The dilemmas of children’s participation

To what extent, if any, should children be involved in the process of resolving parenting arrangements when their mother and father cannot agree? Should they be given seats to the boxing match, or invited into the ring? Or should they rather be excluded from the venue? In the past, the most common response to this issue around the world has been that the courts seek to protect the children from the conflict as far as possible, trying to shield them from the sometimes acrimonious conflicts about their future care arrangements. There is good reason for this. The consistent message of research has been that it is the parental conflict—both before and after the separation—that is most harmful to children (Bradford, Burns Vaughn, & Barber, 2008; McIntosh, 2003; Simons, Whitbeck, Beaman, & Conger, 1994.)

Another issue that has prevented children’s views from being given significant weight in parenting disputes has been a belief that children, especially prior to their adolescence, do not have the capacity to make reasoned choices about important matters (James & Prout, 1997; Jans, 2004; Thomas, 2007).

However, another way of thinking about children’s participation has emerged in recent years in relation to adult decision-making on issues that affect children. There has been a new awareness of the value of giving children a voice, and the benefits to the decision-making process that can result from listening to and involving children. The UN Convention on the Rights of the Child, in particular, has been a catalyst for a new focus on the inclusion of children’s views and perspectives when decisions are to be made on issues that matter to them (Kilkelly, 2006). Ideas of children’s social citizenship have also been influential (Jans, 2004; Lister, 2007; Roche, 1999; Woodhouse, 2004). Earlier assumptions about children’s capacities and presumed incompetence are being challenged, as it is recognised that children’s competence depends not so much on their age as on the context, the support they receive, and the way in which activities are structured (Kaltenborn, 2001; Taylor, 2006, p. 160).

In addition to the arguments based on moral and citizenship rights, various reasons have been put forward for taking children’s views into account in family law and other arenas (Chisholm, 1999; Lansdown, 1995a, 1995b). These include the twin rationales of enlightenment and empowerment (Warshak, 2003). The enlightenment rationale is that children can provide important information about their perspectives and experience that can contribute to more informed decisions and potentially more positive and workable outcomes. The empowerment rationale is that children benefit from being involved in several ways: by learning to make decisions, by having a greater sense of control and self-esteem that comes from recognition and respect, and being acknowledged as people with interests in and perspectives on the decision rather than being the “object of concern” (Smart & Neale, 2000; Warshak, 2003). It has also been suggested that children, like adults, are more
likely to feel that the process and outcome are fairer if they perceive that they have had a chance to have some control over the way in which the decision is made ("voice") or over the outcome ("choice") (Thibaut & Walker, 1975).

This movement towards the greater involvement of children has also influenced thinking about the determination of parenting arrangements following parental separation and divorce (Neale, 2002; Smart, Neale, & Wade, 2001; Taylor, 2006). However, arguably, there needs to be some caution about applying the new ideas on children’s participation to this area of decision-making. The issues involved in encouraging children’s participation in this area are unlike any other. Listening to children’s voices in the public sphere concerning issues such as the governance of their schools, the design of playgrounds or on issues of town planning, all carry obvious benefits with few risks. They do not involve the sort of emotional and relational issues that arise in disputes about post-separation parenting arrangements. Even when children are involved in decision-making about medical matters, the final decisions on treatment are likely to rest with their doctors and their parents.

Involving children in decision-making about post-separation parenting is different because the very process of so doing has the potential to be detrimental (Warshak, 2003). Children may experience loyalty conflicts or be subjected to pressure and manipulation by one or both parents. There are also issues about asking children to take the role of adult decision-makers, reversing the allocation of decision-making responsibility that is found in intact families.

Of course, children may be involved in various ways that do not involve them in “making the decision” and this is one of several distinctions that need to be drawn in understanding children’s participation. Their influence may be direct or indirect, and is likely to differ at different times in the process, rather than being a “one-off” event. It might involve some input into the process (“voice” or having a say) at some stages and even some “choice” or control over some aspects of some decisions. It may take a number of forms, depending on the circumstances. Children may be consulted in the course of negotiations between their parents on contact arrangements where the issue of primary residence is not in dispute; they might be interviewed by a counsellor and their views fed back to their parents in the course of mediation; they might have their views included in a family report; and they might be involved in the trial process as well, at least through having an independent lawyer to represent them and also, uncommonly, by having the opportunity to talk with the judge. Children’s wishes or views have typically been one of the factors that courts have been required to consider in many jurisdictions in making determinations about children’s welfare.

The extent to which children are involved in any real sense, however, depends on a number of factors; not least the extent to which the adults involved, and particularly the parents, allow this to happen. Apart from the situation in which older children and adolescents “vote with their feet” or refuse to cooperate with their parents’ arrangements, children generally have to rely on the adults involved to hear their voices and accommodate their choices. Where parents and the other adults who are involved doubt children’s competence or suspect their motivation for involvement, they can often play a key gatekeeping role by preventing those views from being heard or being taken seriously. The advice of counsellors and lawyers is likely to play an important role in how parents see the views of children and the participation of children. If counsellors and lawyers are opposed in general to the involvement of children in resolving disputes, they will advise parents against it when the issue arises, or not mention options that are theoretically possible. While family consultants and counsellors are not adjudicators in any formal sense, in their role as writers of family reports for the court, they will often have a decisive impact on the outcome of a case.

Listening to children sensitively, and with awareness of the kinds of decisions in which they are best able to participate, is the key to resolving the tension between participation and protection.
In the continuing tension between participation and protection, and in the debate about the appropriate means of involving children in these decisions, some understanding of how those involved think about the issues is clearly important—the children themselves who have experienced their parents’ separation and divorce, their parents, and the professionals outside the family who contribute to or make the decisions about the arrangements for the children where their parents cannot resolve their dispute. To what extent do children want to be involved and what are their reasons for wanting or not wanting to be involved? To what extent do they think they had had some say or wanted more say? How appropriate do parents think it is for children to be involved, and under what circumstances? How far do their views differ from those of their children? What are the views of the professionals involved?

The study

To explore these issues further, we conducted interviews with parents, children, family consultants, mediators, lawyers and judges.1

The 90 parents and 47 children and young people (ranging in age from 6 to 18 years) were in families that had engaged lawyers and had resolved matters in the preceding 12 months, either through more informal processes or through court-related proceedings. Just over half the parents were resident parents (39 mothers and 11 fathers) and just over half of the families had been involved in contested proceedings (including 25 of the 47 children interviewed). Either the parent or the child(ren) made substantive allegations of some form of family violence (allegations of violence between the parents or abuse or neglect) in 9 families, affecting 19 children; most of these cases (15 out of 19) were contested. Three-quarters of the children (35) were living with their mother, and one in five with their father, with only two children in shared alternate-week arrangements.

The interviews with the children concerned their understanding of and participation in decision-making about residence and contact issues following the separation of their parents. Thirty-five children were re-interviewed (18–30 months after the first interview) to explore any changes in their arrangements and their views about being involved in making or changing those arrangements.

Interviews were also conducted with 20 Family Court judges and Federal Court magistrates (10 men and 10 women), 42 lawyers (21 men and 21 women), 24 family consultants (18 women and 6 men) working in three registries in the family court system in New South Wales, and 17 mediators (12 women and 5 men) from three large community-based organisations in New South Wales. They were each asked a range of questions about children’s participation, including questions such as: “How important do you think children’s views are in terms of making satisfactory parenting agreements after separation?”, and “Do you encourage parents to involve the children in the parent’s own negotiations about the parenting arrangements?” The judges and lawyers were interviewed by the lawyers in the study team and the counsellors and mediators by the psychologists.

Findings

The findings that follow focus on the children and their parents and provide an overview of the main issues outlined by the professionals that are discussed in some detail in Parkinson and Cashmore (2008).

Children’s views

How much say did children have?

Sixty per cent of the children said they had had some say (either “a bit” or “a fair bit”) at some stage in the arrangements about where they would live and when they would see their parents after the separation. For some children, especially those who had been very young, this was not in the immediate aftermath of their parents’ separation but some years later, when circumstances changed or the children wanted them to change.

In about half the families, both parents and children reported that at least one of the children had been instrumental in changes to either the residence or the contact arrangements (18 children in 14 families); all the children involved were at least 10 years of age. Changes in residence (which were less common than changes in contact) were initiated or influenced by children in two main ways: either by direct and uncontested changes from one household to the other, or as a result of court action following children’s disclosures of abuse and violence, calls to the police or running away. Other children had considerable influence over changes in the contact arrangements by initiating significant changes or asking for the changes to occur. In seven cases, six of which had been contested at some stage, children refused contact or refused to stay overnight where they were unhappy about the relationship with their parent or where their parent’s new partner was abusive or unwelcoming. On the other hand, three children “pushed” for a resumption of or an increase in
contact, in two cases after relocating with their mother some; distance from their father and their sibling.

**How much say did children want and why?**

Most children (91%) said that they should be involved, though not necessarily in making the decisions. Most of the children who expressed strong and unqualified views were involved in contested matters, whereas those who said that they wanted to be involved but did not want to make the decision themselves were more likely to be involved in non-contested matters without high levels of conflict or violence.

There were several themes in children’s comments concerning the reasons they wanted to be involved—themes that have emerged in other studies: the need to be acknowledged, the belief that this would ensure more informed decisions and better outcomes, and the view that they had the right to have some say in the arrangements that would affect them most (Gollop, Smith, & Taylor, 2000; Parkinson, Cashmore, & Single, 2007; Smart & Neale, 2000). The need for some acknowledgement and recognition that “it is their lives” that are affected by the decisions made about them was the most commonly expressed reason for children wanting to have some say in what happened. For example:

I think that it’s important for them to have a say because it’s their lives and they’re going to have to deal with it and it’s a choice that I think personally is up to them. It’s not whether the parents want them to be with them, because I’m hoping both of the parents want to be with their kids. (Emma, 13, non-contested matter)

**Children’s concerns about having a say**

While only four children (9%) said they thought it was not fair to ask children what they want to happen in relation to the residence and contact arrangements, the majority (70%) indicated that “being asked” does put them in “a difficult position”. The main reasons for their discomfort were their unwillingness or inability to choose between their parents and their concern about the consequences of choosing—in particular being unfair to and upsetting one of their parents. For four children involved in highly contested matters, their concern was about more direct and immediate consequences—that a parent might “hit”, “hurt” or “not let them in the house”. Despite their fears about being hurt, these children still wanted to have a say and thought that it was appropriate that they should do so.

**Parents’ views**

Most parents, like most children, said it was appropriate for children to have a say; in fact, the proportions of parents and children who said it was not fair or inappropriate for children to have a say were small and similar (13% and 9% respectively). Parents also gave similar reasons for the benefits and fairness of children having a say—acknowledgement and respect, and as a contributor to better decisions and outcomes. The idea that children’s views should be heard (voice) but should not be decisive or determinative (choice) was common. Some parents also referred to a therapeutic benefit for children in being able to express and manage their feelings and the positive impact on their self-esteem and development. Unlike the children, relatively few parents referred to children’s right to be heard:

They’re the only ones who are in the position to judge what their life is like under the current regime and under the possible alternate regimes, and they are the only ones who are going to be in those conditions. (Non-resident father of 13-year-old, contested matter)

You have to take the circumstances into account … and the maturity of the child, and I don’t think it should be directed by the children. But having their opinion [taken into account], yes. (Resident mother of three children aged from 6 to 11 years, non-contested matter)

Both resident and non-resident parents who had been through contested proceedings were more likely than those who had not to regard hearing children’s voices—but not their choices—as an avenue to better decisions being made, and to believe that children would be able to indicate which parent they felt most comfortable with, if a preference needed to be given. Parents in contested matters were more likely to indicate that children under 10 years of age should be heard than those who did not go through contested proceedings. On the other hand, only two of the parents who supported children’s choices were in contested cases, and their children were adolescents.
Parents’ concerns about children being involved

Parents were, not surprisingly, more likely than children to be concerned about children’s age and maturity and the changeability of their views, as well as children feeling pressured to say what they thought their parents wanted to hear. About half the parents saw children as possible ‘victims of manipulation’ at the hands of the other parent or, less commonly, as “potential manipulators”. Both resident and non-resident parents referred to the influences that they or their ex-partners could use or had used in relation to their children, including direct bribery by buying children games, toys and motorbikes, and being the “fun” parent, allowing children more freedom than they had in the other household:

Kids are very smart. Kids love to play one off against the other. “At Mum’s I have no rules, but at Daddy’s, because I see Daddy every second weekend, we run riot, and Daddy buys us this, or Mummy buys us that.” (Resident father of two children aged 8 and 7)

Several parents, however, acknowledged the risk of wrongly interpreting the motives of the other parent during the heat of the dispute, indicating that they had been suspicious about the other parent being manipulative, but recognised later that it had not happened. Others explicitly challenged the idea that children are manipulative or easily “bought off”, and several made comments about children’s perceptiveness:

But I actually don’t think children can be brainwashed. I actually think that that’s thinking that children are like puppets or, like, that we can coerce them into thinking and believing whatever we want them to think or believe, and that’s far from the truth. (Resident mother of children aged 8 to 19, contested matter for younger children)

The more weight that is given to children’s views, the greater the danger that they will be exposed to pressure from parents and manipulation, and the more they are likely to experience damaging loyalty conflicts.

Lawyers’ views

While most lawyers were generally supportive of children “having a say” in the process, they consistently emphasised the risks of harm from children’s participation, especially in the litigation process, rather than any benefits that might flow from it. The main benefit was expressed in terms of the workability of the arrangements, with children’s views feeding into better decisions that children could be happy with and that might prevent older children and adolescents “voting with their feet”. Like lawyers and judges elsewhere, most attached a great deal of importance to children’s age and maturity, and their competence as “rational decision-makers” (Crosby-Currie, 1996; Murch et al., 1999; Felner et al., 1985; Piper, 1996). Some lawyers classified children in age bands:

In that age group—say from 10 upwards for argument’s sake, where you get up to about 14 or thereabouts—then, yes, you should be giving some reasonable weight. But it shouldn’t be the thing that is uppermost in your mind; but it may be the factor that might tip the scale if everything else is balanced. There’s a very strong argument you could mount to suggest that the court shouldn’t make any orders about children over the age of 14 years. It’s just a waste of time. (Experienced male lawyer and child representative)

A consistent theme for lawyers was the need to protect children from the conflict between their parents, loyalty conflicts and pressure from their parents, the burden of responsibility, and having inappropriate power in the relationship. For example, one lawyer commented on the impact of loyalty conflicts on children’s views:

It’s a survival issue for children, I think; that they can’t afford to be disloyal to Mum—as they see it—because they’re living with Mum. So if Mum has expressed a strong view that “I don’t want you to see Dad”, then they feel that they might be disloyal to Mum if they say “I do want to see Dad.” (Female lawyer, child representative)

Lawyers generally responded to the questions on children’s participation by seeing the issue in terms of children expressing choices between the competing positions of the parents. Choices were therefore seen as binary in nature, and the views that a child expressed would necessarily be a view in favour of one parent or another. They tended to think of children’s preferences as being about outcomes, with the available choices being defined by the parents’ respective positions. There was an implicit assumption in some of the interviews that because the parents could not find the middle ground of a dispute, and were locked in adversarial positions, there was therefore no place for the children to identify and articulate that middle ground, or to suggest the compromises that might lead to settlement.

However, there were some exceptions to this:

I don’t think children are given enough credit for understanding what goes on—their ability to understand how it can work. And I think children can have some incredibly positive inputs. I don’t think you should place children in the role of mediating between parents, but they often do and they’re acutely aware of the positives and the negatives of each of their parents. (Female lawyer, child representative)

Many lawyers referred to parental pressure on children as being a significant problem, and this was a major argument against putting more weight on children’s views. For example:

It would … be hard for a parent if they understood that their children’s wishes were going to have a significant effect on the outcome; they would almost be saintly if they could hold themselves back from trying to influence their children in some way. Even unconsciously they would do it. There would be a group that would take it as a [matter of] course to make sure their child held their point of view. (Male lawyer)

I have … seen cases where parents have exerted enormous pressure, either deliberately, or perhaps unintentionally, on children to get them to make choices one way or the other. (Female lawyer)

Family consultants’ and mediators’ views

Although the family consultants and mediators engaged with families at different stages of the dispute resolution continuum, they had very similar views. All of them considered children’s views to be important to the process, except when the children were very young and seen as not knowing what was going on. However, they gave some different reasons from the family lawyers, and offered different concerns about involving children. In the following discussion, when we are talking about both mediators and family consultants, we will use the term “counsellors”.

Almost all the counsellors expressed support for children’s participation in terms of one or both of Warshak’s (2003) rationales—enlightenment and empowerment—in contrast
to family lawyers’ concerns with the “reliability” of children’s views and the workability of arrangements. For example:

Children have the right to have a voice, and to be heard about what’s happening to them, because their issues are going to be different to parents’ issues. (Female mediator)

I think kids’ views are pretty good. They know who they feel they can relate to. I mean, probably particularly sort of [from] 8 years old. Before then it’s probably a bit hard for them to conceptualise. (Female family consultant)

However, for both the mediators and family consultants, the most important aspect of the involvement of children was to enlighten the parents. Their assumption was that parents did not know what their children really thought, whereas the lawyers were concerned about the extent to which parents talked with children and tried to influence them. For example:

In the majority of cases, I would like to have the child’s voice heard, because I think all parents can learn about how their children are travelling. And everyone knows children have thoughts they don’t express to their parents, and if the parents can be more child-aware and child-focused, that’s good. (Female mediator)

Counsellors expressed some concerns about loyalty conflicts, and children trying to “look after” their parents’ needs above their own, particularly in the quest for fairness and looking after a vulnerable parent, as well as possible repercussions for children who are asked to choose. But they were less troubled than lawyers about children’s age and maturity issues, and about parental pressure and manipulation. This is for three reasons. First, counsellors were less likely than lawyers to say that parents talked to children about the parenting dispute and less likely to say that this was inappropriate, as they considered it important for parents to know what their children thought. Only a small minority of the counsellors thought that most of the parents talked with their children in an attempt to influence them. Secondly, most counsellors thought they could identify situations where a child has been told what to say or has been strongly influenced by a parent. Unlike the lawyers, counsellors saw both parents in the course of their mediation or assessment processes. Where they were least confident was where children have been subject to such influence and pressure that they have internalised the parent’s viewpoint so that it becomes their own, although this was not a commonly expressed concern. Thirdly, counsellors were less concerned with discerning the pure, uncontaminated voice of the child. For example:

Nearly all children are going to be influenced one way or another by what their parents think. It need not be just parents sitting down the night before saying: “I want you to tell the counsellor this and that”. But nearly all children, if you ask them: “What do you think your Dad thinks?” or “What do you think your Mum thinks?”, they usually know. Which means that they found out somehow. You know, like the song, it’s like family osmosis. Most of us in a family would know what each person thinks about a particular issue. (Male family consultant)

They saw children’s participation as being a means of discerning the children’s best interests and promoting those interests by giving them a voice in the process, rather than a means of discerning decision-making competence. For this reason too, they were less concerned than lawyers about children’s age, maturity and competence. For example:

Do you take a 2-year-old’s view into consideration that they want a lolly? No, you don’t. But do you take a 2-year-old’s views into consideration that they’re frightened when they sleep at Daddy’s house, because he lives with three other people? You obviously would. So it’s actually weighing it up to try and get something that works, that’s safe for the child, and going to enhance their relationship. (Female mediator)

Discussion

Children, parents and counsellors—and lawyers to a lesser extent—were generally in agreement that it is important to hear children’s views and for children to feel that they have been heard. The children’s views are in line with those of children in a number of other studies. Children generally do not want to make the decisions about the residence and contact arrangements after their parents separate, but they do want their views to be heard and taken seriously (Butler, Scanlan, Robinson, Douglas, & Murch, 2003; Douglas, Murch, Robinson, Scanlan, & Butler, 2001; Gollop et al., 2000; Graham & Fitzgerald, 2006; Parkinson, Cashmore, & Single, 2005; Smart & Neale, 1999, 2000). Their views are also consistent with the distinction between voice (control of the process) and choice (control over the decision) (Thibaut & Walker, 1975).

Being heard was clearly seen as a signifier of respect and recognition (Graham & Fitzgerald, in press; Tyler & Degoe, 1995). Children were generally keen to maintain relationships with their parents and wanted their views to be acknowledged and taken seriously as a sign of their parents’ respect and care for them. For some children and parents in contested matters, however, where violence and abuse and the ongoing disputation had disturbed children’s trust in those relationships and concern for maintaining them, children wanted more say in the decision—choice, not just voice. Parents, however, like the family lawyers involved in this study, were often concerned about undue pressure on children’s views, a concern that was less prevalent and less strong among counsellors. For parents and lawyers, their trust in the process meant that they wanted to be sure that the voice they heard was that of the child only, not the result of influence or manipulation by the other parent (as if that could ever be the case). For counsellors, children’s views were part of an overall picture at one point in time, but influenced by what they could discern about the family’s background.

Then how should we listen to children in family law disputes? That we should is beyond question. The Family Law Act, s. 60CC(3)(a), provides that children’s views should be considered by the judge, and participation is also a right enshrined in the UN Convention on the Rights of the Child. The great majority of children, parents and professionals thought so also.

However, there is a paradox. The more weight that is given to children’s views, the greater the danger that they will be exposed to pressure from parents and manipulation, and the more they are likely to experience damaging loyalty conflicts. Where this happens, parents also lose trust in the legal process.

Lawyers who were appointed to represent children risked placing them in the middle of the conflict by putting too much emphasis on the children’s choices between the parents’ conflicting positions. One reason is that they typically focused on the age and maturity of the child as if the main
issue was to determine whether the child had the capacity to make his or her own decision. Family consultants, by way of contrast, used children’s views as windows on their worlds, and to give them insights on how the children experienced family life and what could make it better. They also had the advantage of having seen both parents, whereas lawyers typically heard only one parent’s “story”.

Sometimes, parents have entirely irreconcilable positions; but in most cases there is a substantial middle ground. Exploring that middle ground with the children is an important means of hearing their voices. It involves getting their views on the detail of contact arrangements, working out what is fundamental to their happiness and how well they will adjust to different changes. Family consultants or child-inclusive mediators are best placed to explore that middle ground when parents cannot agree. The means of doing this will obviously vary with the age, maturity and responsiveness of the children. Conversely, there may be situations where children should be protected from the pressure to make a choice between irreconcilable positions, particularly where they have a good relationship with both parents. Family consultants, mediators and independent children’s lawyers need to be aware of this.

Children’s views are an essential part of the decision-making process, but there was a consensus in this study between parents and professionals that they should generally not be determinative. Working out the issues on which to involve children is as important as the means of so doing. Listening to children sensitively, and with awareness of the kinds of decisions in which they are best able to participate, is key to resolving the tension between participation and protection.

Endnotes

1 We would like to acknowledge and thank all the children and families, judges, lawyers, family consultants and mediators who participated in the study, and Judi Single for managing and conducting most of the interviews with the children and parents; also the anonymous reviewers for their helpful comments. The project was funded by the Australian Research Council under its Discovery Projects funding (DP0210153) and had ethics approval from the Human Ethics Committee of the University of Sydney; it was also endorsed by the Research Committee of the Family Court of Australia. The ethics conditions on interviewing children provided that the researchers could interview the children with the consent either of both parents, or the permission of one parent without the refusal of the other, having given that other parent the opportunity to object. The informed consent of the children was also required and obtained.

2 While “a lot of say” was an option, none of the children used it.

References


