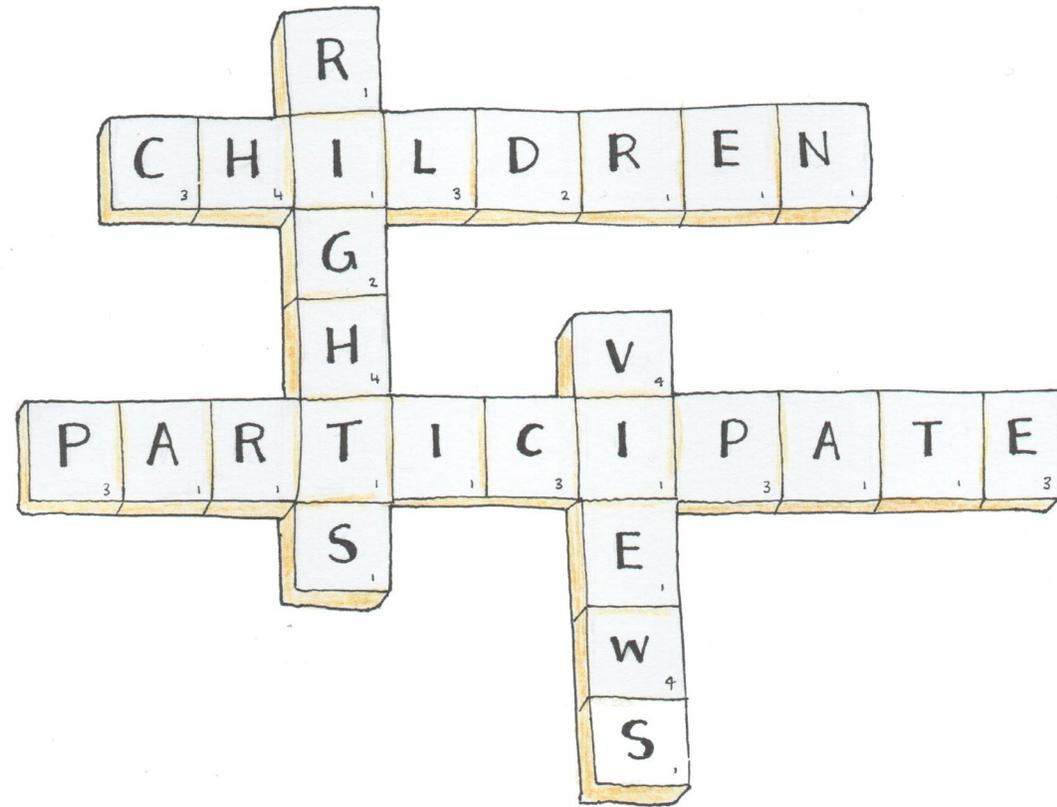


Children's Participation in Family Law – Probing Compliance with Children's Human Rights



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Our Study

- To interrogate the current challenges and barriers to realising and implementing children’s participation rights in family actions and the implications these have for compliance with children’s human rights.
- To identify empirical evidence on potential solutions to these issues from Scotland and from other jurisdictions (England and Wales, Australia, Canada and New Zealand– who have positively evidenced developments, from judicial interviewing to children’s advocacy).



Children's Priorities

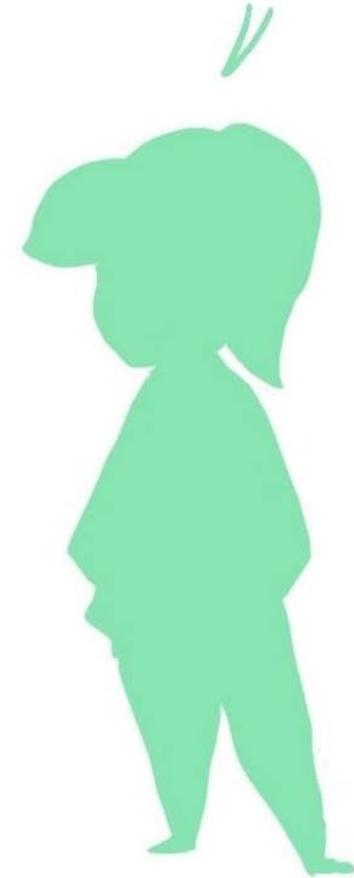
We met in
school-
that was
stressful.



It was hard
to say
everything.



I felt interrogated,
not listened to.



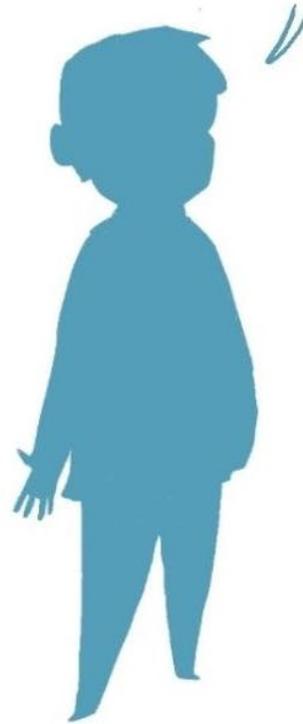
Giving views in disputed contact is difficult

Children's Priorities

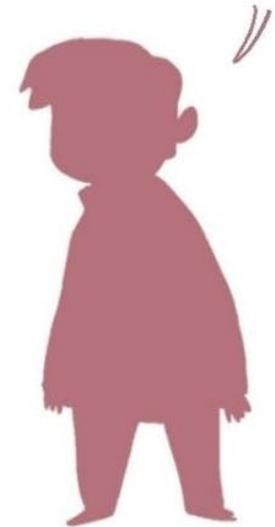
Think about
what you are
writing.
You changed
what I said.



I didn't
find out what
happened.



Write down
what kids say.
Don't put it
in your
own words.



Keeping children out of the legal process

Children's Priorities

I want you
to listen
to children
more.



Take my
views more
seriously.



You had
already
made your
mind up.



Listening to and weighing children's views

Compliance with children's human rights?

Article 12 of UNCRC

2.1 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.

2.2 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.

General Comment on Article 12 UN Committee on the Rights of the Child (2009)

Children's participation rights should be considered throughout the legal process, including:

- Preparation
- An enabling and encouraging environment for any hearing;
- Assessing the capacity of the child, so as to guide the weight to be given to these views in the decision
- Feedback to the child on the outcome and how the child's views were considered
- Child should have access to complaints, remedies and redress should their right be disregarded or violated (para 40-47).

Steps necessary to implement Article 12

Children should be presumed to have capacity

No age limit

No need for comprehensive knowledge

Children experiencing difficulties must have opportunities

Aware of negative consequences of inconsiderate practice

'Freely' - not manipulated or subject to undue pressure. Not interviewed more than necessary.

Information is precondition to 'clarified decisions'

'All matters' to be understood broadly

Wherever possible, directly heard in proceedings

Maturity defined as capacity to express views in a reasonable & independent manner

'Due weight' requires views to be considered seriously

Maturity as well as age in determining significance

Compliance with the CRC

An expansive interpretation of Article 12 that *maximises* the potential for children to have their views duly considered

A child's age and maturity can be relevant, particularly in terms of the weight given to a child's view, but children should be presumed to be capable of having a view

So, the question is not *if* but *how* children's views are facilitated

Review of Reported Case Law

Shields v Shields (2002 SC 246)

The sheriff was obliged to exercise a discretion as to whether, and, if so, how, an opportunity should be given to the child to express his views.

Courts could not necessarily rest on an early decision but had to consider whether a material change in circumstances had happened, up until the order is made.

“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” (para 11).

Review of Reported Case Law

S v S (2012 Fam LR 32)

s. 11(7)(b) is “... also concerned with what is appropriate having regard to the age and maturity of a given child. It would ... be most unsatisfactory if considerations of physical practicability obliged this court to follow a course which risked causing further distress, and perhaps lasting harm, to a young child.”
(para 36)

Review of Reported Case Law

“... parties in the present case were agreed – correctly – that given IM’s very young age [4.5 years] and level of maturity it would be inappropriate to seek to ascertain her views...” (*M v F* (2016 Fam LR 70), para 3)

“Arguments as to the effectiveness of forms F9 are far from uncommon. ... Also, the taking of views at a very early stage in proceedings may not be appropriate.” (*X v Y* (2018 SLT (Sh Ct) 215), para 26)

Children’s *direct* involvement in court proceedings has not been encouraged by the courts nor been evident in practice (e.g. *B v B* (2011 SLT (Sh Ct) 225)). Judicial interviewing? (e.g. *G v G* (2015 SCLR 1))

Review of Reported Case Law

Judge was “entitled to treat the recorded views as the views of the child unless the judge (exceptionally) accepts evidence that contradicts them” (*L v L* (2013 GWD 25-496) para 22).

“..a very clear example of the appellant’s lack of judgement in considering the welfare of one of his children, rather than asserting...his deeply held principles about the appropriate legal basis for his children’s care arrangements.” (*Hall v Hall* (2014 GWD 26-521) para 13(2))

“The glacial pace of the proceedings was itself inimical to the best interests of the child.” (*B v G* (2012 UKSC 21) para 21).

“I do not believe a 7 year old child would talk in the manner they claim.... That seems to me to be the ways adults, not young children speak.” (*E v W* (2014 GWD 26-514) para 11)

Review of international evidence and experts' views

Canada (Ontario)

- Office of the Children's Lawyer – lawyer for child and clinical investigator
- Voice of the Child Reports
- Judicial Interviewing

England and Wales

- Welfare Reports – CAFCASS
- Judicial Interviewing had been 'discouraged' – but guidance issued
- Children's representation in 'exceptional cases'

New Zealand

- Child's lawyer – in cases likely to proceed to hearings – represents child's views *not* interests
- Judicial Interviewing – more common and with a longer history.

Australia

- Family Reports
- Independent Child Lawyers – represent child's 'best interests'
- Judicial Interviewing – rare, judges reluctant to do so.

Review of international evidence and experts

- Notions of children's competence, distress, manipulation and 'alienation' are replete in the literature
- Tensions between representing children's views and making an assessment of their best interests. 'Voice of the Child Reports' - one way to ensure that children's views are not 'lost' in assessments of best interests?
- Adults anxious about hearing directly from children. Concerns about: re-traumatising children; 'hearing evidence' from children; knowledge, skills and experience of those responsible for listening to children

Review of international evidence and experts

- Children's power in decision making is questionable in many mechanisms internationally
- Significant questions remain internationally about how 'child friendly' mechanisms are for participation are e.g. how much time is spent *with children* gathering their views – and who is best placed to do this?
- Little evidence on extended approaches to support participation in complex cases (e.g. child abuse, domestic abuse)

Key challenges for law and policy in Scotland

- Children's participation in family actions is largely indirect and their views are mediated by adults (child welfare reporters)
- Children are not given options for participation
- Views on current mechanisms for participation
 - The F9 form: progress made, but more to do – it's a starting point to facilitate views
 - Child welfare reporters: largely positive amongst judiciary, not always with others
 - Judicial interviewing: the purpose, discretion, the implications of it
 - Legal representation for children: evidence of influence?
 - The role of non-court based organisations

Key challenges for law and policy in Scotland

- A strong sense by those working in courts that children's increased participation in court processes may be detrimental to children's welfare
- Adult concern that participation risks exposing children to parental influence and 'adult concerns' e.g. parental relationship breakdown, domestic abuse
 - Unclear how influence is 'assessed' e.g. psychologist?
- An absence of an infrastructure to facilitate children's participation
 - No routine services to prepare and support children to participate in family actions.
 - No routine mechanisms to children, to feedback decisions or explain the influence their views had on decisions.



Implications for Children (Scotland) Bill

- The child support worker role?
- Age as a bar
 - Removal of presumption of children over 12 years being sufficiently mature to form views – but over 12 years is the bar for instructing solicitor Section 1 (11ZB)(3) and (4)
- The (in)capable child
 - Not if ‘the child is not capable of forming a view’ e.g. Section 1 (11ZB)(2)(a) – a tension with CRC presumption that children have capacity

Looking to the planned reforms

- Expanding mechanisms for participation?
 - Section 1 (11ZB)(1)(a) 'give the child an opportunity to express the child's views in a manner suitable to the the child.'
 - Methods not specified to allow for flexibility and practicality – will they available; how will children be informed; how will they be claimed?
 - Not encouraging of children's own legal representation see Section 1 (11ZB)(3)?
- Opportunities for children to give their views directly to the court?

Looking to the planned reforms

- Explanation of decisions to children
 - By the court or welfare reporter Section 15(2)(11E)(3) – unless the child is not ‘capable’, ‘not in the best interests of the child’
 - Information about ongoing processes? About the weighing of children’s views? Information as a precondition to clarified decisions?
- Register for child welfare reporters and curators ad litem
 - Potential to address gaps in training and skills? Will this go far enough to address the difficulties children may have in giving views? Trust, time, building relationships etc.
- Accessible complaints and redress for children

Looking to the planned reforms