

CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN NEW ZEALAND

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Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on child participation in family and protection matters. The article explains the legal, institutional and procedural aspects of child participation in the Justice System in New Zealand.

Key words: child participation; family law; child protection; children's rights

You have asked how a judge interacts with children in New Zealand in family and child protection matters. The law that governs the care and welfare of children generally in the Family Court is different to that which governs children in need of care and protection. I have therefore answered each of the questions below in two parts:

- Cases regarding care and welfare generally (in black).
- Those regarding care and protection (in blue).

1. By defining that a situation concerns the child, does he/she become a party to the proceedings? Does he/she have the right to legal representation by a lawyer? Are there limits to the intervention of this lawyer in comparison with the other parties? The lawyer has an ethical duty to represent only the child's opinion, including cases where he/she does not consider the child's opinion in accordance with his or her best interests?

Family Court proceedings generally

The Care of Children Act 2004 ("COCA") governs the law relating to children's care arrangements, their development and well-being generally. Parties to such proceedings are usually parents, caregivers, guardians and the issues are mostly to do with care and contact arrangements or disputes between guardians in relation to important welfare issues for the child (such as health, education or religion).

The child will usually be the subject of the proceedings but will not be a party to them. That can only happen if a Judge directs they become a party in appropriate circumstances, or when the child has made an application to the court themselves in the few situations they can do so. In 22 years, I have never seen that happen.

Although the child is not a party, the COCA offers children the opportunity to make their views known. Section 6 of the COCA requires that in all proceedings involving issues concerning guardianship, day-to-day care and contact with a child, or certain issues regarding property that a child has an interest in, the child must be given reasonable opportunities to express views on matters affecting them and any views they express (directly or through a representative) must be taken into account.

The weight to be given to such views is always case-specific and will depend on such things as the age and maturity of the child. Other considerations can include how consistently the views have been held and over what period of time but, of course, a child must be allowed to change their mind as time passes. Judges will also be mindful of pressure that may have been placed on a child to express certain views and be careful not to place the child in a situation of appearing to have chosen one parent over another, especially in contentious cases. The child's views and wishes will always be considered but they are not determinative.

A Judge may appoint a lawyer to represent a child if there are concerns for the child's safety or well-being or if such an appointment is considered necessary. In cases where a child's views need to be ascertained (which is many) a lawyer will be appointed for them. To the extent possible the lawyer appointed will be suitable in terms of, for example, experience, cultural and gender match.

The role of a lawyer who is appointed to represent a child in proceedings, is to act for the child in a way that the lawyer considers promotes the welfare and best interests of that child. That will include ensuring that any views expressed

by the child to the lawyer on matters affecting them are communicated to the court. As well as that the lawyer's role includes:

- assisting the parties to reach agreement on the matters in dispute in the proceedings to the extent to which doing so is in the best interests of the child:

- providing advice to the child at a level commensurate with that child's level of understanding, about any right of appeal against a decision of the court; and the merits of pursuing any such appeal.

The lawyer must meet with the child to ascertain the child's views on matters affecting the child relevant to the proceedings unless there are exceptional circumstances such that a Judge directs that it is inappropriate for the lawyer to meet with the child.

A lawyer appointed to represent a child in proceedings may call any person as a witness in the proceedings and cross-examine witnesses called by any party to the proceedings or by the court.

The lawyer for a child must communicate to the court any views expressed by the child, but also that lawyer must also act for the child in a way they consider promotes the child's welfare and best interests. Sometimes those two things can be in conflict. In some cases, the lawyer might be comfortable communicating the child's views but also advocating a different point of view based on what is considered to be in the child's welfare and best interests. In other situations, where the child's views and wishes are significantly different to what the lawyer believes are in the child's welfare and best interests, the court has appointed counsel to assist the court so that the child's lawyer can advocate on behalf of the child and counsel to assist the court can advocate the welfare and best interests' position.

Care and protection proceedings

The Oranga Tamariki Act (“the OTA”) governs the law concerning children in need of care and protection (and also the youth justice system). Care and protection proceedings are usually brought to the Family Court by New Zealand’s state welfare organisation, Oranga Tamariki. However, the police can bring care and protection proceedings in relation to 12 and 13 year old children whose alleged offending is of such number, nature and magnitude as to cause concern for the child’s well-being.

In every case a lawyer must be appointed to represent the child in those care and protection proceedings under the OTA. Such lawyers must be suitably qualified by reason of their personality, cultural background, training and experience.

In all such proceedings there is a duty on the court and the lawyer for a child to explain the nature of the proceedings in a manner and in language that can be understood by the child and to satisfy themselves that the child does understand. When certain orders are made the court and lawyer must explain the nature and requirements of the order, provisions to vary it and the existence of rights of appeal. That is what the OTA says but in practice it almost never happens. It is very rare for children to appear in court in such proceedings despite the clear expectation of Parliament that they would. Also, the child must be encouraged and assisted to participate in the proceedings to the degree appropriate for their age and level of maturity unless that participation is not appropriate, having regard to the matters to be heard or considered. The child must be given:

- reasonable assistance to understand the reasons for the proceedings or process, the options available to the decision-maker, and how these options could affect them;
- reasonable opportunities to freely express their views on matters affecting them. If a child has difficulties in expressing their views or being understood (for example, because of their age or language, or because of a disability), support to assist them to express their views and to be understood must be provided.

Any views that the child expresses (either directly or through a representative) must be taken into account and any written decision must set out the child's views and, if those views were not followed, include the reasons for not doing so; and the decision, the reasons for it, and how it will affect them must be explained to the child.

Those statutory considerations are consistent with New Zealand's obligations under the United Nations Convention on the Rights of the Child ("the CRC"), and the Convention on the Rights of Persons with Disabilities ("the CRPD"). The OTA requires that children's rights under both of those Conventions must be respected and upheld.

Article 12 of the CRC, for example, provides:

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

2. For this purpose, the child shall in particular be provided with 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

In relation to the CRPD, relevant articles include:

- Article 7 requires States parties to ensure that all children with disabilities have the right to express their views freely on all matters affecting them on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.

- Article 12 requires that those with disabilities have legal capacity on an equal basis with others and that they receive the support required to exercise their legal capacity.

- Article 13 requires effective access to justice by providing procedural and age appropriate accommodations in legal matters. Given the prevalence of neuro-disabilities and what we know about the associated communication disorders, effective and practical steps must be taken to comply with these obligations.

The significance of such provisions has become much more apparent in recent years with the growing awareness of the prevalence of communication disorders and learning disabilities (often comorbid with other neuro-disabilities) amongst children in need of care and protection. As a result, the involvement of communication assistants is becoming increasingly common so as to enable the child's understanding and meaningful involvement in the proceedings. More is said about this below.

2. How does the child participate in Court proceedings? Directly, in front of the judge, or through an intermediary, either the lawyer or another professional? If it is another professional, can you identify it and specify its responsibilities, please?

In the Family Court generally

The nature of a child's participation will vary from case to case depending on such things as the age, level of maturity, nature of the subject matter of the proceeding, the views of the child, the views of the Judge and many more variables.

The requirement is that a child must be given reasonable opportunities to express views on matters affecting the child. This means, for example, that if the child does not wish to take up that opportunity to talk to a Judge, they do not necessarily have to.

Lawyers representing children will always be expected to make reasonable efforts to gain the child's views, and to do so in a way that is appropriate and sensitive to the particular child's age and circumstances including where any interview occurs (eg; at the child's home or school or another location such as a park or a café).

Interviews of children by Judges are reasonably common but, again, how, when and where they are done will depend on the particular child, the particular case and the judge. Some will be done in a courtroom but usually with only the child, Judge and child's lawyer present (the child's lawyer will usually be present for all such interviews). It would be very rare for anyone else to be present unless it is as a support person for the child at his/her request). Some of these interviews will be recorded and a transcript provided later. However, sometimes the interviews are less formal and might occur in the Judge's chambers without being recorded.

Intermediaries are not yet being involved in Family Court hearings generally, but I expect that will change soon given the nature and extent of the involvement of communication assistants (as intermediaries are referred to in New Zealand) in other jurisdictions and proceedings (see comments below about care and protection cases).

Sometimes the child's views will be included in a report obtained by the Court from a psychologist. Such reports usually contain quotes from a child and their views, as well as opinions and conclusions of the psychologist. However, the purpose of the report cannot solely be to obtain the child's views.

In care and protection proceedings

Given the duty on the court to explain proceedings to a child and others (referred to in part 1. above) and to encourage a child's participation, it should be that children who are old and mature enough to understand proceedings and express a view would come to court but that rarely happens in practice in care and protection proceedings. In most cases their views and wishes are communicated to the court and to others by the child's lawyer.

The involvement of communication assistants in such proceedings is becoming more common in recent times as a result of the prevalence of children in the care and protection system who are also in the youth justice system where the use of communication assistance has become common place in some parts

of the country. This has come about over the past 5 years or so as a result of the growing awareness of the high prevalence of neuro-disabilities in the youth justice population – with many of those children being involved in the care and protection system too. These communication assistants are usually speech-language-therapists who typically assist in two ways;

- By assisting the child to understand and follow what is happening in the proceedings so as to enable the child's meaningful participation;

- By advising the professionals involved in a case about adaptations they need to make to the conventional language and processes used to enable the child's understanding and meaningful participation.

3. If the participation is direct, is it voluntary? In this case, who consults the child if and how he/she wants to participate? Are there any institutional protocols on how to do that? Are there any informative materials specially prepared for children about its participation? Can you share it with our members?

In the Family Court generally

The answer to this is covered in sections 1 and 2 above. There are no institutional protocols I am aware of in the Family Court proceedings generally.

In care and protection proceedings

See sections 1 and 2 above. There are very helpful resources provided by the communication assistants that are specially prepared for children. At the moment, most of those resources are available in the context of youth justice proceedings rather than care and protection proceedings. That is changing and, as well as the communication assistants providing such resources, they have been training social workers to prepare their documents in more child-friendly formats.

4. If the child does not want to participate directly, what alternatives are there in your country to ensure indirect participation? If there are doubts about what the child really wants or if his/her opinion is really expressed, what's the solution in your country?

In the Family Court generally

As can be seen from the comments in parts 1 and 2 above, a child's participation in proceedings mostly occurs through their lawyer, who will liaise with the parties to proceedings and their lawyers in the way described above and also by providing reports and making submissions to the Judge.

Typically, the lawyer for a child will provide an initial report, identifying the issues and making recommendations about the action needed to progress the proceedings. Further reports are provided as the case progresses.

Any views expressed by a child, whether they are received directly or through a representative, must be taken into account. The term "Representative" is not defined in the COCA but will usually be views expressed through a neutral party as opposed to what the child's parents or others who may have a bias.

The use of the word "directly" also means the child can express views to the Judge in person, and judicial interviews are often used in practice as mentioned above. If the child's lawyer knows the child wishes to speak to the Judge, this will be communicated to the court and appropriate arrangements made. Potential benefits of such a meeting include enabling the child to put a face to the name of the person making the decision about them and allowing the child greater agency in a process they may feel is happening to them rather than with them.

If a judicial interview is to take place the court may order that any party to the proceedings, and the lawyers or other persons representing a party or the child or young person, be excluded from the hearing for so long as may be necessary to ascertain those wishes or views; or direct when and where the Judge will ascertain those wishes or views. Children should not feel pressured into expressing their views if they do not wish to do so. If a judicial interview is suggested, the child is free to decline.

There may be certain very rare situations where a child's views are not sought, for example they are too young or have been subjected to many court interventions already and it could be abusive to involve them further. However,

each situation will be fact specific and the child's lawyer would not usually make this decision on their own but would seek guidance from the court.

As stated above, participation by the child is not compulsory. Higher Courts in New Zealand (ie; higher than the Family Court) have refused appeals when the reason is that the child's views were not considered if it can be seen that a child was given reasonable opportunities to express their views to a lawyer and/or psychologist and did not take that option up.

In care and protection proceedings

The comments above about Family Court proceedings generally are also relevant in the context of care and protection proceedings.

5. In cases of direct participation, in what procedural phase does it take place? Is there a quantitative limit on consultation with the child? The child participates in this delimitation? How? When the opportunity to participate in the child is offered, what is the extent of options available to the child? I mean, should the child be limited to the aspects considered important by the adults or can the child bring other questions and possibilities?

In the Family Court generally

To some extent this has already been covered above.

Meetings between the child and Judge most often occur at about the time of a hearing of the substantive issues. Meetings between the child and their lawyer and with a psychologist occur during the build up to such a hearing.

In relation to a substantive hearing, a child is not barred from being a witness in proceedings, but it would be extremely rare for that to happen. If a child is a witness, he or she could be cross-examined which would drag them into the adversarial aspects of a court proceeding, potentially causing them unnecessary stress and also risking pitting them against their parents or guardians. Children have been able to give evidence or answer questions in court in front of the parties in the past when there has been no other reasonable

alternative to hear their views, however it is a fact dependent situation, is very rare and will always be a last resort. If it did happen, a judge would be able to make directions for the child to give evidence in alternative ways such as outside the courtroom or by video and/or CCTV as they would likely be considered vulnerable witnesses under the Evidence Act 2006.

As already noted above, if a judicial interview takes place, it is not usually done in open court with others around, but either in an empty courtroom or in the judge's chambers, with the child's lawyer usually present.

6. How is the courtroom where participation takes place? And the formalities of the child's participation in front of the judge? Is the participation taking place in the regular courtroom or in the office? Who is present in the courtroom/cabinet? How are the people dressed? Can you present a photo of such an atmosphere?

The Family Court generally

This question has been answered already in the sections above.

In care and protection proceedings

Covered above.

7. Is there a protocol on how to address questions to the child in family and child protection issues? Who developed it? Can you share it with our members? If there is not, how do you do it?

There is no protocol either in the Family Court proceedings generally.

Nor in care and protection proceedings.

8. Who is allowed to ask questions the child? Are the questions asked directly by the party or are they intermediated by the judge? What are the concerns adopted by the judge to avoid questions that may embarrass or violate the rights of the child? How does the debate unfold around the regularity of questions if the child is present in the atmosphere?

Covered above for both Family Court proceedings generally.

The same in care and protection proceedings.

9. Is the decision taken in front of the child? If the child wants to, can he/she stay in the room?

In the Family Court generally

This is largely covered above. It is very rare for the child to be in the courtroom when the decision is given. However, a Judge could invite a child to court when a decision is made in order to explain the decision to the child in person. There are no express rules about whether a child can be in the room when a decision is given, however it will be the Judge's discretion to control the court room and who should be in it.

The position would be much the same in care and protection proceedings.

10. Are there any special rules about the consideration of the child's opinion in the context of the reasons for the decision? What's the weight given to the child's opinion? Is it the age a criteria? Which one? If the child's degree of maturity is taken into account, how is this maturity assessed? By whom? What are the criteria considered?

In the Family Court generally

A Judge should state in the judgment how much weight they have placed on the child's views, and the reasons for that decision. Age and level of maturity will be amongst the reasons for any such decision. As is clear from comments in other sections above, the legislation requires that a child's views had been taken into account, but the Judge is not bound to follow those views. In some cases, there may be other factors relevant to this decision such as children who have been subjected to pressures that have been found to have influenced views that are not considered to be in their best interests. Sometimes maturity might be an issue commented on in a psychological report or by the child's lawyer. In other cases it may be an assessment made by the judge after a meeting with the child.

In care and protection proceedings

The situation is much the same in care and protection proceedings.

11. How is the decision communicated to the child? Are there any protocols for this communication? If the child has doubts or questions, is he/she allowed to speak with the judge? How do you do that?

In the Family Court generally

Under the COCA, it is the lawyer for child's responsibility to take all reasonable steps to ensure the effect of a parenting order is explained to the child, to an extent and in a manner and language that the child understands.

There is technically no bar to the child reading the judgment though this does not happen in all cases. It is also possible the child could tell the Judge they would like to speak to them after the decision is made, though there is no obligation on the Judge to accept this request.

In care and protection proceedings

Where the court makes certain orders a Judge and the lawyer must explain to the child, and to any parent, in a manner and in language that can be understood the nature and requirements of the order, any provisions for variation of the order and the existence of rights of appeal against the order or the finding in which it is based.

It is the duty of the child's lawyer to explain the decision, the reasons for it and how it will affect the child. Children do not speak to the judge about the decision. If the child has doubts or questions they would ask their lawyer.

12. Does the child have the right to appeal the decision?

In the Family Court generally

Under the COCA, a child to whom certain Family Court proceedings relate may appeal to the High Court against the decision. In some instances, they may need leave from the High Court to appeal.

It is the role of lawyer for child to provide advice to the child at a level of their understanding about any right of appeal against a decision of the court and the merits of pursuing that appeal.

A child or young person to whom the proceedings relate may, with leave of the Family Court, appeal to the High Court against the order.

In care and protection proceedings

See the comments in part 1 and 11 above about the duty on the Judge and the lawyer in this regard.

SUPPLEMENTARY MATERIAL

New Zealand

Chambers



Courtroom

