

# Children in court: from communication to effective participation

*The child's right to be heard and the  
procedural position of children in family  
and child protection proceedings*

## SUMMARY

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# Summary

In Dutch civil law, other than in exceptional cases, children are not competent to participate autonomously as litigants. The principle is that the child's interests are safeguarded by his or her legal representatives: the parent(s) with parental responsibilities or the legal guardian(s). When the child's interests are in conflict with the interests of their legal representatives, the judge can appoint a guardian *ad litem* for the child. Even though children lack competence to participate autonomously in civil law proceedings, they do have to be involved in family and child protection proceedings (according to Book 1 Dutch Civil Code). For children above the age of twelve years, this is embodied in the right to be heard.

The central question in this research is if it is desirable and possible to improve the procedural position of children in Dutch civil law and, if so, in what way. To answer this research question, both pedagogical and legal advantages and disadvantages are examined. Thus, this research tackles two aspects: (I) children's right to be heard in family- and child protection proceedings and (II) the procedural position of children in family- and child protection proceedings.

This research focuses solely on the procedural position of children and their right to be heard in family- and child protection law, as set out in Book 1 Dutch Civil Code, with a division of three clusters: adoption/parentage, custody/divorce and contact and visitation rights, and child protection measures.

The reason for this research is the recommendation of the Government Committee of the Reassessment of Parenthood in its report 'Child and Parents in the 21st Century' from December 2016, that special attention must be paid to the procedural position of children in family law – including the right to be heard.

## RESEARCH METHODS

This research can be divided into four parts, which by using different research methods contribute together to answering the research questions.

The first part – a *legal-literature and case law study* – examines the current procedural position of children and their right to be heard in civil proceedings, the development of these aspects and the implementation of these rights in practice (by means of case law study). Furthermore, an internal legal comparison was carried out, looking for the similarities and differ-

ences between (the application of) legislation and regulations with regard to the procedural position of children and their right to be heard in various subareas of civil law, administrative law and juvenile law. Also, it has been investigated to what extent obligations and recommendations ensue from international law regarding the right of the child to be heard and the right of children to participate in family and child protection proceedings. Children's right to access to justice and to legal aid or other support in proceedings is included in this analysis.

The second part concerns a *literature study with insights from pedagogical sciences and neuropsychology*. A literature study has been conducted into the neurocognitive, psychological and pedagogical insights with regard to the procedural position of children and their right to be heard. Through an extensive literature study in relevant databases, it was examined to what extent children are able to participate in family and child protection proceedings. For this purpose, legal terms (such as competence) have been converted to related psychological constructs (such as executive functions, decision-making, stress(sensitivity), etc.). In addition, the context of hearing children was further investigated, with attachment theory as a starting point for examining the quality of several contextual factors.

The third part concerns an empirical *study focusing on experiences with hearing children and their procedural position*. In this study, the experiences, needs and opinions of professionals in legal practice, children and parents were mapped and analysed. The experiences of professionals involved in legal proceedings have been collected through questionnaires and interviews. A total of 272 participants completed the questionnaire: 10 Court of Appeal judges, 30 family and children's judges, 41 family lawyers, 26 guardians *ad litem*, 76 employees of the Child Protection Directorate, 73 employees of certified care institutions and 16 employees of the Children and Youth Law Centres. In addition, 21 of these experts participated in an interview: 5 judges, 3 family lawyers, 3 guardians *ad litem*, 5 employees of the Child Protection Board and 5 employees of certified care institutions. The experiences of children and parents were collected through questionnaires. A total of 136 adolescents aged 16 to 24 years old completed the questionnaire, of whom 43 had experience with family- or child protection proceedings. Furthermore, 131 parents and caretakers completed the questionnaire: 82 biological parents, 27 foster parents, 13 stepparents and 9 grandparents.

The fourth part concerns *bringing together the legal, empirical and social-sciences research results*. An answer has been formulated to the question how an extension of the procedural position of children in civil law is possible and/or how adjustment of the age limit for the right to be heard could possibly look. Furthermore, two expert meetings were held to further map the pedagogical and legal advantages and disadvantages of hearing children in family and child protection proceedings and to what extent these advantages and disadvantages are different for children under the age of twelve.

## THE RIGHT OF CHILDREN TO BE HEARD

### *The current regulation and purpose of the right to be heard*

Article 809 of the Dutch Code of Civil Procedure provides that in principle the judge will give children as of twelve years the opportunity to present their opinion. Under Article 809 of the Dutch Code of Civil Procedure, children under twelve years may also be given the opportunity to be heard. However, they are not invited by default by the judge for a child-hearing, but if they request an interview, the judge has a discretionary power to decide on hearing the child. Dutch legal research shows that the discretionary power of the judge is varied and sometimes applied to a limited extent in practice with regard to hearing (or not hearing) children younger than twelve years old. Earlier practical research shows that children under the age of twelve are hardly heard in family law cases.

The purpose of the child's right to be heard has not been explicitly mentioned by the legislator, nor has it been clearly defined in parliamentary history. However, it can be inferred that the child's right to be heard was introduced to offer children legal protection. In addition, the child's right to be heard, as laid down in Article 809 of the Dutch Code of Civil Procedure, gives substance to the right of every child to be heard in proceedings as laid down in Article 12 of the Convention of the Rights of the Child (CRC). Pursuant to Article 12 CRC children have the right to freely express their opinion on all issues that concern them. The views of the child must be given due weight in accordance with the age and maturity of the child (Article 12 (1) CRC). The second paragraph of Article 12 CRC requires that the child be given the opportunity to be heard in any legal proceeding affecting the child. Age limits can be used, but according to the Committee on the Rights of the Child, they cannot be absolute and age limits should leave space for younger children to have the opportunity to be heard by the judge. It also follows from international standards that children can be heard directly (by a judge) or indirectly (by an expert outside the courtroom), and that they should be able to choose this themselves. In Dutch law the way in which children must be given the opportunity to make their opinion known to the judge is not regulated. In legal practice, only the Courts of Appeal have developed a professional standard "Child conversations".

### *Hearing children above twelve years of age in practice*

In the empirical study, it was investigated how child hearings unfold in practice. This study shows, among other things, that judges prefer to hear children directly, even though an expert (from the Child Protection Directorate or a certified care institution) has often spoken with children before the hearing and this information often reaches the judge. Adolescents also indicate that it is important to speak with the judge in person. In addition, the empirical research shows that children of twelve years and older are invited for a child hearing with a standard invitation letter. It appears that children do not always respond to this letter. Almost half of the judges who partici-

pated in this investigation indicated that most children do not respond to the invitation. The empirical research also shows that judges see the child hearing primarily as an opportunity for a child to give his or her opinion.

The interviews with judges show that the duration of the child hearing in family matters (including custody and access rights) and in child protection (including supervision and out-of-home placement) differ. In family law cases about 15 minutes are available for a child hearing. In child protection cases, it appears that much less time is available for a child hearing and these conversations usually last five minutes. The location for the child hearing also differs; sometimes the child hearing takes place in a special child-friendly room, sometimes in the courtroom and sometimes in the council chamber. This empirical study also shows that sometimes several judges are present during the child interview. It also appears that there is a current need among some adolescents to take a support person to the child hearing, while this is not common practice.

In addition, the empirical research shows that the degree to which the child's opinion is taken into account varies between judges. Judges have indicated that the opinion is more strongly taken into account when the child is older, and that this can be dependent on the type of case. In general, the majority of adolescents have indicated that they had a good feeling about the conversation with the judge. They have a strong feeling that they were taken seriously during the conversation.

Regarding the feedback of the decision towards the child, this does not happen often. From the interviews with judges it becomes clear that they mainly see practical problems with regard to the feedback of the decision and the use of child-friendly judgments. Furthermore, provision of information before the child hearing is not always sufficient. When asked what adolescents were not satisfied with regarding the right to be heard, they often replied that they would like to be better informed about the procedure and the child hearing. In a question about what made adolescents most nervous when they went to court, lack of information was also mentioned.

Furthermore, the empirical research shows that the child hearing is often stressful for a child. However, adolescents do not report this as a reason *not* to use their right to be heard. One reason for making the child hearing stressful, is the chance to possibly bump into a parent or to raise problems while the situation has just become stable, which can indirectly be strenuous. Half of the group also thought that expressing a personal opinion to the judge may impact negatively on the relationship with their parents. Nevertheless, adolescents underline the importance of the child hearing. Almost all adolescents indicated that they thought it was important to give their opinion. This interest must therefore have outweighed the perceived nerve and load.

#### *The hearing of children under twelve years of age in practice*

The outcomes show that hearing children under twelve years of age is practically non-existent. Earlier research findings show that the age limit of twelve years is strictly adhered to when the right to be heard is given by the

judge and that children younger than twelve years are hardly, or not, heard at all. In most cases that the child under the age of twelve is heard, this is at the request of the child himself. The foregoing does not alter the fact that, in current practice, initiatives have been taken in recent years that have opted for a lower age limit to hear children (The Hague Court in child abduction cases: all children of six years of age and older; and the Amsterdam Court in family and child protection cases: all children of eight years of age and older).

## THE LEGAL POSITION OF CHILDREN

### *Regulation and purpose of the legal position of children and their legal status in other areas of law*

In family law, the child is in principle incapable of autonomously participating in legal proceedings (has no *locus standi*) and his or her legal representatives (parents or guardian) or – in the event of a conflict of interests – a guardian *ad litem* act on behalf of the child as (formal) litigants. Several exceptions have been introduced in recent decades for the child to litigate independently, sometimes in a formal and sometimes in an informal way. These exceptions are fragmented in the Dutch Civil Code and sometimes have twelve years, and sometimes sixteen years as the lower age limit. Various reasons can be found in parliamentary history that underlie these possibilities. The reasons given for these different variants do not seem consistent; there is no clear objective, policy or uniform view with regard to the civil procedural position of children.

In recent decades, there have been repeated calls for strengthening of the procedural position of children. The proposals to strengthen the autonomous legal position of children have always been rejected on the basis of a desire to protect children and to involve them as little as possible in legal proceedings against their parents. The possibility of appointing a guardian *ad litem* is also mentioned as a reason for not making further improvements. Although special guardians *ad litem* are increasingly being appointed by the court, case law research shows that such requests are also regularly rejected. Thus, there is no right as such in law for children to be represented by a guardian *ad litem*.

In other areas of law, the child does have the option of litigating independently. In administrative law, for example, children are allowed litigation if they can be deemed capable of giving a reasonable assessment of their interests. This means that every child is assessed on his or her specific capacity. In criminal law, the minimum age for criminal responsibility is twelve years old. However, children between twelve and sixteen years old can undertake certain procedural acts, such as calling witnesses. As long as the child is not yet sixteen years old, the powers in the criminal proceedings are also vested in his or her lawyer. As of sixteen years, children have full legal capacity in their own right. In some civil law proceedings (such as health law or labor

law), children from the age of sixteen are able to start proceedings independently. In these areas of law, the child seems to be granted more autonomy and less protection compared to family- and child protection law. This leads to a lack of clarity and a difference in legal status for children in the Netherlands, depending on the type of proceedings they are faced with.

From international standards it can be deduced that children who are confronted with legal proceedings are entitled to child-friendly proceedings and also have the right of access to justice and the possibility to challenge court decisions that are relevant to them. The unclear procedural position of children in the various proceedings seems to contradict the principles of relevant international standards, which emphasize the right to effective access to justice for children. Furthermore, it is doubtful whether family law proceedings in the Netherlands meet the requirements for a child-friendly system.

#### *Practice and current experiences with the legal position of children*

The empirical research shows that children do not often start a proceeding, with or without help. In the small number of cases that it does occur, it is usually in cases regarding custody and access rights. Judges also indicate that the possibility for children to litigate independently, for example by filing an appeal against an out-of-home placement in secure treatment setting, is rarely used. They also indicate that informal access to justice (this means that for some situations the child can request the court to take a decision, e.g. with regard to custody and access, but the judge has discretionary power to decide whether to proceed or to reject the request) is rarely used and is probably unknown to many children. This confirms earlier research results that pointed to unfamiliarity and the scarce use of the informal legal entry by children.

This study shows that requests from children through informal access to justice do not always lead to a judicial decision. This study also shows that the studied population of adolescents is hardly aware of the possibility of approaching a judge through informal channels. Almost all experts from the various professional groups who participated in this study believe that children are insufficiently aware of their procedural position and that this also applies to parents. Furthermore, a majority of the experts believe that children currently receive insufficient support during legal proceedings. In addition to the judges, the majority of the other experts also believe that the parents as legal representatives should not be the ones to represent the child in family and child protection proceedings and that representation of children in these proceedings is insufficient. Almost all experts from all professional groups believe that the possibilities of appointing a guardian *ad litem* to represent children should be broadened.

## CONCLUSIONS AND RECOMMENDATIONS

The findings from the legal part of this study lead to the conclusion that the formal procedural position, the right to be heard and the support of children in family and child protection proceedings deserve adjustment. With regard to the formal procedural position, there is a lack of a well-considered, accessible and clear system. The starting point that children are not able to autonomously participate in legal proceedings has numerous exceptions to the rule and civil law also deviates from the legal position of children in other areas of law. With regard to the right to be heard, it has been found that the legal exception to be able to hear children under the age of twelve at their request is hardly applied in practice. Each child should be enabled to be involved, directly or indirectly, in proceedings. In the Netherlands this is legally possible on the basis of the right to be heard in Article 809 Dutch Code of Civil Procedure. As this research shows there is no effective possibility to be heard for children younger than twelve years old. With regard to the support of children in family and child protection proceedings, it has been found that there is no guarantee for children that a request for the appointment of a guardian *ad litem* is granted. Also, the legal criterion of 'conflict of interests between the child and the legal representative (s)' is ambiguous and subject to different interpretations in practice.

The results of the empirical research also point in the direction of improvements that are needed for the child's right to be heard, the formal procedural position and the support of children in family- and child protection proceedings. First, on the child's right to be heard, one recommendation is to adjust the age limits. Almost half of the professionals indicated that they wished for a lower age limit. The adolescents and parents involved in this study also have a strong preference for lowering the age limit. Second, on the formal procedural position, the experts are positive about a change in civil procedural law for children, in which the law on parts should be amended. A large majority of experts do not agree that the main rule should be that children are competent in litigation and have *locus standi*. Just about all adolescents who participated in the investigation think it is important that children know that they themselves can write a letter to the judge. They are very divided about a possible extension of the formal legal entry and about the age from which this should be possible. A majority of the experts are of the opinion that children are currently insufficiently supported during proceedings. Many experts believe that the options for appointing a guardian *ad litem* should be broadened.

Finally, it can also be concluded from the results of relevant (neuro)psychological and pedagogical scientific research that the procedural position of children and their right to be heard in family- and child protection proceedings needs improvement. With regard to the child's right to be heard, the study shows that language comprehension and production of children is not an obstacle to lowering the current age limit of the child's right to be heard: around the age of four children are able to understand and produce com-

plex sentences. In the context of possible loyalty conflicts, it is also important that children from the age of eight understand that it is possible to experience both positive and negative emotions on one subject (or person). Since around this age the cognitive development of children has also undergone a major leap, especially with regard to logical reasoning, it is possible to hear children from the age of eight.

There are some important recommendations regarding the context of hearing children in court. If a lower limit of eight years is chosen, this does not imply that younger children do not have to be invited to express their opinion; after all, having a conversation about this is already possible from preschool or kindergarten. Given that there are still many differences between children between the ages of four and eight, it is necessary to offer these younger children more guidance during a child hearing. Indirect hearings through an expert who can take more time for a conversation and who is specialized in having conversations with young children may be an option. Although children often indicate that they want to be heard or give their opinion, this is not always done because of the assumption that hearing is perceived as burdensome or stressful and that young children are insufficiently resilient. A good context in which the child hearing takes place can ensure that (obstructing) tension and stress are reduced.

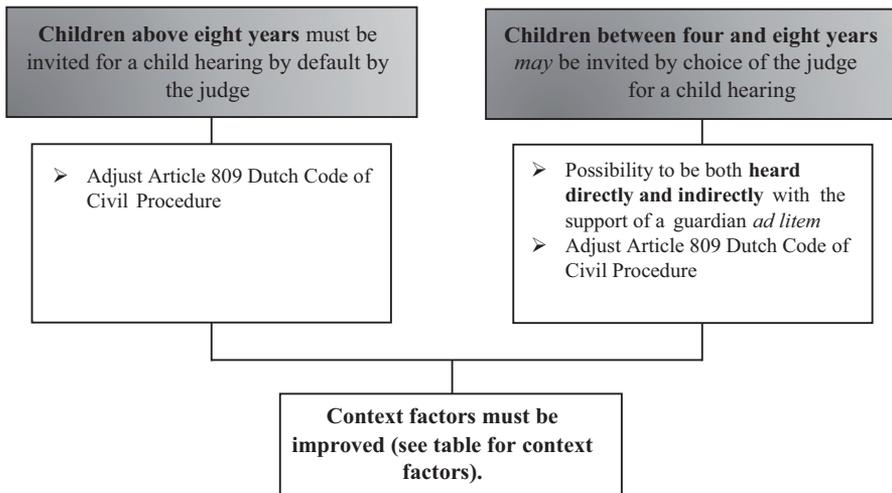
This study has made it clear that the research findings point towards an adjustment of the position of children in family and child protection proceedings.

#### *Improvement of the right to be heard*

With regard to the right to be heard, it is proposed on the basis of the research results that children from the age of eight are invited for a child hearing. In other words: lowering the age limit in Article 809 Dutch Code of Civil Procedure from twelve years to eight years (unless it concerns child support cases). Furthermore, it has been shown that children under the age of twelve have also the right to be involved in proceedings that concern them and they are generally able to express their opinion. In addition, the importance of a supporter for the child before, during and after the child hearing has become clear in this study. The possibility of taking a counselor to the child hearing should become standard practice, or at least be offered in advance (more than is currently the case) to each child, for example by mentioning this as an option in the invitation letter. The possibility should also be explored to make support by a guardian *ad litem* (more often) possible for children, who wish so, in these proceedings without strict requirements being imposed on them. It is important to clearly define the role of the guardian *ad litem*. At the moment it seems that the guardian *ad litem* has become an instrument of the judge (as an expert) instead of an advocate and litigator for the child. The guardian *ad litem* must support the child in the proceedings and express the view of the child as clearly as possible.

In addition, based on the research results, it is proposed to explore the possibility for the judge to hear children between four to eight years old. A

pilot procedure could be set up to test the feasibility of this proposal in practice. It is proposed that this group of children should be given the opportunity to be heard both indirectly and directly with the support of a guardian *ad litem* who is simultaneously responsible for the provision of information before the hearing and the child hearing and after the hearing for explaining the ruling, just like in the proceedings of international child abduction cases in The Hague.



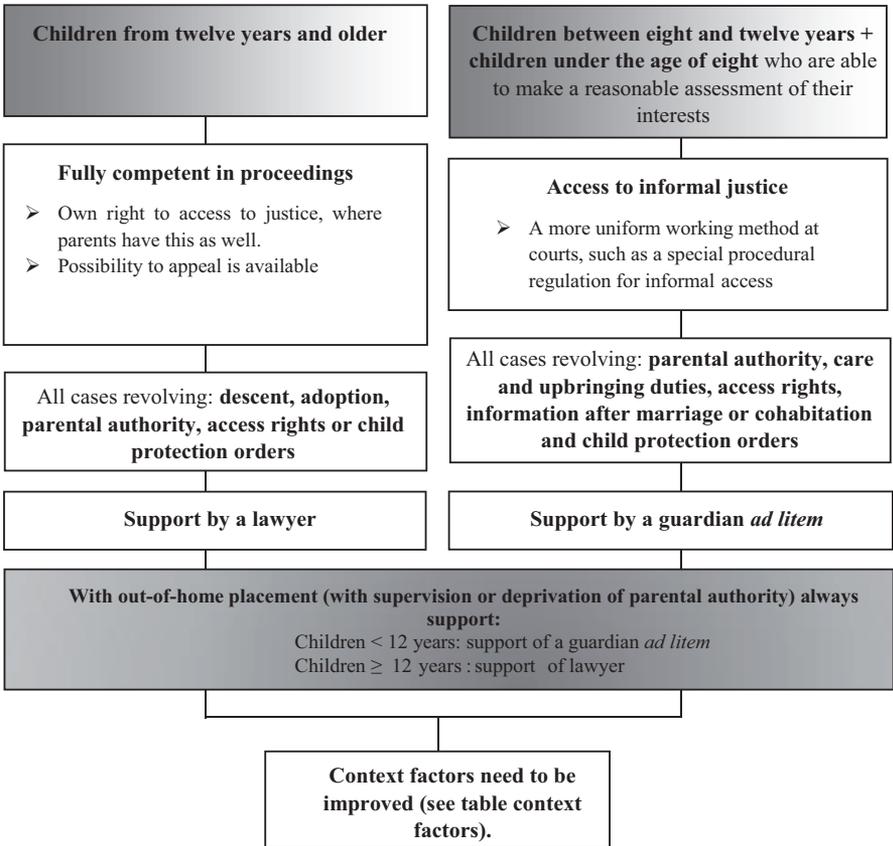
#### *Improvement of the formal procedural position*

Based on the research results, it is proposed that children from the age of twelve receive party status and their own legal access, wherever parents have this as well to issues related to parentage, adoption, divorce, custody, access rights, and child protection. This means that they can independently – without the intervention of a legal representative or guardian *ad litem* – initiate such proceedings and are also authorized to autonomously appeal a judgement. Children from twelve to eighteen years of age should be competent in litigation with regard to the aforementioned subjects and should have *locus standi*. This means that children have party status and can also exercise the corresponding rights independently. An autonomous legal position should also mean that children involved in such proceedings should be able to appeal independently from the age of twelve.

It is furthermore proposed that children aged twelve years and older who use their independent legal access to custody and child protection issues should be assisted by a lawyer. This lawyer represents the interests of the older child in which he or she expresses the view and wishes of the child. This lawyer also has the task of carefully informing the child about everything concerning the process. In addition, it is proposed that children aged twelve years and older who are faced with an out-of-home placement authorization under a supervision order or guardianship order should always be

assisted by a lawyer. Children under the age of twelve must be assisted by a guardian *ad litem*.

Moreover, it is proposed to introduce a new informal legal entry. Children aged eight to twelve must be able to use this informal access to all matters relating to custody, care and upbringing duties, access rights, information after marriage or cohabitation, and child protection orders. For children under the age of eight, this informal access to justice must also be available when they are capable of a reasonable evaluation of their interests. Children under the age of twelve who rely on this informal access to justice should be assigned a guardian *ad litem*. The guardian *ad litem* can properly inform the child about a possible proceeding and can discuss in advance whether the child oversees the consequences of such a decision and wants to continue this on his own initiative. The extension of the informal legal entry only seems sensible when the working method for the informal legal entry becomes more uniform. For this purpose, for example, a special procedural regulation or professional standard for the informal access to justice could be developed.



The above does not alter the fact that, as a greater ambition for the future, it is desirable that the procedural position of children in all areas of law should be thoroughly examined by an integrated approach.

*Improving context factors for effective participation*

This study has shown that for effective participation of children in family- and child protection proceedings it is not only important that changes are made to the age limit for the right to be heard and the independent access to justice for children, but it is also necessary to improve context factors.

First of all, it is proposed to conduct further research into what exactly is meant by “child-friendly”, partly from the point of view of different stages of development of children with corresponding different needs with regard to child-friendly proceedings. Continuous attention should also be paid to effectively informing children about their rights with regard to family- and child protection proceedings. In line with this, children must also be better informed prior to the hearing about the content of the proceedings and the general course of affairs at the court.

Besides, it is proposed that the court summons children in a child-friendly manner; further investigation would be desirable for (more modern) alternatives to the invitation letter from the court. It is also suggested to introduce child-friendly waiting rooms and meeting rooms in court. More attention should be paid in this context to unwelcome encounters between children and other involved parties in court proceedings.

Another proposal is to make sufficient time available for a conversation between a child and a judge; this means that investments must be made in a longer period of time for these child hearings. Continuous attention and investment is also needed for training and regular education for judges who hear children in court. In every court ruling that concerns family or child protection decisions, it must be made clear how the opinion of the child has influenced the court decision. Finally, child-friendly case-law – the writing of a separate recital in the judgment specifically addressed to the child or the writing of an entire judgement in child-friendly language – should be encouraged.

CONTEXT FACTORS:

*Child-friendliness:*

- Further research to conduct what is exactly meant by “child-friendly”.

*Before the child interview and hearing:*

- Child-friendly information available about the child hearing and the formal procedural position of the child (e.g. through movie clips with educational purpose) and adequate provision of information before the child hearing by an adult
- Summoning of the court in a child-friendly manner

*During the child interview and hearing:*

- Child-friendly waiting rooms and child-friendly meeting rooms where the child hearing takes place and special attention to unwelcome encounters between children and other involved parties in court proceedings;
- Enough time available for the child hearing
- Training and regular education for judges who hear children in court

*After the child interview and hearing:*

- More attention to the feedback of the decision to the child;
- It must be made clear in every decision in what matter the opinion of the child has influenced the court decision;
- Child-friendly case law should be encouraged.

*From communication towards effective participation*

This study reaffirms that the procedural position of children in family and child protection cases before the civil court must be thoroughly improved. This applies both to the child’s right to be heard and to the informal access to justice and competence for proceedings of children, and also to the support of children in such proceedings. Previous research findings pointing in the same direction have been confirmed in this study by neuropsychological and pedagogical insights. These insights, together with relevant international standards on the right of children to be heard in all proceedings, have made it clear that restraint with regard to the procedural position of children is no longer appropriate. In recent years, important first steps have been taken based on case law, as a result of which children in family and child protection proceedings are no longer regarded as mere decorations but where communication with children occurs. Now the necessary step must be taken from communication to effective participation of – also young – children in family and child protection proceedings.