is not an easy matter to determine the level of the child's understanding and his or her 'real' age. Sawyer (1995: 112–22) looked at solicitors' decisions in this area and found great differences between individual solicitors and considerable anxiety on the subject.

The level of the child's understanding is an essential area for the guardian ad litem to explore. Schofield & Thoburn (1996: 12–15) argue that those concerned with making decisions about children's lives have a responsibility to provide 'extra help to maximize their level of understanding by having information about the options and time to discuss them'. Children who are the subject of care proceedings have often acquired from key adults a biased understanding of the factors involved. There are therefore strong arguments for the guardian to take time to assess the child's level of understanding and for her to assist the child to appreciate the areas of choice available and the likely consequences of each course of action.

Those who take a 'children's rights' approach to these matters are critical of any attempt to limit the child's voice in crucial areas of decision making such as in court proceedings. Hough raises the following questions:

'Who is it that decides when a child is of sufficient age and understanding to be able to express what she wants and feels? How is this decision reached, and on what is it based? Adults, of course, are the ones who are in the positions of power to make this judgement and, depending on our individual value base, life experiences and our understanding of the concept of “advocacy”, we are also in a position to use the “get-out” clause to contribute to the erosion of the rights of children and young people.' (Dalrymple & Hough 1995: 54).

It is important to recognize that all children have the right to have their wishes and feelings listened to and taken into account in court proceedings which affect their future; this applies whatever the age or cognitive ability of the child. This is not the same, however, as allowing children to make decisions about their future. The only matters on which children have the right to decide are submission to medical examination and, if judged to be of sufficient age and understanding, instruction of a solicitor, separately from the guardian ad litem.

There is another aspect to this question, however. There are many children who have been rendered powerless in their family situation and who are unable to express views about the future. This is particularly true of children who have been seriously abused and for children who are caught between warring parents and are terrified of being put in the position of choosing between mother and father. In these situations it is appropriate for the guardian ad litem to assure the child that he/she does not have to bear the responsibility for the decisions which have to be made; adults must take responsibility for keeping children safe and for making 'least worst' decisions when parents cannot agree. One does occasionally see children who have been so burdened by having to express views with far-reaching consequences that they run away or harm themselves, to avoid being put in this situation. The guardian ad litem who listens carefully to what the child says, both in words and in actions, should be in a position to judge how difficult it is for the child to express views in the face of fear or family loyalties. This is clearly not a quick or simple matter. Even if paralysed by big issues, the child or young person may be able to express views on safer or smaller matters and the guardian will need to test out her own views about the child's dilemmas by talking to a range of people who know the child and have his or her confidence and by encouraging the child to talk generally about hopes, fears and sadnesses.

Sometimes children particularly do not wish their views to be made public. This may well be the case where a child has strong family loyalty or fear of a particular family member. The guardian ad litem is in a difficult position here as she is unable to give an absolute guarantee that what the child says will be treated confidentially. The guardian has a responsibility to put all relevant information before the court and courts are reluctant to agree that any information be not disclosed to the other parties in the case (see Re C (Disclosure) [1996] 1FLR 797). Such issues demand very careful handling. Children deserve a clear picture at the outset of the use to which their expressed views will be put, in order that they can make a proper decision about disclosure. Ultimately the guardian ad litem will have to balance the child's expressed views and her perception of his or her best interests in the longer term. In the words of Mr Justice Wall:

"The dilemma of the guardian’s role is that he or she has to represent the best interests of the child – and what is in the best interests of the child is not necessarily what the child wants." (Wall 1997: 24).

Adults are in a better position than children to weigh up possible harm and to look at the future
implications of a decision made in childhood. I have had to argue in court that a child should not return home, despite a wish to do so, because the risk of harm to that child is too great to take. I have also argued that family contact with a child should be maintained, despite the child’s reluctance, because of the long-term implications of a total loss of family ties. Because of the responsibility to weigh such factors the guardian ad litem cannot be totally the child’s advocate and indeed her role has not been set out in statute with advocacy alone in mind. The role involves a combination of advocacy and negotiation, of professional assessment and quasi-parental care.

The key to the social worker’s or guardian’s promotion of the child’s voice is in the quality of the listening. We know, from research which has looked at the reliability of child witnesses (for example Dent & Flin 1992; Ceci & Bruck 1993) that children have a strong wish to please adults, especially those in authority. Those interviewing children can so easily influence what the child says, by encouraging some subjects rather than others, by indicating their own emotions of surprise, disgust, discomfort and so on, by setting their own agenda without giving children space to indicate theirs.

Words are not the only key to the child’s feelings. The guardian ad litem must also give attention to tone of voice, stance, facial expressions, behaviour and what the child is unable to talk about. The child who says he or she does not want to see his or her parents but becomes animated and excited when recalling past family events or a former home is probably giving a more complicated message than the words alone convey.

CONCLUSIONS

This article has attempted to chart the rise in importance of the child’s voice in court proceedings and to describe the development of a facilitator and interpreter of this voice, in the person of the guardian ad litem. I have argued that the role arose out of a widely felt mistrust that children were being inadequately consulted in matters which affected their future and out of a feeling that the state’s power over family life needed some outside control. Paradoxically, the advent of guardians has appeared to undermine the confidence of social workers who are often reported as feeling that their opinions are less valued than those of the guardian ad litem, whose knowledge of the child and his/her situation is often of short duration. Hetherington et al. (1997: 176) draw attention to this loss of confidence on the part of social workers:

‘They have been attacked by the media, criticised by child abuse inquiries and increasingly fenced in by procedures and guidelines which imply that they are incapable of acting effectively on the basis of their professional judgement. Lawyers undermine them in court and the intervention of the guardian ad litem can feel like one more hostile intrusion into their attempts to do the best they can for the children and families with whom they are concerned.’

It is clear that children will not be best served by social workers who are demoralized and who feel powerless and it is important that guardians ad litem are not seduced into a position where they pay scant regard to the knowledge and opinions of the social worker, whose work may well continue long after the guardian’s involvement has ceased. However, enough is now known about the problems posed for children and adults of growing up within the care system, and about the pernicious long-term consequences of abuse and neglect, to be clear that decisions about a child being removed from the family of origin are of crucial long-term significance. It seems reasonable that there be an independent person available to the child who will scrutinize such decisions and listen carefully to the child. Both the guardian and the social worker are required to produce evidence for their assessments and predictions of the likely outcomes of their chosen proposals. In those cases where the court has to decide between conflicting viewpoints, it is important that the decision is based on an objective appraisal of all the evidence. Against a backdrop of constantly shifting attitudes towards state intervention it seems appropriate that there be checks and balances in place to ensure that decisions are made only after a consideration of all options and some independent scrutiny.

There is a strong case for saying that children should have more of a voice in private law proceedings which affect their welfare so centrally. Sections 11 and 64 of the Family Law Reform Act 1996 offer the prospect of some progress in this area. There are those who have argued for a combined court welfare service which would cover the welfare of children in all types of proceedings, bringing together court welfare officers and guardians ad litem in an organization independent of the local authority (Murch & Hooper 1992: 137).

The child’s voice should be central to any process which impinges on his or her own future and, as with adults, that voice has to be listened to carefully and without prejudice. The difference between children and adults is that children do not have the knowledge and the time perspective necessary to make long-term
decisions on their own; neither should they be given this responsibility.

REFERENCES