

White Paper Seminar

12th January 2026

Voice and Competence:

How should practitioners assess a child's voice and competence?

What are the consequences for evidence and DOLs applications?

I. Legal Framework for Assessing a Child's Voice and Competence

1. Statutory Foundations

- **Children Act 1989 s1(3)(a)**
 - Courts must have regard to “ascertainable wishes and feelings of the child... in light of his age and understanding” as part of the welfare checklist.

2. Family Justice Council Guidance

- **Guidance on Assessing a Child's Competence to Instruct a Solicitor – Family Justice Council April 2022¹**
 - Encourages structured, consistency-focused assessments of competence; each case is *unique* and fact-specific
 - Level of intelligence: intellectual impairment may have an impact on competence, and it may be relevant to consider any expert evidence of neuro disability, but it may not be determinative of understanding the issues
 - Emotional maturity of the child, which may be informed by any school reports. Consider any independence or agency they exhibit in other areas of their life
 - Factors which might undermine understanding such as issues arising from emotional, psychological, psychiatric or emotional states which may be identified in any expert evidence from social workers or mental health professionals
 - Reasons for wanting to directly instruct without a guardian and the strength of feeling accompanying that wish (have they been calling or sending emails to the guardian or solicitor?)

¹ <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/family-justice-council/resources-and-guidance/capacity-and-competence/>

- Assessing the understanding of the issues by the child and the extent to which their wishes are their own or reflecting that of the parent
 - Understanding the process of litigation, the meaning of evidence, the role of the judge etc
 - Assessment of risk of harm of direct participation weighed against harm of being excluded and the child's understanding of that potential harm
 - The risk associated with the child having access to all the documents relating to the proceedings. In considering that risk it is important to assess whether the amount of documentation that is going to be withheld from the child is such that you would not be able to take proper instructions. In that event, you may conclude that direct representation is not appropriate.
 - Record analysis clearly:
 - What the child said
 - How views were obtained
 - Assessment of competence
 - How views influenced the decision
- **Judicial Guidance on Child Meetings and Views – Family Justice Council April 2010²**
 - Guidelines for how judges and practitioners engage children directly in the proceedings.
 - Solicitor for child or Cafcass officer to advise whether child wishes to meet judge, purpose of meeting and welfare analysis of meeting
 - Judge to decide timing and arrangements for meeting with child and their solicitor
 - Judicially approved note of meeting to be circulated to parties
 - *“It cannot be stressed too often that the child’s meeting with the judge is not for the purpose of gathering evidence. That is the responsibility of the Cafcass officer. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/ her.”*

² https://www.judiciary.uk/wp-content/uploads/JCO/Documents/FJC/voc/Guidelines_Judges_seeing_Children.pdf

II. Competence: Principles and Judicial Authorities

1. Gillick Competence

- **Gillick v West Norfolk and Wisbech Area Health Authority [1985] UKHL 7**
 - Establishes that a child under 16 may have capacity (Gillick competence) to make decisions when sufficiently mature to understand the information, implications, and consequences.
 - Widely referenced as an analytical tool in capacity discussions beyond medical treatment (e.g., residence, welfare choices).

- **Re S (Wardship: Removal to Ghana) [2025]EWCA Civ 1011**
 - Parents had tricked child into visiting Ghana in early 2024. Left him there against his wishes in a boarding school. They had been worried about his recent violent behaviour and getting involved in criminal activity, including theft of phones and possession of knives. S instructed his own solicitor to make an application in wardship for his summary return to England & Wales.
 - At first instance Hayden J refused his application focussing decision upon the scope of parental responsibility and examining that in context of S' expressed wishes & feelings
 - S appealed. Decision gives helpful clarification between scope of Gillick competence and use outside medical treatment. S contended for his views to be determinative given his Gillick competence, but CA disagreed. Macfarlane P framed the Gillick test to be very much like the functional limb of the MCA 2005, but no need to continue to consider whether mental functionality is attributable to impairment of brain. Courts will override decision of a Gillick competent child, especially where there is a statutory context, in this case CA89. The voice of the child must be taken seriously and be heard, but is not determinative. For different reasons the appeal was successful and a re-hearing directed.

2. Family Proceedings Competence Case Law

- **Re C (Child: Ability to Instruct Solicitor) [2023] EWCA Civ 889**

- The Court of Appeal confirmed that evaluating a child's ability to instruct a solicitor turns on their understanding in *the particular circumstances* supported by all relevant factors and opinions, including from solicitors/experts.

III. The Child's Voice as Evidence

1. Evidential Requirements

- **Direct Evidence vs. Filtered Reports**
 - Expectation that evidence to clearly set out *what the child said, in what context, and the method used* to ascertain views.
- **Article 12 UNCRC**
 - Although not fully incorporated, Article 12 supports the principle that capable children have the *right* to express views and those views be *given due weight* in decision-making.

2. Practical Evidence Tips

- Use age-appropriate methods.
- Record verbatim child's expressions where possible.
- Distinguish wishes/feelings from professional interpretation.

IV. Deprivation of Liberty, Competence & Voice

1. DoL Legal Context

- **Article 5 ECHR**
 - Lawful deprivation of liberty must satisfy prescribed legal grounds and be subject to strict safeguards.

2. Evidence and Judicial Scrutiny in DoL

- **Consent vs. Authorisation**

- **Re QX (Parental Consent for DoL: Children under 16) [2025] EWHC 745 (Fam)** demonstrate that parental consent may suffice where a child lacks competence, but there are strong judicial cautions about lack of oversight when courts are not involved.
- **J v Bath & NE Somerset Council [2025] EWCA Civ 478**, appeal highlighted the need for appropriate order where Article 5 liability arises—even where parents and local authorities consent. Not an extension or part of exercise of parental responsibility. Emphasises requirement for judicial authorisation for DoL.

V. Consequences for Evidence and Applications

1. Court Expectations

- Applications (e.g., DoL authorisations, interim orders) must include:
 - Clear assessment of child’s competence (Gillick/functional analysis)
 - Child’s views and how they were obtained
 - Consideration of less restrictive options

2. Evidence Drafting

- Build capacity analysis into witness statements/assessments.
- Use child’s own words where possible.
- Anticipate and address possible objections regarding competence.

3. Advocacy

- Distinguish between rights to be heard and decision-making authority (wishes influence best interests but do not determine them).
- If competence disputed make Pt25 for permission to reply upon expert evidence.

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