7-16-2015

Children’s voices in family law conflicts

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Children’s voices in family law conflicts

International Perspectives and Empirical Findings on Child Participation

Children are commonly recognized as separate human beings with individual views and wishes worthy of consideration. Their ability to freely express these views and wishes constitutes the concept of child participation, defined by Article 12 of the United Nations Convention on the Rights of the Child as the right of children capable of forming their own views to be able to express themselves freely in all matters affecting their lives. Children should particularly be provided with the opportunity to be heard in any judicial and administrative proceedings pertaining to them, either directly or through appropriate representatives, and with necessary precautions and support.

Beyond the international law definition of child participation, the right of children to be heard has been increasingly recognized by national courts, even in the United States, which qualifies as one of the very few countries that has not yet ratified the Convention. For instance, the recent case In Re Marriage of Winternitz, 2015 DJDAR 3526 (27 February 2015) decided by the 4th District Court of Appeal, Division I, of California on 27 February 2015, includes an important holding regarding children’s wishes in custody law disputes. The California Family Code Section 3042 provides that courts should consider and give due weight to the wishes of a child when making an order granting or modifying custody or visitation. The statute has also recently granted permission to children to address the court if they are 14 years or older, unless it is against their best interest.

California courts have interpreted this statute in different ways. Some judges allow children to provide testimonies, others prefer to meet with children privately, and finally some still refuse to hear children’s preferences. The Winternitz opinion concerns Tami Winternitz’s request to move away with her minor daughter, Jamison. The father, William Winternitz, opposed the move and sought custody of the daughter. The trial court found that denying the move-away request was in the best interest of the child and decided to grant primary custody to the father, in spite of Jamison’s wish to remain with her mother. The court clarified that the fact that the decision did not follow the child’s custodial preferences did not establish an abuse of discretion because her wishes were expressly considered and given due weight by the court.
Empirical studies conducted in Ireland and New Zealand have compared the different approaches adopted by national courts in providing children with the opportunity to be heard in family disputes. Findings show the importance of legislation in securing the implementation of the right of children to have their wishes taken into due consideration. In Ireland, where there is no proper regulation granting children the right to participate in family law proceedings, judges reluctantly and seldom seek children's views. In New Zealand, on the other hand, courts are very supportive and accustomed to this practice, regulating judicial interview with children through legislation and national guidelines.

Studies conducted in Canada found that both judges and children benefit from judicial interviewing. Children shared their wish to be involved in the decision-making process affecting their family situations without dictating the final decision. They want to have “a voice, not a choice.” Judges, also, believed that meeting with children is a useful tool to complement or corroborate the facts and information about a case. Other studies in Israel have suggested that allowing children the opportunity to participate in their parents’ disputes has a positive impact on the decisions reached by the court and contributes to children’s well-being and satisfaction with the process. In addition, parents were surprised to find that the information sought by a third party helped them better understand their children and what they were going through. In California, when children are denied the opportunity to meet with the judge and have their voice heard, they become disappointed and frustrated.

Thus, the goal of allowing children to participate in judicial proceedings affecting their lives is not to impose their preferences or grant them veto power. It is instead about empowering children to voice their feelings and opinions and promote their self-esteem, respect, and trust in others and themselves regardless of the outcome. This is also the correct interpretation and the purpose of the children's right to participation under the United Nations Convention on the Rights of the Child. Thus, even though judicial opinions, as in the Winternitz case, may not always follow the child’s wishes, the court’s concern to consider and give them due weight in reaching the decision is exactly what child participation is about.

**Image Credit:** “Epic Parenting 101” by Peter Kirkeskov Rasmussen. CC BY-NC-SA 2.0 via Flickr (https://www.flickr.com/photos/peterras/14360594083/)

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