HEARING CHILDREN IN THE LAW

[1] There has been a significant change in the way the law treats children over the last twenty five years. At one time children were generally seen as the helpless subjects of decisions by adults. What the grown ups said, or decided, was good for them, was what should happen. Increasingly children have been recognised by the law as having an important contribution to decisions. They are no longer inevitably viewed as the subjects of decision-making, but may be participants in the making of decisions.

United Nations Convention on the Rights of the Child, article 12

[2] The United Nations Convention on the Rights of the Child has been one of the main driving forces for change in the law. On 20 November 1989 the United Nations General Assembly adopted the Convention on the Rights of the Child. It has since been ratified by 194 countries, every member of the United Nations save the United States of America and Somalia. The United Kingdom ratified the Convention on 16 December 1991. Ratification commits a country to bringing its law into conformity with the Convention. The Convention has 54 articles which focus on the rights of children, from a basic right to life, to rights in terms of education and rights under the criminal law. When it comes to legal proceedings concerning children the best interests of the child is to be the primary consideration. The most often quoted article however is probably article 12. This provides:

> "(1) States Parties shall assure to the child who is capable of forming his own views the right to express these in all matters affecting the child, the views being given due weight in accordance with the age and maturity of the child;
> (2) For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

[3] The Children (Scotland) Act 1995 gives statutory effect to the Convention. There is a theme running through the Act which is based on article 12. The theme bears first of all on parents. This can be seen in section 7 which states:

> "A person shall, in reaching any major decision which involves—
> (a) his fulfilling a parental responsibility ...; or
> (b) his exercising a parental right...,

have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity..."

[4] It then goes on to apply article 12 to courts making decisions about parental responsibilities and parental rights, including residence and contact. This is can be seen in section 11(7)(b) which says:

"... in considering whether or not to make an order under subsection (1) above and what order to make, the court—

... (b) taking account of the child's age and maturity, shall so far as practicable—

(i) give him an opportunity to indicate whether he wishes to express his views;

(ii) if he does so wish, give him an opportunity to express them; and

(iii) have regard to such views as he may express."

[5] The theme continues into the part of the Act relating to children's hearings and court decisions in the context of hearings, where in section 16(2) there is an identical duty. This duty has been carried forward into the Children's Hearings (Scotland) Act 2011, where it is found in section 27 and will be applied as and when the new Act comes into force. There are similar provisions in adoption legislation, now found in the Adoption and Children (Scotland) Act 2007, sections 14 and 84. Education authorities providing school education have a duty to consult children's views in terms of the Standards in Scotland's Schools etc, Act 2000, section 2(2). This is expressed in general terms in section 2, but given particular effect elsewhere, for example requiring schools to consult pupils in relation to school development plans. More recently the Schools (Consultation) (Scotland) Act 2010 includes pupils as relevant consultees in relation to proposals to close schools or to make other material changes to the provision of education. Article 12 has had a far-reaching impact on the law relating to children.

[6] Clearly a baby is not going to express a view. The law takes account of child development by requiring that the child's age and maturity is taken into consideration. Views are only to be taken where this is reasonably practicable taking account of the child's age and maturity. In legislation relating to parental responsibilities and paretal rights a child twelve years of age or more is presumed to be of sufficient age and maturity to form a view. This does not mean that a child under the age of twelve lacks the age and maturity to form a view. Many children under twelve will have the age and maturity to be consulted. Whether or not this is so is a question of fact in each case. The closer the child is to the age of twelve the more likely it is that he or she can form a view and should be given the opportunity to express that view. The Children (Scotland) Act 1995 is careful to avoid an intrusive

approach. Children are not required to express their views. They must be given the opportunity.

Children's views in court

[7] It is one thing to recognise the principle that children should be given the opportunity to express views. It is another to put the principle into practice. When Part I of the Children (Scotland) Act 1995 (the part that relates to parental responsibilities and parental rights) was implemented the court rules were changed to provide for a Form (Form F9 in the sheriff court and Form 49.8-N in the Court of Session) to be sent to children, asking certain questions. The form is mandatory. It must be sent unless the court dispenses with sending the form on the basis that this would be inappropriate. Reasons why this is the case have to be set out in the pleadings.

[8] As stated in Form F9 the questions are:

> "QUESTION (1): DO YOU WISH THE SHERIFF TO KNOW WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?
> QUESTION (2): WOULD YOU LIKE A FRIEND, RELATIVE OR OTHER PERSON TO TELL THE SHERIFF YOUR VIEWS ABOUT YOUR FUTURE?
> QUESTION (3): WOULD YOU LIKE TO WRITE TO THE SHERIFF AND TELL HIM WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?"

Setting on one side the patronising use of capital letters (clearly no teacher was consulted), and the implication from modern usage that the words are being shouted at the child, the form is formal and rather off-putting. The language could do with some more thought. The child is presented with several unfamiliar concepts in the same sentence. Even "views" may suggest to a child something on a front of a postcard. The form is printed only in English and thought needs to be given to translation where the child's first language is not English. The best that can be said for it is that it gives the freephone number of the Scottish Child Law Centre. On the other hand this is a genuine attempt to satisfy article 12. And amazingly some children do respond.

[9] The sheriff court rules and the rules of the Court of Session reinforce the requirement to have regard to children's views (see OCR 33.19 and RCS 49.20). Where the child has returned the form, or otherwise indicated a wish to express views, the court should not grant any order unless an opportunity has been given for the views of the child to be obtained or heard. The court should order such steps to be taken as the sheriff or the judge considers

appropriate to ascertain the views of that child. No order should be granted in a family action, in relation to any matter affecting a child who has indicated his wish to express his views, unless the court has given due weight to the child's views, having due regard to his age and maturity.

[10] Form F9 was considered by the Inner House in *S v S* 2002 SC 246. In *S v S* parents were in dispute about whether the mother should be able to take her son to Australia while she worked in a promoted position for a period of up to three years. The action commenced when the boy was seven. Both parents considered he was too young for his views to be sought. The requirement to send the relevant form was dispensed with. The litigation dragged on until the boy was nine, when the sheriff decided the boy could go. The father appealed to the sheriff principal and then to the Inner House, arguing (contrary to his original position) that it was an error of law not to seek the views of the child. The Inner House agreed.

[11] In *S v S* the judges considered that the lapse of time between the start of the action and its conclusion meant that there had been a material change in circumstances. The court had a duty to give the child an opportunity to express a view at the time the order was made, and if necessary should do so *ex proprio motu* (ie of the court's own volition, and without being asked). The only limitation on giving an opportunity to the child to express a view is practicability. If it is practical to ask the child, the child must be asked. And sending the court form is not the only way of asking. The Inner House mentioned that the sheriff or judge could see the child in chambers. This is the accepted method in many European countries, albeit those countries will often have an inquisitorial as opposed to adversarial system of justice. In S v S the court also mentioned the possibility that the child's views, or lack of them, could be made known to the court through the agency of a private individual who was well-known to the child or perhaps through a child psychologist. If, by one method or another, it is "practicable" to give the child the opportunity of expressing views, then the only safe course, according to the Inner House , is to employ that method. Less formal methods will, of course, be appropriate if a formal approach would risk upsetting the child. In S v S the court sent a court reporter to see the child. The report stated that the child did not wish to go to Australia.

[12] Litigators forget the requirement to seek children's views at their peril. There have been other cases where matters have gone awry because children's views were not obtained. For example in *H v H* 2000 FamLR 73 the sheriff decided to dispense with intimation to the child. No-one had asked for this, but the child suffered from Asperger's Syndrome and Tourette's Syndrome. The child was eleven at the date of proof. The sheriff ordered that he should

have contact with his step-father for six hours once a week. The child was very unhappy about the order. He was allowed to enter the process as a party minuter, and to lead additional evidence in the course of appeal to the sheriff principal, to show that the effect of making him attend the contact were likely to be adverse. His appeal was allowed.

[13] On the other hand there may be a nuanced approach. Some issues are more complex than others. Children may be able to understand one aspect of an application, but not another. Contact may be a straightforward matter. Other matters are less straightforward. As Sheriff Morrison said in *Treasure v McGrath* 2006 FamLR 100 "The dividing line between listening to a child and doing what a child wants can be a thin one .... I think Edie's views expressed to Dr Edwards are relevant to the issue before me. They disclose her feelings about her father and her reasons. I think, though, that a ten year old is unlikely to comprehend all the aspects of parental responsibilities and rights. I do not consider it necessary, or appropriate, to seek to obtain Edie's views about the application for parental responsibilities and parental rights." The sheriff proceeded on the basis of the child's views on contact, and refused to grant parental responsibilities and rights to the father.

[14] Seeking the views of children brings its own problems. What does one do with the views when they arrive? The sheriff court rules (OCR 33.20) expressly allow documents recording views to be sealed in a confidential envelope, and available only to the sheriff. There are no express rules to this effect in the Court of Session, albeit a judge would no doubt order sealing in a confidential envelope if this were thought to be appropriate. *Dosoo v Dosoo* 1999 FamLR 80 was a sheriff court action where the views of the children were sealed and not released to the father. Albeit the Human Rights Act 1998 was not then in force, warning bells should have sounded. How could there be a fair hearing if those involved could not address all the material that was to be used as a basis for the decision? The point was taken in *McGrath v McGrath* 1999 FamLR 83. Sheriff Principal Bowen, who heard that case, recognised that all material had to be disclosed, unless disclosure involved a real possibility of significant harm to the child. He adopted the decision of the House of Lords in an adoption case, *In re D*, [1996] AC 593. The analysis by the House of Lords is rather more subtle than this, but starts from the same point, namely that there is a strong presumption in favour of disclosure.

[15] Having regard to children's views does not, of course, mean that those views are determinative. The Children (Scotland) Act 1995 makes the welfare of the child the paramount consideration (sections 11(7)(a) and 16(1)) and there are similar provisions in other legislation relating to decisions about children's safety and adoption. While regard

must be had to views, children may want something that would not be consistent with their welfare. So “my dad says that if we stay with him we can have a dog” may not assist in supporting the argument for a residence order in favour of the father (see *Ellis v Ellis* 2003 FamLR 77). There are particular problems where different children in the same family hold different views. Their views may be a factor, but cannot be determinative (see eg *H v H* [2010] CSOH 32, 2010 SLT 395).

[16] The requirement to offer children the opportunity to express views has been given impetus by international law. Council Regulation (EC) No 2201/2003 provides for enforcement of orders relating to parental responsibility, including contact, across the member states of the European Union. Such orders do not qualify for recognition and enforcement if they were given, except in case of urgency, without the child having been given an opportunity to be heard (arts 23, 41 and 42). There is a similar provision in the Hague 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, art 23 which will apply to enforcement between states that are not both members of the European Union.

Representation of children in court

[17] A requirement to take account of children’s views is not however a requirement to involve children as parties in legal proceedings. Their views can be presented without the children becoming directly involved. Section 11(9) of the Children (Scotland) Act 1995 expressly provides that the provisions relating to children’s views do not require a child to be legally represented, if he or she does not wish to be. The 1995 Act did however change the Age of Legal Capacity (Scotland) Act 1991 to allow children to become parties to legal proceedings and to be represented in those proceedings.

[18] The 1991 Act, in section 1, provides that children under the age of 16 do not generally have legal capacity to enter into any transaction. This general rule would prevent children instructing solicitors and entering proceedings, were it not for section 2, which sets out certain exceptions. The 1995 Act amendment introduced an exception for children who have a general understanding of what it means to instruct a solicitor in connection with any civil matter. A person of twelve years of age or more is presumed to be of sufficient age and maturity to have such understanding. Where a child has such understanding then he or she has legal capacity to sue, or to defend, in any civil proceedings (1991 Act, section 2(4A) and (4B)).

[19] These provisions are consistent with children's rights in terms of the European Convention on Human Rights. Article 8 of the Convention provides that everyone has the right to respect for his private and family life, his home and his correspondence. It is an important aspect of the right to respect for family life that a person is sufficiently involved in any decision-making process capable of affecting that family life, so as to afford protection to his or her interests (*Principal Reporter v K* [2010] UKSC 56, 2011 SLT 271). In the case of adults this will generally mean that the adult cannot be excluded from legal proceedings that may affect family life. There is a good argument that this also applies to children who are of an age and maturity to take part in those proceedings. Further article 6 of the Convention provides that in the determination of a person's civil rights and obligations he or she is entitled to a fair hearing. If a child requires legal representation in order to be effectively involved in decisions that touch upon fundamental rights then the law should allow that to take place. In the context of the children's hearing those rights may relate to family life, or the right to liberty in terms of article 5 of the Convention. In such cases article 6 is likely to require access to a solicitor (*S v Miller* 2001 SC 977).

[20] The changes to the Age of Legal Capacity (Scotland) Act 1991 making it possible for children to instruct solicitors and take part in proceedings have not always met with enthusiasm. In the first reported case, *Henderson v Henderson* 1997 FamLR 120, the sheriff disapproved and commented, "The court should normally be able to have regard to the views of the child without the child entering the process ..." This was followed by *Fourman v Fourman* 1998 FamLR 98 where the sheriff considered it "entirely appropriate" for a fourteen year old to be a party, albeit her evidence was presented by affidavit. The eleven year old in *H v H* 2000 FamLR 73 was allowed to enter proceedings at the appeal stage. A fourteen year old and his ten year old sister appealed to the Inner House of the Court of Session in *R v Grant* 2000 SLT 372, despite the fact that they had not previously been directly represented in proceedings commenced by the reporter to the children's hearing, and despite the fact that their interests had been represented by a safeguarder. In the recent case of *B v B* (unreported, 23 March 2011, Sheriff Principal Bowen) it was accepted that a child could become a party to proceedings between his parents, despite the fact that a curator *ad litem* was representing his interests. He disagreed with the curator and wanted his position to be advocated in court. His application was refused and his appeal failed, but chiefly because the court had already heard five days of proof, although the sheriff principal was also concerned that he would not cope with the pressures of being a party to the litigation. There are therefore limits to participation by children.

Conclusion

[21] The last twenty five years have produced some interesting developments in relation to the participation of children in legal decisions. A review of the cases, and a review of my own experience of children's cases, suggests that we could do better. There is scope for improvement in the way in which we facilitate the expression of children's views. We could be better informed by our colleagues in other disciplines as to how to go about implementing article 12 of the United Nations Convention on the Rights of the Child. The mark that our children may give us is "Good, but could do better."

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