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HEARING THE VOICE OF THE CHILD IN FAMILY ACTIONS – FORM F9

The Family Law Reform Group of the Faculty of Advocates have been asked to review Form F9. We have also considered the related Form used in the Court of Session, Form 49.8-N. All members of the group practise regularly in cases involving children, in the sheriff courts and the Court of Session. As will be apparent from our response, we have drawn on our experience as well as our knowledge of the relevant law.

The context

We consider it is important to start from a clear understanding of the purpose of these forms. They may be thought to serve two roles: the first being to tell a child that he or she is the subject of a court action and has the right to express a view on the issues raised, in so far as they concern him or her; and the second beingto fulfil the obligation to give the child the opportunity to express a view about what is sought in the action.

These objectives arise from the obligation under article 12 of the United Nations Convention on the Rights of the Child, which states:

> "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."

The Children (Scotland) Act 1995, section 11(7)(b) was designed to give effect to article 12. This subsection provides:

> "… in considering whether or not to make an order … 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."

There is a statutory presumption in section 11(10) that a child of twelve years of age or more will be of sufficient age and maturity to form a view. This does not, of course, mean that children who are younger than twelve will not have views and be able to express them.

The leading authority on this issue is the decision of the Inner House in *S v S* 2002 SC 246. The court took the opportunity to offer guidance on the correct approach to section 11(7)(b), as follows:

> "We would add, however, that we are inclined to the view that counsel for the appellant was correct in her primary submission and that, 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. At one extreme, intimation in terms of Form F9 may be appropriate whereas, at the other extreme, a much less formal method will be appropriate. Seeing a child in chambers is, of course, always open to the court but, in the case of a very young child, we do not discount the possibility that his or her views, or the lack of them, could properly be made known to the court through the agency of, for

example, a private individual who is well known to the child or perhaps by a child psychologist. But, 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. It follows that we do not agree with counsel for the respondent's contention that the formal process of intimation in terms of Form F9 should necessarily be seen as the principal mode of compliance with sec 11(7)(b). In particular, where younger children are involved or where there is a risk of upsetting the child, other methods may well be preferable. We emphasise that the duty on the court to comply with the provisions of sec 11(7)(b) is one which continues until the relevant order is made and the fact that formal intimation may have been dispensed with as 'inappropriate' in no way relieves the court of complying with that continuing duty."

All children capable of forming views should thus be given the opportunity to express a view, which should be taken into account in accordance with their age and maturity. The only limitation on this obligation is practicability. Despite the 20 years in which the 1995 Act has been in force, and the fact that *S v S* was decided 14 years ago, there are still misapprehensions about the effect of the legislation. On occasions, children under twelve are not offered the opportunity to express a view. This may be an error of law. The child in *S v S* was nine at the date of the original sheriff's decision and the sheriff's decision was recalled because the child was not given the opportunity to express a view. In our experience, even younger children can have enlightening comments on their situation, if given a proper opportunity to offer these.

Failure to give the opportunity to provide a view may well result in injustice to a child. There is at least one reported example of a child taking it upon himself to appeal a contact order made in litigation between his parents, without consulting him (*H v H* 2000 Fam LR 73). He was eleven years old, but had capacity to instruct a solicitor under section 2(4A) of the Age of Legal Capacity (Scotland) Act 1991 because he had a general understanding of what it meant to do so and therefore had the right to enter the process under section 2(4B). Other children may simply be subjected to unwanted orders, or find themselves in a position they did not want, without the opportunity being offered to protest. This can occur in particular in cases where parents settle

their dispute and the court makes agreed orders without fulfilling its duty to seek the views of the child.

One matter of particular concern is passage of time. *S v S* concerned a lengthy litigation where the parents had agreed that the child's views should not be sought because he was seven when the action commenced. Aside from any reservations about whether the court should simply have accepted that the child should not be given any opportunity to express a view, the decision reached by the sheriff was recalled by the Inner House because by the time the matter was resolved the child was old enough to have a view and should have been asked. In our experience there have been cases where there is a lengthy delay between a case being heard and the court issuing its judgment. This poses particular difficulties in relation to children's views, which may well have developed and changed in the intervening period, as the child has matured and his or her circumstances varied as a result of matters such as a new school, new friends, new activities or changes in the composition of the family.

Finally, it is our experience that the court rules are not always properly understood. The rules require intimation of the form, not the Initial Writ or other pleadings. This is still not fully appreciated. In our experience agents intimate the pleadings, or seek to dispense with intimation of the form on the ground that it would be inappropriate for children to see the pleadings.

The forms

We support the proposal to replace form F9, and we hope Form 49.8-N. It is our concern that these forms can result in lip-service to article 12 of the United Nations Convention on the Rights of the Child, rather than an effective attempt to assure children the right to express a view as intended by section 11(7)(b). The present forms are not fit for purpose. They are off-putting and difficult to comprehend. They do not encourage a response. It is unsurprising that courts and professionals

involved with children are on occasion reluctant to seek children's views when doing so is perceived as associated with these forms.

One issue we would advance for consideration is whether the two objectives of informing the child of the action and the right to express a view, and giving the child the opportunity to express a view are separated. It may be easier for a child to advance a view if he or she has some time to think about this. A letter giving 'notice' of the action and the fact that the child can, if he or she wishes, express a view may be sent in the first instance, to be followed about a week later by a request for views, if the child wishes to express these, and establishing mechanisms by which the views can be given.

The former involves a child being told in words appropriate to his or her age and stage what is being considered by the court regarding his or her future care and that he or she may wish to express a view on these issues. The latter will ask the child whether he or she wishes to be involved in the discussion about this, and identify the means by which views can be given. It should be made clear that the child does not have to express a view, but can leave the court to decide.

If the objectives are to be fulfilled and the law is to be satisfied by the use of any document then this must first of all be an effective communication. It is not possible to communicate in the same terms with children of all ages. There should be different documents for children at different ages and stages of development.

It should be possible for the child to indicate how he or she wishes to respond. It should be possible to respond by email or text, or by asking to speak to someone, or by asking the court to

hear from a particular person (such as a relative or teacher) on behalf of the child. The court service should maintain a central secure point of contact for a child to respond electronically.

The child should be told what to do if, after giving a view, he or she has something more to say, or changes his or her mind. The possibility of electronic response would be particularly useful for this purpose.

We would suggest that the Civil Justice Council should commission assistance from persons with qualifications and experience in communicating with children as to the best format and terminology for different age groups. We would suggest that advice is sought from both child psychologists and teachers. Groups of children and young people should also be asked to assist in the design. A similar piece of work was undertaken by the Scottish Child Law Centre who have produced a "Helping Hand Resource Pack for Contact" designed to elicit children's views. Children in residential care were themselves involved in the design of forms to communicate their views and produced effective materials to assist other children. This would be a good model for development of a replacement communication for present purposes.

Any new procedures should be widely publicised, particularly to the legal profession, so that they are properly used and there is no repetition of the current misunderstandings about seeking children's views. It should be made clear that if an order is made of consent the court must give the child the opportunity to give a view. If there is a delay in determining a case the child must be given the opportunity to up-date his or her views.