

Case study 1: Family Law Proceedings

Case scenario

Tom and Julie have been married for 15 years and in the past few months have decided that their marriage is no longer working out and they wish to separate. They cannot agree on contact and living arrangements concerning the children so they decide to go to court. Tom and Julie have three children: Jenny (3 ½), Bell (6) and Martin (12). Julie has explained to the children that she and Tom no longer intend living together and that the court is going to make a decision about their living arrangements. She tells the children that she wants them to make their views known to the court.

Jenny asks if she can say hello to the Judge. Bell states that she does not want to talk to anyone about living arrangements – she wants things to stay the way they are. Anyway, she thinks court is for bad people and she doesn't know what she did wrong. Martin writes a letter to the Judge, which reads:

Dear Judge,

Please don't make me choose. ☹

Martin

Questions for Consideration

1. Share your experiences of how this issue would be addressed in each of your own jurisdictions? Choose the most Article 12 CRC compliant with a view to reporting back to the group.
2. If you were a professional involved in this particular case, what steps would you take to ensure that the rights of these children under Article 12 and the CRC are protected under the circumstances?

Solution

There are a number of factors to be considered in this case.

As Article 12 provides that all children capable of forming views have the right to be heard, all three children should have the opportunity to contribute to this decision making process. Thus, the first part of this process is that the children be given an opportunity to express their views which should be communicated to the decision-maker – in this case the judge. Once their views have been expressed on the matter in this case affecting them, whether through speech or alternative forms of expression, those views must be considered seriously by the Judge, with due weight being given to the views of each of the children in accordance with the age and maturity of each child. Age by itself (no matter how young the child is) should never be a reason for not treating the views of the child seriously. Children are not a homogenous group and so an individualized approach needs to be adopted in such cases.

Children should never be forced to participate in a decision-making process affecting them. Children should be provided with the opportunity to be heard in a child appropriate environment where they can talk freely without fear or judgment. Furthermore, children need to be informed in child-appropriate language not only about the decision being made but also about the process surrounding it. It is unfair to expect anyone including a child to contribute to a decision that they do not understand. For example, it needs to be made very clear that it will be the Judge in this case who makes the decision – not the children and even though the children will the judge know their views, these are not always determinative, they are just one factor of the bigger decision being made for which the judge takes full responsibility.

Children also need to be advised about the consequences of them contributing to the decision making process. They should be told that feedback concerning the decision will be given to them as soon as the decision is made. It is imperative that the children in this case are given individual feedback about the decision making process and what this will mean for them in their lives.

Children also need to be advised that they can contribute to the decision-making process directly or indirectly – the method should be of their choosing. Direct participation involves either speaking directly to the Judge or contributing their views in non-conventional or alternative ways (as envisaged by Article 13) such as through art, or a letter or play. Indirect participation will vary from one case to the next and from jurisdiction to jurisdiction but generally will include: communication of views

through a social worker, as part of the court report for example, or through a separate legal representative or a Guardian Ad Litem. Whichever mechanism is used, any communication with the children should take place in a space that is child – appropriate and they should be spoken to and informed in a language that they understand.

It is important to remember that Article 12 is a right of the child and thus must be adhered to in all decision-making processes concerning children. Indeed, in order to be able to make a decision in a child's best interests, it is important that their views (which gives important information to the decision-maker concerning the life of this child) are considered seriously as part of this process. Generally, the intention behind Article 12 is not that the information from the child would be used for forensic purposes, Article 12 should be used for the benefit of the child in question and their wellbeing.