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Hearing Children

"my dad says that if we stay with him we can have a dog"

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

[1] Do we really have to listen to children when making decisions about them? The answer to that question is yes. Whether or not we believe in equality for children, or think that justice demands that we listen, the law on the matter is settled. The die was finally cast in the United Nations Convention on the Rights of the Child. This Convention was adopted by the General Assembly of the United Nations on 20 November 1989 and ratified by the United Kingdom on 16 December 1991. Every member state of the United Nations has now ratified the Convention, save for the United States of America and Somalia. This Convention, unlike European Convention on Human Rights, does not have the force of law in the United Kingdom, but by ratifying the Convention on the Rights of the Child the United Kingdom, including Scotland, committed itself to bring its law into conformity with the Convention. For present purposes the most important article is article 12, which 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."

Children (Scotland) Act 1995, section 11

[2] In this presentation I propose to look at hearing children in the context of actions relating to parental responsibilities and parental rights. The Children (Scotland) Act 1995 required to put article 12 into effect. It did so by requiring parents to have regard to children's views (section 6), and then went on to require courts to have regard to article 12 principles, by stating in section 11(7)(b)

> "... 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."

S v S

[3] The Inner House of the Court of Session looked at this section in *S v S* 2002 SC 246. In S a mother wanted to take the parties' only child to Australia, where she was due to go on secondment for three years to take up a promoted post. Father objected. Neither wanted to tell the boy, who was only seven, about the dispute. The litigation dragged on until he was nine. His views were still not sought. The sheriff decided he could go. The father appealed. The sheriff principal refused the appeal. The father appealed again, to the Inner House of the Court of Session. By this time the child was rising ten and the father was founding on the failure to seek the boy's views. The Extra Division allowed the appeal. The following points emerge from their decision:

- The court requires to discharge its duty under section 11(7)(b) at the time the relevant order is made, and if necessary must do so *ex proprio motu*.

- So far as affording a child the opportunity to make known his views, the only proper and relevant test is one of practicability. At one extreme intimation may be given in form F9, but at the other a less formal method may be appropriate.

Practicability of seeking views

[4] When may it be impracticable to seek the views of the child? Some children are too young to have a view. One cannot ask a baby or a toddler whether she wishes the opportunity to express a view. Such a child is clearly not of an age and maturity where this would be practicable. If being asked for a view would be damaging for the child, because it might make the child think he was having to make a choice between parents, then that could make it impracticable to ask (see sheriff's decision in *G v G (Note)* 2003 FamLR 118), but some care would be required. There is no authoritative decision supporting lack of practicability in these circumstances. It may be dangerous to go back to the decision of Sheriff Gow in *C Petitioners* 1993 SLT (Sh Ct) 8, where the local authority could not complete a report in respect of a step-parent adoption because the child did not know that the mother's husband was not her father. The sheriff there held that it was not practicable to ascertain the wishes and feelings of the child. Lack of practicability is a question of fact, and in marginal cases it would be wise to seek expert assistance from a child psychologist.

Form F9

[5] The Extra Division in *S v S* indicated that practicability was more a question of how to seek a child's views than whether to seek the views. The sheriff court rules require intimation of a crave relating to parental responsibilities or parental rights in form F9 (OCR 33.7(1)(h)). The form may have been a radical advance when first drafted, but is now looking decidedly dated. In supposedly 'large and friendly letters' it states:

> **"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?"**

Children are not taught to read in capital letters, and all children now know that capitals in "txt" indicate shouting. There are too many ideas in one sentence. The form is printed only in English, albeit it could be translated for children in any particular case. It does need to be revisited, but in the meantime it is what we are supposed to present to children.

Court reporter

[6] A more sensitive approach would be to send someone to see the child. It would be possible for the court to appoint a reporter to see whether the child wished to express a view, and if so what that view might be. The power to appoint a reporter is lost in the mists of time, save for local authority appointments which are covered by the Matrimonial Proceedings (Children) Act 1958, section 11. Appointments are however covered in the ordinary causes rules at 33.21. The sheriff is required to direct the person who sought the appointment, or where a report is ordered *ex proprio motu* the pursuer/minuter to instruct the report and to be responsible in the first instance for the expense, subject to any order in relation to liability for expenses (1958 Act, section 11(5)). Reports can be expensive (see *O'Neill v Gilhooley* 2007 FamLR 15).

Other sources of views

[7] A further alternative may be to appoint a curator *ad litem* to represent the child's interests, and I will deal with this in more detail below. The Inner House in *S v S* thought there may be scope for a private individual who was well-known to the child to convey the child's views. In my experience this has been a disaster. Private individuals may not understand what is being asked of them. The court may be presented with, for example, a letter from a teacher who has tried to cover the issues at "Circle Time" and tells the court the outcome of the discussion. Psychologists do have their uses, and eliciting whether a younger child wishes to express a view and what that view may be, without causing distress, is a skill that a psychologist should be able to exercise, but again at a cost.

Sheriff to see child

[8] The sheriff or judge seeing the child in chambers is not a course to be adopted with too great alacrity. In *McG v McG* 2007 FamLR 62 the judge agreed that children aged 5 and 7 were too young to be interviewed. *W v W* 2004 SC 63 was a child abduction case, where one of the children was nine and a half. She objected to being returned to Australia. The judge interviewed her in chambers. He was criticised by the Inner House for proceeding on the basis of that interview. The First Division doubted that a judge, who is neither trained nor experienced in the techniques of interviewing and assessing children could assess the issues arising under the Convention. While that was a Hague Convention abduction case, there could be similar concerns about a sheriff trying to assess age and maturity for the purposes of section 11 of the Children (Scotland) Act 1995. In *X v Y* 2007 FamLR 153 a sheriff experienced in family law declined to see children, when one of the parties urged her to do so in relation to an assertion that they had 'lied' in expressing their views to a psychologist. Judges in other parts of Europe seem to have no difficulty in seeing children, but many of the legal systems in which they do so are inquisitorial, rather than adversarial.

Confidentiality of views

[9] One of the issues that arises in relation to children's views is confidentiality. A child may be reluctant to express a view if the parents are going to find out. The court rules (OCR 33.20) allow the child's views to be sealed up and available only to the sheriff. In *Dosoo v Dosoo* 1999 SLT (Sh Ct) 86, soon after this rule appeared, the sheriff was concerned that the children should be able to express their views freely, and to that end she considered that their views should to remain confidential. That decision cannot be regarded as good law. The House of Lords considered confidentiality of children's views in *Re D (minors)(adoption reports: confidentiality)* [1996] AC 593. Lord Mustill applied a proportionality test. Information in reports should be disclosed to parents unless there was a real possibility of significant harm to child, subject to a test of the overall interests of child in having the material properly tested, weighed against the interests of the parent in having the opportunity to see and respond to the material taking into account its importance to the issues. Non-disclosure should be exceptional. Sheriff Principal Bowen adopted a slightly simplified version of this test in *McGrath v McGrath* 1999 SLT (Sh Ct) 90. These cases pre-date implementation of the Human Rights Act 1998, which puts beyond doubt that the child's views should be disclosed to the parents, save in extreme and unusual cases. The words "blatant infringement of article 6" come to mind. This is language used by the sheriff principle in an Aberdeen case, where the sheriff had acted on a psychologist's report which had not been disclosed to the parents (*A v B* 2011 FamLR 76).

Children's evidence

[10] One of the reasons why it is important that children's views are available to parties is that the views are part of the evidence in a case. Children may also have important evidence about the facts. They no longer have to give evidence in person. It took a five judge bench in

T v T 2001 SC 337 to decide that hearsay of children was admissible in civil proceedings without calling the child to prove that she know the difference between truth and lies. Affidavits of children are competent, but require to be carefully drafted. In *M Petitioner* 2005 SLT 2, which was admittedly an abduction case, the judge was inclined to place weight on a the affidavits of a 12 year old on the basis that they had been prepared by experienced solicitors acting for him, not his mother and there were "a number of passages in them which appeared to be an attempt to record accurately S's own language."

[11] If children do give oral evidence, the so-called "competency test" has now been abolished altogether by section 24 of the Vulnerable Witnesses (Scotland) Act 2004. The court "must not" take any step to establish whether the witness understands the difference between truth and lies. If children do give evidence in person special measures are available in civil proceedings. These are the same as for criminal proceedings, namely a supporter and screens or CCTV. It may be easier to use a commission to take the evidence of a child in civil proceedings. A party intending to cite a child witness must lodge a child witness notice. The views of the child and parent should be sought in relation to the special measure to be adopted. Ascertaining whether a vulnerable witness is to be called at the proof is one of the matters to be covered at a child welfare hearing under OCR 33.22A.

Relevance of child's views

[12] Having the views of the child can be a mixed blessing. Children's views are not determinative of the outcome of a case. In some cases they may weigh heavily, in others not. Sheriff Morrison commented 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..." On the other hand in *Perendes v Sim* 1998 SLT1382 Lord Osborne made a decision about contact that was not consistent with the views of the child. He said "it appears to me to be important also to recognise what I consider has been established, that is to say that the current views of the children on this matter are very largely the product of the respondent's determination to cut the petitioner out of their lives..." And in *Ellis v Ellis* 2003 FamLR 77, referred to in the title to these notes, the child did not get his dog, or at least if he did it was not because he was living with his dad. The court may be faced with a particularly acute difficulty where different children in the same family hold different views (see eg *H v H* [2010] CSOH 32, 2010 SLT 395). In that case one child wanted to stay with her mother in Glasgow and the other wanted to return with his father to Australia. The judge acknowledged that views were not decisive, but were a factor that he weighed in allowing one child to stay and the other to go. Views are relevant, but the test applied by the court remains the welfare of the child as the paramount consideration.

Potential for appeal if views not considered

[13] If views are not considered, then there can be unwelcome consequences, as the mother in *S v S* discovered. The court may dispense with intimation to a child, with the best of intentions, but failure to obtain views may abrogate the final decision. 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. After 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.

Difficulties of enforcement if views not considered

[14] Not only may there be a successful appeal, but an order secured without taking the views of the child may be unenforceable, if the case has, or comes to have, a European dimension. 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). If it becomes necessary to complete a certificate in order to secure direct enforcement, one of matters covered is confirmation that the child was given the opportunity to be heard. There is a similar principle 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.

Curator *ad litem*

[15] The court may go further than simply hearing the child, and allow representation of the child in the proceedings. A curator *ad litem* may be appointed. A curator is not strictly speaking a representative of the child. The curator represents the child's interests, which will mean forming a view about the best interests of the child, and advocating that view in the course of the proceedings. There is no statutory basis for the appointment of a curator in proceedings relating to parental responsibilities and parental rights (as opposed to adoption and permanence orders, where there is a strictly prescribed role in terms of the court rules). The basis for appointment is common law. There has been no thorough review since the thirteen judge decision in *Drummonds Tee v Peel's Tee* 1929 SC 484, where the court decided that it is competent to appoint a curator ad litem to a pupil, called as defender in an action, for whom appearance has not been entered. A cause may be commenced in the name of a child and a curator may be appointed to continue the action (*Kirk v Scottish Gas Board* 1968 SC 328, cf person who lacks capacity due to mental disorder *Moodie v Dempster* 1931 SC 553). This is the slender basis that underpins the modern practice of appointing curators *ad litem* to children in family actions. There are no court rules to follow, but if the analogy of a defender with a mental disorder is followed (OCR 33.16) a curator may lodge defences (or other pleadings), or a minute stating he/she has no intention to lodge pleadings, but may appear at any time to protect the interests of the child. This is consistent with OCR 39.1 which requires the pursuer to be responsible for fees and outlays in the first instance unless the court otherwise directs. This continues until the curator lodges the minute or decides to instruct or adopt pleadings after which he/she would require legal aid or other funding. This may be restricted to expenses of representation, as opposed to the work of the curator who will probably consider it appropriate to make personal inquiries and to be present in court.

Child as a party to the action

[16] The most direct way in which the court may hear a child is where the child enters the process as a party to the action. The Age of Legal Capacity (Scotland) Act 1991 was amended by the Children (Scotland) Act 1995 to allow children to be represented and appear as parties, in appropriate cases. Children under the age of 16 would not normally have such capacity, but new subsections were inserted in section 2 as follows:

> "(4A) A person under the age of sixteen years shall have legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; and without prejudice to the generality of this subsection a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding.
> (4B) A person who by virtue of subsection (4A) above has legal capacity to instruct a solicitor shall also have legal capacity to sue, or to defend, in any civil proceedings."

[17] The changes did not meet with immediate and universal approval. In the first reported case, *Henderson v Henderson* 1997 FamLR 120, Sheriff Bell clearly disapproved. He commented, "The court should normally be able to have regard to the views of the child without the child entering the process ..." The following year a different stance was taken by Sheriff Morrison in *Fourman v Fourman* 1998 FamLR 98. He 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. In *R v Grant* 2000 SLT 372A fourteen year old and his ten year old sister appealed to the Inner House of the Court of Session in relation to a referral to the children's hearing, despite the fact that they had not previously been directly represented in the proceedings commenced by the reporter to the children's hearing, and despite the fact that their interests had been represented by a safeguarder.

[18] The latest chapter is the recent case of *S (a child)*, *B v B* (2011 FamLR issue 6 – to come). This was a case where there had been five days of proof in a contact action, in December 2009. The child, who was 9 years old, had a curator *ad litem*, but disagreed with the curator who thought it was in his best interest to have contact with his father. The child wanted to be a party so that his views could be advocated. The sheriff refused to allow him to minute into the process, partly because it was thought that this would result in discharge of the curator. By the time the matter came before the sheriff principal parties had agreed that both the child and the curator could competently be in the process. Sheriff Principal Bowen accepted that a child could become a party to proceedings between his parents but refused to allow this to happen after five days of proof, given the potential disruption to the proceedings. He also expressed a real doubt about whether the boy could be expected to give instructions other than of a restricted nature and even more doubt as to whether it was fair, or in his interests, to expect him to cope with the pressures of being a party to the case.

Children's rights to involvement and representation under ECHR

[19] That is all very well, but children as well as adults have rights in terms of article 8 of the European Convention on Human Rights. Article 8 gives "everyone" the right to respect for private and family life. 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 his family life, so as to afford protection to his interests. We were reminded of that by the Supreme Court last December, in relation to unmarried fathers in *Principal Reporter v K* [2010] UKSC 56, 2011 SC (UKSC) 91). 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 such cases article 6 is likely to require access to a solicitor (*S v Miller* 2001 SC 977).

Conclusion

[20] Scots law and procedure has changed over the years, to give effect to article 12 of the United Nations Convention on the Rights of the Child. We have dusted down some old remedies and established some new ones. Hearing children is not however easy. It introduces new dilemma and difficulty into proceedings. These are however worthwhile challenges and ones that we are required to face up to and grapple with.