

# HEARING THE VOICES OF CHILDREN AND YOUNG PEOPLE IN FAMILY JUSTICE

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## WHY LISTENING TO CHILDREN AND YOUNG PEOPLE IS IMPORTANT IN FAMILY JUSTICE

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During the last 30 years, there has been a growing body of evidence indicating that children and young people often feel marginalized when their parents are making critical decisions that will shape their young lives, and they are calling for family justice professionals to hear their voices. This article explores the research evidence, examines the relevant theories about child development, and demonstrates how a focus on age-related competency fails to take account of children's subjective meanings about their lives. The authors consider a model of participation first designed to understand adult participation in government and show how this can be usefully applied to understanding children's participation in family justice.

Key Points for the Family Court Community:

- Children and young people often feel marginalized in family law proceedings when their parents are making decisions about their future.
- Protectionist approaches by family law professionals can suppress the views of children and young people in the misguided belief that they are protecting them from the negative impacts of parental conflict.
- Applying the 'ladder of citizen participation' to children's participation in family justice is a useful way of helping different professionals to reconsider their approaches to working with young people.
- A child-inclusive approach has been shown to improve children's outcomes when their parents separate.

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Much has been written about why a child-centered approach to family justice is important (e.g., see Barton & Pugsley, 2014; Parkinson, 2012; Walker, 2013).<sup>12</sup> Research (e.g., see research undertaken in England by Walker et al., 2004; Walker, McCarthy, Coombes, Richards, & Bridge, 2007) has demonstrated very clearly that when parents separate, their children experience a range of changes that have a direct impact on their lives and well-being. Parents are required to make decisions about where the children will live and how they will maintain a relationship with both parents. The decisions taken might mean a change of home, a change of school, and a regime in which they move between the homes of both parents on a regular basis. Moreover, they may find themselves living with step-parents and step-siblings. These changes can be very traumatic for children and young people, especially if they lose touch with close friends. Yet until recently, children and young people in many jurisdictions have rarely been given an opportunity to express their views about the decisions made on their behalf. As a result, they can become unhappy and marginalized and struggle to settle in new environments. Furthermore, if the parents are in conflict about the arrangements, the children find themselves in the middle of what can often be described as a "war zone."

In 1989, the United Nations Convention on the Rights of the Child (UNCRC) set out in detail what every child needs for a safe, happy, and fulfilled childhood. Article 12 includes the assurance

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that every child who is capable of forming a view shall have the right to express those views on all matters affecting the child, and these should be given due weight in accordance with the child's age and maturity. Moreover, the convention states that the child shall be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative. All UN member states except the United States have formally approved the convention. It came into force in the UK in January 1992. Yet over 25 years later, debates continue as to how children's voices should be taken into account in private family law proceedings and, indeed, whether children should be directly involved in processes when decisions will be taken that will have a fundamental impact on their lives and well-being. Hearing the voice of the child is still a highly controversial issue, and although most jurisdictions recognize the child's right to be heard, few guarantee it. As long ago as 2008, the ethical challenges for lawyers representing parents when the interests of their children were at stake were discussed in *Family Court Review* (Howe & McIsaac, 2008). The authors noted that, in practice, children's direct participation in private family law proceedings remained relatively low in many jurisdictions, although lip service was being paid to the importance of upholding the rights of the child. Yet evidence from those jurisdictions that had grasped the nettle indicated that the appropriate inclusion of children has major benefits for children and for their parents.

In July 2009, the UN Committee on the Rights of the Child adopted a General Comment on Article 12. This further underlines the importance of hearing the voice of the child during parental separation and divorce and outlines the parameters on the right to be heard. In summary, it made the following clear:

- States must avoid tokenistic approaches that limit children's ability to express their views or that fail to give their views due weight.
- If children's participation is to be effective and meaningful, it must be understood as a process and not a one-off event.
- Processes should be transparent, informative, voluntary, respectful, relevant, child-friendly, inclusive, safe and sensitive to risk, and accountable.
- Adults should be given the skills and support to involve children.
- Once the child is deemed capable of forming a view, then he or she should have the option of talking directly with the judge.

In England and Wales, a major review of family justice (Norgrove, 2011) highlighted an urgent need to address the ways in which children and young people are included in processes in which arrangements for their future are being decided. It endorsed the importance of child-friendly and child-inclusive approaches. It called for more child focus and better training for professionals to make sure children's voices are heard and proposed that children and young people should, as early as possible in a case, be offered a menu of options laying out ways in which they could, if they wish, make their views known. The review acknowledged that including and listening to children requires skilled professionals who work under national standards and guidelines. Importantly, the Norgrove review made it clear that child-inclusive mediation should be available to all families seeking to mediate. The family justice reforms proposed by Norgrove required the voice of the child to be taken seriously and agreements reached as to how this could be achieved both within the courts and in all kinds of dispute resolution interventions in and out of court.

## I. WHAT CHILDREN AND YOUNG PEOPLE SAY

There is a substantial body of research portraying a consistent message that children and young people do not want to be kept in the dark about family proceedings that impact on their lives. Rather than wanting to be protected and sheltered from what is going on, children consistently say that they want to be told what is happening and given clear age-appropriate information, to have their views heard, to be respected and believed, and to be treated as individuals with agency.

Moreover, siblings have made it clear that they want to be recognized as individuals and not some kind of package deal. Studies show that children as young as 3 years old can participate effectively in appropriately conducted conversations about what is happening in their family (Aubrey & Dahl, 2006; Karle & Gathmann, 2016). Children and young people interviewed by researchers during the evaluation of the Family Advice and Information Service pilots in England were extremely vocal about having their voices heard (Walker et al., 2007). Two sisters, for example, aged 15 and 13, had a strong sense that no one was prepared to listen to them. The 15-year-old described her frustration as follows:

I find it really annoying, 'cos the people there [at the family court] asked us if we wanted to come in and speak to them. We went in. They didn't listen. I'm sick of adults. No offence, but no adults listen to kids—even if—I want to have my say heard. (Richards, Day Slater, & Webber, 2007, p. 241)

When asked what she planned to do next, she replied: “Even if I have to barge in, and go to the judge myself. I will do. To tell him how I feel” (Richards et al., 2007, p. 242).

This teenager, like other young people, had felt marginalized, confused, and angry about being excluded from family proceedings. Several others described how their lack of participation had resulted in their having to accept contact arrangements that they regarded as unsatisfactory, leaving them feeling sad and with a sense of alienation from the adult world where all the decisions were taken. The teenager quoted above graphically commented that her wishes and feelings had been so overlooked that she felt “like a nobody.” Young people said that they felt powerless to make a difference and that their wishes and feelings were deemed irrelevant. They had been silenced and defeated by the experience.

It was very clear from the conversations with these children and young people that they had had considerable difficulty in making sense of their experiences and had been deprived of opportunities to articulate their own thoughts. The researchers concluded that the lack of support those children received and their exclusion from family law processes caused the real possibility of longer-term detrimental consequences. The connecting thread in the accounts the children gave of their parents' separation was that of a lack of opportunity to be heard (Richards et al., 2007).

Other research in England has echoed these findings. A National Society for the Prevention of Cruelty to Children (NSPCC) survey of children in private family law cases found that children frequently felt disempowered (Willow, Franklin, & Shaw, 2007). A survey by the Children and Family Court Advisory and Support Service (Cafcass, 2010) found that when children were not happy with the arrangements following their parents' separation, it was mainly because they felt they had had little input into the process, or that their views had not been taken into account.

There is little doubt that the inclusion of children's voices can make a significant difference in the outcomes achieved. Accumulated research evidence indicates that children's participation in family law processes can empower them to develop a sense of autonomy and social competence; understand the relationships between actions, decisions, and their consequences; develop responsibility and ownership of situations; develop protective factors in their lives; and develop skills in citizenship. The thorny questions, however, are how, when, and where children should participate, and who should provide the opportunities. In England and Wales, it is usually regarded as preferable for parents to talk to their children and ascertain their wishes and feelings so that these can be taken into account. But research suggests that parents rarely manage to do this in a constructive and inclusive way (Walker, McCarthy, Stark, & Laing, 2004). Many parents have told researchers that they do not know how or when to talk to their children because it is too painful, especially when consumed by their own emotional distress. Other parents clearly believe that it is better to avoid talking to their children, either believing that there is nothing to discuss, that decision making is best done solely by adults, that they know their children well enough not to need to talk to them, or that it is better to protect children from the emotional upheaval (Walker et al., 2004). These parents were keen to protect their children and believed that by not talking to them, their children would be less upset.

Children, on the other hand, see things differently and are quite clear that their parents do not necessarily know what their wishes and feelings are, nor do they believe that their parents will accurately reflect their views—in other words, parents are regarded by many young people as unreliable when it comes to articulating their wishes and feelings accurately. A qualitative synthesis of 35 studies of children's participation in custody disputes examined research undertaken over the previous 20 years (Birnbaum & Saini, 2012). The analysis involved 1,325 children from 11 countries and concluded that children and young people generally want to be engaged in the decision-making process in some way. Several key themes emerged from the review of the research (Birnbaum & Saini, 2012), including the following:

- children's desire for personal autonomy and having a voice in the changes that will occur
- empowerment of children to have a basic right to be part of the decision-making process and to provide better outcomes
- tension between being involved in decision making and feeling vulnerable and being hurt by the processes
- importance of capacity, maturity, competency, independence, and character and personality in children's being able to express their views
- importance of mutual trust, respect, and meaningful interactions between family members as key to ensuring children's involvement is authentic and family change is positive
- children's preference to be involved early on, including at the point when parents decide to separate—their desire for parents to be sensitive to a child's need for information
- children are generally content to share their views and experiences through a lawyer, mental health professional, mediator or judge and would like to have the option of talking to the decision maker, irrespective of the decisions that are made, but one size does not fit all; not all children want to talk to professionals or a judge

The synthesis of these research studies suggests that children's experiences are shaped by constraining adult factors that can either facilitate or hinder the voices of children (Birnbaum & Saini, 2012). The authors argued that protectionist frameworks can suppress children's views by attempting to shelter them from the parental conflict; yet many children want to be involved in matters that concern them and to have their voices heard without the constraints of social and legal obstacles.

## **II. UNDERSTANDING CHILDREN'S PARTICIPATION IN FAMILY JUSTICE PROCESSES**

The evidence suggests that participation of children and young people in decision making in family justice processes, such as parental separation and divorce, remains limited, despite the heightened interest and research into children's views in this context. It is helpful, therefore, to consider the knowledge from child psychology relating to childhood development.

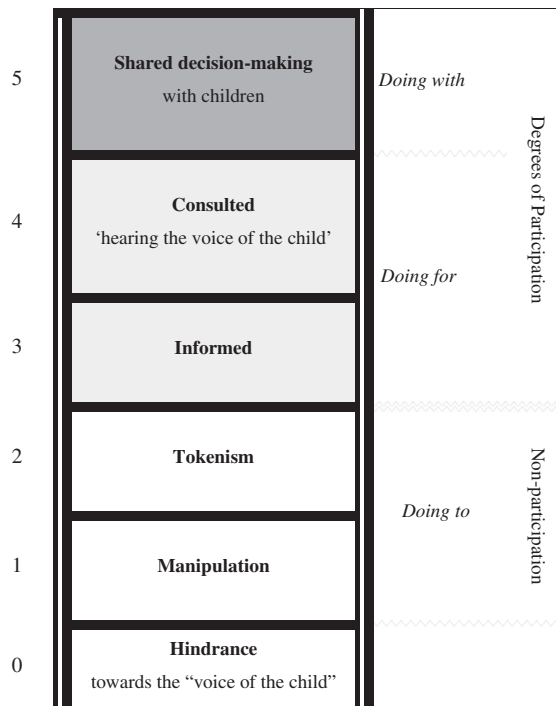
The theoretical underpinning of the UNCRC emerges from an understanding of children as competent social actors, from progressive views born out of sociological formulations of childhood (Prout, 2004; Prout & James, 2003), and from critical views on traditional developmental theories (Burman, 2017) that have dominated public conceptions of children and childhood. Looking through a traditional developmental lens, children are seen as being shaped by their environment and according to age-related competencies, such as Piaget's stages of cognitive development, and reaching their full potential only as adults. This perspective implies predictability of children's development progressing in a stage-like manner, along a "developmental pathway" (Misca & Unwin, 2018). However, such a focus on age-related competency fails to take into account the children's subjective meaning of their lives, thus rendering children "not knowing" what is best when it comes to their own lives (Misca & Unwin, 2017). The social constructionist

understanding of childhood embraces such subjective-meaning perspective (Pufall et al., 2003), and moving beyond models of developmental psychology, argues that children's ability to understand cannot be singularly determined by age or developmental stage. In this framework, children's capacity and understanding are influenced by their experiences and the multiple milieus within which they live.

There are many arguments supporting the rationale for children's participation in decision-making processes. These range from a rights perspective, empowering children in relation to their lived experience of family life, to ideas that children's participation may help them to accept their parents' decisions and alleviate the stress these may cause. Researchers have suggested that children's participation in family decision making leads to better outcomes, associated with feelings of mastery and control (Sutherland, 2014). Alternatively, it has been argued that excluding children from the decision-making process could be potentially harmful, such as in the context of parental divorce/separation where diminished parental capacity may deprive children of the support they need (Neale, 2002).

### III. A LADDER OF CHILDREN'S PARTICIPATION IN FAMILY JUSTICE?

Understanding children's participation in decisions about their lives is not a new concept. As a natural progression of discourse derived from children's rights, soon after the publication of the UNCRC, the UNICEF International Centre for Child Development in Florence published (as part of the Innocent Essay series) a visionary document entitled *Children's Participation: From Tokenism to Citizenship* (Hart, 1992). This caught the interest of child advocates and professionals who work with young people, as it appeared to provide some guidance on the aspects of the UNCRC that may seem to be problematic to interpret, such as those concerning the participation of children (Article 12). The author of the UNICEF report (Hart, 1992) borrowed a theoretical model from



**Figure 1** Children's participation ladder in family justice processes (adapted from Hart, 1992).

adult participation in government, namely, the “ladder of citizen participation”<sup>3</sup> (Arnstein, 1969), and applied it to children’s participation, with the aim of helping different professional groups to (re)consider their approaches to working with young people.

In Figure 1, we have further adapted Hart’s (1992) participation ladder in an attempt to apply it to children’s participation in the family justice context. The five rungs of the ladder suggest the different degrees to which children are allowed, enabled, and supported to make their voices heard. In line with the original distinction between *nonparticipation* and *degrees of participation*, the adapted names and meanings for the rungs are as follows:

- (0) *Hindrance* refers to situations when adults appear to restrict opportunities for children and discourage them from participating, intentionally or unintentionally. This step does not exist in the original model, and it was intentionally placed below the first step of the ladder as it precludes—intentionally or unintentionally—children’s participation. For example, a separated parent might make it clear that he or she knows what the children want and need, so they do not need to be asked directly.
- (1) *Manipulation* happens when adults use the voice of the child for advancing their own agendas. For example, in cases when a child refuses to have contact with the other parent after parental separation, it is thought that this may be the result of the undue high conflict and influence of one parent against the other (sometimes referred to as *parental alienation*).
- (2) *Tokenism* refers to situations in which children appear to be given a voice, but in reality, they have little or no opportunity to formulate and/or express their own opinions. For example, in the past, some courts in England had invited the child to come to the court but was never seen by the judge or invited to participate.

The following three rungs of the ladder suggest varying degrees of participation, with the understanding that participation is best understood as a continuum, taking into account both the age of the child and his or her ability to comprehend, as follows:

- (3) *Informed* refers to when children whose parents are separating are kept informed fully about the issues and consequences, and they understand why they are being given the information, how the decisions about their future are being made, and what they will mean. This kind of information is what many children ask for.
- (4) *Consulted* is the level that “hearing the voice of the child” frequently falls into, arguably still a tokenistic way of participation, as children have no guarantee that their views and wishes will be acted upon. In England, mediators have traditionally “consulted” children and young people only if the parents had suggested including them in the discussions. So the consultation was often instigated by one or both parents, perhaps to underscore a view being put forward by one or the other parent, rather than being an integral part of the decision-making process to listen to the children’s views.
- (5) *Shared decision making with children* is the level that represents *real participation* when adults share decision making with children. The children are routinely offered the opportunity to participate if they wish and to take an active part in the decisions affecting their future. Of course, some children may express the wish that their parents be reunited, or they may have unrealistic expectations about the arrangements that can be agreed upon. So it is very important that children understand their voices will be heard, but that they do not make the decisions and their wishes may not always be fulfilled.

Although, like any metaphor, the use of a ladder of children’s participation involves reducing the complexity of the real-life issues, it is hoped that it can provide a broad framework for exploring barriers and facilitators that either prohibit or encourage children’s participation in family justice processes.

#### IV. PROFESSIONAL PRACTICE IN FAMILY LAW

An international consultation on the voice of the child in 2009 found that almost all family law professionals (97.6%) around the globe believed that children's voices should be heard, and in some jurisdictions, involving children had become commonplace, including the opportunity for children to meet with the judge (Paetsch, Bertrand, Walker, MacRae, & Bala, 2009). In Australia, for example, child-responsive family proceedings aim to educate and focus parents on the needs of their children, facilitate out-of-court settlements via mediation, and provide the opportunity for children to be involved if they wish. As a result, parents appear to be more satisfied with the processes and the outcomes, agreements are more durable, family law professionals (including judges) report a higher level of connection with each family, and the system is regarded as more supportive. A study of 28 families in Australia indicated that the vast majority of the children (91%) had wanted to be involved in the proceedings in some way, children in half the families had been instrumental in seeking changes to contact and residence arrangements, and children who had participated in mediation had liked being able to reach decisions in collaboration with their parents (Cashmore & Parkinson, 2008).

Although the 2009 international consultation of family law practitioners revealed that there was almost universal support for appropriate involvement of children, many practitioners said they were uncertain how to do this. They cited challenges relating to lack of training, lack of resources, and inconsistencies in practice, particularly in mediation, as barriers to making progress. There was unanimous agreement that hearing children's voices is a skilled activity and should be seen as a process (not a one-off conversation) involving clear protocols.

In 2014, the Mediation Task Force in England and Wales requested more information about how children's voices should be heard. The subsequent review included information obtained from young people who form the Family Justice Young People's Board established by Cafcass to ensure that young people are represented and their views understood in the work they undertake in the courts in England (Walker & Lake-Carroll, 2014, 2015). Not surprisingly, all of the young people who had experienced the separation of their parents expressed strong views about the importance of children and young people being given information and having the opportunity to talk to someone about what is happening to them and their family, and to have a say in their future, if they wish. The young people acknowledged that it is not always easy to talk to parents, and it is therefore important to be able to talk to someone who understands what they are going through and to be reassured that their parents' separation is not their fault.

The young people were clear that information should be available about the changes that will happen as a result of parental separation, what to expect, the emotions they might experience, the coping strategies they might employ, and how conflict might be resolved. As one young person commented:

There is a risk that if they [children] do not talk to anyone about it [their parent's separation] they are worrying about it and do not have anyone to reassure them about their worries. (Walker & Lake-Carroll, 2014, p. 1579)

The young people referred specifically to the roles played by mediators and judges and their wish to be able to talk to them if their parents cannot agree. Moreover, there was also agreement that age should not be a barrier. As one young person put it:

In my opinion, a child is ready for mediated communication as soon as they are able to communicate; this may be through playing, drawing a picture or simply speaking to the mediator. (Walker & Lake-Carroll, 2014, p. 1579)

Mediators clearly need a range of skills to include children of all ages and to be confident in giving children a choice about how they would like to communicate, perhaps through writing things down

if they would prefer not to talk directly. Several young people said they preferred to be able to write a letter to the judge or the mediator, as this may be less intimidating than talking to them. The clear message from the advisory group was that children and young people would like to be given options so that each child can choose whether and how he or she would like to communicate with the professionals involved and to do what is most comfortable for him or her.

The young people expressed clear views about the importance of confidentiality and would not want mediators or judges relaying information to parents unless the young person had given permission. Nevertheless, the young people saw some benefits in being included in a mediation family session, perhaps toward the end of the process when arrangements for the future are being made, but this kind of meeting needs to be handled sensitively to ensure that it is not upsetting for the parents or the child. The young people made a very strong case for being given information, both general and specific to them; being given options to participate in family law proceedings, which include direct consultation in mediation or with the judge; and being heard (Walker & Lake-Carroll, 2015). The then government in England accepted all the recommendations that were made, and mediators and judges have been encouraged to embrace child-inclusive approaches to listening to children and giving them opportunities to be heard. Mediation training has been enhanced to include the skills needed to include children in the process.

Research with high-conflict families in Australia, which compared child-focused with child-inclusive mediation, demonstrated significant additional beneficial outcomes from child-inclusive mediation (McKintosh, Smyth, Kelaheer, Well, & Long, 2011; McKintosh, Wells, Smith, & Long, 2008). These include a higher level of repair in the parental relationship, more developmentally sensitive agreements sustained over time, improved father–child relationships, and improved attachment. Importantly, children demonstrated lower anxiety, fewer fears, and fewer depressive symptoms. The research found that children and young people appreciated the safe avenue to express their views and contribute to the agreements made by their parents. The inclusion of children challenged parental assumptions, and the feedback from children was frequently referred to by parents as “transformative.” With better emotional health outcomes for children and improved parent–child relationships after parental separation, the child-inclusive approach to mediation and to dispute resolution generally in Australia have confirmed the benefits for children and their parents associated with giving children and young people a meaningful voice in dispute resolution proceedings.

Australia has set a clear example of listening to children and young people. Elsewhere, particularly in England, attitudes about the direct involvement of children in mediation have varied. In the early days in the 1970s and 1980s, practitioners in the United States and the UK provided compelling arguments for involving children in mediation. Family Mediation Scotland laid the foundations for children’s participation in the UK, arguing that it would help children and young people to adjust emotionally to the restructuring of family relationships. Nevertheless, not all mediators have been convinced by the arguments for a child-inclusive approach. There is widespread evidence that giving children a voice must be embedded in processes and not regarded as a one-off event; tailored to the needs of the child, it should not be left to individual professional discretion based on arbitrary factors.

The work undertaken for the Mediation Task Force in England demonstrated clearly that a range of models of practice was in evidence. Several providers referred to the concerns mediators have about selecting appropriate cases for child-inclusive work. It was frequently left to the parents to request that their child be included rather than its being an opportunity afforded to the child. In this context, the inclusion of children was primarily a means of assisting the parents to resolve a dispute rather than providing children and young people with a voice. This raises a number of issues in relation to the primacy of the child’s voice when heard as part of a parental mediation process—that is, whether and if children’s voice or view is seen primarily to inform parental decision making or whether the children are being given a forum in which they can express their views, possibly their own preferred choices or decisions in relation to their family and to receive information and support. The focus may also vary according to the age and understanding of the child or children involved.



Unless children and young people are offered an opportunity to express their views as a routine part of practice, mediators have to assess very carefully with parents if, whether, and how their child's being offered an opportunity to be consulted directly is going to be of assistance to the family as a whole and particularly for the child. For many parents, this is a lot to ask at a time when their own emotions may be running high and/or they are keen to protect their children from the conflicts they are experiencing as parents. In New Zealand, mediators developed a direct participation approach that allows those children who wish to be involved to make a brief, uncontested statement at the start of mediation before the parents attempt to resolve issues in dispute (Boshier, 2006). Yassenik and Graham (2016) have pointed out that it is the mediator's job to undertake a multi-party mediation that is inclusive of all the parties, including children, taking account of vulnerabilities. In other words, children are not to be regarded as passive players in the unfolding family dynamics, and parents do not hold all the power to decide to exclude their children for whatever reason.

Generally, it appears that mediators make decisions on the direct participation of children very much on a case-by-case basis and may also consider that an important aspect is parental "competence" in the sense that they are able to be supportive, considerate, sensitive, and insightful with respect to their child or children. The onus, it seems, is on the mediator and the parents to assess the value of talking directly to a child, rather than there being a presumption with respect to the rights of a child to be heard in any family law process that impacts their life if they so wish. In order to address the dilemma inherent in this kind of model, Yassenik and Graham (2016) have developed a four-level Child-Centred Continuum Model for ensuring the input of children and young people. It considers the balance between including children and child safety. It takes account of the parents' readiness for different levels of involvement. It emphasizes the importance of child agency and a need to move away from models of mediation in which decisions as to whether to involve children and young people are subjective and paternalistic.

Confidentiality and privilege appear to be difficult issues in a number of jurisdictions that do not routinely involve children. In England, there has been a sharper focus on confidentiality and privilege in the family mediation process in recent years; and although the existing and long-standing precedent in relation to privilege in mediation is generally respected, there have been more recent attempts to utilize civil precedents to challenge both privilege and confidentiality of family mediation processes. One significant point that often remains unclear is the place of privilege and confidentiality of discussions during which the mediation breaks down or does not reach a conclusion. This may and can lead to parents' subsequently issuing proceedings (or returning to proceedings) for adjudication of matters relating to the future parenting of their child or children and where the information shared by the child during the mediation process may or does become a focus for parents and therefore for the court in considering the matter before them. This has presented a socio-legal issue in that it has ethical, welfare, and legal considerations that may also affect whether mediators feel able to offer to include a child or children as part of a mediation process.

The issue of confidentiality was addressed directly in England by the Voice of the Child Dispute Resolution Advisory Group (Walker & Lake-Carroll, 2015). Among a wide range of recommendations, a nonlegal presumption that child-inclusive practice was to be the normal starting point for all mediations concerning children's issues was proposed. This would assist parents and the professionals working with them to regard the involvement of children as commonplace and potentially beneficial for everyone. The Advisory Group considered it extremely important for there to be very clear guidelines about issues of confidentiality, and parental consent for all practitioners engaged in dispute resolution processes. The Advisory Group recommended that mediation should remain an essentially confidential process. It formed the view that the Gillick test, which had been established in England with respect to medical matters (see *Gillick Competency and Fraser Guidelines*, NSPCC, 2019), could be adapted in relation to whether a child has sufficient maturity and understanding to determine whether his or her communications with the mediator should or should not remain confidential. Having taken account of the child's age, this process

would involve an assessment of the maturity and understanding of the child. It follows that the “Gillick-competent” child may waive, or decline to waive, the right to confidentiality in relation to his or her communications with the mediator.

So the Advisory Group recommended that all communications between a child and a mediator should be confidential. However, the mediator should always discuss with the child the issue of confidentiality and seek to elicit the child’s views about the confidentiality of discussions. The mediator should attach due weight to the child’s views according to the child’s age and understanding when considering whether information given by the child should be shared with the parents. Moreover, when a child is assessed to be Gillick competent, the mediator should respect that child’s wishes about disclosure/nondisclosure of information given in mediation; only in exceptional circumstances and for good reason should a mediator override the child’s wishes. The Advisory Group considered that safeguarding issues, serious mental health issues, and severe learning difficulties would be the only reasons for assessing that the child lacks understanding and competence.

## V. CONCLUDING COMMENT

Undoubtedly, the participation of children and young people in family matters remains a complex and sensitive issue, and more research is needed before it can be said that the principles underlying the UNCRC are being routinely followed. Nevertheless, there is widespread acceptance that children and young people should be given a voice in matters that affect them. The question remains as to how to do this, and many jurisdictions are still trying to find the best way of achieving this. It is also important to consider not just if, whether, and how a child may be heard, but to ensure that children and young people are given information about family separation and change, and helped to understand their feelings, to know that they are not alone, and to feel better equipped and confident to consider how they might talk with their parents about what is important to them if it is possible for them to do so. The imperative is to be able to listen to what children and young people have to say.

During the Voice of the Child Advisory Group review (Walker & Lake-Carroll, 2015), one young person from the Family Justice Young People’s Board in England provided an extract from the writings of Janusz Korczak (1878–1942), a Polish doctor and passionate children’s rights advocate who, as his final selfless act, walked with 200 homeless Jewish children from the orphanage he ran in the Warsaw ghetto to catch a train to Treblinka. He got on the train with his children rather than take up an offer to save his own life and leave Poland safely. The human consignment never arrived in Treblinka and was almost certainly exterminated en route. Korczak’s powerful legacy is his belief that children have a right to be treated by adults with tenderness and respect and that the best way to prepare children for adult life is to have them experience situations that are real. At the beginning of one of Korczak’s books (1925), he wrote the following:

To the Adult Reader:

You say:

*Dealings with children are tiresome.*

You’re right.

You say:

*Because we have to lower ourselves to their intellect. Lower, stoop, bend, crouch down.*

You are mistaken. It isn’t that which is so tiring. But because we have to reach up to their feelings.

Reach up, stretch, stand up on our tip-toes, as not to offend.

The young person who quoted this believed that Korczak spoke for most of today’s generation of young people over 90 years later.

## NOTES

1. This article draws on research that the first author has undertaken over a number of years, primarily for government departments in England, and subsequent publications (Walker 2013; Walker et al., 2003, 2007).
2. Most recently, she was co-chair of the Voice of the Children Dispute Resolution Advisory Group established by the Ministry of Justice in England and Wales in 2014. Its remit was to undertake a thorough review of the evidence about children's participation in family justice processes and conduct interviews and focus groups with young people who had experienced the family justice system in action, in order to make recommendations about how the voices of children and young people could and should be heard in the future. Discussions in this article have been informed by the results of this review of evidence and subsequent publications by the co-chairs (Walker & Lake-Carroll, 2014, 2015).
3. Arnstein's (1969) model of the "participation ladder" is also referred to in the article in this issue by Misca, Walker, and Kaplan as an example of user involvement in service delivery.

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