
CHILDREN: HEARD BUT NOT LISTENED TO?
AN ANALYSIS OF CHILDREN'S VIEWS IN DECISION MAKING UNDER S6 OF
THE CARE OF CHILDREN ACT 2004.

Antoinette Robinson

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‘A change in law will not deliver a true change, if the change is not the result of a change
in attitude.’

Dala Huang

‘When we are listened to, it creates us, makes us unfold and expand.’

Karl Menninger

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INTRODUCTION

New Zealand is regarded as an international leader for its child-inclusive legislative provisions. This reputation is due to s6 of the Care of Children Act 2004 ('COCA') which significantly broadens the scope of how children should be involved in proceedings to which they are subject. However, this paper shows that despite the clear intent of Parliament in enacting s6, the practices regarding children's participation have not substantively changed from the prior provision in s23 of the Guardianship Act 1968 ('Guardianship Act'). For example, in *JKB v JWN*¹ the Judge stated:²

O [a four year old girl] is too young for a judicial interview. That said, I have no doubt that that she would express a wish to remain in the care of her mother but also spend time with her father.

In that case, the Judge imposes what he perceives to be important in the child's world as the child's views, rather than attempting to understand what is important from the child's own perspective. This shows the judge has not internalised the policy basis underlying the legislative shift to s6 of the COCA, as his judgment indicates he is still applying the age and maturity qualifications from s23 of the Guardianship Act. These qualifications are removed in the COCA. This paper explores the rationale behind the provisions in s6, and demonstrates that the misapplication in *JKB v JWN*³ is not an isolated occurrence. Accordingly, in order to deserve the reputation New Zealand holds as an international leader in child-inclusive provisions, changes need to be made in order to ensure s6 is applied in the way that Parliament intended in enacting it.

¹ *JKB v JWN* FC Tauranga FAM-2004-070-1291, 4 July 2008.

² *Ibid* at [110].

³ *JKB v JWN*, above n 1.

CHAPTER ONE

THE BASIS FOR, AND SCOPE OF, S6 OF THE CARE OF CHILDREN ACT 2004

In proceedings to which a child is subject, s6 of the Care of Children Act 2004 ('s6') requires the child to be given reasonable opportunities to express his or her views, and for any views expressed to be taken into account by the judge in the decision. Several different factors were responsible for driving this legislative shift which places a greater emphasis on child participation.⁴ This chapter will discuss each of these factors and illustrate the scope of the changes which they have promoted.

The United Nations Convention on the Rights of a Child⁵ (UNCRC) has played a significant role in the push for greater child-participation rights internationally. Articles 12 and 13 of the UNCRC provide that in matters affecting a child, the child should be able to obtain information and make his or her ideas known.⁶ Where a child is capable of forming a view, the child should be assisted in expressing his or her views, and the Court should give any views due weight in the decision making process according to the age and maturity of the particular child.⁷ These articles affirm that "children should not be seen as passive individuals but fully fledged people with rights to express their own

⁴ Care of Children Act 2004, s6; Principle Family Court Judge Peter Boshier "Listening to Children's Views in Disputed Custody and Access Cases" (Association of Family and Conciliation Courts Annual Conference, Vancouver, BC, Canada, 29 May 2008) <<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/association-of-family-and-conciliation-courts-annual-conference>> at 1.

⁵ United Nations Convention on the Rights of a Child (adopted 20 November 1989, entered into force 2 September 1980) (UNCRC).

⁶ UNCRC art 12-13 as set out in Appendix One.

⁷ Ibid; This focus on participation was not provided for in the earlier declarations specific to children, (United Nations Declaration on the Rights of a Child (Proclaimed 20 November 1959); Geneva Declaration of the Rights of the Child (adopted 26 November 1924)) which instead focused solely on protection and provision rights. The shift to include participation rights is due to the all-inclusive nature of the UNCRC, as it is intended to encompass all rights of a child in one document (Nicola Taylor, "The Rights and Wellbeing of New Zealand Children" (Course book for LAWS 487, University of Otago, 2010), at 88.). This format is distinct to all other United Nations conventions which have differing rights provided for in differing conventions (See generally the multitude of United Nations Treaties, declarations and conventions, for example The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), The International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976); Universal Declaration of Human Rights (adopted 10 December 1948)). Thus, as children would be granted participation rights as a fundamental human right under the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) as an example, these rights were included in the UNCRC.

views on all matters affecting them.”⁸ Having both signed and ratified the UNCRC, New Zealand has an obligation to ensure national laws become consistent with the articles of the convention.⁹ Consequently, the participation provisions in the UNCRC have been a significant influence on New Zealand’s legislative shift towards greater provision for child-participation.

There has also been an international shift in the conception of childhood.¹⁰ A *conception of childhood* refers to a socially constructed generalisation based on the experience of people outside the generalised group.¹¹ The shift in values, beliefs, understanding and attitudes of a particular society will dictate the generalisations made, and how children are seen.¹² There have been several distinct conceptions of childhood historically, each based on the social, economic, religious and political ideals of the era they arise in.¹³ Prior conceptions of children have seen them as wage earners, dependents, vulnerable and in need of support and control in all areas of their lives.¹⁴ Recent perspectives see each child as significant in his or her own right.¹⁵

The change to the current conception of childhood is a result of the international

⁸ Jane Fortin *Children’s Rights and the Developing Law* (3rd Ed, Cambridge University Press, Cambridge, 2009) at 235.

⁹ UNCRC Arts 42-45; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945).

¹⁰ This shift is consistent with the provisions in Articles 12 and 13 of the UNCRC.

¹¹ Harry Hendrick, “Constructions and Reconstructions of British Childhood: An Interpretive Study, 1800 to the Present” in Allison James and Alan Prout (eds) *Constructing and Reconstructing Childhood* (The Falmer Press, Basingstoke, Hampshire, 1990) 35 at 35-36; Nicola Taylor “Care of Children: Families, Dispute Resolution and the Family Court” (PHD Thesis, University of Otago, 2005) Chapter Five; Nicola Taylor, Anne Smith, and Pauline Tapp “Rethinking Children’s Involvement in Decision Making After Parental Separation” (2003) 10 *Childhood* 201 at 202.

¹² Diana Gittens “The Historical Construction of Childhood” In Mary Jane Kehily (ed) *An Introduction to Childhood Studies* (Open University Press, England, 2004), 25 at 25.

¹³ Hendrick, above n 11, at 36.

¹⁴ Hendrick, above n 11, at 37-54; Gittens, above n 12, at 25-38.

¹⁵ Allison James and Alan Prout “Introduction” in Alison James and Alan Prout (eds) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Falmer Press, Basingstoke, Hampshire, 1990) 1 at 1-6; see also Taylor “Care of Children”, above n 11, Chapter Five. This conception will be discussed later in this chapter.

promotion of child participation through the UNCRC, and challenges to traditional psychological accounts of childhood development. It is undeniable that psychological domains such as genetics, environment and cognition are significant factors that account for children's development; however, two dominant influences have added to, extended and challenged our traditional understanding by drawing attention to the importance of participation and agency for a child's development.¹⁶ These influences are Socio-cultural Theory, and Childhood Studies.¹⁷

Socio-cultural Theory is based on Vygotsky's¹⁸ contribution to understanding how children develop through a focus on social processes.¹⁹ He identified that each child comes to know and understand the world as a result of the social interactions and experiences he or she has.²⁰ Vygotsky drew attention to the difference in children's ability when performing a task alone, compared to when they perform it with the assistance of a parent or more competent peer.²¹ The difference he termed as the 'zone of proximal development,'²² arguing that when a parent or more capable other assists, a child is able to achieve a much greater level of understanding which is central to that child's development.²³ 'Assist' in this sense refers to guiding, supporting and interacting

¹⁶ Boshier "Listening to Children's", above n 4 at 1-2; Nicola Taylor, Pauline Tapp and Mark Henaghan "Respecting Children's Participation in Family Law Proceedings" (2007) 15 Intl J Child Rts 61 at 66-68.

¹⁷ Childhood Studies has also been known as Sociology of Childhood.

¹⁸ Les Vygotsky was a Russian Psychologist who has been named the Founding father of Socio-cultural Theory due to his early work in the field. For more information on Les Vygotsky and Socio-cultural Theory see Nicola Taylor "What do we Know about Involving Children and Young People in Family law Decisions Making? A Research Update" (2006) 20 AJFL 154 at 154-178.; Stephen Coyle "Sociology of Childhood: Implications for our Practice as Lawyers" (2007) 5 NZFLJ 256 at 256-262.

¹⁹ Mark Henaghan "Legally Rearranging Families" in Mark Henaghan and Bill Atkin (eds) *Family Law and Policy in New Zealand* (Lexis Nexis, Wellington, 2007) at 317; See generally Taylor "Care of Children", above n 11, Chapter 5.

²⁰ Taylor "What do we Know", above n 18, at 159-160; Coyle "Sociology of Childhood", above n 18, at 257.

²¹ Anne Smith "Interpreting and Supporting Participation Rights: Contributions from Sociocultural Theory" (2002) 10 Intl J Child Rts 73 at 85; Henaghan "Legally Rearranging Families" above n 19, at 317; Nicola Taylor, Pauline Tapp and Mark Henaghan, "Respecting Children's Participation in Family Law Proceedings" (2007) 15 Intl J Child Rts 61 at 64-66; See generally Taylor "Care of Children", above n11, at Chapter Five.

²² Smith "Interpreting and Supporting" above n 21, at 85; Henaghan "Legally Rearranging Families", above n 19, at 317.

²³ Ibid.

with a child to aid the child's understanding. This may be achieved through providing a child with access to information which allows the child to express an informed view, followed by helping the child articulate what is important to him or her.²⁴ This interaction has been termed 'scaffolding,'²⁵ as it promotes a child's resilience and development, only being removed once no longer necessary.²⁶

Vygotsky's work led to a widespread critique of the previously accepted model of development posed by Piaget.²⁷ Piaget explained development to be according to a set of four pre-determined chronological stages of cognitive functioning which each child inevitably passed through in order to become an adult.²⁸ Piaget's model downplays the individuality of each child and the influence that a child's social experiences can have on their development. His theory of development identifies children as 'immature, irrational, incompetent, asocial and a-cultural,'²⁹ thus ignoring both a child's agency and the social and cultural influences on a child's development.³⁰ Socio-culturalists instead view the social context of a child, and the child's network of relations as fundamental, since they consider that each child develops as a result of their experiences and interactions within that social context.³¹

Similarly, Childhood Studies offers a challenge to traditional psychological accounts of

²⁴ Coyle "Sociology of Childhood", above n 18, at 257; Taylor "What do we Know", above n 18, at 7.

²⁵ A metaphor used to describe the role of a successful assistor when interacting with a child (Henaghan "Legally Rearranging Families", above n 19, at 318; Pauline Tapp, Anne Smith and Nicola Taylor "Children, Family Law and Family Conflict: Subdued Voices" (Paper presented to New Zealand Family Law Conference, Christchurch, October 2001) <http://www.lawyers.org.nz/conference/_pdf%20files/S13%20papers.pdf> at 5; Coyle "Sociology of Childhood", above n 18 at 25).

²⁶ Coyle "Sociology of Childhood", above n 18, at 257.

²⁷ Jean Piaget is a well known Psychologist who has contributed enormously to our understanding of child development. His theory of development is based on four set stages of cognitive development. For more information on Piaget see Laura Berk *Child Development* (7th ed, Pearson, Boston, 2006) Chapter Six.

²⁸ Henaghan "Legally Rearranging Families", above n 19, at 318; Tapp, Smith and Taylor "Children, Family Law", above n 25, at 5; Coyle "Sociology of Childhood", above n 18, at 25.

²⁹ Taylor "Care of Children", above n 11, at 2.

³⁰ Ibid.

³¹ Taylor "Care of Children" above n 11, at 2-3.

development based on Piaget models. Leading authors, James and Prout, explain Childhood Studies to be a way of rethinking the societal role children play, and define it as a discipline of examining how children 'live in and across different social arenas and settings, [and] where differences of ethnicity, age, gender, health and economic status combine to produce diversities rather than commonalities in their lives.'³² Accordingly, under Childhood Studies each child is seen as a separate and important individual who plays an active role in the construction of his or her own childhood.³³ On this premise, the experiences and interactions a child is exposed to, and the role he or she is given within the community contribute to the development of that child.³⁴

Since childhood is regarded as a social construction under Childhood Studies,³⁵ it follows that the expectations of a specific community or culture will influence how children of that community are treated and how their needs and competencies are assessed. The greater number of experiences a child is exposed to, and the more that child is encouraged to participate, the richer his or her knowledge and understanding will become.³⁶ This view accounts for the diversity in the experiences which each child has over time, and across cultures and communities.³⁷ Thus, it may be more correct to speak of childhoods as opposed to childhood collectively, as each child must be considered as an individual rather than under a general umbrella.³⁸ As Taylor illustrates, recognising that childhood varies over a number of dimensions, makes it 'possible to regard childhood as a stage in the life course that is significant in its own

³² Allison James "Understanding Childhood from an Interdisciplinary Perspective" in Peter Pufall and Richard Unsworth (eds) *Rethinking Childhood* (New Brunswick, N.J. Rutgers University Press, 2004) 25 at 26.

³³ Smith "Interpreting and Supporting", above n 21, at 77; Taylor, Tapp and Henaghan "Respecting Children's", above n 19, at 62-64.

³⁴ Smith "Interpreting and Supporting", above n 21, at 77.

³⁵ Rather than developing along set stages which was a dominant theory prior to Childhood Studies (Chris Jenks "Constructing Childhood Sociologically" in Mary Jane Kehily (ed) *An Introduction to Childhood Studies* (Open University Press, Maidenhead, New York, 2004) 77 at, 77-78).

³⁶ Smith "Interpreting and Supporting", above n 21, at 77.

³⁷ While many countries are signatories to the UNCRC, the way the rights are exercised varies between countries and cultures (James "Understanding Childhood", above n 32, at 36).

³⁸ James "Understanding Childhood", above n 32, at 33; Michael Freeman "The Sociology of Childhood and Children's rights" (1998) 6 *Intl J Child Rts* 433 at 436, 438.

right.’³⁹

Childhood Studies places an emphasis not only on the socially constructed nature of childhood, but also the agency of children under this conception. Children are now regarded as active participants in the construction of their own childhoods *and* the communities they exist in. This conception has enabled children to participate in research and decision making processes⁴⁰ rather than simply being passive subjects. Accordingly, Childhood Studies has become concerned with the relations children have with adults in their lives, thus tying in with Socio-cultural Theory and the concept of ‘scaffolding.’⁴¹

This interconnection of different disciplines and how each contributes to the understanding of how children develop has been the focus of contemporary ‘Developmental Science.’⁴² Developmental Science amalgamates each discipline’s account of a child’s development and considers development to be the ‘fundamental experience of all human persons in social settings and in time.’⁴³ Developmental Science combines psychological factors such as genetics, the child’s environment and the cognitive ability of a child *as well as* Socio-cultural Theory and Childhood Studies to account for the way in which children develop. It seeks to provide a basis for how people should interact with a child in order to promote that child’s development when they are involved with the law.⁴⁴

The legislative shift to s6 and the current child-inclusive structure of the Family Court is a result of the combination of the aforementioned influences. The Family Court dispute resolution processes, and their promotion of child participation through several

³⁹ Taylor “Care of Children”, above n 11, Chapter Five, at 8.

⁴⁰ For example, within the Family Court.

⁴¹ See generally Taylor “Care of Children”, above n 11, Chapter Five.

⁴² Jeanette Lawrence “The Developing Child and the Law” in G Monahan and L Young (eds) *Children and the Law in Australia* (Lexis Nexis Butterworths, Chatswood, NSW, 2008) 83 at 85.

⁴³ *Ibid* at 83-104.

⁴⁴ *Ibid* at 100.

avenues, resembles both the Socio-cultural concept of 'scaffolding,' and the Childhood Studies principles. As Principal Judge Boshier identifies, 'the [Care of Children Act 2004] places a much more direct emphasis on children's involvement in the process and the obligation on the Court to ascertain, listen and to take account of their views.'⁴⁵ This provision is evidence of Parliament's intent to promote child-participation in light of the current conception of childhood.

Section 6 reads:

6. Child's views-

(1) This subsection applies to proceedings involving-

- (a) the guardianship of, or the role of providing day to day care for, or contact with, a child; or
- (b) the administration of property belonging to, or held in trust for a child; or
- (c) the application of property of that kind

(2) In proceedings to which subsection (1) applies –

- (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
- (b) any views the child expresses (either directly or through a representative) must be taken into account.

In essence, s6 requires that in any proceedings involving children, those children must be given reasonable opportunities to express their views, and that the views they express must be taken into account. The provisions in s6 reach wider than what is required under the UNCRC, and when comparing s6 to its predecessor, s23 of the Guardianship Act, the scope of s6 becomes apparent. Section 23 reads:

In any proceedings [under s23(1) of the Act] the Court shall ascertain the wishes of the child if the child is able to express them, and shall take

⁴⁵ Principal Family Court Judge Peter Boshier "Foreword to Lawyer for the Child Workshop" (NZLS Lawyer for Child Training Workshop, 2006).

account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child.

There are three distinct differences in the wording of s23⁴⁶ and s6 reflecting the change in societal attitudes resulting from the intervening 35 years.⁴⁷ Firstly, the Guardianship Act refers to 'wishes', and the COCA to 'views'. As pointed out in the literature, 'wishes' is directed at the future aspirations, whereas 'views' is broader and is "grounded in the current experiences and concerns of children."⁴⁸ 'Wishes' may often be interpreted by children to require that they exercise a choice between each parent in a conflicted family situation.⁴⁹ The term 'views' avoids this interpretation and allows a child opportunities to discuss what matters in their lives without such a burden.⁵⁰

Secondly, the phrase 'if the child is able to express them' is absent from s6. These words suggested children may not necessarily be able to express views⁵¹ which is inconsistent with the shift in the understanding of child development.⁵² As Henaghan highlights, the issue is not the child's ability to express views, but rather with the adult's competence to elicit those views.⁵³ Similarly, Principal Judge Boshier states:⁵⁴

Listening to a child requires 'being able to enter the child's world; listening to

⁴⁶ Guardianship Act 1968, s23.

⁴⁷ Principal Family Court Judge Peter Boshier "Involving Children in Decision Making: Lessons from New Zealand" (2006) 20 AJFL 145 at 146.

⁴⁸ Henaghan "Legally Rearranging Families", above n 19, at 318.

⁴⁹ Tapp, Smith and Taylor "Children, Family Law", above n 25, at 10; Talyor, Tapp and Henaghan "Respecting Children's", above n 19, at 68.

⁵⁰ This difference has been identified in the leading case on the application of s6 (*C v S [P Orders]* [2006] NZFLR 745) and several subsequent cases (see for example *Pehi-Neho v Davis* FC Manukau GV-2002-055-377, 9 June 2006; *JWP v SRW* FC Hastings FAM 1999-020-491, 28 March 2008).

⁵¹ Henaghan "Legally Rearranging Families", above n 19, at 319; Tapp, Smith and Taylor "Children, Family Law", above n 25, at 10-11.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Boshier "Listening to Children's Views", above n 4, at 6 (quoting Pauline Tapp "Examining Judicial Approaches to Interviewing Children" (paper given at LexisNexis Child Law Conference, March 2002, at 10)).

very young children does not necessarily mean taking all their utterances at face value, but it does mean observing the nuances of how they exhibit stress, or curiosity or anxiety in a manner which is congruent with their maturity.

Omitting the phrase ‘if the child is able to express them,’ gives effect to the Childhood Studies principles and recognises that children have a ‘voice’ from birth, whether that voice is articulated into words or expressed through indirect means.⁵⁵

Finally, ‘age and maturity’ as factors determining the weight to be placed on a child’s views are also omitted in s6. The age and maturity qualification added to the misconception that there were certain ages in which it was inappropriate to listen to children, or that children were unable to express views.⁵⁶ Additionally, it gave judges an easy way of disqualifying children’s views without listening to them carefully and assessing if a solution could be found which would fit with those views.⁵⁷ The qualifications are consistent with the outdated Piagetian theory of child development rather than the current multi-disciplinary account.⁵⁸

These differences between the previous and current provisions for child participation are evidence that Parliament has responded to the changing societal attitudes.⁵⁹ This is consistent with Principal Judge Boshier’s statement that ‘Legislative change is driven by changing societal attitudes.’⁶⁰ Accordingly, in making the changes in wording from s23⁶¹ to s6, Parliament cannot have intended the prior qualifications on ascertaining and

⁵⁵ Henaghan “Legally Rearranging Families”, above n 19, at 318; Tapp, Smith and Taylor “Children, Family Law”, above n 25, at 10-11.

⁵⁶ Smith “Interpreting and supporting”, above n 21, at 81.

⁵⁷ Henaghan “Legally Rearranging Families”, above n 19, at 318.

⁵⁸ Smith “Interpreting and supporting”, above n 21, at 82; Tapp, Smith and Taylor “Children, Family Law”, above n 25, at 11.

⁵⁹ Kathryn Hollingsworth “Speaking Loudly and Carrying a Small Stick? The New Zealand Commissioner for Children” (2006) 6 OtaLRw 599 at 607-608.

⁶⁰ Boshier “Listening to Children’s Views”, above n 4, at 2.

⁶¹ Guardianship Act 1968, s23.

giving weight to children's views to carry over into the new legislation.⁶² This is because s6 is premised on psychological *and* sociological principles as well as UNCRC Articles which together promote children as autonomous actors in their own right, and as people who play an active role in the construction of their own childhoods. As Principal Judge Boshier identifies, the legislative changes recognise that:⁶³

Children's right to participation is particularly important in two respects. First, it recognises their basic dignity and place of participation in society as of right, rather than attaining this legitimacy only on reaching adulthood. Secondly, it is important for children in terms of their development.

Section 6 stands apart from the statutory constraints evident in other parts of the COCA,⁶⁴ and is consistent with the concept of Gillick⁶⁵ competence⁶⁶ and with the New Zealand Bill of Rights Act 1990 (NZBORA).⁶⁷ Section 6 allows each child subject to a proceeding to have a say, and it gives families an opportunity to understand why a

⁶² See generally Henaghan "Legally Rearranging Families, above n 19, at 269-360; Taylor, "Care of Children", above n 11, Chapter Five.

⁶³ Peter Boshier in his address to the Children's Issues Centre Conference in 2005, in Coyle "Sociology of Childhood", above n 18, at 256.

⁶⁴ For example, Care of Children Act 2004, s36. This section gives very specific circumstances for when a medical practitioner can act on the consent or refusal of consent from a person under s16 years of age. See also Care of Children Act 2004, s106(d) which specifies the age and maturity of a child are factors which are relevant in assessing the weight to be placed on a child's objection to being returned to their country of origin under the Hague Convention (Hague Convention on the Civil Aspects of Child Abduction, adopted 25 October 1980, entered into force 1 December 1983). See http://www.legislation.govt.nz/act/public/_/2004/0090/latest/DLM317463.html#DLM317463 for more information.

⁶⁵ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 WLR 83, [1986] AC 112.

⁶⁶ Gillick competence provides that 'a competent child is one who achieves a sufficient understanding and intelligence to enable him or her to make a wise choice in his or her own interests.' (Jan Pryor "Assessing children's information" (NZLS Advanced Lawyer for the Child – The Winds of Change CLE Conference, July 2008 at 59)). Gillick competence is based on a particular child's understanding rather than a set age determining competence which is consistent with the Childhood Studies Principles as it assumes that children's competence will vary greatly according to several different factors which differs between each individual child. (Sandra Porteous "Children and Consent to Adoptions" (2006) 5 NZFLJ 105 at 108.).

⁶⁷ New Zealand Bill of Rights Act 1990, s27(1). Principal Family Court Judge Boshier identifies this section as a section which "affirms a right relevant to a child by requiring the Court to observe the principles of Natural Justice when making a determination which affects a person's rights which are protected or recognised by law" (Boshier "Listening to Children", above n 4, at 2).

child's viewpoint is important.⁶⁸ Section 6 also separates siblings so that the best interests of each child are considered rather than collectively. This enables children to feel as though they are listened to and respected as individuals which is consistent with the current conception of childhood and multi-disciplinary account of childhood development.

As participation is important for a child's development, it logically follows that promoting participation is not only important to give effect to s6, but also to ensure the criteria in ss3-5⁶⁹ are met. This is because a child's participation in matters affecting him or her is vital to that child's best interests and development which are the overriding considerations in ss3-5.⁷⁰ For this reason, Judges must strive to give more than simple face value to s6, as its rationale reaches further than simply asking the child to express his or her views.⁷¹

Therefore, this chapter has shown both that there were several factors which influenced the legislative changes in s6, and its scope. Section 6 allows more information to be taken into account by judges in arriving at their decision, thus demonstrating Parliament's acceptance of the changing conception of childhood, and the idea that participation is vital for a child's development based on the Childhood Studies principles. The next chapter considers the risks associated with promoting a child's participation in this way, and how such risks may be minimised or overcome by a successful 'scaffolder.' It will then investigate the methods of ascertaining children's views, and identify the issues that stem from the lack of guidance on the application of s6.

⁶⁸ Pauline Tapp "Judges are Human Too. Conversations Between the Judge and a Child as a means of Giving Effect to s6 of the Care of Children Act 2004" (2006) NZ Law Review 35 at 49.

⁶⁹ Care of Children Act 2004, ss3-5

⁷⁰ Care of Children Act 2004, ss3-5

⁷¹ Although this interpretation of ss3-5 has not yet been recognised or discussed by the courts. While it is beyond the scope of this paper to explore why ss3-5 are often applied in isolation to or, in some instances contrary to s6, it is worth noting the connection between these sections at this point.

CHAPTER TWO

RISKS ASSOCIATED WITH ENHANCING CHILDREN'S PARTICIPATION RIGHTS, AND METHODS USED TO ASCERTAIN CHILDREN'S VIEWS

Lawyer for child, judicial interviews and specialist reports by psychologists are the three main avenues for children's views to be ascertained and conveyed to the court under s6. In providing these avenues Parliament gives effect to both Childhood Studies principles and Socio-cultural Theory as they promote child participation and seek to assist children in participating to a greater level.⁷² This chapter will consider the risks inherent in involving children in this way, and will then assess and evaluate the effectiveness of each of the three methods used to ascertain and convey children's views to the Court.

As with any theory of children's development, there are risks associated with understanding children based on the Childhood Studies and Socio-cultural principles discussed in Chapter One.⁷³ For instance, a child may be influenced or coached into expressing certain views,⁷⁴ may give a view he or she thinks the interviewer wants to hear,⁷⁵ or the child may feel intimidated by the person seeking to ascertain their views

⁷² Pauline Tapp, Anne Smith and Nicola Taylor "Children, Family Law and Family Conflict: Subdued Voices" (Paper presented to New Zealand Family Law Conference, Christchurch, October 2001) <<http://www.lawyers.org.nz/conference/pdf%20files/S13%20papers.pdf>> at 5.

⁷³ Peter Boshier "Involving Children in Decision Making: Lessons from New Zealand" (2006) 20 AJFL 145 at 146; Tapp, Smith and Taylor, "Children, Family Law", above n 72, at 1; Jane Boylan and Pauline Ing "Seen but Not Heard – Young People's Experience of Advocacy" (2005) 14 Intl J of Social Welfare 2 at 5-9; See generally Allison James and Alan Prout (eds) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Falmer Press, Basingstoke, Hampshire, 1990).

⁷⁴ Pauline Tapp "Judges are Human Too. Conversations Between the Judge and a Child as a means of Giving Effect to s6 of the Care of Children Act 2004" (2006) NZ Law Review 35 at 49.

⁷⁵ See for example Rachel Zajac and Aspasia Karageorge "The wildcard: A simple technique for improving children's target-absent line-up performance" (2009) 23 Applied Cognitive Psychology 358 at 358-368 – where the experimenters investigated the suggestibility of children. Children in that study witnessed an event. They then took part in a line-up and were instructed to identify the perpetrator. The children were instructed that if they thought the perpetrator was absent from the line-up, they could simply say he was not there. The results showed that the children were accurate in line-ups where the perpetrator was present, but where the perpetrator was absent the children were always inclined to pick someone rather than saying the perpetrator was absent. However, when the experimenter employed a wild card technique which involved a silhouette to point to if no one else was recognised, the children were far more accurate in pointing to the blank person when the perpetrator was missing from the line-up. This

so that the child does not express what is important to him or her.⁷⁶ There are also risks that a child will be burdened by an internal belief that his or her views have a determining role in the conflict to which the child is exposed.⁷⁷ Conversely, the child may believe that he or she can manipulate the situation because of the role given in the decision making process.⁷⁸

Numerous studies have been conducted across several disciplines to gain insight into how children think.⁷⁹ From these it appears that the risks associated with involving a child in matters such as Family Court Proceedings can be minimised or overcome by a successful and trained 'scaffolder.'⁸⁰ For example, if there is a trusting relationship in which the child feels comfortable, that child is more likely to open up and express what matters to them.⁸¹ If Family Court professionals have a comprehensive understanding of how children think and the theories upon which s6 is based, the benefits to the child

suggested the children felt as though they must select something as this is their interpretation of what the interviewer wanted.

⁷⁶ Nicola Taylor, Pauline Tapp and Mark Henaghan "Respecting Children's Participation in Family Law Proceedings" (2007) 15 Intl J Child Rts 61 at 77-78; John Caldwell "Judicial Interviews of Children: Some Legal Background" (2007) 5 NZFLJ 215 at 220; See generally James and Prout "Constructing and Reconstructing", above n 73; Mark Henaghan "Legally Rearranging Families" in Mark Henaghan and Bill Atkin (eds) *Family Law and Policy in New Zealand* (Lexis Nexis, Wellington, 2007) Chapter Seven.

⁷⁷ Principal Family Court Judge Peter Boshier "Listening to Children's Views in Disputed Custody and Access Cases" (Association of Family and Conciliation Courts Annual Conference, Vancouver, BC, Canada, 29 May 2008) <<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/association-of-family-and-conciliation-courts-annual-conference>> at 6; Caldwell "Judicial Interviews", above n 76, at 220.

⁷⁸ Taylor, Tapp and Henaghan "Respecting Children's", above n 76, at 77-78; Caldwell "Judicial Interviews", above n 76, at 220; See generally James and Prout "Constructing and Reconstructing", above n 73; Henaghan "Legally Rearranging Families", above n 76, Chapter Seven.

⁷⁹ Tapp "Judges are Human", above n 74, at, 49; Nicola Taylor "What Do We Know about Involving Children and Young People in Family Law Decisions Making? A Research Update" (2006) 20 AJFL 154 at 172; Nicola Taylor, Megan Gollop and Anne Smith "Children and Young People's Perspectives on the Role of Counsel for the Child" (2000) 3 Butterworths Family Law Journal 146 at 146-154; Jan Doogue "A Seismic Shift or a Minor Realignment? A View From the Bench Ascertaining Children's Views" (2006) 5 NZFLJ 198; Stephen Coyle "Sociology of Childhood: Implications for our Practice as Lawyers" (2007) 5 NZFLJ 256 at 256-260.

⁸⁰ A child is much more likely to give their honest opinion if they have a trusting relationship with the person trying to ascertain the child's views (Nicola Taylor, Anne Smith, Pauline Tapp "Rethinking Children's Involvement in Decision Making after Parental Separation" (2003) 10 Childhood 201 at 203; Smith "Interpreting and Supporting", above n 79 at 80.

⁸¹ Anne Smith "Interpreting and Supporting", above n 79, at 85; Boshier "Listening to Children's", above n 77, at 6.

from their involvement will outweigh the consequences that these risks may pose.⁸² This again places the focus on the competence of the person eliciting the views, rather than the child's competence to express them.⁸³ Family Court professionals often do not have extensive training in child development or specialist questioning practices which are necessary for working successfully with children.⁸⁴ This chapter will now discuss the implication of these factors for each of the three main avenues used to ascertain views under s6.

2.1 LAWYER FOR THE CHILD:

Section 7 of the COCA provides for the position of lawyer for a child. It requires a lawyer for child to be appointed in all proceedings involving a child, unless there are exceptional circumstances which would render that appointment inappropriate.⁸⁵ The criteria for selection of a lawyer for child are outlined in 9.5 of the Lawyer for Child Practice Note.⁸⁶ Essentially, to be appointed as a lawyer for child, a lawyer is not required to have extensive training in how children think or the basis for why it is

⁸² See generally Henaghan "Legally Rearranging Families", above n 76, Chapter Seven; Taylor, Tapp and Henaghan "Respecting Children's", above n 76, at 61-82.

⁸³ Without specialist training there is a danger that views will be taken at face value rather than interpreting the non verbal cues that the child is exhibiting to gain a comprehensive understanding of the views they are conveying. This was pointed out by Allison James where she states: 'We need to be careful we know how to hear what children are saying through acknowledging that their words and ideas may be filtered, obscured or muted by the constructs of childhood that shape our conceptualisation of the life course.' (Alison James "Understanding Childhood from an Interdisciplinary Perspective" (2004) in Peter Pufall and Richard Unsworth (eds) *Rethinking Childhood* (New Brunswick, N.J. Rutgers University Press, 2004) at 33); See also Tapp "Judges are human", above n 74, at 49.

⁸⁴ For example, the training course of lawyers for children includes two 30 minute sessions based on child development (NZLS Lawyer for Child Workshop Training Module, 2006, 2010). Even if the content of those sessions was exactly relevant to the current multi-disciplinary understanding of child development (which it is not, as this training encompasses set ages where children attain specific abilities which is consistent with the outdated Piaget model of development) one hour out of a three day course does not seem sufficient for anyone to learn and internalise how children develop, especially those who will be frequently appointed as the sole avenue to represent a child's views to the court. The lack of legislative guidelines has added to the uncertainty about the lawyer for child role. While the variation in techniques that lack of guidance inevitably leads to may allow the judge to tailor the situation to the particular child; the lack of consistency in approach creates uncertainty and potential conflicts between cases (Doogue, above n 79, at 198).

⁸⁵ See Appendix Three for the Care of Children Act 2004, s7 in full.

⁸⁶ See Appendix Four for the full set of criteria used to select lawyers to be appointed as lawyer for child.

important for children to play an active role in proceedings they are subject to.⁸⁷ The lawyer for the child ‘acts for’ the child in Family Court proceedings, including advancing the object of s 6. The Practice Note governs how representation should proceed:⁸⁸

6.3 ... the lawyer shall be guided by the presumptions that, first, the older the child, the more the representation shall be in accordance with the child’s instructions, (irrespective of the welfare and best interests) and, secondly, the younger the child the more representation shall be in accordance with the child’s welfare and best interests.

With respect, this provision seems to ignore Parliament’s removal of age and maturity as qualifications, instead using them to define the parameters of the role of lawyer for child. Further, the Practice Note does not specify how lawyers should seek to assist children in expressing their views which has led to confusion and variations in practice between individual practitioners.⁸⁹ Consequently, the role of lawyer for child is “guided largely by the personal philosophy of individual practitioners regarding the rights of children.”⁹⁰ Undoubtedly, this can result in conflict between the child’s views and what the lawyer considers to be the child’s best interest.⁹¹ Despite his provision in the Practice Note, Principal Judge Boshier believes:⁹²

The obligation that rests on the child’s lawyer is to always present the views of the child to the Court regardless of whether they believe they are in the child’s

⁸⁷Practice Note: Lawyer for the Child: Code of Conduct (Issued 8 March 2007; took effect 1 April 2007). <<http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes/lawyer-for-the-child>>

⁸⁸ Ibid.

⁸⁹ Taylor, Gollop and Smith “Children and Young”, above n 79, at 146.

⁹⁰ Ibid.

⁹¹ Common practice in such circumstances has seen a court appointed assistant take on one of the roles and the lawyer for the child the other.

⁹²Boshier “Listening to Children’s”, above n 77, at 4. This point was also made by Kathryn Hollingsworth who noted that ‘it is essential that a children’s advocate *actually* represents the views of children, rather than simply assuming he or she is representing the views and interests of children, otherwise there is a considerable risk of confusing whose interests are being advocated.’ (Kathryn Hollingsworth “Speaking Loudly and carrying a small stick? The New Zealand Commissioner for Children” (2004) 6 OLR 599 at 607).

best interests. Any deviation from this role would negate the child's right to participate.

Some lawyers for child do act consistently with this statement and perform their roles in an exemplary manner. These lawyers display a sound understanding of how children think and as a result, are innovative in how they create rapport with children they represent. For example, one lawyer found out a child he was representing was obsessed with cars, and he too having a keen interest in cars asked the child to describe what type of car each of the people in his life would be.⁹³ This 'scaffolding' was an effective way for the child to open up to his lawyer and communicate his views in a way he was comfortable to do so. It is unlikely the same result would have occurred in a formal setting with a pre-determined set of questions.

This example is however not representative of all relationships between children and their counsel. Without a universal understanding of the purpose of their role, or an insight into how children think, lawyers are less able to mitigate the risks associated with increased child participation in Family Court proceedings. In fact, in one case a lawyer for child reported to the court that the child "is reluctant and very hesitant to express any particular choice".⁹⁴ This suggests the child is under the impression that he must exercise a choice, which is not the object of s6 as Parliament makes clear in changing the term 'wishes' in s23 of the Guardianship Act, to 'views' in s6. Accordingly, the lawyer in that case is not assisting the child in a way which will promote the child's ability to participate, thus negating the purpose of s6.

Therefore, the insufficient training in Childhood Studies and Socio-cultural Theory, paired with inadequate guidelines governing the process lawyers should undertake to ascertain children's views, results in a large degree of subjectivity in how the role of lawyer for child is approached.⁹⁵ This was recognised by Lady Hale who states: 'too

⁹³ Example recounted by Dunedin Practitioner, 9 August 2010.

⁹⁴ *AWH v TAMR FC* Wellington FAM-2003-012-000166, 5 March 2010 at [19].

⁹⁵ For example, a teacher was recently interviewed by a lawyer for the child in her capacity as the boy's school teacher.⁹⁵ The teacher obtained a copy of the report and, while her words were reported, they were taken out of context and did not give proper effect to the point she was making. This example

often, it is said, the officer [of the court] has put his own interpretation or spin on it.⁹⁶ As lawyers cannot be cross examined on the contents of their reports, this is an ongoing issue the Family Court faces.

2.2 JUDICIAL INTERVIEWING

The COCA does not provide for judicial interviews specifically, however Principal Judge Boshier identifies that to satisfy s6, “the child’s wishes should be introduced ‘primarily’ through either counsel for child or through an interview with the judge.”⁹⁷ Judges often elect to conduct judicial interviews on the recommendation of a lawyer for child, who also routinely sits in on judicial interviews.⁹⁸ The use of judicial interviews as a tool for ascertaining views is consistent with research concluding “children are not uniformly happy with how their views are interpreted when conveyed indirectly.”⁹⁹ As such, there is a belief that in order to ensure the welfare and happiness of children is promoted; judges must always listen to a child’s views first hand. These factors have seen the practice of judicial interviewing become more common.¹⁰⁰

Guidelines for discussions with children have been implemented by Principal Judge Boshier and are intended at outlining a recommended procedure for judicial interviews.

highlights the subjective nature of such reports (Interview with primary-school teacher in Kapiti Region, 2009).

⁹⁵ Taylor, Gollop and Smith “Children and Young”, above n 79, at 146.

⁹⁶ Baroness Hale of Richmond “Children’s Participation in Family Law Decision Making - Lessons from Abroad” (2006) 20 AJFL 119 at 22.

⁹⁷ Boshier “Listening to Children’s”, above n 81, at 1.

⁹⁸ However meetings can be initiated through other means also, for example on the initiative of the judge, or through a request from the child or the child’s parents (Mark Henaghan “Doing the COCACobana – Using the Care of Children Act for your child clients” (2008) 6 NZFLJ 53 at 53-63.

⁹⁹ Boshier “Listening to Children’s”, above n 77, at 5; Boshier “Involving Children”, above n73, at 149; Taylor, Gollop and Smith “Children and Young”, above n 79, at 154-155.

¹⁰⁰ Principal Family Court Judge Peter Boshier “The Child’s Voice in Process: Which Way is Forward? A New Zealand Perspective” (New Orleans, 28 May 2009) at 6; Judge Ian Mill “Conversations with Children: a Judge’s Perspective on Meeting the Patient Before Operating on the Family” (2008) 6 NZFLJ 72 at 78.

Adoption of these guidelines is however at the discretion of each judge.¹⁰¹ The guidelines stipulate that each judge is to be guided by ‘the age and maturity of the child when deciding whether or not to adopt [the guidelines].’¹⁰² With respect, this again appears contrary to Parliament’s intent in removing age and maturity as considerations under s6.¹⁰³ Further, the guidelines relate solely to procedure which does not provide for consistency in the content of judicial interviews, yet:¹⁰⁴

Judges are not trained in child interviewing skills and generally lack knowledge about developmental differences in cognitive, language and emotional capacities. Thus, it is hard for even the most experienced judge to place children’s responses in an appropriate context and evaluate the weight that should be given to their wishes.

It is clear from the research that many children are reluctant to express a view until a relationship of trust has been formed;¹⁰⁵ however judges are not given guidance in how to achieve this.¹⁰⁶ Reluctance would be especially acute when a meeting carries with it a stigma of superiority, and consequently intimidation. Judicial interviews are often conducted in an “intimidating environment by a person unskilled in asking questions and interpreting the answers of children. In the relatively short time these interviews take place, it is difficult to investigate with sufficient depth and subtlety the perceptions of a child which explain, justify or represent the child’s [views]”.¹⁰⁷ Taylor identifies that

¹⁰¹ Principal Family Court Judge Peter Boshier “Judges’ Guidelines – Discussions with Children” in Suzanne Williams “Judges Listening to Children Directly in Separation and Divorce Proceedings: Individual, Institutional and International Guidelines” (National Judicial Institute of Canada Family Law Program, Toronto, February 2010) at appendix C.

¹⁰² Boshier “Judges’ Guidelines”, above n 101, at 1.

¹⁰³ As with the Practice Note on the Role of Lawyer for Child – these assumptions are in line with the outdated Piagetian conception of child development based on set and rigid stages of development which determine a child’s capabilities (Taylor, Tapp and Henaghan “Respecting Children’s”, above n 76, at 68).

¹⁰⁴ Patrick Parkinson and Judy Cashmore *The Voice of a Child in Family law Disputes* (Oxford University Press, 2008) at 56.

¹⁰⁵ Tapp “Judges are Human”, above n 74, at 19; Boshier “Listening to Children’s”, above n 77, at 6; Taylor “What do we know”, above n 79, at 17.

¹⁰⁶ This relationship is inherently difficult to achieve in one short meeting between a child and a judge, and factors such as socio-cultural differences between the judge and child can enhance this difficulty (Taylor, Gollop and Smith “Children and Young”, above n 79, at 146; Parkinson and Cashmore “The Voice of”, above n 104, at 55-57.

¹⁰⁷ Tapp “Judges are Human”, above n 74, at 19.

when adults in such roles are not prepared; the discussions can resemble interrogations.¹⁰⁸ This would negate any potential developmental benefits associated with participating based on Childhood Studies principles. Therefore as with lawyer for child, the training and knowledge of judges specific to Childhood Studies and Socio-cultural principles will dictate the developmental success of any judicial interviews.¹⁰⁹

Natural justice is a further issue which arises with judicial interviews¹¹⁰ as they may be seen as a violation of the impartial role a judge is perceived to have.¹¹¹ This is because there is no mandatory requirement that the judge inform the parties of the content of the interview, and there is no opportunity to cross-examine the child.¹¹² In an attempt to counteract a perceived breach of natural justice, most judges inform children that the contents of the discussion will be repeated to their parents.¹¹³ In practice, this may contribute to the unwillingness of a child to let his or her true views be known.¹¹⁴ Accordingly, “involving children is not inherently positive as harms can result to children through anxiety, loyalty conflicts or damage to family relations.”¹¹⁵ For this reason, it is of utmost importance that judges emphasise to the children, in appropriate language, that while their views are critically important, they are not determinative.¹¹⁶ This practice allows the child to feel as if he or she is important and involved, but is not solely responsible for the outcome. Many judges are aware of these factors and do conduct interviews which are positive for both the child involved, and for the judge.

¹⁰⁸ Taylor “What do we Know”, above n 79, at 18.

¹⁰⁹ However, whether or not a Judge does have an interview with a child, the judge still has a duty to take account of any views the child expresses. This requirement will be discussed in Chapters three and four of this paper.

¹¹⁰ Mill “Conversations with children”, above n 100, at 72-79; Tapp “Judges are Human”, above n 74, at 49.

¹¹¹ Parkinson and Cashmore “The Voice of”, above n 104, at 56-60.

¹¹² Since the child is the subject of the proceeding, not a party to it.

¹¹³ Mill “Conversations with Children”, above n 100 at 74-75; Boshier “Judges’ Guidelines”, above n 101, at 1.

¹¹⁴ For example if a child feels his or her actual thoughts may cause pain to one or more of their parents (Parkinson and Cashmore “The Voice of”, above n 104, at 56-60).

¹¹⁵ Boshier “Involving Children”, above n73, at 3.

¹¹⁶ Caldwell “Judicial Interviews”, above n 76, at 220.

Such judges have stated:

As to interviews with a child, I have almost invariably found these helpful.¹¹⁷

I benefited from seeing [the child] not so much [because of] what he said, but rather being able to make this decision with his personality in mind.¹¹⁸

Similarly, children also benefit from well conducted judicial interviews as they allow the judge to see the situation from the child's point of view, thus allowing the child to convey what is important to him or her directly. This enables children to feel as though they have had a say about what will happen in their life, and feel listened to and respected as an individual. Children have reported that they "think it is wrong that [judges] can decide what should happen in [a child's] life without seeing [him or her]".¹¹⁹

These examples are consistent with Judge Mill's study concerning the practices of Family Court judges in New Zealand where he addressed many of the criticisms related to judicial interviewing practices.¹²⁰ His findings indicated that many criticisms are not well founded. For example, Mill J showed that judges are becoming more willing to interview children, and that those judges are able to pick up signals the child is exhibiting which indicate the views are not the child's own.¹²¹ Mill J argues this is evidence that judges are working at changing their practices to ensure compliance with s6.¹²² However, while Mill J's study is seen as a representation of New Zealand judicial

¹¹⁷ One judge's perspective as quoted in Murray Cochrane "Children's Views and Participation in Decision Making" (2006) NZFLJ 183 in Simon Jefferson "Point and Purpose: The Judicial Interview as a Tool for Ascertaining the Child's Views" in NZLS Advanced Lawyer for the Child (The Winds of Change CLE Conference, July 2008 65 at 66).

¹¹⁸ Judge Neal in *Knight v Finn* (2003) NZFLR 38 in Simon Jefferson "Point and Purpose: The Judicial Interview as a Tool for Ascertaining the Child's Views" in NZLS Advanced Lawyer for the Child (The Winds of Change CLE Conference, July 2008 65 at 66).

¹¹⁹ Tapp "Judges are Human", above n 74, at 3.

¹²⁰ Mill "Conversations with Children", above n 100, at 72-79.

¹²¹ Mill "Conversations with Children", above n 100, at 75.

¹²² Ibid.

practice, it only encompasses ten judges. Despite the examples above, it is clear that Judge Mill's findings are not consistent across the judicial cohort as a whole, and that compliance with the changes that s6 of the COCA brings is lagging.¹²³ In fact, judicial interviews only occur in approximately one-third of cases heard under the COCA which indicates the majority of judges have not internalised the developmental benefits judicial interviews may have for a child.¹²⁴

2.3 SPECIALIST REPORT WRITERS

Section 133 of the COCA gives courts the ability to appoint a specialist report writer if they are satisfied such an appointment is necessary. Specialist report writers cannot, as the law stands, be appointed solely to ascertain a child's views.¹²⁵ There are a number of different specialists who can be appointed under s133; however this paper will focus on the most common specialist appointed, being a psychologist.

Psychologists have extensive training in how children both develop and think, as well as how to interpret verbal and non-verbal cues. As such, there are significant advantages associated with involving psychologists in the application of s6:¹²⁶

A report by a child psychologist has the benefit of involving someone trained to communicate with children, to ensure the child's views are heard correctly. Children are not always forthcoming with their views... A child-psychologist will often be more skilled at discussing these matters with children than a judge or lawyer who has minimal training in the area. An expert has the advantage that they may be able to ascertain a child's opinion without discussing the subject with them directly. They can also give evidence, unlike a lawyer or a judge, and

¹²³ Henaghan "Legally Rearranging Families", above n 76, at 321-323; Mark Henaghan "Doing the COCACobana – Using The Care of Children Act for Your Child Clients" (2008) 6 NZFLJ 53 at 53-63.

¹²⁴ This was the result of a case study of 120 cases heard under the Care of Children Act 2004, for a more thorough discussion see chapter four of this paper.

¹²⁵ Henaghan "Legally Rearranging Families", above n 76, at 322.

¹²⁶ Boshier "Involving Children", above n73, at 5.

can therefore be cross-examined which gives better effect to the parent's rights of due process.

Unlike many lawyers or judges, psychologists have both the expertise and time to have an ongoing relationship with a child in order to gain a comprehensive understanding of the child and what is important to him or her. However, while psychologists have extensive training in child development from a psychological perspective, they are not trained in the sociological accounts of childhood development and consequently, are not trained specifically in the multi-disciplinary account of child development which has been accepted at law. Accordingly, psychologists often work with clinical samples, observational measures and standardised tests. As a result, the specialists reports written would not be considering the child as an individual, but instead against what is perceived as 'normal' by the psychologist. This does not fit with the Childhood Studies principles, yet courts often place significant weight on the psychologist's recommendations without ascertaining how those psychologists came to their conclusions:¹²⁷

The advice given to the Court by [psychologist] ... [is] to be given more weight than the opinions expressed by others.¹²⁸

I place considerable weight on the psychologist's evidence and proposals because not only has he been report writing for the Family Court for 17 years, but particularly because his report and evidence provide a wealth of good sense and direction¹²⁹

Further, there is often an extensive delay between when the psychologist interacts with the child and when the case goes to court. Consequently, any reporting may become out of date. A child can develop significantly over a short period and, with the right support,

¹²⁷ See for example *Wheelan v Last* FC Lower Hutt FAM-2003-032-000366, 11 July 2005; *SLM v BS* FC Nelson FAM-2000-042-736, 25 October 2006.

¹²⁸ *Wheelan v Last* FC Lower Hutt FAM-2003-032-000366, 11 July 2005 at [111].

¹²⁹ *SLM v BS* FC Nelson FAM-2000-042-736, 25 October 2006 at [25]. Note that particularly with cases such as this one where psychologists have been acting for a number of years, special care must be taken to determine if the practices of the psychologists have changed to become consistent with the changes in the COCA, and particularly with the multi-disciplinary account of development accepted at law.

may be able to play a much more active role in the proceedings, and express their views in a more comprehensive manner than when assessed by the psychologist.

2.4 SUMMARY

This chapter has identified the strengths and weaknesses inherent in each of the methods used to ascertain children's views. Any avenue can be successful, and is successful in ascertaining children's views and promoting a child's development through participation where there is sufficient training in the Childhood Studies and Socio-cultural principles. However, the lack of training and guidance can lead to uncertainty and inconsistency in the application of s6 across Family Court professionals.¹³⁰ If there is a sound understanding of the multi-disciplinary account of children's development, and this understanding is internalised by those involved in the application of s6, these methods will be improved enormously. Consequently, there will be far less variation in the application of s6 between cases, and the risks inherent in promoting children's participation will be minimised. The next chapter involves an analysis of how the higher courts have interpreted and applied s6.

¹³⁰ Chapter Five will discuss how extra training could be implemented.

CHAPTER THREE

THE LEADING CASES ON THE APPLICATION OF S6

Given our understanding of the rationale behind s6 and the methods in which children's views are ascertained, a consideration will now be made as to how the leading courts are applying s6, and whether or not they are giving effect to s6 as it was intended to be applied.

The first case to be appealed based on a misapplication of s6 was *C v S*.¹³¹ This case concerned a four-year and three-month old child who was not provided with an opportunity to express her views as the Family Court and lawyer for child believed she was too young. On appeal the High Court remedied this disregard for s6 and held that the obligation in s6 was a mandatory one. Randerson J in the High Court pointed out that s6 requires a child to be given 'reasonable opportunities' to express a view, and that this may mean that more than one opportunity should be offered. He noted that this would especially be the case where there is a significant delay between the time in which views are first ascertained, and when the proceedings occur. This is because a child's views may change over time as he or she either adapts to the changes in his or her life, or he or she becomes more aware of what the changes entail.¹³²

Randerson J also considered the differences between s23 of the Guardianship Act and s6 of the COCA;¹³³ however he went on to hold that the omission of 'age and maturity' in the new provision did not mean the court should not have regard to those factors.¹³⁴ Given the discussion earlier in this paper, this is 'a fundamental misunderstanding of the reason why age and maturity were removed.'¹³⁵ As discussed, having age and maturity

¹³¹ *C v S [P Orders]* [2006] NZFLR 745

¹³² See generally, Mark Henaghan "Legally Rearranging Families" in Mark Henaghan and Bill Atkin (eds) *Family Law and Policy in New Zealand* (Lexis Nexis, Wellington, 2007) at 269-360.

¹³³ As discussed in Chapter One of this paper.

¹³⁴ *C v S* [2006] 3 NZFLR 420 at [31(h)]; Henaghan "Legally Rearranging Families", above n132, at 321-323; Mark Henaghan "Doing the COCACobana – Using the Care of Children Act for your Child Clients" (2008) 6 NZFL 53 at 53-63.

¹³⁵ Henaghan "Legally Rearranging Families", above n132, at 323.

as qualifications is consistent with outdated theories of child development.¹³⁶

Randerson J in *C v S*¹³⁷ held that the four year old child in that case was able to express views and should have been given an opportunity to do so, yet he went on to say that the failure of the Family Court to ascertain the girl's views was not material because 'there was no reasonable prospect that any views obtained could have affected the outcome of the case.'¹³⁸ With respect, this comment seems to completely contradict the existence of s6 and the Childhood Studies and Socio-cultural principles which underpin it. It ignores both the idea that children should be respected as individuals, and the understanding that participation is important for a child's development; both of which are factors Principal Judge Boshier identifies as important rationales behind the provision for child participation in s6.¹³⁹

The parties in *C v S*¹⁴⁰ applied to the Court of Appeal to appeal the High Court's decision, however leave to appeal was declined. This was due to the Court of Appeal's decision that failure to ascertain a child's views would not make the decision void or ultra vires, and ordering a re-hearing would be more detrimental to the family due to financial costs and emotional wellbeing. The Court of Appeal held 'there is not much point in requiring a court to ascertain the views of a child who is not capable of having or forming a view which is material.'¹⁴¹ This 'materiality test' ignores Parliament's clear intent in enacting s6, as it is contrary to the entire rationale which underpins the section.¹⁴²

¹³⁶ See Chapter One for a thorough discussion of the traditional and contemporary theories of child development.

¹³⁷ *C v S*, above n 131.

¹³⁸ Ibid at [40].

¹³⁹ Care of Children Act 2004, s6; Principle Family Court Judge Peter Boshier "Listening to Children's Views in Disputed Custody and Access Cases" (Association of Family and Conciliation Courts Annual Conference, Vancouver, BC, Canada, 29 May 2008) <<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/association-of-family-and-conciliation-courts-annual-conference>> at 2.

¹⁴⁰ *C v S*, above n 131.

¹⁴¹ Ibid at [9].

¹⁴² Henaghan "Legally Rearranging Families", above n 132, at 323-324.

While C v S¹⁴³ is the only case which has been appealed to the Court of Appeal directly on s6 and is therefore the leading case, the nature of Family law requires each case to be decided on its own facts. This has seen some cases follow the lead of C v S,¹⁴⁴ and others interpret s6 with a slightly different emphasis. One High Court case which is consistent with C v S¹⁴⁵ is DLB v DLS.¹⁴⁶ In that case, the lawyer for child met with the child at the beginning of the proceedings when she was nearly two years old. At that point, the lawyer for child came to the conclusion that the girl was too young to articulate any views. When the child was four and a half years old, proceedings again came before the Family Court. Despite the passage of time and the significant development the child would have undergone in the intervening two and a half years, the lawyer for the child did not meet with the child in regard to the most recent proceedings; instead retaining that she was still too young to express a view. On appeal the High Court agreed, saying that a four and a half year old cannot articulate views in a way which could be given weight in by the court in the decision making process. Like C v S,¹⁴⁷ this case illustrates the higher non-specialist courts applying the legislation without a sound understanding in the rationale behind its provisions.

Similarly, in Carpenter v Armstrong¹⁴⁸ the High Court held there was a breach of s6 as one child to the proceedings was not given reasonable opportunities to express their views. Heath J in that case considered Henaghan's criticism of C v S,¹⁴⁹ that a court cannot dismiss a child's view as immaterial when they have not heard the view. He distinguished his case from that situation as opportunities had been made since the Family Court decision for the child to express views. It was once these opportunities

¹⁴³ C v S, above n 131.

¹⁴⁴ C v S, above n 131.

¹⁴⁵ Ibid.

¹⁴⁶ DLB v DLS [Parenting Orders] [2007] NZFLR 263.

¹⁴⁷ C v S, above n 131.

¹⁴⁸ Carpenter v Armstrong HC Tauranga CIV-2009-470-511, 31 July 2009.

¹⁴⁹ Carpenter v Armstrong, above n 148, at [74], discussing Henaghan "Doing the COCACobana", above n 134, at 53-62.

had been given, and the views had been heard, that the High Court on Appeal held the breach of s6 at Family Court level did not have a material impact on the outcome of that case.¹⁵⁰

Conversely, the High Court in *L v B*¹⁵¹ found that the trial judge was wrong not to give weight to the views of a five year old on the basis of the child's age and maturity. Potter J in that case held that the child's views were consistent with the welfare principles in s5 of the COCA, and for that reason the trial judge was wrong in not giving significant weight to the views. While this case is moving in the right direction, it still provides a subtle qualification of only giving weight to a child's views when they are consistent with the principles in s5.¹⁵² Likewise, s5¹⁵³ was the reason another recent High Court case¹⁵⁴ found that the children's views in the case could not be given significant weight. In that case the Judge held that the views did not coincide with what the Court perceived to be in the best interests of the children subject to the proceedings, and therefore had to be disregarded.¹⁵⁵ However, in a recent decision¹⁵⁶ regarding a misapplication of the s 5¹⁵⁷ principles, the Supreme Court noted that s5¹⁵⁸ does not limit s6.¹⁵⁹ Accordingly, taking account of, and placing weight on views should not be entirely based on how those views fit with the welfare and best interests set out in s5.¹⁶⁰

This sample of cases from the higher courts illustrate that there is a large degree of

¹⁵⁰ *Carpenter v Armstrong*, above n 148, at [86-87].

¹⁵¹ *L v B* (High Court, Auckland, CIV 2009-404-005482, 22 January 2010, Justice Potter).

¹⁵² Care of Children Act 2004, s5.

¹⁵³ Ibid.

¹⁵⁴ Re WAH 09/07/2009, Courtney J, HC Auckland, CIV 2007-404-7415 [59].

¹⁵⁵ Ibid.

¹⁵⁶ *Kacem v Bashir* [2010] NZSC 112.

¹⁵⁷ Care of Children Act 2004, s5.

¹⁵⁸ Ibid.

¹⁵⁹ However the discussion of s6 in that case was limited as the application of s6 in that case was not a contested issue.

¹⁶⁰ Care of Children Act 2004, s5.

variation in the application of s6. The Court of Appeal has introduced a materiality test; however some subsequent cases have based giving weight to views on whether or not they accord with the welfare and best interest principles in s5 of the COCA rather than if the views will be material to the outcome of the case. Given this variability, the next chapter will involve an analysis of a number of cases predominantly at Family Court level in order to determine whether or not there are any general trends in the application of s6, and if so, possible explanations for those trends.

CHAPTER FOUR

HOW IS S6 BEING APPLIED IN EVERY DAY CASES? AN ANALYSIS OF 120 CASES TO DETERMINE IF THERE ARE TRENDS IN THE APPLICATION OF S6

As seen in chapter three there is a large degree of variation in how the higher courts have interpreted and applied s6 despite the Court of Appeal's application of a materiality test.¹⁶¹ This is consistent with Professor Henaghan's statement that the role of precedent in the Family Law field does not play as significant a role as it does in other areas of law:¹⁶²

Winkelmann J [in *LH v PH* [2007] NZFLR 737] emphasises that because of the child's welfare and best interests being the first and paramount consideration, the inquiry is intensely fact specific with little assistance to be derived from decisions in other cases. This contention further highlights the freedom Judges have to use their discretion in the particular case at hand, rather than being tightly bound by past cases, and such freedom arguably has led to the lack of clarity and predictability in this area of law.

Henaghan's argument was accepted by the Supreme Court in *K v B*¹⁶³ where they cited the above quote and reasoned:¹⁶⁴

These and other concerns identified by the Professor are inherent in the exercise in which judges administering ss 4 and 5 of the Act are involved. Lack of predictability, particularly in difficult or marginal cases, is inevitable and the so-called wide discretion given to judges is the corollary of the need for individualised attention to be given to each case.

Therefore, consideration must stem beyond the leading cases into the first instance courts to determine if there are any trends in how the COCA, and in particular s6, is

¹⁶¹ *C v S [P Orders]* [2006] NZFLR 745.

¹⁶² *Kacem v Bashir* [2010] NZSC 112 at [34].

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid* at [35].

being applied in everyday Family Court cases. Accordingly a sample of 120 cases heard under the COCA were selected to study.¹⁶⁵ These cases fitted four broad categories,¹⁶⁶ namely Alienation cases,¹⁶⁷ Relocation cases,¹⁶⁸ Protection cases,¹⁶⁹ and Care and Contact Dispute cases.¹⁷⁰ This chapter will involve both a qualitative and a quantitative analysis of the cases in order to assess whether there are trends in how the Family Courts apply s6, and the reasons which may underlie those trends.

4.1 HOW ARE THE COURTS APPLYING S6(2)(A)?

Section 6(2)(a) requires the courts to give a child, or of there is more than one child subject to the proceedings, each child, reasonable opportunities to express their views. In the sample of 120 cases, 34 cases (28%) did not discuss the child's views in the judgment, despite a lawyer for child being appointed to represent the child in 99% of cases. The methods used to ascertain a child's views reflected the three main methods discussed in chapter two. The instances in which each was employed is set out in the following table:

¹⁶⁵ See appendix two for the list of cases used and the methodology used to select these cases.

¹⁶⁶ The cases were split into these categories in order to assess whether the type of case was a factor in how the judge applied s6 in the particular case.

¹⁶⁷ This is the situation when one parent or caregiver exposes a child to information or attitudes which influence the child's own views. With alienation one parent typically turns the child against the other parent and the child expresses the view that he or she wants nothing to do with the other parent.

¹⁶⁸ This is the situation where one parent wants to relocate with the children away from where they currently are. This may be to the next town, to a different part of the country or overseas.

¹⁶⁹ These cases include where the child is at some sort of enhanced risk because of a history of violence within the family unit.

¹⁷⁰ This category includes cases where the major dispute is because each parent/caregiver cannot agree on the care and contact arrangements of the child/children.

	Lawyer for child	Psychologist	Judicial Interview	Counsel to assist	Child giving evidence
Alienation	15/15	13/15	5/15	6/15	1/15
Relocation	47/47	26/47	18/47	0/47	1/47
Protection	29/30	13/30	4/30	2/30	0/30
Care/Contact	28/28	12/28	12/28	2/28	0/28
Total	119/120	64/120	39/120	8/120	2/120

This table shows that in all but one of the 120 cases a lawyer for child was appointed (99%), in approximately half of the cases a psychologist was appointed under s133 (53%), and in approximately one third of the cases a judicial interview took place (32.5%). Counsel to assist was appointed less frequently (6.6%), and in two cases a child was permitted to give evidence in court.¹⁷¹

These statistics show that the category of case does appear to influence which methods, in addition to lawyer for child, will be used by the court to ascertain a child's views.¹⁷² For example, in 86.7% of the Alienation cases a psychologist was appointed by the court. This differs significantly from the 55% of Relocation cases, 43% of Protection cases and 42.9% of Care and Contact Dispute cases where a psychologist is appointed.

The higher rate of psychologists being appointed in Alienation cases can be attributed to the challenge judges in such cases are faced with in the decision they must make. Judges in Alienation cases must choose between following the views of the child, which are ultimately internalised negative views of the alienated parent caused by the resident parent, or, placing the child with the alienated parent in an attempt to remedy the relationship. The latter option is often seen to be in the child's best interests as the COCA promotes ongoing relationships with both parents:¹⁷³

¹⁷¹ As in the circumstances of those cases, the other methods were unavailable.

¹⁷² Care of Children Act 2004, s7; Lawyer for child statistics do not differ between categories of cases as s7 provides for their appointment in all cases to which a child or children are subject. For this reason when any discussion of trends relating to the method used to ascertain a child's views is made, lawyer for child will be excluded.

¹⁷³ Care of Children Act 2004, ss3-5.

A had consistently expressed the view that he did not want to have contact with his father ... [lawyer for child] reminded me that shifting A's care should only be contemplated if it was found to be in A's best interests, for that underpins the principles of the Care of Children Act. ... I have come to the judgment that A must immediately come into the care of his father.¹⁷⁴

Likewise in SAM v DLR¹⁷⁵ the child subject to the proceedings was placed in the care of his stepmother contrary to his expressed views because:¹⁷⁶

It is clear that R has been coached and his views reflect a home environment that is openly hostile to his paternal family.

The Judge found that given the child's home environment, in order to give effect to the best interests of the child¹⁷⁷ he had to order a change in primary care.

Conversely, in some cases where the negative views are so strongly internalised, judges consider that shifting the child into the care of the alienated parent can be more detrimental to the child's welfare than allowing the child to stay. This was the case in JR v RCT¹⁷⁸ where the Judge held:

[The option of being moved into the care of their alienated mother] is quite contrary to the boys' wishes, and, because of the degree of their polarisation and the depth of their emotions, would almost certainly provoke an extreme reaction in them.¹⁷⁹

It is quite obvious from the discussion that, harmful as it may be, retaining the

¹⁷⁴ ADK v KMR FC Hastings FAM-2002-090-001392, 24 February 2010 at [20].

¹⁷⁵ SAM v DLR FC Rotorua FAM-2004-073-000025, 17 March 2009.

¹⁷⁶ *Ibid* at [36].

¹⁷⁷ Which under s5 includes maintaining relationships with both families (Care of Children Act 2004, s5).

¹⁷⁸ JR v RCT FC Christchurch FAM-2002-009-001773, 22 December 2006.

¹⁷⁹ *Ibid* at [37].

status quo is less dangerous to the boys' welfare than any alternative.¹⁸⁰

The same reasoning was applied in *JTP v BTT*¹⁸¹ where the Judge states:¹⁸²

It is not realistic for Elaine to live with her mother. She wishes, in the strongest terms, to live with her father and have no contact with her mother. This is one of those exceptional cases where I have decided not to interfere with Elaine's wishes even though I am utterly convinced that what Elaine wants is not in her best interests.

An example of a Judge thinking outside the square in order to give effect to both the child's views and the best interests of the child was the case of *ADK v KMR*.¹⁸³ In that case a 14 year old child was severely alienated against his father. The Judge in the first instance did not order that the boy be taken out of the care of his mother and placed with his father, but instead ordered supervised contact aimed at establishing a relationship between the boy and his father. The Judge ordered that the mother assist in building this relationship and that as the relationship builds, the contact should increase. This order was intended to enable the views of both the mother and her child to change, thus promoting the best interests of the child. A year later however, the Judge found there had been continued alienation by the mother and only one attempt at contact with the father. On these findings, the Judge concluded that the boy must be transferred into his father's care as his best interests and welfare were not being promoted in the environment with his mother, despite the chance given to the mother to shift her attitude.

As is evident from these examples, judges in Alienation cases are faced with a difficult task. It is unclear whether views a child expresses are the child's actual views, whether they have been coached into expressing specific views or, whether the alienation is so severe that the child has internalised the views of the alienating parent. It is also unclear

¹⁸⁰ Ibid at [41].

¹⁸¹ *JTP v BTT* FC Invercargill FAM-2008-082-000004, 28 January 2010.

¹⁸² Ibid at [40].

¹⁸³ *ADK v KMR* FC Hastings FAM-2002-090-001392, 2 October 2009.

whether a child will be more detrimentally affected if they are placed into the care of the alienated parent, or if the status quo is retained. As judges have limited expertise specific to these issues,¹⁸⁴ it is quite apparent why the rate of psychologists is increased in Alienation cases compared with other categories of cases. If judges are unable to assess the strength and scope of a child's views or how much weight can be placed on them it is only natural they seek expert help:¹⁸⁵

I do not think I can place a great deal of weight on what the children said because without the input of the psychologist, it is difficult for me to know just what reliance I can place on their comments.

Psychologists are able to assess the validity of a child's expressed views and are trained to be able to determine how different outcomes would affect a child.¹⁸⁶ This role requires time and expertise unavailable in any of the other methods used to ascertain children's views.

Similarly, the number of counsel to assist appointments were also elevated in alienation cases compared with other categories of cases.¹⁸⁷ This is because in alienation cases a child's 'expressed [views] appear to be at odds with [that child's] welfare and best interests.'¹⁸⁸ In such cases the lawyer for child will either represent the child's views or the child's best interests, with counsel to assist representing the alternative.

These examples indicate that the methods used to convey the child's views are often employed in instances where they will be most helpful to the court in coming to their decision. This finding may also explain the difference in rates of judicial interviews

¹⁸⁴ Principal Family Court Judge Peter Boshier "Involving Children in Decision Making: Lessons from New Zealand" (2006) 20 AJFL Lexis 4 at 5.

¹⁸⁵ *SFW v RAL* FC Lower Hutt FAM-2005-032-000695, 15 November 2006 at [5].

¹⁸⁶ Based on psychological training. See Chapter Two for a consideration of the role of psychologists as specialist reporters under the Care of Children Act 2004, s133.

¹⁸⁷ The rate of counsel to assist in Alienation cases was 40%, compared with 0% in Relocation cases, 6.6% in Protection cases and 7% in Care and Contact Dispute cases.

¹⁸⁸ *SAM v DLR* FC Rotorua FAM-2004-073-000025, 17 March 2009 at [32].

between the categories of cases. The cases studied showed that there was a judicial interview in 32.5% of cases. When the figures were compared between categories, it was found that judicial interviews took place in 33% of Alienation Cases, 38% of Relocation cases, 42.8% of Care and Contact Dispute cases, and only 13% of Protection cases.

Without having a full understanding of the basis of s6 and the developmental advantages full participation in proceedings can have for a child,¹⁸⁹ it is likely that the potential assistance an interview can give the judge will dictate when and if the avenue is pursued. If a judge has a comprehensive understanding of Childhood Studies, the judge will be likely to have a presumption for undertaking judicial interviews regardless of any other factors,¹⁹⁰ as the judge will be aware that a child's participation is important for that child's development. This does not appear to be the situation with the cases studied, as the highest rate of judicial interviews occurs in the Care and Contact Dispute category. Where all other factors in the case are balanced, which is often the case in the Care and Contact Dispute category, judicial interviews can be a very useful tool to assist the judge in coming to a decision.

In comparison, the rate of judicial interviews in Protection cases is a lot lower. This appears to be due to the overriding concern of safety becoming the determinative factor in those cases:

I consider there is a serious risk to the children if they were in the unsupervised care of their father ... The risk is such that, in my view, it outweighs the benefits to the children of having unsupervised contact with [father].¹⁹¹

They love their father and want him to play a significant part in their lives. I am required to have regard to their views and they deserve to be respected. However I am also mindful of the mandate to regard Benjamin and Hamish's

¹⁸⁹ See Chapter One for detailed discussion on this point.

¹⁹⁰ Such as the category of case or potential helpfulness the child's views will be in the final decision.

¹⁹¹ *Thomas v Brough* FC Nelson FAM-2006-042-159, 2 May 2007 at [34].

best interests as the first and paramount consideration in the context of their particular circumstances. In considering them I must have regard to the principles specified in s5 of the Act, and in particular s5(e) – that their safety must be protected from all forms of violence.¹⁹²

The Supreme Court impliedly acknowledged this trend in the decision making process:¹⁹³

If, for example, principle (e) (concerning the child’s safety) is engaged it is likely to have decisive weight, not because of any presumptive legal weighting, but because of the crucial factual importance of protecting the safety of children when compared with the objectives at which the other principles are aimed.

A judicial interview will not alter these conclusions on safety for the judge. Thus, if there is not a comprehensive understanding of the Childhood Studies grounding in why we have s6,¹⁹⁴ judicial interviews will be rendered unhelpful in protection cases.¹⁹⁵

Despite the category of case, the total figures for judicial interviews are generally low. This is surprising given that judges are encouraged to meet with children who they are making a decision about, and judicial interviews have been identified as one of the two main avenues of bringing a child’s views before the court.¹⁹⁶ There are several reasons judges are not interviewing children, some because they were “not invited to do so”¹⁹⁷

¹⁹² *Williams v Williams* FC Chch FAM 1998-012-000971, 8 September 2006 at [58].

¹⁹³ *Kacem v Bashir* [2010] NZSC 112 at [19].

¹⁹⁴ And the importance of participation for a child’s development. See Chapter One for a more comprehensive discussion of Childhood Studies.

¹⁹⁵ This premise was recognised and discussed by Pauline Tapp where she noted that situations where a child requires protection or finality may result in non-compliance with s6 due to the s4 requirements (Pauline Tapp: A Child’s Right to Express Views: a Focus on Process, Outcome or a Balance (2006) 5 NZFLJ 209 at 211).

¹⁹⁶ Principle Family Court Judge Peter Boshier “Listening to Children’s Views in Disputed Custody and Access Cases” (Association of Family and Conciliation Courts Annual Conference, Vancouver, BC, Canada, 29 May 2008) <<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/association-of-family-and-conciliation-courts-annual-conference>> at 1.

¹⁹⁷ *DMM v SBM* FC Waitakere FAM-2001-090-001220, (March 2009 at [13].

in a particular case, and others declining even when an interview is requested because “there are risks for [the child] that [the child] will be expressing views which have arisen naturally in the situation that may not necessarily be in his interests”,¹⁹⁸ or, because they see that there would be “little benefit” in the exercise.¹⁹⁹ The judicial Practice Note does not specify that judges must be requested to conduct a judicial interview before they are able to do so, yet as evidenced in the sample of cases, this appears to be a common reason which leads judges to make a decision whether or not to conduct a judicial interview:

The children did not convey a wish to meet with the judge so I have not met with the children.²⁰⁰

Neither counsel nor the children’s parents thought it desirable for me to meet with them and as I was satisfied their views were represented I did not meet them.²⁰¹

It is increasingly the case that judges undertake a judicial discussion with children in order to elicit their views directly. I was not invited to do so in this case.²⁰²

As the children wished to meet with me, I met with the children, separately, prior to the hearing.²⁰³

While these quotes illustrate some judges are not taking a leading stance in requesting interviews from the outset, there other judges have been taking a more pro-active role:²⁰⁴

¹⁹⁸ *Lingham v Dazel* FC Manukau FAM-2004-092-2001, 29 July 2005 at [52].

¹⁹⁹ *O v F* FC Porirua FAM-2009-091-000005, 11 September 2009 at [50].

²⁰⁰ *Holliman v Holliman* FC Wellington FAM-2006-004-1230, 28 February 2007 at [23].

²⁰¹ *CAJ v DVJ* FC Christchurch FAM-2006-009-2591, 7 May 2008 at [21].

²⁰² *DMM v SBM* FC Waitakere FAM-2001-090-001220, 9 March 2009 at [13].

²⁰³ *STH v EFG* FC Nelson FAM-2008-042-000723, 4 May 2009 at [57].

The children are 14 and 11 and I felt it crucial they had the opportunity to see me to express their views, as s6 of the COCA provides, if they wished to do so. They did and I saw them in the court at 9am. My usual practice was followed, and that is that the children played in the courtroom in various roles before I had individual discussions with each of them.

Thus, it is evident there are differences in the approach to judicial interviews within the judiciary which account for both the low overall rate of judicial interviews, and the intra-category differences.

This part has shown that the category of case does appear to have a bearing on which methods are employed to ascertain a child's views under s6(2)(a).²⁰⁵ The next part of this chapter will consider s6(2)(b), that is how does the court 'take account' of the views a child has expressed in their decision.

4.2 HOW DOES THE COURT 'TAKE ACCOUNT' OF A CHILD'S EXPRESSED VIEWS UNDER S6(2)(B)?

Section 6 requires that a child be given reasonable opportunities to express views, and any expressed views are to be taken into account. Judges often ascertain the views, and then sometimes discuss the weight they are placing on the expressed views, but very rarely do judges indicate how they are *taking account* of the views they have before them. Perhaps judges think this is implied in their discussion about the weight to be placed on the views. However, in the cases studied, weight was often either not discussed at all, or was dealt with very briefly in a way that did not make it clear how the judge had actually *taken account* of the views before them:

[child] does not have a sufficient level of maturity to understand the implications of relocation, so little weight can be placed on any impression she

²⁰⁴ *TM v NJ* FC Queenstown FAM-2005-002-000247, 25 February 2009 at [6].

²⁰⁵ In addition to the method of lawyer for child which is employed in all cases due to s7 COCA.

gives that she would like to go to South Africa with her mother.²⁰⁶

I place little weight on [child's] views. [Child] is a 6 ½ years old and does not have the maturity or cognitive ability to understand what relocation would entail.²⁰⁷

I am required to take the children's views into account; s6 says that. The youngest child [4 years] is really too young to express a mature view. The older two children say that they do not want to see their father. But there is obvious caution about that, as pointed out by [psychologist].²⁰⁸

In other cases judges did acknowledge that they took account of the child's views, but did not say *how* they took account of the views:

Whilst I take all the views [the child] has expressed into account, I place little weight on the child's views given her age, the changeable nature of her views, and the psychological evidence that given her age, it is unlikely that she has any real concept of what relocation may mean for her.²⁰⁹

[Section] 6 requires that the child's views must be taken into account. [lawyer for child] has fulfilled that role.²¹⁰

The latter quote illustrates a Judge misinterpreting the requirements in s6. The Judge in that case failed to separate out the requirement of ascertaining a child's views from the requirement that the views expressed must be taken into account. He instead, stated that the child's views had been taken into account by virtue of the lawyer for child

²⁰⁶ *HJT v EGT* FC Hamilton FAM-2003-019-00896, 3 October 2008 at [28].

²⁰⁷ *FLT v WT* FC Hamilton FAM-2008-019-001111, 28 January 2010 at [108]. There was no further discussion about how the judge takes account of the views in this case.

²⁰⁸ *PSC v BLB* FC Waipukarau FAM-020-286-05, 7 May 2008 at [16]. There was no further discussion about how the judge gave weight to each child's views in this case, nor was there any further discussion about the views at all.

²⁰⁹ *O v F* FC Porirua FAM-2009-091-000005, 11 September 2009 at [54-55].

²¹⁰ *Sullivan v Nash* FC Manukau FAM-2007-055-000321, 30 April 2008 [8].

conveying those views to the court.

Ascertaining views, taking account of views and placing weight on views are three distinct steps. If a judge decides to discount a child's expressed views because of the child's age, this does not indicate how the judge is taking account of the views, and in fact suggests that the judge is not taking account of the views at all. Taking account of a child's views is important as it allows the child to see that their participation has meant something, that they have been listened to and heard. Based on Childhood Studies, this will promote their development as it will elevate confidence, self-esteem, psychological functioning and independence.²¹¹ Where a judge has taken account of a child's views in their judgement, this will be of great assistance to the lawyer for child who has a duty to explain the decision to the child.²¹² A judge should ascertain a child's views, and then take account of them regardless of whether they decide to attach weight to the views or not.

An example of a case where a Judge did discuss how each child's views have been taken into account was *BU v AC*.²¹³ In that case, the Judge ascertained the views, considered the possible outcomes which would be consistent with the views, identified the 'welfare and best interests' reasons which weighed against a decision following the views, and finally came to a decision which was a compromise between the views and the welfare and best interest principles in s5 of the COCA. That process allowed the Judge to show how the views have been taken into account, yet justified a decision which elected not to follow the views exactly due to the balancing exercise the Judge had undertaken.

Similarly, another case²¹⁴ involved issues regarding the safety of the children while they were in their father's care. In that case, the Judge also took account of the children's views that they wanted increased contact with their father by exploring several possible

²¹¹ Boshier "Listening to Children's Views", above n196, at 2.

²¹² Explaining decisions thoroughly to a child is part of what is necessary for an effective 'scaffolder,' and to promote a child's development based on the Childhood Studies principles. See Chapter One of this paper for more information.

²¹³ *BU v AC* FC Manukau FAM 2001-092-1875, 26 February 2007.

²¹⁴ *Rewi-Wetini v Wasser* FC Hamilton FAM-2002-019-1515, 21 September 2005.

outcomes which could be consistent with the views, finally coming to a compromise which promoted both their views and their best interests:²¹⁵

In my view the girls' wishes can be accommodated to an extent, providing that they do not stay overnight at their father's home and that contact is supervised by [paternal grandmother].

Further, the Judge in *CAJ v JE*²¹⁶ found:²¹⁷

The children's views must be respected and given that there are two other viable options available to meet their needs it is not necessary to impose a regime on them that is more adult focused.

These examples illustrate judges are able to show how they have taken account of a child's views even when they come to a decision which is inconsistent with the views expressed. If the judge explains how they have taken account of views, this will often indicate how the judge determined the weight to be placed on the views.

Section 6 also requires that *each child's* views must be ascertained and taken into account. Out of the 62 cases in which there was more than one child subject to the proceedings, 38 (61%) discussed each child's individual views comprehensively. Thus, in 23 (39%) cases the court failed to sufficiently consider each particular child in his or her circumstances. As with the decision on which methods to employ to ascertain a child's views, the category of case again appeared to influence whether the court considered each individual child's views.

In the Relocation category, the courts ascertained each individual child's views in 78% of cases where there was more than one child subject to the proceeding. This figure differs from the 63% of Alienation cases, 54% of Care and Contact Dispute cases and 40% of Protection cases which considered each child's views. Again, this inter-category

²¹⁵ Ibid at [80].

²¹⁶ *CAJ v DVJ* FC Christchurch FAM-2006-009-2591, 7 May 2008.

²¹⁷ Ibid at [29].

difference may be due to the assistance the court gains from ascertaining views in the particular category of case. As has been shown with protection cases, the overriding concern of safety often results in the child's views being ignored or discounted more readily. Relocation cases, on the other hand, require a judge to make a difficult decision involving either promoting the status quo and the ongoing relationships with both parents, or, promoting the relocating parent's welfare and consequently their ability to be an effective parent. Thus, considering each child's view is vital in order for the judge to determine how the possible outcomes will impact on each child given their attachment with each parent and the factors in their individual lives which need to be considered in order to promote their welfare and best interests.²¹⁸

Therefore, many cases do not specify either how they take account of a child's expressed views, or fail to consider each child subject to the proceedings. It is apparent that the category of case is a factor which influences whether full effect will be given to s6, indicating that judges have generally not internalised the Socio-cultural or Childhood Studies principles which promoted the changes evident in s6.²¹⁹

4.3 HOW DOES THE COURT DETERMINE THE WEIGHT TO BE PLACED ON A CHILD'S EXPRESSED VIEWS?

In 21 out of the 86 cases in which views were discussed, there was no further discussion of the weight to be placed on the views. Thus, in 55 cases (45.8%) either the child's views were not ascertained, or they were ascertained, however there was no further consideration of the weight the views should be given. This shows that there are a significant number of cases in which the courts are not complying with s6.²²⁰

²¹⁸ The explanation for the figures of Alienation cases which consider each child's views may be that judges need to consider each child to determine the strength of the alienation and whether all children have been alienated to the same degree or not. The figures for the Day to Day Care category are surprising given that these cases are the ones where there are no overriding concerns of safety or alienation, so any views expressed can help the judges immensely. It may be that in these cases the older child's views are seen as more influential.

²¹⁹ See Chapter One for a thorough discussion on this point.

²²⁰ At least in terms of their written judgments – this study is limited in that there is no further information about the evidence given in proceedings and the thoughts of the judge.

In cases where weight was discussed, there were a series of different factors which caused weight to be given, or conversely, weight not to be given and views to be discounted. For some of these cases, it is evident that courts have not internalised the changes between the Guardianship Act and the COCA.²²¹ For example, despite age and maturity being removed as qualifying considerations in s6, judges are still using those factors as considerations. In 47 (39%) of the cases studied, age and maturity of the child were discussed as a consideration when determining whether the child is capable of giving views, or, whether weight should be attached to views. In 13 (10.8%) of the cases the judge recognised the obligations of the court under s6, yet held that the child at issue was too young to express a view. The age of the children in those 13 cases ranged from one year old to five years old:

This is a case where Hugo [two years old] is too young to express an opinion or indicate his wishes.²²²

Section 6 of the Act makes it clear that a child must be given reasonable opportunity to express any views on the matter affecting the child and that those views must be taken into account. In this case [the child] has only just turned five. He is described as a bright and articulate young boy, but he is too young to express a view.²²³

The children's ages [six and four and a half] preclude the Court receiving their full and independent views and wishes.²²⁴

In a further eight cases (6.7%) views were ascertained but were discounted due to age or maturity. The ages of the children in those eight cases ranged from four and a half years old to thirteen years old:

²²¹ As discussed in Chapter One of this paper.

²²² *Carey v Walker (previously Carey)* FC Dunedin FAM-2003-002-000252, 5 July 2005 at [6].

²²³ *WAB v NTTT* FC Wellington FAM-2003-085-2119, 10 August 2005 at [14].

²²⁴ *R v M* FC Hamilton FAM-2007-019-001242, 27 February 2009 at [26].

Given [seven year old child's] age, and the contents of the reports form [psychologist] in relation to this, I was not prepared to explore reasons for her views.²²⁵

[Eight year old child] does not have a sufficient level of maturity to understand the implications of relocation, so little weight can be placed on any impression she gives that she would like to go to South Africa with her mother.²²⁶

I place little weight on C's views. C is 6 ½ years old and does not have the maturity or cognitive ability to understand what relocation would entail... The critical concept in my view, is whether the children have, in the words of Priestly J, articulated a 'valid view'. What I take that to mean, is a view rationally and maturely formed and well thought out.²²⁷

In six cases (5%) weight was given to the views because of the age/maturity of the child expressing the views. The ages of the children in those six cases ranged from eight and a half years old to 16 years old:

Having regard to their ages, I find that children's wishes must be given significant weight²²⁸

It is very apparent that a child's age and level of maturity will be relevant considerations for the court to take into account in assessing the weight to be given to a child's expressed views. So also will be the influences which have tended to shape the child's viewpoint.²²⁹

Given the ages of the boys, I find that their views must be given considerable weight.²³⁰

²²⁵ *BU v AC FC Manukau* FAM 2001-092-1875, 26 February 2007 at [43].

²²⁶ *HJT v EGT FC Hamilton* FAM-2003-019-00896, 3 October 2008 at [28].

²²⁷ *FLT v WT FC Hamilton* FAM-2008-019-001111, 28 January 2010 at [108].

²²⁸ *Rewi-Wetini v Wasser FC Hamilton* FAM-2002-019-1515, 21 September 2005 at [63].

²²⁹ *Doherty v Johnson FC New Plymouth* FAM-2003-043-116, 17 January 2008 at [43].

²³⁰ *Pehi-Neho v Davis FC Manukau* GV-2002-055-377, 9 June 2006 at [81].

These findings suggest not only that courts are still considering age and maturity, but that they also are under the impression that some children are unable to express views. Further, in 39 cases (32.5%) the courts referred to the term 'wishes' as opposed to 'views.' These practices are consistent with the outdated provisions in the Guardianship Act rather than the COCA, demonstrating that in practice, judges are ignoring Parliament's intent in changing the law, and the Childhood Studies and Socio-cultural influences which promoted that change.²³¹

In addition to the qualifications in the Guardianship Act which still appear to influence weight given under the COCA, several other factors also appear to influence the decision to attach weight to a child's views. For example, out of the 203 children who were subject to one of the 120 cases, the court followed or partially followed the views of 80 children, 44% of whom were males and 50% females.²³² This may indicate female children are slightly more likely to have their views followed, however this cannot be conclusive given there are 6% of children within this category for whom gender is unknown based on the judgment.²³³

From those 80 children whose views were followed or partially followed, 41 (51%) involved a judicial interview and 40 (50%) had a court appointed psychologist.²³⁴ Given that the overall rates for judicial interviewing were 32.5%, there is a significant difference between general rates of judicial interviews and the rates of cases in which

²³¹ As discussed in Chapter One of this paper.

²³² 6% of the children whose views were followed or partially followed were not identifiable by gender in the judgment.

²³³ These figures highlight the issues which arise regarding the current method employed by the Family Court to make their judgments anonymous. Using only initials removes the personalities and humanity of the person the decision is about, and results in mechanical judgments. In many judgments gender was not obvious and could only be found through very careful reading. Perhaps a better method would be to use fake names, or, to use the relationship of the person in order to provide for ease of understanding who is who as one reads the judgment. For example, [psychologist] says [son1] has expressed that he does not want to live apart from [son 2] and [daughter 1], and that he would like to spend more time with [paternal grandmother].

²³⁴ As the general rate of court appointed psychologists under s133 was 53% these figures show there is no significant difference between the cases in which weight is given to views conveyed via a psychologist and the rate of psychologist appointments generally

weight is attached to views which have been obtained via a judicial interview among other methods.

Three differing explanations may account for the finding that the occurrence of a judicial interview appears to influence the weight to be attached to a child's views ascertained via that interview.²³⁵ Firstly, the type of case in which judicial interviews are employed may account for the fact that judicial interviews influence whether the views are followed or not. As noted earlier in this chapter, judicial interviews are most commonly used in categories of case where the interview can be some help to the judge in making the decision. It was shown that judicial interviews are relatively rare in protection cases, largely because of the overriding concern of safety in those cases. On this premise, it may be that where the child's views will make a difference to the judge, those are the cases where judges make a conscious effort to hear the child's views. Accordingly, the judge is more likely to use the views in a meaningful way because the views were ascertained with an intention that they would be of assistance in the final decision.

Alternatively, this trend may be explained by reason that in interviewing a child, a judge does get a more comprehensive idea about the impact the decision is going to have on the child. By talking with a child, the judge is more qualified to determine what will and what will not work for that particular child. Meeting the child first hand allows judges to have an extra dimension in consideration when making their decisions. This may result in judges being more likely to come to a decision which is consistent with the child's views, or which attempts to give effect to the expressed views.

A further explanation again may be that the judges who elect to undertake judicial interviews have a better understanding about why we have s6, and the importance of participation for a child's development. A more thorough understanding about these factors could alter the process in how a judge proceeds with a case, and the importance they place on s6 itself.

²³⁵ Among other methods.

Without insight into a judge's thought process it is impossible to determine whether one of these explanations is more accurate than another.

Regardless of how views were ascertained, several reasons were given for either attaching weight, not attaching weight, or for discounting a child's views. Most commonly a child's views were discounted because of age,²³⁶ because they were seen to be contrary to what was perceived to be in the best interests of the child (17% of cases), or, because the views were seen as tainted due to an external influence (8% of cases):

The views expressed by a child effected by the Court's jurisdiction must be taken into account. That does not mean that the child's views must dominate what decision is made. It is very apparent that a child's age and level of maturity will be relevant considerations for the Court to take into account in assessing the weight to be given to a child's expressed views. So also will be the influences which have tended to shape the child's viewpoint.²³⁷

I have considered Chelsea's views and wishes with respect to contact. However, the court also needs to consider the objects of the Care of Children Act as outlined in s5. It is clearly the intent of the legislation to ensure children are safe. In that regard, irrespective of Chelsea's views and particularly given the serious nature of the violence I have found, I consider at this stage, given the separation is still recent, that it is valid to consider as one of the more important objects to ensure Chelsea's safety irrespective of her views and wishes'²³⁸

I find that the children's wishes have been so influenced by Ms Bennett that they cannot be regarded as the children's own. I am unable to place any reliance on those wishes.²³⁹

²³⁶ See discussion earlier in this chapter regarding age.

²³⁷ *Doherty v Johnson* FC New Plymouth FAM-2003-043-116, 17 January 2008 at [43].

²³⁸ *McPhee v Cadman* FC Dunedin FAM-2006-012-000205, 14 July 2006 at [71].

²³⁹ *Bennett v Reeves* FC Hamilton FAM-1999-019-1558, 19 July 2005 at [32].

With some understandable reluctance I have decided to override S's views and promote her welfare by placing her along with her siblings in the care of her father.²⁴⁰

Very rarely did judges openly attempt to find a solution which could give effect (even partially) to the views of the child, although this was attempted in some cases:²⁴¹

I find that there is an unacceptable risk to the girls that they would be exposed to sexually abusive behaviour or emotionally abusive behaviour if they have unsupervised care with their father. ... In my view the girls wishes [of wanting more contact including overnight visits with their father] can be accommodated to an extent, providing that they do not stay overnight at their father's home [but instead at their paternal grandmother's home] and that contact is supervised by [paternal grandmother].

In cases where the decision was consistent with the child's expressed views, the views were often not discussed as a reason for coming to the decision. In fact, in some cases a judge would discount the views of a child for some reason or other, and then come to a decision which followed with the views expressed:²⁴²

I have said the children want to spend more time with their dad and that must mean that they want to spend more than five hours a week with him. That is their view, but while the view must be taken account of, it cannot decide this case. I am the one that has to make that decision and I have to do it as best as I can with what is in front of me. ... I do not think I can place a great deal on what the children said because without the input of the psychologist, it is difficult for me to know just what reliance I can place on their comments. ... The effect of this order then is to double the amount of time that the children spend with their dad each week.

²⁴⁰ *DMM v SBM* FC Waitakere FAM-2001-090-001220, 9 March 2009 at [48].

²⁴¹ *Rewi-Wetini v Wasser* FC Hamilton FAM-2002-019-1515, 21 September 2005 at [76].

²⁴² *SFW v RAL* FC Lower Hutt FAM-2005-032-000695, 15 November 2006 at [5].

Similarly, the case of *GRT v RT*²⁴³ illustrates the same pattern of reasoning:

Older child said he would like care arrangements ‘to stay like it is’ and he wants to stay at his current school. ... Younger child wants ‘seven days with dad and seven days with mum.’²⁴⁴

I consider that the boys of five and seven are simply not old enough to undertake that forward projection so I cannot give significant weight to their views.²⁴⁵

The status quo appears to me to be meeting the boy’s interests and welfare and I do not think that the court should take the risk of changing it as sought by the mother.²⁴⁶

In cases where weight was attached to the expressed views, the age and maturity of the child, or the fact that the views were consistent with the court’s interpretation of best interests were reasons given for attaching weight:

Such arrangements are in the children’s welfare and best interests, having regard to their ages, I accept that a degree of flexibility is warranted.²⁴⁷

The children strongly oppose any move to Nelson. ... Alice and Jackson are 11 and eight respectively. Alice shows a maturity beyond her years but both children have had a long association with Family Court proceedings and have been made to confront and discuss their views and the reasons behind them, over a significant period. I attach considerable weight to them. ... [Mother’s] proposal to relocate to Nelson does not meet the children’s best interests and welfare which are reflected in the existing parenting order and their continued

²⁴³ *GRT v RT* FC North Shore FAM-2008-044-002629, 29 March 2010.

²⁴⁴ *Ibid* at [68].

²⁴⁵ *Ibid* at [71].

²⁴⁶ *Ibid* at [83].

²⁴⁷ *MAB v KRJB* FC Rotorua FAM-2008-063-000317, 19 September 2008 at [14].

residence in Christchurch.²⁴⁸

Overall, I consider the advantages to P of extending contact outweigh the disadvantages. Extending contact would accord with her views and would accord with the [best interests] principles in s5 of the Act to which I have referred.²⁴⁹

Aside from factors specific to the child, an investigation was also made as to whether characteristics of the judges themselves influenced the application of s6. From the 120 cases, 43 cases (35.8%) were decided by a female judge and 77 cases (64.2%) decided by a male judge. There were a total of 56 cases in which the views of at least one child subject to the proceedings did not have their views ascertained, or, the views which were ascertained were discounted due to age. Eighteen of those 56 cases (32%) were decided by female judges and 38 (68%) by male judges. Similarly, there were a total of 50 cases in which views of at least one child to the proceedings were followed or partially followed. Again, 18 (36%) of these cases were decided by female judges and 32 (64%) by male judges. These statistics indicate there is not a gender bias in the application of s6 within the judiciary.²⁵⁰

Therefore, there are several trends emerging in how judges determine the weight to be attached to a child's expressed views. Overwhelmingly, age, maturity and factors regarded as in a child's best interests are determinants for judges to either place weight on a child's views, or discount a child's views. These findings indicate judges have not, in general, internalised the Childhood Studies and Socio-cultural components of Developmental Science which pushed for the legislative change to s6.

²⁴⁸ *RIS v DM* FC Christchurch FAM-2002-009-001115, 10 February 2010 at [38].

²⁴⁹ *CAH v LJD* FC Porirua FAM-2007-091-000716, 17 July 2009 at [22].

²⁵⁰ At the time this paper was due the author was unable to ascertain the ages of the judges in the study despite attempts through an Official Information Act request to the Ministry of Justice. For that reason the author has not determined whether or not the age of the judge impacts the application of s6 in any way.

4.4 HAVE THERE BEEN CHANGES IN THE APPLICATION OF S6 OVER TIME?

In order to assess whether there have been changes in the application of s6 over time, the cases were divided into the years in which they were heard within their respective categories. The sample was then analysed in order to determine whether there were any overall changes, or category specific changes in the application of s6 over time.²⁵¹

The case sample showed there were no changes overtime, either overall or within categories, in the number of cases employing judicial interviews. Similarly, there were no overall changes or category specific changes in the number of cases appointing psychologists, or, the number of cases which discussed a child's views, except for the Care and Contact Dispute category. This category displayed an increase over time in both the appointment of psychologists, and in the number of cases within that category where judges discussed the views of a child in their judgment.²⁵²

There was a slight increase in instances where judges discussed weight to be attached to a child's expressed views over time, both overall and within the Relocation and Alienation categories.²⁵³ Despite this increase, there was no significant change in the number of cases where views were followed or partially followed.²⁵⁴

One concerning finding was that there was an increase over time, both overall and in the Relocation and Protection categories, in judgements which discussed age and maturity of a child in relation to s6.²⁵⁵ This indicates judges are not universally working to change their practices in order to ensure compliance with s6, as Mill J's suggests.²⁵⁶ In

²⁵¹ See Appendix Five for tables setting out the quantitative statistics over time. Once cases were divided in this way there were minimal cases per year per category which makes any findings subject to confirmation from a larger sample. It is beyond the scope of this paper to make this confirmation.

²⁵² See Appendix Five for the table displaying the data which led to these conclusions.

²⁵³ The Protection and Care and Contact Dispute categories did not show this same increase.

²⁵⁴ Either over time or within specific categories.

²⁵⁵ The Alienation and Care and Contact Dispute categories did not exhibit this increase over time in the number of cases within their categories which referred to the age and maturity of a child in relation to s6.

fact, it seems that judges have generally not made any changes in their practices regarding applying age and maturity as qualifying factors when ascertaining and taking account of children's views, despite the clear intent of Parliament to remove those factors as considerations in the COCA.²⁵⁷

4.5 SUMMARY

This chapter has shown there are several trends arising in the application of s6. It appears as though there are a number of cases where judges are not complying with s6, either by omitting to ascertain the child's views altogether, or through failing to take account of the views. The category of case has been illustrated to have a significant impact on which methods are employed to ascertain a child's views, and in the case of judicial interviews, whether or not the views are given any weight. A child's age, maturity and best interests were dominant factors which commonly dictated whether weight would or would not be attached to a particular child's expressed views. Coaching or external influence were also factors used to disqualify a child's views in several cases. In many instances where views were followed or partially followed, the decision was incidental to the views being expressed.²⁵⁸ In cases where views were cited as a reason for coming to the decision, those views were most often consistent with the best interest factors set out in s5.

These findings demonstrate there has not been a significant shift in how judges deal with children's views since the Guardianship Act, despite the significant legislative

²⁵⁶ See Chapter Two for a brief discussion of Mill J's study.

²⁵⁷ See Chapter One for a thorough discussion of the legislative changes from the Guardianship Act 1968 to the Care of Children Act 2004.

²⁵⁸ These findings are consistent with the conclusions made by Henaghan: 'Despite the mandatory requirement to consider the child's views, it appears that the courts are employing broad arguments of maturity, parental influence and negative outcome (not in the child's 'best interests') to effectively ignore the views expressed. An analysis of the case law indicates that the child's wishes will only be given weight where the judge feels the child is of a high level of maturity, the views are strongly and reasonably held, or where the wishes of the child are in favour of moving to more equal contact between both parents.' (Mark Henaghan, "Doing the Cocacopana – Using the Care of Children Act for Your Child Clients" (2008) 6 NZFLJ 53 at 60)

changes;²⁵⁹ thus indicating judges have generally misunderstood the significance of Childhood Studies and Socio-cultural principles as factors which contributed to the change.

²⁵⁹ As discussed in Chapter One.

CHAPTER FIVE

RECOMMENDATIONS

Section 6 reflects an inherently positive shift towards the greater recognition of child participation rights. In order to ensure those participation rights are given maximum value, the people involved in its application need to have a thorough understanding of Childhood Studies and Socio-cultural principles, two components of Developmental Science, the multi-disciplinary account of child development accepted at law.²⁶⁰ These principles highlight the importance of participation for a child's development, and indicate how adults can assist children to participate to a greater level:²⁶¹

If a child is truly to be given a reasonable opportunity to express their views then it is essential that the person to whom they communicate them has the capability and training to understand that children and adults see the world differently, and use different language to articulate their experiences. The recipient of the views needs to know how to create an environment within which to facilitate the expression of views, both in the very questions that are asked and how they are asked.

Chapter Four has shown that there are certainly cases where judges are giving careful thought as to how they can best apply s6 and promote a child's participation rights, even in instances where those judges have reasoned that the views expressed may not be in the child's best interests. Chapter Four has, however, also shown that this practice is not true of all Family Court professionals. The analysis of cases highlighted trends which suggest that despite the clear legislative shift to s6 from s23 of the Guardianship Act,²⁶² there are many instances in which the practice regarding a child's participation has not altered at all. In fact, in 45.8% of the cases studied, either the child's views were not ascertained, or views were ascertained however there was no further consideration of the views to show how they had been taken into account. These figures demonstrate

²⁶⁰ See Chapter One for a thorough discussion of this.

²⁶¹ Judge Jan Doogue "A Seismic Shift or a Minor Realignment? A View from the Bench Ascertaining Children's Views" (2006) 5 NZFLJ 198 at 201.

²⁶² As discussed in Chapter One.

that there are a considerable number of cases in which the courts are not complying with s6.²⁶³ This chapter will consider what can be done to achieve an application of s6 which is more consistent with the legislative purpose in its enactment.

Firstly, Family Court professionals need a comprehensive understanding of Childhood Studies and Socio-Cultural principles, two significant components of Developmental Science. Essentially, Childhood Studies provides that children play an active role in the construction of their own childhoods, and that the experiences and relationships a child is exposed to influences that child's development. Accordingly, participation in matters which affect a child is essential in order to promote that child's development. Since every child is unique and no-one is able to understand a child's world better than the particular child; judges, and others working with or making decisions about children, *must* attempt to understand the *child's view* of his or her world, rather than making their own assumptions of the child's world through predetermined ideas. Socio-cultural Theory provides a framework for how Family Court professionals can work with and assist a child to express what is important to that particular child. Family Court professionals need extensive training in both these components, as together they will provide the theoretical information which underlies the changes to s6, *and* the practical training in how to engage and talk with children of all ages.

A universal understanding of these principles will ensure consistency between cases as it will regulate both how children's views are ascertained and presented to the court, and what the court then does with the views. As Coyle, when referring to Childhood Studies principles, argues:²⁶⁴

It is time that we as Family Court Professionals, whether lawyers or judges, looked to disciplines outside of our comfort zone in our efforts to ensure that the Court is best able to meet the needs of those who appear before it, but in particular, those of children.

²⁶³ At least in terms of their written judgments. This study is limited in that there is no further information about the evidence given in proceedings and the thoughts of the judge.

²⁶⁴ Stephen Coyle "Sociology of Childhood: Implications for our Practice as Lawyers" (2006) 5 NZFLJ 256 at 256.

Accordingly, training must occur at every level of those who obtain children's views under s6(2)(a), and within the judiciary who are required to take account of any expressed views under s6(2)(b).

Training of this type can be achieved in a variety of ways. Firstly, a more comprehensive module on child development, including the Socio-cultural and Childhood Studies disciplines, could be incorporated into the Lawyer for Child Training Workshop.²⁶⁵ As lawyers are required to attend this workshop before being appointed as a lawyer for child, this is a direct avenue that can be utilised to educate those who wish to be considered for appointment.

An alternative avenue will need to be pursued in order to target those lawyers who are already appointed to practice as lawyer for children, as these lawyers will have already completed the lawyer for child workshop.²⁶⁶ The Legal Services Bill 2010, if passed, could provide a perfect opportunity to require lawyers who are already appointed to act for children to undertake further training.²⁶⁷ This Bill proposes to introduce several changes to the legal aid scheme, including a quality assurance framework, which would ensure that all legal aid providers have the skills to complete the job assigned to them.²⁶⁸ Under this regime, legal aid providers will be required to reapply and prove their skills. Thus, if the Bill is passed, a training course for lawyers in child development, and the principles which underlie s6, could easily be invoked as a part of this process.²⁶⁹

²⁶⁵ The lawyer for child training workshop at present only contains two half an hour sessions on child development. These sessions focus on the psychological account of child development rather than the multi-disciplinary account accepted at law (NZLS Lawyer for the Child Workshop, session 3 2006, 2010).

²⁶⁶ Many lawyers who are appointed as lawyers for children were appointed prior to the Care of Children Act 2004. This means any training they received would not have been consistent with either the overriding principles in the Care of Children Act 2004, or the Childhood Studies and Socio-cultural principles which have influenced s6 itself.

²⁶⁷ The Legal Services Bill 2010 was introduced into Parliament on 4 August this year in response to national scrutiny surrounding legal aid providers.

²⁶⁸ Legal Services Bill 2010 < <http://www.parliament.nz/NR/rdonlyres/8695F38F-929D-44F9-8C1D-B6FAF759181E/157050/1800LegalServices1.pdf> > at 2.

²⁶⁹ If the Legal Services Bill 2010 is not passed, and this training would not be possible through any statutory framework which is adopted, the Family Court could invoke its own training regime, only appointing lawyers who complete a further training course of this nature.

Similarly, court appointed psychologists could also be required to attend training on both Childhood Studies and Socio-cultural Theory, and the implications of these principles for the application of s6. Such training will ensure that psychologists are not only applying their knowledge based on specific psychology training, but that they apply their knowledge with a sound understanding of the multi-disciplinary account of child development accepted at law.²⁷⁰

Finally, if the judiciary internalises the Childhood Studies and Socio-cultural principles on which s6 is based, they will be in a better position to apply s6 as it was intended rather than in a way which is most helpful to them as the decision maker.²⁷¹ As Lady Hale identifies, the potential advantages in the court seeing a child will only be realised if there is appropriate education, thought and background information.²⁷² This point is supported by Jefferson:²⁷³

above all, without a specialised understanding of child development, coupled with training and experience in interviewing children, a judge's ability to effectively elicit, and understand, a child's views is extremely restricted. The fact, as Pauline Tapp points out, that many judges have children of their own and extensive experience (before elevation to the Bench) as counsel for children is hardly a basis for 'assuming' appropriate expertise.

This would especially be the case where those judges acted as a lawyer for child under the Guardianship Act, as opposed to the COCA.²⁷⁴ Judges need to be trained both in how

²⁷⁰ Requiring such training before a psychologist can be appointed by the court under s133 will ensure psychologists appointed by the Family Court have appropriate training in the principles upon which the law is based.

²⁷¹ The analysis in Chapter Four showed this is something judges often do.

²⁷² Lady Brenda Hale, Justice of the United Kingdom Supreme Court, The Right Honorable Baroness of Richmond "Address to Family Law Class" (Otago Law School, Otago University, Dunedin 2010).

²⁷³ Simon Jefferson "Point and Purpose: The Judicial Interview as a Tool for Ascertaining the Child's Views" (NZLS Advanced Lawyer for the Child – The Winds of Change CLE conference, July 2008)65 at 71.

²⁷⁴ As the provisions for child participation in the Guardianship Act 1968 are markedly different from those in the Care of Children Act 2004 – as discussed in Chapter One of this paper.

to maximise the developmental value of judicial interviews, and how to work through a process which takes account of any views expressed. Training of this nature will ensure that judges carry out judicial interviews in the majority of cases, rather than when the judge deems them to be helpful to the decision. It will also direct judges to a process for judicial interviews which promotes the child's participation.²⁷⁵ Further, training will assist judges in their ability to specify how they are taking account of a child's expressed views, thus ensuring views are considered on their own merit, rather than according to predetermined qualifications.²⁷⁶ Judges could be trained in this way through a Family Court judicial conference, or, through regional educational forums.

Training for all Family Court professionals, as recommended in this chapter, would promote s27 of the NZBORA, as it would ensure each child is provided with information necessary for him or her to express an informed view, thus complying with natural justice principles. Additionally:²⁷⁷

It is a necessary correlative of having the right to express views, and having those views taken into account, that those to whom the views are expressed have the 'ability' to listen to the child.

Training would ensure that those involved in the application of s6 have the necessary skills to understand the message the child is exhibiting, again promoting compliance with s27 NZBORA.

In addition to extra training, some specific changes to the existing processes should be

²⁷⁵ For example creating an environment, and asking appropriate questions which will facilitate and promote a child's ability to participate, contribute and express what is important to him or her.

²⁷⁶ Simply discounting the views due to age or because they are contrary to best interests does not specify how the views have been taken account of. This point is supported by Stephen Coyle, as he noted that the removal of factors such as age and maturity is significant, and that when considering s6 and s3 of the Care of Children Act 2004, 'there is no logical reason why views of children should be disregarded simply because of perceptions about their age and maturity. A [childhood studies] perspective demands nothing less than the views of children being considered on an equal basis with those of parents.' (Stephen Coyle "Sociology of Childhood" above n 264, at 260).

²⁷⁷ Nicola Taylor, Pauline Tapp and Mark Henaghan "Respecting Children's Participation in Family Law Proceedings" (2007) 15 Int J Child Rts 61 at 70.

implemented. Firstly, a judgment that the child can understand²⁷⁸ should be written for each child subject to proceedings, as doing so will promote the child's development under the Childhood Studies principles.²⁷⁹ Changes should also include updating the Lawyer for Child and Judicial Interviewing Practice Notes to be more consistent with Childhood Studies principles, rather than setting out qualifications such as age and maturity to govern practice. These Practice Notes could also direct lawyers and judges to appropriate methods in how to ascertain children's views.²⁸⁰

Further, provision for child participation should stem beyond the court hearing itself. Since the vast majority of cases which initially make applications to the Family Court are resolved prior to the defended hearing stage, other dispute resolution mechanisms should also promote child participation.²⁸¹ This has been recognised by Principal Judge Boshier:²⁸²

With this focus on keeping cases out of Court unless absolutely necessary, it is crucial children are heard through the earlier phases of the process...To fully realise our obligations under UNCROC and give children a real opportunity to

²⁷⁸ In situations where a child is unable yet to read, the judgment can still be written in child-friendly language for the child so that as the child grows up and does learn to read, that child can have a record of why his or her life is structured as it is. A judgment of this nature will provide answers to such children at a time when the child begins to question things, and as such, it will aid their understanding and consequently, their development.

²⁷⁹ This recommendation was posed by Lady Hale in her address to the Family Law class at Otago University in 2010 (Lady Brenda Hale, Justice of the United Kingdom Supreme Court, The Right Honorable Baroness of Richmond "Address to Family Law Class" (Otago Law School, Otago University, Dunedin 2010)). This process would also ensure that children have a resource in which to find answers after the court proceedings, as sometimes the proceedings can seem overwhelming and once the child has time to reflect on their participation, further questions may arise.

²⁸⁰ For example, judicial chambers or a school principal's office will often cause a child to feel intimidated rather than relaxed, and as such, the child will be less likely to open up to the judge or lawyer (Gillian Basher and Karen Wilson "Talking to Children" (NZLS Advanced Lawyer for the Child – The Winds of Change CLE conference, July 2008)47 at 49.)

²⁸¹ Due to the connection between participation and child development based on Childhood Studies and Socio-Cultural Theory.

²⁸² Principal Family Court Judge Peter Boshier "The Care of Children Act 2004 – Does it Enhance Children's Protection and Participation Rights?" (Children's Issues Centre, 6th Child and Family Policy Conference, Dunedin, 7 July 2005) <<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/archived-speeches/the-care-of-children-act-2004-does-it-enhance-childrens-participation-and-protection-rights>>.

participate, much of this must be done before the Court itself becomes involved.

There are some organisations who already advocate for child-inclusive mediation and counselling, and some practices which encourage children's participation according to the Childhood Studies and Socio-cultural principles.²⁸³ However, there are currently no set guidelines of child-inclusive practices at resolution stages prior to a defended hearing.²⁸⁴

Similarly, other legislation which relates to children²⁸⁵ should also be amended to take account of, and promote, the current conception of childhood as the COCA has. Consistency between statutes will send a strong message to the courts about the extent to which Parliament intends children to be involved in matters which affect them.

Therefore, there are a multitude of ways that the current practice regarding and relating to s6 can be modified to better promote a child's participation and development based on the Childhood Studies and Socio-cultural Principles. Changes of the type recommended in this chapter, if adopted, will ensure that children are respected as individuals who should have a say about what is important to them. These changes will also promote children's development as Family Court professionals will be attempting to understand the child's world through the child's eyes, and the child will be assisted in several ways to express what is important to him or her. This practice will ensure compliance with s6 as Parliament intended it to be applied, and will reduce variation between cases. Finally, these changes will promote consistency throughout all matters involving children in the legal sphere, rather than solely within the COCA itself.

²⁸³ Nicola Taylor "What do we Know About Involving Children and Young People in Family Law Decision Making? A Research Update" (2006) 20 AJFL 154 at 177.

²⁸⁴ Boshier "Care of Children", above n 282; It is beyond the scope of this paper to undertake an in-depth analysis of the dispute resolution mechanisms which are or are not child-inclusive and the reasons for each. For more information on this point see generally Jill Goldson "Hello I'm A Voice, Let Me Talk: Child-inclusive Mediation in Family Separation" (2006) New Zealand Families Commission <<http://www.familiescommission.govt.nz/research/hello-im-a-voice-let-me-talk>>; Nicola Taylor "What do we Know", above n 283, at 154- 180.

²⁸⁵ Such as the Domestic Violence Act 1995 and the Child, Young Persons and their Families Act 1989.

CONCLUSION

This paper has shown that “a change in law will not deliver a true change, if the change is not the result of a change in attitude.”²⁸⁶ Despite the clear legislative intent in enacting s6, Family Court professionals involved in its application have not substantially altered their practices from the prior provision in s23 of the Guardianship Act. This suggests that Family Court professionals have not internalised the Childhood Studies or Socio-Cultural principles which influenced the changes to s6, and form part of the multi-disciplinary account of child development accepted at law, now known as Developmental Science.²⁸⁷ This paper has attempted to identify avenues which can be pursued to change the attitude of those involved in the application of s6 in order to ensure s6 is applied as it was intended to be. Once judges, lawyers acting for children, and psychologists appointed under s133 COCA have been trained comprehensively in Childhood Studies and Socio-cultural Theory, they will be in a much better position to assist children and take account of their views in the way s6 intends. When this occurs, New Zealand will deserve its reputation as an international leader in child-inclusive policies, as children will not only be heard, but they will be listened to.

²⁸⁶ Dala Huang *Accession Magazine* (New Zealand, August 2010) at 1.

²⁸⁷ This is the multi-disciplinary account of child-development which is accepted at law. See chapter one for a more comprehensive discussion of what this science encompasses.

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APPENDIX ONE
UNITED NATIONS CONVENTION ON THE RIGHTS OF A CHILD

Article 12

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

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

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

APPENDIX TWO

METHODOLOGY OF ASCERTAINING AND ANALYSING SAMPLE OF 120 CASES

In order to select the 120 case sample I took the cases since 2005 which had been sent from the Family Court to Professor Mark Henaghan for the purposes of research. I coded these cases into broad categories based on the main purpose the case was before the Family Court. The cases which fitted into the categories of 'Alienation,' 'Relocation,' 'Protection,' and 'Day to Day Care' were separated and arranged in lists according to the judgment dates. The case sample included every Alienation case which available as there were only 15 cases under this category. The remaining cases were selected by taking every 'x' number of cases from the list of cases in order to ensure a sample was taken over time but also that the selection was random. The relocation case sample was larger as it included all of the 2010 cases which had been sent to Professor Henaghan at the time the sample was selected. The purpose of including these cases was to determine how the courts are currently applying s6. The relocation and Alienation categories were the only categories with access to the 2010 cases which is why all available cases were included. The sample of cases (under each category) are as follows:

Alienation

Bennett v Reeves FC Hamilton FAM-1999-019-1558, 19 July 2005
BJ v LA FC Tauranga FAM 2002-070-000735, 23 September 2005.
CJ v KS FC Hamilton FAM-2001-019-1413, 27 September 2005.
VB v PS FC Wanganui FAM-2000-090-1262, 5 September 2005.
RH v YH FC Dargaville FAM-2001-011-000048, 1 March 2006.
JR v RCT FC Christchurch FAM-2002-009-001773, 22 December 2006.
S v W FC Waitakere FAM-2002-090001294, 1 May 2006.
BU v AC FC Manukau FAM 2001-092-1875, 26 February 2007.
JM v SA FC Auckland FAM-2006-004-001108, 13 February 2007.
JWP v SRW FC Hastings FAM 1999-020-491, 28 March 2008.
ADK v KMR FC Hastings FAM-2002-090-001392, 2 October 2009.
SAM v DLR FC Rotorua FAM-2004-073-000025, 17 March 2009.
K v B HC Auckland CIV-2008-404-006583, 23 April 2009.
STH v EFG FC Nelson FAM-2008-042-000723, 4 May 2009.
JTP v BTT FC Invercargill FAM-2008-082-000004, 28 January 2010.

Relocation

Carey v Walker (previously Carey) FC Dunedin FAM-2003-002-000252, 5 July 2005.
Taeata v Whiting FC Dunedin FAM-2004-012-779, 28 July 2005.
WAB v NTTT FC Wellington FAM-2003-085-2119, 10 August 2005.
West v Gore FC Lower Hutt FAM-2003-032-000539, 18 October 2005.
Williams v Williams FC Taupo FAM-2003-069-255, 24 November 2005.
Queenin and Anor v Rudd and Anor FC Manukau FAM-2005-092-002460, 2 December

2005.

NL v SB FC LowerHutt FAM-2005-032-000887, 27 January 2006.

LS(formerly B formerly L) v RL FC Manukau FAM-090-907-98, 10 April 2006.

Mills v Holmes FC Christchurch FAM-2003-003-000222, 16 June 2006.

Payn v Perkins FC Greymouth FAM-2004-018-000193, 11 August 2006.

DRS v DGW FC WRK FAM-1999-084-41, 21 August 2006.

PBL v AVA FC Porirua FAM02001-091-000299, 19 December 2006.

Maaka v Maaka FC Dunedin FAM-2003-012-1004, 15 January 2007.

CMV v PTA FC Levin FAM-2002-031-00319, 13 May 2007.

MBF v SRF FC Napier FAM-2007-041-77, 5 July 2007.

HRMCK v JNMCK FC Nelson FAM-2006-042-000801, 20 August 2007.

JA v LAD FC Tauranga FAM-2007-070-1478, 28 November 2007.

Denny v Toxward FC Tauranga FAM-2002-070-664, 25 January 2008.

PRM v NJP FC Auckland FAM-2007-004-000224, 22 February 2008.

M v M FC Waitakere FAM-2005-090-1937, 12 March 2008.

JCK v LDK FC Wellington FAM-2004-091-00956, 17 April 2008.

TMH v CHK FC Whakatane FAM-2006-087-000150, 10 June 2008.

Sims (AKA Clapperton) v Le Roy FC Waitakere FAM-1999-044-001038, 29 February 2008.

HJT v EGT FC Hamilton FAM-2003-019-00896, 3 October 2008.

DJW v PJW FC Timaru FAM-2008-076-000192, 2 December 2008.

H v H FC Christchurch FAM-2005-009-000311, 26 February 2009.

R v M FC Hamilton FAM-2007-019-001242, 27 February 2009.

H v T FC Wellington FAM-2007-091-000072, 20 March 2009.

I v B FC Hamilton FAM-2003-019-000700, 13 March 2009.

H v H FC Nelson FAM-2008-042-000597, 9 April 2009.

C v T FC Porirua FAM-2006-091-000577, 1 May 2009.

M v E FC Invercargill FAM-2003-025-000949, 19 June 2009.

L v P FC Invercargill FAM-2004-025-000969, 23 June 2009.

Carpenter v Armstrong HC Tauranga CIV-2009-470-511, 31 July 2009.

O v F FC Porirua FAM-2009-091-000005, 11 September 2009.

RJF v TLS FC Tauranga FAM-2004-070-001563, 13 October 2009.

JAD v NLP FC North Shore FAM-2004-044-000619, 19 November 2009.

HKB v ZMRC-B FC Timaru FAM-2009-076-000451, 21 January 2010.

TWL v LCB FC Lower Hutt FAM-2007-032-000325.

FLT v WT FC Hamilton FAM-2008-019-001111, 28 January 2010.

RIS v DM FC Christchurch FAM-2002-009-001115, 10 February 2010.

DGF v RLN FC Blenheim FAM-2006-006-000326, 11 February 2010, Judge Russell.

AWH v TAMR FC Wellington FAM-2003-012-000166, 5 March 2010.

ASL v CDC FC Rotorua FAM-2007-077-00041, 26 March 2010.

GRT v RT FC North Shore FAM-2008-044-002629, 29 March 2010.

TWMM v KEE FC Papakura FAM-2002-055-000550, 30 March 2010.

AMH v SH FC Napier FAM 2009-041-000369, 4 May 2010.

Violence:

Wheelan v Last FC Lower Hutt FAM-2003-032-000366, 11 July 2005.
Rewi-Wetini v Wasser FC Hamilton FAM-2002-019-1515, 21 September 2005.
X v Y FC Dunedin FAM-2004-012-545, 14 October 2005.
Hartwell v Hamblin FC Hamilton FAM-2003-039-000166, 10 November 2005.
Lingham v Dazel FC Manukau FAM-2004-092-2001, 29 July 2005.
AJH v SWK FC Christchurch FAM-2005-0099-000711, 18 January 2006.
Mataira v O'Dwyer FC Porirua FAM-2005-091-926, 4 April 2006.
TJS v GNN FC Nelson FAM-2005-042-853-4, 11 April 2006.
Burns v Kiddey FC Christchurch FAM-2006-009-000709, 11 May 2006.
McPhee v Cadman FC Dunedin FAM-2006-012-000205, 14 July 2006.
SLM v BS FC Nelson FAM-2000-042-736, 25 October 2006.
Gillanders v Gillanders FC Dunedin FAM-2006-012-233, 11 December 2006.
Williams v Williams FC Christchurch FAM 1998-012-000971, 8 September 2006.
SFR v GJT FC Wellington FAM-2005-091-000419, 17 September 2007.
SD v SC FC North Shore FAM-2005-044-1793, 30 March 2007.
Bane v Bryant FC Nelson FAM 2006-042-034, 1 May 2007.
Thomas v Brough FC Nelson FAM-2006-042-159, 2 May 2007.
NG v MT FC Gisbourne FAM-2002-016-000128, 17 December 2008.
MAB v KRJB FC Rotorua FAM-2008-063-000317, 19 September 2008.
REC v CJC FC Christchurch FAM-2006-009-000425, 9 May 2008.
GPF v FMF FC Nelson FAM-2007-042-000654, 31 July 2008.
JKB v JWN FC Tauranga FAM-2004-070-1291, 4 July 2008.
PSC v BLB FC Waipukurau FAM-020-286-05, 7 May 2008.
HMM v ATT FC Christchurch FAM-2007-009-000376/7, 8 October 2008.
Mallam v Meek FC Dunedin FAM-2007-012-358, 15 February 2008.
DFH v TNB FC Waitakere FAM-2006-044-001597, 22 December 2009.
KR v RR FC Auckland FAM-2009-004-001927, 29 October 2009.
KPS v KJS FC Hastings FAM-2008-020-000371, 9 March 2009.
MC v KFO FC Tauranga FAM-2004-070-000245, 31 August 2009.
GHO v LAO FC Waitakere FAM-2007-090-001957, 8 September 2009.

Care

O'Donnell v Ritchie FC New Plymouth FAM-2001-021-000099, 7 December 2005.
JEO v ALN FC Hastings FAM-2003-020-642, 5 October 2005.
Dickson v Gilland FC Dunedin FAM-2005-012-951, 20 October 2005.
CDH v EWPO FC Upperhutt FAM-2004-078-000040, 10 November 2005.
D v AS FC Dunedin FAM-2001-012-00694, 22 November 2005.
Pehi-Neho v Davis FC Manukau GV-2002-055-377, 9 June 2006.
Kearton v Kearton FC North Shore FAM-2004-044-681, 28 June 2006.
JDS v MJS FC Tokoroa FAM-2005-077-42, 11 October 2006.
SFW v RAL FC Lower Hutt FAM-2005-032-000695, 15 November 2006.

CRJ v JEJ FC Rotorua FAM-2004-077-00002, 19 December 2006.
Holliman v Holliman FC Wellington FAM-2006-004-1230, 28 February 2007.
Re Nicol-Thorstensen FC Palmerston North FAM-2003-054-1099, 28 March 2007.
SJH v FSE FC Christchurch FAM-1999-009-001561, 20 September 2007.
Oberman v Oberman FC Hamilton FAM-2004-019-001802, 18 April 2007.
Jones v Skelton FC Hamilton FAM 2001-019-1413, 23 January 2007.
Green v Jacobs FC Tauranga FAM-2006-079-000054, 15 February 2008.
Doherty v Johnson FC New Plymouth FAM-2003-043-116, 17 January 2008.
Smith v Smith FC New Plymouth FAM-2007-043-000371, 26 September 2008.
Sullivan v Nash FC Manukau FAM-2007-055-000321, 30 April 2008.
SOW v NJP-B FC Palmerston North FAM-2003-031-000407, 28 April 2008.
CAJ v DVJ FC Christchurch FAM-2006-009-2591, 7 May 2008.
RAJ v KMJ FC Tauranga FAM-2004-070-657, 15 December 2009.
CAH v LJD FC Porirua FAM-2007-091-000716, 17 July 2009.
ATL v LDG FC Rotorua FAM-2009-063-000133, 29 June 2009.
DC and OW v CW FC Gisbourne FAM-2008-016-000356, 20 May 2009.
RMG-M v BJM FC Dunedin FAM-2004-012-000230, 23 March 2009.
DMM v SBM FC Waitakere FAM-2001-090-001220, 9 March 2009.
TM v NJ FC Queenstown FAM-2005-002-000247, 25 February 2009.

Once the cases were selected for the sample I read each case and coded it based on a number of factors. Each child was coded under the following categories:

- Age/gender
- Type of representation
- Whether age and maturity was discussed
- Whether views were discussed
- Whether views were discounted due to age
- Whether weight discussed
- Whether weight was given due to age/maturity
- Whether weight was given
- Whether views were followed
- Whether views were partially followed
- Reasons why views may have been discounted – not in best interests/influenced or coached/other reasons.
- Whether the judge used the term wishes
- Who the judge was.
- Whether or not the case was an exceptionally good or bad example of the application of s6.

Once the cases were coded the coding was analysed and statistics were taken. These are discussed in chapter four of this paper. The judgements were then used to make a qualitative analysis in order to explain why the trends emerging in the quantitative

analysis may be there.

APPENDIX THREE
CARE OF CHILDREN ACT 2004, s7

S7 Lawyer to act for child

- (1) A court may appoint, or direct the Registrar of the court to appoint, a lawyer to act for a child who is the subject of, or who is a party to, proceedings (other than criminal proceedings) under this Act.

(2) However, unless it is satisfied the appointment would serve no useful purpose, the court must make an appointment or a direction under subsection (1) if the proceedings—

- (a) involve the role of providing day-to-day care for the child, or contact with the child; and
- (b) appear likely to proceed to a hearing.

(3) To facilitate performance of the lawyer's duties and compliance with section 6 (child's views), the lawyer must, unless he or she considers it inappropriate to do so because of exceptional circumstances, meet with the child.

(4) The lawyer may call any person as a witness in the proceedings, and may cross-examine witnesses called by a party to the proceedings or by the court.

APPENDIX FOUR
LAWYER FOR CHILD PRACTICE NOTE, PART 9

9. PROCESS FOR SELECTION OF LAWYER FOR THE CHILD

9.1 In each Court there will be a list of lawyers who are available to accept appointments from the Court as lawyer for the child and from which the lawyer may be appointed in individual cases.

9.2 The Registrar will convene a Panel to consider applications for inclusion in the list of lawyers for the child available to undertake Family Court appointments. This Panel will consist of a Caseflow Manager or a Family Court Co-ordinator as chair, two nominees from the Family Law Section of the New Zealand Law Society, and a Family Court Judge nominated by the Regional Administrative Family Court Judge. The Panel should normally sit with four people, but a panel of three may be convened in some circumstances (for example, where an interview would be unable to be arranged within a reasonable timeframe). Any Panel of three must include a Family Court Judge, a nominee from the Family Law Section and the Caseflow Manager or Co-ordinator.

9.3 Panels will be convened as required but no less than twice a year, if there are applications waiting to be considered and a need for a lawyer to be appointed.

9.4 The following appointment process should be followed:

- a. The lawyer must submit an application form to the Registrar in the Court region in which they wish to practise, nominating the particular Court or Courts where they wish to be on the list. The application is referred to a Panel convened by the Registrar.
- b. The application should be in form PSFC L4C 1 which is available from the Family Court website or any Family Court. The application should be accompanied by any references or testimonials that the applicant would like the Panel to consider and the names of other referees who can provide professional, confidential comment.
- c. The Registrar shall give copies of the application and any supporting documentation on the Regional Administrative Family Court Judge who shall be given 7 days to make any comments in writing relating to the application.
- d. Panel members may make such inquiries as may be needed for them to be informed about the applicant's ability to meet the criteria including inquiries of referees.
- e. On completion of its inquiries the Panel may arrange an interview with the applicant at such time and place as may be determined by the Registrar.
- f. Not less than 7 days prior to the interview the Registrar shall forward a report to the applicant detailing the inquiries made by the Panel including details of any

response that is adverse to the applicant. In the event of there being insufficient time available to consider the application the Panel may adjourn the interview or otherwise arrange a hearing to consider the application.

- g. The role of the other members of the Panel is to advise the Judge. The Family Court Judge on the Panel makes the appointment to the list.
- h. An unsuccessful applicant shall be provided with reasons for not being included in the list.
- i. The Registrar will advise the applicant, the Court, and the Family Law Section, in writing, of the recommendation and in the event that the application is successful, the National Office of the Ministry of Justice.

9.5 The lawyer should meet the following criteria:

- a. Have a current Practising Certificate;
- b. Ability to exercise sound judgment and identify central issues;
- c. Have a minimum of 5 years practice in the Family Court;
- d. Have proven experience in running defended cases in the Family Court;
- e. Have a sound knowledge of the Care of Children Act 2004;
- f. Have an understanding of, and an ability to relate and listen to, children of all ages;
- g. Have good people skills and an ability to relate and listen to adults;
- h. Sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families;
- i. Relevant qualifications, training and attendance at relevant courses;
- j. Personal qualities compatible with assisting negotiations in suitable cases and working co-operatively with other professionals;
- k. Independence; and
- l. Knowledge and understanding of the Practice Note - Lawyer for the Child: Code of Conduct and Best Practice Guidelines for Lawyer for the Child.

9.6 The lawyer will be able to transfer their approval from one Court region to another.

APPENDIX FIVE

DATA TABLES FOR CHANGES IN THE APPLICATION OF S6 OVER TIME

Table One – Cases which discussed age and/or maturity of the child in regard to s6

	2005	2006	2007	2008	2009	2010
Alienation	3/5	0/2	½	0/1	2/4	0/1
Relocation	2/6	0/6	2/5	5/8	8/12	4/10
Protection	1/5	2/8	1/6	3/6	2/5	n/a
Care	0/5	3/5	1/5	3/6	3/7	n/a
Total	6/21	5/21	5/18	11/21	15/28	4/11
Total %	29%	24%	28%	52%	54%	36%

Table Two – Cases which ascertained and discussed the views of the child/children subject to the proceedings.

	2005	2006	2007	2008	2009	2010
Alienation	5/5	2/2	2/2	0/1	3/4	1/1
Relocation	3/6	6/6	2/5	7/8	7/12	8/10
Protection	5/5	3/8	3/6	1/6	3/5	n/a
Care	1/5	4/5	4/5	5/6	6/7	n/a
Total	14/21	15/21	11/18	13/21	19/28	9/11
Total %	67%	71%	61%	62%	68%	82%

Table Three – Cases which discussed the weight to be attached to a child's expressed views.

	2005	2006	2007	2008	2009	2010
Alienation	3/5	2/2	½	1/1	¾	1/1
Relocation	2/6	5/6	2/5	6/8	7/12	6/10
Protection	2/5	1/8	2/6	0/6	3/5	n/a
Care	4/5	5/5	1/5	6/6	6/7	n/a
Total	11/21	13/21	6/18	13/21	19/28	7/11
Total %	52%	62%	33%	63%	68%	64%

Table Four – Cases which followed or partially followed the expressed views of a child subject to the proceedings.

	2005	2006	2007	2008	2009	2010
Alienation	2/5	2/2	½	0/1	¼	1/1
Relocation	3/6	6/6	2/5	6/8	3/12	3/10
Protection	3/5	1/8	3/6	0/6	2/5	n/a
Care	0/5	4/5	1/5	3/6	4/7	n/a
Total	8/21	13/21	7/18	9/21	10/28	4/11
Total %	38%	62%	39%	43%	36%	36%

Table Five – Cases where there was a judicial interview with the child/children subject to the proceedings.

	2005	2006	2007	2008	2009	2010
Alienation	2/5	½	½	0/1	¼	0/1
Relocation	3/6	2/6	2/5	4/8	4/12	3/10
Protection	1/5	1/8	1/6	0/6	1/5	n/a
Care	0/5	3/5	3/5	3/6	3/7	n/a
Total	6/21	7/21	7/18	7/21	9/28	3/11
Total %	29%	33%	39%	33%	32%	27%

Table Six – Cases where there was a psychologist appointed under s133.

	2005	2006	2007	2008	2009	2010
Alienation	4/5	2/2	2/2	1/1	4/4	1/1
Relocation	4/6	2/6	2/5	3/8	8/12	5/10
Protection	4/5	2/8	1/6	4/6	2/7	n/a
Care	1/5	1/5	3/5	4/6	3/7	n/a
Total	13/21	7/21	8/18	12/21	17/28	6/11
Total %	62%	33%	44%	57%	61%	55%