

CHILDREN AND THE TRANSFORMATION OF FAMILY LAW

Carol Smart*

INTRODUCTION**

Anyone who adopts an historical perspective on family law¹ will be struck by the extensive changes that have occurred in this field of law over the last decade. Of course almost every decade throughout the twentieth century has brought changes, most particularly after the second world war when the disadvantaged position of wives became more apparent and as divorce was made accessible to a much wider constituency. These changes, combined in a complex fashion with social, economic and cultural transformations, have not produced a state of stasis or of resolution, but rather have generated a field of legal policy which is in perpetual motion and reformulation. Family law cannot stay still while the family itself is being transformed and redefined, nor can it these days escape the consequences of operating beneath a close political scrutiny by media, pressure groups and government alike. Family law is the site of contested meanings and moralities as government seeks to reduce the cost of divorce to the Exchequer, as pro-family rights groups seek to reintroduce matrimonial fault, as gays and lesbians seek to extend the right to marry, as fathers seek to redefine their roles, and as mothers still seek to combine care work with paid work and avoid poverty after divorce.

These are not, however, the only matters of significance that we need to take into account in understanding recent policy changes. This is because amongst the 'noise' associated with the transformations cited above, there has been a quieter set of developments which have centred on the place of children in the family, before

* Professor of Sociology, Centre for Research on Family, Kinship & Childhood, University of Leeds. This paper is based on the text of the Ivan C. Rand Memorial Lecture at the Faculty of Law, University of New Brunswick (Fredericton), March 23, 2000.

** I am grateful to Bren Neale and Amanda Wade who worked with me on both of the projects on which these ideas are based. The ideas discussed here are part of our ongoing discussions and are owned by all of us alike. I am also grateful to the Nuffield Foundation and the ESRC in the UK for funding these research projects.

¹ I am speaking of England and Wales in this context, but I am certain that similar changes have been occurring in other common law jurisdictions as well and so I hope that this paper will carry a relevance beyond the shores of the UK.

and after divorce. I do not, of course, suggest that children have been ignored throughout the twentieth century only to be 'discovered' in its final decade. This would give the wrong impression entirely because a commitment to the 'welfare of the child'² has been a major principle in family law since the end of the nineteenth century. But I do suggest that the 'place' that children occupy in the principles and practice of family law is beginning to change considerably as our ideas of childhood and about children change and as children themselves begin to become the speaking subjects of law, rather than the objects of law's benevolence.³ It is on this quiet, incomplete revolution that I shall concentrate. In the first section I shall take the *The Children Act 1989* in England and Wales as my starting point for a discussion of how post-divorce family life has been changing over the last decade. I shall, however, move quickly onto how children themselves see post-divorce family life. I shall then focus on how children and childhood are being re-defined and re-conceptualised in family policy terms, especially in relation to the *UN Convention on the Rights of the Child*.⁴ Finally I shall draw these issues together to give consideration to what these changes might mean for the practice of family law in the broadest sense.

CHANGING POST-DIVORCE FAMILY LIFE

*The Children Act 1989*⁵ occupies an important cultural place in the history of family life in England and Wales because it symbolises a shift in policy emphasis away from the centrality of marriage and spousal relationships toward the centrality of parenthood and parent/child relationships.⁶ Hale, the main author of the Act, has argued that there has been a clearly discernible trend in English family law away from a preoccupation with adjudicating on the conduct of adults towards one another

² Of course the extent to which this principle was put into practice varied considerably, and the meaning of welfare changed constantly throughout the twentieth century. C. Smart & S. Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (London: Routledge, 1989).

³ J. Roche, "Children: Rights, Participation and Citizenship" (1999) 6 *Childhood* 475.

⁴ *Convention on the Rights of the Child*, 20 November 1989, UNGA Res. 44/25, entry into force 2 September 1990 [hereinafter *UN Convention*].

⁵ I shall be referring only to the private law provisions of this Act.

⁶ B. Hale, "Private Lives and Public Duties: What is Family Law For?" The 8th ESRC Annual Lecture 1997, (1998) 20 *Journal of Social Welfare and Family Law* 125.

and away from prioritising marriage over other forms of family life.⁷ Family law has become more concerned with the extent to which arrangements between parents (married or not) meet the best interests of their children. *The Children Act* embraced this idea in particular through measures to abolish the legal concepts of 'custody' and 'access' to children on divorce. Basically the Act severed the traditional relationship between marriage and parenthood (in which marriage provided legal rights in relation to legitimate children) by decreeing that the termination of a marriage no longer affected parents' legal relationship with their children.⁸ This measure removed the need for courts to decide upon which parent should be granted custody and which should be given access because both parents retained the full set of 'rights and responsibilities' generated by legal marriage even after the termination of the marriage. Moreover, unmarried parents could be placed in exactly the same position as married parents by making, or by being awarded, a Parental Responsibility Agreement/Order. This measure, in effect, gave primacy to the biological status of parenthood over the legal institution of marriage. This was reinforced by the Act's presumption that there would be 'shared' parenting after divorce and that the first and paramount consideration of the courts should be the best interests of the child.

As I have argued, the Act did not start this trend towards the primacy of parenting; but was a powerful lever in the shifting cultural significance of marriage versus parenthood. Moreover, this shift coincided with other important developments. For example, the rise of the Fathers' Rights Movement⁹ was important to the extent that it identified men in family law as fathers/parents rather than solely as husbands or breadwinners. This gradual identification of (some) men with the 'new fatherhood'¹⁰ was part of a process of shifting the terms of the debate towards a focus on the parent/child relationship. The claims that men made were increasingly made by them as fathers rather than as husbands, and they were

⁷ This trend may be in the process of being reversed by the current Labour Government which has expressed a preference for marriage as a basis for family life over other forms of family formation. Home Office, *Supporting Families: A Consultation Document* (London: The Stationary Office, 1989)

⁸ J. Roche, "The Children Act: Once a Parent, Always a Parent?" (1991) 5 *Journal of Social Welfare Law* 345.

⁹ I am not concerned here with the 'rights' or 'wrongs' of this movement, nor with the extent to which it could be argued that Fathers' Rights were a foil for 'Men's Rights' and an attempt to reduce Women's rights.

¹⁰ By the 'new fatherhood' I mean fatherhood defined more in terms of shared (practical and emotional) caring rather than traditional fatherhood defined in terms of being the breadwinner and head of household.

increasingly made in terms of the welfare of children rather than in terms of the rights of adults. It has been argued that fatherhood has become more significant to men with the rise of divorce precisely because divorce has been associated in the recent past with a loss of both a partner and of children.¹¹ As one father we interviewed stated:

Leon: I hadn't really thought about it. We were still living in the house together for about a year when we were going through really difficult times, moved into separate rooms. It was a case of I'd always worked really hard, I'd come home, gone up to the study and the children were there. My role as a father was to go out to work, to bring the money in, to try and look careerwise and the children were young and it was a case of just saying "Hello, sit on my knee, then off to bed". And I was just there and I probably didn't pay them much attention at all. *It was only when I realised that they might not be part of my life that gave me a real shock and it made me more aware and during that year I made more effort to spend time with the children.*¹²

POST-DIVORCE FAMILY LIFE: THE PERSPECTIVE OF CHILDREN

In the UK there is a growing tendency to talk about 'parenting across households' rather than family breakdown.¹³ This shift in terminology represents two elements. The first is an ideological shift away from framing family transitions in perpetually negative terms. The term 'breakdown' inevitably implies that a disaster or set of harms has befallen the family or its members. It fixes in the imagination the idea that something has gone wrong which should not have gone wrong – and which could never occur in 'intact' families. The shift away from the term 'breakdown' is a sign of a shift away from an automatically value-laden frame of reference. The second element in this shift is in the positive, even optimistic, assumption that parenting can actually continue even if parents are not co-resident. This idea was virtually unthinkable prior to the *Children Act*. The family and parenthood were

¹¹ 'Becoming a father is not difficult, but being a divorced father certainly is. At the moment when it is too late, the family personified by the child becomes the centre of all hope and concrete effort; the child is offered time and attention in a manner which during the marriage was allegedly out of the question, 'although I really would like to spend more time with him/her'. Divorce confronts the man with his own feelings as a father; he is the one to mourn for, having realised too late what liberation means, just as its objective slips away': Beck and Beck-Gernsheim, *The Normal Chaos of Love* (Cambridge: Polity Press, 1995) at 154.

¹² C. Smart, "The 'New' Parenthood: Fathers and Mothers after Divorce," in E. Silva & C. Smart, eds., *The New Family?* (London: Sage, 1999) at 103.

¹³ M. Maclean & J. Eekelaar, *The Parental Obligation* (Oxford: Hart, 1997).

both usually imagined¹⁴ to be located within a single household with a clear physical boundary between one family and another. Family members outside the household were assumed to be 'extended' kin and therefore less important or significant; whilst grown up children living apart were described as having 'left' the family of origin. The recognition that important, emotional, caring relationships which are still called family can exist across households marks an important shift in policy thinking - and possibly in the national psyche.

Parenting across households is not only imaginable now, it is also the lived experience of a growing number of children who retain close bonds and/or contact with both parents after divorce or separation. *The Children Act* has meant that the old 'custodial' model of post-divorce parenting (in which one parent, usually the mother, has the children living with her exclusively, and where the other parent, usually the father, takes them out for trips and visits on alternate weekends) is no longer the only possibility. This kind of arrangement can be entirely satisfactory of course, but now there are alternatives, especially the co-parenting model where children spend half (or approximately half) their time with each parent in different households. This shift towards parenting across households, or co-parenting, has the potential to change the nature of childhood in late modernity, and the potential to change children's experiences of both childhood and parenthood.

Our research with children¹⁵ suggests that divorce can provide children with a new, reflexive position from which to understand and evaluate parenthood and post-divorce family life. The quotation from Leon above suggests that divorce can shake or even destroy the taken-for-grantedness of parent/child relationships (just as it

¹⁴ Of course not all families lived like this. Oral histories show that children often lived with relatives, especially in working class families and, of course, in upper class families children were often sent away to Boarding Schools. The growth of a multi-cultural society in Britain has also meant that norms about family life have changed. However, the populist image of the family used by Governments and the Media alike has been based on the limited nuclear family, single household, model.

¹⁵ We have recently completed two research projects on children's experience of post-divorce family life. The first was funded by the ESRC and concentrated on children who were being co-parented. That is to say they were spending more or less equal amounts of time with both parents in different households. We interviewed 65 children in depth in this study and they were all aged between 4 and 17 years. The second study was funded by The Nuffield Foundation and was a follow-up study of the children of the parents we had interviewed in *Family Fragments?* [C. Smart & B. Neale (Cambridge: Polity Press, 1999)]. Here we interviewed 52 children aged between 5 and 22 years, the majority of whom were between 7 and 15. The Research Officers on the projects were Dr Bren Neale and Dr Amanda Wade. The following quotations from children are derived from this research.

surely disrupts the taken-for-grantedness of spousal relationships). We found that this happened for children as well:

Q: Has your relationship with your dad changed at all?

James H (12): No, it's just the same. ... Sort of, like, appreciate him more. Sort of think about it more. Whereas before I just like took it for granted that he was there.

Selina (16): I think I've probably got closer to mum *and* dad just because of the situation. Like, my friends will take their parents for granted [and say things] like "Mum's always there when I get home" or "Oh God, mum was moaning last night", kind of thing. But I don't 'cos when they're there I know it's only for a short time and I like appreciate them a lot more, I think.

Children could begin to see their parents as 'people' with their own needs, interests, habits and even flaws. They were able to reflect upon how good they were as parents or whether different parents provided different kinds of care and support:

Nina (11): I don't think we'd like it living with dad... mum looks after us nearly all the time, she's better with us and she does things that I'm comfortable with and that are right for me and dad sometimes doesn't know what to do and gets panicked. I can't really talk to my dad about my feelings and stuff, sometimes there's like long silences ... I'd end up feeling bored and sick of it [with him].

It is not unusual for adults to revisit their childhood and re-evaluate their parents' parenting abilities, but it is possibly a recent development for children to do this during their childhoods, and it may be that being parented across households provides an emotional space for children to be more reflexive. It was the case that some children could compare¹⁶ how they were being parented by their different parents and could make choices about which they preferred:

Q: What's it like when you're going off to dad's?

Alistair (11): Well it depends whether he's been nice to me the week before. Sometimes I want to go but not usually. ... I like mum the most. ... I didn't like it when I was seeing dad more. I never saw my mum at weekends. So I asked for it to change. Now it's much better. Dad used to be much nastier than he is now,

¹⁶ I should make clear that we did not ask children to compare their parents, nor did we ask them questions about whether they preferred to be at one house rather than another. Where comments of this sort emerged it was as part of a conversation about their experiences in a broad sense and children could volunteer as much or as little as they wished.

especially to mum. He shouts at me, he used to give me smacks a lot, but he's better than he was.

It also gives children potentially a wider range of childhood experiences which can focus on 'small' things:

Q: Is it difficult to remember what to do at each house?

Lisa (8): No, not really, 'cos they're different places and they look very different. As soon as you walk in you think, "Ah, late night tonight, stories, cornetto", and at mum's house you think, "Ah, nice early night tonight, nice little bowl of cereal and some lovely hot chocolate".

Being parented in two households could increase children's range of experiences as well as the number of new challenges they might have to face, but it also provided the opportunity for them successfully to negotiate such challenges:

Karl (15): When I'm here, I don't sort of think, "Hang on, what am I doing? Why am I doing this, I don't normally do this". You know, I just sort of, wherever I am, I just sort of do whatever it is. I'd get really confused if my mum and dad swapped places, that would just totally confuse me. I'd be doing all the wrong things at the wrong house! But, you know, you just sort of got to get used to it, I do what I do here, I just do that automatically.

The fact that parents lived in two separate households did not - in itself - necessarily constitute a problem for the children we interviewed, at least it did not once they had got used to the changes that inevitably accompany having parents in two places. As long as parents were supportive of their children in this new lifestyle the children could thrive. However, if parents made the transitions difficult, if they restricted the toys or clothes that children could take with them, or if they required children to convey painful messages, then the situation could become extremely difficult for the children. We also found that certain practical things such as the physical distance between the households could be a problem and for younger children there was always the problem of losing toys. One 10 year old boy spoke of the Bermuda Triangle that existed between his mother's home, his school, and his father's home, in which huge numbers of toys and school items were forever lost. Having parents in two places obviously made life more complicated, but this alone was not enough to make most children feel it was not worth the extra effort involved. Where being parented across households worked well the children saw a continuity in their family life and they continued to feel cared for and part of their

whole family. However, this does not mean that they did not feel an element of resentment or that the arrangement was better for the parents than for the children:

Q: What do you think of your family living in two houses?

Ryan (7): I think it's crap. I wish my dad was next door so I could see him whenever I wanted .. or that he stayed here.

Q: Who do you think this arrangement works best for?

Lisa (8): Both of them [parents]. I don't like it. There are good advantages and bad advantages... but I don't like living away from the two of them.

Q: Who do you think this arrangement works best for?

Charmaine (11): Yes, I think it's probably a lot easier for my parents because they're not swapping around all the time. ... But it's fine now because it's been about four years so I've got used to it.

Q: Who do you think this arrangement works best for?

Selina (16): I mean, they've still got their house, haven't they? They're not moving. And I don't think they realise how hard it is. I don't think they understand how hard it is! But then no-one would until they actually did it themselves.

These quotations make it clear that even where the arrangement is working fairly well there was a price to pay, and the children could feel that they were the ones paying it. But, as I suggest above, children were much more likely to feel that the price was too high if there were additional burdens placed on them besides the need to be regularly moving. Some children, for example, felt that they could not suggest changes to their arrangements because it would only provoke long arguments between their parents, or because one parent would feel betrayed. The boy we quote below only managed to change his 50:50 split with his parents because his mother agreed to support him and because she took legal advice first on whether her former husband could prevent an adjustment to the arrangements. Because Tom was 12 years old the mother was advised that he was old enough to have his views taken into account.

Tom G (12): I used to split my time really sort of evenly [between my parents] but I find my dad quite a prat to put it bluntly, so I've sort of been taking away days from him and coming to mum's instead because I don't like being depressed. ... My dad always seemed to criticise me about my homework and boss me around and tell me to do things over and over again and not let me do anything in my own time or anything.

Being co-parented could therefore feel quite oppressive to some children. One girl of 13 was angry that whenever she tried to change the arrangements she would be reminded that the legal battle to achieve equality had cost thousands of pounds and so she felt completely stuck in the middle of her parents' battle. Other children felt it was not worth the effort of trying to change things.

One of the most poignant things that the children spoke of was the fact that even though they saw both of their parents an equal amount of time, it did not mean that they did not miss the parent they were not with. This sense of perpetual loss might be chronic rather than acute most of the time, but it could become acute at the point of transition from one household to another. While children who might only see a non-residential parent occasionally also suffer these same emotions, for co-parented children the loss was built into their lives in a totally regular way and was combined with leaving 'home' as well. Thus not only would they leave one parent, but they would be leaving their bedroom, their local friends, and possibly their pets, on a weekly or half weekly basis:

Selina (16): I find on Sunday evening I always *miss* where I've just come from. Either way. It's not like I miss mum more than dad or anything like that. When I get here and I've been at mum's all week I miss mum and I miss Paul [step dad] and I miss *that* - 'cos it's two different families and two different ways of doing things. You know, even things like clearing the table, whatever. ... I always come on Sunday night and I start unpacking all my stuff, whatever, if I've come from mum's, and I'll start just to miss mum a bit 'cos I've had her all week. And then by Monday I go to school and by Monday night it's just "I'm at dad's now" and I'm in that mood. ... It's just Sunday evenings really that make me [sad]. If I *get* upset about it, it's always on a Sunday night. Like, I have a cry or whatever. Or write it down. I always write stuff down. Just like, a thought book. I just write things in it when I need to. And then ... I'm all right again by Monday.

For very young children a whole week away from one parent could seem far too long but for older ones the responsibility of having to see both parents for the same amount of time each, meant that they felt they had far less freedom than their peers and that they had less time to spend with their friends. It could produce a situation

of ‘over-parenting’ in which all of a child’s spare time was accounted for and where some children gave up trying to sustain friendships because they were so busy being parented:

Harold (12): I like my family ... I think you should spend an equal amount of time at your mum and dad’s ... We sleep Mondays, Wednesdays, Fridays and Sundays at our mums and Tuesdays, Thursdays and Saturdays at our dad’s ... I see them both every day. I come back to mum’s after school and then round to my dad’s for an hour or so.

Q: *If a friend invited you out for the day and you had arranged to be with dad, what would you do?*

Harold: I haven’t got [many friends] ... I wouldn’t go on the trip really, I wouldn’t want to, I’d prefer to stay with mum or dad ... I wouldn’t like them to [have new partners] because I wouldn’t like to spend time with the other person.

This last quotation introduces one final area of potentially significant change to post-divorce family life. Prior to *The Children Act* there was a presumption – albeit one on the decline – that the best thing for children following divorce was for the parent with custody to re-marry and to create a reconstituted nuclear family so that the children would have a ‘proper’ family life. Research had shown that step families could face a number of problems, but it is clear that the ethos of the 1970s and 1980s was geared towards ‘starting again’ as a ‘proper’ family.¹⁷ New husbands were presumed to become the main father figure for the children and it was not uncommon for children to be adopted, or at least for them to take their step father’s name so that they would ‘look like’ a proper family to the outside world.

The Children Act undermined these presumptions by emphasising the ongoing relationship between non-residential parents (presumed to be fathers) and their children. By endorsing an omnipresent biological father, the Act left little room for the step father to replace him. In reality children would often not accept a step father or mother as a substitute parent, especially if they had a good and ongoing relationship with their biological parent. But *The Children Act* has formally endorsed this shift away from the idea that a mother’s (or father’s) new partner also becomes a new parent. We found that where children were being parented across households that they were not inclined to see a parent’s new partner as a substitute parent, or even a parent at all:

¹⁷ J. Burgoyne & D. Clark, *Making a Go of It* (London: Routledge, 1984).

Bob (13): Michael [mum's live-in partner] has always been there to help with things like my bike and stuff but he's never, ever, like if I was upset, come into my room to say 'Are you OK?' or 'What's happened?'. He's just like there to help you with easy things.

Q: He doesn't try to be a parent?

Bob: Well, if he did basically I'd tell mum that I wasn't happy living with him. 'Cos the way I see it you can only ever have one person that's not just your dad but like your dad, or your mum, doing dad or mum things.

David (16): I don't think of [dad's live-in partner] as a part of the family, I just think of her as dad's friend

Andrijka (10): [Mum and dad's new partners] are a big part of my life. But I don't really think of them as family and people who I love, I think of them as, I don't know, friends I suppose.

It is likely therefore that not only are 'biological' families changing, but also 'reconstituted' families are changing, and some children are increasingly able to define the nature of their relationships with adults who share their lives. Mothers can be seen as having boyfriends - even live-in boyfriends - but these men need not impact particularly on the children co-residing with them. In fact these new partners are seemingly forced into finding new ways of relating to these children because they cannot fall back into the old pattern of substitute parent with presumptions about authority and obedience.

If parenthood after divorce or separation is changing as a consequence of these developments, it follows that childhood too is likely to be changing. Of course, childhood is unlikely to change in only one direction or in only one dimension. Nor is it likely to change solely as a reaction to changes in parenting.¹⁸ However, it would be unrealistic to imagine that parenting across households puts childhood back together as it might have been had the divorce rate remained at pre-war levels. Divorce has changed modern childhood and the trend towards co-parenting (if it is actually realised) will change it again.

¹⁸ Influences from the media, the internet, the education system, high crime rates, high urban traffic density and so are going to be very influential as well.

REDEFINING CHILDHOOD

Alongside actual changes in how childhood is organised, experienced and lived in post-traditional societies, there are (inevitably) changes in perceptions of and definitions of childhood. These latter changes are evidenced in changes to social policy and law, in pressure groups and new social movements, in marketing and media, and in academic disciplines where children are the focus of study. In this section I shall, for reasons of space, confine myself to family law rather than trying to discuss the broader fields of social policy, health and education. However, I start by referring to some important conceptual shifts which are creating a new climate in which new policy demands may become more feasible.

In 1975, John Holt published one of the first academic texts in the UK on the 'liberation' of children. It was called *Escape from Childhood: The Needs and Rights of Children*.¹⁹ It was seen as a very polemical book in the same sort of tradition as early feminist work which was demanding women's liberation.²⁰ The sorts of ideas that Holt was working with, namely giving political rights to children and democratising the two most important sites of oppression for children which he saw as the family and the school, were controversial. Holt argued against the common sense idea that the acquisition of rights should be linked to age because he saw such distinctions as purely arbitrary and as no proof of competence. But he also argued against basing rights on a notion of competence because tests of competence were not applied to adults. He suggested that adults could also be incompetent and that it was discriminatory to use this measure as a method of disqualifying children when it was not used for adults.

His arguments were not successful in the sense of persuading parents and governments to change how they conceptualised and hence treated children, but he did rekindle a debate about childhood and created a space for more critical thinking. This challenged the naturalist assumption that children were inevitably incompetent and immature and that they should remain outside the modern concepts of citizenship and democracy. Holt's work was mirrored by the establishment of pressure groups such as The Children's Legal Centre in London, and radical lawyers and social workers began to operationalise some of these ideas, especially around the position of children in public care who had no voice at all in how they were treated and 'disposed' of. Some radical educationalists also sought to take forward

¹⁹ J. Holt, *Escape from Childhood: The Needs and Rights of Children* (Harmondsworth: Penguin, 1975).

²⁰ D. Archand, *Children: Rights and Childhood* (London: Routledge, 1993).

these ideas, setting up schools where the children participated in the running of the institution and where they could choose which classes to attend.

The ideas generated by Holt and others in the 1970s, and more recently in the 1990s by academic lawyers²¹ have gradually begun to create a climate in which the idea that children are citizens too has become 'thinkable'. These developments have been assisted by the establishment of the *UN Convention on the Rights of the Child* to which the UK became a signatory in 1991.²² What is particularly important about the *Convention* is its focus on family life and not just on the idea of citizenship in the public arena. It shifts the emphasis away from the idea that parents have rights over children to focus on the ways in which parents have responsibilities towards their children, including the responsibility to allow them to participate in family life.²³ Article 12 is of particular importance in this respect. It states:

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

2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.²⁴

The *Convention* bridges two dominant views on how children should be attended to in legislation. The first is the welfare principle, which is a major theme in the wording of the *Convention*. The second, which is more apparent in the sections quoted above, is the idea of the child as an actor who can intervene on his/her own behalf. The *Convention* does not, however, seek to resolve how to marry these two potential conflicting principles in practice.

In terms of family law in the UK it has been the welfare principle which has dominated, at least until recently. The idea that the courts should put the welfare of

²¹ J. Eekelaar, "The Emergence of Children's Rights" 1986 6 *Oxford Journal of Legal Studies* 16; J. Fortin, *Children's Rights and the Developing Law* (London: Butterworths, 1998); M. Freeman, *The Moral Status of Children* (The Hague: Martinus Nijhoff Publishers, 1997); Roche, *supra* note 8.

²² *UN Convention*, *supra* note 4.

²³ Children's Rights Office, *Building Small Democracies* (London: CRO, 1995).

²⁴ *UN Convention*, *supra* note 4.

children first in cases of divorce or disputes between parents, or between parents and the state, was a powerful counter balance to the idea that children were 'owned' by their parents. It also allowed courts to settle disputes between adults in ways which did not ignore the needs of children who were not represented in these legal conflicts. However, the idea of the welfare of the child did not envisage a *participating child* who could speak for him or herself. The welfare principle was based on a presumption that professionals knew what was best for the generic child, and even for the specific child, and that their evidence should be sufficient to allow for children's interests to be represented. In turn, the professionals' understanding of the needs of the child was based on research which cast the child as the dependent within the family and with levels of competency which were likely to be related to age.

The way in which children became visible in family law, particularly in issues of divorce, was therefore a long way away from Holt's earlier vision of the child as a speaking citizen with rights comparable to an adult. The British philanthropic, paternalist tradition evinced concern for the child, but still preferred her to be seen and not heard. The welfare principle did not make the child into a legal subject.²⁵

Inroads were made into the dominance of this principle by three major developments. The first was the *Gillick* decision.²⁶ This case concerned whether doctors could prescribe contraceptive pills to a girl under 16 without informing her parents or gaining their consent. It ruled that children under the legal age of consent could consent to medical treatment if they had 'sufficient understanding and intelligence' to comprehend what was proposed as well as the emotional capacity to make a mature decision. This decision allowed a child under 16 to become a speaking subject as long as she was deemed to be sufficiently mature. It therefore freed children from an arbitrary and automatic assumption that before they reached 16 they were incapable of making decisions and forming judgements. The second development was the *Report of the Inquiry into the Cleveland Affair*.²⁷ This had focussed on the question of whether doctors and social workers in Cleveland in Northern England, had been too zealous in the diagnosis of child sexual abuse to the extent that their interventions which were designed to 'save' children actually harmed them. The Chair of the Inquiry was Mrs Justice Butler Sloss who stated:

²⁵ Freeman, *supra* note 21.

²⁶ *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1986] AC 112.

²⁷ *Report of the Inquiry into Child Abuse in Cleveland 1987* (London: HMSO, 1988) at 245.

'The child is a person and not an object of concern'.²⁸

In this parsimonious sentence, she conveyed the idea that children should be allowed their personhood – a concept which arguably embraces dignity, respect and a voice – and that they should not be reduced to mere objects no matter how worthy the concern for their well being. In this utterance she sought to shift the balance between citizenship and welfare towards the former.

Finally, the third development was *The Children Act* 1989 itself. This Act place the welfare of the child at its core, but also insisted that 'the wishes and feelings of the child should be ascertained'. It therefore pre-empted the *UN Convention's* Article 12, but like the *Convention*, it did not address the competing tensions which arise in practice from marrying together the idea of welfare, which is defined by a professional corpus of knowledge and expertise, and the wishes and feelings of children which are unlikely to be framed in the same way. The tension between these two ways of attempting to represent children arises from the fact that they symbolise two very different theories of childhood. The welfare paradigm is based on the notion that the child is an adult in the making and that the concern of policy is to protect childhood so that a responsible, functioning adult can emerge. It is a future-oriented philosophy which is given scientific support by the dominance of medical and psychological research on outcome measurements.²⁹ The concern of the policy makers, judges, welfare officers and others in the family law system is therefore not with the child's current views or experiences, but with what effect the present will have on her future. The opposing perspective is one which argues that if we only see children as adults in the making, we ignore the extent to which children are able to be actors (persons) and to participate in decisions about their own lives in the present.³⁰ This approach also argues that children become competent actors if they are allowed to participate more fully and to have a wide range of experiences. It suggests that, rather than waiting for children to mature in accordance with a biological clock before giving them rights to participate, giving them rights to participate will allow them to mature as part of a cultural process.³¹ The former perspective concentrates on children's biologically induced dependency, the latter on their socio-cultural agency.

²⁸ *Ibid.*

²⁹ S. Rose, *Governing the Soul* (London: Routledge, 1989).

³⁰ A. James & A. Prout, eds., *Constructing and Reconstructing Childhood* (Brighton: Falmer Press, 1990).

³¹ T. Cockburn, "Children and Citizenship in Britain" (1998) 5 *Childhood* 99 [hereinafter Cockburn].

This latter perspective has given rise to research³² which is gradually making visible the extent of children's competence, rather than working from a presumption of childhood incompetence or a position of indifference to lived childhood based on a future-oriented focus on children's adulthood. As a consequence of being prepared to listen, it has been discovered that children have much to say. This in turn is generating much discussion about how children can participate, not simply in the legal process or in the divorce process, but in all aspects of family life.

THE IMPLICATIONS FOR FAMILY LAW/ FAMILY POLICY

Nina (11): Well *she should be involved in sorting it out* but I don't think her parents should actually make her choose, or anything [Why?] Because she is going to feel awful if she says one parent and lets the other down, and they shouldn't make her do that.

Quentin (13): *I think you should like have a debate* so you can say, like, why you'd choose your mum 'cos she's got more time for them and she can cook for them, and your dad could say "Well, I've got a step mum", but then the mum could say, "Well, they really don't like it and they wouldn't be happy with her", say to the judge or someone ...

Mark (15): I think he should have an opinion, I don't think he should necessarily decide, *he should get a say in it, he shouldn't just be left out*, I mean it's his life as well, he shouldn't be stuck with someone he didn't want to be with.

When we put to the children in our study a vignette which depicted parents requiring a child to decide who s/he wanted to live with after their divorce, we found that the majority felt that children should be able to participate in reaching such a decision, but that they should not have to be responsible for making the decision unless there were grounds for a serious dislike of one of the parents. Only the youngest children felt that they should not be involved at all and wanted to leave things to their parents.

The idea that children should be able to participate is gaining ground in family law in the UK and there is a growing sense of enthusiasm to hear 'the voice of the child' at some stage in the divorce process. However, a number of authors have also

³² An example of this is the body of empirical work funded by the Economic and Social Research Council in the UK on Childhood.

pointed to the ease with which this demand can be made, compared with the difficulty there exists in operationalising it.³³ Parents may not allow their children to participate in even the most routine decisions in their families and so, when it comes to divorce, children may not have the skills or experience to play a part. The legal process may be reluctant to involve children because its procedures are not child-friendly or because they may worry that the child will become a pawn in the battle between parents. Children themselves may not want to participate, or one sibling might wish to while another does not. There is also the problem of balancing welfare with participation. By being invited to participate a child might show a preference for an option that the court feels goes against his/her best interests.

There is also an equally important subset of issues which affect participation. For example, at what stage should a child be able to participate – at the point when parents first think about divorce or only after they have made the decision? Should children be invited to participate in decisions about how often they see each parent, or only on tactical issues such as where the transition should be? Should solicitors speak to the children and, if so, should the solicitors from both sides do so? Or, should children only be invited to participate by Court Welfare Officers or Mediators? To what extent does participation in any of these forums amount simply to tokenism, with professionals informing children of what will happen and striving to achieve their consent rather than their participation in arriving at decisions?

Once we start to list these questions it quickly becomes apparent that participation by children cannot simply be put forward as a solution to the discomfort we might feel about their exclusion. Moreover, inclusion in the legal process may be the last place to seek participation, not the first. As James and James argue,

Many parents believe, rightly or wrongly, that they *do* have rights over their children and that it *is* their right to make decisions about their children's future when

³³ Roche, *supra* note 8; Cockburn, *supra* note 31; C. Piper, "Ascertaining the Wishes and Feelings of the Child" (1997) 27 *Family Law* 796; ; Adrian James and Allison James, "Pump up the Volume: Listening to Children in Separation and Divorce" (1999) 6 *Childhood* 189; L. Ackers, "From 'Best Interests' to Participatory Rights: children's involvement in family migration decisions" (2000) University of Leeds: Centre for Research on Family, Kinship & Childhood Working Paper 20 [hereinafter Ackers]; R.A. Hart, "Children's Participation: From Tokenism to Citizenship" (Florence: UNICEF Innocenti Essays No 4, 1992).

they divorce. Such a view makes the assertion of children's agency and *their right* to be heard much more difficult to accommodate.³⁴

This suggests that a lot of work has to be carried out at the level of parent/child relationships before any headway can be made at the level of legal proceedings. The children we interviewed were not particularly interested in having a voice in legal proceedings, they wanted a voice in their family. But what is also interesting is that, in having a voice, they did not necessarily assume that this should mean that they determined the outcome of discussions. It seems that they wanted 'recognition', not control or rights. This brings us back to the concept of personhood which is hailed in Butler-Sloss' remark that 'children are persons and not objects of concern'. Of course, whilst we might accept that one route to personhood for children is to give them rights which are legally enforceable, the children we interviewed did not construct family relationships through this legal prism. We need, therefore, to consider whether solutions do lie in legal forums or whether we should start somewhere else when we try to attend to the specific situation of children.

In the field of law it is always tempting to see legal rights as the solution to newly recognised problems, especially ones which can be construed as a form of discrimination. The limits of rights have been much discussed³⁵ and I will not rehearse all of these issues again here. But the *UN Convention* necessarily takes us into a rights-framework and some researchers have argued strongly that children must have clearer rights as well as the right to separate representation in family matters.³⁶ It is therefore necessary to point to some problems with this approach. The first is that the rights approach takes and translates personal and private matters into legal language. In so doing it reformulates them into issues relevant to law rather than to the lives of ordinary people. It also positions people in opposition to one another and this can be particularly problematic for children. But the rights based approach also individualises issues in that it removes and isolates the individual who is claiming rights from their family or social context. This means that for the duration of the conflict of rights that the individual cannot be part of their family or context and, after the conflict is over, has to find ways of re-entering into those relationships, assuming that they are not removed entirely. In some cases this

³⁴ *Supra* note 33 at 204.

³⁵ C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

³⁶ C. Lyon, E. Surry, & J. Timms, *Effective Support Services for Children and Young People when Parental Relations Breakdown: A child centered approach*, (Liverpool: Centre for the Study of the Child, the Family and the Law, University of Liverpool, UK, 1998).

might be appropriate, but in cases where there are problems over the amount of contact between parents and children, whether contact can be suspended for a period of time, whether one sibling can end contact while another continues and so on, the process of turning such claims into legally recognised rights could be extremely damaging for individual children.

The children in our studies seemed to be more interested in having a 'voice' and having their situation 'recognised', than in having enforceable rights. Williams³⁷ has argued in relation to welfare principles that what is more important than rights (for example as consumers) is the ability for people to be able to voice their diverse needs and for those needs to become formulated into collective claims rather than individual demands.³⁸ These ideas are particularly important where children are concerned. Thus, what needs to be heard is not so much the expression of the rights of individual children so much as the kinds of things that children-in-general have to say about post-divorce family life. Once such voices can be heard then the terms of the policy debate can begin to change. No longer would it be experts and judges who frame the policies or guidelines alone, and parents could finally hear what children-in-general think without it having to be distilled into a conflict with their own child. This is a slow process of cultural change in which legal rights play an important part in redefining the status of subjugated groups, but where the actual implementation of rights in individual cases may be counter-productive.

In family law there are procedures which fall short of adversarial battles over rights, or even fall short of the idea that each child in a divorce case should have his/her own lawyer to pursue his/her own separate interests. These procedures could entail involving children in some way in mediation sessions, or it might mean that solicitors and court welfare officers take further their duty to 'ascertain the wishes and feelings of the child' by interviewing each and every child, whether there is a conflict between parents or not. These suggestions seem less than ideal also. It is not that solicitors and CWOs should never speak to children, but such interviews do not overcome the problem of the child's loyalty to both parents, nor the fact that the child is asked to reveal private matters which will then be 'used' in a legal forum. Being interviewed is not, in any case, equivalent to participation in family decisions which are ongoing processes that change with time. Involving children in mediation is also problematic. Should children be present while parents discuss them,

³⁷ F. Williams, "Good-enough Principles for Welfare" 1999 28 *Journal of Social Policy* 667.

³⁸ N. Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (1995) 212 *New Left Review* 68.

especially if there is a great deal of hostility and even a history of violence? Or should children only be brought in when a compromise has been reached so that they can 'hear' what the arrangements will be? Ackers would argue that it depends on which level of participation you wish to achieve, and that the level may not be one that is determined by the 'facts' of the case but by the quality of the relationships in the family, and by a recognition of existing power relationships in the family.³⁹ It might therefore be entirely appropriate to involve a child in a mediation session where the father or mother is violent and where there is hostility if the child has witnessed this on many occasions already and has a stake in coming to an arrangement where s/he will feel safe.

The practicalities of the situation and the cost to the legal aid budget are such, however, that it is most unlikely that children will become more involved in the legal process except in cases where there is conflict. This brings us back to how children can be allowed to participate (should they wish to) where there is - in legal terms - no dispute. It is here that the idea of the voice of children-in-general becomes significant again. Through the mechanism of hearing what children have to say (even though they do not speak with a unitary voice), children can begin to assume the role of citizens of the family. We all know the extent to which children have been turned into vociferous consumers by being addressed as such by advertising campaigns. Such campaigns may be entirely problematic, but it is clear that children born in 2000 are quite different than children born in 1950 when it comes to their knowledge and desire for consumer goods. An equivalent change may be possible in relation to building families into small democracies. This need not be carried forward on the basis of individual rights in which the child is construed as an autonomous individual consumer of oppositional rule-based entitlements, but more where the child is construed as part of a web of relationships in which outcomes need to be negotiated (not demanded) and where responsibilities are seen to be reciprocal. As eleven year old Jake said when we asked him what a boy should do when his parents asked him to decide who to live with after their divorce:

I think there should be some kind of agreement between him and his parents as to what should happen, rather than him just deciding who he wants to live with. I think the people who are involved should get to decide, not by themselves, but by helping each other to reach some kind of agreement as to what would be best.

It would be hard to improve upon this recommendation.

³⁹ Ackers, *supra* note 33.