"A child is, after all, a child": ascertaining the ability of children to express views in family proceedings

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Introduction

Family lawyers have for decades wrestled with practical, ethical and academic difficulties surrounding the expression of views by children in family disputes. With some frequency Scottish courts have observed that a number of welfare based factors can affect the ability of children to participate in proceedings. These factors, which are diverse, have been recognised in most jurisdictions and can include age, mental illness, distress and undue influence. As Sir Thomas Bingham observed in Re S (A Minor) (Independent Representation) [1993] Fam 263: “a child is, after all, a child. The reason why the law is particularly solicitous in protecting the interests of children is because they are liable to be vulnerable and impressionable, lacking the maturity to weigh the longer term against the shorter, lacking the insight to know how they will react and the imagination to know how others will react in certain situations, lacking the experience to measure the probable against the possible.”

An overview of judicial rationale, relevant to ascertaining the child's ability to express views, is given in this article. While Scots law has for some time been static in respect of certain issues arising, recent statutory developments and existing English precedent are likely to generate fresh concerns and so are deserving of consideration.

The views of children: a familiar starting place

International provisions

Article 12 of the UN Convention on the Rights of the Child is the international benchmark for considering the child's right to express views in the context of relevant family, and indeed any other, proceedings. It provides:

“(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child 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.” (Italics added).

Even before considering the domestic operation of art 12, a number of observations may be made.
For example, how independent must a child's views be before these can rightly be termed the child's own views? Surely assuring anyone the right to express an opinion, without restraint, about “all matters” capable of affecting them is an unrealistic, onerous and potentially expensive promise. The lack of specific age guidance permits states considerable freedom in determining when a child may legitimately express views, and how much sway those views should hold. Further, states need only provide a child with an opportunity to express a view in one of the ways outlined in art 12(2). The Convention obligation might thus be satisfied without affording the child any prospect of personally, or directly, voicing an opinion or, indeed, instructing an independent representative.

In addition to the considerations arising from the expression of art 12 other points must be borne in mind. It has been said that UN Convention rights fall into three distinct categories: (i) rights which protect children (e.g. the right to life, to be raised by parents); (ii) rights which provide for children (e.g. the right to identity, education); and (iii) rights which allow for participation (e.g. freedom of expression, access to information and state services). Accordingly, the right to express a view, which is a participative right, must be balanced against these other rights and, in particular, those which protect the child's welfare. A key welfare provision is found in art 3(1) of the UN Convention: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Article 3 does not state that the welfare of the child need be the primary, or paramount, consideration.

*S.L.T. 122 However, the Convention provides that the child's views are just one of a number of factors to which regard should be given when childcare decisions are made. And, many of the welfare based factors falling to be considered by domestic courts can be objectively determined with far more ease than the child's views.

**Domestic provisions**

Much of the expression and the spirit of art 12 have been preserved by domestic statute, and a brief overview is here given of the relevant legislation. Part 1 of the Children (Scotland) Act 1995 provides that children (persons under 16) should be able to express views in two situations:

1. Behind closed doors (s 6(1)(b)): this is a private duty owed by the parent, carer or any other “person” reaching a “major decision” in the fulfillment or exercise of parental responsibilities and rights. Depending on the child's “age and maturity”, and practicability, regard must be given to the child's views. A child aged 12 or over is “presumed” capable of expressing a view. This section raises some difficult questions, including how to determine what constitutes a “major decision” and how society might police the expression of children's views in such situations, particularly when most Scottish families are unfamiliar with the terms of the 1995 Act.

2. The s 11 order welfare test (s 11(7)(b)): this public duty is imposed upon courts in family proceedings. Section 11(7) expressly provides that children should be afforded the opportunity to indicate whether they wish to express views and be given assurance that those views will, again in so far as practicable, be taken account of. The extent to which expressed views are given “regard” depends on the child's age and maturity. It can be assumed that court proceedings about childcare arrangements are “major decisions”. Section 11(9) expressly provides that nothing in s 11(7)(b) requires a child to instruct a solicitor if he or she does not wish to do so and s 11(10) provides that a child aged 12 or more should be presumed competent to express a view or, as the case may be, to confirm she does not wish to do so.

Recently added to these provisions, by virtue of the Family Law (Scotland) Act 2006, is the new s 11(7A-E) which concerns the protection of children from “abuse … or the risk of any abuse”. The definition of abuse is intentionally vague and includes “any … conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress.” There is, accordingly, scope for the confusion, anxiety or distress suffered by a child as the result of failure to ascertain or give due weight to her views to constitute “abuse.”

Finally, s 2(4A) of the Age of Legal Capacity (Scotland) Act 1991 allows the “competent” child to instruct a solicitor, either to correspond with adult parties' solicitors on his behalf or to minute into proceedings. The section provides a child may instruct a solicitor in connection with “any civil matter” as long as he has a “general understanding of what it means to do so.” The 1991 Act creates a statutory presumption that once a child has reached the age of 12 he will be competent to instruct.
It might be said that domestic legislation is conservative in its approach to the age at which children may participate in family disputes and decisions by expressing views. Statute also creates a dual presumption that expressing an opinion worthy of “regard” coincides with the age at which a child is capable, independently, of instructing a legal representative. In more recent practice, however, a distinction has emerged between children perceived as possessing ability to express legitimate views and, on the other hand, children who possess the capacity to instruct their own solicitor. While courts afford children as young as five or six the opportunity to voice an opinion, some judicial unease is observable in situations where children under the age of 12 instruct solicitors to enter into family proceedings on their behalf (see, e.g., Henderson v Henderson, 1997 Fam LR 120; and C v McI, 2005 Fam LR 36).

Ascertaining the ability of children to express views

The general position

Article 12 of the UN Convention provides no guidance on how states should determine whether a child “is capable of forming his or her own views.” The leading authority in Scotland remains Shields v Shields, 2002 SC 246; 2002 SLT 579, in which the Inner House observed: “so far as affording a child the opportunity to make known his views, the only proper and relevant test is one of practicability. Of course how a child should be given such an opportunity will depend on the circumstances of each case and, in particular, on his or her age.” (Italics added). Lord Marnoch, who gave the opinion of the court, commented: “if, by one method or another, it is ‘practicable’ to give a child the opportunity of expressing his views, then, in our view, the only safe course is to employ that method. What weight is thereafter given to such views as may be expressed is, of course, an entirely different matter.”

*S.L.T. 123 The task of ascertaining a child's ability to express a view or instruct a representative, often falls, certainly in the first instance, to a family practitioner interviewing the child. Case law indicates it is unlikely solicitors would be criticised for representing children around or marginally below 12 years of age, even where the child is generally distressed or where some allegations of inappropriate parental conduct exist (see, e.g., Fourman v Fourman, 1998 Fam LR 98; Mabon v Mabon [2005] EWCA Civ 634; and Re C (A Child) (Appointment of Guardian) [2005] EWCA Civ 300).

However, circumstances may be such that “practicability” suggests a child either should not express a view or should not instruct a solicitor. Four common scenarios are identified and discussed below. These include: (1) the manipulated or unduly influenced child; (2) the disturbed child; (3) the child with a disability; and (4) the underage child. The tension between advocating the child's right to express a view and imposing upon her what objectively appears to serve her best interests is particularly conspicuous in such cases. While contemporary perceptions of what is normal in the context of family breakdown have undoubtedly impacted upon the approach adopted by British courts in recent decades some useful (and durable) judicial observations have been made in respect of each of these scenarios.

1. The manipulated or unduly influenced child

This is perhaps the most common “problem” child client encountered in practice. Although English courts at times tend towards a more paternalistic view of the child's participation in family proceedings, in Re H (A Minor) (Guardian ad litem: requirement) [1994] Fam 11, Booth J posed the question common to both jurisdictions: “[while] the evidence points to a strong influence by [the child's father] and his family … [upon the child's] views, it is impossible, as I judge it, on the evidence before me to find that the views [the child] presently holds are not his own to such an extent that he is not able to present them as his case … I ask myself, has the [adult] influence been so intense as to destroy … capacity …?” (Italics added). This que sera attitude appears to accept that some parental (and quite possibly deliberate) influence upon children is inevitable and that courts should be slow to hold, even where children appear simply to reiterate parental views, that the child's views should necessarily be disregarded. The approach of Booth J appears to set a fairly low benchmark for ascertaining the capacity of the child to “form his or her own views.” It also suggests that questions of external influence upon the child should be addressed at the stage the child's views are attributed weight, rather than interfering with considerations concerning capacity to form or express those views. A brief overview of UK judicial approaches to date is helpful.
In times past contact (then access) orders were simply granted against the child's expressed wishes where courts were persuaded that the unwillingness of children to see one parent was neither genuine nor reasoned (see, e.g., Blance v Blance, 1978 SLT 74; and Brannigan v Brannigan, 1979 SLT (Notes) 73). However, later judgments (see, e.g., Porchetta v Porchetta, 1986 SLT105; and Russell v Russell, 1991 SCLR 429) demonstrated growing judicial unease in forcing children to comply with living arrangements to which they were strongly opposed, even where it was obvious that the child's distress was nurtured (or indeed caused) by a parent.

Not all courts have accommodated such adult manipulation and there has been a marked division amongst UK judiciary in approach in most recent years. This can, in particular, be observed in English precedent. In W (Contact: Joining Child as Party), 2003 Fam Law 225, a 10 year old boy who had previously enjoyed a close and loving relationship with his father refused to continue having contact. His views were, undoubtedly, fuelled by his mother with whom he lived. Dame Elizabeth Butler-Sloss refused to side step consideration of granting a contact award. Instead she grasped the proverbial nettles: “Here was a boy who was setting out strongly what his views were. Here was a father not prepared to accept that the boy’s views were valid…however … [we have] a duty to take into account the views of the boy … For my part, I would not think it right to close the door [on contact]. The way this goes forward is nothing like as easy as the father thinks. He must not thank us, as he has been doing, because we may not succeed.” These comments suggest it is the court's duty strongly to advocate contact in such cases, involving other agencies where necessary: in W, the court concluded by “invit[ing those involved] to consider the propriety of involving a child psychiatrist or other mental health professionals.” Some courts have, however, been less proactive: in K (Children) [2005] EWCA Civ 1691, the Court of Appeal, although persuaded that the children’s mother had “indoctrinated” them so they did not wish to see their father, made no award of contact. In its *S.L.T. 124* judgment the court cited, with approval, the view of the court appointed welfare reporter: “whatever the course of the children’s hostility towards, and suspicion of, their father, it was apparent from … observation of the three contact sessions, that they derived little, if any positive benefit from the meetings with him.”

Some consistencies emerge from more recent Scottish judicial rationale: in Ellis v Ellis, 2003 Fam LR 77, the mother of children aged eight and five, both of whom expressed a clear view to reside with their father in residence proceedings, “claimed that the children ... had been influenced by bribes from [their father].” In response, the father alleged that the mother encouraged hostility of the children towards him. While Sheriff Evans attributed some weight to the views of the children he considered other more objectively measurable factors, such improvement in their general wellbeing, to be decisive. This approach has been adopted in similar cases (see, e.g., G v G, 2003 Fam LR (Notes) 118).

J v J, 2004 Fam LR 20, remains a leading Scottish authority. This Inner House judgment followed upon the appeal by a mother against an award of contact in favour of the children’s father. The children were aged 10 and seven at the time the award was made and had not seen their father for over five years. The sheriff had made the contact award notwithstanding the existence of a report indicating the children's consistently expressed wish that no contact took place. The Inner House observed that the children's hostility to their father was, if not facilitated, certainly encouraged by the children's mother who strongly opposed contact herself. Lord Abernethy, in giving the opinion of the court, observed that while “in the short term the possibility must be that difficulties” would be encountered there were “no disadvantages to the long term benefits to the children should the contact order be granted.” These advantages included the preservation of ongoing links with extended paternal family. In conclusion, Lord Abernethy stated: “The welfare of the children [is] paramount … their views [are] a factor to be taken into account … they were liable to be upset at the outset if contact were resumed. Their temporary distress … should not stand in the way of what was in their long term best interests.” (Italics added).

The court in J v J saw it as the duty of the court to be far sighted in situations where the child and the parties, were unable to be. This seems to indicate that Scottish courts may be more likely consistently to adopt a pragmatic long term approach to cases involving the manipulated child expressing a view than their English counterparts. However, the judgment of J v J should now be read in conjunction with the recent s 11(7D) of the 1995 Act which requires the court to consider how appropriate it is to make any s 11 order in the event parents or carers are unable to “co-operate with one another as respects matters affecting the child.” We await general judicial observation on this provision.

It thus appears very unlikely a Scottish court would deem a child incapable of expressing a view simply because of, even very strong, adult manipulation (see J v J, Ellis v Ellis, above). Where the child is believed generally competent to express an opinion (largely in terms of age and broad
understanding of the context in which a view is being sought) concerns surrounding adult influence on children's views have, instead, been addressed at the stage courts decide how much weight to attribute to the child's views.

2. The disturbed child

English courts have been more comprehensive in their consideration of the disturbed child in family proceedings than have their Scottish counterparts. This consideration has tended to arise in cases where children have instructed solicitors. It might, of course, be observed that all children are disturbed by parental acrimony. However, English case law indicates that, even after a child has been deemed intellectually capable of expressing a coherent opinion (or, as the case may be, instructing a solicitor), distress can preclude the child's ongoing participation in decision making. It seems that monitoring the child's ability to express a view has been held both to be an ongoing duty upon the child's representative and a matter to be revisited by the court at any crisis point in proceedings. In *Re H (A Minor) (Care Proceedings: Child's Wishes)* [1993] 1 FLR 440, Thorpe J observed: "Obviously a child suffering from a mental disability … or a … psychiatric disorder might not [be able to express a view or instruct a solicitor]. But I cannot … [conclude] that if a child is only suffering from some emotional disturbance then really there is little room to question his or her ability to instruct a solicitor. It seems to me that a child must have sufficient rationality within the understanding *S.L.T. 125* well as perpetually competent and is not a requirement imposed on the adult parties in family proceedings. One cannot be certain whether a Scottish court would follow such persuasive precedent. However, if other fields of Scottish law provide any guidance it is by no means clear that Scottish courts would disregard the views of a disturbed child, even a child who was irrational at the time those views were expressed. In *Houston, Applicant*, 1996 SCLR 943, a sheriff court case involving a mentally ill and quite seriously disturbed 15 year old, the child concerned was held competent to instruct a solicitor and to refuse to consent to medical treatment in terms of s 2 of the Age of Legal Capacity (Scotland) Act 1991. Sheriff McGowan also held that the child's intrinsic capacity could only be undermined following an order of court. *Houston* indicates that a child is perhaps unlikely to be perceived as incapable of expressing a view or instructing a solicitor in Scotland merely by virtue of being disturbed, or mentally ill.

It may be that the child concerned is emotionally well at the start of proceedings but her well being deteriorates throughout the course of the action. Again, English precedent proves interesting. In *Re C (Residence: Child's Application for Leave)* [1995] 1 FLR 927, Stuart-White J indicated that the question a judge, or indeed a solicitor, should pose in such cases is whether the child should then be freed from a situation in which he or she has "distressingly [found] himself or herself caught up", and which has created a “lack of objectivity and a lack of insight” rendering ongoing involvement in the proceedings untenable. Certainly, a court could seek to appoint a *curator ad litem* to safeguard the interests of the child, notwithstanding the ongoing appointment of a solicitor representing the child's views (see, e g *R v Grant*, 2000 SLT 372: appointment of safeguarder).

It is unclear whether a Scottish court would be prepared to appoint a *curator* in the event that a disturbed child strongly opposed the appointment. If English precedent were to be followed this might be possible: in *Re S (AMinor) (Independent Representation)* [1993] Fam 263, for example, the Court of Appeal refused to grant the petition of a troubled 12 year old to remove his court appointed guardian.

3. The child affected by disability

Disability, in terms of present legislation (see, e g the Disability Discrimination Act 1995, Sch 1), includes mental illnesses (if it is “long term”) and reported decisions to date have largely concerned mental, rather than physical, disability. Article 12 provides no guidance in respect of the expression of a view or the instruction of a representative by a disabled child; nor does domestic statute. Children suffering from mental illness in Scotland will probably not (see, e g *Houston, Applicant*, above), simply by virtue of that illness, be deemed incapable. Limited Scottish case law within the field of family law exists. In *H v H (Contact Order: Views of Child)*, 2000 FLR 73, a decision of Sheriff Principal Risk, A, a 13 year old boy with aspergers, tourettes syndrome and attention deficit disorder, gave evidence and instructed a solicitor to minute into process on his behalf in an action raised by his stepfather for
contact. A’s solicitor demonstrated, with reference to reports from three health professionals, his ability to express an independent view and to instruct. Issues of disability were then addressed at the point the child's view was afforded weight.

In view of the dearth of reported Scottish case law it is helpful to consider a recent English decision. In Re C (A Child) (Appointment of Guardian) [2005] EWCA Civ 300, the Court of Appeal appointed a guardian to C, a teenager with aspergers syndrome and who had expressed a clear desire to have no contact with his father. C attended a mainstream school and was at the lower end of the autistic spectrum. The court observed: “where there is an application [for contact brought] by a devoted and deserving parent… and the child concerned evinces dislike or distrust of the parent for no explicable reason other than it must be a product of a psychiatric disorder present in the child, it must, in principle, be wrong for the judge to proceed to make an order, the effect of which is to cut off contact with that parent, without first obtaining the guidance of an expert in the effects of that disorder with a view to obtaining advice on the best way of persuading the child to resume a relationship with that parent.” This, quite paternalistic, approach suggests that in the event disability coincides with strongly expressed (or awkward) views the ability of the disabled child to hold and express views at all should be subject to particular scrutiny.

Certainly it seems, whether in Scotland or in England, courts are more willing to supplant the views of disabled children with what might objectively be perceived as a sensible, and reasoned, adult perspective. However, these authorities indicate prudent solicitors instructed by disabled children should obtain a report from at least one relevant health professional confirming capacity. If instructed to enter into process, it may also be wise to request (following upon R v Grant and Re C (A Child)) a curator be appointed.

4. The underage child

There are two senses in which a child might be considered to be “underage” in the context of family proceedings. First, a child might be ascertained as being too young to be afforded the opportunity to express views and, secondly, the child may be able to express views but might nonetheless lack the ability to instruct her own legal representative.

Too young to be afforded the opportunity to express a view?

Here Scottish authority proves particularly useful. In Fairbairn v Fairbairn, 1998 GWD 23-1149, the views of children aged seven and five were recorded by a curator and considered by the court in deciding whether to vary a residence order in favour of the children's mother. Both children were accepted as being capable of expressing their own view.

However, greater inquiry is likely to be made by the court into the impact expressing a view may have upon the psychological wellbeing of younger children. In C v McM, Sheriff Principal Kerr dealt with an appeal brought by a mother who had been given contact to, rather than residence of, her children at proof. The children were aged six and eight at the time of proof. After giving what the court termed “anxious consideration” the sheriff had decided not to afford the children the opportunity of expressing views. Their mother argued, on the basis of Shields that the sheriff had erred in fulfilling his “continuing duty” to have regard to the views of the children. On appeal, a number of factors were noted: first, the children had given views on previous occasions; secondly, there had been no change in the parties' positions and thirdly, the children were found to be “ambivalent” about their living arrangements. It was, in particular, noted by Sheriff Principal Kerr that the sheriff had been “entitled to take account of the youthful ages of the children in deciding whether to obtain their views [at proof].”

Last year, Stewart v Stewart, 2007 SC451, was decided in the Inner House. The case arose from the appeal of a father against a decision in Kilmarnock sheriff court to award residence to his wife. One of the 16 grounds of the father's appeal concerned the sheriff's failure to afford his young daughter the opportunity to express a view. Lord Wheatley, who gave the court's opinion, observed: “At the time of the proof, the child was under three years old, and it was clearly within the sheriff's discretion to take the view that to seek the views of a child of that age would be wholly impractical … Accordingly, there was no realistic failure to consult the child in this matter at that time; and even if it can be said that there was such a failure, it would in our view be of no significance.”

The concept of a continuum emerges from judgments like C v McM and Stewart, which indicate that somewhere between three and six years old, depending on the child, it will be appropriate to give
consideration to whether the child has anything to say. The comments of Lord Wheatley also suggest that any failure to ascertain ability of a child below five years of age to express a view is unlikely to be held to be a “significant” lapse.

**Too young to instruct a solicitor?**

Section 2(4A) of the 1991 Act creates a statutory presumption that children aged 12 years and over possess the capacity to instruct independent representation. Limited case law exists. Certainly British courts have not necessarily been sympathetic to solicitors’ involvement in proceedings on behalf of children below 12; even where that child is articulate.

In *Henderson v Henderson*, a 10 year old girl instructed her solicitor to minute into her parents’ action for divorce. The court did not query the solicitor's assessment of the child's capacity to instruct. However, the court's observations indicate concern about the exercise of professional judgment in entering process, and the sheriff commented that she would “deprecate any general tendency for applications to be made for children to be party minuters and to lodge defences.” The court had regard to the child's age in concluding that it was ‘not regard[ed] of any assistance’ that the child was separately represented. The sheriff also noted, in passing, that the child was simply reiterating her mother’s view which meant that the Legal Aid Board was duplicating funding by paying for both of them to be separately represented.

English judges have also focused on the overall cost benefit arising from the involvement of younger children as parties in family proceedings. In *R v Legal Aid Board Ex p W (Children)* [2000] 2 FLR154, the Court of Appeal adopted much the same view as did the sheriff in *Henderson* in respect of the separate representation of three children, aged 12, 10 and six respectively, observing that: “the legal aid board is not a bottomless pit and it is right that officers should scrutinise very carefully cases where *S.L.T. 127* there may be duplication in representation.” Courts have, on the whole, been most supportive of independent representation for children when they are teenagers (see, e g *Fergus v Eadie*, 2005 SCLR 176; *E v E*, 2004 Fam LR 115; *Mabon v Mabon*; and *Re Č (A Child) (Appointment of Guardian)*). In the Scottish case *Fourman v Fourman*, a sheriff commented positively upon the minuting into process of a 14 year old. The court considered the child's input valuable; even though the residential parent consistently indicated was that he was happy to adhere to whatever her views were and to represent them on her behalf. There was no negative judicial observation about the legal aid expense arising from funding the child third party in *Fourman*.

Notwithstanding the comments of the court in *Henderson*, it is perhaps worthy of note that nowhere in art 12 of the UN Convention is a younger or older child afforded the right to express a view on the basis that she holds a unique view; rather she participates because she holds an independent view. However, although all children are different, and assessing capacity is not merely an exercise in numbers, it is probable that involving children below 12 as parties in family proceedings will invite judicial scrutiny of the ethical and, quite possibly, the financial prudence of doing so.

**Conclusion**

It is trite to observe that the ability of children to express views should be ascertained with care, but the authorities considered demonstrate that this is particularly true where additional vulnerabilities, such as adult manipulation, patent distress, disability or young age exist. Practitioners may, however, be reassured to note that the judiciary has been reluctant to police the exercise of the solicitor's professional judgment. There is no reported decision in which a Scottish court has ruled that an independently represented child should not have been held competent to instruct. Scottish courts, perhaps more so than their English counterparts, have also tended towards holding that children able to voice any understandable opinion should be ascertained as capable of expressing views. This means many thorny issues concerning the substance of what has been said fall to be considered when courts decide how much “regard” should be attributed to the child's view in family proceedings.

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S.L.T. 2008, 18, 121-127