CORA Cork Open Research Archive
Cartlann Taighde Oscailte Chorcaí

Title	Children, autonomy and the courts: Beyond the right to be heard: Introduction
Authors	Daly, Aoife
Publication date	2017-12-17
Original Citation	Daly, A. (2018) Introduction, Children, Autonomy and the Courts: Beyond the Right to be Heard, Leiden: Brill/Nijhoff, pp. 1-14. doi: 10.1163/9789004355828_002
Type of publication	Book chapter
Link to publisher's version	https://brill.com/view/title/35870 - 10.1163/9789004355828_002
Download date	2024-04-20 04:25:01
Item downloaded from	https://hdl.handle.net/10468/10962

UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

Introduction: Children, Autonomy and the Courts: Beyond the Right to be Heard

> *My Judge thanked me for coming but said they were capable of making decisions without me.*[1]

1. The Argument in Favour of Prioritising Children's Autonomy in Best Interest Proceedings

The 'right to be heard' enshrined in Article 12(1) of the UN Convention on the Rights of the Child (CRC) is possibly the most discussed, and certainly the most controversial, principle in the arena of children's rights. This book initially began as an attempt[2] to ascertain what such a right actually means and what good examples of implementation might look like in the context of *best interest proceedings* – legal proceedings in which decisions are made in the best interest[3] of the child (for example 'residence' and 'contact' arrangements[4]). In the process, I determined, however, that whilst being 'heard' might suffice in, for example, the political arena, the right to be heard is ill-suited to application in best interest proceedings. In liberal democracies[5] individual freedom is upheld as the ultimate ideal; and the right to be heard provides potentially little respect for children's legal autonomy, and too many excuses to override children's wishes, because it still leaves adults (primarily judges) with all of the discretion, and therefore all of the power. It results, for example, in children being denied due process in proceedings concerning their[6] own legal interests,[7] and in children being ordered by courts into relationships they do not want.[8] When asked, most children say they want to be involved in proceedings, they want to influence decisions, and some feel strongly about determining the outcome.[9] I argue that we need to move beyond the right to be heard, therefore, and to focus instead on the concept of *autonomy*.

---

[1] Nineteen year old young man speaking of his experiences of family proceedings as a child, quoted in Jennifer McIntosh, "Four Young People Speak about Children's Involvement in Family Court Matters" 15 *Journal of Family Studies* 98 (2009), at 101.

[2] This book is based on the Ph.D. thesis: Aoife Daly, *The International Legal Right of Children to be Heard in Civil Law Proceedings Affecting them* (Unpublished Ph.D. Thesis, Trinity College Dublin, 2010).

[3] I prefer the 'best interest of the child' (singular) although it is necessary to use 'best interests' (plural) occasionally, for example when referring to the best interests of children as a group, or when various interests are being considered.

[4] 'Contact' and 'residence' is the terminology used in England and Wales, although amending legislation (the Children and Families Act 2014) has replaced these words with the catch-all term 'child arrangement orders'. I prefer the terms 'contact' and 'residence' to 'access' and 'custody' (used in other countries) as the latter words have greater connotations of children as property.

[5] That is, states in which individual freedoms and the rule of law are ostensibly upheld. See further Jeffrey Kopstein, Mark Lichbach and Stephen Hanson, *Comparative Politics: Interests, Identities, and Institutions in a Changing Global Order* (4th edn, Cambridge University Press, 2014). For a list of such states, see that produced in Freedom House, *Freedom in the World 2016* (Freedom House, 2016), at 12-3. The report categorises 86 states as 'free'; 59 as 'partly free' and 50 as 'not free'. At 13.

[6] In order to avoid the awkward 'him/her' situation, I will refer to hypothetical people as 'they'.

[7] See for example *P.–S. (Children)* [2013] EWCA Civ 223 and *O. (A Child)* [2012] EWCA Civ 1576 in England and Wales; *Gordon v Campbell* [2015] NZHC 1264 in New Zealand; *In Re A.G.*, Slip Opinion No. 2014-Ohio-2597 in the US, and Canada's *Comeau v Comeau*, 2013 ONSC 6762; all considered in Chapter 4.

[8] See for example many cases considered in Chapter 5 including *K. (Children)* [2016] EWCA 99; *M. v B.* [2016] EWHC 1657; *Re H.–B.* [2015] EWCA Civ 389; and *Re E. (Children)* [2011] UKSC 27 in England and Wales; US case *In Re Marriage of Winternitz*, 2015 DJDAR 3526, and Canadian cases *D'Abruzzo v Giancola*, 2017 ONSC 2349 and *Letourneau v Letourneau*, 2014 ABCA 156.

[9] See further Chapter 1, Section 4. Although children have not been formally consulted for this book, extensive research of existing consultations and interviews has been conducted. Direct quotes from children are presented throughout in italics in order to differentiate them from the quotes of adults. Formal consultation explicitly on the matter of the proposed children's autonomy principle is the next step in the research on this topic.

This book engages in an analysis of what autonomy means, how it underpins liberal democracy[10] and the individual's sense of dignity and well-being,[11] and its consequences for children's legal rights. Detailed analysis of case law and research, both first hand[12] and secondary,[13] makes it clear that CRC Article 12 has not assisted children in gaining much power in proceedings in which their best interests are decided. The reluctance to prioritise children's wishes in proceedings is based strongly on fears of undermining parents, yet, ironically best interest proceedings arise because parents cannot agree (private law), or because children are likely not safe with them (child protection). The reluctance is also based on assumptions that children are incapable, dishonest or irresponsible decision-makers – assumptions which are not borne out by the evidence.[14] The introduction of a 'right to be heard' in proceedings reflects to some extent a misplaced focus and a misunderstanding about childhood; even about the human condition. This is because as it still permits judges to override children's wishes in their apparent 'best interests' it supports rather than challenges a general assumption in the law that adults are totally autonomous and that children are not at all, when the reality is much more fluid and complex. This assumption both denies children their individuality and over-responsibilises (and sometimes neglects) adults.[15]

As adults, at the end of the day, we pride ourselves on our autonomy. In reality it is a limited, relational type of autonomy where we are restricted by our circumstances, and often prioritise the interests of our loved ones as we do our own. What we do not seem to realise is that children are no different in this regard – they pride themselves on this kind of autonomy also.[16] Therefore it is argued in this book that in proceedings about children's best interests,

[10] See for example Jonathan Beever and Nicolae Morar, "The Porosity of Autonomy: Social and Biological Constitution of the Patient in Biomedicine" 16 *The American Journal of Bioethics* 34 (2016), at 34 and Viv Ashley, "Philosophical Models of Autonomy" *Essex Autonomy Project Green Paper Report* (Essex Autonomy Project, 2012), at 1.

[11] Edward Deci and Richard Ryan, "Autonomy and Need Satisfaction in Close Relationships: Relationships Motivation Theory" in Netta Weinstein, ed, *Human Motivation and Interpersonal Relationships* (Springer, 2014).

[12] As part of completion of a Ph.D. thesis I conducted interviews with professionals in Ireland, and attended District Court proceedings (in Dublin and in the courts of three cities outside of Dublin) from 2008-9, see note 2 above. I spent approximately 24 days observing child care proceedings and nine days observing family law proceedings. Approximately 17 professionals (including solicitors, barristers, guardians *ad litem* and other professionals) were interviewed. Reference to this research will be made in particular in Chapters 4 and 5. The dates of proceedings in Dublin will not be cited in order to protect anonymity of all involved – professionals in Dublin are more easily identifiable than elsewhere in the country for various reasons.

[13] Searches were conducted of relevant databases for case law in Australia (http://www.familycourt.gov.au), Canada (www.canlii.org/en/index.html), England and Wales (www.jordanpublishing.co.uk), Ireland (www.courts.ie), New Zealand (https://forms.justice.govt.nz), Scotland (Westlaw database references to relevant legislation), South Africa (www.centreforchildlaw.co.za), the US (http://caselaw.findlaw.com/), and the most relevant cases were chosen for analysis. Research assistants with language expertise were employed for the identification of relevant cases in France, Norway and Sweden. Most case examples are drawn from England and Wales for language and practical reasons (I am based in this jurisdiction and higher courts here provide extensive judgments which can then be analysed) and case law cited in this book is from this jurisdiction unless otherwise identified. Admittedly this enquiry is Anglo-centric. It is intended however that the theories and arguments of this book will be applicable to some extent in any jurisdiction.

[14] This is considered in detail in Chapter 3, particularly in Section 2.3. Furthermore, adults are far from perfect decision-makers – Donald Trump has just been elected President of the US at the time of writing.

[15] See for example Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016); Jonathan Herring and Jesse Wall, "Autonomy, Capacity and Vulnerable Adults: Filling the Gaps in the Mental Capacity Act" 35 *Legal Studies* 698 (2015), at 698; Charles Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law* (Hart, 2009); and Martha Fineman, "Vulnerable Subject: Anchoring Equality in the Human Condition" 20 *Yale Journal of Law and Feminism* 1 (2008).

[16] See further Chapter 3.

the autonomy of children should come first. The benefits of accepting this are several. Children will genuinely become the most important individuals in proceedings concerning them. True influence on outcomes will be enjoyed. Parents will be less likely to resort to legal proceedings, because legal outcomes will be easier to predict (as they will be more likely to be in line with children's own wishes[17]). An indirect benefit may be that children will be taken more seriously in their own families at difficult times, such as when parents are separating. Possibly even more beneficial will be the likelihood that children will be 'heard' and subsequently ignored less frequently – something which leaves them disillusioned and upset.[18] It will be argued in this book that a focus on autonomy is more likely to give children real influence on both process and outcomes in best interest proceedings. In this introductory section, an overview is provided of some of the main ideas and concepts considered throughout.

2. The Problem with Best Interest Proceedings

I have been writing letters to the judge. He answered, but he didn't really listen.[19]

2.1 The Indeterminacy of the Right to be Heard in Proceedings

CRC Article 12, which contains the 'right to be heard', stipulates that:

> 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.*

The inclusion of this provision was the first time at international law level that there had been an attempt to deal with the primary dilemma relating to children's rights – that adults usually make decisions on children's behalf. The law generally understands 'children' to include all those under the age of 18 years (as does CRC Article 1), and individuals in this group as lacking legal capacity.[20] CRC Article 12 is heralded as a significant step forward for the recognition of children's rights. The noble aim of Article 12 is to account for the reality that decision-making ability is not binary; whereby one day an individual lacks those abilities, and overnight (that is, on reaching 18 years) suddenly gains them. It recognises that obtaining

[17] I prefer the term 'wishes' compared to 'views' which is relied upon in CRC Article 12, as a 'wish' implies a potential decision, whereas a 'view' does not. I rely more on the concept of a child's wishes therefore, though I sometimes use the term 'views' where that is more appropriate to the context (for example where this is the term used in a particular law or case).

[18] See Chapter 4, Section 2.3.3.

[19] Eleven-year-old girl in Belgium, quoted in Sofie Maes, Jan De Mol and Ann Buysse, "Children's Experiences and Meaning Construction on Parental Divorce: A Focus Group Study" 19 *Childhood* 266 (2001), at 275.

[20] Priscilla Alderson, *The Politics of Childhoods Real and Imagined* (Routledge, 2016), section entitled 'Childhood Youth and Politics'. I will use the term 'children' to refer to all under-18s as I am exploring systems and laws which also generally categorise under-18s accordingly. It is acknowledged that many adolescents would not identify as 'children'. Bhaba argues that using the term neglects adolescents: Jacqueline Bhabha, "Introduction: The Importance of a Rights-Based Approach to Adolescence" in Jacqueline Bhabha, ed, *Human Rights and Adolescence* (University of Pennsylvania Press, 2014).

decision-making ability is a gradual process, and that the guidance and control of children by adults should steadily decrease in accordance with this process.[21]

CRC Article 12 does this by stipulating that children have a right to be heard, particularly in proceedings (Article 12[2]). An accompanying right that those views will be given "due weight" aims to further strengthen the process in that it is insufficient just to "hear"; which implies that children's views must have some level of influence.[22] However the form that such a process should take – whether they should enjoy legal representation for example, or meet the judge – and the *extent* of children's influence on outcomes, are left unclear in the text of Article 12. This book points to the problems of implementation that this uncertainty has presented; problems which have rendered the right ill-defined and ineffective.[23] In fact, Article 12 has actually compounded the low status accorded to children in their own proceedings, whilst permitting adults to claim they are committed to children's rights because of the rhetoric of the right of children to be heard. Children themselves are frequently left upset and bewildered by proceedings which may exclude them completely, or alternatively include them only to override their stated wishes (often without explanation).[24] An alternative approach is proposed in this book; one which would better facilitate children's involvement through prioritising their autonomy in both the process of hearing children and in the decision itself. The book builds on theories such as Freeman's 'liberal paternalism'[25] which sought to confine paternalism for children "without totally eliminating it";[26] whilst reconceptualising the rationale of modern legal decisions about children's best interests; proposing concrete answers to some difficult questions about how to approach vague terms such as 'due weight for children's views' and 'capacities'.

2.2 What are 'Best Interest Proceedings/Decisions'?

> *They are there to help; they try to make you and others safe, they are trying to help you.*[27]

I will argue in this book that where courts make decisions in which a child's best interest is *the primary factor*, they are essentially rendering 'substitute decisions'[28] on matters which adults would decide for themselves. Such judgments are most commonly given in the arenas of family law and child protection, where decisions must be made about where children will live and with whom they will have relationships.[29] The best interest principle dictates that it is

[21] See CRC Article 5 which recognises the principle of the evolving capacities of the child.
[22] Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* CRC/GC/2003/5 (27 Nov. 2003), para. 12.
[23] Attempts to more firmly define the terms, for example through General Comments, have provided limited assistance in this regard. See further Chapter 1, Section 5 and Chapter 5, Section 1.2.
[24] See Chapter 5.
[25] Freeman now prefers the term 'limited' paternalism. See Michael Freeman, *A Magna Carta for Children?: Rethinking Children's Rights* (forthcoming, Cambridge University Press, 2017).
[26] Michael Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983), at 55.
[27] Fifteen-year-old boy quoted in Children's Hearings Reform Team, *The Views of Children* (Children's Parliament/Children's Hearings Reform Team, 2010), at 14.
[28] See in the context of adults with disabilities Mary Donnelly, "Best Interests in the Mental Capacity Act: Time to Say Goodbye?" 24 *Medical Law Review* 318 (2016) and see further consideration of this point in Chapter 1, Section 7.
[29] They may also include, however, court decisions such as those made about children's property and medical treatment. Medical law decisions take a strange position in this enquiry – they are simultaneously included and yet somewhat external. They are included because they are technically best interest decisions, but external because children's consent to medical treatment is usually at issue and this is taken more seriously than

the best interest of the *child*, rather than the interests of anyone else, that determines the outcome of a case.[30] It is not to be merely *a* consideration – that is, one factor to weigh against others, as happens in criminal and immigration law.[31] I am arguing in this book that the defining feature of best interest decisions is therefore that it is a decision which is being taken *because the individual is a child*. If the individual was instead an adult, the case would not arise as they would decide the matter for themselves. This makes the principle, and therefore the decision, extraordinarily paternalistic – especially because it is not just very young children to whom this is applied – it is generally possible for courts to apply such decisions to all under the age of 18 years.[32]

The example of Clare's case[33] lends some substance to this point. Clare is 11 years old and lives with her mother. Her parents have been separated since she was three and have been in a legal dispute about paternal visits for a number of years, during which time Clare has insisted for a number of years (through the court channels for hearing children) that she does not wish to continue the visits. Her father has not done anything particularly bad, she just does not enjoy spending time with him. At the most recent hearing the court decided that the visits should continue, and Clare is very upset.

This is a decision about a personal relationship which Clare would have made herself if she were an adult, but it has entered the legal arena because she is a child, and the decision-maker adults (her parents) are in disagreement. The law is structured in such a way that courts make the decision, and children's preferences are *just one factor* of many to consider. It was decided in this case that Clare's wishes were outweighed in the best interest decision by the presumed value of maintaining the relationship with her father. I argue in this book that this approach – children's preferences as just one factor of many – is not justifiable. The 'best interest principle' used in these cases is extremely paternalistic as it takes children's decisions from them. This is sometimes appropriate, as some children (infants for example) will need the decision to be taken by another, and some children will not wish to make such a decision. But considering the value placed on personal autonomy in liberal democracies, where

children's wishes in other areas of the law. Medical law cases are therefore primarily used for comparison purposes in this book. These issues are considered in detail in Chapter 3.

[30] The best interest principle is prominent across liberal democracies. See for example Fiona Raitt, "Judicial Discretion and Methods of Ascertaining the Views of a Child" 16 *Child and Family Law Quarterly* 151 (2004), at 151.

[31] The principle of the 'best interest' or 'welfare' of the child as *the* 'primary' or 'paramount' consideration is encapsulated in the legislation of numerous jurisdictions. See for example Children Act (England and Wales) 1989, Section 1. Some distinguish between 'primary' and 'paramount' as noted in Chapter 1, Section 2.2, but my point is that children's best interests determine the outcome in these proceedings – and if they do not, they should. See further Chapter 1, Section 2.2.

[32] It is acknowledged that for some purposes the limit is set at age 16 years – see *G. (A Child: Intractable Contact)* [2013] EWHC B16 in which the contact order was made to last until the child's 16th birthday. Yet the courts of England and Wales, for example, have frequently imposed medical treatment on unwilling 17 year olds. See *Re P. (A Child)* [2014] EWHC 1650 in which it was determined that it was permissible to override the consent of a 17 year old patient who was deemed to have capacity. Notably in California an unwilling 17 year old cancer patient was treated under armed guard in 2015. AHC Media, "Ethical Controversy Erupts over Minors' Autonomy" *AHC Media* (1 Mar. 2015). Available at: https://www.ahcmedia.com/articles/134767-ethical-controversy-erupts-over-minors-autonomy (last accessed 19 Nov. 2016). In England and Wales it is also possible to incarcerate 17 year olds 'for their own safety' even if it is shortly before their 18th birthday, at which point they must be released. See for example *W. (A Child)* [2016] EWCA Civ 804.

[33] Taken from Kay Tisdall and Fiona Morrison, "Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences" 14 *Law and Childhood Studies: Current Legal Issues* 156 (2012), at 165-171.

children have preferences, this should not just be treated as any other factor. This should at least be considered the most important factor. Yet Article 12 does not require this.

Adults 'hear' children, and in spite of calls to 'weigh' views, nobody actually knows what this means, and consequently little trouble is taken to determine what adequate weight for children's views should look like. Huge importance is placed on the need to understand, support and value the decision-making of vulnerable adults,[34] yet little effort is expended on trying to determine where the courts should and should not uphold *children's* decisions. Courts generally do not concern themselves with such matters, and where they do (usually in medical law cases) it is easy to determine that children do not have capacity, because capacity is so little understood.[35] This is why we need to focus on 'autonomy'– which is after all what is being denied to a child when someone else makes a legal decision on their behalf – in order to bring greater focus and definition to what Article 12(2) is presumably trying to achieve for children, that is, legal proceedings which recognise their dignity and individuality.

3. Introducing the Children's Autonomy Principle

I'd probably say stand up for yourself really.[36]

There are a number of ways in which the term 'autonomy' can be understood.[37] Autonomy is primarily understood as the individual's capacity for self-governance – 'personal autonomy'. There is a distinction however between 1) autonomy as a capacity to make decisions, including the legal right to take those decisions (for example capacity to consent to medical treatment); and 2) autonomy as an ideal, that is *the liberal ideal that we should all have personal autonomy in our lives to the extent possible*. It is primarily the latter conception which I am arguing for in best interest proceedings about children. Children need not have identical legal autonomy rights to adults, but instead only be denied them where absolutely necessary. Furthermore, in reality nobody has total autonomy, because of numerous constraints such as those relating to finances, personal abilities, and our relationships with others. If I wished to exercise my autonomy to marry Brad Pitt (single, I understand, at the time of writing) I might not succeed – he might have some objections. I would also face some legal issues in that I am already married. Furthermore I may face some familial opposition on my end. Autonomy is not about always getting what you want; it is primarily about being recognised as having choices to the extent you possibly can, free from undue interference of others, particularly from physical or legal coercion. Autonomy is intimately linked to our environment and our relationships with others, as these relationships are often what define us and determine what our values (and consequently our choices) are. Our approaches to children's autonomy should involve an understanding of these factors, and this is what the following principle tries to capture.

I would like to propose in this book that we should put in place standards to mitigate the paternalism of best interest proceedings through the *children's autonomy principle* which is as follows:

[34] Herring and Wall, note 15, at 698.
[35] See Chapter 3 and Michael Freeman, "Rethinking Gillick" 13 *International Journal of Children's Rights* 201 (2005), at 211.
[36] Fourteen-year-old boy with experience of family law proceedings, quoted in Gillian Douglas *et al*., *Research into the Operation of Rule 9.5 of the Family Proceedings Rules, 1991* (Department for Constitutional Affairs, 2006), at 99. He was asked what advice he would have for other children in the same situation.
[37] See further Chapter 3.

***Children's Autonomy Principle*:** In legal decisions in which the best interest of the child is the primary consideration, children should get to choose – if they wish – how they are involved (*process autonomy*) and the outcome (*outcome autonomy*) unless it is likely that significant harm will arise from their wishes.

There are, of course, questions which require answering regarding how such a principle could work in practice. Exceptions could be in put place where children do not want this power, where they are very young or where there is explicit pressure on them – these issues are considered in the coming chapters.[38] The two main points to highlight at this juncture relate to significant harm and autonomy support. Although a 'significant harm' threshold for overriding children's wishes appears to be high, in fact courts regularly accept harm to children where it is perceived to outweigh some more serious harm – leaving children in inadequate families rather than taking them into care,[39] for example, and ordering changes of residence from one parent to another whilst accepting that this will cause great distress.[40] If we are to take children's autonomy seriously then a vague notion of potential future harm (from children missing contact with a parent for example) should not alone be invoked as a reason to override children's wishes.[41] The second important point is that many children will need information and support if their wishes are to play such an important role in proceedings. It is proposed therefore that systems should be adequately resourced to ensure 'autonomy support' for children in their involvement in proceedings. 'Autonomy support' in the context of best interest proceedings will be taken here to mean *non-controlling, impartial information and support to form and/or express views and decisions about a best interest matter*.[42]

The vagueness of Article 12 on how children's views are to be 'weighed' leaves open the possibility of overriding children's wishes for any and every reason – to achieve 'contact at all costs'[43] for example, or because rejecting inoculations is an objectively poor decision.[44] Compare these scenarios to cases in which the state is considering interfering with *adult* autonomy – states do not force adults to have a personal relationship with someone else no matter how beneficial it would apparently be (imagine if *parents* were forced into contact visits with children against their will). States do not legally compel parents to inoculate their children. In few if any best interest cases do the courts consider the potential harm of coercing children into arrangements they do not want. The application of the children's autonomy principle would likely mean that children would achieve outcomes in line with their preferences in cases where they resist contact.

Some outcomes would remain the same of course – where a child wishes to remain in a dangerous home which is causing them significant harm, for example, their autonomy most likely cannot be upheld.[45] But in all cases children would be benefitted – even in cases where

[38] See in particular Chapter 6.
[39] See *Re L. (Care: Threshold Criteria)* [2007] 1 FLR 2050 at para. 50.
[40] See *T.E. v S.H. and S.* [2010] EWHC 192 and *Re R. (A Child)* [2009] EWHC B38.
[41] See Chapter 6.
[42] See Chapter 7.
[43] See for example Stephen Gilmore *et al.*, "Contact/Shared Residence and Child Well-Bring: Research Evidence and its Implications for Legal Decision-Making" 20 *International Journal of Law, Policy and the Family* 344 (2006) and further Chapter 5.
[44] *F. v F.* [2013] EWHC 2683.
[45] For this reason many of the examples in this book relate to private family law cases rather than to child protection cases. It is intended however that the points and proposals outlined in this book will be of relevance

children do not achieve the outcome they wish for, they should receive 'autonomy support' to help them through the case, they should enjoy 'process autonomy'[46] which means that they should be involved in proceedings in the way they wish (for example if they wish to meet the judge or be present in court), and regardless of the outcome, their autonomy – and therefore their dignity and individuality – should be respected to the highest extent possible.

4. The Aim of this Book: Embedding Children's Autonomy in Official Decisions

> *[The judge] said that I don't decide whether I see my dad or not…It was kind of like a warning, this time, I guess.*[47]

This book aims to demonstrate that autonomy is crucial to children's well-being, that the best interest principle should involve explicit consideration of autonomy, and that autonomy is not prioritised in CRC Article 12, or at the very least in interpretations of Article 12. The book also aims to change attitudes about the adult/child divide and how this arguably manifests in total denial of children's autonomy rights when best interest decisions are made. It seeks to secure a change of approach on the part of judges primarily, and also others who can influence children's treatment in the courts, such as social workers, lawyers, and more broadly policy-makers and legislators (who can potentially, of course, secure legal change).[48]

Parents need not fear that I am seeking to treat children exactly like adults – I am not. I am speaking very particularly about one zone of the law concerning children; that is official decisions in which the best interest of the child is the primary consideration. I am not arguing that children should have a veto in every decision in their lives – at home, at school, or in public. Children should have a greater say in these areas, but this is not the focus of this book, and the children's autonomy principle which I am proposing is not designed for zones other than those which involve the state, and particularly courts, making decisions about intimate aspects of children's lives. For one thing, I wish to draw attention to the institutionalisation of the denial of children's autonomy in the courts; organs of the state which do not just reflect, but also shape, how children are perceived. Secondly, I do not have the scope in this book to consider all of the areas in which children are unjustifiably denied autonomy – they are numerous and the solutions will be complex.[49]

It is the element of state interference which is a key driver of the children's autonomy principle which I am proposing. The court may think that it is taking the place of the parent in best interest decisions,[50] but it is not. Unlike parents, courts have *force of law* behind them. It is a power which has on occasion led to outrageous outcomes. It has led to children being

---

in at least some aspects of child protection cases, for example when it comes to the *process* of hearing children, and instances where it is debatable as to whether the threshold of significant harm has been reached.

[46] See Chapter 1, Section 8.2.

[47] Quote from fourteen year old boy incarcerated overnight by judge for refusing to go on a court-mandated visit with his father. See Jameson Cook, "Teenager Incarcerated for Refusing to Visit his Father" *Macomb Daily* (21 Nov. 2009). Available at www.macombdaily.com/articles/2009/11/21/ (last accessed 12 Dec. 2016).

[48] See further Chapter 7.

[49] There are some texts in which other areas of children's autonomy are tackled in some detail. See for example Ian Butler, Lesley Scanlon, Margaret Robinson, *Children and Decision Making* (Jessica Kingsley Publishers, 2005) for consideration of the family context; Lynn Hagger, *The Child As Vulnerable Patient: Protection and Empowerment* (Ashgate, 2013) and Claudia Wiesemann, *Moral Equality, Bioethics, and the Child* (Springer, 2016) for the context of medical treatment; and Hanne Warming, ed, *Participation, Citizenship and Trust in Children's Lives* (Palgrave MacMillan, 2013) on the topic of children's citizenship.

[50] This impression has been expressed by judges, for example, in *Re G.* [2012] EWCA Civ 1233; *Re S. (Contact: Intractable Dispute)* [2010] 2 FLR 1517, at para 7; and *J. v C.* [1970] AC 668, at 722.

incarcerated in the US for refusing to obey visitation orders[51] – an ironic, though perhaps inevitable, destination of such proceedings because children's refusals constitute contempt of court. In 'international abduction' cases it results in children being forcibly removed by police, often terrified, sometimes across jurisdictions, to parents that they do not wish to see.[52] It is difficult to reach any other conclusion than the fact that the best interest principle and its attendant 'right to be heard' are drastically failing children in such cases, institutionalising an unjustifiably paternalistic and coercive approach to children's wishes.

I am not suggesting that children be accorded the right to get whatever they wish even in this narrow context. A concept of autonomy necessarily involves acknowledging where individuals are not autonomous and where they require protection, and responding appropriately.[53] Nor am I claiming that a focus on autonomy will solve most of the difficulties encountered by children in proceedings as, clearly, not all problems relate to children's wishes. Not all proceedings require a simple yes/no answer. Many cases involve the problems of highly dysfunctional families – problems that autonomy alone cannot solve. Some cases involve numerous types of proceedings – immigration, child protection, private family law – which complicates whether a child's wish can be upheld.[54] I am simply arguing that children can be benefitted by adults adopting a deeper appreciation of what autonomy means in real terms for children in best interest cases. I am advocating a framework in which children's wishes are overridden by the state only where truly necessary – something which we adults take for granted every day in liberal democracies.

5. Overview of this Book

In **Chapter 1**, the initial argument is made that the text of the CRC Article 12 'right to be heard' is flawed when it comes to best interest proceedings, as it is too vague and inadequate for the personal matters determined in such proceedings. We need to focus instead on children's autonomy. In **Chapter 2** it is stated that whilst the 'best interest principle' is positive in that it focuses on *children's* interests rather than those of others, it is flawed in the way that children's wishes are treated as any other factor in the best interest determination. In **Chapter 3** it is argued that autonomy is crucial to well-being, but it is also limited. This goes for everyone, including children. The limits of children's autonomy are usually understood to be defined by 'capacity' but as this is so little understood, the limit for children should instead be determined by potential harm from outcomes. **Chapter 4** uses examples of practice and proceedings from around the world to demonstrate that Article 12 has not resulted in good *processes*. Children are routinely excluded, and many processes fail to

[51] See Chapter 5, Section 4.2. See also Cook, note 47; Bill Laitner, "3 Kids Ordered to Juvenile Hall After Refusing to Have Lunch with Dad" *USA Today* (9 Jul. 2015). Available at http://www.usatoday.com/story/news/nation/2015/07/09/judge-jails-kids-refusing-lunch-dad/29940397/ (last accessed 12 Dec. 2016); and *In re Marriage of Marshall*, 278 Ill.App.3d 1071 (1996), all involving children being incarcerated for refusing to attend contact visits. Children are also sometimes threatened by courts with police to enforce contact or residence orders. See Chapter 5 and Canada cases *K.D.S. v G.M.P.*, 2017 ONSC 212 and *Millar v Williams*, 2009 CanLII 41350 (ON SC).

[52] See for example Chapter 6 which outlines the distress for children in cases concerning the Hague Convention on International Child Abduction (1980). See particularly *M. v B.* [2016] EWHC 1657; *Re M. (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26 and Israeli case *FamA (Dist TA) 1167/99 R. v L.* (unreported, 3 July 2000) [INCADAT cite: HC/E/IL 834]. Such cases are complicated by the supremacy of the presumption in favour of return (in that they are not treated by the courts as 'best interest decisions'), a point which is considered in Chapter 2, Section 5.3.

[53] See Herring and Wall in the context of vulnerable adults; note 15, at 699. See further Chapter 3.

[54] Immigration cases are not decided with the best interest of the child as *the* primary consideration unfortunately, frequently leaving little room for a child's wishes. See further Chapter 2, Section 5.2.

adequately prepare children for proceedings. In **Chapter 5** evidence is considered that points to Article 12 making little difference in the *outcomes* of decisions as children's wishes are easily overridden. A power gap is created where children's wishes are denied, one which is filled by already powerful forces such as the state and parents (particularly non-resident parents). **Chapter 6** outlines *how* courts should only override children's autonomy where it is likely that significant harm will result, similar to the high standard by which the state must abide in child protection cases. In **Chapter 7** it is argued that for the autonomy principle to work, an autonomy-supportive, child-friendly process for hearing children must be in place – this requires a change in the values underpinning legal systems. The final chapter brings together key points from the preceding chapters.