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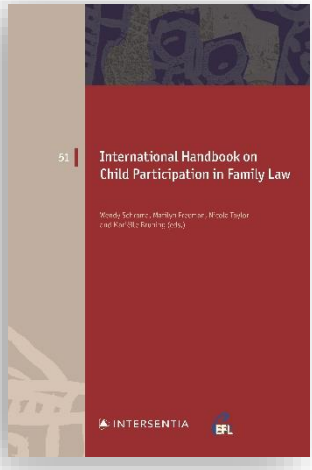

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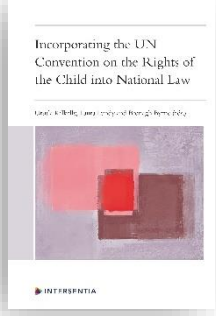

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ENGLAND AND WALES

Marilyn Freeman and Nigel Lowe

1. INTRODUCTION

In mid-2018 England and Wales had an estimated population of 59,115,800,[1] of which 12,584,403 (21%) were children aged 0–18 years.[2] In 2017 there were 101,669 divorces of opposite-sex couples in England and Wales (the lowest

[1] Office for National Statistics, https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2018.

[2] Population estimates: Persons by single year of age and sex for local authorities in the UK, mid 2018 MYE2-All; Office for National Statistics, above n. 1.

since 1973), 338 divorces of same-sex couples,[3] and 1,217 dissolutions of civil partnerships.[4] Between 2008 and 2018[5] there was a 25.8% increase in the number of people who live together as a family without being married to each other, making this the fastest-growing family type in England and Wales and, indeed, the UK as a whole. Given that there is an increased likelihood that such families will break down as against married couples,[6] the fact that there are less divorces does not necessarily mean there are less family breakdowns. Although there are no statistics on the breakdown of family relationships outside marriage or civil partnership, it is clear that the 3.9 million children who are part of the 2.5 million separated families in England, Wales and Scotland[7] are directly impacted by the decision-making processes which take place about their post-separation care arrangements. If those with parental responsibility for the children are unable to agree what these arrangements should be, the decisions will be made through agreement in mediation or some other form of dispute resolution, or by the court in judicial proceedings.

England and Wales has a Family Court which deals with all family cases, including *all* those concerning the upbringing and status of children except those invoking the inherent jurisdiction of the High Court[8] and international cases concerning applications relating to child abduction and matters of jurisdiction, recognition and enforcement under the 1996 Hague Protection of Children Convention. These latter cases are heard by the Family Division of the High Court. Whenever a court decides an issue relating to a child's upbringing, its paramount consideration is the child's welfare.[9]

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3 Divorces in England and Wales: 2017. Annual divorce numbers and rates, by duration of marriage, sex, age, previous marital status, and to whom granted and reason.

4 Civil partnerships in England and Wales: 2017 Annual statistics on formations and dissolutions of civil partnerships analysed by the sex, age, and previous marital status of the couples and the place of registration.

5 https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2018.

6 HM Government, *State of the Nation Report: Poverty, Worklessness and Welfare Dependency in the UK*, May 2010, p. 50; A. Goodman and E. Greaves, 'Cohabitation, marriage and relationship stability', Institute for Fiscal Studies Briefing Note BN107, 2010, at [12]; Marriage Foundation (2015) *Get married BEFORE you have children*, https://marriagefoundation.org.uk/wp-content/uploads/2019/09/MF-paper-Get-married-before-children.pdf.

7 These statistics relate to 2016/17. In *Estimates of the separated family population statistics data for April 2014-March 2017* (17 April 2019), the Department for Work and Pensions defined a separated family as one resident parent, one non-resident parent and any biological or adopted children they have between them who are either under 16 or under 20 and in full-time non-tertiary education.

8 The inherent jurisdiction is based on the sovereign's power to protect those such as children who are unable to protect themselves. It has no statutory foundation and can be invoked as a supplementary jurisdiction.

9 Children Act 1989, s 1(1).

2. STATUTORY PROVISIONS

2.1. DOMESTIC PRIVATE CHILD LAW PROCEEDINGS

There is no mandatory provision governing children's participation in domestic private child law proceedings. However, by section 1(3)(a) Children Act 1989, the court must have regard to the 'ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)'. The Act is silent on how these wishes and feelings should be ascertained. Furthermore, the *obligation* only arises in *contested* applications for section 8 orders[10] (principally those determining with whom the child should live and/or have contact), which means that, if the *adults* are agreed on such matters, there is no statutory compulsion to consult the children at all.

Absent any child-related proceedings, the court has no obligation to consider the child's position. This has a particular impact in the context of divorce, especially since the removal (by section 17 Children and Families Act 2014) of the divorce court's obligation to consider whether they should exercise any of their powers under the 1989 Act in relation to any children of the family. A similar gap exists in proceedings concerning parentage (though English law treats the genetic issue in parentage disputes as a matter of fact) and financial proceedings.

Under section 10 Children and Families Act 2014, save in cases of domestic violence, any person wishing to make a relevant family application must first attend a family mediation and assessment meeting (MIAM). However, there is no statutory requirement for children's views to be ascertained at these meetings. There is concern, too, that mediators do not always adopt a child-inclusive approach.[11] The evidence is that whilst mediation is child-focused, it is rarely child-inclusive.[12] There is no legislation controlling the practice and procedure of mediation in England and Wales[13] so, despite the Family Mediation Council's

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10 Children Act 1989, s 1(4)(a).

11 See J. Walker, 'How Can We Ensure That Children's Voices are Heard in Mediation?' [2013] *Fam Law* 191. See also J. Norton, 'The Voice of the Child in Mediation in NFM Services' [2012] *Fam Law* 84. For an interesting discussion of engaging children in contact centres see L. Trinder, C. Jenks and A. Firth, 'Talking Children into Being *In Absentia*? Children as a Strategic and Contingent Resource in Family Court Dispute Resolution' [2010] *CFLQ* 234; L. Caffrey, 'Hearing the "Voice of the Child"? The Role of Child Contact Centres in the Family Justice System' [2013] *CFLQ* 357.

12 A. Barlow, J. Ewing, R. Hunter and J. Smithson, *Creating Paths to Family Justice Study – Briefing Paper and Report on Key Findings*, Universities of Exeter and Kent 2014, p. 18.

13 L. de Oliveira and C. Beckwith, 'Is there a need to regulate mediation? The English and Welsh Case Study' (2016) 42(3) *Commonwealth Law Bulletin* 327, 327.

Code of Practice[14] requiring all children and young people over the age of 10 years to be offered the opportunity to have their voices heard directly in the mediation, if they wish, the extent of children's actual involvement in family mediation remains inconsistent, varying according to the mediator.[15]

2.2. ADOPTION PROCEEDINGS

Since adoption was introduced into English law in 1927 courts have had to give due consideration to the wishes of the children concerned, having regard to their age and understanding.[16] Currently, the obligation, which lies on both courts *and* adoption agencies, is to have regard, whenever they are 'coming to decisions relating to the adoption of a child', to the child's ascertainable wishes and feelings considered in the light of the child's age and understanding.[17] A similar obligation applies when determining parental order applications.[18] There is no fixed age at which this obligation is triggered. It is a matter for the court's discretion in each case.

2.3. CROSS-BORDER PROCEEDINGS

Following *Re D (A Minor) (Abduction: Rights of Custody)*[19] children's views are commonly investigated in all Hague Abduction Convention cases. Children as young as six now routinely have their views investigated in all Hague abduction proceedings.[20] In *Re KP (A Child) (Abduction: Rights of Custody) (Practice Note)*[21] Moore-Bick LJ considered that there is a presumption that a child should

14 The Family Mediation Council comprises six family mediation organisations in England and Wales.

15 The Child Dispute Resolution Advisory Group report (March 2015) endorsed the principle of child inclusive practice, and recommended the adoption of a non-legal presumption that all children and young people aged 10 and above should be offered the opportunity to have their voices heard directly during dispute resolution processes, including mediation, if they wish. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/421005/voice-of-the-child-advisory-group-report.pdf. See also J. Walker and A. Lake-Carroll, 'Hearing the Voices of Children and Young People in Dispute Resolution Processes: Promoting a Child-inclusive Approach' [2014] *Fam Law* 1577.

16 Adoption of Children Act 1926, s 3(b).

17 Adoption and Children Act 2002, ss 1(1) and (4)(a).

18 See the Human Fertilisation and Embryology (Parental Orders) Regulations 2010, reg. 2 and Sch. 1.

19 [2006] UKHL 51.

20 This seems to have become the general practice in *all* Hague abduction proceedings, following *Re W (Abduction) (Child's Objections)* [2010] EWCA Civ 520, in which the Court of Appeal made it clear that there was no 'age barrier' in relation to the child's objection defence.

21 [2014] EWCA Civ 554, at [53].

be heard during Hague Convention proceedings, unless it appears inappropriate (by 'hearing' is meant listening to the child's point of view independent of the abducting parent). The 2018 *President's Guidance* states (at 3.5):

> Where it is clear on the face of the application and supporting evidence that it will be appropriate for the child to be heard during the proceedings the court may give directions to facilitate this at a without notice hearing or by way of standard directions on issue. Where directions have not already been given, the question of whether the child is to be given an opportunity to be heard in proceedings having regard to his or her age and degree of maturity, and if so how, must be considered and determined at the first on notice hearing.

3. MODES OF CHILD PARTICIPATION

Children may participate in family proceedings in different ways. They can have their views conveyed to the court by reporting officers, they can talk to the judge directly, they can be formally represented in the proceedings and participate as a party, or they can bring proceedings in their own right.

3.1. REPRESENTATION FORMS OF PARTICIPATION

3.1.1. Domestic Proceedings

Even where their views, wishes and feelings must be taken into account, children are not usually made parties to private law proceedings (and will not therefore be separately represented), though the court has a general power to join them.[22] Normally, the court learns of the child's views, wishes and feelings via a court welfare report. Any court, when considering *any* question with respect to a child under the 1989 Act, can ask for a report to be made to the court 'on such matters relating to the welfare of that child as are required to be dealt with in the report'.[23] These reports are usually provided by officers appointed by the Children and Family Court Advisory and Support Service (Cafcass) known as Children and Family Reporters (CFRs). These officers are independent of the parties and are appointed by the court to investigate and report on the child's circumstances. In the words of Thorpe LJ:

> Both judge and CFR are united sharing the same ultimate objective, namely, the protection of children and the advancement of their welfare. In pursuit of

22 Family Procedure Rules (FPR) 2010, r 16.2.
23 Children Act 1989, s 7.

> that overriding objective each must be free to operate independently as well as collaboratively and independent operation includes the exercise of an independent discretion.[24]

The reporter's duty is to report on the child's welfare rather than on the child's wishes and feelings, although, in discharging this duty, the reporter will investigate those wishes and feelings and will likely comment on whether those are in the child's best interests. In other words, a welfare report provides a limited indirect voice in the proceedings for the child.

A report should not be ordered unless there is a contested issue under the Children Act or one which the court thinks should be investigated, and before one is ordered consideration should be given to the power to refer the parties (with their consent) to mediation. According to the Child Arrangements Programme,[25] the court should specifically consider whether there are welfare issues that need addressing and, in any event, consider whether there are alternative ways of working with the parties such as through mediation. At every First Hearing Dispute Resolution Appointment (FHDRA), a Cafcass officer is expected to be available to facilitate early dispute resolution rather than to prepare a formal report. Commonly, the court decision to order a report will be taken at the FHDRA, though there is power to order a report at any stage.

The officer must notify and explain to the child such contents as the officer considers appropriate to the child's age and understanding, including any reference to the child's own views and the recommendation.[26] Written reports, which are filed with the court, are confidential documents that should not be disclosed to anyone other than a party (which will normally include the parents of the child concerned), their legal representative, the Cafcass officer and the Legal Services Commission without court leave.[27] The court is not bound by any recommendations contained in the report, but reasons should be given if it departs from them.[28]

3.1.2. Cross-Border Proceedings

Any inquiry into the child's views is normally made by a Cafcass reporting officer (CRO).[29] That officer sees the child and reports upon that meeting as close to the final hearing as possible so as to ensure that the child's current position is being

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24 *Re M (Disclosure: Children and Family Reporter)* [2002] EWCA Civ 1199, at [26].
25 (2014), para. 11.12.6(a).
26 *Practice Direction 16A*, para. 9.3.
27 FPR 2010, r 16.33.
28 See, for example, *Re M (Residence)* [2004] EWCA Civ 1574.
29 *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390.

reported to the court.[30] Reports usually take three weeks to prepare. The 2018 *President's Guidance* states:

> In most cases where it is appropriate for the child to be given an opportunity to be heard in proceedings an interview of the child by an officer of the Cafcass High Court Team will be sufficient to ensure that the child's wishes and feelings are placed before the court. In only a very few cases will party status be necessary. … The court should record on the face of any final order the manner in which the child has been heard in the proceedings.[31]

3.2. DIRECT FORMS OF PARTICIPATION

Children's direct involvement in private law proceedings is generally limited, their views either being conveyed to the court through a welfare report or via the parents. Nevertheless, children can have direct involvement in domestic private child law proceedings. Even where they are not parties, judges can, at their discretion, interview children in private. Furthermore, there are occasions when children can be made parties to proceedings brought by the parents. Finally, children of sufficient age and understanding can initiate proceedings themselves. Competence in this regard is based on an assessment (ultimately by the court) of whether the child has sufficient understanding, intelligence and maturity to instruct a solicitor to bring proceedings.[32]

3.2.1. Judicial Interviews with Children

3.2.1.1. Domestic Proceedings

The appropriateness of judges seeing children in private was referred to a sub-committee of the Family Justice Council, 'The Voice of the Child'. That committee was strongly in favour of judges seeing children. The resulting guidance from the Council, *Guidelines for Judges Meeting Children Who Are Subject to Family Proceedings* (2010) (hereafter Guidelines), states its purpose as being:

> to encourage judges to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives and to give them

30 See *Re J (Children) (Abduction: Children's Objections to Return)* [2004] EWCA Civ 428, at [64], per Wall LJ.

31 Para. 3.5.

32 See *Re CS (Appeal FPR 2010, Rule 16.5: Sufficiency of Child's Understanding)* [2019] EWHC 634 (Fam).

> an opportunity to satisfy themselves that the judge has understood their wishes and feelings and to understand the nature of the judge's task.[33]

The Guidelines, which are not binding,[34] emphasise that the child's meeting with the judge is not for the purpose of obtaining evidence, which, instead, is the responsibility of the Cafcass officer. 'The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her.'[35] They provide that the judge is entitled to expect the child's lawyer, if there is one, and/or the Cafcass officer to advise on whether the child wishes to meet the judge and whether that accords with the child's welfare. If a judge decides not to meet the child, he/she should consider providing the child with a brief written explanation. The other parties are entitled to make representations about any proposed meeting. If the meeting takes place before the conclusion of proceedings, the judge should explain to the child that they cannot hold any secrets and discuss with the child how their decision (which they should explain is their responsibility) should be communicated. These Guidelines have been said to create dilemmas for judges about how to treat the information they inevitably obtain when meeting children face-to-face. The continuing lack of clarity regarding this issue has been identified as 'something that needs to be addressed for children involved in the proceedings.'[36]

3.2.1.2. Cross-Border Proceedings

Judges can see the child in private and, in appropriate cases, ask the child to expand on, and explain, their views.[37] In *Re J (Abduction: Children's Objections)*,[38] the trial judge was held to have erred by not raising with the parties upon his motion the need for him to meet the children (aged 15, 13 and 10) face-to-face. That case also established that the Guidelines (referred to above) apply to Hague abduction proceedings.

In *Re KP*[39] Moore-Bick LJ advised that in any meeting between a young person and judge, 'the judge's role should be largely that of a passive recipient of whatever communication the young person wishes to transmit', and that its

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33 [2010] 2 FLR 1872 (Preamble).

34 '[T]he Guidelines are no more than they purport to be, namely guidelines', per Moore-Bick LJ in *Re KP*, above n. 21, at [52].

35 See Guidelines, para. [5].

36 Mr Justice MacDonald (Deputy Head of International Family Justice for England and Wales), 'Hearing the Children's Objections. Some Perspectives From a Judge Hearing Cases in England and Wales' (2018) XXII *Judges' Newsletter on International Child Protection – Special Focus. The Child's Voice – 15 Years Later*, p. 48, www.hcch.net.

37 See, for example, *Re G (Abduction: Child's Objections)* [2010] EWCA Civ 1232, at [15], per Thorpe LJ.

38 [2011] EWCA Civ 1448.

39 Above n. 21, at [56].

purpose is not to obtain evidence, but rather primarily for the benefit of the child. Its dual purpose is to allow the judge to hear what the young person may wish to volunteer and for the young person to hear the judge explain the nature of the court process. If the child volunteers evidence that would, or might be, relevant to the outcome of the proceedings, the judge should report back to the parties and determine whether, and how, that evidence should be adduced.

In *B v P (Hague Convention: Children's Objections)*[40] MacDonald J commented that where a judge considers that what they have heard in the meeting with the child has some relevance to the issues to be determined in the proceedings, 'it would be entirely artificial, and potentially unjust simply to banish those matters from his or her mind without more'. Parties or their representatives should therefore be given the opportunity to respond to the contents of the meeting.

3.2.2. Children as Parties

3.2.2.1. Domestic Proceedings

Children are not automatically parties to private law proceedings. Nevertheless rule 16.2 of the FPR 2010 allows a court to make a child a party if it considers it is in the child's best interests to do so.

Practice Direction 16A provides general guidance on when to make children parties to proceedings concerning them. Its basic premise is that making a child a party is 'a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases.' Before taking such a step, the court should consider whether an alternative route might be preferable, such as asking a Cafcass officer to make further enquiries or possibly by obtaining expert evidence. The court should also take into account the risk of delay that such an appointment will inevitably cause.

Upon being made a party, the court must appoint a children's guardian to act for the child, unless the child has obtained the court's permission to act without such a guardian or a solicitor considers that the child is able, having regard to his/her understanding, to give instructions (which the solicitor has accepted) in relation to the proceedings.[41] According to *Practice Direction 16A*, a 'children's guardian' should 'fairly and competently conduct proceedings on behalf of the child' such that all steps and decisions taken by the children's guardian 'are taken for the benefit of the child.' However, as Thorpe LJ said in *Mabon v Mabon*:[42]

> 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.

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40 [2017] EWHC 3577 (Fam), at [45].
41 FPR 2010, rr 16.4 (c), 16.6 (3).
42 [2005] EWCA Civ 634, at [26].

3.2.2.2. Cross-Border Proceedings

In cross-border proceedings involving children, the court is obliged (FPR 2010, rule 12.48(1)(e)), as soon as practicable after the application has been made, to give directions as to whether the child should be made a party. However, by rule 16.2, the court may only make a child a party if it considers that it is in the child's best interests to do so.

In *Re C (Abduction: Separate Representation of Children)*[43] Ryder J held that the proper test for considering an application for the child's separate representation in Convention cases[44] is whether such representation 'will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion and the expense and delay that may result'.

If a child is joined as a party, the court must appoint a children's guardian for the child and make directions for doing so as soon as practicable after the application has been made.[45] There is no power in Convention proceedings to permit children to participate in the proceedings without a representative.[46] A grant of party status leaves the court with a wide discretion to determine the extent of the role the child should play in the proceedings.[47]

3.2.3. Children as Litigants

Children's ability to seek section 8 orders in their own right was an innovation of the 1989 legislation. Court leave (which can only be granted where the court is satisfied that the child has sufficient understanding to make the application)[48] is a prerequisite to seeking an order.[49]

FPR rule 16.5 requires a child who is a party to, but not the subject of, proceedings to have a litigation friend to conduct proceedings on their behalf. A litigation friend is a disinterested person who can fairly and competently conduct proceedings on the child's behalf. However, as an exception, rule 16.6 enables a child to conduct proceedings under the 1989 Act and, under the High Court's inherent jurisdiction, without a litigation friend or children's guardian. By rule 16.6(3) a child may do so either where the court has given leave or where a solicitor considers that the child is able, having regard to their age and

43 [2008] EWHC 517 (Fam), [2008] 2 FLR 6, at [31]–[33].

44 Cf. in non-Convention applications in which the appropriate test is the child's best interests, see *Re C*, above n. 43, applying *Mabon v Mabon*.

45 See FPR 2010, rr 16.4 and 12.48(1)(g), respectively.

46 See *Re L (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, at [46], per Lord Wilson.

47 *Re L*, above n. 46, per Lord Wilson, at [55].

48 See s 10(8).

49 Section 10(1)(a)(ii).

understanding, to give instructions and has accepted instructions from the child to act for him/her in the proceedings.

Re T (A Minor) (Child: Representation)[50] established that where the court considers that the child does not have sufficient understanding, though the solicitor's assessment of the child's capacity to instruct him is otherwise, the court is the final arbiter and can appoint a litigation friend or guardian ad litem.

The required level of understanding of a child was considered in *Mabon v Mabon*,[51] in which the Court of Appeal overturned a refusal to grant three brothers, aged 17, 15 and 13, separate representation. In so concluding, Thorpe LJ recognised that there is now 'a keener appreciation of the autonomy of the child and the child's consequential right to participate in decision-making processes that fundamentally affect his family life'. Consequently, courts must accept that in the case of articulate teenagers 'the right to freedom of expression and participation outweighs the paternalistic judgment of welfare'.[52] However, this is not to say that welfare has no place. There are acknowledged limits to the willingness of the court to respect even an articulate teenager's desire for self-determination when this puts their welfare in jeopardy.[53] In this context,[54] Bridge argues that 'the law should openly declare that welfare reigns when grave decisions with momentous outcomes are considered and recognise that adolescent autonomy is, inevitably, circumscribed.'

4. RESEARCH

In the divorce context, research has found that welfare is the primary rationale for ordering separate representation and, in particular, 'a desire to ensure that a conflict of interests of the parents does not obscure the real needs of the child'.[55] The courts' overall concern, when ordering separate representation, is 'to obtain a complete picture of the situation, where necessary presented by someone who is independent of the parents' positions. 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'. More generally, research suggests that many family practitioners lack the necessary skills for effective face-to-face work with children and that children may not be receiving

50 [1994] Fam 49.

51 Above n. 42.

52 *Mabon v Mabon*, above n. 42, at [28].

53 *An NHS Trust and Child B and Mr & Mrs B* [2014] EWHC 3486 (Fam).

54 C. Bridge, 'Religious Beliefs and Teenage Refusal of Medical Treatment' (1999) 62 *Modern Law Review* 585, 594.

55 G. Douglas, M. Murch, C. Miles and L. Scanlan, *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991*, 2006, paras. 2.38 ff.; See also M. Murch, *Supporting Children When Parents Separate*, Policy Press, Bristol 2018, ch. 4.

information about judicial proceedings, the options available and the possible consequences that are compatible with their age and maturity, in a language that they understand, and in a manner sensitive to their culture and gender.[56]

5. CONCLUSION

The UK ratified the UNCRC in 1991, but has not incorporated it into domestic law despite continuing calls to do so, including in particular by the Children's Commissioners for England, Scotland, Wales and Northern Ireland, who commented:

> Wales has a legal requirement on government ministers to have due regard to the UNCRC, and in Scotland ministers must keep it under consideration. Northern Ireland and England do not have such requirements, although in England a template for Child Rights Impact Assessments is being introduced across government. Scotland is so far the only nation to have plans to incorporate the UNCRC into law, with a bill due to be introduced in 2020.[57]

James[58] expressed serious reservations about the extent to which the Children Act 1989 has delivered the level of participation by children in family proceedings that would be consistent with the provisions of the UNCRC. He suggested that this was connected to the traditional view of the role of parents in making decisions about their children:

> … the provisions of Article 12, which have in many ways proved to be more problematic than other provisions, not least because, in the context of family law, children's participation rights are necessarily juxtaposed with the long-standing and hitherto unchallenged rights of parents to make important decisions about family life.[59]

Aldridge[60] argued that, as Article 12(2) UNCRC states that children's opportunities to be heard should be in a manner consistent with procedural

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56 See, for example, J. Hunt and J. Lawson, *Crossing the Boundaries – The Views of Practitioners of Family Court Welfare and Guardian ad Litem Work on the Proposal to Create a Unified Court Welfare Service*, 1999; J. Beqiraj and L. McNamara, *Children and Access to Justice: National Practices, International Challenges*, Bingham Centre for the Rule of Law Report 02/2016, International Bar Association 2016.

57 UK Children's Commissioners' UNCRC mid-term review, November 2019, p. 3.

58 A. James, 'Children, The UNCRC, and Family Law in England and Wales' (2008) 46 *Family Court Review* 53–64.

59 A. James, above n. 58, p. 53.

60 J. Aldridge, *Introduction to the Issue: Promoting Children's Participation in Research, Policy and Practice*, Cogitatio Press, Lisbon 2019, p. 90.

rules of national law, it is questionable how children and young people can exercise their right to express their views contained within Article 12(1) if they have no legal standing or agency in their own country. She stated that this can only be achieved through the actions of both adults and children/young people, by continuing to promote children's right to participation in decisions which affect their lives, and by states and governments hearing their voices and acting according to children's expressed views and wishes.

An illustration of judges acting in a way which promotes children's right to participation in decisions affecting their lives may be seen in *Re A: Letter to a Young Person*[61] where Peter Jackson J gave his decision by letter to the child (addressing it 'Dear Sam'), read the judgment to the parents, and gave it to the child's solicitor to give to, and discuss with, the child. Interestingly, Peter Jackson J was the first judge to include emojis in a judgment.[62] There are other signs that child-friendly awareness might be gaining traction as, for example, when HHJ Lynch, in *Re X (A Child)*,[63] said that her judgment would be written so as to make sense to the parents and the adopted child, and abandoned legal jargon, using far greater colloquial language instead.

However, as encouraging as these are, such decisions remain uncommon. In view of the reports from the interviewees in the study by Lundy et al.[64] that incorporation of Article 12 into domestic law had had a strong impact on practice in their countries, it may be that incorporation of the UNCRC into domestic law would provide the additional impetus in England and Wales for more meaningful participation of children in decisions affecting their lives.

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61 [2017] EWFC 48.

62 *Lancashire County Council and Mr A, Mr B, The Children (by their Children's Guardian)* [2016] EWFC 9.

63 [2018] EWFC B82.

64 L. Lundy, U. Kilkelly, B. Byrne and J. Kang, *The UN Convention on the Rights of the Child: A Study of LegaI Implementation in 12 Countries*, Unicef, United Kingdom 2012, p. 101.