The Separate Representation of Children – In Whose Best Interests?
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Introduction

‘When the question before the court is what is best for children, judges tend to insist that all of the parties (including the children) be subject to a battery of tests, interviews, and evaluations by psychologists, psychiatrists, or trained court personnel. … Perhaps the least necessary member of this new group of costly professionals is the lawyer for the child. … It is useful to wonder why this is the only country in the world that even takes seriously the importance of providing three lawyers in a custody dispute. ¹

Contrary to the above author’s impression, the USA is not in fact the only country in the world to consider that there may be situations in which it is desirable for a child to be separately represented in legal disputes between his or her parents. ² This paper³ examines the growing trend in England and Wales for this to occur, with the court directing that a child be separately represented⁴ by his or her own guardian ad litem.

There appears to be an increasing recognition in the English jurisdiction that such separate representation may be important in certain cases, but it is not entirely clear

¹ M Guggenheim, What’s Wrong with Children’s Rights (2005, Harvard UP) pp 158-159 and 166.
² In New Zealand, for example, ss 6 and 7 of the Care of Children Act 2004, (entry into force on 1 July 2005), impose ‘a requirement to appoint counsel to represent the child in all matters involving their day-to-day care that are likely to proceed to a hearing, unless this would serve no useful purpose (for example if the child was an infant so unable to express any views).’ See Judge Peter Boshier, ‘Care and Protection of Children: New Zealand and Australian Experience of Cross-Border Co-operation’, speech to the 4th World Congress on Family Law and Children's Rights, 20-23 March 2005 at http://www.justice.govt.nz/family/media/4th-world-congress-family-law-childrens-rights.html.
³ The paper draws on a study currently being conducted by a team (M Murch, G Douglas, L Scanlan, C Miles, J Doughty and N Smalley) at Cardiff University. The author is particularly grateful to Nina Smalley for her work on analyzing the solicitors’ questionnaires, referred to below.
⁴ Strictly speaking, being separately represented and being joined as a party to proceedings are two separate things. However, it has been held that, where a child is separately represented, he or she should also be joined as a party (L v L (Minors)/Separate Representation) [1994] 1 FLR 156) and the discussion below assumes that both steps have been taken. However, this is not always done, causing problems in obtaining public funding for the child: see C Blackburn, ‘Rule 9.5 Demystified’ (2005) 15, 1, Seen and Heard 19 at 21.
how this judgment is made, nor what impact such a change in the usual form of proceedings may have on the outcome of the case or on the attitudes and behaviour of the family members themselves or indeed, what costs and resource implications it may have. The issue is becoming pressing because primary legislation, due to be implemented in autumn 2005, will extend the ‘tandem model’ of separate representation (under which a child is represented by a ‘children’s guardian’ – a trained social worker – together with a legal representative), which is currently confined to cases involving child protection proceedings, to private law proceedings as well. Since it will not be feasible to extend separate representation to all private proceedings, it will be necessary to determine in which cases and which circumstances such provision should be made. The use of this mechanism will also need to be slotted into an increasingly ‘managerial’ approach to children cases, epitomized by the publication of guidance, known as ‘The Private Law Programme’, issued by the President of the Family Division at the end of 2004, which sets out three principles to enable the welfare of the child to be safeguarded in private law cases. These are first, to achieve dispute resolution at a first hearing where possible; secondly, to exercise effective court control including monitoring outcomes against aims and thirdly, to provide flexible facilitation and referrals so that resources are matched to families. The Programme also declares that the overriding objective is as follows:

‘… to enable the court to deal with every (children) case
(a) justly, expeditiously, fairly and with the minimum of delay;
(b) in ways which ensure, so far as is practicable, that
   a. the parties are on an equal footing;
   b. the welfare of the children involved is safeguarded; and
   c. distress to all parties is minimised;
(c) so far as is practicable, in ways which are proportionate
   a. to the gravity and complexity of the issues; and

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6 Concern at ‘excessive’ use of separate representation has been expressed both in relation to individual courts’ use (eg the ‘Leeds Syndrome’ discussed below at p 000) and in recent guidance issued by the President intended to curtail an apparent expansion in use across the country in the wake of her Practice Direction issued in April 2004, discussed below at p 000. See J Timms, ‘The Rights and Representation of Children: Current Developments’ (2005) 15, 1, Seen and Heard 24 at 26.
b. to the nature and extent of the intervention proposed in the private and family life of the children and adults involved.\textsuperscript{7}

How, and how far, the separate representation of children can be incorporated into this approach remains to be seen. It is therefore important to have some clearer idea of current thinking and practice to determine when separate representation is appropriate.

The use of separate representation can be justified on the basis of seeking a better outcome to the case either where a ‘welfare’ rationale is adopted – i.e. that the court is concerned to determine what is best for the child - or where a ‘voice’ approach is taken – i.e. that the court is concerned to ‘hear’ what the child’s own views, wishes and feelings are on the matter in dispute. Indeed, both rationales may be present at the same time: ‘hearing the child’ is both respectful of the child’s personhood and promotes the child’s sense of identity.\textsuperscript{8}

Separate representation may therefore simultaneously benefit the child from a welfare and rights perspective. Under s 1(1) of the Children Act 1989 courts in England and Wales are always charged to reach a decision concerning the child’s upbringing which makes the child’s welfare paramount, and it is not suggested that a ‘voice’ perspective should replace this. Rather, I suggest that the reason for using separate representation must be to enable the court to reach a better decision (better in the sense, presumably, of more informed and hence more calibrated to achieve the best outcome for the child) but that this may turn on the view that more needs to be known about what will be best for the child’s welfare, or that more needs to be known about what the child thinks and wants. The two are different things. I will argue that, in England and Wales, in practice, and perhaps contrary to expectation, it is a concern for the child’s welfare rather than his or her views which currently seems to predominate in such cases.

\textsuperscript{7} Guidance issued by the President of the Family Division, \textit{The Private Law Programme-Guidance for Courts on Parental Separation and Children’s Needs} (2005, DCA) at p 5.

\textsuperscript{8} See too, the views expressed in \textit{Mabon v Mabon and others} [2005] EWCA Civ 634 by Thorpe LJ at para 23: ‘It was simply unthinkable to exclude young men [aged 17, 15 and 13] from knowledge of and participation in legal proceedings that affected them so fundamentally’ and Wall LJ at para 44, in asserting ‘the need for the boys … to emerge from the proceedings (whatever the result) with the knowledge that their position had been independently represented and their perspective fully advanced to the judge’.
I suggest that this may be contrary to expectation because usually, discussions about separate representation start from the assumption that this in some way helps to fulfill the well-known requirement under art 12 of the United Nations Convention on the Rights of the Child (UNCRC) to

‘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, [such views] being given due weight in accordance with the child’s age and maturity.’

Art 12(2) goes on to require states in particular to provide the child ‘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.’ Article 9(2), which has received less attention, also provides that, in any proceedings concerning the separation of a child from his or her parents, ‘all interested parties shall be given the opportunity to participate in the proceedings and make their views known.’ It has been argued – surely correctly - that the child is to be regarded as an interested party.9

These provisions can be seen to establish a right which may be described as part of the participation, or empowerment, rights laid down in the Convention and in so doing, imply a right of children, as Jane Fortin has put it, ‘to convey to the courts their own perceptions of … family disagreements’.10 The United Nations Committee on the Rights of the Child has itself also regarded separate representation in this way. In reviewing the United Kingdom’s second report on its implementation of the UNCRC in 2002, the Committee expressed concern that

‘the obligations of article 12 have not been consistently incorporated in legislation, for example in private law procedures concerning divorce, … . In addition, the Committee is concerned that the right of the child

to independent representation in legal proceedings, as laid down in the Children Act 1989, is not systematically exercised. …’

It recommended that the United Kingdom ‘take further steps to consistently reflect the obligations of both paragraphs of article 12 in legislation, and that legislation governing court procedures and administrative proceedings (including divorce and separation proceedings) ensure that a child capable of forming his/her own views has the right to express those views and that they are given due weight.’

The focus on participation is underscored by the more detailed European Convention on the Exercise of Children’s Rights, not yet ratified by the United Kingdom. This Convention, which relates specifically to family proceedings, in particular those relating to residence and ‘access’, gives children the right to receive all relevant information, to be consulted and express their views, to be informed of the possible consequences of compliance with these views and of any decision, and to apply for the appointment of a special representative if those with parental responsibilities cannot represent the child due to a conflict of interest. Whilst it does not follow from the terms of either art 12 or the European Convention that these expect that a child’s wishes and feelings must be acceded to in preference to a decision based on welfare, it is clear that the drafters have in mind a ‘voice’ approach which enables the child’s views to be properly presented to the decision-making body.

The introduction of the European Convention on Human Rights (ECHR) into English law through the Human Rights Act 1998 has given further impetus to the argument that there may be a greater need than hitherto to accommodate children’s separate representation in litigation concerning their futures. Art 6 guarantees the right to a fair trial in the determination of one’s civil rights and obligations, and art 8 has been interpreted as having a procedural dimension so that where a person’s right to respect for family life is under threat, they must be given an adequate opportunity to participate in the decision-making process concerning control over the exercise of

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12 See articles 3-5.
their right. Although children are not mentioned in the Convention, it is clear that they enjoy the same rights under it as adults, and thus it is arguable that these two articles imply a right for children to be actively involved in decision-making affecting their civil rights and obligations or their right to respect for family life. The former President of the Family Division, Dame Elizabeth Butler-Sloss, has indeed suggested that, in the light of these provisions, we may expect to see an increase in the appointment of guardians ad litem – i.e. separate representation for children – in private law cases.

The legal basis of separate representation in England and Wales

At common law, parents have the right to conduct litigation on their child’s behalf unless there is a conflict between the parent’s and the child’s interests. In private law cases, a welfare investigation may be ordered by the court. This will usually be conducted by a ‘CAFCASS officer’ who will visit the family members and should usually talk to the child. The officer then reports to the court and may give evidence and be cross-examined as a witness. However, a child may also be separately represented in these proceedings through a variety of mechanisms. Section 10(8) of the Children Act 1989 enables a child to seek leave to apply for a s 8 order (i.e. an order for, usually, residence or contact, broadly equivalent to custody and access), which leave may be given if the court is satisfied that he has sufficient understanding

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14 In Re A (Contact: Separate Representation) [2001] 1 FLR 715, at paras 22, 23. For a full discussion of the potential implications of art 8 for children, particularly those in the public care system, see The Hon Mr Justice Munby, “Making Sure the Child is Heard: Part 1 – Human Rights” and “Part 2 – Representation” [2004] Family Law 338 and 427. See also C Blackburn, op cit (n 00 above) at p 19.
15 Woolf v Pemberton (1877) 6 Ch D 19.
16 Under s 7 of the Children Act 1989. In cases where child protection issues are raised, the court may also direct the local authority social services department to investigate, under s 37 of the Act. However, the authority are not obliged to take action in light of their findings: Nottingham CC v P [1994] Fam 18.
17 CAFCASS is the Children and Family Court Advisory and Support Service, staffed by social workers. CAFCASS officers may act in two guises – as ‘children and family reporters’ in private law cases, or as ‘children’s guardians’ in child protection cases. The latter, as noted above, represent the child; the former usually have an investigatory or supportive role (eg promoting conciliation or mediation to parents in dispute). See A Buchanan et al, Families in Conflict (2001, Policy Press) and A James et al, ‘Turn down the volume? – not hearing children in family proceedings’ [2004] CFLQ 189.
to make the proposed application. Under the Family Proceedings Rules 1991 (FPR),\textsuperscript{19} a child may bring or defend proceedings under the Children Act or the inherent jurisdiction if the court gives leave or if a solicitor acting for the child considers that the child is able to give instructions in relation to the proceedings. The court can override the solicitor’s opinion and decide that the child is not so competent\textsuperscript{20} although it has been said, judicially, that ‘in the 21\textsuperscript{st} century, there is a keener appreciation [than hitherto] of the autonomy of the child and the child’s consequential right to participate in decision making processes that fundamentally affect his family life.’\textsuperscript{21}

Furthermore, the CAFCASS officer appointed in the proceedings must consider whether it is in the best interests of the child for him or her to be made a party and advise the court accordingly.\textsuperscript{22} FPR r 9.5 then provides that, if in any family proceedings it appears to the court that it is in the best interest of any child to be made a party to the proceedings, the court may appoint a CAFCASS officer or (if he or she consents) some other proper person, ‘to be the guardian ad litem of the child with authority to take part in the proceedings on the child’s behalf.’\textsuperscript{23}

The appointment of a guardian ad litem under this rule is the main mechanism utilized where a court reaches the view that the child’s interests cannot adequately be identified or served either by means of the evidence and arguments presented by the parties to the proceedings, or the information provided by the CAFCASS officer in his or her report to the court. It is important to understand that the role of the guardian ad litem in such a case, and the use of the ‘tandem model’, is welfare-focused, or, as Thorpe LJ has put it:

\textsuperscript{19} (As amended) r 9.2A.
\textsuperscript{20} Re CT (A Minor)(Wardship: Representation) [1993] 2 FLR 278, CA. In such a case, it may appoint a guardian ad litem for the child under r 9.5 of the FPR (below) or continue such appointment where it has already been directed: Re N (Contact: Minor Seeking Leave to Defend and Removal of Guardian) [2003] 1 FLR 652.
\textsuperscript{21} Per Thorpe LJ in Mabon v Mabon and others [2005] EWCA Civ 634 at para 26.
\textsuperscript{22} Rule 4.11B(5)(6)).
\textsuperscript{23} Courts may appoint individual solicitors as ‘other proper persons’ to act as guardians ad litem, or NYAS, the National Youth Advocacy Service (a charitable voluntary organization). These are both likely to be utilized where there is either some problem with using CAFCASS officers (perhaps a lack of an available officer or the possibility of further delay) or the judge knows and has a particular faith in the solicitor or has experience of NYAS’ services.
‘essentially paternalistic. The guardian’s first priority is to advocate the
welfare of the child he represents. His second priority is to put before
the court the child’s wishes and feelings.’

In cases where these priorities conflict, the child can seek leave to dismiss the
guardian and instruct the lawyer directly to present his wishes and feelings, but only
where he is sufficiently ‘competent’ to do so.24

But a key question arises: how does the court determine when it is appropriate to
direct separate representation? Some light is shed on this by some empirical evidence,
by the case law and by the practice guidance issued from time to time on the use of
separate representation in private law proceedings, most recently in what is known as
a ‘President’s Direction’, issued in 2004.

Empirical evidence of the use of separate representation

There are no reliable figures indicating the extent of use of separate representation of
children in private law proceedings in England and Wales and we are currently
dependent upon three sources of data. The first is a study25 by two district judges, who
examined the use of r 9.5 in Leeds (a large city in northern England) over a 12 month
period (2001-2). They undertook the study because it had been suggested that ‘too
many’ orders for separate representation were being made in their court. They found
that over the requisite period, 34 appointments under r 9.5 were made out of a total
number of 465 applications for s 8 orders, representing some 7.3% of cases.26

Another, unpublished, set of data shows the number of CAFCASS appointments27
under r 9.5 made over a given period. These reveal that there are areas of the country
which appear to make much more use of r 9.5 appointments than others. ‘High use’
areas (Yorkshire/Humberside, the North West and the West Midlands) appear to use r

24 See Mabon v Mabon and others [2005] EWCA Civ 634.
Law 265.
26 The authors rightly noted that comparing the number of appointments with the number of
applications is a crude device for attempting to measure the degree of exposure to r 9.5 in such cases,
but we would agree that it is the best mechanism available. It should be noted that the Leeds research
was dependent upon CAFCASS data to identify the relevant cases. In other areas where non-
CAFCASS appointments are made, CAFCASS would not have data on such cases and so reliance on
their figures alone would not produce an accurate picture of extent of use.
27 That is, appointments of CAFCASS officers to carry out the role of guardian ad litem.
9.5 in up to around 10% of cases, compared with what medium use areas (such as the South West, the West and the East Midlands), at around 5%, and low use areas (such as the North East and East) at around 2%. These data, of course, do not tell us what would be the ‘right’ proportion of cases separately represented.

Finally, a research team at Cardiff University,²⁸ as part of an in-depth qualitative study, collected information via postal questionnaires from 420 family solicitors in England and Wales about their experience of separate representation under r 9.5. Seventy-five per cent (315) had been involved in a r 9.5 case, but few had been involved in more than five such cases during their careers.²⁹ Only 16% had experienced between 5 and 10 cases and only 2% had been involved with more than 20 cases. Reflecting the geographical variation noted above, those practising in the ‘high use’ areas were more likely to report having handled more cases.

**Reasons for directing that the child be separately represented**

There is also only limited data on the reasons the court has for directing that a child requires separate representation. If the main motivation is to ‘hear the voice of the child’ one would expect that the child’s age would be a crucial factor, with older children being more likely to be separately represented than the very young. But the evidence is not clear-cut on this point. CAFCASS figures³⁰ show that in 2004, the age breakdown of children separately represented by CAFCASS was as follows:

**Number of children separately represented, by age**

<table>
<thead>
<tr>
<th>Age of child</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>under 1</td>
<td>23</td>
</tr>
<tr>
<td>1 – under 5</td>
<td>126</td>
</tr>
<tr>
<td>5 – under 10</td>
<td>320</td>
</tr>
<tr>
<td>10 to under 16</td>
<td>199</td>
</tr>
<tr>
<td>16 or 17</td>
<td>11</td>
</tr>
</tbody>
</table>

²⁸ M Murch, G Douglas, L Scanlan, C Miles, J Doughty and N Smalley. The study is ongoing and this paper presents the first detailed findings from it.
²⁹ 86% had been in practice for more than 10 years.
³⁰ Unpublished. But note that the data relate only to appointments taken on by ‘children’s guardians’, not ‘children and family reporters’ and so do not present a complete picture of CAFCASS activity under r 9.5.
These data show that just under a third (210: 30%) of the children separately represented were aged ten or over, but nearly half (320: 47%) were aged between five and ten. This age group could arguably be seen as on the cusp of being regarded as ‘old enough’ to express a view that the court should take into account (but not old enough to represent themselves without a guardian ad litem) and thus as demonstrating a concern by the court to ‘hear the voice of the child’. However, if we compare these figures with national statistics showing the age of children whose parents divorced between 1989 and 1999, we find that again, the largest group was aged between five and ten with about a third aged over ten, and these patterns have been consistent over the years. The CAFCASS figures probably therefore simply reflect the same pattern rather than any particular emphasis on ‘voice’ as the predominant motive for appointment. In slight contrast, just on half (60 out of 121) of the solicitors in the questionnaire survey who answered the relevant question considered that the usual age range for separate representation was ten and over. They commented that it is more likely to be directed where the child is of an age and maturity to express a view:

‘Children are of an age where their views will carry weight.’

‘Because the child is Gillick competent and disagrees with some elements of the case.’

‘Age and maturity of the child and the child’s wish to become a party.’

Bellamy and Lord categorized the cases in their sample according to five main kinds of factual circumstances. The first category was ‘intractable’ cases where proceedings
had been ongoing for an extended period of time with no long-term resolution in sight. This was also the type of case identified by the majority of the solicitor respondents as the main trigger for a r 9.5 appointment. In these cases, they reported that parents often become entrenched in their views, locked in a battle that may make them less responsive to their child’s wishes and feelings: 33

‘Where courts are faced with serious case of implacable hostility, parents’ intractable position means r 9.5 is the only way forward.’

‘Children’s voices are being lost amongst adults’ hostility and inability to prioritise.’

‘In almost all of my cases, r 9.5 has been involved when there is implacable hostility and the children appear to have been exposed to emotional abuse as a result. Generally, the situations appear to relate to families where the children have been damaged, sometimes seriously, by the parents’ attitude to each other.’

The second category concerned cases with a significant foreign, ethnic or cultural element, especially where there was a risk of, or actual, child abduction. The third involved cases where a parent had mental health difficulties which impacted not just on the parents’ ability to care for the child but on the absent parent’s contact with that child. The fourth category concerned cases where there was either an allegation of physical or sexual abuse of a child or there had been violence between the adults which had impacted on the child. Drugs and alcohol abuse also featured in some of these cases. Finally, some cases concerned care of the child being passed amongst extended family members, with multiple applications being brought about the child by different such members. One might group these categories together as being ‘complex’ cases, and complexity was also frequently mentioned by the solicitor respondents as a reason for directing separate representation:

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33 As noted below, this is a view echoed strongly in the case-law.
‘The realisation that some cases are so complex and difficult that a referral to CAFCASS alone and a report will not suffice.’

‘Complicated issues – residence abroad, immigration issues and religious issues.’

‘Complexity of cases especially where expert evidence from psychologists is required.’

Bellamy and Lord recognized that such categorization does not, of itself, identify why separate representation was considered appropriate by the relevant judge. They suggested that this will turn on the ‘perceived seriousness of the case and the welfare needs of the child’.

One factor that might influence a decision to make an appointment, in their view, is the greater ability of a guardian ad litem to put in the extra time and work that is needed to move the case forward. This suggests that an important feature of the use of a guardian is to enable social work (be it conciliation, mediation, counseling or support of other kinds) to be undertaken during the proceedings with a view to helping the parties come closer to an agreement with which each can live. It also underscores the development of the ‘managerial’ court which pro-actively governs the progress of the case.

The case-law
Reported case-law can also shed a little light on the purpose of using r 9.5, although of course, caveats must be entered – case-law is never representative of the norm but relates only to the most unusual and therefore report-worthy issues coming before the courts.

Welfare as the primary rationale
Conflict of interests

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34 At p 267.
35 See also Guidance issued by the President of the Family Division, The Private Law Programme (2004, DCA). A more robust view is proffered by C Blackburn, op cit (n 1 above) at p 22: ‘Sometimes it is a case where perhaps the District Judge thinks that the guardian ad litem will “bang heads together” to produce the miracle result.’
Examination of the case-law suggests that a major motivation for the use of separate representation is to ensure that the child’s ‘true’ interests will be properly revealed to the court – a ‘welfare’ stance. In particular, there is often a concern that they should not be lost in the face of the evidence and arguments being presented by the parents (or, in some instances, such as medical cases, for example, by united parents against the medical professionals). A decision by Wall J, Re H (Contact Order)(No 2) illustrates the approach. Here, the father suffered from Huntington’s disease, which had adverse effects on his mood and personality. The father enjoyed generous contact with the children, now aged eight and five, until he threatened to kill himself and them. The police rescued the children who were unharmed and unaware of the danger they had been in. The mother refused further direct contact, a decision upheld by the court and on appeal. His Lordship considered that in a case as difficult as this one, consideration should have been given to the children’s being separately represented and, where appropriate, expert advice being sought on their behalf. Given the young age of the children, the rationale for such representation must have been to ensure that all sides of the question of whether direct contact could be safely and appropriately ordered could be explored, and a concern that the court would not be adequately informed by reliance on the parties or the CAFCASS officer’s report alone.

‘Implacable hostility’

A similar concern can be seen in Re A (Contact: Separate Representation). The mother alleged sexual abuse by the father when he sought staying contact with their four year old daughter. The Court of Appeal considered that the antagonism between the parents was such that neither could be regarded as able to put the interests of the child first. This kind of ‘implacable hostility’ is a feature of several of the reported cases.

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37 See also M v M (Parental Responsibility) [1999] 2 FLR 737, (the father, partly as a result of a motor-cycle accident, had severe intellectual impairments leading to aggressive behaviour. Three-year old child separately represented in proceedings brought by the father for parental responsibility and direct contact); Re W (Contact: Parent’s Delusional Beliefs) [1999] 1 FLR 1263, (father apparently suffering delusional beliefs, but no up to date psychiatric assessment of him available. Children, aged 10 and 11, made parties with the Official Solicitor to instruct a consultant child psychiatrist to report on the effects of contact on them).
38 [2001] 1 FLR 715, noted above.
But it is not immediately obvious why the child needs to be separately represented simply because one or both parents is highly antagonistic to the other side’s case. One might expect that the two radically opposed positions being advocated will result in the court acquiring a full picture of the situation – is this not the very basis of the adversarial system, after all? But the most likely explanation seems to be that this is a variant on the conflict of interests concern and the court wishes to ensure that a truly rounded picture of the circumstances and requirements of the child is presented to it. This suggests a recognition that standard court processes may be inadequate to deal with some children cases, a point to which I return in my conclusion.

**Welfare overriding the child’s own wishes**

The importance of the welfare rationale can also be seen in a number of cases where it is clear that the court’s fear is that one of the parents (usually the parent with residence) may have influenced the child’s views and that these cannot therefore be taken at face value. An example may be seen in *Re W (Contact: Joining Child as Party)*. The child, aged seven when the proceedings began, expressed growing reluctance to have contact with his father and the district judge ordered that he be joined as a party and represented by a local solicitor, with an independent social worker instructed to report. On this social worker’s advice, the judge made an order for no contact. The Court of Appeal considered that the boy had ‘a right to a relationship with his father even if he does not want it. The child’s welfare demands that efforts should be made to make it possible that it can be.’ The Court agreed with the trial judge that, given the level of the child’s expressed concerns and upset over contact, something ‘needed to be done’ but the tenor of the judgment is towards overcoming the child’s reluctance to see his father and thus to reaching a decision which better fits the Court’s idea of what is in his best interests rather than what he himself might sincerely want. As Adrian James et al have put it in commenting on this dictum, it ‘demonstrates the power of the language of welfare to deny children’s agency in expressing their views.’

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39 [2001] EWCA Civ 1830, [2003] 1 FLR 681. It may be noted that, in the face of the child’s continuing refusal to have contact with the father, the latter was permitted to withdraw his application for contact in *Re O (Contact: Withdrawal of Application)* [2003] EWHC 3031 (Fam) [2004] 1 FLR 1258.

40 At para 16.

41 A James, A James and S McNamee, ‘Constructing Children’s Welfare in Family Proceedings’ [2003] Fam Law 889 at 892. They make the same point in slightly different language in ‘Turn down
the greatest collective experience of representing children, NYAS (the National Youth Advocacy Service), has reported that children may be very reluctant to express their opinions because they feel pressured by their parents.\textsuperscript{42}

\textbf{‘Voice’ as the prime rationale}

It would not be correct to claim that a court never or rarely seeks to use separate representation to find out the wishes and feelings of the child and there are certainly instances in the case law of this being the prime, or a main, motivation. Just as the court may consider that a child is being pressured by a parent into asserting that he wishes, or does not wish, to see a parent and that separate representation is necessary to get to the underlying truth and thus the child’s best interests so too, the courts have also wanted the child to be separately represented so that they do indeed find out what the child really wishes. In \textit{Re L (Minors)(Separate Representation)}\textsuperscript{43} the Court of Appeal upheld the appointment of a guardian ad litem for three children, aged 14, 12 and 9, who lived with their father, the mother having left home. The father wished to take them back to Australia and the court welfare officer\textsuperscript{44} considered that she could not adequately present the children’s views to the court. Butler-Sloss LJ noted that there was an ‘overall need to ascertain what the children genuinely feel about their future in the present situation’.\textsuperscript{45}

Interestingly, whilst separate representation is rarely directed in cases of international child abduction,\textsuperscript{46} these constitute one of the main categories in the private law jurisprudence where the child has been joined as a party because the court has

\footnotesize{\textsuperscript{42}E Fowler and S Stewart, ‘Rule 9.5 Separate Representation and NYAS’ \cite{Fowler2005} Fam Law 49. Our research with solicitors confirmed this view. As one commented: ‘They [guardians ad litem] help to define the issues in a child-centred way where the child can be helped to say what they have been prevented from saying by pressure from a carer or other adults.’}

\footnotesize{\textsuperscript{43}[1994] 1 FLR 156.}

\footnotesize{\textsuperscript{44}The forerunner of CAFCASS officers.}

\footnotesize{\textsuperscript{45}Ibid at p 160 C-D.}

\footnotesize{\textsuperscript{46}Re S (Abduction: Children: Separate Representation) \cite{SvB2005} [1997] 1 FLR 486 – such representation to be exceptional. See also \textit{S v B} \cite{SvB2005} EWHC 733 (Fam) where the President considered that it had been unnecessary to direct separate representation for a sibling of the child who was the subject of abduction proceedings, since there had been no substantial divergence of interest apparent between the sibling and the child’s mother (the abductor): para 67.}
concluded that the child’s voice does need to be heard. Since the child’s objection to returning to the state of habitual residence is a ground for not ordering the child’s return under the two international conventions dealing with this issue, one might expect that there could well be situations where it is necessary to ‘hear’ the child more directly than through the welfare report. Moreover, Brussels IIR, which governs jurisdictional questions within the European Union (apart from Denmark), requires that the child be given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or maturity. Finally, the paramountcy principle does not apply in such cases, leaving more space, perhaps, for the court to focus on other concerns. But it is also important to note that in several of these cases, the child had taken the initiative by approaching a solicitor him-or herself and applying for party status. In Re J (Abduction: Child’s Objection to Return) the children were returned to Croatia but their father broke undertakings he had given not to harass them or their mother and the mother removed them to England. The father again sought their return. The CAFCASS officer had interviewed the children but did not attend the hearing and the judge dismissed the 11 year old elder child’s objections and ordered the return. The mother was refused leave to appeal but the child sought legal advice and his solicitor successfully applied to have him joined in the proceedings. The Court, while stressing that separate representation is only to be directed where the court is satisfied that the child has an independent viewpoint that will not otherwise be placed before the court, also noted that it may be difficult for an abducting parent to advance arguments based on the child’s objections for fear of being accused of influencing or pressuring the child into objecting. Either way, the Court’s concern, as we have noted above, was to ensure that a full picture of the circumstances, here including the child’s wishes, was presented to the court. But the question will also arise whether the child should be a party instructing his or her own solicitor, or should have a guardian ad litem appointed to do so. In Re HB (Abduction: Child’s Objections) (No 2) the court ordered the return of the children

47 Hague Convention on the Civil Aspects of International Child Abduction, Art 13(b); European Convention on Recognition and Enforcement of Decisions concerning Custody of Children, Art 10(b) – the latter requires the court to be satisfied that it is also manifestly no longer in the child’s welfare to enforce the original order.
to Denmark but the 11 year old girl refused to board the plane, and applied to become a party to seek leave to appeal against the return order. Her application and appeal were successful\(^{51}\) and the case remitted to Hale J, who had made the original return order. Both she and the Court of Appeal condemned the child’s parents for having left the child to carry the burden of the litigation, and noted that the child was not really mature enough to participate in the proceedings without a guardian.

Summing up the case-law, it appears that even where the need to identify the child’s wishes and feelings prompts separate representation, the court’s agenda is a broader one. The overall concern is to obtain a complete picture of the situation, where necessary presented by someone who is independent of the parents’ positions. And this will often be motivated less by a concern to hear the child than to explore conflicts of evidence or to hear arguments that neither adult party wishes to put forward. This must be particularly the case where the child is very young or incapable of expressing a view. Thus, we can also find instances of separate representation for infants,\(^{52}\) or children with learning difficulties.\(^ {53}\) The aim must be to reach the most informed decision and thus, one must assume, the decision most likely to be conducive to the child’s welfare. This aim is reflected in the most recent practice guidance on the issue, emanating from the President of the Family Division.

The President’s Direction\(^ {54}\)

The President’s Direction followed (some time after) a report of a multi-disciplinary advisory body, the Children Act Sub-Committee (CASC) of the Lord Chancellor’s Advisory Board on Family Law.\(^ {55}\) The Committee was charged with the task of reviewing how to make contact between non-resident parents and children work more

\(^{51}\) Re HB (Abduction: Children’s Objections) [1998] 1 FLR 422.

\(^{52}\) See e.g. R (D) v Secretary of State for the Home Department [2003] EWHC 155 Admin [2003] 1 FLR 979 (mother challenging refusal of prison authorities to keep her and child together in mother and baby unit); Re C (Welfare of Child: Immunisation) [2003] EWCA Civ 1148 [2003] 2 FLR 1054 (fathers seeking specific issue orders to require mothers to have children immunized); Re R (IVF: Paternity of Child) [2003] EWCA Civ 182 [2003] 1 FLR 1183 (man seeking parental responsibility in respect of child conceived through IVF after he and mother had split up).

\(^{53}\) Re P (Section 91(14))(Guidelines: Residence and Religious Heritage) [1999] 2 FLR 573, CA (orthodox Jewish parents of child with Downs Syndrome challenging foster placement with non-Jewish carers).


effectively.\textsuperscript{56} It noted a strong feeling amongst respondents to its consultation paper that children should be separately represented more often in difficult cases, and recommended accordingly. Nonetheless, the President made clear in her Direction that the decision to make a child a party is only to be taken in cases of ‘significant difficulty’, with the child’s welfare to be regarded as the court’s ‘primary consideration’ in making the decision, taking due notice of the risk of delay and other adverse factors. The criteria setting out when the decision might be appropriate are as follows:

‘3.1 Where a CAFCASS officer has notified the court that in his opinion the child should be made a party …
3.2 Where the child has a standpoint or interests which are inconsistent with or incapable of being represented by any of the adult parties.
3.3 Where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute.
3.4 Where the views and wishes of the child cannot be adequately met by a report to the court.
3.5 Where an older child is opposing a proposed course of action.
3.6 Where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child.
3.7 Where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court.
3.8 Where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of a CAFCASS officer.
3.9 Where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position.
3.10 Where there is a contested issue about blood testing.’

\textsuperscript{56} This is an ongoing issue and has received much publicity. It is currently the subject of draft legislation, the Contact and Adoption Bill, 2005.
These criteria bring together the range of particular instances which have prompted courts to direct separate representation over the years, with evidence of new thinking in the light, perhaps, of a more ‘voice’-based approach. Certainly, paragraphs 3.2, 3.4 and 3.5 all make reference to the child having a position or views contrary to those being proposed by the adults. They therefore suggest a sensitivity to the need to hear the child’s wishes and feelings and to ensure compliance with art 12 and the ECHR. But the other examples concern either the complexity of the case or the welfare of the child and largely reflect the older practice and assumptions of the courts.

It has been argued by Charles Prest, the former legal director of CAFCASS, that underlying all the guidance one can identify three general principles – the need for someone to orchestrate an investigation on behalf of the child, the need to ensure an argument is put that might not otherwise have been put, and ‘(rather less clearly defined) some sort of recognition that at some point it is “right” for an older child to be allowed to participate in the proceedings in this way.’ As Prest comments, none of the guidance and individual experience of using it tells us whether it is in fact effective and beneficial in helping a child get through the proceedings, still less in determining the medium and long-term outcomes for the child and the family.

What then, might be said in answer to the question: what does separate representation bring to the proceedings that could not be accomplished without it?

**The benefits of separate representation**

Separate representation may be beneficial to the court, in enabling it to produce a ‘better’, more informed decision, or to the CAFCASS officer, in enabling him or her to work more effectively in the proceedings, or to the child, in enabling his or her wishes and feelings, or interests, to influence the court’s decision.

Judith Masson and Maureen Winn Oakley have summed up such advantages, in the context of public law proceedings, but which appear to be equally applicable to the private law sphere, as follows –

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‘Although the guardian ad litem does not have party status, he or she has the power to make applications, call evidence and to seek to appeal. Without the guardian’s involvement the court would not be able to have an adequate picture of the child’s interests. Guardians ad litem can do these things because they stand in the place of the child in the litigation and instruct the child’s solicitor. The child’s party status shapes the court process even though it may not give the child active participation in it. Through the involvement of the guardian ad litem it enables the court to have a more complete picture and more active presentation of the child’s interests than would be possible if the court only had access to reports from a court welfare officer.’

Our solicitor respondents reflected this opinion:

‘In cases where the a child is separately represented the issues are usually examined in greater depth, often with expert evidence which can lead to a greater understanding on the part of the parents as to why a particular course of action is being recommended. There is a greater chance of agreement being reached and adhered to.’

‘Presents matters more independently without being so bogged down in parents issues. It is easier for the court to consider what is right for the child with input from the Guardian in this way.’

It has also been suggested by professionals that appointing a child’s guardian ad litem is done as a last resort, when everything else has been tried and the judge (and CAFCASS officer) have run out of other ideas. As some solicitors commented:

‘Implacable hostility has set in, court proceedings have been exhausted over 3-5 years with no success.’

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58 Op cit p 117.
‘Usually, after many years of either continued litigation or numerous applications to the court regarding contact, the case reaches a stalemate and the judge has run out of options, patience or both!’

Separate representation enables the guardian to continue to work with the family over a period, extended if necessary, to bring them either to a compromise solution to their dispute, or to acceptance of the status quo. For example, the officer may, as Jonathan Whybrow has identified, investigate allegations of abuse and either shed light on them or seek to bring the person making them to a realization that they are groundless, from which that person can move on to address the question of contact etc. Or the officer may, as Bellamy and Lord noted, be able to devote additional time and effort, not available within the constraints of investigation and report writing, to help mediate between the parties. This is a view held strongly by both Lord Justice Wall and Mr Justice Munby, particularly as a response to ‘intractable’ disputes. It is also a main aim of the Government’s most recent plans regarding the handling of contentious contact disputes, which seek to shift the emphasis of CAFCASS work from report-writing to active engagement with families. However, these professionals have all felt that cases appropriate for a r 9.5 appointment should be identified much earlier in the process, instead of as a last resort. It is possible that the President’s Direction, spelling out clearly the kinds of cases for which r 9.5 may be suitable, has in fact given judges and CAFCASS officers the confidence to use r 9.5 as a first choice rather than a last resort.

But there is an additional dimension which party status for the child and representation via the guardian ad litem can give, and that is to change the family dynamics and to empower the child. It has been strongly argued by professionals that the CAFCASS officer (or other guardian) has an enhanced status in the eyes of the

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60 See Bellamy and Lord, op cit at p 267 for the view that the extra time devoted by r 9.5 guardians ‘is more likely to lead to a better final outcome’. In the solicitor survey, this was a view expressed by those practising in the ‘high use’ areas but not otherwise.
63 But note the concern about excessive use discussed below at p 000.
parents when they know that that person has been appointed by the court to represent their child. The recommendations of the guardian may be more readily accepted by parents, as a ‘second opinion’, even if they are the same as those previously put forward by a CAFCASS officer when acting as the children and family reporter. The child is said to assume centre-stage in such a case, with the parents more readily persuaded to shift ground and to focus on his or her interests. Thus, two solicitors commented:

‘The court is helped to maintain its child-centred approach. There can be a tendency for one or other parent to gain the sympathy of the court because of their own needs [or] difficulties and for parents to pursue self-interested ‘side issues’ in which the needs and interests of the child may become lost. The child’s representative keeps the court’s eye on the ball.’

‘It gives more leverage to the judge to press the parents to adopt what is clearly in the child’s interests as opposed to their view thereof.’

It has to be said that it is also important to recognize that the ‘child’s voice’ may in fact play a more significant part in the process when the child is separately represented, even if the court’s motivation for so ordering was welfare-focused. Of 358 open-ended responses to the solicitors’ questionnaires, 137 specifically mentioned giving a voice to the child as a benefit to the child. For example:

‘The children have been amazed that someone takes their views seriously and will be speaking to the judge for them.’

‘Children are so often unable to articulate their feelings at short notice, they often sit on the fence or say things to please the parent with whom they reside, and separate representation gives them a greater chance to be heard accurately.’
Research by the National Youth Advocacy Service into a sample of their own cases certainly suggests that the child’s input can affect the court’s decision. Most significantly, they report that in 89% of the 52 cases reviewed, the reports of the child’s views coincided with the outcome of the proceedings and in 95% of cases the child’s views had a significant impact on decision making. In NYAS’ opinion, the child-centred nature of their work, and their very extensive direct work with the child, enabled the child’s views to become

‘an active dynamic in the process of conflict resolution and through the process of consultation within a safe environment, the children were able themselves to become agents of change rather than the passive subject of intractable disputes.’

The disadvantages of separate representation

In contrast to these positive views, we should also note the possible disadvantages of providing separate representation for the child. First, as has already been pointed out above, there is the likelihood of added delay and cost to the proceedings. Secondly, there is a risk that being directly involved in the case may be stressful to the child, and may even make the child the focus of parental hostility. One-fifth of solicitor respondents to the questionnaire survey considered that rule 9.5 can create difficulties for the child, including being embarrassed at having to talk to yet another professional:

‘The child very often has to meet another professional. ... The signal given to the child is that this is not over and that even worse, there may be something wrong with them. So it can have a negative impact.’

‘Having yet another professional, such as a solicitor, prying into their lives.’

There was also recognition amongst the solicitors that the child can be placed under a considerable onus of responsibility for the outcome of the proceedings. Suddenly, the child ‘has to accept a central role in the dispute’. This can serve to cause anxiety as

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64 Above n 00.
well as to raise expectations where the child may believe that the judge will make a
decision based entirely on their view. This appeared to be a double-edged sword in
that a manipulative child could use this against their parents whilst a manipulated
child could be pressurised into repeating allegations or reciting one parent’s viewpoint.

Respondents acknowledged that voicing a different opinion to that of the resident
parent could ‘increase tensions in day to day living’ or mean that the child may be
‘got at’ for saying the wrong thing. Thus, the risk of introducing conflict into the
parent-child relationship emerged as a potential problem of separate representation:

‘It can bring out issues between them and a parent or parents which have
not surfaced before. These can then be difficult to get over once the
proceedings have ended; it can be a Pandora’s Box.’

‘I fear in some cases it empowers a manipulative child to vacillate and
bargain.’

Proceedings may become more complicated, with an adversarial contest being turned
into a three-cornered fight.

Finally, it is clear that, because r 9.5 envisages that the judge should generally first
seek to appoint a CAFCASS officer to act as guardian ad litem, ‘too ready’ a resort to
directing separate representation risks placing an intolerable strain on CAFCASS’
resources. Indeed, there are already signs of concern that this is happening. The
President issued guidance\(^{66}\) in February 2005 to attempt to curtail what was described
as a ‘dramatic increase’ in the number of guardians in private law cases.\(^{67}\) The
guidance limits the ability of district judges (who sit at the lowest tier in the county
courts) to order separate representation and requires consideration to be given to
transferring the case up to the High Court.

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\(^{66}\) Guidance from the President’s Office, ‘The Appointment of Guardians in Accordance with
Rule 9.5 and the President’s Practice Direction of 5 April 2004’ 25 February 2005.

\(^{67}\) Of our solicitor respondents answering the question, 60% considered that the volume of r 9.5
cases had increased since the President’s 2004 Direction.
Conclusion
The concern that the court will not hear a sufficiently robust presentation of the child’s interests unless he or she has independent status undermines two assumptions made about private family law proceedings in the English system. The first is that the court’s role is inquisitorial rather than adversarial. It has been said, for example, that the court is to play an active part in the proceedings rather than act as umpire between the parties. It has the power to set the timetable for the proceedings, control the use of experts, determine how evidence is to be heard and make orders of its own motion. But none of this, it seems, is apparently enough to ensure that the child’s interests are adequately identified in every case. Moreover, what may be regarded as the key ‘inquisitorial’ element – the investigation and report by the CAFCASS officer – may apparently be insufficient as well. Secondly, as noted above, even if an ‘adversarial’ rather than inquisitorial model of proceedings is accepted, it seems that this may fail to convey to the court enough of the true picture of the child’s interests to enable it to reach the best outcome for the child.

It seems, too, that, in England and Wales at least, the purpose of the courts in directing separate representation appears to be two-fold and primarily welfare-focused. First, if the judge does have to make the final decision, he or she wants to do so in the light of the best evidence, in order to reach a decision better calibrated to the child’s welfare. But secondly, the guardian ad litem is seen as someone who can help bring the parents to a settlement or acceptance of an outcome and thus to put an end to what has usually become particularly intractable litigation.

Finally, it may be suggested that in their use of separate representation the courts have been feeling their way to a broader, more metaphorical and more sophisticated understanding of the need to ‘hear’ the child than is encapsulated in the literal meaning of art 12. The clue may be seen in the reference in the President’s direction to the situation where the child’s ‘standpoint’ is inconsistent with that of the adult parties. If we think of the child as having a standpoint, rather than a view or even perspective, it enables us to place ourselves metaphorically in that child’s position and

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69 Cf. Masson, op cit at 248-249.
70 Para 3.2.
to see, and feel, what it is like to be that child. The age or maturity, the capacity or articulacy of the child, are irrelevant in this process. The point is to focus on the issues in the case from the position of the child, rather than to focus on the child through the eyes of the adults.  

It has been argued by Carol Smart et al that when adults attempt to do this, they ‘simply project on to children what they remember of their own childhood. So they do not see the child in question, but an image of themselves as children.’ This ‘asymmetrical reciprocity’ is taken as a warning to adults not to ‘fool themselves that they know what children think or want by pretending that they can really take the standpoint of children’. Smart and her colleagues argue that it is therefore all the more important to accord children respect by listening to what they have to say and indeed, this should be a fundamental part of any enquiry into a child’s interests. But it does not follow from this reminder that we should not even attempt to turn our gaze away from looking down at the child from above, as it were, to looking at the child as just as significant a participant and protagonist in the proceedings as the adults.

In giving the child a status in the proceedings equal to that of the adults who are litigating over him or her, the courts are clearly attempting to balance out the competing interests of all those involved in the case. This is not only compatible with international human rights law but takes us a step beyond existing formulations of that law, with a new focus on ensuring that there is ‘a voice for the child’ in private law proceedings, rather than that ‘the child’s voice’ is heard. But it must be questioned whether this can be fully achieved within the confines of the existing family justice system in England and Wales, with its increasing emphasis on the ‘managerial court’. A more far-reaching conclusion therefore suggests that existing processes also need to be fundamentally re-thought in order to achieve the best outcomes for all the children whose parents resort to the courts to resolve disputes over their upbringing.

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71 And see Wall LJ in Mabon v Mabon and others [2005] EWCA Civ 634 at para 43: ‘My difficulty … is that the judge seems to me, with all respect to him, to have perceived the case from the perspective of the adults’.
73 Whether enough is being done, or contemplated, to cater for the estimated 90% of families who do not resort to the courts on separation (DFES et al, op cit, Supporting Evidence para 9), is a separate question, of course.