

Children's voices: Centre-stage or side-lined in out-of-court dispute resolution in England and Wales?

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Abstract

The UK Government recently announced that children aged 10 and over should have the opportunity to be consulted on their views in both family court proceedings and family mediation. Drawing on data from the ESRC-funded 'Mapping Paths to Family Justice' project, this article examines the extent to which children's voices are currently heard within out-of-court family dispute resolution (FDR) processes in England and Wales. The paper documents practitioners' and parties' views and experiences of child consultation, as well as evidence of the ways in which adult disputes may become the dominant concern and children's welfare marginalised in FDR processes. It argues that the government's proposals would represent a significant change in current practices. To achieve such a cultural shift would require better training and accreditation for FDR professionals, adequate funding of child-inclusive mediation, reframing of children's participation in terms of rights to have their views heard and correspondingly, modification of the central principle of party autonomy in FDR processes.

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Introduction

In a speech at the Family Justice Young People’s Board’s ‘Voice of the Child’ Conference on 24 July 2014, The Rt Hon Simon Hughes MP, Minister of State for Justice and Civil Liberties (‘The Minister’), acknowledged that, in decision-making for arrangements for children following the breakdown of the parental relationship,

[I]t is still too often that [children’s] views are not heard. Or that the law is interpreted to mean that others can make an assumption about the view of the child or young person – often for the best of intentions and acting in their interest, but nevertheless with the outcome that the child or young person does not feel that their own distinct voice was heard.¹

The Minister therefore announced that the government intended to move to a policy whereby all children aged 10 and over² in public or private family law proceedings in England and Wales have the opportunity to make clear their views to the judge in person, or, if preferred, in another way. Children and young people will have the opportunity to

¹ The Rt Hon Simon Hughes, MP, Minister of State for Justice and Civil Liberties, Speech at the Family Justice Young People’s Board’s ‘Voice of the Child’ Conference, London, 24 July 2014, available at <https://www.gov.uk/government/speeches/simon-hughes-speech-at-the-voice-of-the-child-conference>.

² The age of 10 was chosen since this is the age that children in England and Wales are deemed old enough to be criminally responsible.

meet and communicate with the professionals involved with their case including Cafcass officers,³ social workers, judges and legal representatives. Children and young people will be kept informed about the court proceedings in an age appropriate manner.⁴

The government's newfound interest in the voice of the child in family court proceedings may be considered somewhat ironic in the private law context, given that its policies have otherwise strongly discouraged court proceedings in private Children Act cases, and thus arguably diminished the voice of the child. The encouragement for parties to mediate rather than take their cases to court represents a shift from a procedure in which children's wishes and feelings are required to be taken into account to one in which there is no obligation and little support for hearing children's views. A potential consequence of the emphasis on out-of-court family dispute resolution is the silencing of children, since the focus is on the adult parties reaching an agreement between themselves. It is thus somewhat hollow to promise children a voice in court when every effort is being made to keep their parents out of court.

This point was, indeed, recognised by the Family Mediation Task Force, which recommended in its June 2014 report that 'options to include children' in out-of-court family dispute resolution processes 'should be urgently reviewed'.⁵ This recommendation appears to have prompted the Minister's further announcement, in the same speech, that he would be starting 'a dialogue' with the mediation profession to ensure that the voice of

³ Cafcass – the Children and Family Court Advisory and Support Service – is the organisation responsible for the provision of family court welfare services, including Family Court Advisers and Children's Guardians.

⁴ See also the Family Justice Young People's Board's 'National Charter for Child Inclusive Family Justice', available at <http://www.cafcass.gov.uk/about-cafcass/how-we-are-organised/family-justice-young-peoples-board.aspx>.

⁵ Family Mediation Task Force, *Report of the Family Mediation Task Force* (June 2014), at para 85.

the child becomes a central part of the process of family mediation.⁶ Children aged 10 and over will have ‘appropriate access’ to mediators. The Minister indicated:

It cannot be right that parents can mediate an agreement affecting their child or children and then ask the court to consider making this into a binding order in the absence of the children’s voice being heard.

While Anthony Douglas, the Chief Executive of Cafcass, announced at the same conference that Cafcass would provide an advisory service to mediators to support them to be more child inclusive, the Minister gave no indication of whether or to what extent additional resources would be made available to train mediators in hearing from children⁷ or to cover the additional cost of child-inclusive mediation. Rather, he simply acknowledged that there was ‘more careful and detailed work to do’ with regard to hearing children’s voices in mediation and other out-of-court dispute resolution processes. Subsequently, a Voice of the Child Dispute Resolution Advisory Group has been convened to ‘fully scope child inclusive practice, update relevant guidelines, make sure information is available for children and

⁶ The Minister subsequently announced at the Family Mediation Association Annual Conference (London, 26 September 2014) that he will be setting up an Advisory Group to provide the basis of this intended ‘dialogue’ with the mediation profession. It is notable, however, that while the Family Mediation Task Force recommendation applied to family dispute resolution processes generally, the government has responded only in relation to mediation.

⁷ The Family Mediation Task Force also recommended that ‘steps should be taken to: improve training and supervision for DR practitioners’ in child-inclusive practices: *Report of the Family Mediation Task Force* (June 2014), at para 85.

young people, and improve management information in the area'.⁸ Interim recommendations are due to be submitted to the Ministry of Justice in early 2015.

This article considers both the practical and philosophical changes which might be needed in order to make the routine inclusion of children's voices in mediation a reality. In doing so, it draws in particular upon the findings of our research in the ESRC-funded 'Mapping Paths to Family Justice Project' concerning the current incidence of and attitudes towards child-inclusive mediation.

The research study

Background and aims

There are three main types of family dispute resolution (FDR) practised in post-separation parenting disputes in the UK. These are: solicitor negotiation (in which solicitors engage in a process of correspondence and discussion to broker a solution on behalf of their clients without going to court); mediation (in which both parties attempt to resolve issues relating to their separation with the assistance of a professional family mediator); and collaborative law (in which each party is represented by their own lawyer and negotiations are conducted face to face in four-way meetings between the parties and their lawyers, with all parties agreeing not to go to court).⁹ Against the backdrop of changes in the landscape of family law in England and Wales, the project's central aim was to provide evidence about the

⁸ The Rt Hon Simon Hughes MP, letter to Family Mediation Partners, 'Family Mediation Update and Communication Strategy for 2015', 18 December 2014.

⁹ A fourth option, arbitration, became available after the study commenced and hence was not included, but in any event is not widely used and focuses on financial rather than children's issues.

awareness, usage, experience and outcomes of these three FDR processes. The project also sought to:

- produce a 'map' of family dispute resolution pathways and consider which pathways are most appropriate for which cases and parties;
- consider which (if any) norms are embedded in the different FDR processes and
- provide research evidence to inform policy and consider best practice.

Traditionally, people's first port of call when faced with problems concerning family breakdown was to see a solicitor.¹⁰ However, since the 1990s, successive governments have promoted mediation as the preferred means of resolving family disputes. People applying for legal aid for family disputes were first required to receive information and be assessed for suitability for mediation. Subsequently, unless falling within a narrow band of exemptions (chiefly relating to recent incidents of domestic violence), any party wishing to make a court application following family breakdown is required first to attend a Mediation Information and Assessment Meeting (MIAM).¹¹ A MIAM is a short meeting that provides information about mediation as a way of resolving disputes.¹² Legal aid is now effectively available only for mediation, not for court proceedings.¹³ Collaborative law was introduced in England and Wales in 2003, in response to the dissatisfaction of a number of family

¹⁰ H Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, 1999).

¹¹ Children and Families Act 2014, s 10 (1).

¹² Practice Direction 3A – Family Mediation Information and Assessment Meetings (MIAMs); and now Children and Families Act 2014, s 10.

¹³ Legal Aid, Sentencing and Punishment of Offenders Act 2012.

lawyers with traditional adversarial processes. Since it has never been supported by public funding,¹⁴ however, it tends to be used mainly by relatively well-off parties, primarily to resolve financial arrangements, although the interests of children are an essential consideration in that process.

In 2013 the Family Justice Review, led by Sir David Norgrove, made a raft of recommendations to overhaul the family justice system in England and Wales, indicating that, ‘these recommendations aim to ensure that children’s interests are truly central to the operation of the family justice system.’¹⁵ The government accepted the review’s recommendations, stating that one of the ‘key principles’ guiding reform of the family justice system should be that ‘children must be given an opportunity to have their voices heard in the decisions that affect them.’¹⁶

Methods

The study had three phases. First, we undertook a national survey of awareness and experiences of the three FDR processes using a structured questionnaire administered as part of two larger surveys: the TNS-BMRB nationally representative Omnibus survey, and

¹⁴ Collaborative law was due to become eligible for public funding from November 2011, but this was withdrawn prior to implementation.

¹⁵ Family Justice Review Panel, *Family Justice Review: Final Report* (Ministry of Justice, Department for Education and the Welsh Government, November 2011), at p 26.

¹⁶ *The Government Response to the Family Justice Review: A system with children and families at its heart*, Cm 8273 (2012), at p 8.

the Civil and Social Justice Panel Survey. Results of the survey phase are reported elsewhere.¹⁷

In phase two we undertook in-depth qualitative interviews with 95 parties (44 men and 51 women) who had undergone one or more of the dispute resolution processes in the past 15 years. Several parties had experienced more than one process; 56 had experienced mediation, 44 solicitor negotiation and 8 collaborative law. There was a mixture of legally aided and non-legally aided parties. Some parties were recruited via follow-up contacts from the surveys, but most were recruited via law firms and mediation services. Consequently, the majority of parties interviewed had experienced family dispute resolution relatively recently (with the earliest mediation experiences dating from 2002). There was also a range of successful and unsuccessful attempts at FDR. Phase two further included in-depth qualitative interviews with 40 solicitors and mediators. The majority of the solicitors interviewed were trained and practised in all three FDR processes. Just over half of those practising solely as mediators had come from a legal background with just under half from a non-legal (therapeutic/social work) background. In order to protect interviewees' anonymity, all names of parties and practitioners in the following discussion are pseudonyms.

Phase three entailed recording sessions from each FDR process and analysing the transcripts to understand the dynamics of the process and the interactions between the parties and practitioners, and to triangulate the interview data. We recorded five mediation

¹⁷ For a summary of the Phase 1 findings see A Barlow, R Hunter, J Smithson, J Ewing, K Getliffe and P Morris, 'Mapping paths to family justice: A national picture of findings on out of court family dispute resolution' [2013] Fam Law 306-310.

processes (four children's matters and one financial; four privately funded and one in which the mother was publically funded; four sole and one co-mediation; involving a total of nine separate sessions) and three collaborative law processes (all concerning divorce and financial matters; involving a total of 11 separate sessions – with one case running to seven sessions). In the two collaborative cases where the parties had minor children, the parties had agreed post-separation arrangements for the children prior to commencing the collaborative process. In relation to solicitor negotiations, we took the pragmatic decision to record the first solicitor-client interview since this is when the client would be explaining the disputed issues, the solicitor would be giving advice and explaining FDR options, and (ideally) together they would be agreeing a course of action. Additionally, most of the subsequent progress of a negotiated case is conducted by telephone or written correspondence rather than face-to-face meetings. We recorded five lawyer-client first interviews: two concerning children's matters, two divorce and finances and one focused primarily on divorce; four privately funded and one legally aided.

Although we made efforts to do so, we were unable to record any mediation processes which included consultation with children.¹⁸ Neither was it part of our research design to interview children whose parents had attempted one or more FDR processes. However information on child-inclusive mediation was gathered from both mediators and parties with experience of and/or views on this process.

¹⁸ This was due to a combination of circumstances, including mediator unavailability; the very young age of the children in some of the cases where parties consented to recording, making their inclusion not a realistic option; and the fact that phase three of the research coincided with the drop in mediation following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Children's rights versus party autonomy

When parents separate, children overwhelmingly report that they want information, both general and specific, and that they wish to be consulted on arrangements made for them.¹⁹ They wish to have a 'voice', not necessarily a 'choice' (save for children in abusive or violent families who want both a voice and a choice).²⁰ Uncertainty coupled with fear of decisions being made without their involvement causes distress for children.²¹ Conversely, children who report that they were consulted over or influenced the making of contact and

¹⁹ J Fortin, J Hunt and L Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults who Experienced Parental Separation in their Youth* (Sussex Law School, 2012); Smart and Neale, *ibid*; J Walker and A Lake-Carroll, 'Hearing the Voices of Children and Young People in Dispute Resolution Processes' in *Report of the Family Mediation Task Force, Appendix D* (June 2014); J Walker and A Lake-Carroll, 'Hearing the voices of children and young people in dispute resolution processes: Promoting a child-centred approach' [2014] *Fam Law* (forthcoming); J Walker, P McCarthy, M Coombes, M Richards and C Bridge, *The Family Advice and Information Service: A changing role for family lawyers in England and Wales* (Legal Services Commission, 2007); J Walker, P McCarthy, C Stark and K Laing, *Picking up the Pieces: Marriage and divorce two years after information provision* (Lord Chancellor's Department, 2004)

²⁰ P Parkinson and J Cashmore, 'Children's and parents' perceptions on children's participation in decision making after parental separation and divorce' (2007) 46 *Family Court Review* 91-104; P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford Scholarship online, 2009); C Smart and B Neale, "'It's my life too": Children's perspectives on post-divorce parenting' [2000] *Fam Law* 163-169.

²¹ G Douglas, M Murch, L Scanlan and A Perry, 'Safeguarding children's welfare in non-contentious divorce: Towards a new conception of the legal process' (2000) 63 *Modern Law Review* 177-196; G Lansdown, *Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No.12* (Save the Children UK on behalf of Save the Children and UNICEF, 2011).

residence arrangements express higher degrees of satisfaction with the arrangements.²²

Some studies have found that giving children a voice can lead to more durable agreements, improved parental alliances, better father–child relationships and more cooperative co-parenting.²³

There has been something of a 'clarion call' in recent decades to consider children's perspectives in family dispute resolution processes.²⁴ Although consulting with children might be seen as an element of promoting children's welfare – and indeed this is how it is characterised in s 1 of the Children Act 1989 – the call for children's participation has generally been framed in terms of children's rights. Children's rights discourse views children as competent social actors, by contrast with the welfare paradigm in family law, which is said to view children as vulnerable dependants in need of protection rather than empowerment.²⁵ The right of the child capable of forming his or her own views to express those views freely in all matters affecting them, and for the views of the child to be given

²² I Butler, L Scanlon, M Robinson, G Douglas and M Murch, 'Children's involvement in their parents' divorce: Implications for practice' (2002) 16(2) *Children and Society* 89-102; J Fortin, J Hunt and L Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults who Experienced Parental Separation in their Youth* (Sussex Law School, 2012).

²³ J Walker and A Lake-Carroll, 'Hearing the Voices of Children and Young People in Dispute Resolution Processes' in *Report of the Family Mediation Task Force, Appendix D* (June 2014).

²⁴ AL James and A James, 'Pump up the volume: Listening to children in separation and divorce' (1999) 6 *Childhood* 189-206, at p 189; E Bennett, V Miller and C Perry, 'Conclusions: Family Justice Council's inter-disciplinary conference: Family Justice Redefined' [2014] 44 *Fam Law* 684.

²⁵ R Hunter, 'Close encounters of a judicial kind: "Hearing" children's "voices" in family law proceedings' (2007) 19 *CFLQ* 283–303; James and James, *ibid*; P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford Scholarship Online, 2009); C Smart and B Neale, "'It's my life too": Children's perspectives on post-divorce parenting' [2000] 30 *Fam Law* 163–169.

due weight in accordance with the child's age and maturity, is enshrined in the United Nations Convention on the Rights of the Child 1989, Article 12 (Article 12). Article 12.2 provides that the right of the child capable of expressing his or her view to do so extends to both 'judicial and administrative proceedings affecting the child'. According to the Committee on the Rights of the Child, this encompasses alternative dispute resolution mechanisms such as mediation.²⁶

Yet at the same time, as Alison Diduck has noted, party autonomy has become the major focus of family law policy and decision-making.²⁷ The notion that decisions about post-separation arrangements for children and finances should be made by the separating couple themselves rather than by a court is a key underpinning of the recent reforms outlined above. In particular, in the consultation preceding the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the withdrawal of legal aid from almost all private law cases was rationalised on the basis that public funds should not be spent on sorting out private disputes.²⁸

Party autonomy is a central tenet of both mediation and collaborative law. For example, the Family Mediation Council Code of Practice defines mediation as:

²⁶ Committee on the Rights of the Child, *The Right of the Child to be Heard* (General Comment No. 12 CRC/C/GC/12, United Nations Convention on the Rights of the Child, 2009), at para 32; G Lansdown, *Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No.12* (Save the Children UK on behalf of Save the Children and UNICEF, 2011).

²⁷ A Diduck, 'Autonomy and Vulnerability in Family Law: The Missing Link', in J Herring and J Wallbank (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2013).

²⁸ *Proposals for the Reform of Legal Aid in England and Wales*, Cm 7976 (Consultation Paper CP12/10, November 2010), at para 4.69.

a process in which those involved in family breakdown...appoint an impartial third person to assist them to communicate better with one another and *reach their own agreed and informed decisions* concerning some, or all, of the issues relating to separation, divorce, children, finance or property by negotiation.²⁹

It further specifies that 'Mediation aims to assist participants to *reach the decisions they consider appropriate to their own particular circumstances*'.³⁰ The Resolution Guide to Good Practice in Mediation sets out the four basic principles of mediation as being: voluntary participation by all those involved, confidentiality, mediator impartiality, and '*the decision-making authority rests with the clients*'.³¹ And the Family Law Protocol instructs solicitors that they must explain to their clients the potential benefits of mediation including 'The aim of mediation is to help parties find a solution that meets the needs of all involved, especially any children, *and that both parties feel is fair*'.³² Likewise, self-determination is, in Denny's view, the hallmark of the collaborative process. Rather than the passive role that clients so often adopt in contested proceedings, the collaborative process hands decision-making control back to the parties.³³

Autonomy for parties on family breakdown is championed as leading to more enduring agreements since the parties avoid having a solution forced upon them by a

²⁹ Family Mediation Council Code of Practice, para 1.2, emphasis added.

³⁰ Ibid para 2.1, emphasis added.

³¹ Resolution Guide to Good Practice in Mediation, s 3.1, emphasis added. The same four principles are set out in the Family Justice Council and Family Mediation Council's 'Independent Mediation: Information for Judges, Magistrates and Legal Advisers' (2011).

³² Family Law Protocol (3rd edn, 2010), at para 2.2.29.

³³ N Denny, *The Collaborative Law Companion* (Jordans, 2011).

court.³⁴ The Family Justice Review endorsed the view that it is better for children if parents are able to resolve post-separation arrangements for themselves.³⁵ Diduck suggests that the recent policy preoccupation with party autonomy has led to the belief that the parties' right of self-determination is now normative or at least of 'magnetic importance'. She suggests that the A in ADR has come to mean 'autonomous', albeit a limited understanding of autonomy which risks uncritically accepting the presumption that it is possible to isolate individual interests in family matters and that personal relations can be neatly separated from public ones.³⁶

The discourse of party autonomy in out-of-court dispute resolution focuses exclusively on empowering adult parties and appears to leave no scope for the incorporation of children's rights to be heard. Although, as discussed below, there is a strong emphasis on children's welfare, it is a version of welfare in which children are constructed as the objects of parental decision-making rather than as subjects with their own entitlement to participate in the dispute resolution process. The evidence from our own and other studies is that the notion of children's rights to be consulted in dispute resolution is currently subordinated to the notion of (adult) party autonomy. We suggest that in order to effect a shift of the kind envisaged by the Minister, in which children's voices become a central part of the family mediation process, the principle of party

³⁴ M Roberts, 'New Zealand's family court-Reflections for the Family Law Act of England and Wales' (1997) 11 *IJLPF* 246-269.

³⁵ Family Justice Review Panel, *Family Justice Review: Final Report* (Ministry of Justice, Department for Education and the Welsh Government, November 2011), at para 104; see also *Proposals for the Reform of Legal Aid in England and Wales*, Cm 7976 (Consultation Paper CP12/10, November 2010), at para 4.210.

³⁶ A Diduck, 'Justice by ADR in private family matters: Is it fair and is it possible?' [2014] *Fam Law* 616-619, at p 616.

autonomy will need to be expanded into something like a principle of family autonomy. That is, while the notion of private decision-making tailored to the circumstances of the particular family would remain intact, it would be recognised that all family members with the capacity to do so should be engaged in that decision-making, including children.

Current policy and practice

In spite of the extensive evidence that children wish to be heard following parental separation, the evidence to date, in much of Europe as well as the UK,³⁷ is that the emphasis on hearing the voice of the child on family breakdown is more rhetorical than real.³⁸ As Lucinda Ferguson argues,³⁹ it does not benefit children to give them the 'right' to be heard in theory unless in practice that right is exercisable, and leads to better outcomes as assessed by the child.

The voice of the child in contested proceedings

When a court is determining any question with respect to a child's upbringing, the welfare of the child is the 'paramount consideration'.⁴⁰ In order to determine how best to promote the child's welfare, the court must, amongst a number of other factors, consider 'the ascertainable wishes and feelings of the child concerned (considered in the light of his age

³⁷ B Rešetar and R Emery, 'Children's rights in European legal proceedings: Why are family practices so different from legal theories?' (2008) 46 *Family Court Review* 65–77.

³⁸ AL James and A James, 'Pump up the volume: Listening to children in separation and divorce' (1999) 6 *Childhood* 189–206.

³⁹ L Ferguson, 'Not merely rights for children but children's rights: The theory gap and the assumption of the importance of children's rights' (2013) 21 *International Journal of Children's Rights* 177–208.

⁴⁰ Children Act 1989, s 1(1).

and understanding).⁴¹ According to the Family Proceedings Rules, the child should be at the centre of all proceedings⁴² and should feel that their needs, wishes and feelings have been considered in the court process.⁴³ At the First Hearing Dispute Resolution Appointment (FHDRA) the court must ask:

- i. Is the child aware of the proceedings?
- ii. Are the wishes and feelings of the child available, and/or to be ascertained (if at all)?
- iii. How is the child to be involved in the proceedings (Should they meet the judge, be encouraged to write to the court or have their views reported by Cafcass or by a local authority?)
- iv. Who will inform the child of the outcome of the case, where appropriate?⁴⁴

Traditionally the child's views in contested proceedings are sought by appointing a Family Court Adviser⁴⁵ to report to the court on the child's wishes and feelings, or, in more serious and intractable cases, by making the child a party to proceedings and appointing a Guardian to represent the child's interests to the court.⁴⁶ Some courts have adopted the practice of requiring all children over the age of eight to attend court for the first appointment, when

⁴¹ Children Act 1989, s 1(3).

⁴² Family Proceedings Rules, Practice Direction 12B (Child Arrangements Programme 2014), para 4.2 and para 14.13 Wishes and feelings of the child (a).

⁴³ Ibid, para 14.13 Wishes and feelings of the child (b).

⁴⁴ Ibid, para 14.13 Wishes and feelings of the child (d).

⁴⁵ Children Act 1989, s 7.

⁴⁶ Ibid, s 9(2).

they will be interviewed by a Family Court Adviser and their views fed back to the judge and the parties, however this practice is not widespread.

Two factors interact to limit the degree of consultation with children, however. First, in accordance with the principle of party autonomy, courts strongly encourage parents to agree arrangements between themselves rather than proceeding to adjudication, which may obviate any need for the court to ascertain the child's views. Secondly, and more recently, due to financial constraints and the need to meet time-based performance targets, courts are encouraged to minimise the ordering of reports and appointment of Guardians to cases only where they are absolutely necessary.⁴⁷

In reality, then, children are often not consulted in cases that go to court.⁴⁸ Indeed, this fact was highlighted by one of the parties we interviewed, Henry, a father with residence of two children aged 13 and nine. He explained that within contested residence proceedings the children wrote a letter to their mother:

saying that they were concerned they didn't feel they were being listened to and that nobody from this Cafcass place had actually asked them what they wanted yet

⁴⁷ Family Proceedings Rules, Practice Direction 12B (Child Arrangements Programme 2014), para 14.13 Reports (a) and (b); see also Family Law Protocol (3rd edn, 2010), para. 59.17.

⁴⁸ There have also been criticisms of how children's wishes and feelings are obtained and responded to in court proceedings, but that is beyond the scope of this paper. See, e.g. AL James and A James, 'Pump up the volume: Listening to children in separation and divorce' (1999) 6 *Childhood* 189-206; C Sawyer, 'An inside story: Ascertaining the child's wishes and feelings' [2000] *Fam Law* 170; V May and C Smart, 'Silence in court? Hearing children in residence and contact disputes' (2004) 16 *CFLQ* 305-315; C Smart and B Neale, *Family Fragments?* (Polity Press, 1999); C Smart and B Neale, "'It's my life too": Children's perspectives on post-divorce parenting' [2000] *Fam Law* 163-169.

and they were concerned that it was all rushing forward and nobody would give them the information so they couldn't express proper opinions and so on.

Following accusations from the mother's solicitors that Henry had coerced the children to write the letter,⁴⁹ the Family Court Adviser appointed a mediator qualified to undertake direct consultation to speak to the children, which the children, Henry reported, found helpful. However, following a change of personnel at Cafcass, the new Family Court Adviser took the decision that further sessions between the children and the mediator were not appropriate.

The voice of the child in out-of-court FDR processes

In line with s 1 of the Children Act 1989, the codes and protocols governing family law solicitors, mediators and collaborative lawyers in England and Wales require practitioners to promote the child's welfare as the paramount consideration in family law disputes.⁵⁰ The codes and protocols also encourage the separation of children's and adults' needs with parents encouraged to focus on the children's needs.⁵¹ Nevertheless, the codes and protocols for both family lawyers and mediators are *child-focused*, emphasising the importance of basing decision-making on children's welfare, rather than *child-inclusive*,

⁴⁹ Family Law Protocol (3rd edn, 2010), para 5.9.12 states: 'Solicitors should advise clients that it will not assist them to produce statements or letters written by their children... and solicitors should firmly discourage such conduct.'

⁵⁰ Family Law Protocol, *ibid*, para 1.5.1; see also Family Mediation Council Code of Practice, para 5.7.1: 'At all times mediators must have special regard to the welfare of any children of the family.'

⁵¹ Family Law Protocol, *ibid*; Family Mediation Council Code of Practice, *ibid*.

which would entail children's active involvement in the dispute resolution process. The Code of Practice for mediators requires mediators to encourage participants to consider the children's wishes and feelings in the search for a solution. If appropriate, mediators *may* discuss with participants whether and to what extent it is proper to consult the children directly in order to ascertain their wishes and feelings.⁵² In practice, the option of child consultation is not routinely offered.⁵³ Children may participate in mediation but only with the agreement of the mediator and the parties.⁵⁴ Any one of these can stymie the child's involvement, however strongly the child might express a desire to contribute to the decision-making. The Family Law Protocol acknowledges that children do not 'routinely' participate in mediation.⁵⁵ Within all FDR processes, parents remain the 'principal conduit' for conveying the wishes and feelings of the children to lawyers and mediators.⁵⁶

The Family Law Protocol's encouragement to parents to enter into parenting agreements, which should address, inter alia, how the children will be told about the separation and the arrangements that have been made for them, underlines its paternalistic undercurrent.⁵⁷ The Protocol neither envisages nor encourages direct involvement of the children in the decision-making process for post-separation arrangements. Good practice in collaborative law anticipates a similarly passive role for children. Resolution's Good Practice

⁵² Family Mediation Council Code of Practice, para 5.7.2.

⁵³ J Walker and A Lake-Carroll, 'Hearing the voices of children and young people in dispute resolution processes: Promoting a child-centred approach' [2014] Fam Law (forthcoming).

⁵⁴ Family Law Protocol (3rd edn, 2010), para 2.2.5.

⁵⁵ Ibid, para 2.2.7.

⁵⁶ A O'Quigley, *Listening to Children's Views. The Findings and Recommendations of Recent Research* (Joseph Rowntree Foundation, 2010).

⁵⁷ Family Law Protocol (3rd edn, 2010), para 3.11.3.

Guide for Collaborative Professionals suggests that the agenda for the last four-way meeting should include a discussion of how the parents will explain the agreed outcome to the children.⁵⁸ The view of the child as a competent social actor with a right to be heard in the dispute resolution process itself is notably absent from the codes and protocols as currently drafted.

Direct consultation with children in mediation

Although the UK's Family Mediation Council (FMC) has 396 mediators on its register trained to provide direct consultation with children, it appears that very few children and young people participate directly in the mediation process, with some mediators involving children maybe once or twice a year at most.⁵⁹ Mediation is child-focused but rarely child-inclusive and where children are included this is usually to assist parents' decision-making in difficult cases or where parents are stuck. The decision to include children is taken by the adults rather than viewed as the right of the child.⁶⁰ National Family Mediation (NFM) make the (notably vague) claim that 'NFM services...provide child-inclusive mediation in up to 25 per cent of cases'.⁶¹ However, Janet Walker and Angela Lake Carroll conclude that while some services offer child consultations routinely this is a minority activity for most mediators.

⁵⁸ Resolution's Good Practice Guide for Collaborative Professionals, para 7.

⁵⁹ J Walker and A Lake-Carroll, 'Hearing the Voices of Children and Young People in Dispute Resolution Processes' in *Report of the Family Mediation Task Force, Appendix D* (June 2014).

⁶⁰ Ibid.

⁶¹ National Family Mediation, News and Comment, 'National Family Mediation responds in full to Government Task Force recommendations' (11 July 2014).

Relatively few regard it as a central aspect of their practice and it has become a 'specialist interest' activity.⁶²

As discussed below, practitioner interviewees in the present study displayed a lack of consensus over whether child-inclusive mediation is in the best interests of children, reflecting similar disagreements in the international literature on mediation.⁶³ Robert Emery (in the US context) suggests that children (save for teenagers where appropriate) should generally not be included in mediation as he feels that in giving children the 'right' to be heard in mediation, too many children end up with the 'responsibility' of making custody decisions. He contends that parents know what is best for their children and parents should take responsibility for decision-making over children on family breakdown.⁶⁴ By contrast, Janet Walker argues that children can distinguish between participation and decision-making and that consulting children directly should never be about the latter.⁶⁵

In child-focused mediation the mediator encourages the parties to keep the children at the forefront of the decision-making but children are not directly consulted. In child-inclusive mediation the views of the child are sought directly, by the child speaking to the mediator or to an independent child consultant. In their Australian study, Jennifer McIntosh and colleagues found that parents and children reported enduring reduction in levels of conflict and improved management of disputes following child-focused and child-inclusive

⁶² J Walker and A Lake-Carroll *Hearing the Voices of Children and Young People in Dispute Resolution Processes: A Child-Centred Approach: Report for the Mediation Task Force* (2014).

⁶³ G Dennison, 'Is mediation compatible with children's rights?' (2010) 32 JSWFL 169-182.

⁶⁴ R Emery, *Re-negotiating Family Relationships: Divorce, Child Custody and Mediation* (The Guilford Press, 2nd edn, 2012).

⁶⁵ J Walker, 'How can we ensure that children's voices are heard in mediation?' [2013] Fam Law 191-195.

mediation. However, child-inclusive mediation was also associated with a significant level of parental relationship repair and improved emotional availability of parents to children. Agreements reached were developmentally sensitive with parents and children more content with arrangements over a one-year period post-mediation.⁶⁶ Agreements reached in child-inclusive mediation were more enduring than agreements made in child-focused mediation at a four-year follow-up.⁶⁷ In another Australian study however, Felicity Bell and colleagues failed to replicate these findings.⁶⁸ While participants who had experienced both child-focused and child-inclusive mediation reported positive benefits from the mediation process, child-inclusive mediation did not prove to be more beneficial in terms of improving the parental relationship or the likelihood of resolving the dispute. Bell et al's study involved a smaller number of families than did McIntosh et al's and thus may have been less able to discern differences between the two groups. At the same time, participants in Bell et al's study, on average, had lower incomes and levels of educational attainment than those in the McIntosh et al study, which may also have contributed to the differences in findings between the two studies.

Direct consultation with children: Evidence from the practitioner sample

⁶⁶ J McIntosh, Y Wells, B Smith, and C Long, 'Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of post-separation adjustments' (2008) 46 *Family Court Review* 105–124.

⁶⁷ J McIntosh, B Smyth, M Kelaher, Y Wells and C Long, 'Post-separation parenting arrangements: Patterns of developmental outcomes: Studies of two risk groups' (2010) 86 *Family Matters* 40-48.

⁶⁸ F Bell, J Cashmore, P Parkinson and J Single, 'Outcomes of child-inclusive mediation' (2013) 27 *IJLPF* 116–142.

Of the 31 mediators in our practitioner sample, 20 were qualified to provide direct consultation with children but only a couple of mediators practised direct consultation relatively frequently. One of these estimated that she had an average of three cases a year. Consistent with Walker and Lake-Carroll's findings,⁶⁹ most practised direct consultation rarely. Around half of those qualified had had only one or two cases ever. Some had never practised or were currently non-practising, either because of lack of opportunity, personal misgivings or because they belonged to mediation organisations opposed in principle to direct consultation with children. One mediator had no experience of direct consultation despite having been qualified for 10 years. It was perhaps therefore unsurprising that there were very few examples of child-inclusive mediation in our party sample.

Models of child inclusive mediation varied among the practitioners with experience of child consultation. The most common practice was for the mediator to consult with the child themselves, but some would engage a different mediator or child consultant to undertake the consultation. One who adopted the latter practice said they did so because it is important that the child feels that the mediator/child consultant is available 'exclusively' for them, and this enables the child to speak freely with the professional. A third model was of co-mediation with a mediator from an education or child social work background, usually undertaken as an expense to the mediation service.

Some practitioners who had undertaken the direct consultation training expressed misgivings over the quality of the training offered. The additional cost of child-inclusive mediation was also a barrier. This is a significant issue in the context of the Minister's 'dialogue' with the mediation community. Walker and Lake-Carroll report that perceived

⁶⁹ J Walker and A Lake-Carroll, 'Hearing the Voices of Children and Young People in Dispute Resolution Processes' in *Report of the Family Mediation Task Force, Appendix D* (June 2014).

problems with legal aid payments act as a disincentive to child-inclusive mediation. Some mediators they interviewed reported that the structure and level of legal aid payments make child inclusive practice uneconomic. There were also concerns about whether, on audit, payment claimed for a co-mediation might be refused (despite guidance having been issued by the then LSC that child inclusive practice is a legitimate co-mediation claim).⁷⁰ A similar concern was expressed by a practitioner in our sample, Gordon Russell, who is a trained child consultant but has not practised child inclusive mediation. His practice is 45 per cent co-mediation, in which context there is no capacity to add a child consultant:

[G]enerally speaking it is the more difficult cases that you would involve direct child consultation. The problem is I am already usually co-mediating that type of case and if wanting to bring in a separate mediator to do the direct child consultation, if it is a legal aid case, there is no spare money to pay for that.

Moreover, if parties are not legally aided, they are expected themselves to bear the additional cost of child consultation, which may well limit their willingness to agree to the process.

Even absent cost considerations, mediators reported that consent from both parents for the mediator to consult the child was not always forthcoming. Several mediators were cautious about direct consultation because of the risk that, consciously or unconsciously, parents might seek to influence the child, adding pressure on the child, particularly where the parents held polarised positions. There were concerns that it can be difficult for the

⁷⁰ Ibid.

mediator to assess accurately whether the child had been 'primed' by a parent. Other mediators expressed reticence because of difficulties around how information from the children would be fed back to the parents, with concerns that the process could be damaging for the child if not handled well. These concerns echo the anxieties over direct consultation expressed by mediators in much of the available research⁷¹ – as well as echoing concerns expressed by judges about direct consultation with children.⁷²

In the present study, the reservations of practitioners reluctant to engage children directly in the mediation process centred on the belief that the parents ought to be able to represent the child's voice adequately – in other words, a view of children's welfare which made parents responsible for listening to and conveying their children's views, and which dovetailed neatly with respect for party autonomy. Jane Davison expressed concern that child-inclusive mediation might become mainstream as she felt that involving children directly in mediation is an abdication of parental responsibility. She said that most parents interested in using child-inclusive mediation generally accepted that it was 'not really appropriate' once she had explained her views. The view of the majority of those who had reservations about child-inclusive mediation was summarised by Ed Jamieson, who practises all three FDR processes:

⁷¹ J Walker, 'How can we ensure that children's voices are heard in mediation?' [2013] Fam Law 191-195; J Walker and A Lake-Carroll, 'Hearing the voices of children and young people in dispute resolution processes: promoting a child-centred approach' [2014] Fam Law (forthcoming).

⁷² See, eg R Hunter, 'Close encounters of a judicial kind: "Hearing" children's "voices" in family law proceedings' (2007) 19 CFLQ 283–303.

To be honest I have never found the need to bring children into mediation because my practice seems to work quite well on the basis that the children's voice is heard but it's the parents that will bring that voice.

The hope expressed by Henry Sanderson that parents ought to be 'reliable consultants with their own children' was commonly held.

By contrast, some mediators were positive about the potential for direct consultation to assist older children who might be struggling to tell their parents what they really feel, and some thought that direct consultation enabled the mediator to understand more fully the dynamic of the whole family:

[Direct consultation with children] really gives you a much better sense of the whole family; the whole dynamic. (Laura Gurney)

Only a small minority of the mediators we interviewed could be said to be strongly supportive of child-inclusive mediation, and in some cases their support was more theoretical than real since they seldom practised direct consultation. Most mediators who supported child inclusive mediation strongly did so because it gives children an independent voice and, as Hannah Philips put it, it is 'really, really useful in terms of getting parents to see it from the child's perspective,' especially in cases where parents give diametrically opposed versions of what the children say they want. Only one mediator spoke explicitly about direct consultation as being the right of the child:

I am very pro direct consultation... I am very much about involving the voice of the child, you know. All the research that I have read in the last 10 years tells me the same common factor; children don't feel heard, they feel lied to and they feel betrayed by the parents because they haven't been told the truth about things, there is no honesty in the process for them, and that the decision making quite often ignores the children's wishes. (Molly Turner)

Walker concludes that the patchy exercise of direct consultation of children in mediation in the UK 'appears to have been based less on the rights and needs of children and more on ...factors to do with the personal position of each mediator on the matter.'⁷³ The evidence from the present study bears out this observation. There was also some limited evidence that those most comfortable with the concept of direct consultation often had previous professional experience of working with children. This suggests that mediators may require additional initial training and continued professional development to enable them to undertake or refer to direct consultation where appropriate.

Direct consultation with children: Evidence from the party sample

In a recent Australian study of child-inclusive mediation most participants reported that they gave or would have given their consent for their children to see a child consultant because, amongst other reasons, child-inclusive mediation gives children a voice.⁷⁴ In the present study however, party interviewees were generally reluctant to engage in child-

⁷³ J Walker, 'How can we ensure that children's voices are heard in mediation?' [2013] Fam Law 191-195.

⁷⁴ F Bell, J Cashmore, P Parkinson and J Single, 'Choosing child-inclusive mediation' (2012) 23 *Australasian Dispute Resolution Journal* 253-264, at p. 259.

inclusive mediation. Ryan, whose eldest two children were aged 16 and 17, indicated that direct consultation was not considered but he would not have supported it as he felt that mediation would have been 'awkward' if the children were involved and he did not think that it would be good for them.

Lynn's mediator did raise the possibility of the parties' eight-year-old daughter attending mediation. The parties were unable to agree the practicalities of who would take the child to and from mediation. The daughter considered attending but in the event did not wish to take up the mediator's offer.

Most parents wanted to minimise the impact of the separation on the children and believed that this could be achieved best by shielding the children from involvement in the chosen FDR process.⁷⁵ Seth, a father of nine-year-old twins, typified this view:

We didn't tell them until we had already got this agreement sorted and I had found somewhere [to live]. So they were told probably two weeks before I moved out that it was all happening. So at the time of the mediation they didn't know anything about it, but of course we wanted to protect the children from all that as much as possible...

Some parties actively chose mediation because they thought that would avoid the children facing the 'trauma' of being interviewed by court officers:

⁷⁵ See also J Walker and A Lake-Carroll, 'Hearing the voices of children and young people in dispute resolution processes: Promoting a child-centred approach' [2014] Fam Law (forthcoming).

I just wanted a resolution. I didn't want... because my concern was when I looked about going to court was that the children, because of their age, would be interviewed by court officers and I didn't want to put them through that, and so I just wanted a resolution... where the children... I knew they had to be involved at some stage but I wanted a resolution where it was less traumatic for the children.

(Malcolm)

McIntosh et al's study highlighted the ability of direct consultation to assist parents 'to see it from the child's perspective'. One of the fathers who had used child-inclusive mediation to resolve his family dispute in McIntosh's sample, for example, observed:

I heard their opinions, which were an eye opener. It gave insight into what they were going through. I do stuff differently now. Getting past the hurt and seeing them more clearly is what happened.⁷⁶

However, this was not a view expressed by either of the parties we interviewed whose children were consulted. Gerald was unhappy that his children were interviewed together when he had wanted the mediator to see them separately. The parties failed to reach agreement in mediation but subsequently settled following intervention from Gerald's ex-wife's new partner.

⁷⁶ J McIntosh, Y Wells, B Smith, and C Long, 'Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of post-separation adjustments' (2008) 46 *Family Court Review* 105–124, at p 117.

Ernest said that he 'felt uncomfortable' about the mediator's suggestion of speaking directly to his 11-year-old daughter because he felt that his ex-wife was putting the children 'in a position where they would have to make a choice'. He agreed that the mediator could speak to the child about a specific issue (choice of school) but felt that the mediator went beyond 'the original remit' by discussing contact arrangements with the child as well. Ernest had told his daughter that he would support her choice of school '110 per cent' and, after the child clearly articulated her choice in direct consultation, the parties agreed matters without recourse to the court. However, Ernest thought that consulting his daughter direct had 'put her in a difficult position'. His view was:

I think mediation has to be child-focused... rather than child-inclusive. I think there are better ways of bringing the child... I think the jargon now is 'into the room'. I think there's better ways of focusing on the child than actually bringing them to mediation. I think it puts them in a very difficult position... I am not saying it's not appropriate in all cases, but I think it has to be managed so very carefully.

Overall, the research yielded insufficient data on parties' experiences of child inclusive mediation to be able to assess its value. But it did generate information on a significant range of barriers to child-inclusive mediation which will need to be overcome if the Minister's vision is to be realised.

Direct consultation with children: Other FDRs

There was no evidence from the party interviews of children being given the opportunity to speak to a child consultant in solicitor negotiations or collaborative law, and none of the

practitioners suggested hearing the voice of the child in this way.⁷⁷ Parties did report in some cases how, after prolonged dispute, consulting the children outside the dispute resolution process had helped to resolve the issue. For example, Sheila's ex-husband proposed in collaborative sessions an arrangement whereby the children would spend more time with him, which Sheila resisted because she did not think it would be in the children's best interests at that particular time. This was one of the reasons the collaborative process broke down, after which:

I actually spoke to the kids... and I said, 'Look, part of the reason things were difficult was because we were about to make these new arrangements. What do you think?' And they said, 'Fine, we'll try it'.

Sheila's account, like Seth's earlier in which the children were not told anything until an agreement was reached, points to the more general issue of the extent to which parents are accustomed to consulting their children and including them in decision-making in ordinary family life. If parents are not in the habit of considering their children's views on issues arising for the family prior to separation, it is perhaps unrealistic to expect them to begin to do so at the point of separation or divorce, especially when consultation at this point may be perceived as exposing children to parental conflict from which they ought to be shielded. Arguably, rather than simply focusing on children's rights to be consulted in family justice processes, the government's focus should be directed towards encouraging parents to consult with their children on important matters more generally. If this was taken

⁷⁷ This position may be changing, with some practitioners attending the October 2014 Resolution Dispute Resolution conference indicating greater use of child and family consultants.

to be normal practice in intact families, it would then be more likely to flow over to situations of family breakdown.⁷⁸

Focus on the child in the FDR process

All three processes officially espouse a focus on the children's needs and well-being, both in children's cases and in financial cases where there are dependent children. Richard Benson, a practitioner qualified in the three processes, indicated that a child-focused approach is 'fundamental' to all family dispute resolution processes, a view echoed unanimously in the practitioner interviews. He demonstrated this approach in a recorded session subsequent to his practitioner interview:

The reality is as you have said, you have got kids and they are at the heart of the solution. (Solicitor-Client Interview 203)

Many parties said that the mediator or solicitor did focus on the child's welfare and put that at the centre of negotiations:

[The mediator was] very clear with me that it was about the children and not about either of us, really. It was all about them. (Tilda, settled child arrangements in mediation)

⁷⁸ We are grateful to one of the anonymous referees for suggesting this point.

My lawyer yeah, she 100 per cent she agreed with me that the kids should come first. (Jason, solicitor negotiations followed by children proceedings that settled prior to final hearing)

Some practitioners in all FDR processes provided information to parties on the courts' focus on children's welfare and on social science evidence about child development. In the absence of direct consultation, several parties reported that by providing helpful, age appropriate literature on separation for the children to read, their mediators had 'empowered' the children.

In the recorded sessions, we saw considerable emphasis on 'bringing the children into the room' by discussing the children's personalities at the beginning of the first session.⁷⁹ Often this appeared to be a 'good ice-breaker' and was used by practitioners as a reminder that the process is 'child-focused'. The following exchange in collaborative case 214 typifies this approach:

Wife's collaborative lawyer:

We have got the [children] on the agenda, not because we think there was anything major to think about from what I gather, as everything seems to be going reasonably well there, but just as a kind of reminder that, you know, they are three very important people who aren't sitting in this room.

⁷⁹ Cf. L Trinder, CJ Jenks, and A Firth, 'Talking children into being in absentia? Children as a strategic and contingent resource in family court dispute resolution' (2010) 22 CFLQ 234-257, who found that this did not occur in the in-court conciliation sessions they observed.

Husband's collaborative lawyer:

I would like to hear what they are like. Would you mind describing them...? Because all I know is sort of how old they are and what they are doing [educationally]... but I don't really know much about them...

A discussion of the child's personality was also used to good effect at the outset of mediation 209, a highly conflictual contact dispute, as a means of getting the parents to focus on what they did agree on, namely that they were the proud parents of a 'clever... switched on... bubbly' toddler.

In the recorded mediation sessions, mediators often used 'reframing' techniques when parties were becoming positional to try to break an impasse and to try to refocus the discussion on the children's needs. For example:

Mother:

My priority is for [father] to realise that having the children half the time is not in their best interest.

Mediator:

So can I rephrase that, if I may, – and I do this all the time – arrangements for the children? (Mediation 207)

There was also evidence from the party interviews of effective use of reframing to move negotiations forward in a child-centred way:

One of my husband's objectives was to spend as much time with the children as possible and so the mediator said, 'Well, why don't we phrase it as to be able to build meaningful relationships with the children?' (Tracy, Mediation)

In the recorded sessions we observed mediators in particular using a focus on the child's welfare as a tool to bring the parties together and encourage them to put their adult dispute aside in order to co-operate as parents and to reach agreement.⁸⁰ Mediators often made several appeals during the sessions to try to keep the discussion child-focused and to diffuse tensions if conflict escalated:

[L]et's explore the options in terms of reintroducing contact, bearing in mind that what we are looking for here is a solution that has [child]'s best interests at heart rather than a solution that is specifically geared to either one of you, because that's the most important isn't it? (Co-mediator, 209)

(and later):

Let's just return [mother], let's just return to the central issue here which is the welfare of [child]. (Co-mediator, 209)

Despite this evidence of good practice, where parties were entrenched in their adult dispute, practitioners' efforts to get the parties to focus on the children were often in vain resulting in children's interests receding into the background.

⁸⁰ Trinder et al, *ibid*, report similar findings.

In addition to loss of child focus in some instances in the recorded sessions, a number of parties also said in interviews that they thought the process was not child focused, for example:

And how far did you think that the mediator was focusing on the needs of your daughter?

I don't think he was at all. No, not at all. I don't think my daughter was mentioned in any way of him explaining to us that we are parents to a child, that wasn't the process. All he kept making it about was me and [ex-partner] ... instead of the child being the important part of all this. (Karl, Mediation)

I expected us to be talking about what was best for my son but it turned out to be, in my opinion, what was best for his mum. (Leo, Mediation)

Some parties felt that that there was incongruence between mediation theory and practice. Sonia, for example, indicated that in the MIAM the mediator had emphasised the need to focus on the children but, in Sonia's opinion, had failed to put this into practice in the mediation session:

[The mediator] decided that we had a choice between discussing our finances or discussing about the child, and we discussed finances. And she made that decision, therefore, that that was the most important thing... It's like [the mediator] knows what to say. It's not like she's not aware of it; she just didn't do it. So there's no point in saying it.

Some parties felt that the focus was on agreement rather than the best interests of the children:

Do you feel the children were at the centre of the process? Were they trying to make you do what was right for them, is that how it was explained, or was it more adult focused would you say?

I can't say that it was to me very completely child focused... [Mediation] wasn't directed. It was more 'this is what [ex-partner] wants to do, this is what Rebecca wants to do, can you come to an arrangement of what you want?' rather than 'this is what is best for the children.' (Rebecca, mediation)

An important caveat is that the perceived lack of child focus outlined above reflects the interviewed party's perception, but this may also be a symptom of the problem with party autonomy. In a number of the party interviews the party appeared to conflate the child's interests and their own interests, or at least to have difficulty separating the children's needs from their own. This casts doubt on practitioners' views reported earlier that parents are always the best representatives of children's voices. This may be true in many instances, but in some cases it will not be, and children's welfare would be better promoted by giving them the opportunity to express their own views.

Parties' use of the rhetoric of child welfare to promote their own positions

Diane Vaughan notes the tendency for spouses/partners to uncouple 'asymmetrically'; that is, to be at different stages of the grieving process over the breakdown of the relationship.⁸¹ There was evidence of this asymmetry in all three processes. In such circumstances, the best approach appeared to be for the practitioner to halt the proceedings until both parties were emotionally ready to cooperate and cope with negotiations with the ex-partner. Emery suggests that when parties at different stages in the grieving process try to negotiate, this asymmetry can lead to 'his' and 'her' versions of the divorce as well as 'his' and 'her' versions of how the children are coping with the divorce.⁸² The parents then become polarised in their positions, each strategically invoking the rhetoric of children's rights to advance and legitimise their own immutable positions. Similarly, Sawyer suggests that the culture of non-adversarialism in family disputes has achieved:

... a remarkable feat of language whereby a certain structure of parental rights is renamed 'children's rights' so as to make it impossible to question, and dissent becomes untenable and even pathological.⁸³

⁸¹ D Vaughan, *Uncoupling, Turning Points in Intimate Relationships* (Vintage Books, 1990).

⁸² R Emery, *Re-negotiating Family Relationships: Divorce, Child Custody and Mediation* (The Guilford Press, 2nd edn, 2012).

⁸³ C Sawyer, 'An inside story: Ascertaining the child's wishes and feelings' [2000] *Fam Law* 170, at p 173. See also AL James, 'Children, the UNCRC, and family law in England and Wales' (2008) 46 *Family Court Review* 53–64; F Kaganas and S Day Sclater, 'Contact disputes: Narrative constructions of "good" parents' (20004) 12 *Feminist Legal Studies* 1-27; E Ryrstedt, 'Mediation regarding children: Is the result always in the best interests of the child? A view from Sweden' (2012) 26 *IJLPF* 220-241; L Trinder, CJ Jenks, and A Firth, 'Talking children into being in absentia? Children as a strategic and contingent resource in family court dispute resolution'

In the party interviews, we found one party accusing the other of using child welfare rhetoric to legitimise their position:

[My ex-husband] kept banging on about [child welfare]. You see, this is his big thing that, you know, he wanted what's best for the children and I didn't. I was just a selfish mad woman, you know. So in fact, he kept banging on about it. He knew the correct buzzwords. He knew what sort of things to hang his argument on, so he kept banging on about it. [The mediator] didn't really need to. (Monica)

This phenomenon was also strikingly evident in our recorded sessions. Three of the four mediations involving children disputes were unresolved because of fundamental clashes between the parents over their views on children's best interests. Appeals by the mediators to approach the negotiations as 'Team Parents' (206) or 'Project Children' (207) are fruitless when parents are so polarised, and exhortations to focus on the child's needs rather than their own are equally fruitless when both parents insist that they *are* focusing on the child's needs:

Mother:

(2010) 22 CFLQ 234-257; J Walker, 'How can we ensure that children's voices are heard in mediation?' [2013]

Fam Law 191-195.

...when the children fall over, when they cry, when they wake up in the night, it is me that they ask for. And children need to be with their mum the majority of the time. There's no doubt about that, [father], they need to be with their mum.

Father:

... in the same way that [mother] is being emphatic about 'I believe that that would be best for the children,' then that's my position too... If it was significantly less than equal time with each of us, then they won't have the relationship with me that they deserve, and need. (Mediation 207)

Like the fathers in Carol Smart and Bren Neale's study, the fathers in the mediated cases with parents expressing polarised views invoked a 'rights' discourse, casting themselves in the role of a victim forced to enforce their legitimate rights.⁸⁴ But their perceived rights to spend equal time with their children tended to be articulated in terms of their children's 'rights' to have their father equally involved in their upbringing. The mothers in these cases, by contrast, invoked a discourse of care, asserting children's need for stability and routine with themselves as primary carer. Inevitably, children's own wishes, and how they might feel about the conflict between their parents, become sidelined in such disputes.

Conclusions

The fundamental shift away from court towards out-of-court settlement of family disputes in recent decades may be seen to have resulted in a loss of opportunities for children's voices to be heard in decision-making about post-separation parenting arrangements. The evidence from the present study, confirming earlier research in England and Wales, points

⁸⁴ C Smart and B Neale, *Family Fragments?* (Polity Press, 1999).

towards the fact that children are rarely consulted in out-of-court dispute resolution processes. And in the absence of direct consultation with children, while dispute resolution practitioners endeavour to be child-focused, the fact that only the adults are participants creates an inevitable tendency for all processes to become dominated by adult agendas and for children's voices to be marginalised.

In agreement with the Family Mediation Task Force,⁸⁵ our findings suggest that, in order to place children more at the centre of the decision-making process,⁸⁶ there is a need for a more systematic – and nuanced – approach to the inclusion of the voice of the child in all out-of-court dispute resolution processes. Since divorce and separation is a process not a discrete event⁸⁷ involvement of the child must also be viewed as a process and must be tailored to the needs of the individual child.⁸⁸

Ensuring that children's voices are heard more consistently will require a number of changes to current FDR processes. First, as also recommended by the Family Mediation Task Force,⁸⁹ there will need to be more – and better – training for mediators (and potentially also for solicitors) in child consultation, combined with ongoing support and continuing professional development opportunities in this area. We have elsewhere

⁸⁵ *Report of the Family Mediation Task Force* (June 2014), at paras 85 and 86.

⁸⁶ C Barton and J Pugsley, 'The voice of the child: Are mediators listening?' [2014] *Fam Law* 357-358.

⁸⁷ P Mansfield, 'From Divorce Prevention to Marriage Support', in The Rt Hon Lord Justice Thorpe and E Clarke (eds), *No Fault or Flaw: The Future of the Family Law Act 1996* (Jordans Publishing Ltd, 2000) 29-33.

⁸⁸ C Smart and B Neale, *Family Fragments?* (Polity Press, 1999); J Walker, 'How can we ensure that children's voices are heard in mediation?' [2013] *Fam Law* 191-195; Committee on the Rights of the Child, *The Right of the Child to be Heard* (General Comment No. 12 CRC/C/GC/12, United Nations Convention on the Rights of the Child, 2009), at para 133.

⁸⁹ *Report of the Family Mediation Task Force* (June 2014), at para 85.

advocated the development of accredited specialisations in mediation,⁹⁰ and this could become one of the areas of specialisation (alongside specialisations in domestic violence and complex financial matters, for example). Secondly, the very real issue of the cost of child-inclusive mediation will need to be addressed. The rhetoric of child consultation will not become reality without acknowledgement of and response to its resource implications.

Thirdly, children's participation in mediation will need to be reframed in terms of children's rights to be heard rather than merely represented in dispute resolution. Welfare-based concerns to protect children from being exposed to their parents' disputes and from being pressurised into making decisions on behalf of their parents cannot be ignored, but responsibility for decision-making as to whether children should participate will need to be relocated to children themselves. In other words, it will need to be seen as the right of the child (of sufficient age and understanding) to choose whether to participate or not, rather than the right of the mediator and the parents to make this choice. This, in turn, will require modification of the principle of party autonomy into a wider principle of family autonomy, and a necessary loss of some degree of control over the process and the direction of negotiations for both parents and mediators.

One way to go about achieving such a cultural shift, as potentially envisaged by the terms of reference of the Voice of the Child Dispute Resolution Advisory Group, would be by means of amendment to the codes and protocols for solicitors, mediators and collaborative lawyers⁹¹ to reflect the expectation that (a) children should be informed of their rights to

⁹⁰ A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Justice, Briefing Paper and Report on Key Findings* (University of Exeter, 2014), at pp 27, 33; R Hunter, A Barlow, J Smithson and J Ewing, 'Mapping Paths

to Family Justice: Matching Parties, Cases and Processes' [2014] Fam Law 1404-1411, at p 1410.

⁹¹ See also *Report of the Family Mediation Task Force* (June 2014), at para 85.

express their views in decisions concerning them following parental separation,⁹² and (b) children should be afforded the opportunity to make their views known. Another would be to include clauses concerning how children's voices will be heard in agreements to mediate and collaborative law participation agreements.⁹³ Of course, children's right to express a view must include a right not to express a view should they so choose. Nevertheless, amendments along these lines appear necessary in order to move the issue of hearing children's voices in out-of-court FDR processes from the margins to centre-stage. Whether the Advisory Group's recommendations will extend this far, and whether the practitioner communities can agree to proposals representing such a fundamental change to current practice and widely-held views, remain to be seen.

⁹²Committee on the Rights of the Child, *The Right of the Child to be Heard* (General Comment No. 12 CRC/C/GC/12, United Nations Convention on the Rights of the Child, 2009), at para 41; G Lansdown, *Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No.12* (Save the Children UK on behalf of Save the Children and UNICEF, 2011).

⁹³ Thanks to Hilary Linton for this suggestion.