With reference to cases - relocation and alienation - when and with what frequency are the courts requiring children to give evidence?

Concept of alienation

1. What is parental alienation syndrome?

The term "parental alienation syndrome" was brought to life as a concept by a US child psychiatrist, Richard A Gardner. He described parental alienation as a child's campaign of denigration against a parent which has no justification and results from the combination of two factors: firstly, the programming or brainwashing by one parent of the child and secondly, the child's own contribution to the vilification of the target parent.

Gardner's views have attracted considerable criticism in academic literature from experts in the fields of health care, social work and law, with the view being expressed by Jaffe, Lemon and Poisson in 'Child Custody and Domestic Violence' (2003) that "*parental alienation syndrome is not validated by any empirical studies, Gardner's work is self-published and not subject to peer review, and Gardner's theory is grounded in gender bias with its claim that 90% of alienators are mothers*."

In 2001, Kelly and Johnson in their paper "The Alienated Child: a reformulation of parental alienation syndrome" sought to re-cast the concept of parental alienation by focusing on the alienated child. They define an alienated child as "*one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent*."

Whilst Gardner concluded that children with parental alienation syndrome had been indoctrinated against one parent by the other, Kelly and Johnson concluded that "*alienating behaviour by a parent is neither a sufficient nor a necessary condition for a child to become alienated*."

2. Consideration of parental alienation syndrome by Courts.

European Court of Human Rights

Parental alienation was raised before the European Court of Human Rights in *Elsholz v Germany* (2002) 34 EHRR 58 where an unmarried father alleged that the refusal to grant him access to his son amounted to a breach of Article 8 of the European Convention on Human Rights and that as an unmarried father he had been the victim of discrimination contrary to Article 14 of the Convention taken together with Article 8 and that under article Section 6 §1 of the Convention, the proceedings were unfair. The argument was raised however only within the applicant's submission and in holding that there had been a violation of Article 8, that there had been no violation of Article 14 taken in conjunction with Article 8 and that there had been a violation of Article 6 §1 the Court did not explore the concept nor its validity.

English Courts

Parental alienation has been considered by the courts in England although some judges prefer the term "implacable hostility".

In *V v V (contact: implacable hostility)* [2004] EWHC 1215 (Fam), the applicant father applied for a residence order in respect of his two daughters aged seven and nine, both of whom had lived with their mother since the breakdown of the parties' marriage four years previously. Since that time there had been constant litigation about contact arrangements, resulting in a number of orders for contact. The father argued that the mother had shown implacable hostility to him having contact with the children; that she had, on numerous occasions, unilaterally halted contact in breach of court orders; that she had made false allegations against him and his family and in so doing had acted contrary to the children's welfare and best interests. The application was granted. The Court held, that although the mother had presented herself as someone who put her children's welfare first, in reality she had an agenda to undermine contact arrangements. If the children remained with their mother then it was very likely that her implacable hostility to contact would continue, which would subject them to further emotional harm. Although the children wanted to continue living with their mother, their wishes and feelings, whilst significant, were not determinative given their age and because their views had been tainted by their mother.

In this case, by the time of the judgment the children's views were taken by Reports. The Cafcass Officer had prepared six Reports with an addendum 14 days before the judgment was published.

Scottish Courts

While behaviour of the kind that might be recognised within the definition of parental alienation syndrome is not unknown in Scotland, the courts do not appear to have addressed the matter in any detail, within either that named construct or as "implacable hostility", as yet.

Perendes v Sim 1998 SLT 1382 was a case commencing before but determined after the coming into the force of Children (Scotland) Act 1995. A Greek Cypriot was father of two children whose mother was Scots. The children were born while the parties lived together in London without having married. An order regulating access was obtained by the father in the Inner London Area Magistrates Court in 1988. The mother moved from London to Kilmarnock without informing either the father or the Magistrates Court. The father by his own efforts managed to trace the mother's whereabouts and thereafter petitioned the Court of Session for residential access in London, where, he argued, the children would benefit from contact with their father and the wider circle of his family. The respondent argued that the children had an aversion to their father, did not wish to visit him in London and that he had on at least one occasion physically and sexually abused them. The court held that while the views of the child had to be taken into account, in this case it was clear that the views expressed by the children were the product of the respondent's determination to cut the petitioner out of their lives and to this end she had misled her children as to the purpose of the court proceedings, and that they should accordingly be afforded limited weight. Further, it was held that reintroduction of the non-custodial parent would require careful and sensitive planning and would require to be carried out gradually with the involvement of a third party as facilitator. The granting of orders was, therefore, postponed so that an agreed third party could carry out inquiries into the practicability of such an approach.

The children in this case gave evidence. By the date of the judgment they were aged 11 and 10.

In *JS v DS*, unreported, July 4, 2002, parental alienation syndrome was raised by the party-litigant father but, since no relevant ground of appeal was advanced by him, an Extra Division of the Inner

House did not have occasion to determine whether Scots Law recognises "parental alienation" syndrome.

In its judgment the Court noted that the syndrome was not mentioned before the original presiding Sheriff. No evidence was led to the effect that the witnesses criticised by the appellant were unfamiliar with the syndrome or with what the Court described as the phenomenon that a custodial parent may influence a child against the non-custodial parent and no evidence was presented that the child was affected by the syndrome. The child had a curator *ad litem* appointed who participated in the proof at the conclusion of which the child was 10.

In *Q v P* 2016 Fam LR 54, the sheriff found that there was no factual basis for concluding or suspecting that either child was suffering from or affected by any underlying psychological issue which required the input of a child psychologist. The sheriff considered there was neither a basis nor a need for a discussion of the theory of attachment or parental alienation which were both referred to at length in one of the child psychologist's reports. [Para 36].

3. Dr Kirk Weir's study on effects of parental alienation on children's ascertainable wishes and feelings

Dr Weir is a UK based consultant child psychiatrist who acts as an expert witness within the family courts of England & Wales. In 2011, he undertook a study of cases in which he conducted assessments of children caught in high conflict contact disputes between their separated parents. All 58 children included in the study had consistently opposed contact with the non-resident parent, despite the court having determined that there was no good reason to constrain contact.

He concludes that "*the ascertainable wishes and feelings of some children…are extremely unreliable, in the sense that their consistently expressed opposition to contact and the non-resident parent can be overcome in most cases*." In his study, there was a more than an equal chance that the child would enjoy the experience of contact once it was insisted that a visit take place.

He goes on to state that "*of considerable concern was the reaction of those resident parents who claimed that their only reason for opposing contact was their child's resistance to contact, but who continued to oppose contact after a successful visit had been achieved. Many seemed only too aware of the court's duty to consider the child's views and may have tried to exploit this."*

He recommends that "*practitioners…be aware of the different reasons for resistance to contact with the non-resident parent and be able to determine when external influences and abnormal psychological reactions, such as alienation are influencing children's ascertainable wishes and feelings."*

Dr Weir believes that "*the assessment of the child's wishes and feelings was incomplete unless there was an observation of contact with the non-resident parent*." He believes that taking the views of children can often be counterproductive, and in many instances the best approach might simply be to order that contact takes place, even against the child's perceived wishes.

The child's views

In litigation, there is an obligation under domestic and international law to obtain the views of the child.

1. The UN Convention on the Rights of the Child

Article 12 provides that "*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. Children (Scotland) Act 1995 s11(7)(b)

When considering whether to make any order relating to parental responsibilities or rights, the court:

"*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."

3. *Shields v Shields* 2002 SC 246

The mother sought a specific issue order to relocate to Australia. The child was 7 when the action was raised. Intimation on the child was dispensed with as inappropriate and the matter of whether the child wished to express views was not raised at any time during the action at first instance, or in the judgment issued. The Extra Division however said "*the duty on the court to comply with the provisions of s11(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*."

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*."

4. How much weight should be attributed to a child's views?

McG v McG 2007 Fam LR 62

The case of *McG v McG* 2007 Fam LR 62 demonstrates how the courts are aware of the possibility of pressure being brought to bear on children in disputed residence and contact cases.

In this case, the father of two children sought a residence order and further hearing on contact regarding the children. It was held that the children's home environment was decisive and the mother had been their principal carer since birth. The children were well looked after and thriving, they appeared fond of their mother's partner, their schooling was satisfactory, they had better accommodation in Glasgow, and it was in their best interests to grow up together and remain where they were. If they were to move, they would have to share a bedroom, they would be growing up in a family to which they would be unused, and the father's partner should not be asked to bear the burden of caring for four children at this time.

In this case, Counsel suggested and the judge agreed that the children, aged 7 and 5 at the time of the judgement, were too young to be interviewed. The pursuer had suggested that the children had been in betting shops and public houses. This belief was based upon comments made by the children. The judge noted: "*I attach little importance to the alleged remarks of the children to either party…At best, they are unreliable. Also, it is well known especially in cases like this that children can be 'coached' to pass on the opinion of a parent or to say what the other party does not want to hear. At other times, children of that age can simply have a vivid imagination*."

C v Finland (2008) 46 EHRR 24

In *C v Finland* (2008) 46 EHRR 24, the European Court of Human Rights held that there had been a violation of the father's right to family life under Article 8 of the ECHR. C, a British national, married B, a Finnish national and they had two children whilst living in Finland. Following the parties' separation, the children resided with B and her new partner, L. When B died, both C and L sought residence. The children were aged 12 and 14 at the time when the Supreme Court in Finland granted L residence. In doing so, the court observed that, since the views of the children were very strong, it would be "counter-productive and quite possibly harmful" to force conformity to a living arrangement they so strongly resisted. The Supreme Court did not conduct an oral hearing but ultimately the ECHU did not consider that to have been a violation of the father's Article 6 rights.

The children had been interviewed five times by court appointed social workers, twice by independent psychologists and once by a psychiatrist throughout the domestic proceedings. C argued that the domestic court had breached his right to family life under Article 8 of the ECHR because the court, in reaching its final decision, considered the children's views without re-examining the validity of their opinions or permitting C to respond in the context of a full hearing.

In reaching its decision, the ECHR stated that the domestic court had "*placed exclusive weight on the children's views without considering any other factors, in particular the applicant's rights as a father, effectively giving the children an unconditional veto power*."

Barnes in her article 'Moral actors in their own right: consideration of the views of children in family proceedings stated in reference to C v Finland that "*the judgment…indicates the danger in allowing even the clearly expressed views of teenagers decisive weight*."

Relocation

1. Statistics

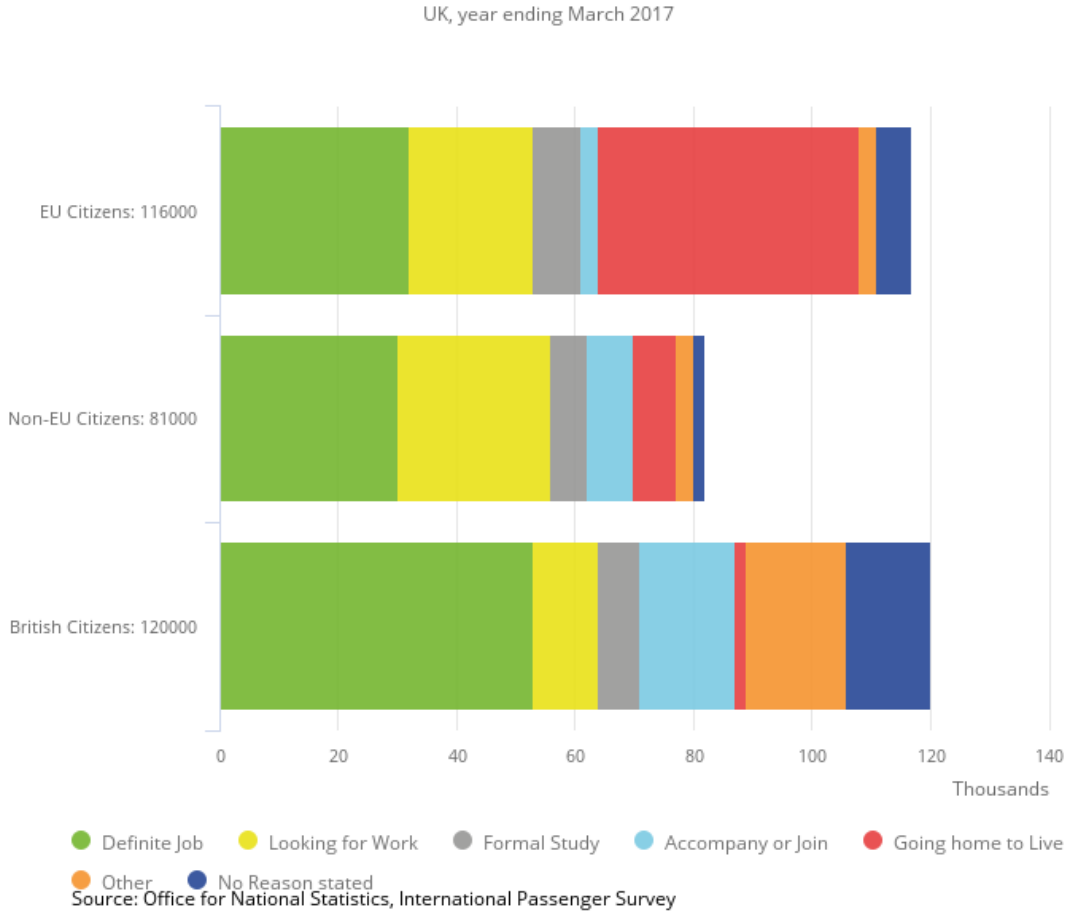
In a world where cross-border migration is increasingly popular and accessible, instances where one parent wishes to relocate with a child back to their home country, or to relocate elsewhere as a result of career developments, relationship breakdown or a new relationship are likely to be increasing.

The Migration Statistics Quarterly Report August 2017: a summary of the latest official long-term international migration statistics for the UK for the year ending March 2017 published by Office for National Statistics (ONS)

Net long-term international migration was estimated to be +246,000 in year ending (YE) March 2017, down 81,000 from +327,000 in YE March 2016.

The table below shows estimates of emigration from the UK by citizenship and reason:

Figure 5: International Passenger Survey estimates of emigration from the UK by citizenship and reason



Source: Office for National Statistics, International Passenger Survey

2. The Applicable Law

Parental responsibilities are outlined in s.1 of the Children (Scotland) Act 1995 and the corresponding parental rights are listed in s.2 of that legislation. Section 11(1) of the 1995 Act provides that the court may make orders in relation to:

- (a) parental responsibilities;
- (b) parental rights;
- (c) guardianship; or
- (d) subject to s.14(1) and (2) of this Act, the administration of a child's property.

The test to be applied by the court where any order under s.11 is sought can be found in s.11(7) which provides:

Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—
(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and
(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.

Relocation cases are those in which a party seeks to remove a child from the jurisdiction of his habitual residence to settle elsewhere. Such removal is unlawful other than with a court order, where the intention is to remove a child habitually resident in Scotland from the UK — s.2(3) of the 1995 Act.

In respect of removal from one of the jurisdictions of the UK to another, s.41 of the Family Law Act 1986 confers on the Courts from where the child was removed jurisdiction for one year after removal.

Further, any person reaching a major decision involving his or her fulfilling a parental responsibility or exercising a parental right must have regard, so far as practicable, to, amongst other things, the views of any other person who has parental responsibilities or parental rights in relation to the child (s.6 of the Children (Scotland) Act 1995).

3. Welfare of the child is paramount

In relocation cases, there are various conflicting or at least competing, interests at stake, namely: the interests of the child; those of the relocating parent; and those of the parent who remains.

While the relocating parent enjoys a right of freedom of movement expressed in Article 2 of the ECHR: "Everyone shall be free to leave any country, including his own", this is to be weighed against the other parent's right to private and family life within Article 8 of the ECHR.

It has been said that the approach of the courts in Scotland is neither pro-relocation nor anti-relocation but that they adopt a neutral stance. In Scotland, the welfare and best interests of the child are paramount. The Pursuer is required to discharge the onus that, from the child's perspective, it would be better that an order be made than that no order be made at all. This is in contrast to the approach in England, set out in *Payne v Payne* 2001 EWCA Civ 166, which suggests that the proposals of the parent with residence wishing to relocate should be given a weight which is greater than other factors.

In *M v M 2012 SLT 428*, the Inner House of the Court of Session held that the ratio of Payne v Payne 2001 EWCA Civ 166 formed no part of the law of Scotland. The court was clear that the welfare of the children had to be the paramount consideration, and that no special significance should be accorded to the wishes of the primary carer. Lord Emslie stated that "*in all the circumstances no positive benefit to the children, as opposed to the defender herself, had been shown to flow from the relocation proposed. But for the defender's wish to move south to be with [her new partner], there would be no possible reason to disturb and disrupt the children's settled and happy life*."

The parties were agreed that it was inappropriate for either child to be asked to express views in terms of Section 11(7). The older child had certain additional support needs which resulted in developmental delay of 18 months behind his peers.

4. Jurisdiction

The determination of parental rights and responsibilities is a matter for the law of the state wherein a child is habitually resident.

5. The child's views in relocation cases

<u>*S v S* 2012 Fam L.R. 32</u>

In *S v S* 2012 Fam L.R. 32, the mother was successful at first instance in her application for a specific issue order permitting her to take the child to reside with her in Texas. The father appealed on the grounds that the sheriff had, amongst other factors, failed to have regard to the child's view.

The Inner House refused the appeal. They were not persuaded by the submission that the sheriff failed to comply with his statutory obligations under s.11(7)(b) of the 1995 Act. There had been a pre-proof exercise which was conducted by PB. The court at first instance had remitted to PB, a person skilled in the conduct of child related investigations, to see whether any worthwhile ascertainment of B's (the child's) views could be achieved. While the general approach to be taken by PB was apparently discussed in court, it was left to her to decide how a six year old child, unaware of the relocation proposal, should most appropriately be interacted with, if at all. From her experience, she elected for an oblique approach, couching questions in terms of the hypothetical feelings of an imaginary animal

rather than those of B himself. Where, however, certain questions were asked from both angles (for example in connection with attitudes to school), B's responses were contradictory, giving rise to an assessment that his answers to other questions might not necessarily have related to his own situation.

The Inner House noting in particular that B was only six years old and that, at the material time he knew nothing of the relocation proposal, nor of its implications for his relationship with the defender, nor indeed of the likely consequences if relocation did not take place, held that there was no reason to attach material significance to any views which B might be thought to have expressed. The sheriff therefore, had committed no error of law in so far as he declined to do so.

LC v KM, Stonehaven, Sheriff Halley, 6 December 2011, unreported

In LC v KM, the children aged 12, 10 and 8 wished to relocate with their mother. Their views were available to the court in Form F9 and a report. Each of the children expressed a clear view that he or she wished to go to New Zealand, however, each of the children had also expressed his or her love for their father and concern at the prospect of seeing him less often.

The sheriff refused the application principally on the ground that the existing regime of contact and residence was operating in their best interests. The Sheriff found that "*significant caution*" had to be employed when assessing the weight to be given to the children's views. The Sheriff found that "*it is clear that the manner in which the children's views have been formed has been managed and influenced by the pursuer. This has been the case to the extent that the defender has been effectively disabled from communicating with any of the children about the major decision to relocate to New Zealand*."

SP v BM, Sheriff Sheehan, 17 July 2012, unreported

The issue in this case was whether the defender should be able to take the parties' children, C aged 11, T aged 7 and A aged 5, to live in Northern Ireland. The parties were in agreement that T and A did not have sufficient maturity to express a view and had not expressed a desire to do so. Both parties were in agreement that their daughter C was of a sufficient age and maturity to express a view and furthermore that she wished to do so. C was brought to court to speak with the sheriff. The sheriff's impression of C was that neither parent had attempted to influence her in forming her views and both had stressed to her that they would not be angry or upset with her no matter what view she expressed. C had a very clear view that she did not wish to relocate to Northern Ireland.

Sheriff Sheehan said that "while it is clear that a child this age would be unlikely to want to change the status quo, in my view C was able to articulate very clear reasons for her views which have remained consistent over a significant period of time….while I have no doubt that in time she would settle into a new school in Northern Ireland, I think she may find this more difficult than many children her age and that she would miss her father, extended family and friends with whom she has close relationships very much. I think there is every prospect that she would be unhappy both in the short and medium

term following a move to Northern Ireland. Some weight must be given to her views in the context of weighing up the relevant factors in this case."

The Sheriff found that moving to Northern Ireland was not in the best interests of the children.

Q v P 2016 Fam LR 54

In Q v P 2016 Fam LR 54, previously mentioned in the context of there not being a need for expert psychological input, a mother sought a specific issue order to relocate from Glasgow to Exeter with her two children aged 10 and 4. The case raised questions relating to admissibility of expert opinion evidence in light of the Supreme Court decision in Kennedy v Cordia (Services) LLP 2016 UKSC 6. Sheriff Anwar found that the evidence of two of the psychologists in relation to the likely impact upon the children of any orders the court may make, or refuse to make, was unnecessary and therefore inadmissible. She considered that both experts were doing the very task entrusted to the court – an analysis of all relevant risks and benefits but without the advantage of seeing and hearing all parties giving evidence and being cross-examined.

C. Millar makes the points in her Case Comment on Q v P, Fam LB 1, that "*this case serves as both a warning and a reminder. Family practitioners must give careful consideration as to whether their case is one that warrants instruction of an expert witness, particularly in child-related cases. Secondly, in cases where such an instruction is appropriate, practitioners should consider the specific remit issued to experts to ensure that they do not attempt to usurp the court's decision-making function*."

During the course of the proof, it became clear that a focused report from a child psychologist would be of assistance to the court. Such a report was obtained from Dr Katherine Edward. Sheriff Anwar found that the child "presents as a child who does not wish to make a decision as he does not wish to disappoint either of his parents." The Sheriff found that Dr Edward's assessment that the child would not like to see his time with his father reduced as a fair analysis of his position. While the Sheriff had regard to the child's view in arriving at her decision, she did not attach "significant weight to his view in light of the ambiguous terms in which it has been expressed."

Re A: Letter to a Young Person (Rev 1) 2017 EWHC 48

This case caught the attention of the public when Justice Jackson handed down his judgment in a letter to the 14 year old boy was the subject of the proceedings.

The boy instructed a solicitor. The solicitor considered him competent to provide instructions. The boy applied to the Court to relocate from the UK with his father. His father planned to emigrate to Scandinavia. After case management and directions hearings, the application was taken over by his father.

The issue arose whether the boy, called Sam by the judge should give evidence at the hearing. He wanted to do so. His father agreed with that. His mother, stepfather and Cafcass Officer preferred that he be seen privately by the judge. The judge decided that he should give evidence briefly at the beginning of the hearing but not to be questioned directly by his parents. Each prepared five questions which the judge put to the boy after he had been asked introductory questions by his own solicitor. His evidence took less than half an hour.

Importantly Justice Jackson records that the boy to whom he referred to as Sam in his judgment was satisfied that he had got his point of view across and had been seen to do so. He then went on a school trip which was what he wanted and the judge heard the remainder of the evidence.

The boy in this case at 14 years therefore gave evidence but it was the form in which he delivered his judgement on 13th July 2017 which caught the public imagination. The letter is reproduced in the judgment.

In Scotland, this same step has also been taken by Sheriff Anwar in *Patrick v Patrick* [2017] SC GLA 46 which followed the Sheriff having heard evidence over 11 days. The contested issue was the father's application for a contact order.

The children had spoken with a clinical psychologist during the proceedings. That psychologist offered the view that the court's decision in the case would be best communicated to the children by the court, rather than by either of the parents. She explained that she considered it important for the children who had expressed views to her to understand the decision the Sheriff had reached and why she had. It was drawing upon this opinion and recommendation the Sheriff decided to take the step of writing to the children. Because the psychologist was known to the children it was decided that she would read the content of the letter to the children. The letter was addressed to the two older children. It was left to the discretion of the psychologist whether it should be read to the youngest.

As practitioners we are all familiar with the various ways in which the views of the children can be taken in the course of proceedings. Those apply in all contested cases and not simply those specific to the topic of this paper. Now that the Children (Scotland) Act 1995 is about to attain 21 years of having come into force, the profession's renewed interest will be what innovative ways a court might relay its decisions to them. 🤔