

## **FAMILY LAW COMMITTEE: SCOTTISH CIVIL JUSTICE COUNCIL**

### **HEARING THE VOICE OF THE CHILD IN FAMILY CASES**

#### **Purpose**

1. This paper from the Scottish Government asks the Family Law Committee of the Scottish Civil Justice Council to consider whether court rules should be changed to ensure that the duty to hear the voice of the child in family cases is complied with. We recommend some changes (such as in relation to Form F9) and request views from the Committee in relation to other matters. This is an **open** paper.
2. The Government notes that procedures and practice in the courts are a matter for the Lord President as advised by the Scottish Civil Justice Council. Form F9 is not a Government form. We have prepared this paper following comments from stakeholders (including criticism of Form F9) and to form a basis for discussion.
3. The Government appreciates that this is not a straightforward area. However, it relates to a fundamental issue. These cases are all about the welfare and wellbeing of the child. A fundamental part of that is that the child's voice should be heard.
4. This paper concentrates on practice in the sheriff court, as that is where most family cases are heard. Therefore, in relation to cases under Part 1 of the Children (Scotland) Act 1995, the paper refers to the form F9. However, the same points arise in relation to the equivalent Court of Session Form (Form 49.8-N). In civil partnership actions in the sheriff court, the relevant form is CP7.

#### **Background**

##### *International obligations*

5. The United Nations Convention on the Rights of the Child<sup>1</sup> sets out rights of children. Article 9 is about the relationship between children and their parents. Article 12 sets out the obligations on states parties in relation to the voice of the child. The Convention has influenced the drafting of domestic law.<sup>2</sup>

##### *The domestic legislation*

6. The primary legislation in this area is well established. For private family law disputes, this is Part 1 of the Children (Scotland) Act 1995. The duties on the court in relation to the voice of the child are set out in section 11(7)(b) of the 1995 Act. The relevant court rules are in Chapter 49 of the Court of Session Rules and Chapters 33 and 33A of the Ordinary Cause Rules.

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<sup>1</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

<sup>2</sup> The Government is also aware that issues around hearing the voice of the child may feature in the current review by the European Commission of the Brussels IIA Regulation.

7. The Adoption and Children (Scotland) Act 2007 and the Children's Hearings (Scotland) Act 2011 provide for public law cases and for adoptions. The relevant court rules are Chapter 67 of the Court of Session Rules, the Sheriff Court Adoption Rules, and Chapter 3 of the Child Care and Maintenance Rules.

8. The Age of Legal Capacity (Scotland) Act 1991 makes provision on a child instructing a solicitor. Section 2(4A) of the 1991 Act says that 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. A child age 12 or more is presumed to be of sufficient age and maturity to have such understanding.

#### *Domestic case law*

9. In drafting this paper the Government has taken into account the judgement delivered by Lord Marnoch in the Inner House in *Shields v Shields*.<sup>3</sup>

#### *Relevant research*

10. In addition, the Government has taken account of relevant research. Dr Kirsteen Mackay has conducted research on the voice of the child in family cases. She prepared a report for Scotland's Commissioner for Children and Young People about the treatment of the views of children in private law child contact disputes where there is a history of domestic abuse.<sup>4</sup> The then Scottish Executive published papers on the voice of the child.<sup>5, 6</sup>

11. Research published by the Scottish Government on other matters also refers to the voice of the child in family cases.<sup>7, 8</sup>

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<sup>3</sup> <http://www.bailii.org/scot/cases/ScotCS/2002/342.html>

<sup>4</sup> <http://www.sccyp.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf>

<sup>5</sup> <http://www.gov.scot/Publications/2002/09/14905/6731>

<sup>6</sup> <http://www.gov.scot/Publications/2002/09/14913/7386>

<sup>7</sup> <http://www.gov.scot/Publications/2010/12/08145916/0> (see particularly paragraphs 7.1 to 7.24)

<sup>8</sup> <http://www.gov.scot/Publications/2011/01/07142042/0> (see particularly paragraphs 4.3 to 4.11)

## Outcomes wanted

12. The Government considers that the following outcomes are the ones which we would want to see in the family justice system in Scotland.

- Where the court is reaching a decision about a child, it should invite the child to give views. The way in which the court does this should be appropriate to the child, taking into account the child's age, maturity, and other personal characteristics.
- Where the court seeks views from a child, the child should understand:
  - what the court is being asked to decide
  - that the court will listen carefully to his or her views (but that their views will not determine the outcome of the case)
  - who (e.g. the judge or sheriff or children's hearing panel) will be responsible for making the final decision
  - what the basis for the decision will be (e.g. child's welfare)
  - that it may be open to the child to instruct a solicitor and to be represented in the case.
- When a child gives views to the court, the court should take into account the child's age and maturity in deciding what weight to give to those views.
- The views of a child can change over time. A typical defended family case can take over a year. It may therefore be necessary to ask the child for views more than once. Or to seek views from a child who was previously considered too young to offer any.
- Intimation on a child has different requirements (and fulfils a different need) from seeking views from the child. Each should be considered separately by the court.
- Ideally, the child should receive feedback from a person independent of the parties about the court's decision and the reasons for it.
- There should be consistency across Scotland about the way in which the court deals with family cases, including in relation to the voice of the child.
- In making decisions about rules and procedures in relation to children, the decision makers should seek views from children and young people.

## **Actions under Part 1 of the Children (Scotland) Act 1995**

### *Intimation: the role of F9*

13. The court rules generally require that a family action be intimated on the child.

14. Rule 33.7(1)(h) of the Ordinary Cause Rules (OCR) requires intimation in Form F9 on a child who is the subject of an application for an order under section 11 of the Children (Scotland) Act 1995. Rule 33.7 OCR allows the pursuer in a family action to ask the court to dispense with intimation on a child where the pursuer considers such intimation “inappropriate”. The pursuer must provide reasons. The sheriff may dispense with such intimation or make such other order as he thinks fit.

15. If another party (typically the defender) considers that the court should intimate on the child, that party could ask the sheriff to do so under rule 33.15 OCR.

16. In *Shields v. Shields*, the Inner House noted (in paragraph 11 of the opinion) that it did not agree with the contention:

“that the formal process of intimation in terms of Form F9 should necessarily be seen as the principal mode of compliance with section 11(7)(b) [of the Children (Scotland) Act 1995]. 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 section 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”.

**17. The Scottish Government therefore proposes that intimating an action on the child concerned and seeking views from the child should be considered separately by the court.**

18. We can see an argument that in some cases it may be appropriate to intimate on a child, ask the child if he or she wishes to express views, and seek those views all at the same time. (It appears that in some cases, F9 does all of these things).

19. The Government’s proposal is that the court deal with intimation as one issue and the child’s views as another. The court may then decide, in a particular case, to:

- Order intimation on the child and seek views at the same time
- Order intimation on the child and seek views by other means or at another time
- Order intimation on the child and not seek views (this option is logically possible but we think unlikely)
- Not order intimation on the child but still seek views
- Not order intimation on the child and not seek views

20. We invite the Committee to consider this point and, if necessary, to recommend changes to the rules.

21. One possible option is that the rules could be amended to encourage all parties to consider (and ideally agree about) an appropriate way of asking the child whether he or she wishes to express views, how to seek those views, and communicating to the court any views the child expresses.

22. It is not clear what the court does if the child indicates on F9 that he or she wishes to express views, and then does not answer question 2 or question 3.

**23. The Government invites the Committee to consider whether court rules should make more provision on when intimation on a child should take place.**

24. The Government's understanding is that the reason given for dispensation is usually that the child is too young to understand the process. It may be useful for the rules to make more provision in this area.

25. Research into family cases indicates that only a small proportion of children are sent Form F9.<sup>9</sup> One piece of research found that "sending a child a Form F9 significantly increased the likelihood of that child's views being taken, with 90% of children who received intimation expressing a view by some means."<sup>10</sup>

#### *The initial writ*

26. In some cases, it appears the child has been served the initial writ. We consider that generally it is not appropriate for the child to see the initial writ. The initial writ is legalistic and not easy for a child to understand. It may contain distressing information such as allegations of abuse.

**27. We would welcome the Committee's views on a rule which makes clear that the initial writ should not be sent to the child except where the child is a party to the action.**

28. We have also heard of cases where a party's reason for not intimating on a child is to avoid the child seeing the initial writ.

**29. We would welcome a view from the Committee about how best to deal with the situation where a party to a case asks that intimation on the child be dispensed with to avoid the child seeing the initial writ.**

#### *When views are sought*

30. The court in *Shields v. Shields* said [paragraph 10 of the opinion] that it is "clear from the opening wording of section 11(7) of the 1995 Act that the court must discharge its duty under sub-paragraph (b) at the time the relevant order is made".

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<sup>9</sup> Understanding Child Contact Cases in Scottish Sheriff Courts – see in particular paragraphs 7.7 and 7.8: <http://www.gov.scot/Publications/2010/12/08145916/0>.

<sup>10</sup> <http://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf>

(Paragraph 7 of the opinion notes that, in *Shields v Shields*, the child, during the life-time of the case “progressed from 7½ years of age to past 9 years of age”).

31. We think that this is a further argument for separating intimation and hearing the voice of the child (as some time may elapse between intimation and the final decision in the case).

**32. In addition, the Government asks the Committee to consider if rules should be made about the court obtaining the child’s views again (or for the first time) where:**

- A period of time has elapsed and the child may have gained sufficient age and maturity to form a view; or
- A period of time has elapsed and the child may have a different view; or
- The questions arising in the case have changed; or
- The court considers that there are other reasons why the child’s view should be obtained again.

**33. The Government would also welcome views from the Committee about the process for obtaining views from a child who has indicated a wish to express views.**

34. For example, the court may send the child Form F9 and the child may complete and return the form or send a letter to the court expressing views. The court may then appoint a child welfare reporter who will interview the child and report the child’s views to the court.

35. A child may find it confusing or distressing to give views more than once in a relatively short space of time. We have also heard that a child may feel *not listened to* where the child’s views are sought more than once in a short space of time.

## **Form F9**

### *The wording*

36. Stakeholders generally agree that the wording of Form F9 is not child friendly.

**37. The Government considers that as a minimum there should be changes to form F9 to make it more child friendly.**

38. There are examples of more child friendly (and age and stage appropriate) forms in the Children’s Hearings system.<sup>11</sup> We recommend that if the Committee decides to revise Form F9, it should seek views from children about the revision and test a revised draft with children of different ages and abilities. The Committee could ask an external body to undertake this work. The Government does not consider that it is appropriate for the Government to carry out work of this nature, given that Form F9 is not a Government form.

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<sup>11</sup> [http://www.scra.gov.uk/home/all\\_about\\_me\\_form.cfm](http://www.scra.gov.uk/home/all_about_me_form.cfm)

*Should it be a form anyway?*

**39. The Government would welcome views from the Committee about whether using a form is an appropriate way to ask a child whether he or she wishes to express views, and if so, how the child wishes to offer them.**

40. We consider that other methods would definitely be more appropriate in the case of younger and less mature children. For example, it may be appropriate to use material which is not a form and which is laid out and written in a way which a younger child can more easily understand. Support for a child by someone such as an advocate or a teacher may also help the child to form and express views.

*Other ways of seeking the child's views*

41. Form F9 says that "If you return the form it will be given to the Sheriff. The Sheriff may wish to speak to you and may ask for you to come and see him or her."

42. We understand that it is more common for the court to hear the child's views via a child welfare reporter than by the sheriff speaking personally to the child. One possible amendment to Form F9 would therefore be to explain that someone appointed by the sheriff may wish to speak to the child about the child's views.

*What the child receives*

43. Form F9 says that "This part must be completed by the Pursuer's solicitor in language a child is capable of understanding."

44. We have heard that the solicitor completing the form does not always do so in child friendly language. There is an argument that the pursuer's solicitor may not be the best person to do this.

45. The Government appreciates that it might be difficult for somebody else to accurately reflect what the pursuer is seeking.

**46. Therefore, if the Committee decides that the pursuer's solicitor remains the best person to complete Form F9, we would be grateful for views about how best to ensure that the form is completed in child friendly language.**

47. A potential option is that the rules could provide templates to cover the most common circumstances such as applications for contact, residence, and seeking parental responsibilities and rights. These could, for instance, provide a menu of options that the pursuer or pursuer's solicitor could select from.

48. Another concern is where the pursuer does not have a solicitor. We assume that the pursuer would then have to complete the first part of Form F9. That may not always be appropriate. The pursuer may not be able to write in child friendly

language. In some cases, the child could be distressed by receiving papers from a party to the action.

**49. We would welcome views from the Committee on whether it is appropriate for a pursuer who is a party litigant to complete Form F9.**

50. The Form F9 may not contain enough information about the court action. We know that sometimes parents tell their children nothing or very little about legal disputes concerning them.<sup>12</sup> A child may therefore know nothing about the dispute and what the court has been asked to decide.

51. There is an argument that the F9 (or any process to seek the child's views) should provide a fuller account of the issues before the court. The Government recognises that it may not be appropriate to share all court papers with a child who is not a party to the action. Any summary of the issues would have to be sensitively written.

**52. We would welcome views from the Committee on whether the Form F9 (or any process to seek the child's views) should provide a fuller account of the issues before the court.**

#### *How F9 is sent to the child*

53. The Form F9 is normally sent to the home where the child is living. This could mean that it never reaches the child. Or that the person the child lives with tells the child not to fill it in, or unduly influences the child in completing the form. There is no easy answer to this difficulty.

**54. The Government would welcome views from the Committee about whether there are better ways of ensuring the child receives Form F9 and is not unduly influenced when completing it.**

55. Possible routes might be teachers, social workers, an advocacy service, or the named person (under the Children and Young People (Scotland) Act 2014).

#### **Adoption and permanence order cases**

##### *Intimation*

56. There is no requirement for intimation on the child in permanence and adoption cases. In permanence cases, the child will have a social worker who ought to explain the process to the child. In adoption cases, the child may not have an appointed social worker. The social worker preparing a report for the court will generally have to speak to the child to report the child's views to the court.

##### *Views of the child*

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<sup>12</sup> See, for example, paragraph 7.4 of this research:  
<http://www.gov.scot/Publications/2010/12/08145916/0>.

57. The Government considers that in adoption and permanence cases, the court should seek views in a way that is tailored to the needs of the individual child.

58. Rules 17 and 46 of the Sheriff Court Adoption Rules 2009 both state that where the child has indicated a wish to express views, 'the sheriff ... (a) may order such *procedural steps* to be taken as he considers appropriate to ascertain the views of that child.

**59. We are unclear about whether the way in which a sheriff ascertains the child's views would be classified as court procedure. We would welcome a view from the Committee on this point.**

60. We also consider that the issue in paragraphs 30 to 32 – about making sure the views of the child are current – applies here.

**61. We therefore invite the Committee to consider whether the Sheriff Court Adoption Rules 2009 should make provision on when to hear a child's views.**

62. Finally, we note that the issue noted in paragraphs 33 to 35 – that a child whose views are sought often may feel *not* listened to – applies equally in adoption and permanence cases. The child may have been asked to give views to many people e.g. social workers, children's rights officers, and children's hearings.

**63. The Government would therefore welcome views from the Committee about the process for obtaining views from a child who is the subject of adoption or permanence proceedings and has indicated a wish to express views.**

#### **Other points during the case**

64. Other issues may arise about the voice of a child during a case. For example, the Government is aware of some concerns about confidentiality of information held about a child. This could arise where the court asks to see records held by an organisation providing services to children. The Government is holding a roundtable discussion on 4 December to discuss the issues. One issue is whether the child should be asked to express a view to the court about who sees information provided in confidence.

#### **Feedback to the child**

65. The Government considers that ideally, where a court or tribunal makes a decision about a child, the child should receive feedback from a person independent of the parties about the court's decision and the reasons for it.

66. There is evidence that in a significant minority of cases, the court's decision is not in line with the child's expressed wishes. Given this, it is even more important for the child to know both the decision and the reasons for the decision.

*(Originally Paper 5.1A at FLC meeting on 07 December 2015)*

67. Rule 22 of the Sheriff Court Adoption Rules 2009 rules deals with the pronouncement of the sheriff's decision. We are not aware of similar provision for other categories of family case.

68. This is not straightforward. It is not clear who would provide such feedback.

69. One option is that the rules could provide that the court's order should make clear who is to communicate the court's decision and reasoning to the child, and how those should be communicated.

70. Another possibility is that the court could provide an interlocutor in language which the child is able to understand. Court rules could provide style interlocutors for common scenarios. This could also be helpful to other court users.

**71. We would welcome views from the Committee about giving feedback to the child about the court's decision and the reasons for it.**

## Summary and Conclusion

72. The table below outlines the points and questions which the Government would like the Committee to consider.

	<b>Point/question</b>	<b>Paragraph in this paper</b>
1	The Scottish Government proposes that intimating an action on the child concerned and seeking views from the child should be considered separately by the court.	Paragraph 17
2	The Government also invites the Committee to consider whether court rules should make more provision on when intimation on a child should take place.	Paragraph 23
3	We would welcome the Committee's views on a rule which makes clear that the initial writ should not be sent to the child except where the child is a party to the action.	Paragraph 27
4	We would welcome a view from the Committee about how best to deal with the situation where a party to a case asks that intimation on the child be dispensed with to avoid the child seeing the initial writ.	Paragraph 29
6	The Government asks the Committee to consider if rules should be made about the court obtaining the child's views again (or for the first time) in certain circumstances.	Paragraph 32
7	The Government would also welcome views from the Committee about the process for obtaining views from a child who has indicated a wish to express views.	Paragraph 33
8	The Government considers that as a minimum there should be changes to form F9 to make it more child friendly.	Paragraph 37
9	The Government would welcome views from the Committee about whether using a form is an appropriate way to ask a child to express views, and if so, how the child wishes to offer them.	Paragraph 39
10	Therefore, if the Committee decides that the pursuer's solicitor remains the best person to complete Form F9, we would be grateful for views about how best to ensure that the form is completed in child friendly language.	Paragraph 46

11	We would welcome views from the Committee on whether it is appropriate for a pursuer who is a party litigant to complete Form F9.	Paragraph 49
12	We would welcome views from the Committee on whether the Form F9 (or any process to seek the child's views) should provide a fuller account of the issues before the court.	Paragraph 52
13	The Government would welcome views from the Committee about whether there are better ways of ensuring the child receives Form F9 and is not unduly influenced when completing it.	Paragraph 54
14	The Government is unclear about whether the way in which a sheriff ascertains the child's views would be classified as court procedure. We would welcome a view from the Committee on this point.	Paragraph 59
15	We therefore invite the Committee to consider whether the Sheriff Court Adoption Rules 2009 should make provision on when to hear a child's views.	Paragraph 61
16	The Government would welcome views from the Committee about the process for obtaining views from a child who is the subject of adoption or permanence proceedings and has indicated a wish to express views.	Paragraph 63
17	We would welcome views from the Committee about giving feedback to the child about the court's decision and the reasons for it.	Paragraph 71