



Hearing Children in Scottish Family Proceedings: A Practitioner's Perspective

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Setting The Scene

- Private law relating to parents and children
- Children (Scotland) Act 1995
- Court proceedings relating to parental responsibilities and rights

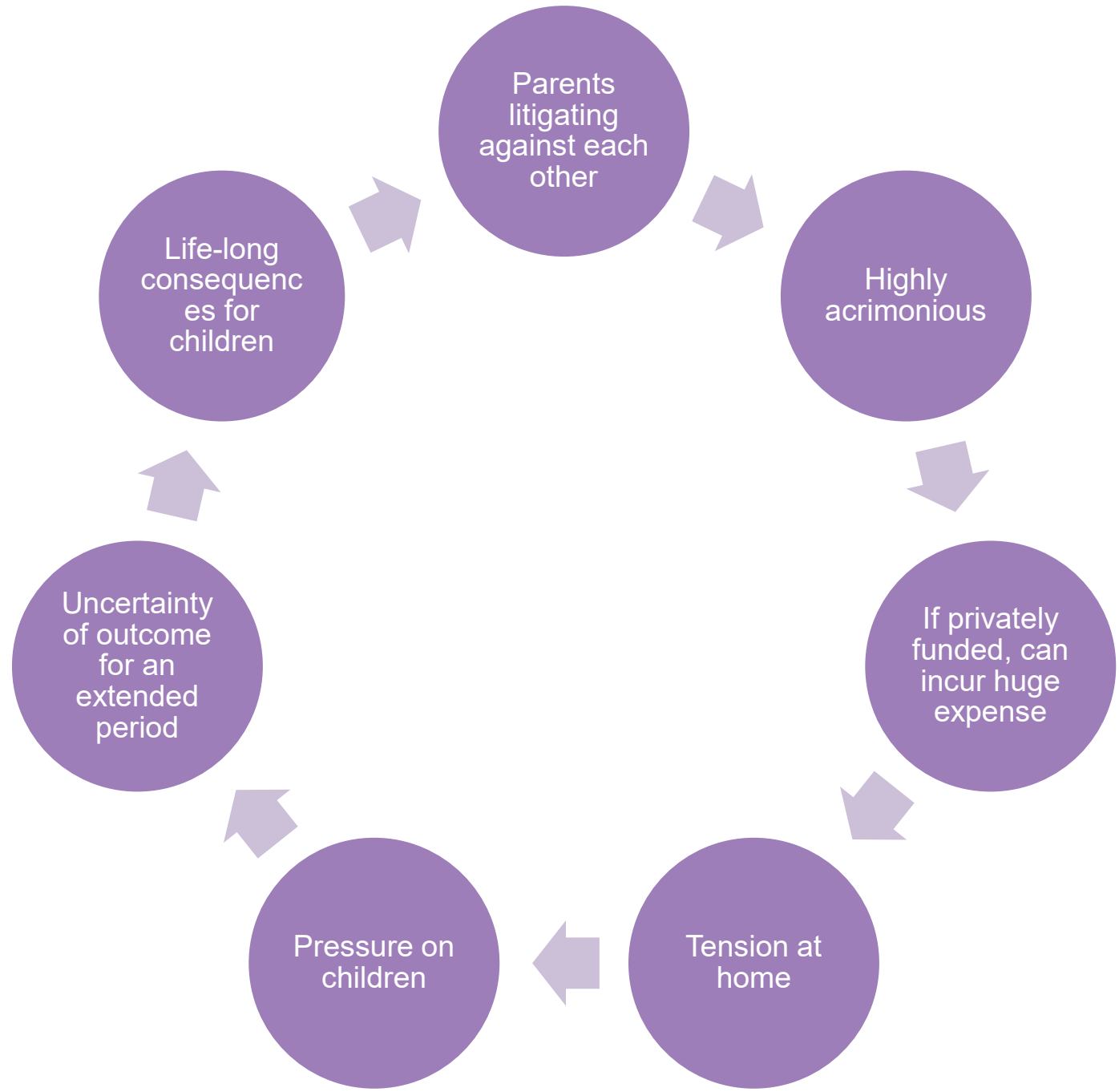
Participation of Children in family proceedings: The Law

- UNCRC (Incorporation) (Scotland) Act 2024
- UNCRC, Article 12:
 - 1) *States Parties shall assure to the child who is capable of forming his own views the right to express these in all matters affecting the child, the views 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

- Put Article 12, UNCRC into effect
- Section 6: Parents required to have regard to children's views
- Section 11(7)(b): Court required to have regard to children's views
- Will be amended by Children (Scotland) Act 2020

The Reality of Family Proceedings



Decision making by the Court

- Section 11 orders
- Three duties on the court:
 - Welfare is paramount
 - No order principle
 - Give opportunity to express views / have regard to views, so far as practicable taking account of child's age and maturity
- Children aged 12 presumed to be of sufficient age and maturity to express a view
- Court required to discharge duty / Potential for appeal if views not considered

Practicability of Seeking Views

- Taking of views is the default position
- Presently, only relevant test is practicability
- But, what of best interests?
 - M v C [2021] CSIH 14
 - Weighty adverse welfare considerations of sufficient gravity can supersede the default position

Child Participation in Practice

- Form F9
- True representation of the child's views?
- In sheriff court actions a warrant for intimation by way of F9 must be sought or dispensed with
- Concern of parental influence

Child Welfare Reporters

- Appointed by the court to report on views and/or specific questions relating to **welfare**
- Appointed from a **panel** of members maintained by Scottish Courts and Tribunal Service
- Important role; **Easier** for children; Can provide helpful context to assist court
- Eligibility criteria / training standards for reporters not presently **regulated**.

Curators ad litem

- Appointed by the court if welfare not sufficiently safeguarded by parties / court
- Not just taking views
- Curator represents child's interests

Other means of participation

- Child speaks to decision maker
- Child psychologists
- Child giving evidence

How do views of children impact on decision making

- Views are **not** determinative of outcome
- Cases can be **complex**
- Each case turns on its own **facts**
- Welfare remains **paramount** consideration

After views are given by children

- Presently no mechanism or requirement to **acknowledge** views received or considered
- No mechanism or requirement for **feedback**
- Left to **parents** to feedback
- Set to **change** under 2020 Act

The Future: The “New” 2020 Act

Key Aims:

- ensure that the child’s best interests are at the centre of any contact and residence case or Children’s Hearing;
- ensure that the views of the child are heard;
- ensure further compliance with the UNCRC in the family courts.
- Substantive provisions not yet in force.

Views of the Child: Changes under the Children (Scotland) Act 2020 (1)

- Children enabled to *express views in their preferred manner*
- Two situations in which court not required to comply with this requirement
 - Child not capable of forming a view
 - Location of child not known
- New duty appears absolute; potential for clash with best interests?

Views of the Child: Changes under the Children (Scotland) Act 2020 (2)

- Children to be *presumed capable of forming a view*.
- No *minimum* age for capacity. Aligns with Article 12, UNCRC.
- How young is *too young* to give a view?

Views of the Child: Changes under the Children (Scotland) Act 2020 (3)

- Duty to provide *explanations to Children*
- Only excused if:
 - Child *not capable* of understanding an explanation
 - Not in *child's* best interests to give explanation
 - Location of child *not* known

Other relevant 2020 Act changes re participation by the child (4)

- Duty to investigate failures to obey s. 11 orders and to take views about such failures.
- Consideration of best interests and views re a child's private information
- Establishment of registers for Child Welfare Reporters and Curators ad litem.

Thank you

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