

**EDINBURGH SHERIFF COURT
SEMINAR FOR FAMILY COURT PRACTITIONERS
10 OCTOBER 2011**

REPORTERS AND CURATORS AD LITEM

[1] Legal basis for ordering reports

- May derive from Court of Session power to order a report into the facts in petition procedure? See old cases *Mitchell v Wright* (1905) 7F 568, remit to sheriff to inquire into facts and report to Court of Session; *Walker v Cuthbertson* 1921 1 SLT 192, remit to Lord Ordinary to report to Inner House.
- Matrimonial Proceedings (Children) Act 1958, s 11 allows appointment of a local authority (extended to all actions relating to care and upbringing of children by Children (Scotland) Act 1995, which repealed separate provision in s 12 of Guardianship Act 1973).
- Now recognised practice in sheriff court – see OCR 33.21.

[2] Reason for ordering reports

- Adverse comment in older cases on using reports as a substitute for party making own inquiries (*Wallace v Wallace* 1963 SC 256 – an attempt to use as “cheap and convenient private inquiry agents”) or recovering medical reports by Commission and Diligence (*Hardie v Hardie* 1993 SCLR 60). No point if proof imminent as court requires to make own assessment (*Kristiansen v Kristiansen* 1987 SCLR 462; *Oliver v Oliver* 1988 SCLR 285).
- Older cases out of date since Civil Evidence (Scotland) Act 1988, s 2, makes hearsay admissible (see *Glaser v Glaser* 1997 SLT 456) and Children (Scotland) Act 1995 allows sheriff to make orders *ex proprio motu*, with requirement to consider children in divorce under s 12. Law now consistent with commitment to children’s rights in UNCRC. Procedure has become more flexible, with introduction of child welfare hearing. Final decisions may be taken at child welfare hearings on the basis of reports (*K v K* 2004 FamLR 25). Reports should be taken into consideration when making interim or final orders (*Bailey v Bailey* 2001 FamLR 133). Where report ordered, application should not be determined until the report is lodged (OCR 33.21(6)).
- There has been historic resistance to citing reporters as witnesses. There is an old Court of Session Practice Note (6 June 1968) preventing a reporter who has furnished a report under s11 of the 1958 Act from being cited, unless the Court requires appearance. The same applies as a matter of practice in the sheriff court (*Bailey v Bailey, supra*).
- Reports are now a useful tool for provision of information direct to the sheriff. While this is of particular assistance at the interim stage, reports may be relevant to final orders and reporters may (exceptionally) be asked to give evidence.

[3] Contents of reports

- Older authorities discouraged any view about disposal of the case (*MacIntyre v MacIntyre* 1962 SLT (Notes) 70). Practice had changed by 1984 when Guidelines for reports were produced by Scottish Office CRU.
- Style now generally follows the general format:
 - Interlocutor
 - Persons interviewed and documents perused.
 - Details of child
 - Brief summary of events to date, including information about residence, contact
 - and nature of any dispute
 - Information to emerge from inquiry
 - Whether child wishes to express a view and if so what that view is.
 - Conclusions based on information in report
 - Recommendations
- Confidentiality – information in report should be disclosed to parents unless real possibility of significant harm to child, subject to test of overall interests of child on basis of proportionality, weighed against interest of parent taking into account importance of material (*Re D (minors)(adoption reports: confidentiality)* [1996] AC 593; *McGrath v McGrath* 1999 SLT (Sh Ct) 90; cf *Dosoo v Dosoo* 1999 SLT (Sh Ct) 86) – matter for court.

[4] Expenses of report

- OCR 33.21– sheriff to direct person who sought the appointment, or where *ex proprio motu* the pursuer/minuter to be responsible in the first instance (solves problem in *Di Resta v Di Resta* 1991 SCLR 865). Assumes can resolve liability in order for expenses – but that may not be possible if other party legally aided (*O'Neill v Gilhooley* 2007 FamLR 15).
- The solicitor who instructs the report is personally liable for the fee (*Beaumont, Petitioner* [2006] CSIH 27), subject to payment by SLAB.
- There is uncertainty in relation to potential for taxation (Matrimonial Proceedings (Children) Act 1958, s 11(5) says expenses of report are part of the expenses of the action and refers to certification of the amount of expenses incurred by local authority “or any other person appointed under this section”, but see *O'Neill v Gilhooley supra* where sheriff principal thought no taxation possible cf *Aberdeen Council, Petitioners* 2006 FamLR 22 where adoption curator’s expenses taxed).

[5] Curator ad litem

- No statutory basis in actions relating to PRR (cf adoption, where role prescribed by court rules).
- Basis in general law - *Drummonds Tee v Peel's Tee* 1929 SC 484 (13 judge decision) to the effect 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).

- A modern practice of the family court which has not been the subject of any detailed or authoritative analysis in this context. Involves representation of child's interests of child. A curator may continue even if the child enters the process (*Re S, B v B* 2011 FamLR - issue 6).
- If the analogy of a defender with a mental disorder is followed (OCR 33.16) then 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. OCR 39.1 provides that the pursuer is responsible for fees and outlays in the first instance, unless the court otherwise directs, and that 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 (but this may be restricted to expenses of representation, *cf* the work of the curator *per se*). Specific order in respect of expenses may be helpful.

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