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Children’s Voices in the Family Court:
A document analysis of Judges’ decisions

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ABSTRACT

Family court decisions have a long-term effect on children's lives. Research has found that children's wellbeing is enhanced when they are involved in family law decision-making. Having the opportunity to express their views is a protective factor and provides a sense of empowerment, leading to improved outcomes. Children's participation in Family Court proceedings in Aotearoa is legislated for through section 6 of the Care of Children Act, 2004. Section 6 provides for their voices to be heard and their views to be taken into account. This research, located in a qualitative approach, explored the significance of children's voices in Family Court proceedings in Aotearoa as documented in seven Family Court decisions from 2016 to 2019. The research found that judges regarded ascertaining a child's views as taking account of them. A further finding was that a child's age and the Judge's perception of their maturity were determining factors in whether judges considered children's views. Additionally, a range of practices, including prioritising the child's best interests principles over the child's voice, acted as barriers to children's participation. This research recommends further large-scale research to ascertain whether section 6 of the Care of Children Act is being consistently and adequately applied. Recommendations for better practice include: mandatory and formulaic reporting of the process undertaken when accounting for children's views within decisions; robust and external accountability that includes comparing files against decisions to ensure that children's voices are being heard and accounted for as intended; the best interests principles contained within section 5 of the Care of Children Act extended to include hearing the views of children subject to

proceedings and the views of young children being ascertained through specialist interviewers including and increasing visibility of children’s voices in Family Court proceedings.

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CHAPTER ONE: INTRODUCTION

This research explored the significance judges place on children's voices in Family Court proceedings in Aotearoa. Family Court decisions have a long-term impact on children's lives, and it is therefore important that children are included in the decision-making process (Atwool, 2001). Section 6 of the Care of Children Act 2004 (COCA) provides legislative means for children's participation in family law decision-making processes in Aotearoa and this qualitative document analysis explored the significance judges place on children's voices when presiding over family disputes. Families engage with Family Court services to assist with resolving their disputes. Emotions are often high as it is not just the best interests[1] of children that are at stake, but also the futures of the parents and other family members (Taylor, 2005). The Family Court is expected to keep pace with socio-political factors as it fulfils its role dealing with an array of matters from day to day care and contact, guardianship matters, relocation, abuse and neglect of children, protection orders, civil unions, separation and divorce, matrimonial property, maintenance, paternity, adoption and wills (District Court of New Zealand, accessed 2019; Law Commission, 2003).

The child's right to a voice in family law proceedings affecting them is central to this research. Document analysis was utilised to explore seven Family Court decisions to

[1] The bests interests perspective is a child's rights principle arising out of Article 3 of the UNCROC where all actions regarding children undertaken in both public and private welfare sectors, courts of law, administrative and legislative authorities, must place the best interests of the child as the primary consideration. State Parties must ensure children such care and protection as is necessary for their well-being, whilst taking account of the duties and rights of parents, legal guardians and any other person legally responsible for them (United Nations Human Rights Office of the High Commissioner, September 2020).

assess how judges regard children's views in hearings under the COCA. Family Court decisions were accessed through the District Court of New Zealand website. They were analysed for content relating to how judges hear and consider children's views.

Rationale

McLeod (2011) argues that it is people who shape the complexity and subjectivity of knowledge and as such, suggests that researchers need to undertake research on socially significant topics. A child's right to actively participate in decision-making processes which impact them is a strong principle in both current sociological discourses and the United Nations Convention on the Rights of the Child (UNCROC) (Cochrane, 2006). The right to participation holds significance in many international jurisdictions, particularly in family law proceedings. The commitment from Aotearoa to ascertain the views of children in family court proceedings pre-dates the UNCROC (Taylor, 2017). While there is research exploring different facets of the Family Court in Aotearoa, research exploring patterns in judge's attitudes and processes regarding children's participation as demonstrated through their published decisions is sparse.

It is important to understand how judges are approaching legislation, as although the primary target of Family Court decisions is the family subject to proceedings, published decisions become precedence for future cases. The content of judicial decisions is also important for the study of broader social and political practices that work together with judicial precedence (Hall & Wright, 2008).

Children's participation in family law decision-making processes that require a judicial determination has been provided for since the (now repealed) Guardianship Act 1968. The COCA, in section 6, placed a greater focus on the rights of children to have a voice and for their views to be taken into account. Robinson (2010) found that despite the changes implemented, by 2010, six years after its implementation, practices regarding children's voices had not significantly changed from under the Guardianship Act 1968 and that judges had not internalised the changes to legislation aimed at increasing children's participation in proceedings. It is now sixteen years since the COCA was implemented and as such, the changes inherent in the Act and which provide clear direction for children's participation should be consistently apparent in decisions coming out of the Family Court. However, surveys carried out by independent organisation the Backbone Collective (2017b, 2017c, 2018) amongst mothers who were party to Family Court proceedings showed that children are not always being provided with an opportunity to participate. When they are given the opportunity, often their views are not accurately relayed to the court and children do not feel heard. This research will assess whether there has been a change in recent years showing that judges have integrated the changes inherent in the COCA regarding children's participation and views.

Research Questions

This research explores the significance judges afford children's voices in Family Court proceedings in Aotearoa. Three questions informed this research:

1. What adherence did judges pay to section 6 of the COCA in hearing and considering children's perspectives?
2. Did judges discuss children's views in their family court decisions?
3. Were there any commonalities in the way judges treated children's views?

Study Design

To answer the research questions, qualitative document analysis was utilised. Being easily accessible public records, seven Family Court decisions were analysed using a thematic analysis approach. Document analysis has been employed in a range of studies regarding Family Court practices, including the place of children's voices (Black et al., 2012; Foote, 2010; Robinson, 2010; Robinson & Henaghan, 2011; Woodhead et al., 2014).

Background

The specialist Family Court is a relatively recent phenomenon within the Aotearoa justice system. It emerged as we know it today from the latter half of the 20th Century, when the jurisdictional boundaries of differing types of domestic proceedings became ineffective. This recognised that the changing social and legal needs of families experiencing matrimonial and domestic disputes were better dealt with in one specialist court.

Directions for initiating proceedings are laid out in the Family Court Rules, 2002. To commence proceedings, a party makes application to the Family Court for a particular

type of order and must include a range of mandatory documents. Applications can be filed by a lawyer representing a party, or the party is able to self-represent. Applications can be filed with or without notice. The judge's role is to make decisions in accordance with Aotearoa law (District Court of New Zealand, accessed 2019). A lawyer for child may be appointed to provide independent representation and advice to the child and in such a way as to promote the child's welfare and best interests (NZ Law Society, accessed 2020).

The Family Court has expanded significantly since its inception and as its jurisdiction has increased, so too has its workload (Taylor, 2005). Profound and rapid changes in family formation and household composition arising out of economic events, cultural shifts and social transformations, and increased relationship instability, have all had a significant effect on the nature and the complexity of the disputes being dealt with in the Family Court (Ministry of Social Development, 2004; Taylor, 2005). The dramatic increase in workload resulted in significant delays therefore impacting the courts ability to deal effectively with proceedings (Boshier, 2004a; Law Commission, 2002a, 2002b, 2002c, 2003, 2004). Statistics to 30 June 2019 show that the Family Court had 75,418 new applications, and 60,601 disposals (District Court of New Zealand, 2020).

Historically, children have been viewed by the family law system as objects of concern, in need of protection from parental conflict, and lacking the capacity to participate in legal matters that directly impact their lives (Fitzgerald, 2009; Graham & Fitzgerald, 2005; Hayes & Birnbaum, 2019; Kelly, 2012). The prevalent assumptions were that children could, and should, be sheltered from the chaos arising out of the breakdown in

relationship between their parents. Further, professionals in the family law system operated from the assumption that the views and interests of children could be competently represented by their parents (Hayes & Birnbaum, 2019; Timms, 2003; Smart, 2002). Over time however, the understanding developed that a child's best interests could not be determined without hearing their views (Cashmore & Parkinson, 2009; Hayes & Birnbaum, 2019; Smith et al., 2000).

Research regarding the impact on children of the breakdown of their parent's relationships has found that it is nearly always difficult for them. The findings of international qualitative research are consistent regarding children's views of their parents' separation and this holds true across cultural variations regardless of policy environments (Amato, 2004; Butler et al., 2002; Gollop et al., 2000; Taylor, 2005). Children's difficulties are often compounded by a range of ensuing factors, such as a breakdown in their routine, a decline in the household income and subsequently their standard of living. Parents are overloaded and their capacity to be available for their children significantly reduced (Amato, 2004; Kelly, 2003; Taylor, 2005). While many children emerge from parental separation resilient and well-functioning, others demonstrate adjustment difficulties that can leave a legacy of adversity impacting across their lifetime, particularly when the separation has been acrimonious (Amato, 2004; Kelly, 2003; Taylor, 2005). Through the surveying of 291 mothers, with 591 children, subject to Family Court proceedings, independent organisation the Backbone Collective (2017b) found that children who have been subject to Family Court proceedings often experience a range of somatic symptoms and stress disorders which impact their daily activities, and for many, proceedings often continue throughout the course of their

school years. Mothers report their children experiencing disrupted sleep, enuresis, bowel problems, anxiety, depression, eating disorders, alcohol and drug misuse, a range of physical aches and pains and self-harming and suicidal.

Children, of course, are not the only ones impacted by Family Court proceedings. Changes in living arrangements, financial and property divisions and child-care patterns all impact the adjustment process and wellbeing of all those concerned (Smyth, 2004; Taylor, 2005). The expectations of moving on with separate lives and all it will bring are tempered with the legal requirement that the adults remain connected as parents with responsibilities to their children through contact, guardianship and child support (Taylor, 2005). Family Court proceedings occur when families require assistance with managing these realities of separation.

While the past forty years has seen the development of a knowledge base regarding the impact of separation, this offers minimal assistance to the subset of parents who consume the greatest amount of legal and court resources when they are unable to agree about arrangements regarding their children. While a range of models have been developed which explain the impact of separation on wellbeing, these models do not directly address legal interventions in family's lives (Amato, 2000, Taylor, 2005). Studies show that Family Court proceedings can escalate family conflict and relationships between post-separated parents during Family Court proceedings are fraught with tensions, with an increase in threats, harassment and violence from men due to frustrations arising out of proceedings and with women reporting their autonomy being constrained, feeling victimised, under pressure and fearful (Backbone Collective, 2017b;

Dollar, 2020; Elizabeth et al., 2012). Women also report increased financial hardship and an extensive range of health issues (Backbone Collective, 2017a, 2017b, 2017d).

Aotearoa is an international leader in child-inclusive practices through provisions legislated for in section 6 of the COCA (Law Commission, 2003; Taylor, 2005). The Family Court however, has been criticised both within Aotearoa and internationally regarding its response to the voice of the child and for not fulfilling its legislative obligation of ensuring children's participation (Backbone Collective, 2017a, 2018; Family Law Pathways Advisory Group, 2001; House of Representatives Standing Committee on Family and Community Affairs (HRSC), 2003; Hunter, 2002, Taylor 2019). The emergence of children's rights and the active seeking of children's views are discussed in chapter two.

Definitions of Key Terms

Definitions are provided for the following terms to ensure consistency of understanding across the report:

Child/children: A person under the age of 18 years.

Care of Children Act 2004 (COCA): The legal framework through which children's welfare and best interests are promoted and their development facilitated by helping to ensure that appropriate arrangements are in place for their guardianship and care, and through which certain rights of children are recognised. Replaced Guardianship Act 1968.

Contact: All forms of direct and indirect interaction with the child.

Court Order: A legally binding direction issued by a judge requiring a person to take, or abstain from, certain actions or providing certain rights to parties.

Day to day care: Care that is provided only for 1 or more specified days or parts of days and includes, while exercising that role, exclusive responsibility for the child's day-to-day living arrangements.

District Court: The primary court in Aotearoa.

Family Court: A division of the District Court specifically to address family issues. While it is a division of the District Court, the Family Court retains its own identity.

Family Dispute Resolution: Family dispute resolution provided by a family dispute resolution provider for the purposes of assisting families to resolve disputes without having to pursue court proceedings, and to ensure that the first and paramount consideration in reaching a resolution is the welfare and best interests of the children.

Guardianship Act 1968: Now repealed and replaced by the Care of Children Act 2004.

Lawyer for child: Judge appointed independent lawyer for children subject to

proceedings.

Mediators: A family dispute resolution provider.

Oranga Tamariki: The Ministry dedicated to supporting children in Aotearoa whose wellbeing is at significant risk of harm.

Oranga Tamariki Act 1989: Previously the Children, Young Persons and Their Families Act, 1989, provides for the care and protection of children and youth justice.

Parenting Order: means an order under section 48(1) determining the time or times when specified persons have the role of providing day-to-day care for, or may have contact with, the child.

Presiding Judge: The judge who hears and determines any proceedings.

Section 133 Reports: Reports commissioned under section 133 of the COCA in relation to Guardianship or parenting orders. Can include cultural, medical, psychiatric and psychological reports.

Supervised Contact: Direct, face-to-face, contact between a party and a child, occurring under the supervision of an approved provider or in the immediate presence of a person approved by the court.

United Nations Convention on the Rights of the Child (UNCROC): A comprehensive human rights treaty that enshrines specific children's rights in international law, defining universal principles and standards for the status and treatment of children. Adopted by the United Nation in 1989 and ratified by Aotearoa in 1993.

Structure of the Report

Chapter One introduces the report and the key concepts that inform the topic. Chapter Two presents the historical and policy influences which have led to the establishment of the Family Court as it is today. It includes a discussion of the Family Court environment and a summary of the reviews undertaken since its inception. The emergence of children's rights in Family Court are outlined, and the role of judges, children's lawyers, counsel to assist, specialist reports and judicial interviews are detailed. Chapter three details findings in relation to what children want and need in Family Court proceedings and the benefits of participation. It outlines the literature regarding listening to children and the assumptions that exist. The protectionist and children's rights agendas, Aotearoa specific research and judicial interviews are discussed. Chapter four presents the methodology and method informing this research. The methodology section also presents the researchers philosophical approach, based in a subjective ontology and an interpretivist epistemological framework. Chapter Five, the results chapter, details the findings of the research as related to children's right to a voice, taking account of children's views and the judges concluding remarks. Chapter six discusses the findings in relation to children's rights in family court proceedings, the best interests standard, age and maturity, the effect of Conventions of rulings and barriers to hearing children's

voices. The concluding chapter, Chapter Seven outlines the studies major findings and presents recommendations for change.

Chapter Summary

This chapter has introduced the research topic, detailed the rationale for the research and set out the research questions. It has outlined the study design and background to the topic. Definitions for key terms used across the report are provided and the structure of the report has been outlined. The following chapter provides an historic outline of the Family Court and discusses the emergence of children's voices.

CHAPTER TWO: THE ROLE OF THE FAMILY COURT

This chapter outlines the establishment of the Family Court, including touching on the three reviews undertaken since its inception. The statutory framework and policy that informed the inclusion of children's rights and voices in Family Court proceedings are discussed, as are the roles of judges, lawyer for child, counsel to assist and specialist report writers. These roles are important to understand as they make it possible for proceedings in Family Court to be managed appropriately and to ensure effective processes are followed. They exist to support both the professionals working in the Family Court system and families using the service.

The Establishment of the Family Court in Aotearoa

In October 1976, a Royal Commission on the Courts was appointed to examine the structure and operation of Aotearoa's judicial system. At the time, the jurisdiction of family law was held between the Magistrates Court[2] and the Supreme Court[3] which both took an adversarial approach to settling disputes (Law Commission, 2002a). The adversarial approach was severe and harrowing for families who were party to proceedings (Mahony, 1991; Sturm, 2001). Rapid social change was creating "complex

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[2] From its inception in 1846, the Magistrates Courts decided a limited range of civil claims and criminal cases. It held jurisdiction over separation orders, post-separation spousal and child maintenance, custody and access, paternity, adoption and matrimonial property up to a certain value. When it was renamed the District Court in 1980, its jurisdiction was widened to cover family, criminal, youth and civil cases (Courts of New Zealand, accessed 2019).

[3] The Supreme Court was established in 1841 with a jurisdiction over criminal trials, testamentary disputes, questions of lunacy and admiralty matters. It was responsible for separation decrees, granted divorces, post-divorce maintenance, matrimonial property over a particular value, custody and access. The Supreme Court exercised a supervisory role over the lower courts and tribunals. It was also the Court of Appeal for the Magistrates Court. It is currently known as the High Court and is the superior court of general jurisdictions in Aotearoa (Courts of New Zealand, accessed 2019).

personal and legal problems" that posed new challenges for the courts (Beattie et al., 1978:146). New types of relationships resulted in family formations not seen previously and presented the court with new types of issues requiring resolution. The Royal Commission suggested it was "fundamental that the family as a unit should be dealt with as an organic whole" and this was a driving factor in the establishment of a specialist Family Court in Aotearoa (Taylor, 2006:6).

The Royal Commission's report was met with widespread approval and the Family Court was established as a division of the District Court in October 1981 (Boshier et al., 2011; Taylor, 2006). The focus was on being "a place where people can be helped to resolve their family problems in a just and humane manner" (Beattie et al, 1978:181). As such, the emphasis was placed upon mediation instead of adjudication (Beattie et al., 1978; Taylor, 2005). Presided over by specialist judges and assisted by the inclusion of specialist support services, the Family Court was given "exclusive, original jurisdiction in all family matters" (Taylor, 2005:36). Being established within the District Court made the Family Court geographically accessible with 58 locations across Aotearoa (District Court of New Zealand, accessed 2019). Its operating style and its perceived success, led to a rapid widening of its jurisdiction (Atkin, 1992-93; Law Commission, 2002a, 2003; Taylor, 2005). The Family Court now holds jurisdiction over and determines all legal matters relating to children and families under a vast range of Acts[4] (Taylor, 2005).

[4] Adoption Act 1955; Adult Adoption Information Act 1985; Births, Deaths and Marriages Registration Act 1995; Care of Children Act 2004 (replaced the Guardianship Act 1968 from July 2005); Civil Union Act 2004; Child Support Act 1991; Domestic Violence Act 1995; Family Court Act 1980; Family Proceedings Act 1980; Family Protection Act 1955; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; Law Reform (Testamentary Promises) Act 1949; Marriage Act 1955; Mental Health (Compulsory Assessment and Treatment) Act 1992; Oranga Tamariki Act 1989; Property (Relationships) Act 1976; Protection of Person and Property Rights Act 1988; Status of Children Amendment Act 2004. (The Family Court Act, 1980; Taylor, 2005).

Family Court Environment

The formality of the District Court was identified by the Royal Commission as an issue that required addressing, and therefore the new Family Court was designed to have less formal surroundings than that of traditional courts. When cases did proceed to a hearing, they were required to be conducted in a manner that avoided any unnecessary formality, including the absence of gowns and wigs (Boshier, 2005a; Family Court Act 1980). The idea behind being informal was an attempt to reduce stress for the parties and to encourage communication between them (Boshier, 2005a; Taylor, 2005). The privacy of the parties involved was also protected by closed hearings[5], however, the right to publish reports was created, provided they did not identify the parties involved. Anonymised cases were published for professional purposes (Henaghan, 2005).

Family Court Reviews

Four formal Family Court reviews have been undertaken since its inception in 1981. The first review occurred in 1992-1993 to ensure an effective balance between the philosophy from which the court was created, of being just and humane, and the functioning of the court (Taylor, 2005). A second review was undertaken from 2001-2004 to ascertain whether changes in management, administration and procedures within the Court were needed. The main impetus behind this was the need to enable the early resolution of disputes (Law Commission, 2002a). Not for the first time, a conciliation service was proposed, with provision suggested as being through contracted mediators. Most significantly, the report endorsed children's participation in the

[5] This was later reviewed when the COCA enabled increased transparency of proceedings to provide greater accountability and to restore lost public confidence in the system (Henaghan, 2005).

conciliation process and recommended discovering and including their views as part of dispute resolution (Taylor, 2005). The Government's response focused on a public information strategy to increase public support; the development of a non-judge led mediation pilot and an integrated training programme for staff designed to improve their skills and responsiveness (Ministry of Justice, 2003).

During this second review period, the Government also requested the Law Commission undertake a review of the operation and structure of the entire court system in Aotearoa, except for the top appellate tier. The objective of this review was to make certain that "the courts best reflect society's values and preferences". The Family Court was a significant part of this review (Law Commission, 2002b:2). This led to the Family Court becoming a Primary Court, headed by a Principal Judge[6], and with all presiding judges appointed through a warrant signed by the Governor General (District Court Act, 2016; Law Commission, 2004).

The third reforms, in 2014, saw the family justice system move its focus from the court to a new external family dispute resolution process. The Family Dispute Resolution Act, 2013 and the Family Dispute Resolution Regulations 2013, arose out of a third Family Court review that was undertaken from 2011 to 2014 by the Ministry of Justice. The changes brought about by this review were the most significant to the family justice system since the establishment of the Family Court. The review identified the Family

[6] The head of each court is a senior judge, usually referred to as the Chief Judge or the Principal Judge of that court. These positions are sometimes known as 'Heads of Bench' (Courts of New Zealand, accessed 2020).

Court, although being complex, as having uncertain and slow processes, with a lack of focus on children, and inadequate support for families to resolve their issues out of court. The cost of running the court was also of concern to the Ministry, and much of the responsibility for this was laid with the increase in cost to fund lawyer for child appointments (Taylor, 2017). The resultant Family Dispute Resolution Process was designed to keep families out of court and made mediation mandatory with the exception of urgent proceedings involving safety issues (Taylor, 2017).

Despite the review findings regarding the lack of focus on children, the new Disputes Resolution Act 2013 made no provision for child participation or support. Additionally, out of concern over rising costs and delays in court processes, drastic parallel changes to the COCA in 2014 also saw a child's automatic right to legal representation removed. Constraints were placed around lawyer for child provision, limiting appointment to situations where the court considered it necessary due to concerns over child safety and welfare (Atkin, 2015; Nelson, 2017). In 2016, the Ministry of Justice implemented a new service model for family dispute resolution, allowing the inclusion of children where families request it or when the mediators believe it may be beneficial. Different models of practice across the mediation providers meant however that there is no uniform practice regarding hearing children's voices as an integral part of the process (Taylor, 2017).

The most recent reforms, enacted in 2020, included changes to both legislation and funding and have resulted in the creation of the new Family Court (Supporting Families in Court) Legislation Act 2020. In announcing these changes, Hon. Andrew Little (2020)

acknowledged that the 2014 reforms had not worked and this legislation restored the right for legal representation for all parties and allows eligible parties to access legal aid. Family Justice Liaison Officers were also created to provide improved information resources to assist parties with navigating the system. Remuneration to children's lawyers was also increased to improve recruitment and retention levels of skilled children's lawyers (New Zealand Family Violence Clearinghouse, 2020). Significantly, and intended as a means of addressing recommendations made by the Independent Panel who examined the reforms of 2014, a further Bill is imminent in order to enhance the participation of children in proceedings affecting them. The expected Bill aims to ensure children have a sense of being supported and kept informed as they negotiate the family court process, while the duties of lawyers will be expanded (Little, 2020; New Zealand Family Violence Clearinghouse, 2020). The Children's Commissioner is quoted in the report as suggesting that children's rights should be a "golden thread, which runs through all Care of Children Act provisions" (Ministry of Justice, 2019:35)

The Emergence of Children's Rights in the Family Court

The second part of this chapter discusses the UNCROC, which once ratified, mandated children's participation in legal proceedings affecting them, and the COCA as the key legislative means through which provision to include children's voices in Family Court proceedings was created. There are several roles provided for in the Family Court which enable children's voices to be heard. The most utilised methods are through lawyer for child appointments and judicial interviews. The role of judges, counsel to assist, and specialist reports are also discussed.

United Nations Convention on the Rights of the Child (UNCROC)

Aotearoa became a signatory to the UNCROC in 1993, mandating children's right to express their views on matters impacting them. In signing the Convention, Aotearoa had acknowledged the need for a departure from the commodification of children approach, toward viewing them as individuals with rights and needs independent of the adults in their lives (Nelson, 2017; Thomas & O'Kane, 1998). United Nations' Committee guidelines clarified that all children subject to judicial and administrative proceedings must be informed, in an age appropriate manner, of all of their options and of the potential consequences of each, along with any other aspects of the proceedings affecting them. While there is no obligation upon children to express their views, should they want to, it is not sufficient for the court to merely hear them; their views must be given "due weight in accordance with the age and maturity of the child" (UNCROC, Article 12.1). Further, a child's age should not to be a barrier to their right to fully participate in judicial processes affecting them (Fernando, 2014; Taylor & Gollop, 2015). An UNCROC General Comment on Article 12 underlined the importance of hearing a child's voice. Outlining the parameters for a child's right to be heard, the comment drew attention to a range of measures, including the need to avoid tokenism, to be conducted by skilled adults, and to understand children's involvement as needing to be, among many other things, safe, respectful, transparent and accountable (Walker & Misca, 2019). Although the UNCROC itself is unclear on the child's right to be heard directly, the United Nations' Committee have stated that while that is their preference, it should be the child's choice as to whether they be heard directly in proceedings or through a representative (Fernando, 2014). In ratifying the UNCROC, Aotearoa agreed to undertake all appropriate legislative and administrative measures to implement the

rights of children contained therein, and to report regularly to the Committee. While the Committee attempts to ensure accountability on reports submitted by requesting further and updated information regarding legislative and policy measures taken to ensure children's rights to be heard, the UNCROC remains essentially unenforceable (Ministry of Social Development, 2015).

The Active Seeking of Children's Views

While there was provision within the Guardianship Act 1968 to ascertain children's wishes, the wording regarding this was limiting, thus restricted the child's voice and the weight afforded their views (Henaghan, 2002; Taylor, 2005; Taylor et al., 2001). The COCA was designed to introduce moderate changes, primarily around the language and procedures relating to guardianship and care of children law. A significant change involved removing the "age and maturity" clause and changing "wishes" to "views" (Smith et al., 2003; Stahl, 2001; Taylor, 2006; Taylor et al., 2007). These changes brought a stronger emphasis to the rights and views of children than had been seen previously (Atkin, 2003; Goodwin, 2003). It represented an "unmistakable shift towards the recognition of greater rights for children and allows for their greater input into decision-making processes" (Boshier, 2009:1). This piece of legislation placed Aotearoa as the international leader in provisions for child inclusion (Robinson, 2010; Smith et al., 2003, Stahl, 2011; Taylor, 2006; Taylor et al., 2007).

It is section 6 of the COCA that provides legislative direction regarding the active seeking of children's views and clarifies the requirement that they must be considered during proceedings. The provisions under section 6 reach wider than that required under the

UNCROC and hold the potential for the Family Court to respond to children as individuals, with their own views, regardless of age and ability to express those views (Robinson, 2010). Theoretically, these provisions are supported by section 4 of the COCA which states that “the welfare and best interests of the child must be the first and paramount consideration”. It further provides that the consideration of section 5 principles relevant to the welfare and best interests of the child does not limit section 6 regarding children’s views (Fitzgerald, 2009). These important changes moved children’s views to the forefront of the COCA and emphasised the focus on the child’s right to a voice in proceedings. They also imply that importance needs to be placed on a wider range of matters significant to the child and that the court must make effort to understand the child’s perspective (Taylor et al., 2007). Taylor et al. (2007) argue that with section 6(2)(a) requiring “reasonable opportunities” be provided to children to express their views, this would also suggest that each child is matched with a person who is the most suitable to facilitate ascertaining that particular child’s views.

The child-centred provisions in the COCA highlight that any decision made needs to be specific to each individual child and their particular circumstances. Further, these child-centred provisions seek to ensure matters are addressed taking into account a child’s sense of time, and that Parenting Orders are explained to children to a degree, and in a manner, that they can understand. Provision is also made for children 16 years old and over to apply to the court themselves to have decisions reviewed or to address guardianship matters (Taylor et al, 2007).

Professional Roles in the Family Court

As children do not attend hearings in person, they are reliant upon the professionals within the system to present their views to the court. Lawyer for child appointments, counsel to assist, specialist reports and judicial interviews are the main avenues through which children's views can be heard. Judges, while not a vehicle for the child's voice unless through a judicial interview, have a crucial role in ensuring their voices are heard and considered.

Judges

The role of the Family Court judge is to interpret and apply the law in helping to resolve family disputes (Law Commission, 2002a; Taylor, 2005). Judges are appointed based on their "training, experience and personality" and their suitability "to deal with matters of family law" (Family Court Act 1980). Most Family Court judges also sit, in a limited capacity, in the general jurisdiction of the District Court (Law Commission, 2004). The Family Court bench is led by a Principal Family Court Judge; however, individual judges have full control and responsibility over the way in which the Court they preside over is run (Family Court Act, 1980; Law Commission, 2002a).

Due to the inquisitorial nature of family law, the role of judge was set up to differ from other jurisdictions. The inquisitorial system allows for the court to be actively involved with the investigation of the facts of a case as distinct from the adversarial system whereby the court is principally an unbiased referee between the parties (Newlyn, 2018). Strict rules of evidence have been relaxed allowing the court to receive any evidence it determines as credible, reliable, relevant and within the fundamental

principles of natural justice (COCA, 2004). In addition, rather than simply relying on the party's witnesses, judges may also call witnesses for the court to provide evidence (Family Proceedings Act 1980; Care of Children Act 2002). Judges are vested with the power to make orders by consent when parties reach an agreement, therefore eliminating the need to progress to a hearing (Family Proceedings Act 1980; Domestic Violence Act 1995).

Lawyer for Child

The 2020 reforms directly impact the role of lawyer for child and changes are reflected in both the Family Court (Supporting Families in Court) Legislation Act 2020 and the second Bill expected later in 2020. However, the decisions analysed in this research all fall under previous legislation and the research itself was undertaken prior to the 2020 changes coming into effect.

Provision for children's lawyers was created as part of the Guardianship Act 1968 and continued through into the COCA (Atkin, 2015). The lawyer for child role is guided by these statutory provisions, and Practice Notes issued by the Principal Family Court Judge. Lawyer for child has four primary responsibilities: to meet with the child and explain the court process, to represent the child in negotiations and hearings, to ascertain their views for presentation to the court along with any relevant issues around their welfare and best interests, and to explain the final decision to the child at the conclusion of the hearing (COCA, 2004). The guidelines for children's lawyers acknowledge that any discussion with children needs to be carried out in a manner suitable to the child. The dual role of presenting the child's views and the duty to inform

the court of any factors impacting the child's welfare has meant that the role is largely guided "by the personal philosophy of individual practitioners regarding the rights and needs of children" (Department for Courts, 1998, in Taylor, 2005:137).

Counsel to Assist

Both the Guardianship Act 1968 and the COCA provide for judge appointed counsel to assist. In addition to arguing the best interests' perspective, counsel to assist prepares briefs on points of law or undertakes special tasks as required to assist with proceedings. Placed much later in the Act, Henaghan (2005) argues that this provides a clear legislative message regarding the difference between acting for a child and assisting the court.

Specialist Reports

A further mechanism to ascertain children's views and to assist the judge with decision making are specialist reports. These are written documents and can focus on the child's psychological, medical or cultural wellbeing (Doogue, 2006; Fernando, 2013; Nelson, 2017; Robinson, 2010; Tapp, 2006). While these reports cannot be ordered solely to ascertain a child's views, they can help to more deeply explore issues raised through proceedings (Fernando, 2014). Specialist reports must be distributed to all lawyers involved in the proceedings, and while parties are generally not permitted to retain their own copy, the lawyer for child may provide the child with a copy with the consent of the court. The lawyer for child must explain the contents of the report to the child provided to do so is not contrary to their welfare and best interests (Taylor, 2005).

While consensus amongst professionals is that the commonly used psychologists are better able to build a rapport with children and are likely to obtain insights other professionals are not so well placed to gain, there are potential drawbacks (Nelson, 2017; Robinson, 2010). A significant drawback, as with the lawyer for child, is that despite input from the parties, the final brief is determined by the judge, and may prevent the child from talking about matters that are important to them unless they are raised by the report writer. It has also been suggested that psychologist reports are presented from the psychological perspective of an adult interpretation, and not from the child's viewpoint, therefore questionably representing the child's views (Fernando, 2013; Nelson, 2017; Smith et al., 2008; Tapp, 2006). Research shows that these matters are of concern to children who have expressed dissatisfaction with the process, the techniques used when talking to them and that their confidentiality is not assured (Henderson, 2000; Parkinson & Cashmore, 2008; Tapp, 2006).

Judicial Interviews

International support for judicial interviews has been gaining momentum. The 5th World Congress on Family Law and Children's Rights in 2009 passed resolutions in favour of increased training for judges related to directly hearing children's evidence and encouraged judges to consider the use of judicial interviews in every case they preside over (Fernando, 2014). While the COCA does not specifically provide for judicial interviews, Boshier (2004b) argued in favour of them, stating that cases must involve children, not just be about them. This sentiment aligns with research which concludes that there is no uniform way to interpret children's views when they are conveyed through a third party (Robinson, 2010). Research also indicates that children also like

the idea of judicial interviews. They like the direct access to the decision-maker and believe this means there is less likelihood of misinterpretation of their views (Birnbaum & Saini, 2012; Parkinson et al., 2007). Children have also indicated it is important to them to meet the person who is making decisions about their lives (Birnbaum & Saini, 2012; Morag et al., 2012).

As Chief Family Court Judge, Boshier formalised guidelines for judicial interviews in 2007. This outlined the procedure standards required for judges to meet their requirements under section 6(2)(a) of the COCA in enabling children reasonable opportunity to have a voice. The guidelines allow broad discretion in determining the details of the meeting and how it will be reported back to the parties concerned (Fernando, 2014). A significant issue with these meetings, remains the lack of confidentiality afforded to children due to natural justice principles. Natural justice principles determine that any allegations likely to impact the outcome must be reported back to the parties to provide them with an opportunity to respond (Clarkson & Clarkson, 2005; Nelson, 2017).

Chapter Summary

This chapter has outlined the historical and policy influences regarding the establishment of the Family Court. It discusses the Royal Commission from which the Family Court arose, and subsequent reviews. The emergence of children's rights in the Family Court were discussed, including the UNCROC and COCA as the formal vehicles through which children are afforded a voice in proceedings. The professional roles directly involved in proceedings and the reports available to the court were detailed.

The next chapter details current notions and international and Aotearoa specific research findings in relation to children's voices in family disputes in the Family Court.

CHAPTER THREE: CHILDREN'S VOICES IN FAMILY DISPUTES

This chapter details trends regarding children's voices in family law proceedings. The relevant aspects of the UNCROC are outlined. Research findings as to how children perceive themselves in relation to their parents during family breakdown, what they want and need in relation to participation and the benefits from that involvement are detailed. Research regarding listening to children subject to proceedings and the assumptions that exist regarding their participation is outlined. The protectionist and children's rights agendas are described before detailing children's experiences of legal representation. Significant research specific to Aotearoa regarding the implementation of section 6 of the COCA is presented and the chapter concludes with discussing the attitudes of judges and children towards judicial interviews.

In order to find literature on these topics, searches were undertaken through Massey University Library, Google Scholar, Research Gate and the reference lists of relevant literature. While the intention was to keep the literature as recent as possible, due to a lack of current and specific literature it became necessary to include some older literature in the report.

The UNCROC details what children need to be safe, happy, and have a fulfilling childhood (Walker & Misca, 2019). One of the specifications for achieving this is the child's right to be involved in decisions regarding matters impacting them. The Convention states that children are to be provided with the opportunity to be heard, either directly or

indirectly in judicial proceedings they are subject to, however, while most jurisdictions recognise that right, very few guarantee it (Walker & Misca, 2019).

Aotearoa ratified the UNCROC in 1993, however, 27 years later, debate continues regarding how the voices of children should be considered in family law proceedings (Taylor, 2017). Despite an increasing body of international literature directly exploring the involvement of children in post parental separation decision-making there continues to be a lack of consensus on whether children should be involved (Bagshaw, 2007; Birnbaum et al., 2011; Bretherton, 2002; Pike & Murphy, 2006; Smart, 2002; Smart & Neale, 2000; Smith et al., 2000).

What Children Want and Need

Children report that rather than being passive and dependent, they view themselves as proactive participants in forming and maintaining their connections with their parents (Holt, 2018). They carry a sense of inter-dependency in their relationships with their parents where they are both receiving and giving practical and emotional support (Holt, 2018; James & James, 1999; Morrow, 1999). Research indicates however, that many children are uninformed regarding their parents' separation and consequently, plans regarding their future (Maudeni, 2002; Smith et al., 2003). A considerable body of research shows that children want to be told what is going on in family law proceedings and provided with clear, age appropriate information, as well as having their views heard, independently from their siblings. Most significantly, they want to be believed (Bell, 2016; Birnbaum & Saini, 2012; Goldson, 2006; Goldson, 2009; Parkinson et al., 2005; Rae, 2006; Walker & Misca, 2019). Children feel strongly that they have a right

to be heard, however also report that they do not want the responsibility of deciding care and contact arrangements, especially if it means they may have to choose between parents (Banham et al., 2017; Barnett & Wilson, 2004; Bosisio, 2012; Graham & Fitzgerald, 2010; Tisdall et al., 2004). This aligns with Morrow's (1999) assertion that children demonstrate awareness regarding the boundaries of their abilities and can recognise when they require guidance from adults. When children were unhappy with outcomes, it was because they felt their input had been inadequate or that their views had not been considered (CAFCASS, 2010; Richards et al., 2007; Willow et al., 2007). Tapp (2006) found that it is common practice to provide children with the opportunity to have a voice and then to consider that their rights have been met. Henaghan (2012) argues that judges tend to view the status of children through a lens of age and maturity over what the child says and the ways in which their views could be relevant to the outcome. He maintains that if children's views were taken into account but overshadowed by other factors involved in the case, the decision would at least have shown that the child's views had been heard, and show where they fit within the frame of facts the judge is required to consider.

The Benefits of Participation

Extensive research supports the understanding that children, even as young as 3 or 4, have the capacity to manage and cope well with being involved in family law matters impacting them (Cashmore, 2003; Graham & Fitzgerald, 2006; Holt, 2018; Smart, 2002; Smith et al., 2001, 2003). A child's capacity to manage adversity is greater and their self-esteem increases when they can maintain their independence and their views are respected. Participation creates a protective factor, leads to improved outcomes and is

associated with a sense of empowerment, resilience and mastery (Bagshaw, 2007; Bala et al., 2013; Buss, 1996; Goldson, 2009; Sutherland, 2014; Taylor et al., 2007; Van Bijleveld et al., 2015; Robinson, 2010; Walker & Misca, 2019).

Experts point out that children's vulnerability is heightened when their parents are likely to be emotionally unavailable to them, and as a result, children may avoid discussing their situation from a need to be loyal or in fear of upsetting their parents further (Butler et al., 2002; Fitzgerald, 2009; Holt, 2018; Hunter, 2007). Pike and Murphy (2006:7) reported that children in their research acknowledged that while it could be difficult to express their views children "were adamant that this had to be done because it is their lives which are being affected." Children are reported as believing that decisions arising out of proceedings affect their whole family and that their participation provides further perspectives to be considered and presents a fuller picture of their family. They also report that through participating, they themselves gain a better understanding of what is happening for their parents (Quigley & Cyr, 2017). The most common reason for not supporting children's participation relates to their age with the views of children under 4 years old commonly not sought (May & Smart, 2004). Research however, shows that children are capable of participating articulately from very young when they are approached in an age appropriate manner (Bell, 2016; Birnbaum & Saini, 2012; Blackwell & Seymour, 2005; Doogue & Blackwell, 2000; Neale 2004; Taylor, 2005). Another argument against children's views being considered in alignment with their age and maturity, contends that there are no clear criteria regarding assessment of these factors or by whom they should be assessed (Caffrey, 2013; Holt, 2018). This makes the concept of a child's ascertainable views ambiguous and therefore susceptible to subjective

understanding (Aubrey & Dahl, 2006; Bosisio, 2012; Caffrey, 2013; Quigley & Cyr, 2017; Van Bijleveld et al., 2015).

Protectionist and Children's Rights Agendas

Holt (2018) suggests that there is clearly a rhetorical commitment to the notion of children's rights. In practice however, family law has aligned more with protecting than empowering children. The protectionist agenda believes firmly in a child's right to be a child. It dominates in cases where there is parental conflict, leading to tension regarding children's participation and a need to protect them from any involvement in adult matters (Birnbaum & Saini, 2012). This view is criticised for placing children in a subordinate position to adults and consequently limiting their right and ability to participate through prioritising adult discretion (Neale, 2002).

At the opposing end of the continuum is the children's rights agenda. This view accepts a child's capacity and right to participate in decisions that impact them. It argues that to allow children rights, including the right to participate, does not compromise their welfare, but instead protects and empowers them (Holt, 2018; Pryor & Rodgers, 2001). Proponents of the children's rights agenda accentuate that participation is not about self-determination; it is primarily about the child's right to have a conversation – to be listened to and respected, and that this right is integral to child welfare (Holt, 2018; Roche, 1999). Birnbaum et al. (2011) contend that adults need to respectfully listen to and engage in dialogue with children to create an ethic that supports their participation. Such an ethic respects a child's capacity as opposed to placing the focus on their perceived limitations. Aligning with this view, Houghton (in Holt, 2018:463) maintains

that professionals need to "listen louder" to children's voices and acknowledge them as the experts regarding their own lives.

Bell (2016) points out that the melding of children's views and what professionals believe to be best can lead to misunderstandings regarding what is important to children and the subsequent misrepresentation of their views. This raises questions as to whether the expression and use of children's views in a legal context is empowering for children when it has no effect on the decision-making process or outcome (Bell, 2016; Smart, 2003).

The discourses surrounding children's voices in decision-making are confusing. While there is a commitment to the concept of children having rights, these same rights are stifled under a welfare agenda when children become subject to family law proceedings (Holt, 2018; Piper, 1999). In reality, there are a range of options available for providing children with a voice and being represented in proceedings, however, the dominant concept of risk of harm to children in tandem with doubts regarding their competence and maturity has seen a predominance of professional reluctance to support authentic participation (Holt, 2016; Hunter, 2007; Taylor et al., 2007).

Children's Legal Representation

Research undertaken internationally shows that most children respond positively to the concept of participating in the decision-making process (Birnbaum et al., 2011). They appreciated having someone they could talk with, who they expected would accurately report their views to the court and who prevented them having to appear in court or

from having to express their views directly to their parents. They also liked having someone explain proceedings to them and wanted to be kept updated by professionals (Douglas et al., 2006; Stotzel & Fegert, 2006; Tisdall et al., 2004).

A study in Ontario however, found that although children were glad to have someone independent to talk to, their lawyer did not explain processes to them and paid little attention to their views (Birnbaum et al., 2011). Other international studies have also found low levels of consultation with children regarding their care and contact arrangements and children reported feeling resentful when they were excluded from participation (Birnbaum & Bala, 2010; Butler et al, 2002, Graham & Fitzgerald, 2010; Masson & Oakley, 1998; McIntosh, 2009; Parkinson & Cashmore, 2008; Smith et al, 2003).

An extensive Australian mixed-methods study undertaken in 2012/2013 found that most of the children expressed disappointment and a sense of betrayal related to their experiences with their independent child lawyer, often leaving them with feelings of marginalisation (Kaspiew et al., 2014). Children reported feeling unclear as to the purpose of the independent child lawyer, with whom they had minimal or no contact, and displayed a lack of knowledge and understanding of how their views were considered in terms of decision-making (Kaspiew et al, 2014). Of crucial significance, was the finding that many children felt their safety was substantially minimised and that their lawyer made a fundamental assumption that no abuse or violence had occurred, or if it had, that it was of little consequence (Kaspiew et al, 2014).

Aotearoa Research

In Aotearoa, small scale, in-depth qualitative research undertaken by Taylor et al, interviewed 20 children and young people to gain their understanding of the role lawyer for child played in their proceedings. Commissioned by the Department for Courts and connected to a wider policy review context, Family Court Co-ordinators identified and made the initial approach to lawyers and families (Taylor et al., 2000). The research found that children in Aotearoa were generally not well informed about processes and decisions, and the amount and quality of feedback to the children at the various stages of the proceedings varied considerably. Children's feelings regarding their relationship with their lawyer were predominantly ambivalent. The research concluded that just over half of the children interviewed felt they had been understood or listen to, were kept informed and were happy with the final decision. One-fifth of the children expressed clear dissatisfaction with their lawyer (Taylor et al., 2000).

Given the universally applied "best interests" standard in Aotearoa, which provides courts with the means to individualise decisions for children, it is crucial that a lawyer for child works very closely with each child (Henaghan, 2008). A Law Commission Review in 2002 found there were a significant number of cases where the lawyer for child did not meet with the children in a time frame that provided an opportunity for full understanding and presentation of the child's views, as well as citing examples of cases being drawn out to provide lawyers with greater remuneration. Henaghan (2005:7) suggests that while there is a duty upon lawyer for child to report the child's voice to the court, this "is watered down and potentially drowned" by the additional

requirement to present to the court any other factors that may be impacting upon the welfare of the child.

An Aotearoa pilot programme saw mediators meet with children alone before reporting back to the parents with a summary of the child's views (Goldson, 2006). The children identified any information they did not want reported back to their parents. Considering the child's views, and in conjunction with the mediator, the parents devised a tentative parenting plan, before coming together with the children to discuss the proposed plan. A follow-up session occurred a few weeks later to discuss how the plan was working. Children reported that they were more satisfied with the final arrangements due to having had an opportunity to express their views and have them considered (Goldson, 2006). Goldson (2006) also observed that as a result of their child's involvement, parents reported developing an increased awareness regarding the impact of conflict on their children, and the need to work together for a good outcome.

Robinson (2010) engaged in mixed-methods research to analyse a case sample of 120 Family Court decisions made between 2005-2010, to find out how the courts were applying section 6 of the COCA. The sample included day to day care, relocation, protection and alienation[7] cases. While children's lawyers, judicial interviews and specialist reports were used to ascertain children's views, the findings showed that 28% of cases did not show any discussion of their views. A significant number of cases did

[7] A widely discredited theory suggesting (generally) mothers who allege their child is not safe with their father are doing so to alienate the child and father from each other. Allegations of alienation often result in women's and children's reports of abuse being dismissed and is framed as psychological abuse of the child (Mackenzie et al., 2020; Meier et al., 2019; Neilson, 2018).

not specify how they took account of the child's views or failed to consider each individual child in a family. Overall, Robinson found that courts continued to consider age and maturity as determining factors, appeared to be under the impression that some children were unable to express their views and that judges, using outdated terminology, tended to refer to children's wishes as opposed to referring to their views. Further, this research also found that children's views were more likely to be given significant weight where they were consistent with the principles detailed in section 5 of the COCA (Robinson & Henaghan, 2011).

Listening to Children and the Assumptions that Exist

Stanley (2006) argues that constructs of gender and gender relations can lead to situations where children are listened to when they want contact, and overruled when they do not, often on the grounds of undue influence by their mother. Cossar et al. (2016) maintain that when a child disagrees with the views of professionals, this can be used to challenge their level of competence. Moreover, children's voices are often overruled when they do not want contact with a parent, based on the assumption that there can be no valid reason for children to not want what professionals assume is unquestionably in their best interest (Harrison, 2008; Holt, 2011). Sawyer (1999:159) argues that children's views differ from that which the State deems acceptable are "comparatively ignored." In examining international law and practice Daly (2018) has found that side-lining of children in their own proceedings is common practice, with courts relying on common assumptions regarding children and being confused as to what they are applying weight to.

An adult preoccupation with the genuineness of children's views contends that only those children who appear to be unaffected by their parent's dispute are capable of freely expressing genuine views, connecting children's innocence with authenticity. This in turn results in children being viewed as either too innocent to participate, or alternatively, overly involved, and therefore insincere and unable to be trusted. Subsequently, their views are disregarded (Bell, 2016; Butler et al, 2002; Taylor, 2006).

Unwillingness to provide children direct input has resulted in their views most often being inferred and deciphered by a range of professionals prior to reaching court. This often occurs well after proceedings are underway and attempts have already been made to resolve the parental issues. As a result, children's views are only used when adults believe it will be appropriate or convenient (May & Smart, 2004; Taylor et al., 2007).

A range of powerful assumptions exist regarding children's participation in family law processes (Cossar et al., 2016; Holt, 2018: Kjorholt, 2002). Assumptions are problematic as they limit the process of being able to discern what is best for each child in their specific and unique circumstances. Developmental psychology only provides general indicators of age and stage capacity and does not provide the in-depth guidance that Family Court professionals require to make sound decisions (Buss, 1999). This results in expert knowledge of an abstract child being applied to real children without considering their individual needs and wishes (Herring, 2014; Piper, 2000; Walker & Misca, 2019).

In the United Kingdom, researchers analysed a sample of 481 random court files. They found that professionals presumed to know what was best for children based on

universal assumptions regarding the best interests of children, and that as a result, interviewing them seemed unnecessary (James et al., 2004). Herring (2014:20) argued that the populace of children before the Family Court is unique in their circumstances, and as such, this renders knowledge regarding "usual" children to be of minimal significance in the Family Court setting. By adhering to the "single voice of childhood" notion, children will be precluded from having a voice in matters affecting them, especially when their views do not align with universally accepted assumptions (Holt, 2018; Roche, 1999:33).

Judicial Interviews

The suitability of judges conducting meetings or interviews with children has been a topic of debate in many Western jurisdictions. A review by Taylor and Caldwell (2013) of studies undertaken in jurisdictions similar to Aotearoa showed that it is common for judges to be reluctant to engage in judicial interviews, while in Aotearoa, judges reported an increasing willingness to meet with children. Australian research found that many judges believe they are not trained to speak to children and are worried about matters of procedural fairness (Fitzgerald, 2009; Voight, 2017). In Aotearoa, judges reported generally feeling confident about their ability to undertake interviews and that increased familiarity with the process reduced their anxiety regarding their competence, although they would prefer more training. As they obtain more experience with conducting judicial interviews, they also reported relaxing their approach and focussing on the benefits gained through obtaining a better understanding of the individual child (Boshier, 2006; Fernando, 2014; Raitt, 2011; Taylor & Caldwell, 2013). Justice Mill (2008) argued that this is indicative of judges changing their practices to ensure they are

complying with section 6 of the COCA. Fernando (2014) suggests that meeting with children also creates a sense of professional responsibility towards the child on the part of the judge. Cleland (2013) found that while judges are willing to meet with children, and children are expressing their views to them, this does not mean that judges are listening to or taking account of children's view.

Judges in Aotearoa see the purpose of the judicial interview as a critical aspect of the interview process. Most judges engage with the child not to obtain their views, but to honour requirements under section 6 of the COCA and ensure children reasonable opportunity to express their views. Some judges outlined the court process and most reported reassuring children that their views had been heard directly by the decision-maker. Several judges revealed that they regard the judicial interview as a 'meet and greet' only, while others found the judicial interview to be a burden. Some judges expressed concern that judicial interviews were risky, with the potential to place children in the middle of the dispute (Bell, 2016; Taylor & Caldwell, 2013). The judicial interview approach in Aotearoa is criticised for asking children to express their views multiple times without any significant analysis regarding whether this repetitive process works in children's best interests (Fernando, 2014).

At a 2009 international consultation of family law practitioners, most participants supported the appropriate participation of children in family law decision-making. Many of the professionals said they were uncertain of the best way to enable children to participate, citing lack of resources and education, and inconsistent practices as barriers to ensuring children's effective participation. It was agreed that hearing children was a

skilled activity, to be a process and involving clear practices and protocols (Paetsch et al., 2009; Walker & Misca, 2019).

Studies exploring the views of children show that they generally think judicial interviews should be available as an option to all children. Children subject to contested proceedings were more likely to want to talk to the judge despite having their own legal representative present their views to the court. Children in favour of judicial interviews believed all children had a right to be heard, and acknowledged value in direct communication, believing it could be beneficial to the decision-making process (Taylor & Caldwell, 2013). While children report feeling anxious before meeting the judge, they did not feel distressed as a result of the meeting. They thought they could talk about things they did not want their parents to be aware of and believed their views would not be filtered or misinterpreted (Fitzgerald, 2009; Parkinson & Cashmore, 2008). Children reported feeling satisfied with the meeting regardless of whether the judge followed their wishes or not (Taylor & Caldwell, 2013).

Chapter Summary

This chapter has reviewed the literature relating to trends regarding children's voices in family law proceedings. It has detailed children's perceptions of themselves in relation to their parents during family breakdown, what they want and need and the benefits of participation. Assumptions that exist regarding children's participation brought about through protectionist and children's rights agenda were discussed. Aotearoa specific research and children's and judge's views regarding judicial interviews were outlined.

Chapter four details the methodology and method used in this research. Limitations, ethics and insider researcher positioning are also discussed.

CHAPTER FOUR: METHODOLOGY AND METHOD

This chapter details the methodology and method for this research. The first section situates the researcher's understanding of truth and the construction of knowledge in a subjective ontology and interpretivist epistemology. This is followed by outlining Childhood Studies as a framework informing the researcher's positioning. It also locates the research in a qualitative approach. The method details the sampling procedure, data collection, document analysis and thematic analysis. Limitations and ethical considerations are also discussed.

Ontological Position

To conduct research, the researcher must start with their ontology: their beliefs regarding truth and the nature of reality. Ontology addresses the question of when something in a person's perspective is real and meanings about the way things work in their everyday experiences (Adam 2015; Glesne, 2011). A subjective ontological view is that human nature has multiple, socially defined realities (Creswell, 2007). When applied to this research, it means that judge's views may differ from one another depending on their lived reality. It follows therefore, that the meaning they make from the information they receive regarding children's views varies between them. Two different judges may understand a child's views quite differently, and the researcher may have a different understanding again. Although the judges all work within the institution of the Family Court, with the same roles and responsibilities, their interpretations of their lived experiences will tend to be understood differently, therefore impacting the way they view what children's voices are saying.

Epistemological Position

Epistemology relates to questions around how knowledge is acquired, the ways we know what we know, and the nature of understanding (Adam, 2015; Heigham & Croker, 2009; Sprague, 2010). A researcher's epistemological position refers to the way they create knowledge in their research and is guided by their ontological stance. Epistemological considerations shape the methodology used and warrant the way in which the research questions are answered (Glesne, 2011).

An interpretivist epistemology acknowledges that an individual's perception of reality is influenced by political, cultural and social elements that support the construction of shared understandings (Stryker 2002; Howell 2013). As such, social reality is the result of the way in which people, both collectively and individually, make sense of their social world (Markula & Silk 2011). Interpretivism argues for meaning to be established through social consensus, which is innately subject to contestation and disorder (Denzin & Lincoln, 2011; Hall & Wright, 2008). Making sense is not static or stable; change occurs based upon a person's experiences or on their capacity to understand their experiences (Sparkes 1992).

Believing that data is unable to be disconnected from its context, interpretivist researchers promote the discovery, construction and generation of new knowledge (Denzin & Lincoln, 2011; Yanow, 2014). Interpretivism allows for flexible research structures which are receptive to the meanings found in human interaction and to making sense of perceptions of reality (Black, 2006; Carson et al., 2001). Interpretivism also emphasises exploring the experiences of individuals in their social world, and

understanding their perspectives, interpretations and meanings (Adam, 2015; Dey, 1993; Patton, 2002). While approaching research with a degree or prior understanding and insight, an interpretivist researcher will remain open to the new knowledge that emerges as the research progresses. The goal of interpretivist research, therefore, is not to generalise or predict; it is to understand and to interpret meanings (Neuman, 2000; Hudson & Ozanne, 1988).

Insider Researcher Positioning

Insider-researchers are researchers who conduct their research about an aspect of their own community. This can be their profession or workplace, their society or their culture (Innes, 2009). Innes (2009) maintains that being an insider can enable the researcher to comprehend relevant complex issues and provides contextual understanding. It is not uncommon for people to engage in research from within a background that has influenced their interests (Gunter, 2004).

My insider status is three-fold. For several years I worked in Supervised Contact Centres, both as a supervisor and as the Contact Co-ordinator. Most families utilising the service came to us through Family Court rulings. I have also been party to Family Court proceedings regarding my own children's care and contact with their father. With my proceedings behind me, I now volunteer as an advocate and support person for women who are party to proceedings. My insider status has presented challenges. In the initial data collection process, despite being anonymised by the court, I recognised decisions as being those of women I have supported or know of, as well as coming across my own case. I was also presented with the challenge of finding a balance between remaining

detached from the decisions at the same time as engaging with them. I had preconceived ideas due to my own experiences and long involvement in the Family Court. To manage these, I listed the assumptions and preconceived ideas I carried to help me to be aware and to manage them throughout the project. This helped to separate my background knowledge and experiences from the new knowledge I was creating, while still being able to hold the awareness that I may find evidence of experiences similar to my own. My insider status did provide insight into some of the processes that occur in Family Court but are not apparent through the decisions. Regular supervision and a strong support network also assisted with identifying when I was losing my objectivity regarding the subject matter.

Childhood Studies as a Heuristic Framework

The framework informing my research is Childhood Studies. Arising out of Sociology of Childhood, the interdisciplinary field of Childhood Studies seeks to rethink and explore how children live in and across different social arenas and settings (James, 2004). Childhood Studies places value on the roles of children as citizens and attributes them with agency and with being active in the construction of their own lives; not simply passive subjects of the structures and processes around them (Prout & James, 1997). The academic discipline of Childhood Studies has evolved and challenged dominant discourse informing children's lack of civil and legal status (Kaltenborn, 2001). The shift in focus recognises and understands that children are active social agents who have rights and competencies different to, not less than, the rights and competencies of adults (Kaltenborn, 2001; Smith et al., 2001; Taylor, 1998).

Children have held differing roles throughout history. 'Childhood' itself is a fluid and constructed concept that has held different meanings during different periods. In many cultures throughout history, a child became an adult very young, and with that in mind, it seems at odds that their views are now dismissed so readily. Through changing adult perceptions within societies and across time regarding what it means to be a child, it is now possible to view childhood as a significant stage of life (Mayall, 2000). This means valuing children and taking their experiences seriously (Taylor, 2005). Childhood Studies demands children rights and advocacy and carries the aspiration to see children's views and voices acknowledged (James, 2004).

Developmental psychology emphasises children's interests as synonymous with their parents. Childhood Studies has released children from those constraints which render them virtually invisible as an individual and as having the reality of their lives hidden behind the institution of the family (James, 2004; Taylor, 2005). Through Childhood Studies, children's perspectives on parental separation can be understood from an entirely different position to that seen previously with developmental psychology and Childhood Studies identifies children as capable of actively engaging in negotiations regarding their relationships and living arrangements (Taylor, 2005).

Qualitative Research

Qualitative research occurs in natural settings and originates out of people's lived experiences and while generally engaging with a small sample size, in-depth contact with the data is undertaken (Dawson, 2009; Kirby et al., 2006; Marshall & Rossman, 1999). Qualitative research delves into social complexities, exploring to understand and

explain the lived experiences and belief systems that make up every-day experiences, both within institutions and for individuals. It provides an intimate understanding of the subject being studied (O'Leary, 2010). By accepting multiple perspectives and realities, coupled with the flexibility to adapt to change as the research progresses, a qualitative approach is ideal for this study exploring the practices of judges as they apply legislation relating to children's voices during proceedings, as demonstrated through their written decisions (Bowen, 2009; Culver, 2015).

Rather than engaging through sequential steps, qualitative analysis is somewhat organic as the steps in the process interact, overlap and influence each other (O'Leary, 2010). Managing qualitative data is difficult without constantly engaging in some degree of analysis. Complex, with the potential for multiple interpretations, the 'human' element makes it relevant and does not narrow everything down to a logical conclusion (O'Leary, 2010).

Document Analysis

Document analysis is a collection, review, interrogation and analysis process whereby pre-existing documents are regarded as a primary source of data (O'Leary, 2010). It is a process through which evaluating documents produces empirical knowledge and creates understanding of the subject being researched (Bowen, 2009). Documents are "non-reactive" sources of data, allowing for the contents to stay unchanged by multiple readings and reviews (Bowen, 2009:31).

Document analysis can be effectively applied as both a primary method for collecting data and to compliment other methods. Documents can provide broad coverage and background information data, which assists with the contextualising of research within its subject (Bowen, 2009). Documents can also contain data that is unable to be observed, trace developments and changes and provide forgotten details. It can also highlight further questions or situations requiring observation (Bowen, 2009; O'Leary, 2014). For the purposes of this research, document analysis is the primary source of data collection. Family Court decisions are a practical and manageable resource that allows for effective gathering of data. Cost efficient and readily accessible, they are a reliable source of data, that allows for time efficient research (Bowen, 2009).

As court documents, it can be tempting to treat the judicial decisions as the truth, however, the question remains as to what degree those truths have been filtered by the time a decision was made (Atkinson & Coffey, 1997). Further, despite being primary documents, court decisions do contain secondary content as they are the judges telling of events as presented to the court by the parties and their legal representatives. This is an important distinction. With every filter information presented to the court goes through in the telling, the less accuracy there is in the information received, and the more influenced it will be by the opinion of the writer and their ontological and epistemological position. This creates a tension between the influence of their own experiences and the official ideology of the institution for which they act (Kirby et al., 2006).

Engaging in clear processes that incorporate evaluative measures minimises any issues surrounding document analysis (O'Leary, 2014). While some decisions were sparse or felt incomplete, and contained inconsistent or potentially inaccurate information, it needs to be remembered that the decisions were not created with a view to being subject to research, and therefore will not provide perfect information to answer the research questions (Bowen, 2009).

Sample of Family Court Decisions

This research analysed a small sample of seven Family Court decisions from across Aotearoa from between 2016 and 2019. Being an in-depth study of the attitudinal patterns of Family Court judges in applying legislation regarding children's voices, Family Court decisions were the most relevant and accessible documents fit for purpose. The documents contain the data required and are central to the research. They also make for easy creation of an audit trail and are available in the public domain through the District Court of New Zealand website (Denzin & Lincoln, 1994). Potentially relevant decisions required to have been heard under the COCA. Decisions not heard under the COCA were discarded. They were further screened for suitability for inclusion by proceedings relating to day to day care, contact and relocation. Despite Family Court decisions being anonymised as a matter of course, the researcher was still able to identify cases she knew, and these were also discarded from the sample. The remaining decisions were saved electronically before being printed for ease of reading. They were engaged with through a first-pass review, where pertinent passages of text or other data were identified as being relevant to the research (Corban & Strauss, 2008). The final case sample was selected by taking every third decision from the list of suitable decisions

up to a total of seven. This process ensured that the final selection of cases was relevant and random.

Data Analysis

The following questions informed the research:

1. What adherence did judges pay to section 6 of the COCA in hearing and considering children's perspectives?
2. Did judges discuss children's views in their family court decisions?
3. Were there any commonalities in the way judges treated children's views?

The document analysis was divided into stages of immersion, reduction and interpretation, it was also an inherently iterative process (Miles & Huberman, 1994; Sandelowski, 1995). During the immersion stage, the data was engaged with to obtain a feel for the whole. First impressions and ideas were recorded in the margins. A template (Appendix One) was devised to record information relating to case name, names and ages of the children and the reason for proceedings.

Charmaz (2008) maintains that memo writing is a crucial strategy for qualitative analysis. This was undertaken as the research proceeded to allowed for capturing ideas and processing thoughts while carrying out the analysis (Adam, 2015; Richards, 2009). The decisions were read sentence by sentence, with sentences potentially relevant to the research questions being highlighted. The decisions were read several times to ascertain a deeper sense of each before any attempts at cross decision comparatives were made (Bowen, 2009; Labuschagne, 2003; O'Leary, 2010). Each read-through

allowed for new thoughts and understandings to evolve and subsequently contributed to comprising the memos that constituted data for analysis. Brief abstracts were written, providing a summary impression of each decision (Sandelowski, 1995).

After gaining a sense of the whole, a more systematic approach was applied. The research questions were used as an initial organising framework and the raw data was reduced to include only that which was relevant to answering the research questions (Miles & Huberman, 1994; Patton, 2002; Tesch, 1990). This occurred through breaking it into manageable categories directly related to whether children were provided with an opportunity to express their views, how much their views were discussed in the decisions, and how judges explained the weighting they afforded children's views (Corbin & Strauss, 2008; Forman & Damschroder, 2008). Thematic analysis was then applied across the documents.

Thematic Analysis

Thematic analysis is a flexible, stand-alone method of analysis which identifies, analyses and reports patterns within data (Braun & Clarke, 2006; Culver, 2015). McLeod (2011:146) describes it as "flexible, straightforward and accessible". It does not require a detailed technological and theoretical knowledge of approaches, and therefore offers an accessible form of analysis well suited to this study. Braun and Clarke (2006) highlight that thematic analysis is recognised for its ability to hear participants' voices and for allowing researchers to identify and analyse patterns that emerge from the data, resulting in an organised and detailed pattern of themes. It is the way that thematic analysis allows the researcher to examine the way realities, experiences and meanings

are the result of a range of discourses that operate within society that particularly applies to this research (Braun & Clarke, 2006).

A theme captures important information contained within the data in relation to the research question and represents a patterned response within the wider data set. There is no solid rule as to what defines a theme or what proportion of the data is required to display evidence of the theme, therefore requiring clear researcher judgement as to whether the information is relevant. The significance of a theme is determined more by whether it captures important information in relation to the overall research question rather than on quantifiable measures (Braun & Clarke, 2006). Several themes were identified from this sample. A written summary of each of these themes, and the patterns therein, laid the groundwork for the final results (Sandelowski, 1995).

Limitations

The information available in judges' decisions typically does not reveal the full extent of a family's situation, the full nature of both parents' history with the child, or all the information relating to ascertaining a child's views. This meant that caution was required when attaching meaning to observations made throughout the analysis process (Hall & Wright, 2008). Utilising the complete court files may have provided a more comprehensive understanding and is therefore recommended for future research studies in this area. Total reliance on written decisions made it difficult to analyse judicial reasoning, as most decisions documented comparatively little of the judges' thinking behind the orders made. Further, there can be no guarantee that the results of the sample researched is representative of all decisions, as findings of small sample sized

research are difficult to generalise to the wider population (Saunders et al., 2012). This research through using random selection of relevant cases does provide some valuable insights into the way's judges view children's voices as part of proceedings and subsequently apply legislation (O'Leary, 2010).

Ethical considerations

Because the selected documents were accessed via the District Court of New Zealand online decisions portal, the authenticity and credibility of them has already been ascertained; they simply needed to be assessed for comprehensiveness and relevance to the research topic (Bowen, 2009). As the documents are published in the public arena, the research project did not create harm toward any participants who may already have been traumatised by having been through separation and Family Court processes. Anonymisation is carried out by District Court through the names of all parties being changed prior to decisions being published. Despite this, there remained however, a sense of the families being identifiable. Given that the researcher was able to recognise cases, to further try to protect the identity of families whose cases were being used in the research, all parties were anonymised again (Bowen, 2009; Forman & Damschroder, 2008; O'Leary, 2010). While reliability in social science research cannot always be guaranteed, due to the systematic nature of the sampling and analysis methods engaged with these results and conclusions would likely be supported if the same methodology was employed in another study with the same context (O'Leary, 2010).

Chapter Summary

This chapter described the researchers ontological and epistemological positioning and detailed their insider researcher status. The research framework and method followed in undertaking this qualitative exploratory research were outlined. Themes within the sample were identified and thematic analysis as a standalone, flexible method of analysis ideally suited to this small sized research was discussed. Limitations and ethical considerations were also discussed. The next chapter presents the results of the analysis.

CHAPTER FIVE: RESULTS

This research aimed to explore the significance judges place on children's voices in Family Court proceedings in Aotearoa, as found through their written decisions. The following questions informed the research:

1. What adherence did judges pay to section 6 of the COCA in hearing and considering children's perspectives?
2. Did judges discuss children's views in their family court decisions?
3. Were there any commonalities in the way judges treated children's views?

Seven Family Court decisions from the District Court of New Zealand website were analysed with the sample drawn from decisions made between 2016-2019 inclusive. This chapter begins by providing an overview of the families subject to proceedings, the types of cases the proceedings covered and the avenues that were available to the children to have a voice. Following this, the commonalities regarding the way judges talk about children's voices and views including how they take account of their views are presented.

Eleven children from seven families were subject to proceedings. Five of the seven families had children who were not subject to proceedings. This resulted in twenty children being impacted by the rulings. The children who were subject to proceedings were seven boys and four girls, aged between 3 and 15 years of age. The ages of the children who were not subject to proceedings were not stated. All the families were subject to current Court Orders relating to day to day care and contact at the time of

the proceedings. Six families were adhering to those Orders. The exception was one parent who had relocated their child to Aotearoa from overseas without consent. The table at 5.1 details these case particulars.

Year	Case name	Names of children subject to proceedings	Ages of children	Current Orders	Reason for Hearing
2019	Johnston v Read	Holly Noah	8 years 5 years	Interim orders day to day care with father; contact with mother	Mother applying for day to day care
2019	Harvey v Marshall	Hallam	13 years	Day to day care with father; contact with mother	Mother applying for day to day
2018	Stuart v Walker	Rebecca	8 years	Interim order day to day care with maternal grandparents; contact with parents and matua whāngai parents	Guardianship, cross applications for day to day care by mother and matua whāngai parents
2018	Cook v Cook	Freddie	4 years	By consent, day to day care with maternal grandmother; Supervised contact with mother; no contact with father	Maternal Grandmother with day to day care wanting to relocate
2017	Wells v Shearer	Vincent	10 years	Sole legal and physical care to father; contact to mother; order against mother to return child to father's care	Return of child overseas.
2016	Huston v Huston	Charlie Bobbi	8 years 3 years	Day to day care to mother; contact with paternal grandparents; Protection Order and contact by mail with father	Parenting Order Variation by mother; leave to commence proceedings by grandparents
2016	Ross v Edwards	Jakob Marney Connor	15 years 11 years 9 years	Day to day care with mother; Protection order and Contact with father	Mother applying to relocate overseas

Table 5.1. Case Particulars[8]

The Child's Right to a Voice - Section 6 Care of Children Act 2004

Section 6(1)(a) of the COCA relates directly to the type of cases a child has the right to have a voice in. It states that:

[8] Case names and children's names have been anonymised

[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;

As detailed in table 5.1, all the decisions being analysed fit within the parameters of section 6(1)(a) of the Act. Three of the decisions involved relocation; a mother wanting to relocate overseas with her three children; a grandmother with day to day care of her 4-year-old grandchild wanting to relocate within Aotearoa for a new relationship; and a mother who had relocated her 10-year-old child to Aotearoa from overseas without the consent of the father or the courts. This last case overlapped with the Hague Convention on the Civil Aspects of International Child Abduction. Sections 105 and 106 of the COCA were significant to this case. The remaining decisions involved a matua whāngai[9] case where the mother wanted the child back in her full time care; a mother who wanted two of her four children in her care; a mother who wanted her 13 year old to reside with her; and a mother applying to vary a Parenting Order along with the paternal grandparents applying for leave to commence proceedings to a Parenting Order.

All the Judges acknowledged, to a greater or lesser degree, section 6(2)(a) of the COCA, which provides the right for children to express their views: "a child must be given reasonable opportunities to express views on matters affecting the child."

[9] The custom of grandparents raising their grandchildren. Contemporarily this also includes aunts and uncles taking care of their nephews and nieces (Barlow, 2014).

A lawyer for child was appointed in every case. Additionally, across the cases, the courts were further assisted by six section 133 reports, three judicial interviews, Oranga Tamariki involvement in three cases, three evidential interviews, and Non-Government Organisation social worker involvement in two cases. All of these provided an extra means for the child to have a voice over and above the provision available through the lawyer for child. There were only two cases, *Huston v Huston* and *Cook v Cook* where there was no provision for children to express their views beyond the lawyer for child appointment.

In *Johnston v Read*, a report of concern from the children's school to Oranga Tamariki prior to and independent of the proceedings provided an additional avenue for the children to have a voice regarding their situation. The one child, from *Stuart v Walker*, subject to an evidential interview, undertook this prior to court proceedings being initiated, however, it was referred to in order to assist the Judge. The children from *Ross v Edwards* had been subject to a section 133 report undertaken five years previously and referred to as a comparison on their progress. Despite provision for, and the right of all children to have a voice, not all of them appeared to be enabled in doing that. *Cook v Cook* presented no evidence of Freddie having any engagement with the lawyer for child or other professionals, and *Huston v Huston* showed evidence of only one of the two children engaging with their lawyer.

Taking Account of Children's Views

Aotearoa was the first common law country to remove the criteria of age and maturity with regard to the requirement to weigh children's views (Taylor, 2005). As such, any

views children express are required to be considered. Section 6(2)(b) of the COCA provides for this: "any views the child expresses [either directly or through a representative] must be taken into account".

The Judge in *Ross v Edwards*, pointed out that this does not mean that the children's views are to be "determinative" and, despite the age and maturity caveat having been removed, that regard must be afforded to their:

> ages, level of maturity and awareness of all of the relevant factors and also have regard to the extent that those views might have been subjected to manipulation or improper influence" (para [66])[10].

The children's views over time were discussed as they were presented through various reports before the court. Stating that he "must balance all of the children's views" the Judge appeared to apply greater emphasis to the views of the older child, Jakob, aged 15, as evidenced by his commenting that he had given "much thought" to Jakob's views "more than any other matter" and engaged in noticeably more in-depth analysis of his views in comparison to his siblings (paras [131] &[132]). In acknowledging that he "must weigh all relevant factors...there being no room for priori assumption" considerable space was allocated to discussing professional input, quoting precedence and discussing various principles, particularly from section 5 of the COCA relating to a child's welfare

[10] References the paragraph in the Family Court decision that the information is being drawn from or quoted from.

and best interests[11]. Harrison J was quoted, having stated that "...factors to be weighed in the balance are only those which are actually relevant to the particular circumstances" and "the child's views are relevant where they can be ascertained" (para [71]). Additional case law was cited listing relevant factors for judges to analyse. The voice of the child was at number 8 on the list of 11, with the top three being section five principles, the children's relationship/needs and the reasons for the proposed move, including their validity, other ways to achieve the objectives desired through relocating, and how thoroughly the person wanting to move has weighed up all aspects requiring consideration (para [72]). In his analysis, the Judge assessed the "features common to all three" children before considering them individually and later, "nevertheless, I must balance all of the children's views" (paras [102] & [132]).

The Judge presiding over *Johnston v Read* declared "There is no dispute that this proceeding must be dealt with under sections 4, 5 and 6 of the Care of Children Act 2004," and, in the following paragraph, acknowledged, all but quoting the law directly, that section 6 "requires that children must be given a reasonable opportunity to express their views on matters, and any views expressed, whether directly or through a representative, must be taken into account" (paras [141[& [142]). He followed this by saying "the weight that will be given to a child's views will depend, to some extent, on how old the child is." (paras [143] & [144]). This Judge allocated near equal space to

[11] The principles identified in section 5 of the COCA as necessary to a child's welfare and best interests are safety; care and development as primarily the responsibility of, and facilitated by ongoing consultation and co-operation between, the parents; continuity in care, development and upbringing; maintaining a relationship with both parents; the child's identity to be preserved and strengthened (including but not limited to, language, culture, religion).

the views of the older children not subject to the proceedings, as compared to Holly, aged 8, and Noah, aged 5, who were the subjects of the proceedings.

Four reports were filed by the Lawyer for Child in *Huston v Huston*, however, the Judge dedicated just one paragraph to Charlie's voice in relation to contact with his grandparents. Regarding visits with his father he noted that Charlie's first wish of three was "for his dad to come back into his life" (para [28]). The second wish was not stated, and the third wish was to have 1000 more wishes. Younger sibling Bobbi, aged 3, is mentioned by name in the introductory paragraph, however there is no mention of her individually or her views thereafter, despite, early in the decision, the Judge expressing that "In coming to a decision, I must have regard to any views under section 6" (para [27]).

The Judge presiding over *Stuart v Walker* named the child subject to proceedings from the outset, stating that "Rebecca's views, pursuant to section 6 of COCA, are also relevant and must be considered by me in weighing up what is in her best interests and welfare" (para [9]). He compared and analysed Rebecca's views as expressed to the various professionals involved, and, referring to both the COCA, and the High Court decision of *Brown v Argyll*, commented that with any decision he makes, he "must take into account that Rebecca is a unique child in a unique family environment, and thus an individualised assessment needs to be undertaken by the Court rather than any formulaic approach (para [7])".

Wells v Shearer was a complex case with a long history of Family Court proceedings in an overseas jurisdiction. While the Aotearoa proceedings allowed for Vincent to have a voice through his lawyer, the mother's lawyer and the Clinical Psychologist were also both strong advocates for Vincent's voice and wellbeing. The Clinical Psychologist was engaged to undertake a report ascertaining the expected impact of any decision made and a judicial interview was also undertaken at Vincent's request. A substantial amount of space was allocated to detailing Vincent's views. The Judge accepted and made reference to the father's lawyer having accepted that Vincent, at 10 years old, had "attained an age and degree of maturity at which it is appropriate to take his views into account" (para [151]). The Judge summarised Vincent's "relevant views" as expressed to the Lawyer for Child and outlined his own discussion with Vincent (para [49]). He noted Vincent's:

> objection to return overseas without his mother and sibling to an unknown parenting situation with his father and lack of knowledge as to contact detail to follow as between himself, his mother and [his brother] is real and understandable (para [153]).

Based on the assessment of the Clinical Psychologist, the Judge concludes that Vincent's "views are not influenced by, or manipulated by, either parent" (para [154]).

The Judge presiding over *Harvey v Marshall* identified multiple care and protection concerns arising out of both parents' substance abuse. As a result, in discussing the law, she prioritised the safety of the children, continuity of care and identity as the most important principles to be considered over and above any other principles contained

within the COCA. Hallam's views were referenced throughout the decision indicating acknowledgment of section 6 of the COCA, with the Judge commenting that "this case is one where Hallam, at 13 years old, has views that are consistent and a strong wish to live with his father" (para [4]). Further the Judge commented: "I also have to assess the strength of his views and balance those factors in determining whether his welfare demands that his care should change despite his views" (para [10]).

When discussing the law in *Cook v Cook*, the Judge noted that "opportunities must be given to a child to express his views and any views expressed must be taken into account" (para [24]). There is, however, no indication that Freddie engaged with any professionals, and no evidence of his views having been elicited at any stage of proceedings. While this Judge did acknowledge he needs to "consider any views of the child" he emphasised the best interests and welfare principles along with section 5 principles and argues that "there is no preferential weighting between the various principles that are to be considered. If the Court does that, then it will have met the obligations placed upon it by the authorities and the statute" (para [25]). This is presumably referring to considering the various principles. Immediately before presenting his conclusion, the Judge stated that: "This is a child who is not too young to express views but certainly, any views expressed by a [child under four] are likely to be somewhat haphazard and of dubious worth" (para [59]).

This section has detailed the words of judges in relation to taking account of children's views. There are a range of approaches and attitudes engaged in by judges ranging from

detailing the taking account of a child's views through to providing no evidence that children's view have been ascertained or taken into account.

Judges Remarks

Judges remarks are important as they provide an idea of what judges appear to understand and how they are approaching cases (Henaghan, 2012). In cases used as precedence, clear direction for lawyers and judges is created through the logic applied in such cases and offers explanation for why rulings are made. Further, parties, including children, are more likely to accept a ruling when they get a sense that their perspective has been carefully considered (Dickstein, 2014).

Stuart v Walker contains evidence of the Judge considering Rebecca's views as told at various stages of intervention to social workers, in evidential interviews, to section 133 psychologists and the Lawyer for Child. He acknowledged the "consistent tenor" of her views, however, stated that they "need to be weighed against her age and maturity" and that "given Rebecca's age, I would not expect her to fully understand the consequences of her views" (paras [127] & [128]). He referred to case law, precedence and Te Tiriti o Waitangi, along with quoting various UNCROC articles and principles in the COCA, however, section 6 of the COCA and Article 12 of the UNCROC are silent in this discussion. In summing up he stated that "what is consistently clear and what I do place weight upon, is that Rebecca wishes to maintain relationships with the four most significant adults in her life." The ruling in this case was for shared care, as was wanted by Rebecca.

A range of comments by the Judge in *Harvey v Marshall* related to her observations of Hallam who "impressed" her "as a polite, very calm young man who was able to express himself well, but he is carrying a lot inside" (para [67]). This was consistent with other comments made by the Judge throughout the decision. Regarding Hallam's mother's drinking, she observed "his description of his experience of his mother when drunk demonstrates to me, though, the strength of his feelings about this topic" (para [54]). She affirmed several times that "Hallam's views are very strong. He is very consistent" and, further, "It is referred to in all the reports" (para [49]). While the ruling in this case aligned with Hallam's wishes, the Judge noted that in coming to her conclusion, "balancing these different risks, and noting that both proposals carry risks with them... ...this has to, however, be a provisional decision and it has to be dependent on a number of factors" (para [68]).

Jakob, Marney and Connor's views in *Ross v Edwards* were clearly set out in the decision. The Clinical Psychologist advised the Court that all the children "impressed as resilient, articulate and intelligent" (para [49]). When analysing the views of Marney and Connor, aged 11 and 9 years, the Judge stated that "while their views are a factor that supports moving, it does not weigh heavily in the decision" (para [133]). The Judge however made it clear that he had placed great weight on the views of Jakob, aged 15:

> I have set out Jakob's personal situation and I accept his view of not wanting to go to [overseas] is genuine and valid. He is almost fifteen and a half and his peer group are of primary importance for him, particularly having regard to his delicate life situation. I have given much thought to [the child's] views

> and situation. More than any other matter this gave me the most reason to pause before granting the application for relocation (para [130]).

The ruling in *Ross v Edwards* was to allow relocation to overseas. This aligned with Marney and Connor's wishes, however, while Jakob had stated his preference was to not relocate, he had also stated to the Judge that if relocation was ruled, he would prefer to be with his mother over all else. In his conclusion, the Judge commented that "By a significant margin the Court's assessment is that the move will be in the best interests and welfare of each of the children" (para [137]). In summarising the factors that lead to his determination, the Judge made no references to the views and wishes of the children.

Huston v Huston resulted in no real change for the children. Immediately prior to offering up his conclusion, the Judge stated, "I have already addressed the children's views as required" (para [43]). There was no evidence of views having been ascertained from Bobbi, and Charlie's views regarding contact with his grandparents were somewhat ambivalent, with little space allocated to them. In stating the case for the children, early in the decision, the Judge dismissed Charlie's views from the outset by stating "In the end, at the age of only eight years, his views have only a minimal impact on the decision I am about to give" (para [27]).

The Judge presiding over *Wells v Shearer* drew on a range of national and international case law. Attention was drawn to section 106(1)(d) of the COCA, making provision for

courts to refuse to make an order for return of a child, provided the Court can be satisfied, amongst other things:

> that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views (para [106(1)(d)]).

A significant factor in whether to rule returning Vincent [overseas] or allowing him to remain in Aotearoa was determining whether Vincent's views amounted to an objection or a preference. Boshier in *Bayer v Bayer* was quoted at length, where Boshier maintained that:

> Much turns in this case on whether the children object or, are simply articulating a preference. Depending upon how the view is expressed, it might either amount to an objection or may fall short. The concept of "objection" carries with it a notion of clarity and force in the way it is expressed. A mere wish may fall short. I imagine that is why the drafters of the Convention deliberately chose the word "object" (para [41]).

The Judge quoted *JRW v EW*, where the presiding Judge asserted there was "no hard and fast rule that the objection of a child will be determinative when it reaches a particular age or state of maturity" (para [42]). He also referred to Professor Caldwell in "The Hague Convention and the Child Objection Defence" arguing that "the Convention

considerations would outweigh the considerations found in any child objection defence" and that:

> the unmistakable societal and judicial tilt in favour of children's rights means that an appropriately mature child's articulation and interpretation of his or her own interests can prove paramount to Convention considerations in the exercise of the Court's discretion (para [43]).

The Clinical Psychologist maintained that Vincent was "old enough to understand the implication of his objection and also what it means if the Court makes an order for his return despite his objection" (para [79]). Her further assessment was that to return Vincent to the USA, and the ensuing separation from his mother and brother "would more likely than not [taking into account the varying factors] be experienced as a psychologically intolerable situation for him" with potentially long-term consequences (para [52]). She further stated that Vincent:

> is very clear that if he is made to return and be separated from his mother that he will be highly distraught and grief stricken. The fact that he is also a [vulnerable] child (yet to develop helpful coping strategies) means that he will be ill-prepared for the magnitude of such loss. Added to this is the additional loss of his sibling, thus potentially compounding his grief/distress (para [76]).

When referring to the Clinical Psychologist the Judge asserts that she is the “expert in such assessments” and that he would prefer to rely on her observations (para [75]). He referenced the observations of the Lawyer for Child, the Clinical Psychologist and confirmed his own observation that Vincent was “well adjusted, mature and securely attached”, with his mother and brother identified as his “closest and most important attachment figures within his life” (paras [88] & [71]).

The Judge agreed with the mother’s lawyer that it is customary for expert evidence in Hague Convention cases to not be subjected to the challenge of cross-examination (para [56]). Her lawyer argued that as such, it must be accepted as best evidence. The Lawyer for Child also supported the Clinical Psychologist’s report and urged the Judge to also accept her report and evaluation of Vincent (paras [132] & [133]).

In delivering his *Wells v Shearer* decision, the Judge noted “I accept that if Vincent is to return to [overseas] without his mother and [brother] he will suffer psychological and emotional harm” and “I am sure that harm will be occasioned for Vincent if required to return to [overseas], but not grave harm or harm that would leave him in an intolerable situation not capable of mitigation” (paras [85] & [90]).

The Judge maintained that while Vincent’s views were consistent, they were, regarding Aotearoa, “somewhat superficial and subjective” and later, maintained that he could “not give weight to Vincent’s school preferences, they being subjective…” (paras [142] & [156]). He then asserts that Vincent’s parents “must” listen to his views, before stating

in the same sentence that "his views do not amount to views of sufficient substance..." and subsequently ruled to return Vincent overseas (para [157]).

Freddie's lawyer (*Cook v Cook*) indicated at the commencement of proceedings that he "was not keen on relocation" and concluded the proceedings by stating that "the hearing process has been useful" and that he now supported relocation (para [21]). The contents of the decision indicate that the Lawyer for Child had been focused on an older child not subject to proceedings, although no significant information was provided regarding this child. The Judge does note, in relation to Freddie's lawyer, that "on reflection he acknowledged that this was a hearing about this child and therefore when focusing on this child he has reached a view that there is no evidence that supports a change of care" (para [21]). The Lawyer for Child in this case was presented as being unprepared and presenting their own opinion as formed as the hearing progressed, rather than Freddie's views.

In providing an overview and summing up the children's views in *Johnston v Read*, the Judge asked "What weight then do I give to the children's views" and concludes, in the same paragraph, of Noah, "He is only five years old" (paras [153] & [154]). He devotes four paragraphs to relaying Holly's views, to conclude that at 8 years of age, she is not capable of understanding the impact of her wishes.

This section has highlighted practices and attitudes of the judges in this study. Some judges clearly documented their process in reaching their decision, while others stifled children's voices by referring to age and maturity and prioritising the views of older

children. It was also common for judges to appear to assume that to acknowledge section 6 of the COCA was the equivalent of ascertaining the child's views.

Chapter Summary

This chapter detailed the results of the analysis of the decisions. An overview of the families subject to proceedings opened the chapter, including the types of cases the proceedings covered. Lawyer for child appointments, section 133 reports, social worker involvement, evidential interviews and judicial interviews were all means by which children had an opportunity to express their views. Judges remarks in reaching their decisions and the commonalities regarding how they talked about the children's voices and views were presented.

Chapter six discusses the results of the research and the range of attitudes and approaches from the judges. The rights of the child and the best interests standard as setting the context within which children's voices are considered is discussed, followed by the visibility of the lawyer for child and the place of judicial interviews in creating space for children's voices. Implications for the children who were not consulted, over-interviewing, taking account of and weighting children's views in relation to age and maturity are discussed. Peripheral means of stifling children's voices are identified, and the place of judicial discretion discussed.

CHAPTER SIX: DISCUSSION

This research explores the significance judges place on children's voices in Family Court proceedings in Aotearoa. To ascertain a child's views, take account of them, and place weight on them, are three distinct and separate stages of providing a child with a voice. All judges in this research made some acknowledgement of the requirements under section 6 of the COCA, with a significant degree of variation across the decisions as to the emphasis placed on the children's views. This chapter begins by discussing the rights of the child, looking at the best interests standard, and sets the context within which the child's voice is considered. The visibility of the lawyer for child is discussed before considering the place of judicial interviews in creating space for children's voices. This section also discusses the implications for those children in this research who were not consulted as well as considering the common concerns regarding over-interviewing. Section two discusses the taking into account and weighting of children's views and the findings in relation to age and maturity, and children's 'wishes'. The Hague Convention case and the apparent contradictions between the COCA and the Convention requirements are discussed. Section three looks at judicial pressure towards a lawyer for child and the potential for objectifying a child as a further means of stifling children's voices. The chapter concludes with a discussion of the application of judicial discretion through the preference/objection debate, and the place of precedence.

Rights of the Child

The Best Interests Standard

The best interests standard, commonly known as the Paramountcy Principle, frames the decision-making process for judges. It is generally accepted that this principle requires decision-makers to find the best outcome for children subject to proceedings (Eekelaar, 2015). In Aotearoa the best interests standard is conveyed in the Lawyer for Child Best Practice Guidelines (2018:1) as "the welfare and best interests of the child is the paramount consideration of the Family Court in proceedings" and embodied in law under the COCA and the Oranga Tamariki Act 1989. Theoretically, while this provides judges with the flexibility to create decisions specific to each family, applying the best interests principle also presents multiple challenges. As family disputes are extremely emotive, any decision made is open to criticism as not being in a child's best interests. Not being precisely defined, application of the best interests principle is inherently subjective, creating unpredictability and potentially intensifying parental conflict (Bancroft et al., 2012; Emery et al., 2005; Macbeth, 2015). Matsumura (2018) contends that the concept is indeterminate as it requires judges to weigh conflicting values in the absence of consensus, or to make impossible predictions. Because of this, it requires that judges make decisions that are resonant with their own experiences and personal preferences (Bancroft et al., 2012; Matsumura, 2018).

Most judges prioritised the section 4 principle of welfare and best interests over section 6 principles. Minimising section 6 is in direct conflict with the best interests standard as it will not be possible to make a fully informed decision as to what is in the best interests of a child without taking account of their views (Hayes & Birmbaum, 2019; Holt;

2016, Tapp, 2006). In this sample, *Ross v Edwards* saw the Judge debate the relevance of the order of the sections of the COCA in determining the significance to apply to each section. He proposed, using case law to back his argument, that Parliament would not have reordered the principles in section 5 if they did not intend to stress the importance of one over the other. The implication following this is that section 5 principles relating to a child's welfare and best interests takes precedence over section 6 principles relating to the child's voice. Robinson and Henaghan (2011) argue that the correct interpretation of sections 5 and 6 of the COCA, also recognised by the Supreme Court, is that section 5 does not limit section 6. Robinson and Henaghan (2011) found that section 6 was more likely to be afforded significance when the child's views were consistent with section 5 principles.

Children's Voices

Taylor et al. (1999) maintain that to ascertain a child's wishes is to ask them to think and communicate about a future concept, and therefore, will not necessarily be based in the reality of their current situation. Boshier and Steel-Baker (2007) suggest that views carries a broader meaning and may be a perspective or impression of what is important while wishes indicates more of a desire. Future-focused aspirations or desires are based in a concept of children engaged in a process of becoming adults rather than based in their current experiences and this, they argue, makes it easier for adults, including lawyers and judges, to disregard what children say. While the explanatory note in the Care of Children Bill 2003 was silent as to why the term wishes was replaced with views, the decision to remove the concept of wishes when the COCA was written reflects an understanding of this and the need for a stronger focus on children's experiences (Smith

et al., 2003; Stahl, 2001; Taylor, 2006; Taylor et al., 2007). Robinson and Henaghan (2011) suggest that this was to remove the interpretation that a child be required to exercise a choice, therefore creating a burden of responsibility for them. Further, changing the wording also brings legislation into alignment with the wording in Article 12 of the UNCROC (Voight, 2017).

All the judges in this sample referred to the children's "wishes" which was the terminology used in the repealed Guardianship Act 1968. This even occurred in *Cook v Cook* where Freddie, the youngest child, had no visible voice. The Judge, when referencing a previous decision, commented that 'wishes of the child' were a relevant factor despite not appearing to ensure Freddie's views, or wishes, were ascertained (para [26]). Wishes were referred to in 32.5% of cases in an Aotearoa sample of 120 Family Court decisions, and Australian research carried out by Voight (2017) found that most judicial determinations after the Australian change of wording did not recognise or incorporate the change. As occurred in this sample, consideration of views or the weight applied to them, was not conceptually different from the framework whereby wishes were to be considered.

Judicial interviews are one of the two[12] primary approaches recommended for ascertaining children's views (Taylor, 2005; Robinson, 2010). A judge's understanding of the premise behind section 6 of the COCA and the benefits to children of participation determines whether they pursue a judicial interview with a child (Henaghan, 2012; Taylor, 2005; Robinson, 2010). Five children in this research engaged in a judicial

[12] The other being lawyer for child appointments.

interview. Of those, four were at the request of the children[13] with no information regarding how the fifth came about. While the statistic could be affected by the different sample sizes, this indicates slightly higher rates at 42.8% than found in Robinson's (2010) research analysing 120 decisions where judicial interviews were undertaken in approximately a third of cases from her sample. Justice Mill (2008) asserts that as judges become more comfortable conducting judicial interviews, the more willing they are to use them. That the interviews in this sample occurred at the children's request could suggest a lack of confidence, or lack of priority given, to judicial interviews.

Children, particularly when subject to contested proceedings, consistently reveal they are eager to speak directly with the judge as they believe it will help them to feel acknowledged and to have their views heard without being filtered through a third party, with some hoping it would lead to creating a better outcome (Caldwell, 2007). Where judicial interviews had been undertaken in this study, a comparatively more detailed account of the child's voice was presented, perhaps reflecting Caldwell's (2007) finding of judges reporting a better appreciation of the child as a person after meeting with them. While judicial interviews in this sample appear to have provided the children with more visibility, they did not however, necessarily result in a ruling aligning with the child's views. Were judges to take account of the view's children expressed directly to them, this would be evidence that was not heard by the adult parties to proceedings. This could result in cases being brought before the appellate courts as perceptions of fairness and due process are challenged. Judges are generally viewed as neutral

[13] Vincent, aged 10 in Wells v Shearer, and Jakob, 15, Marney, 11, and Connor, 9 in Ross v Edwards.

decision-makers, however, undertaking judicial interviews could result in their being viewed as evidence gathering participants, and therefore subject to cross-examination as parties seek to fulfil their right to know the basis by which judges are coming to their decisions (Boshier & Steel-Baker, 2007; Cleland, 2013; Parkinson & Cashmore, 2007).

The results of this study suggest that the opportunities available through legislation did not necessarily reflect the degree to which the children's views were ascertained or presented in the decision. In *Huston v Huston*, four Lawyer for Child reports were filed relating to the two children, however, the youngest child, Bobbi, was only named in the introductory paragraph of the decision, meaning her views were not reflected in the decision. In *Cook v Cook*, Freddie's views were also not conveyed in the decision. No explanations were provided for the omission of these two children's views from the decisions. Research by May and Smart (2004) found that the most common reason for failure to ascertain children's views was their age, with the child usually being under four. The children in this sample were aged 3 and 4, suggesting this could be the reason their views were not present in the decision.

In exploring ways to objectively ascertain reliable information when interviewing children in family law processes, Saywitz, Camparo and Romanoff (2010) contend that how interviews with children are conducted is determined by the degree that lawyers and judges intend to consider the views of the children. The results of this study show that there was significant variance regarding children's involvement in proceedings as portrayed in and across the decisions and the visibility of the child's voice. The lawyer for child is a significant person in bringing children's views before the court and the

scope of their report or level of involvement is not always clearly visible in the decisions. Bell (2016) suggests that children's lawyers may find it challenging to not impose certain standards of rationality on children's views which can lead to children's voices being constrained. This privileging of the rational can lead to lawyers putting options to children that they think are in the child's best interests and possible in the circumstances. The preoccupation by lawyers of outcomes and available choices, while being disrespectful to children, also silences children's views regarding their situation (Ross, 2012).

In the case of *Cook v Cook* a lawyer for child was appointed to represent the views of Freddie. This lawyer's focus was primarily on Freddie's half-sister, who along with her brother, were also in the Grandmother's care but with no involvement in proceedings. Freddie's voice was silent across the decision and the Lawyer for Child lobbied for an outcome that appeared to be formed from factors related to people other than Freddie. Robinson (2010) points out that there are insufficient guidelines for lawyers, allowing for significant subjectivity. In this case the judge did not appear concerned by the focus placed upon the older step-sibling in comparison to the absence of information regarding Freddie's views.

A further aspect of children's voices being missing from judicial decisions, relates to judges and lawyers becoming concerned that children can be traumatised by overinvolvement in a court process and as such minimise their contact with the child (Boshier & Steel-Baker, 2007). Bell (2016) suggests that the concerns regarding over-interviewing stem from the belief that involvement in the decision-making process can

cause harm to children. Some lawyers and judges are concerned that multiple interviews could contribute to a form of system abuse (Caldwell, 2007). Another possibility, as suggested by Kaspiew et al. (2013), is a fear held by child lawyers that the child may disclose information not previously seen in evidence, resulting in the lawyer for child becoming a witness.

Concerns related to over involvement were evident in *Stuart v Walker*. This was a complex case, embedded with issues spanning the whole of Rebecca's life. Due to allegations of abuse from her mother towards her whāngai mother, Rebecca, aged 8, had been subjected to multiple interventions and she had engaged in several interviews in the two years preceding the hearing. While the information before the Court had not been collected for court purposes, it arguably provided her with a voice in the matters being decided. Rebecca's views were ascertained briefly by the Lawyer for Child, whose main focus was Te Ao Maori[14] and her perception of its place in Rebecca's life. The Judge acknowledged that the lawyer for child was "herself immersed in [sic] both in Te Ao Maori and Te Ao Pakeha[15]" and that as such he "afforded significant weight" to her submission regarding section 5 principles (para [95]). The psychologist commissioned to undertake a section 133 report expressed concerns regarding the amount of intervention Rebecca had been subjected to and that the constant retelling of her story may confuse her memories of her experiences. The Judge's referencing this may have been an explanation for Rebecca's minimal input at the time of the hearing, with judges

[14] The Māori world view.
[15] The Pakeha world view.

often concerned about over-interviewing and creating undue emotional burden (Bell, 2016; Caldwell, 2007; Kaspiew et al, 2013).

Age and Maturity

Research in the health field has found that children who have experienced major surgery often develop a capacity for understanding and making decisions that far exceed perceptions commonly held regarding children's competence (Alderson, 2001; Mantle et al., 2007). Mantle et al. (2007:7) argue that this would suggest that children who have experienced the trauma of their parents' separation may develop "a wisdom beyond their years", adding an additional manifestation of the empowerment-protection axis. To incorporate this into family law, could be to accept that children who have had challenging life experiences can carry self-understanding and awareness that is beyond that generally expected of children. It would go some way to addressing the paternalistic assumption that questions children's ability to participate based on their age and perceived maturity and the belief that to participate in the decision-making process is harmful (Cossar et al., 2014; Holt, 2016; Kjorholt, 2002).

Robinson (2010) suggests that judges may believe that applying weight to children's views is implied through the discussion in their decisions. However, in the case of *Huston v Huston*, where there is no evidence to suggest the views of the youngest child were obtained, the judge comments, at variance with the record, that "I have already addressed the children's views as required" (para [43]). This would indicate with Charlie, that the Judge failed to separate the requirement to ascertain his views from the requirement of taking them into account, and with the youngest child, Bobbi, that he is

applying expert knowledge of an abstract child rather than considering the child's individual needs as required under the COCA (Herring, 2014; Piper, 2000; Walker & Misca, 2019). Another example was the case of *Cook v Cook*. Freddie's views did not appear to have been ascertained but the idea of his views was dismissed by the Judge due to his age, who noted that any views he might hold would be "haphazard and of dubious worth" (para [59]). Not only is this in conflict with the principles of the COCA, it also denies the possibility there will be information of worth to be found in those seemingly haphazard views. When care is applied to interviewing techniques, alternative and age appropriate methods, such as art, writing or play skills, all have the potential to provide clear insight into a child's experiences and views, and as such, could be a clear representation of a child's voice (Boshier & Steel-Baker, 2007; Hill, 2006; O'Reilly & Dolan, 2015).

To minimise or disregard a child's views due to their age does not indicate how a judge is taking them into account. Rather, it implies the opposite. Of the cases in this sample, the older the child, the more fully their views were documented while the younger the child, the less likely their voice would be given a significant presence. Henaghan (2012) contends that with no evidence of taking account of children's views, the intention behind section 6 of the COCA is completely missed. All but one judge referenced the child's age or maturity as a qualifying consideration towards their ruling. This demonstrates a failure to understand the intention behind section 6 of the COCA, and would indicate that judges have not fully internalised the removal of the age and maturity caveat that occurred when the Guardianship Act 1968 was replaced by the COCA (Robinson, 2010).

The absence of the child's voice seen in *Cook v Cook*, could be taken as the representation of a more pervasive attitude towards children and their right to have a voice. The Judge in this case uses objectifying terminology in reference to Freddie's having "been parked in [location 1] but there is now a request to move him to [location 2]." The use of the word "parked" would tend to indicate reference to an object, as opposed to a human being, where it would be more sensitive to use words such as 'lived' or 'resided'. Further, beyond the first paragraph of the decision, Freddie was referred to as "the child" throughout the decision. Taylor et al. (1999) refer to this type of behaviour from Judges as objectifying the child. While the literature is relatively quiet on the objectification of children in Family Court proceedings, a comprehensive review of 829 family law judgments from Aotearoa over 1990, 1994 and 1998 did show that children were objectified in decisions through not being afforded the "dignity" of using their name (Taylor et al., 1999:9).

Daly (2018) suggests that the vagueness and inconsistency surround the concepting of weighting children's views creates a situation whereby there is scant framework for judges to weigh children's views against. This result, she argues, in a lack of transparency, creates the appearance of inconsistency, and little accountability for judges who can apply a large amount of discretion in the decisions they are making.

Prioritising Conventions over the Child's Voice

Wells v Shearer, subject to the Hague Convention, was a case where the child, Vincent, was provided with three avenues to express his views. His views were acknowledged as

being clear, mature, showing understanding of his situation, and were accepted by the Judge. The Clinical Psychologist predicted the likely impact of any decision the Judge could make, including that Vincent would experience long-term psychological harm if returned overseas. The Judge was strongly in agreement with the expert report; even going so far as to acknowledge that he was "sure" Vincent would suffer psychological and emotional harm if returned.

While the global rate of returns to habitual residence has been in decline, Maxwell (2017) claims that Aotearoa has been praised for its exceptional record of returning children subject to Hague Convention cases to their place of habitual residence. In contrast to the COCA, the Convention aims to protect children through applying a universal principle, rather than considering children as individuals (Maxwell, 2017; Messent, 2008). Courts in Aotearoa have taken a narrow approach to section 106[16] defences, guaranteeing prompt return remains the standard outcome (Maxwell, 2017). Regarding the exercise of discretion, Rose (2008) contends that international courts consistently take the view that provided the Convention's purposes are weighed, courts can engage with a best interests-welfare assessment when implementing discretion regarding a child's return. She argues that while a defence can be established, any decision to refuse to return a child is discretionary. Indeed, Tipping J (in Rose, 2008) has highlighted that, regarding applications under section 105[17] of the COCA, it is important to separate the establishment of grounds to decline an order for return as a factual

[16] Section 106 of the COCA sets out grounds for refusal of order for the return of a child under a section 105 application.
[17] Section 105 is the section of the COCA under which an application to the court for the return of a child abducted to New Zealand is made.

matter, and whether a return should be ordered or not, as a discretionary matter and Greene (2006) argues that Article 13 of the Convention allows judges ultimate discretion to decide over a child's return. Given the record of Aotearoa courts returning children such as Vincent, the question needs to be asked as to whether there is an element of trite law at play with Hague Convention cases. This may explain why the Judge was willing to rule to return Vincent despite knowing he was likely to suffer long term psychological harm.

Contradictions within the COCA are apparent for cases subject to the Hague Convention and these were obvious in *Wells v Shearer*. While in domestic proceedings section 4 takes significant priority in the COCA, it is overridden by section 4(4) which allows that implementation of the Hague Convention is not to be limited by section 4. Of further note, in contradiction to section 6 by referencing age and maturity, section 106(1)(d) of the COCA states as a possible defence "that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views". Despite this, in noting that Vincent has "attained an age and degree of maturity" at which it is appropriate to take account of his views as required under section 6(2)(b) of the COCA, the Judge is imposing an intention on section 6 that was deliberately removed to amend the intent behind ascertaining children's views. This would indicate that he was approaching this case from a largely protectionist agenda. Maxwell (2017) that section 4(4) mitigates the importance of a child's welfare and best interests when before the court for Hague Convention hearings. Tapp (2007:78) points out, when discussing *Secretary for Justice v HJ*, that "all the Justices founded the existence of a

discretion on the permissive language in section 106 which confers the power to order return".

The Judge presiding over *Wells v Shearer* appeared very agreeable with the professional opinions, Vincent's objection, and acknowledged the risk of harm. However, he confused matters when he concluded Vincent's views, which he acknowledged as being clear, maturely articulated and uninfluenced, "must be listened to by his parents" while he himself ruled to return Vincent overseas and stated Vincent's views "do not amount to views of sufficient substance..." (para [157]). Given the Judge does have discretion to prioritise Vincent's wellbeing, it appears he chose not to prioritise domestic legislation that has as its core intent the best interests of the child, and on the back of expert evidence of the harm it would cause not to. Maxwell (2017:98) suggests that with the increased international and domestic awareness of children's rights "it cannot be allowable to treat a child as a legal object, so that they become invisible inside the mechanisms of the Convention".

The best interests standard creates challenges for judges and lawyers and in this sample, consistently took priority over the child's voice. The terms 'wishes' and 'views' were used interchangeably and did not appear to impact the weight afforded to children's views or the outcome of the hearing. That 80% of the judicial interviews were at the request of the children indicates that this method was not prioritised as a means of providing children with a voice, however, to use this provision to ascertain views would also create issues around due process. Children's views were more likely to be given weight in combination with the child's age and perceived maturity. The scope of the

lawyer for child report representing the child's voice was not always apparent in the decisions, in some instances making it difficult to clearly identify whether children's views had been ascertained or not. The fear of over-interviewing was also apparent as a reason for not having a child's up to date views. While the COCA is the legislation credited with taking care of children's welfare, its provision for the child's voice was disregarded in favour of convention requirements such as in *Wells v Shearer*, the Hague Convention case. Finally, reference to a child's age in relation to taking account of their views was found across the sample.

Barriers to Hearing Children's Voices

Preference and Objection

Preference and objection[18] appear to have become key concepts in Hague Convention cases. In *Wells v Shearer*, the Judge made several references to case law, and in particular, focussing on a statement from Boshier which maintained that an objection is stronger than stating a preference, meaning that the child had to express their objection with a certain, undefined and therefore subjective, strength of feeling. While that may apply in a situation where the parties know each other well and are comfortable with each other, when applied to a judicial scenario, it is concerning as it does not take into account that a child may be nervous or afraid to express a view strongly in the face of such authority. Fernando and Ross (2018) suggest that how objections are understood impacts the degree that children's voices are listened to and therefore the avenues employed to ascertain children's views is vital to whether they will be regarded or not.

[18] Preference is defined simply as an ordinary wish. An objection must show a strength of feeling beyond just being a preference (Fernando & Ross, 2018).

Further, given the wider oppressions of adultism this attitude allows a gateway to dismiss a child's views on the grounds of being a preference and not an objection (Harden et al., 2000; Mantle et.al, 2007; Thomas, 2000). Freeman et al. (2019) argue that experts, at times, seem to give insufficient focus to the fact that children often have rational and objective reasons for their objections. They further assert that determining what to consider as an objection, and the subsequent weight to apply to it, needs to be assessed from both a rights perspective and an understanding of child development. Greene (2006) suggests that judges have inherent discretion to determine what constitutes a valid objection. In examining the way American courts interpret the Child's Objection Clause of the Hague Convention and through considering the policy provisions for broad and restrictive interpretations of the clause, Greene contends that the threshold is high and suggests that a lack of guidance, contradictory rulings and insufficient analysis of the child objection exception all contribute to conflicting interpretations.

Judicial Discretion

Judicial discretion is at the crux of the child's voice in Family Court. Like the best interests standard, judicial discretion can be a double-edged sword. It provides judges with the means to make unique responses, however, it also means that proceedings become unpredictable, creating room for personal biases and idiosyncratic beliefs of individual judges to impact decisions. Judges make discretionary decisions on a regular basis, with most of them not being subject to any type of review. As such, judges run the risk of allegations regarding inconsistent application of the law across cases and courts (Hickman, 2017; Lubet, 2001). Fitzgerald (2009) criticises judicial discretion as

being indeterminate and a vehicle by which professionals can dominate over parties. This section discusses judicial discretion as it is applied to the child's voice, through preference and objection and the use of precedence.

Precedence

The decisions used in this sample demonstrate judges exercising their freedom to apply judicial discretion from disregarding the child's voice to prioritising various sections of the COCA over those which emphasise the child's voice (Taylor et al., 2007). At times, judges used precedence to justify their stance over such matters as application of the section 5 principles, preference and objection and relocation matters, however, Henaghan (2012) claims that the place of precedence in family law is not as prevalent as it is in other areas of Aotearoa law. In referring to Winkelmann J's assertion that with a child's welfare and best interests being the first and paramount consideration any inquiry made will be fact specific, and therefore minimal benefit will be derived from precedence, he argues that this simply highlights the freedom judges have to apply judicial discretion in any case they are presiding over and suggests that this judicial freedom has created a lack of predictability in family law.

Chapter Summary

This research explores the significance judges place on children's voices in Family Court proceedings in Aotearoa. There were clear trends apparent in the application of section 6 of the COCA across the sample. It was not clear from the decisions in the sample as to whether all the children's views had been ascertained. Where they had been ascertained, most of the decisions did not clearly demonstrate that the child's views had

been taken account of and had weight applied. Judges were most likely to consider a child’s views when the child was older, and the judge perceived a degree of maturity in the child. This was the case even when the older children were not party to proceedings. When a child was under 5 years old, their views were not visible in the decision. Not all judges separated the views of siblings. One child’s views were dismissed as “superficial” and “subjective” and it was coincidental if a child’s views aligned with the ruling. Principles from other sections of the COCA were consistently prioritised over section 6 providing children with a voice. Fear of over-interviewing and objectifying the child were also barriers to the child’s participation. The final chapter concludes this report with the key findings, implications of the research, limitations and recommendations.

CHAPTER SEVEN: CONCLUSION

This research explored the significance judges place on children's voices in Family Court proceedings in Aotearoa. This was a qualitative document analysis of seven Family Court decisions. The questions informing the research were:

1 What adherence did judges pay to section 6 of the COCA in hearing and considering children's perspectives?

2 Did judges discuss children's views in their family court decisions?

3 Were there any commonalities in the way judges treated children's views?

A qualitative document analysis was undertaken with seven Family Court decisions randomly selected from the District Court of New Zealand online search facility. Thematic analysis was used to support answering the research questions.

Key Findings

The first group of findings from this research relate to adherence to section 6 of the COCA and commonalities in the way judges treat children's views. The level of discussion regarding each child's views varied depending on their age. In the judicial decisions it appeared that Judges equated ascertaining children's views for taking them into account, and the minimal discussion of a child's views did not demonstrate how they were considered, or the weight applied to them. This was compounded by references to a child's age and maturity as being a key factor in whether they would apply weight to their views or not. Children under the age of 5 were less likely to have their views considered, this was evidenced in that their views were not present in the

decisions at all. Where children had undertaken a judicial interview, their views were more likely to be discussed in greater detail. This would suggest that children meeting directly with the judge provides the judge with greater insight into the child and their situation. Further, children's views were more likely to be given weight if they aligned with that which the judge believed to be in the child's best interests.

Every decision analysed saw the judge refer to the children's views as wishes, even in the case of *Cook v Cook* where the child's views appear to not have been ascertained. This in combination with the focus on age and maturity, could indicate that judges have not integrated the change from the repealed Guardianship Act 1968 and the legislative requirement of the COCA to ascertain all children's views, and to take them into account regardless of their age and perceived maturity. Fears of a child's over-involvement in court processes, objectifying the child, and the use of precedence all presented as barriers to a child's participation in this sample.

Finally, a significant barrier to affording weight to a child's views, regardless of age, is the prioritising of sections of the COCA over section 6. While this occurred predominantly with the principles relating to a child's best interests and welfare detailed in section 5, section 106 relating to objection defences in international abduction cases was also prioritised.

Implications

The findings of this research indicate that when it comes to children's views, the practices of judges continue to align with the provisions of the repealed Guardianship

Act 1968. The continued use of age and maturity as a determining factor in allowing and considering children's views, along with the use of repealed language such as "wishes" suggests that judges may be struggling to integrate the intention to include all children's voices as prioritised in changing the legislation. To continue to make decisions that align with repealed law could also indicate that judges are engaging in a significant amount of judicial discretion in making their rulings. Perhaps most significantly, the best interests standard has the potential to be a key principle for shaping children's participation. When the best interests standard is looked at beside the extensive body of research supporting children's participation as being of benefit to them, extending the section 5 best interests principles to include children's participation would become a means of ensuring children's appropriate and meaningful involvement (Graham & Fitzgerald, 2006).

Limitations

With all research, there are limitations. A significant limitation of this study is its size. Although it is a random sample, it is but a small percentage of cases before the Family Court and subsequently a small sample of judges' attitudes towards children's voices. Further, looking at decisions only, and not having access to complete court files, means that not all the evidence necessary to fully determine whether children's views have been ascertained or not, is available. Despite these limitations, and that qualitative research does not aim to produce findings that can be generalised, these findings do contribute to knowledge building and resonate with other similar research (Henaghan, 2012; May & Smart, 2004; Robinson, 2010; Robinson & Henaghan, 2011; Tapp, 2006).

Recommendations

Family Court decisions have a long-term effect on children's lives and as such, it is important that their views are included in the decision-making process. Extensive research in Aotearoa and internationally has found that children's wellbeing is enhanced when they are involved. Having the opportunity to express their views has been shown to create a protective factor, provides a sense of empowerment and leads to improved outcomes (Bagshaw, 2007; Bala et al., 2013; Buss, 1996; Goldson, 2009; Sutherland, 2014; Taylor et al., 2007; Van Bijleveld et al., 2015; Robinson, 2010; Walker & Misca, 2019). Children's participation in Family Court proceedings in Aotearoa is legislated for through section 6 of the COCA. The legislation not only requires that children be provided with reasonable opportunity to express their views; their views must also be considered. Domestic legislation regarding children's participation is supported by the UNCROC, to which Aotearoa is a signatory.

Based on the findings of this research the following recommendations are made:

- Larger scale research is needed to ascertain whether section 6 of the COCA is being consistently and accurately applied in the Family Court in 2020;
- The views of young children be ascertained through specialist interviewers, trained in building rapport, open-ended questions, play, art and narrative techniques and including observation of the child with both parents;
- Mandatory and formulaic reporting of the process undertaken when accounting for children's views within decisions;

- Robust and external accountability that includes comparing files against decisions to ensure that children's voices are being heard and accounted for as intended;
- The best interests principles contained within section 5 of the COCA be extended to include hearing the views of children subject to proceedings;
- In-depth, ongoing and regular professional development for judges and lawyers to ensure congruency with current trends and practices regarding children's rights.

Conclusion

Theoretically, the COCA appears to be child-inclusive and responsive to the views of children. However, the legislative provisions available through the COCA were not reflected in the degree to which children's views were present in the decisions analysed. A range of barriers to participation were identified. While the wellbeing and safety of children must be a paramount consideration, their right to a voice and enabling their participation in matters that impact their lives should not be overlooked. There is evidence of the views of 9 of the 11 children in this research being ascertained, however, many other variables took priority and there is no evidence to suggest that the views were ascertained for the two youngest children. Outside of quoting precedence judges also referred to out of date legislation and *Wells v Shearer*, the Hague Convention case, highlighted contradictions within the law and challenged the Judge's subjectivity. Age and perceptions regarding maturity remain barriers, compounded by the continued use of outdated terminology. These findings suggest judges may be having trouble integrating changes in legislation introduced by the COCA and the repealing of the

Guardianship Act 1968. Incorporating the child's participation provisions into the best interests principles could assist with encouraging greater and more comprehensive participation than is currently apparent. This in turn would assist with minimising the health issues identified as being present in children subject to Family Court proceedings and enhance the benefits of participation. Providing children with an opportunity to express their views, listening to them, and weighing them against the other relevant factors of a case does not minimise the place of the other principles contained within the COCA, or mean that a child's safety needs to be compromised. Family Court proceedings are often about the care and contact of children. If this is important enough to go to court over, surely listening to and considering the views of the child concerned is equally as important.

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Family Court (Supporting Families in Court) Legislation Act 2020

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Guardianship Act 1968 (Repealed).

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CONVENTIONS

Hague Convention on the Civil Aspects of International Child Abduction.

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United Nations Convention on the Rights of the Child (UNCROC)

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CASES

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Ridenour v Ratcliff [2019] NZFC 3965

Brown v Byrne [2019] NZFC 8312

Sinclair v Hayden, Hayden, Hayden [2016] NZFC 3648

Nikau v Tatchell and Tatchell; Nikau; Nikau and Hohepa [2018] NZFC 1239

Appendix One

Year	Case name	Names of children subject to proceedings	Ages of children	Current Orders	Reason for Hearing