

White Paper Family Law Conference

Tuesday 6th December 2016

Evidence of Children

Question:

When should you call upon a child to give evidence in private children law proceedings and with what safeguards?

Introduction

In preparing for today I have assumed that the conference wanted to hear about evidence of children in private law proceedings which involve children, that is, criminal proceedings and children's hearing referral proceedings are outwith the remit of this talk. I have also taken the term "evidence" in the wider sense to include children's participation in Court proceedings and other material provided to the Court in proceedings involving children, as well as formal evidence.

When should you call upon a child to give evidence?

In fact, I could think of a few examples when a child's evidence might be required in a case which involves him or her. The most obvious of those might be:-

- Proceedings for Section 11 orders under the Children (Scotland) Act 1995;
- Other types of family proceedings (for example, divorce on the grounds of a parent's behaviour; protective orders to prevent domestic abuse; or an action for an alimentary order re school fees)
- Other types of civil proceedings (for example protective orders outwith the family sphere; or personal injury)

I have chosen to concentrate on Section 11 orders as most directly relevant to the question put to me, although the same considerations would apply in all civil proceedings.

Section 11 orders under the Children (Scotland) Act 1995

The types of disputes which might arise under that legislation would include:-

- Depriving a party of parental responsibilities and rights
- Imposing parental responsibilities and rights on a party
- Residence Order
- Contact Order
- Specific Issue Order
- Interdict
- Order in relation to the administration of the child's property(unusual)
- Order for the appointment or removal of a guardian

The range of Specific Issue Orders which a court could possibly be invited to determine are varied however the two most common types might be:-

- Proposed relocation; and/or
- Attendance at a particular school.

Views of the Child

Section 11 (7)(b) requires the court to give the child an opportunity to indicate whether he wishes to express his views; if so, to give him an opportunity to express them; and further directs that the court should take account of any views which the child expresses having regard to the age and maturity of the particular child.

That particular section of the 1995 Act was brought in in order to bring Scots Law into line with Article 12 of the Convention on the Rights of the Child, which was adopted by the United Nations in 1989:-

Article 12

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.

In my view it is this requirement that the court afford the child an opportunity to express a view which is the most frequent reason for children's participation in civil proceedings in the modern era.

However, I would pause at this point to remind everyone of the precise wording of the section in that the court requires to afford the child an opportunity to express a view if he/she wishes to. It is not in any way mandatory, and it may well be that having been afforded that opportunity, the child would prefer not to be involved, which is obviously a valid stance to take. With that caveat, and assuming that the child has indicated a wish or at least a willingness to express a view, there are a number of options open to the Court:-

- Form F9/ Form 49.8-N
- Child Welfare Report
- Child Psychologist
- Interview by Sheriff
- Affidavit evidence
- Oral evidence

Some of these options could also be used when factual evidence (distinct from his/her views) might be required from a child.

Form F9/ Form 49.8-N

As you will all be aware, the Rules of Court both in the Sheriff Court and the Court of Session require intimation upon a child of any proceedings in which Section 11 orders which would affect the child are sought. Recently the Sheriff Court Rules have been revised to provide that a copy of the Initial Writ should not be sent to a child along with the Form. I'm not sure where that was happening, however, we now have clarity on that point. The main difficulty I think with the Form is that although the solicitor is directed to complete the Form in "child-friendly" language, the solicitor's view of what may constitute child friendly language is perhaps variable. The template of the Form itself is not especially child-friendly and of course whether the child actually receives the Form or not could be entirely at the discretion of the resident parent.

A further anxiety which I have heard from some Sheriffs in the past is that, in the absence of information as to the context in which the Form was completed, its value must be uncertain. Unless the Form has been completed in a neutral environment, for example, with the Scottish Child Law Centre Clan Law or an experienced Guidance Teacher, the question of the extent of parental influence must always arise.

Child Welfare Report

Now that a completed Form F44 (Form 49.22 in the Court of Session) is attached to the interlocutor appointing the Reporter, the Reporter should have clearer direction as to the focus of the report and whom the Court expects to be interviewed; and sometimes the report may be restricted to making enquiry about the views of the child.

Having been on the list of Bar Reporters, now Child Welfare Reporters at Glasgow Sheriff Court for over 10 years, I have interviewed many children in that time. I had no initial training. Although I would hope that my skills have improved over the years, I could not call myself an expert by any stretch of the imagination. What is obvious, is that the approach to be taken to interviewing a child varies with the age of the child and the circumstances of each case.

My usual approach is to have an introductory meeting with the child at home after school in the late afternoon or early evening. At that meeting I would simply explain my role and function to the child. It is important that the child understands that I am not a friend of one or other of his/her parents but that I am there to obtain information to assist the person who is helping his parents make a decision which involves the child. With some children I might avoid the use of the term "Court" or "Judge" whereas for older children who are perhaps aware of the fact that their parents are involved in a Court dispute, it is important to explain that you are there to do a job for the judge.

It is important that the child understands that they do not need to speak with me at all, but that his/her own views are extremely important and can be passed on to the decision-maker if they want, while explaining that any views which they do express are not determinative and it is not "up to them". A child should not feel burdened by the responsibility of decision-making - that is for the adults. I often provide that explanation to the child in the presence of a parent or older sibling and once satisfied that the child has understood my role and function, I would check whether it would be okay if I made arrangements to meet with them again at school in order to discuss things. I explain that a teacher can remain in the room. Sometimes older children have indicated that they would not feel comfortable with my coming to their school and alternative arrangements have been made such as meeting in a café.

Sometimes more than two meetings with the child could be helpful although I appreciate that in legally aided cases, cost constraints do not always permit that.

Child Psychologist

It can sometimes be helpful to involve a child psychologist particularly where complicated issues arise relating to influence, deliberate alienation, inappropriate attachment or potential abuse. In such situations, the expert would not only be expected to ascertain the child's views and report on those but also to comment on the reasons for that. However, the decision of Sheriff Anwar in JQ v CC at Glasgow Sheriff Court on 1st March 2016, (available on the Scotcourts website) is a cautionary tale in the employment of child psychologists. That case concerned proposed relocation. Following the judgement issued by the UK Supreme Court in Kennedy v Cordia Services LLP [2016] UKSC 6 Sheriff Anwar was critical of reports obtained from two child psychologists, pointing out that the children concerned did not have medical or psychological issues which required such expert evidence; and that both reports could be seen as an attempt to usurp the function of the Court as they opined on the very issue which the Court had been asked to rule on.

Interview by the Sheriff

I am aware that many Sheriffs would hesitate to interview children directly. However, in my early years as a solicitor I practised mainly in Airdrie Sheriff Court and anyone from that jurisdiction can confirm that members of the bench and one in particular regularly interviewed children directly. I have on occasion been involved in Proofs or Child Welfare Hearings when the Sheriff simply adjourned, got into his car, and went to a school and speak with the children himself. That Sheriff's particular method with younger children was to ask them to draw a picture for him while they chatted, so that the child was as unguarded as possible. There is no doubt that is a proactive and expeditious approach; however larger, busier courts may not be able to accommodate such spontaneity; and as I say, I suspect that many Sheriffs and Judges might have reservations about interviewing children themselves.

Affidavit Evidence

There is no rule of which I am aware which would prevent a literate child from swearing an Affidavit, as long as the child understands the seriousness of the oath or affirmation. As is well known, the Civil Evidence (Scotland) Act 1988, section 2(1)(b) allows a person's statement, including a written statement, to be admitted as evidence of any matter of which direct oral evidence by that person would be admissible. With the increasing reliance of Affidavits in Court proceedings of all kinds, Affidavit evidence may be a preferable method for a child to provide sworn evidence, particularly if there is a possibility that cross examination will not be required.

If evidence is to be provided in the form of an Affidavit by a child, that obviously places a greater than usual responsibility on the drafter of the Affidavit and the person before whom it is sworn.

Oral Evidence

In my experience it is quite rare for children to participate in private law proceedings by giving oral evidence. I would even say that if possible, that should be avoided if an alternative method will adequately inform the Court to enable decisions to be made. However, even if the case is confined to a dispute about Section 11 orders, there could be factual issues which a child requires to speak to which are quite distinct from his or her own views on the orders sought.

According to MacPhail there is no official age below which a child could not competently give evidence.

Prior to the introduction of the Vulnerable Witnesses (Scotland) Act 2004, much was left to the discretion of the presiding Judge or Sheriff. He or she could order everyone except the parties and their legal advisers from the court and essentially conduct that part of the Hearing in private. It was for the Judge or Sheriff to determine whether to administer the oath to a child witness. Generally children under the age of 12 were simply admonished to tell the truth. It was also for the presiding Judge or Sheriff to establish the competence of the children, whether that was before or after hearing the child's evidence.

Vulnerable Witnesses (Scotland) Act 2004

Part 2 of the Vulnerable Witnesses (Scotland) Act 2004 deals with civil proceedings and the evidence of children and other vulnerable witnesses. Section 11 of the Act, as amended by the Victims and Witnesses (Scotland) Act 2014, provides that a person who requires to give evidence in any civil proceedings is a vulnerable witness if under the age 18 on the date of commencement of the proceedings. This was increased from age 16 as originally enacted. Such a witness is referred to as a "child witness" in the remainder of Part 2 of the Act.

Section 16 makes it clear that a witness may be treated as a vulnerable witness even if that person is a party to the proceedings himself. That is probably unlikely, though not impossible, in the case of child witnesses.

Importantly, Section 24 of the Vulnerable Witnesses (Scotland) Act 2004 abolished the competence test for witnesses in both criminal and civil proceedings. That Section provides that the evidence of any person called as a witness in criminal or civil proceedings is not inadmissible solely because the witness does not understand:-

- (a) The nature of the duty of a witness to give truthful evidence; or
- (b) The difference between truth and lies;

and further provides that the court must not at any time before the witness gives evidence take any step intended to establish whether the witness understands those matters.

I have to say that I struggle with this idea - how can the quality of the child's evidence be assessed in the absence of those enquiries? Essentially it now seems to fall to the Judge or Sheriff to decide what to make of any testimony the child gives.

Special Measures

The Court has a number of options as to "special measures" which can be put in place. Section 12 of the 2004 Act provides that where a child witness is to give evidence in or for the purposes of any civil proceedings the court *must* before the Proof or other Hearing at which the child is to give evidence, make an order authorising the use of such special measures as the court considers to be the most appropriate; or alternatively, that the child witness is to give evidence without the benefit of any special measure.

Section 13 enables the court to review arrangements previously made in respect of vulnerable witnesses which would include adding to or deleting any or all of the special measures previously authorised.

Section 18 specifies the various special measures which the court could consider employing namely:-

- Taking of evidence by a Commissioner;
- Use of a live television link;
- Use of a screen;
- Use of a supporter;
- Or such other measures as the Scottish Ministers may by order prescribe.

Provisions for each of the first four of those are contained in Sections 19 to 22 of the Act.

Taking of Evidence by a Commissioner

Provisions are contained within Section 19. The Commissioner is appointed by the court and the proceedings before the Commissioner must be recorded. Parties are not except by leave of the court present when evidence is taken by a Commissioner but must be entitled to watch and hear the proceedings. Importantly the recording made is to be received in evidence without being sworn to by the witnesses.

Live Television Link

Where that is deemed to be the most appropriate measure the provisions are contained within Section 20. Where the court lacks the accommodation or equipment necessary, the Sheriff may make an order transferring the proceedings to any Sheriff Court in the same Sheriffdom which has the necessary equipment at any stage in the proceedings, whether before or after the commencement of the Proof or other Hearing.

Screens

The rules for the use of screens are set out in Section 21 of the Act. The screen requires to conceal the parties to the proceedings from the sight of the witness however the court must make arrangements to ensure that the parties are able to watch and hear the witness giving evidence. Again if practical requirements dictate the Sheriff has the power to transfer proceedings to a different court in the same Sheriffdom.

Supporters

The rules with regard to the supporters are contained within Section 22. The supporter is nominated by the vulnerable witness himself. Where the person nominated as the child's supporter is also to give evidence, he/she may not act as a supporter prior to giving evidence and the supporter must not prompt or otherwise seek to influence the child in the course of giving his evidence.

Procedure

Where a party cites or intends to cite a child witness that party must lodge with the court a notice known as a “Child Witness Notice” specifying the special measures (if any) which the party considers to be the most appropriate or if the party considers that the child witness should give evidence without the benefit of any special measure stating that fact. If the notice specifies any of the following special measures:-

- Use of a live television link;
- Use of a screen;
- Use of a supporter.

The court is entitled to assume that that special measure is the most appropriate for the purposes of Section 12.

The court may only make an order that the child witness is to give evidence without the benefit of any special measures if satisfied that:-

- The child himself/herself has expressed a wish to give evidence without the benefit of any special measure and that course is appropriate for the witness; or
- The use of any special measure for the child’s evidence would give rise to a significant risk of prejudice to the fairness of the proceedings or otherwise to the interests of justice; *and*
- That risk significantly outweighs the risk of any prejudice to the interests of the child.

In determining whether or not special measures should be employed in terms of Section 12 or reviewed in terms of Section 13, the party or the court must have regard to the best interests of the witness and take account of any views expressed by the witness and where the witness is a child having regard to the child’s age and maturity. The court is also directed to have regard to the views of the child witness’ parents.

Where the witness is aged 12 or older the witness is presumed to be of sufficient age and maturity to form a view and in the event that any views expressed by the witness are not consistent with any views expressed by the child’s parents, the views of the witness are to be given greater weight.

Thoughts and Conclusions

My initial reaction upon having this question put to me was that it is usually desirable to avoid the necessity for children having to give evidence in a formal setting at all. That presumably is why other methods of ascertaining the child's views and feelings or even the child's account of a matter are available. However, the approach taken in the Children (Scotland) Act 1995 is particularly child centred and sometimes in order to reach child centred solutions, direct evidence from the child will be required.

There are particular difficulties when considering the evidence or statement from a child. Sometimes it is difficult for them to distinguish what they have actually experienced from accounts they have heard repeatedly from others. The possibility of influence from one adult or another must always be considered. Also, children are people-pleasers. I'm sure that we have all encountered situations where children who present as credible and genuine appear to be saying different things to different adults. However, in my experience children do feel empowered when they have the ability to participate in proceedings concerning their own destinies. Hopefully the range of options which are available to the Court enable the child to participate in the legal process but also provide safeguards which help to minimise the potential trauma of doing so.

Karen Gailey

Family Law Matters Scotland LLP

December 2016