

# I Wish the Views Were Clearer: Children's Wishes and Views in Australian Family Law

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In 2006, legislative changes were made to the Australian *Family Law Act 1975*. These changes included a revision of the matters that must be considered when determining children's best interests following parental separation, at Section 60CC. This section lists two 'primary considerations', which relate to the child's having a 'meaningful relationship' with both parents and ensuring that children are safe in their interactions with their parents and others in their lives. The first of the 'Additional considerations' under Section 60CC concerns 'any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views'. This consideration differs from that in the pre-2006 Act, which referred to a child's 'wishes' rather than her/his 'views'. There is evidence, however, that those working in the family law system may not yet have made the shift towards understanding what these changes may entail.

In this article I explore the differences between the concepts of 'wishes' and 'views' as they relate to children in family law matters. I argue that these concepts are qualitatively different, and that children's 'views' are far more encompassing than their 'wishes'. Moving to a far broader understanding of children and their ability to understand issues that directly affect their lives may lead to the development of more comprehensive decisions about their futures.

■ **Key words:** Children, family law, participation, wishes and views

## Introduction

The 2006 revisions to the Australian *Family Law Act 1975* included a re-statement of the important factors to be considered when determining children's 'best interests' following parental separation. Of particular interest was the removal of the requirement to ascertain children's 'wishes', replacing this term with the concept of 'views'. Unfortunately, both of these concepts have not been well defined in family law, leading to some apparent confusion as to the reasons for seeking children's input in family law matters.

Perhaps confounding this issue is the diversity of professions that both work in and impact on the family law field. These professions include, but are not limited to, law, social work and social science, psychology, and child protection. The ways in which the members of these professions perceive their roles and tasks within the field are influenced by their education, experiences, understandings and professional orientation, making it difficult to reach consensus on the meanings of concepts enshrined in the *Family Law Act 1975*. Indeed, a 2009 volume of the *Journal of Family Studies* included articles that debated the meaning of the term 'meaningful' as the Act applies it to a child's relation-

ship with her/his parents (Chisholm, 2009). While it can be argued that the diversity of professions in family law assists to build an holistic view of the child's situation, the debates surrounding terms such as 'meaningful' demonstrate the apparent confusion in the field about the intent of the legislation itself. This article focuses on another issue relating to the terminology used in the Act and argues that were the professions able to gain consensus on the meaning of a child's 'views' the outcomes may be different for the families with whom we work.

Recent Family Court judgments, for example, *Poisat & Poisat* (2012) and *Fairfax & Maguire* (2013) discuss the 'preferences' of the children involved. In both cases, these preferences reflect the concept of 'wishes' and not necessarily the children's 'views' of the circumstances in which they were living. In the literature, too, there are examples of 'slippage' in the use of both terms, resulting in simultaneous reference to them. For example, Taylor (2006) refers to

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'Ascertaining children's wishes/views and taking them into account . . .', while Cashmore and Parkinson (2009) state: 'Children's wishes or views have typically been one of the factors that courts have been required to consider . . .'. Byrnes (2011) moves between the terms 'wishes' and 'views' in her discussion of the child's voice in Family Court proceedings. More recently, Bell, Cashmore, Parkinson and Single (2013) discussed child-inclusive mediation in terms of whether this practice contributes to the creation of an appropriate parenting plan as an outcome. While they acknowledge the presence of other benefits for children's participation, the focus on children's contributions to tangible outcomes suggests a continuing expectation that children's wishes may be of greater significance than their broader views. Wishes may be perceived as directly contributing to the outcomes of decision-making approaches, while views can be considered too vague to lead to positive outcomes.

In this article I will explore the differences between the concepts of 'wishes' and 'views', arguing that children's views may be far more useful than their wishes in decision-making processes. I argue that a conversation with children about their own experiences, and their views of these experiences, provides greater information for decision-makers than a more narrow focus on children's wishes. Moreover, a focus on children's views places them in the position of 'experts' in their own lives, rendering the need to consider their levels of maturity and understanding irrelevant.

I will begin the discussion with a brief examination of the definitions of 'wishes' and 'views' before considering the literature relating to these concepts. This discussion will be followed by a review of what children's 'views' might comprise and a consideration about how their views might contribute to the decision-making processes for them in family law. The article will conclude with some suggestions for practice.

## Wishes and views: definitions

Dictionary definitions of the word 'wishes' use the terms 'desire' or 'hope'. Wishes do not necessarily lead to an attainable outcome (Oxford Dictionary), nor are they always couched in positive terms (Merriam-Webster). Some definitions suggest that a 'wish' may have an emotional component, a 'feeling of wanting something' (Cambridge Dictionary) or even a 'strong desire' (Oxford Dictionary). Taylor, Tapp and Henaghan (2007) argue that a 'wish' is future-oriented rather than focusing on the child's current perspectives. In terms of the child's current experiences and responses, wishes provide limited information. Thus, a 'wish' appears rather narrow in its focus, with no guarantee that the content of the wish will be achieved (Byrnes, 2011).

This is important in the context of family law. When children are asked for their 'wishes' in relation to where they might want to live or whether and how they want to spend time with each parent, a child may come to expect that these wishes will be honoured. This expectation is not always

realised in family law decisions, however (e.g., Bagshaw & Shea Hart, 2008), resulting in a potential for children to feel unsafe. As Bagshaw and Shea Hart report, when a child is assessed as 'incompetent' or 'immature', decision-makers may reject their wishes as uninformed. This can lead to children feeling disrespected as a result.

In contrast, definitions of the term 'view' refer to opinions, beliefs and ideas (Cambridge Dictionary). Views can include attitudes to specific topics or issues (Oxford Dictionary), and can provide an understanding of a child's current (rather than future) world. These definitions suggest that our own understandings about our particular worlds are expressed in our views or opinions. They are not dependent on levels of knowledge, cognitive ability or maturity, but are instead based on our practical experiences.

Chisholm (2009) has argued that the change from 'wishes' to 'views' in the Australian *Family Law Act* 1975 was 'intended to direct the courts to have regard to children's viewpoint and understanding in a general sense'. Views therefore seem far broader than the concept of 'wishes'. Seeking a child's views about his/her life experiences does not rely on assessments of the competence or maturity of the child, but rather considers children as experts in their own lives (Roberts, 2000; Scott, 2000).

It is important, though, to acknowledge that there is considerable overlap between the concepts. Practitioners have pointed out that parents may expect their children to express a 'wish' when they are interviewed by a family law professional. Children themselves may also expect that they will have the opportunity to express their 'wants' to a professional and that these 'wants' will be acted upon. The requirement for family law professionals to assess children's levels of maturity and competence, however, renders these expectations difficult to achieve. A broader focus may help children and parents to build more achievable expectations of the outcomes of children's participation.

## Maturity, competence, dependence and children's rights

Issues of competence and maturity are embedded in legislative matters relating to family separation. Both Article 12 of the United Nations Convention on the Rights of the Child (CROC, United Nations, 1989) and Section 60CC(3)(a) of the *Family Law Act* 1975 extend to children the right to freely express their opinions in matters that directly affect them. Free expression is, however, qualified with a requirement to consider the age and level of maturity of a child who does express an opinion. In S60CC(3)(g), the child's level of maturity is also mentioned as a factor to be considered in deciding the child's future relationship with each parent.

This qualification has the potential to marginalise children, denying them a 'legal personality' (Sawyer, 2006) of their own. Children have few opportunities to independently assert their rights (even those related to expressing an opinion) (Sawyer, 2006), and they must rely on adults to

help them assert the rights bestowed on them. When adults qualify these rights with considerations of levels of maturity and competence, it becomes far more difficult for a child's voice to be heard.

Children are also part of a broader structure called 'the family', upon which they rely for their care (O'Neill, 1992). As Sawyer (2006) points out, children remain dependent on their parents for a great deal of their developing years. Parents' agendas can eclipse children's needs when the children themselves are considered to lack the competence to voice their opinions about the state of the families in which they live (Kanavy, 2013; Sawyer, 2006). As Bagshaw and Shea Hart (2008) report, courts can marginalise children's voices in preference for maintaining a family unit (consisting of children, mother and father) in spite of children's reservations about this action. Events such as these lead Sawyer (2006) to argue that 'the child rarely has a positive separate identity' (in law).

A confounding factor is the concept of children as vulnerable. In the literature, this issue is closely related to children's perceived levels of (in)competence (Andrews & Freeman, 1997; Blagg & Wilkie, 1997; Fogarty, 1995; Hubble, 2000; Jones, 1999; Leach, 1994; Marks, 1998). Henry and Hamilton (2012) report that children exposed to family violence have expressed fear at the prospect of discussing their situations with a professional in family dispute resolution. The authors warn against inviting children to participate when they have been exposed to family violence, arguing that this can increase their levels of vulnerability. This argument contrasts with that of Shea Hart (2009) who questions how practitioners can address safety for children if they do not understand their experiences.

Underlying these two views is the issue of children's levels of competence to protect themselves from abuse or to understand what is and is not violence. Shea Hart (2011) found, for instance, that children's reports of their safety concerns and their expressed wishes not to spend time with an abusive parent were often negated by decision-makers who assessed children as 'incompetent' or 'immature'. Children's wishes not to spend time with an abusive parent were sometimes reframed as arising from emotional insecurity or due to a 'tender' age. Some, such as Altobelli (2011), reframe children's wishes not to spend time with a parent in negative ways, such as explaining these wishes as arising from an 'alliance' with one parent, or 'estrangement' and 'alienation' from the other. Each of these reframes implies that children are not competent to understand the complexities of the 'adult' world and are so vulnerable that they can be influenced by one parent to reject the other parent rather than holding serious concerns of their own.

The emergence of diverse levels of competence in children arose from the developmental theories first proposed by Piaget and Cartalis (1928). Piaget described the child as progressing through a series of pre-determined stages of development, during which their cognitive processing skills gradually increase. Piaget theorised that children and young

people are not capable of rational thought until a quite late age, around 15 or 16 years. Until then, their ability to think beyond their immediate needs and concerns is both limited and flawed (Piaget & Cartalis, 1928). Piaget's work has, however, been criticised by a growing number of theorists (e.g., Cleverley & Phillips, 1987; James & Prout, 1990; Jenks, 1982; Lloyd-Smith & Tarr, 2000; O'Neill, 1992). Competence (and the concept of 'maturity') can be considered in a number of ways, including in terms of age, developmental stages, experience and level of exposure to social interactions (David, Edwards, & Alldred, 2000; de Leeuw, Borgers, & Strijbos-Smits, 2002; Edwards & Alldred, 1999; Mason & Urquhart, 2001; Woodhead & Faulkner, 2000).

There is an argument that age and competence are not synonymous, and that other ways of thinking about competence are perhaps more useful (David, Edwards, & Alldred, 2000; Edwards & Alldred, 1999; Mantle, Leslie, Parsons, Plenty, & Shaffer, 2006). Indeed, Taylor, Tapp and Henaghan (2007) argue that the legal system has, since 1985, been aware of the flawed logic in assessments of children's levels of competence based on age. If age is ignored, there is potential to think of children in new ways, as social actors who, as members of families, collaborative learners and peer supporters, actively shape their environments. In this view, children become experts in their own lives, effectively and competently able to discuss events of meaning to them (Campbell, 2008; Mason & Hood, 2011).

### **Children's 'best interests' and adults' perceptions**

The foundation for deciding on children's futures following their parents' separation is the concept of a child's 'best interests'. In both the United Nations Convention on the Rights of the Child (CROC, 1989, Article 3) and the *Australian Family Law Act 1975* (Section 60CA), children's best interests in matters that directly affect them are considered of paramount importance. Kelly (1997) and Hansen and Ainsworth (2009) have argued that this concept is vague and indeterminate, giving rise to subjective adult interpretations of children's best interests, both generally and for specific children. Moreover, the concept of children's best interests, as separate from those of adults, suggests that children are subjugated within adult hierarchies (such as the family) rather than being considered as individuals in their own right (Sawyer, 2006). Children's best interests are thus weighed against those of their parents (e.g., at S60CC(2)(a) the importance of the child having a 'meaningful' relationship with both parents is emphasised). Implied is an argument that children are not competent to communicate their own understandings of their 'best interests', and that adults must decide on the best interests of specific children whose 'wishes' and 'views', especially about their parents, may be unreliable.

As mentioned earlier, Chisholm (2009) suggested that the replacement of the term 'wishes' with the concept of

'views' in the *Family Law Act 1975* was an attempt to explore the wider opinions of children. He argued, especially, that children could provide valuable information for decision-makers about their relationships with both parents in order to assess the meaningfulness of those relationships, a requirement under S60CC(2)(a). The difficulty with this, however, is that the qualification on age and level of competence in assessing a child's views can lead to a disregard for children's reports of their relationships, especially when these reports do not coincide with adults' perceptions of the child's best interests (Bagshaw & Shea Hart, 2008). As is apparent in some of the current literature, as well as some court judgments, the concepts of 'wishes' and 'views' can be used interchangeably, indicating that decision-making practices have not radically changed despite the legislative change in terminology.

### The difficulty with seeking a child's wishes

Why, then, should family law practitioners, of all disciplines, consider a significant change in their practices? Why not continue to ascertain children's wishes, if that is what the Court expects? There appear to be a number of issues that create difficulties for both decision-makers and children if the focus remains on children's wishes.

First, aligned with concerns for children's safety is the suggestion that asking children to participate in conversations about their future can place them in untenable situations. In expressing a wish, children can become targets of abusive parents when the wish becomes known. On the other hand, when their views about the violence and abuse they have experienced are heard, children can feel safer and more valued, especially when their protective parent works to ensure their safety needs are addressed (Shae Hart, 2009; Petridis & Hannan, 2011).

Other criticisms about ascertaining children's wishes in family law matters include that the practice can open children to coercion from parents, being 'forced to choose' between their parents or experiencing divided loyalties (Graham & Fitzgerald, 2006; Mantle et al., 2006). Mantle, Moules, Johnson, Leslie, Parsons, and Shaffer (2007) argue that, while those who interview children in the British CAF-CASS system try to represent the children's views fairly in their reports, they are also mindful of the ways in which children can be influenced by the adults in their lives. Mantle et al. (2007) refer to a dilemma for report writers in attempting to shield children from experiencing divided loyalties while ensuring that they hear the child's wishes. Removing any reference to children's 'wishes', and any requirement for those who work in family law to attempt to ascertain them, may help to resolve this dilemma. When children are asked to talk about their own experiences and understandings, questions of loyalty and competence become irrelevant because the conversation uses their terms of reference rather than those of the adult interviewer, who does not ask a child

to make a choice. The weight that can be given to children's opinions and views is theoretically the same as that given to the opinions and views of their adult counterparts.

A further concern is that a focus on ascertaining children's wishes can place them in deeper levels of grief (Graham & Fitzgerald, 2006). This argument considers that when children are 'forced' to choose between parents, they 're-visit' the grief surrounding the separation, and move into a deeper level because of a perceived need to 'lose' one of their parents. Exploring children's views and opinions can reduce this process by avoiding the requirement for children to express any wish at all.

### What do children say?

Sawyer (2006) argues that although the United Nations Convention on the Rights of the Child provides for children to be heard in matters that affect them, in practice this provision does not appear to be addressed very often, especially in law. Indeed, earlier reports such as the 1997 *Seen and Heard* document indicated that children were all but invisible in legal matters affecting them (Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, 1997). In response to this situation, researchers have, over the past 15 years or so, explored children's own understandings of their participation in family law matters (Campbell, 2008; Smart, 2001; Smith & Taylor, 2003; Cashmore & Parkinson, 2009). Many of the studies have focused on children's participation in decision-making.

For example, in my own study (Campbell, 2008) I asked children about the decisions they make and whether they wished to be part of the decisions about them following their parents' separation. As part of this study I asked children what they thought about the idea of expressing a wish about their future and how they would like to participate. Children's responses echoed those of children in other studies that focused on similar issues.

My findings indicated that children did want to be heard. For example:

I think if people, if like children aren't allowed to speak out and be heard by people they kind of think that they never will, and if they do speak out their opinions can be heard, and sometimes a lot of children's opinions are more logical or sometimes sensible than a lot of ones that adults might have. (Nick, 13 years old)

. . . kids should be involved from the start. If you're gonna do something that affects them, and yeah, they should have some say of how it's, how it looks and stuff.

(Kane, 13 years old)  
(Campbell, 2008).

This does not necessarily mean that children want to make any decisions, however. In a number of studies, children have distinguished between 'having their say' and expressing a desire for a specific outcome (a wish). In my research

children often suggested that they could be consulted, but the decisions themselves could be made by their parents:

Well, y-yess, but not tell the parents what to do, . . . so the parents should um yeah, talk about it and then . . . they'll probably tell the kids and then if they don't want that to happen then they'll figure something else out.

(Callum, 10 years old)

(Campbell, 2008).

These comments, and those of children in other studies, indicate the importance of being clear about what children's participation is all about. While children want to be consulted, they do not necessarily want to state any 'wishes' (Cashmore, 2011). For children, having a chance to voice their opinions is more valuable. It is possible that if researchers asked children about their opinions, rather than couching questions to reflect issues about decisions, different responses may be elicited.

These findings raise the importance of a need for clarity about why adults would seek children's input in their parents' decision-making (Graham & Fitzgerald, 2010). Graham and Fitzgerald (2010) suggest a number of reasons for doing so, including providing children with a neutral 'sounding board', where they can express their views without recrimination; where they can contribute to change within their families, and where their views can help to strengthen relationships between children and their parents. These functions do not rely on children's expressed wishes, but instead, provide a broader and deeper understanding of what it is like for a child to live in her/his family.

### What might a child's opinions include?

The literature suggests a number of contributions that children could make were their views and opinions sought rather than their wishes. These include children's understandings of their own needs and interests (Campbell, 2002) and their fears and hopes (Evans & Havercamp, 1994). Chisholm (2009) suggests that, following the 2006 reforms to the Family Law Act, it is now important to hear from the children their views about their relationships with each parent (in order for an appropriate determination to be made about the child's 'meaningful relationship' with both parents as required under S60CC(2)(a) of the Act). Other relevant contributions include the child's perception of the environment in which s/he lives and her/his experiences of the separation, how they are coping and what supports they require (Graham & Fitzgerald, 2006).

Current approaches to hearing from children in the Australian family law setting appear limited to a child-inclusive practice approach in family dispute resolution (Campbell, 2002; McIntosh & Long, 2006; Bell et al., 2013), reports prepared by independent experts (Cashmore, 2011), and the use of independent children's lawyers appointed by the Court (Shea Hart, 2011). The development of approaches

that focus on children's perspectives and views may provide more in-depth understanding of their experiences, ensuring that decisions made reflect the totality of those experiences rather than considering just their wishes in comparative isolation.

The literature suggests that such an approach can effectively move the decision-making focus from parents' needs and agendas to those of children (Moloney & McIntosh, 2004; Graham & Fitzgerald, 2006) while reducing the possible impact of developmental concerns about levels of competence and maturity (Mantle et al., 2007; Taylor et al., 2007). If children's 'wishes' are not the focus, then their age and competence levels will not be as relevant; they become 'experts' in their own lives no matter what age they are. Indeed, Tapp (2006) reports that New Zealand judges have, in the past, interviewed children in chambers, finding them to be very articulate and definite in their views.

A focus on the child's opinions can further provide the child with an opportunity to participate without fear of repercussions occasioned by an expression of wishes perceived as unacceptable by either or both parents. Children's rights to 'have a say' are supported, with the potential for strong, positive outcomes.

Cashmore (2011) distinguishes between the concepts of 'voice' and 'choice'. She argues:

. . . where the decisions are made by a third party (a court) or by their parents, children and adolescents should therefore see decisions as fairer, be happier with them and more likely to comply with them if they have had some involvement . . . by having a 'voice', if not a 'choice'.

This argument appears difficult in terms of the differences between 'views' and 'wishes'. While it distinguishes between the concept of children being consulted while not being obliged to express their wishes, the suggestion that they 'should' be happier and able to 'comply' with the decisions following their involvement implies that they are considered as 'secondary' to their parents and other adult decision-makers. In Cashmore's argument, the child still seems to be denied a 'legal personality' (Sawyer, 2006). Sawyer suggests that one way of ensuring that children have a 'legal identity' is to 'integrate them wholeheartedly into the legal culture' (p. 3). If this were to occur, children would express their own views in the court system and have them heard directly rather than being relayed by adult 'experts' such as 'child consultants' (McIntosh, Wells, Smyth, & Long, 2008), those who prepare 'family welfare reports' (Brown, Frederico, Hewitt, & Sheehan, 1998), and court counsellors. Whatever approach is adopted, however, a more appropriate outcome for children, beyond feeling happy and compliant, would be that they feel respected by the adults with whom they have had contact (parents, counsellors, and court personnel) (Tapp et al., 2007). The ability to express how they currently feel about their lives, what they think about the situation they currently experience and when they feel happy

(among other issues) would perhaps ensure that their views were appropriately given and heard.

### How else might children participate?

If the goal is to respect children's rights to express an opinion and be heard in matters that affect them, how might they be asked to participate? In what forums and for what purposes might adults hear from children? How can their views be best received by the adults who need to hear them?

A number of forums have been developed by the Australian Government and organisations within the family law sector. Family reports continue to be prepared in issues considered by the courts (Mantle et al., 2006). Children may be assigned an independent children's lawyer where the court deems this appropriate (Ross, 2012). Within the non-government sector, children may attend therapeutic group programs or individual counselling under the Supporting Children after Separation initiative (Attorney-General's Department, n.d.). They may also participate in child-inclusive family dispute resolution (McIntosh & Long, 2006). In other jurisdictions, such as juvenile justice, children may attend a family group conference where they express their views about the offence in which they were involved (Harris, 2008). This approach has yet to be explored within Australian family law approaches to children's participation.

There are at least two purposes for inviting children to directly participate, beyond respecting their rights to do so. The first is to include their input into the decisions that are being made about their future residence and relationships with their parents. As discussed earlier, this purpose appears to be directly related to the outcomes of the decision-making processes, and may build an expectation that children's wishes are important in reaching outcomes.

A second purpose may be to inform parents and other adults about the concerns, experiences and needs of the children in question. This information is as valuable to the decision-making process as are a child's wishes, as it can help to shape decisions that meet children's expressed needs and address their specific concerns.

Questions that remain include how children's views can be best incorporated into adults' and parents' thinking and subsequent decision-making. In practice, it appears helpful to ensure a distinction between 'having a say' and making a decision. Other issues that may be considered include whether one meeting with a child is enough to gain a full understanding of her/his opinions.

### Conclusions

The apparent confusion between the concepts of children's 'wishes' and 'views' continues to arise in both the literature and current Family Court judgments. The argument presented in this article represents an attempt to demonstrate

that there is a difference between the concepts, and that the abandonment of any approach to ascertain children's wishes does not mean that decision-makers will end up in a wilderness of indecision.

Over a long period, there has been an acknowledgment in the literature of the difficulties for children when they are asked about their wishes. Increased grief, divided loyalties, the potential for greater danger from abusive parents, and the potential for coercion have all been associated with a focus on children's wishes in the family law system. These difficulties point to a need to change our thinking in relation to the purposes for, and approaches in, children's participation.

Children themselves have expressed a need to participate in their parents' conversations about their futures following separation. In most studies, however, they have distinguished between being heard and making decisions. They express less interest in engaging in decision-making processes, and argue that decisions should be made by their parents.

These findings indicate that children's views and opinions about their current experiences and situations are useful in assisting parents and other adults to reach appropriate decisions about them. Exploring children's views avoids the need to determine their levels of competence, since hearing about their own experiences and understandings from their viewpoints places them in the position of 'experts' in their own lives. Moreover, the focus shifts from children as developing beings whose lives begin sometime in the future to people in the present whose current situation is important to them, and thus requiring attention now. Focusing on children's views also acknowledges their current legal personality and identity and respects them as individual social actors within broader family structures.

The family law system has moved rapidly to ensure that children participate more easily with their parents. The relatively new Services for Children after Separation programs respect children as clients in their own right, rather than as part of broader family systems. Even so, those working in these programs are still required to gain parents' consent for the participation of their children. Petridis and Hannan (2011) have proposed that in cases where children's safety is of concern, they be invited to talk about their concerns as a matter of course and without parental consent. This is a novel approach that will be interesting to monitor as it develops. These authors are careful not to ask children what they want, but focus on how the children are faring and what they are experiencing. They argue that children's views are essential for developing a strong and positive safety plan for the children and their protective parent.

As children's participation increases through ever more approaches that help them build a legal personality and to participate in meaningful ways, our understandings will no doubt increase. A central contributor to change will be the continuing transition away from ascertaining children's 'wishes' to a greater exploration of their 'views'.

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