

# Study on children's involvement in judicial proceedings – contextual overview for civil justice – UK (Scotland)

**July 2014** (Research carried  
out between March 2013  
and October 2013)

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## Abbreviations

ASTNS	Additional Support Needs Tribunals for Scotland
CA	Competent Authority
CoE	Council of Europe
CPO	Child Protection Order
CSP	Co-ordinated support plan
CWN	Child witness notice
EC	European Commission
EU	European Union
OCR	Ordinary Cause Rules 1993
RCS	Rules of the Court of Session 1994
s.	Section
SLAB	Scottish Legal Aid Board

# Introduction

## Introduction and context

The promotion and protection of the rights of the child is one of the objectives of the EU on which the Treaty of Lisbon has put further emphasis. This report is part of a study 'to collect data on children's involvement in judicial proceedings in the EU' which supports the implementation of the Commission Communication of 15 February 2011 '[An EU Agenda for the rights of the child](#)', which identified the lack of reliable, comparable and official data on the situation of children in the Member States (MS). This deficiency is a serious obstacle to the development and implementation of evidence-based policies and is particularly evident in the context of child-friendly justice and the protection of children in vulnerable situations. Making the justice system more child-friendly in Europe is a key action of the EU Agenda. It is an area of high practical relevance where the EU has, under the Treaties, competences to turn the rights of the child into reality by means of EU legislation. Improved data is crucial to the framing of such legislation.

The objective of this study is:

- to establish statistics and collect data based on structural, process and outcome indicators on children involved in civil judicial proceedings for the years 2008-2010 (and 2011 if available) for all 28 EU Member States;
- to provide a narrative overview of children's involvement in civil judicial proceedings in the EU. The report describes the situation in each Member State as at 1 June 2012.
- This report examines the safeguards in place for children involved in **civil judicial proceedings**. The [Council of Europe Guidelines on child-friendly justice](#) serve as a basis for the analysis of the provisions affecting children in civil judicial proceedings in each Member State.

## Structure and scope

This report describes the national **civil justice system** insofar as children's involvement is concerned. If, in addition to general rules in civil judicial proceedings, there are specific rules in the fields of **family and employment law**, the safeguards in place for children involved in judicial proceedings in those two specific sectors will also be described.

**Chapter 2** of this report provides an overview of the Member State's approach to children's involvement in civil judicial proceedings. It includes a description of the competent authorities and services.

**Chapter 3** of this report is divided in sections (3.1, 3.2, etc.) according to the different safeguards examined (e.g. the right to be heard, the right to information, etc.). Each of these sections is divided into subsections describing the different rules applying to children according to the different role they may have in a civil judicial proceeding (plaintiff; defendant; witness; other roles).

The table below summarises the type of judicial proceedings applicable to the fields of family and employment law and the competent courts. For the sake of completeness, the table also indicates which sectors are examined in the [overview for administrative justice](#), i.e. asylum, migration, education, health, placement into care, administrative sanctions, and offences committed by children below the minimum age of criminal responsibility (MACR). In fact, in some countries, civil procedural rules also apply to judicial proceedings in some of these sectors, but in order to ensure a degree of consistency among the overviews on the 29 jurisdictions covered by this study, the breakdown set out in the table below has been applied for each and every country overview.

Type of judicial proceedings and court competence per sector <sup>1</sup>									
Sectors:	Contextual overview for civil justice	Contextual overview for civil justice	Contextual overview for administrative justice <sup>2</sup>	Contextual overview for administrative justice	Contextual overview for administrative justice	Contextual overview for administrative justice	Contextual overview for administrative justice	Contextual overview for administrative justice	Contextual overview for administrative justice
	Family	Employment	Asylum	Migration	Education	Health	Placement in care	Administrative sanctions	Offences < MACR <sup>3</sup>
Type of proceeding applying in the sector	Civil judicial proceeding	Civil judicial proceeding	Administrative judicial proceeding	Administrative judicial proceeding	Administrative judicial proceeding	Administrative judicial proceeding (judicial review)	Civil judicial proceeding	Not applicable	Civil judicial proceeding
Competent court(s)	Ordinary Civil Court	Ordinary Civil Court/Specialist Employment Tribunal	Immigration and Asylum Chamber/ Special Immigration Appeals Commission (Superior Court)	Immigration and Asylum Chamber/ Special Immigration Appeals Commission (Superior Court)	Sheriff Courts/Local Courts/Additional Support Needs Tribunal for Scotland	Ordinary Administrative Tribunal/Mental Health Tribunal for Scotland	Children's hearing system-Lay Tribunal/ Court of Session	Not applicable	Children's hearing system-Lay Tribunal

<sup>1</sup> This table provides an indicative summary of competent courts and relevant proceedings. However, please check [Section 1](#) for a complete overview of the competent courts or sections/divisions within the competent courts.

<sup>2</sup> This study on Children's involvement in judicial proceedings is composed of three contextual overviews i.e. contextual overview for criminal justice, contextual overview for civil justice, contextual overview for administrative justice. The rules applying to judicial proceedings in the sectors of asylum, migration, education, health, placement into care, administrative sanction and offences committed by children below MACR are described in the contextual overview for administrative justice.

<sup>3</sup> (MACR) Minimum Age of Criminal Responsibility – see [Table 3.1 of the EU Summary of contextual overviews on children's involvement in criminal judicial proceedings](#) on MACR in EU28 as at 1 June 2012.

# 1 Overview of Member State's approach to children in civil judicial proceedings and specialised services dealing with such children

## 1.1 Brief description of judicial system and institutions

### Legal framework

The legal framework relevant to children in judicial proceedings in Scotland is made up of a large number of different civil procedures. The institutions involved, as well as relevant laws and policies, vary depending on the subject matter of proceedings.

In most cases civil litigation will be conducted either in the sheriff courts or the Court of Session, which each has a number of different forms of procedure depending upon the nature of the claim, as well as the value of the claim in some cases.

Overall there are nine separate types of procedure for civil disputes brought before the sheriff courts or the Court of Session. In the sheriff courts, the principal forms of procedure are the following:

1. Ordinary action procedure – The detailed rules of procedure are contained in the **Ordinary Cause Rules 1993<sup>4</sup>** ('OCR') and cover a whole range of actions, including actions for payment of debt, family actions, and personal injury.
2. Summary cause procedure – Summary cause procedure is a simple and shortened form of procedure which is generally used for claims up to £5000 (EUR 5909<sup>5</sup>) including those relating to recovery of possession of heritable property and damages resulting from personal injuries. The detailed rules of procedure are contained in the Summary Cause Rules of 2002<sup>6</sup>.
3. Small claims procedure – Small claims procedure is a type of summary cause procedure which is designed to be quicker and cheaper for specific types of action, primarily claims for a sum of money of £3000 or less. The rules are contained in the Small Claim Rules 2002<sup>7</sup>.
4. Summary application procedure – Summary application procedure generally applies where a statute dealing with a specific subject matter provides for an application to be made to the sheriff court for an order or other decision of the court. The detailed rules of procedure are contained in the Summary Applications Rules of 1999<sup>8</sup>, as amended.

In addition to the four main types of procedure in the sheriff courts, there are specific procedural rules applicable to child care and maintenance<sup>9</sup>, child support<sup>10</sup>, and adoption cases<sup>11</sup> in the sheriff courts.

In the Court of Session, the principal forms of procedure laid down in the **Rules of the Court of Session 1994<sup>12</sup>** ('RCS') are the following:

1. Ordinary action – The rules deal separately with a large number of different types of action, including family actions, intellectual property and judicial review.
2. Petitory action – Petition procedure is a distinct form of procedure from ordinary action, for example being initiated by a petition rather than a summon. Certain actions, such as the

<sup>4</sup> Act of Sederunt Ordinary Cause Rules 1993 (S.I. 1993 No 1956).

<sup>5</sup> Rate of exchange applied of 1GBP = 1.18EUR as at 21 October 2013.

<sup>6</sup> Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (Summary Cause Rules) 2002, No.132.

<sup>7</sup> Act of Sederunt (Small Claims Rules) 2002 No.133.

<sup>8</sup> Act of Sederunt (Summary Applications, Statutory Applications and Appeals Etc. Rules) (S.I.1999 No.929).

<sup>9</sup> Act of Sederunt (Child Care and Maintenance Rules) 1997 (S.I.1997 No. 291).

<sup>10</sup> Act of Sederunt (Child Support Rules) 1993, as amended.

<sup>11</sup> Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 No.284.

<sup>12</sup> Act of Sederunt (Rules of the Court of Session 1994) (S.I.1994 No.1443).



appointment of a judicial factor, a petition for breach of interdict or an application for suspension and interdict, have to be raised by a petition, which generally include a crave<sup>13</sup> for the court to do something. In the Court of Session there are rules relating to petitions in general<sup>14</sup> as well as other rules relating to particular actions by petition.

3. Commercial cause – Commercial cause procedure is a shortened form of procedure applicable to all actions arising out of, or concerned with, any transaction or dispute of a commercial or business nature, and differs significantly from ordinary procedure. Whilst such cases can still proceed under the ordinary procedure in the Court of Session, the pursuer can choose at the outset whether they wish the commercial cause procedure set out in rules 47.1 to 47.16 of the [RCS](#), which should be read alongside the Court of Session Practice Note number 12 of 1994 relating to commercial actions. The procedure in a commercial action is as the commercial judge shall order or direct, but shall follow the general procedure involving a summons, the lodging of defences, a preliminary hearing, a procedural hearing, and proof.
4. Optional procedure – This is a shortened form of procedure applicable to certain actions of damages for personal injury in the Court of Session. Whilst such cases can still proceed under the ordinary procedure in the Court of Session, the pursuer can choose at the outset whether he/she wishes the optional procedure set out in Part V of the [RCS](#), regardless of the size or complexity of the claim.
5. Judicial review – The Court of Session has a supervisory jurisdiction over the decisions of inferior bodies exercising administrative, judicial or quasi-judicial powers. Where an application is made to the supervisory jurisdiction, the rules set out in rules 58.1 to 58.10 of the [RCS](#) apply. However, as the rules provide only a broad framework, the Court of Session is given very wide discretion in relation to the procedure to be following in such cases.

Specific types of claim relating to tort, personal injury, consumer law, contract, inheritance, property, rights of individuals, legal capacity, labour/employment issues and family matters can therefore be brought under one or more of these procedures. In certain cases therefore, there may be a choice available as to which procedure to follow.

In addition, for certain matters such as disputes concerning land or property, or employment issues, claims can be raised before the Lands Tribunal for Scotland, or employment tribunals which in effect act as independent civil courts. The relevant procedural rules are set out in the Lands Tribunal for Scotland Rules (as amended) 1971 and the Lands Tribunal for Scotland Rules 2003, and the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 respectively.

Employment law is essentially concerned with private contractual arrangements between an employer and employee, which are dealt with by ordinary courts or specialist employment tribunals under private law. In accordance with the [Children and Young Person \(Scotland\) Act 1937](#), no child shall be employed that is under the age of 13 years<sup>15</sup>. Regulations under the Act make specific provision for the number of hours<sup>16</sup> and type of work that children under school leaving age can be employed in. However, with the exception of the rules on the national minimum wage and holiday entitlement, general employment law, including rules against discrimination in employment, applies to children in the same way as it applies to the employment of adults.

In principle, for each of the above areas of law, the same procedural rules that apply to adults, also apply to children. Scotland has an adversarial system which means that in each case both parties are given the opportunity to put forward their own arguments and the judge or sheriff decides in which party's favour they will rule. In general therefore, in each type of procedure there is a requirement for the parties to set out in writing the details of their claim/defence, known as written pleadings, in advance of any hearing of evidence about the case. Following the initial claim, the defender has the opportunity to lodge written defences, and thereafter both parties will adjust their arguments in light of the opponent's written response. This enables the court to determine what matters are agreed, what matters are disputed, and what matters will have to be proven during a hearing on the evidence.

<sup>13</sup> The formal statement in an application saying what order the court is being asked to make is often referred to as the "crave".

<sup>14</sup> Chapter 14 of the [RCS](#).

<sup>15</sup> [Children \(Protection at Work\) \(Scotland\) Regulations 2000](#).

<sup>16</sup> [Working Time Regulations 1998](#).

While the detailed rules applicable to the nine different types of civil procedure set out above have been considered in the preparation of this report, reference is only made to the **OCR** and the **RCS** throughout, as the main procedural rules in the sheriff courts and Court of Session respectively. These two sets of rules largely mirror each other, and therefore where reference is made to general rules of procedure which apply to both adults and children, reference is simply made to the 'ordinary cause' rules or procedure.

Specific rules for children are however set out in relation to family law matters, adoption and child care. Under the relevant rules applicable to ordinary actions in both the sheriff courts and the Court of Session, a specific chapter is included dealing with family actions (Chapter 33 of the **OCR** and Chapter 49 of the **RCS**) which makes provision for children in such proceedings. In addition, specific procedural rules are set out for applications under the Adoption and Children (Scotland) Act 2007 and again, provision is made for children in such proceedings.

Finally, children involved in judicial proceedings are also subject to a specialised legal framework, the Children's Hearings System which takes place in lieu of court proceedings. While private law matters will generally fall within the jurisdiction of the sheriff courts, cases concerning children accused of committing offences and children in need of care or protection will be heard before a children's hearing. Where the grounds for referral are disputed however, and evidence has to be heard in order to establish the facts, this will be heard before a sheriff (closed court), before being remitted back to the children's hearing. A key division is therefore made between the establishment of the facts which is kept within the forum of the civil courts, and decisions regarding disposal of the case, which are made by the children's hearing.

With regard to decisions concerning the care of a child, a child may be looked after under a voluntary agreement with a local authority, where the child's parents agree to the child being accommodated in this way or under compulsory measures decided by a children's hearing or a court (civil proceedings). The placement of children in secure accommodation however can only be decided by a children's hearing or a court, by way of a warrant to detain the child or as a condition of a supervision requirement. In each case, the child has to have a history of absconding and is likely to abscond from other types of accommodation, and if they abscond they are likely to suffer significant harm or are likely to injure themselves and/or others.

## Institutional framework

The following judicial authorities are competent for civil judicial proceedings involving children:

- The Court of Session;
- Sheriff courts; and
- Children's Hearings

Most civil cases are heard before a sheriff (judge) in one of the 49 sheriff courts, which sit within one of six sheriffdoms in Scotland. These can therefore be regarded as the 'local' courts. Each sheriffdom has a sheriff principal who administers a number of duties and also hears appeals from the sheriff in civil cases, although certain appeals may also be taken straight to the Court of Session.

The Court of Session is Scotland's supreme civil court, which sits in Edinburgh as a court of first instance and a court of appeal.

While there are a number of areas in which the sheriff courts and the Court of Session have concurrent jurisdiction, the Court of Session has exclusive jurisdiction in certain areas, such as actions of reduction and judicial review. In certain cases therefore the same civil dispute can be litigated in either the sheriff court or the Court of Session, and it will be up to the litigant to decide, depending on a number of factors such as cost, rights of audience, etc., in which forum they raise the action.

## Children's Hearings

Youth justice in Scotland is centred on the **children's hearings system**, which is the main forum for decision making concerning the need for state intervention in the life of a child, rather than a review body for decisions made by other bodies, and thus is regarded as a form of civil rather than

administrative procedure<sup>17</sup>. The children's hearings system has been in place since 1971, and was incorporated into the overarching [Children \(Scotland\) Act 1995](#). It was updated and somewhat extended by the [Children's Hearing \(Scotland\) Act 2011](#)<sup>18</sup>.

A child may be referred by concerned parties, such as family, teachers, social workers or police, to the [Scottish Children's Reporters Administration](#) (SCRA). The SCRA is responsible for the children's reporters, who investigate referrals and take a decision on whether the case should go to the children's hearing, and provides suitable accommodation for children's hearings. The grounds for referral to the SCRA are now set out in the [Children's Hearing \(Scotland\) Act 2011](#), which mostly consolidated and restated the law regarding children's hearings, but also introduced a number of changes (e.g. there is now a specific ground of referral for children exposed to domestic abuse where before the more general ground of lack of parental control had to be used to cover this). Most referrals come from social workers or the police. A small number of referrals are also received from family members, courts or health, education or other services. It is also possible for other members of the public or even the child him/herself to make a referral.

Following a referral, the children's reporter will investigate the case and determine whether a hearing is warranted. The reporter investigates the case with regard to the individual circumstances and best interests of the child. Applying a civil evidence standard (balance of probabilities) in relation to non-offence grounds, the reporter instigates a hearing if a) the required grounds for referral exist, and b) compulsory measures of supervision are necessary to either protect the child, or correct his/her behaviour. If in the view of the reporter a hearing is not appropriate, then they may recommend alternative measures or individually tailored programmes<sup>19</sup>.

## Relationship between civil and administrative; civil and judicial criminal proceedings

There are no specific rules regarding the interaction between civil, criminal and administrative proceedings. It remains possible to have concurrent civil and criminal proceedings, although the civil courts enjoy a degree of discretion as to whether or not to adjourn the civil proceedings pending the outcome in the criminal proceedings.

With regard to the relationship between civil and administrative proceedings, a petition for judicial review (civil procedure) cannot be raised until all other forms of appeal and review procedures have been exhausted.

## Coordination

The Children's Hearing System works in close cooperation with the local authorities. Social workers have a legal obligation to refer cases to the SCRA and to provide additional information throughout the decision making process and the hearing. Where the children's reporter requests further information from social services, this is to be produced within 30 days. While most referrals come from social workers or the police, health, education or other services may also make referrals.

As part of an application for an adoption order or permanence order, any reports by the local authority or adoption agency will be provided to the court. Further, where a reporting officer or curator ad litem is appointed by the court, they may speak to anyone they so wish to, including the local authority, adoption agency, social workers, or anyone who has been involved with the child. Either party to a case would also be free to cite such persons as a witness in the case.

Where a case concerns the placement of a child into care, this will be heard both by a court and thereafter by the children's hearing. While the court may grant a child protection order (CPO), a children's hearing shall then be arranged in order to conduct an initial hearing of the child's case in order to determine whether the CPO should be continued. Provision is also made for the courts to refer cases to the children's hearing.

<sup>17</sup> Tribunal (Scotland) Bill, SCRA response to the Justice Committee's call for evidence, 2 August 2013.

<sup>18</sup> It should be noted that the [Children's Hearing \(Scotland\) Rules 1996](#) were replaced by the [Children's Hearings \(Scotland\) Act 2011 \(Rules of Procedure in Children's Hearings\) Rules 2013](#), with effect from 24 June 2013.

<sup>19</sup> See [section on the role of the reporter on the website of the SCRA](#).

## Training requirements and regular vetting

A children's hearing is held before a lay tribunal of three specially trained and qualified volunteers, who are members of the **Children's Panel**. At least one of them must be male and at least one female, selected by and representing the local authorities. A lot of work has been carried out recently regarding the training of Children's Hearing panel members, following the creation of a new national body, Children's Hearing Scotland, which is now responsible for the recruitment, appointment and training of panel members. Instead of 32 separate local panels, there is now one single national panel appointed by a National Convener<sup>20</sup>. As volunteers for the Children's Panel come from different professional backgrounds, training to be a panel member does not form part of their basic qualification. However, following selection to become a panel member, volunteers receive training in a wide range of areas including equal treatment, protecting rights, conduct of the hearing and effective communication and seeking children's view and participation, which leads to a professional development award. This therefore covers training on interaction with children who are being interviewed or heard. The initial training course for new panel members is delivered at a number of venues across Scotland and lasts for approximately six to seven days. Training is mandatory as all panel members must successfully complete the training programme before they can sit on children's hearings<sup>21</sup>. Training to date has focused on communication with children. Children's Hearing Scotland cooperates with the SCRA and training is also delivered to social work, police, teachers as part of partnership working at both the national and local level.

Following the entry into force of the Children's Hearing (Scotland) Act 2011, the Scottish Legal Aid Board (SLAB) now requires solicitors and law firms to register with the SLAB to provide children's legal assistance under the 2011 Act. To be entered on the register, firms and solicitors are required to conform to the Code of Practice in relation to Children's Legal Assistance Cases<sup>22</sup>. In order to meet the registration requirements, a solicitor must demonstrate that he/she has the following competences<sup>23</sup>:

- An understanding and detailed knowledge of the provisions of the Children's Hearings (Scotland) Act 2011 and all associated Rules and Regulations, as well as the legal assistance regime laid down in Part 19 of the Act and the Children's Legal Assistance (Scotland) (Amendment) Regulations 2013;
- An understanding of the ethos of the children's hearing system;
- Detailed knowledge or experience of representing clients at children's hearings and related court proceedings; and
- A general understanding of child development and how to communicate with children.

The Code of Practice goes on to state that "when conducting proceedings before a Children's Hearing, a solicitor, whilst fulfilling his professional duties to his client, shall respect the ethos of the children's hearing system and acknowledge that decisions should be based on sound reasons, with the best interests of the child being paramount, and that the effective participation of all the parties involved should be promoted"<sup>24</sup>. The Code of Practice also permits a solicitor to consult with a child client at a location other than the solicitor's office, children's hearing centre or court "where it can be demonstrated that the child's best interests would be better served in so doing"<sup>25</sup>.

Where the court appoints a court reporter or curator ad litem to get information from the parents, child and other parties and report back to the court, they are selected from an established panel of persons unless the court decides that it would be appropriate to appoint a person who is not on the panel. The legislation does not however specify any criteria for the selection of a reporter or curator ad litem, or establish what their tasks are. Both aspects are therefore left to the discretion of the court. However, a Working Group is currently looking into criticisms of court reporters, in particular regarding the way in which they are appointed, the fact that there are no requirements

<sup>20</sup> See [section on the Children's Hearing System](#) on the website of the Development Centre for Scotland, Social Work in Youth and Criminal Justice.

<sup>21</sup> [The Children's Panel website on the training of panel members](#) (last accessed 18 October 2013).

<sup>22</sup> [Scottish Legal Aid Board, Code of Practice in relation to Children's Legal Assistance Cases](#) (last accessed 7 August 2013).

<sup>23</sup> *ibid.*, section 2.2.4.

<sup>24</sup> *ibid.*, section 3.3.

<sup>25</sup> *ibid.*, section 3.9.2.

regarding their qualification or training (previously court reporters were social workers, but now are family lawyers), and that in many cases the report they provide cannot be challenged since it is only provided at a late stage in the proceedings. Neither a bar reporter nor a curator ad litem receive any particular training, and both are currently being looked at as part of the Scottish Civil Courts Review (Gill Review), which reported in 2009, and the reforms to the Scottish court system that are being made as a result of the recommendations of the Gill Review<sup>26</sup>. The newly established Bar Reporters Working Party, which is to consider the role of bar reporters, what training they require, how their work is monitored and how parties involved in a case can challenge the contents of a report.

Regarding regular vetting of professionals working with and for children, the performance of a judge dealing with cases involving children is not subject to regular checks as such. However, all judges are required to adhere to the *Statement of Principles of Judicial Ethics for the Scottish Judiciary* which was revised in 2013 to clarify the ethics that guide judges in their professional and personal lives, and sets out the six principles of judicial independence, impartiality, integrity, propriety, equality and competence and diligence<sup>27</sup>. Full-time judges are appointed by the Queen following a recommendation of the First Minister for Scotland. A complaint can be made about the personal conduct of judicial office holders by writing to the Judicial Office for Scotland<sup>28</sup>. Judges or sheriffs can be removed from office due to inability, misbehaviour or neglect of duty, following a tribunal set up by the First Minister having heard the matter and a report being made to the Scottish Parliament seeking the removal of the judge or sheriff in question.

It should also be noted that under the *Protection of Vulnerable Groups (Scotland) Act 2007*, a list is kept of individuals that are considered to be unsuitable to work with children and vulnerable adults<sup>29</sup>. It is an offence for any person that is included on the list to work in a child care position. Organisations are under a duty to refer individuals working in child care positions to the list where the individual is considered to have harmed a child or put a child at risk of harm.

## 1.2 General approach towards children under civil law: definition of child, principle of evolving capacities, best interests of the child, principle of non-discrimination

### Definition of the term 'child'

A child is defined as a person under the age of 16 years, or where it concerns a parental responsibility to provide guidance, a person under the age of 18 years<sup>30</sup>. It should be noted also that under the children's hearing system, where a child is subject to a compulsory supervision order, he/she will remain subject to supervision requirements beyond the age of 16 years, and up to age 18, where appropriate<sup>31</sup>.

### The child's best interests

Both the Children's Hearing (Scotland) Act 2011 and the relevant rules of the Court of Session and the sheriff courts make provision for the views of the child to be heard. In order to seek the child's view in ordinary court actions, the child shall be sent a 'form F9' by the pursuer/plaintiff<sup>32</sup>, which asks whether the child would like to tell the sheriff his/her views. Children can also write to the sheriff directly. Where a child wishes to express his/her view, some sheriffs will ask to see the child, whilst others will appoint a bar reporter, who shall speak to whoever they wish to, and prepare and submit a report to the court, or a curator ad litem, who will be involved for the duration of the case. In each case the bar reporter and curator ad litem must have regard to safeguarding the interests of the child as their paramount duty.

<sup>26</sup> Report of the Scottish Civil Courts Review.

<sup>27</sup> Statement of Principles of Judicial Ethics for the Scottish Judiciary (last accessed 18 October 2013).

<sup>28</sup> Rules for the investigation and determination of complaints against judicial office holders are set out in the Judiciary (Scotland) Rules 2011.

<sup>29</sup> Protection of Vulnerable Groups (Scotland) Act 2007, section 1.

<sup>30</sup> Children (Scotland) Act 1995, section 1(2).

<sup>31</sup> Children's Hearings (Scotland) Act 2011, section 83 defines the relevant period for a 'compulsory supervision order' as ending on the day on which the child attains the age of 18 years, where the order has not already ended.

<sup>32</sup> Ordinary Cause Rules 1993, rule 33.7.

The views of a child are essential at a children's hearing and children have lots of power within that system, for example to reject grounds of referral to the children's hearing, or to go to court to challenge the ground of referral<sup>33</sup>.

In addition, the child's best interests are a primary consideration across all services according to guidelines under Getting it Right for Every Child (GIRFEC). GIRFEC is a national programme to improve outcomes for all children and young people in Scotland. It provides non-binding guidelines that have been adopted by national authorities for a number of years to ensure that the child and his/her family, is at the centre of every decision affecting them. Based on 10 core components (e.g., ensuring an integral role of the child in assessment, planning and intervention processes) and a set of values and principles (e.g., promoting wellbeing, safety, listening to children's views, ensuring confidentiality), GIRFEC promotes a shared approach and is reflected in a wide range of policies and strategies for all children<sup>34</sup>. Key areas of the GIRFEC approach, such as the Named Person (a single point of contact to help children access services, to provide information and support and to discuss and deal with issues with other agencies<sup>35</sup>) and the Child's Plan (sets out an overview of the child or young person's needs, the actions which require to be provided to meet the assessed needs, who will undertake those actions, and the desired outcomes), will therefore be set out in legislation once the Children and Young People (Scotland) Bill<sup>36</sup> is approved.

The Bill also includes duties on local authorities and health boards to prepare a children's services plan which sets out arrangements for the provision of all services having a significant impact on the wellbeing of children in that area. The plan should be designed to promote, support and safeguard the wellbeing of children in that area in a coherent way that is responsive to those children's needs. It will be a requirement that local authorities and health boards involve a number of key service providers in the preparation of the plan, including the Scottish Children's Reporter Administration, Children's Hearings Scotland, and the Scottish Court Service. The new duty on local authorities will be a lot broader than that set out in the Children (Scotland) Act 1995 as will cover every children's service and every service provided in the area by a range of organisations, which is "capable of having a significant effect on the wellbeing of children".

It should also be noted that Scotland's Commissioner for Children and Young People (SCCYP<sup>37</sup>) has a power of formal investigation where it seems that the rights of a group of children may have been breached<sup>38</sup>, although to date, the Commissioner has never had to use these powers. At present the powers of investigation do not extend to matters that apply to only one child, but rather to a group of children. Under the Children and Young People (Scotland) Bill<sup>39</sup> however, it is proposed to extend the rights of Scotland's Commissioner for Children and Young People to undertake investigations on behalf of individual children and young people, to allow investigation into whether a service provider has properly considered the rights, interests and views of the child when making decisions or taking actions affecting them. Following such an investigation the Commissioner may lay a report before Parliament and can require a response to any recommendations made to service providers. This investigatory function will sit alongside, but should not duplicate, work of other existing investigatory bodies such as the Scottish Public Sector Ombudsman.

With regard to determining the child's best interests, the Children and Young People (Scotland) Bill also proposes to create a statutory definition of 'wellbeing' and require that anyone assessing a child has regard to the general principle of wellbeing when it exercises functions in relation to a child who it looks after or who is in need. Wellbeing will be defined as: safe; healthy; achieving; nurtured; active; respected; responsible; and included. Ministers will issue guidance on how these wellbeing indicators are to be used to measure a child's wellbeing. This provision will ensure that services take a holistic view of each child's wellbeing and their needs and will exist alongside existing statutory duties to "safeguard and promote the welfare" of looked after children and children in need<sup>40</sup>. However, it is not added to the statutory duty of the courts to consider welfare under other provisions such as

<sup>33</sup> The Children's Hearing (Scotland) Act 2011, section 93.

<sup>34</sup> The Scottish Government, *A guide to Getting it right for every child*, June 2012 (last accessed 7 August 2013).

<sup>35</sup> Children and Young People (Scotland) Bill, section 25.

<sup>36</sup> *ibid.* (last accessed 7 August 2013).

<sup>37</sup> Established under the Commissioner for Children and Young People (Scotland) Act 2003.

<sup>38</sup> Commissioner for Children and Young People (Scotland) Act 2003.

<sup>39</sup> Children and Young People (Scotland) Bill, (last accessed 7 August 2013).

<sup>40</sup> Children (Scotland) Act 1995, section 17(1)(a).



where a local authority may ‘provide accommodation’ (i.e. take into care) a child in order to “safe-guard and promote his welfare”<sup>41</sup>.

The child is not directly involved in the assessment of his/her best interests. However information gathered through hearing the views of the child allows the respective courts to decide on the child’s best interests.

There is no explicit requirement to assess the best interests of each child separately in cases, where more than one child is involved in the judicial proceedings. Where siblings are involved in cases coming before a children’s hearing, consideration will be given to whether separate hearings should be held, taking into account the individual circumstances of each child (differing methods of communication and/or levels of understanding).

## The principle of treating the child with dignity and respect

The principle of treating the child with dignity and respect is enshrined in the whole children’s hearing system, which sees the views of a child as being essential to the process at a children’s hearing and provides a child with significant power within that system, for example to reject grounds of referral to the children’s hearing, or to go to court to challenge the ground of referral<sup>42</sup>. This does not differ depending on his/her role in the proceedings or his/her legal status and capacity, as the child should be treated with dignity and respect when involved in any manner in civil proceedings.

Aside from the children’s hearings, civil proceedings in which children will be involved are mainly heard in the sheriff courts. The procedure does not differ from a case involving an adult. The requirement to notify the child of proceedings through the use of ‘Form F9’ is the only mechanism to involve the child.

## The child’s evolving capacity

Under the **Age of Legal Capacity (Scotland) Act 1991**, where a person is considered to have legal capacity to instruct a solicitor, they shall also have legal capacity to sue or to raise an action, or to defend, in any civil proceedings<sup>43</sup>. If the child is over 12 years old, he/she is presumed to be of sufficient age and maturity to instruct a solicitor<sup>44</sup>. If the child is under 12, then this is up to the solicitor to decide whether the child understands enough to have a stateable case.

## The child’s protection from discrimination

The Equality Act 2010, brought together previous equality legislation which had transposed the main European Directives on discrimination<sup>45</sup> into a single Act in an attempt to simplify and strengthen provisions for various factors, including age. The Equality Act 2010 includes provisions that ban age discrimination against adults in the provision of services and public functions. The ban came into force on 1 October 2012 and it is now unlawful to discriminate on the basis of age unless the practice is covered by an exception from the ban or good reason can be shown for the differential treatment (‘objective justification’). However, the ban does not apply to children under the age of 18, thereby allowing people and organisations to continue to provide different services at different rates or on different terms and conditions for children of different ages<sup>46</sup>. The Government’s justification at the time of introducing the act for the exclusion of children from the ban was that there was no evidence of discrimination against children, and therefore no need to protect children from age discrimination and that since a child’s age is closely related to his/her levels of development and need, it was not appropriate to apply age discrimination legislation to the treatment of children<sup>47</sup>. As the Act does not apply to children, there are no rights of redress for a child who feels that he/she has been discriminated against.

<sup>41</sup> *ibid.*, section 22.

<sup>42</sup> The **Children’s Hearing (Scotland) Act 2011**, section 93.

<sup>43</sup> **Age of Legal Capacity (Scotland) Act 1991**, as amended, section 2(4B).

<sup>44</sup> *ibid.*, as amended, section 2(4A).

<sup>45</sup> Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC.

<sup>46</sup> Government Equalities Office, ‘Equality Act 2010, Banning Age Discrimination in Services, An overview for service providers and customers’, at paragraph 4.

<sup>47</sup> Scotland’s Children’s Sector Forum Briefing: Consultation about age discrimination in the UK Equality Act, May 2011 (last accessed 9 August 2013).

## Protection of vulnerable children

Children aged under 16 are considered vulnerable witnesses<sup>48</sup> and may apply for special protective measures under the **Vulnerable Witnesses (Scotland) Act 2004**. Part 2 of the Act makes provision in relation to civil proceedings. 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 special measures for the purpose of taking the child witness's evidence, or that the child witness is to give evidence without the benefit of any special measures. The special measures are taking of evidence by a commissioner, use of a live television link, use of a screen, use of a supporter, and such other measures as may be prescribed by statutory instrument<sup>49</sup> (see further 3.1 below). The court may review the arrangements for taking the witness's evidence at any stage in the proceedings.

Aside from the general protection afforded to those appearing as witnesses in civil proceedings, special measures exist for unaccompanied children in the context of asylum and immigration cases. Where an application is made to the UK First-Tier Tribunal (Asylum & Immigration) concerning an unaccompanied child, they will be appointed a 'guardian' under the Scottish Guardianship Service (SGS), who will act as an independent advocate and assist the child during the asylum process.

It should also be noted that due to their particular circumstances and vulnerabilities, asylum seeker children, whether unaccompanied or living with their families, children with disabilities, homeless children and children in the care of the state, amongst others, can be considered 'children in need' under section 93 of the Children (Scotland) Act 1995 as require care and attention as a result of being unlikely to achieve or maintain a reasonable standard of health or development, their health or development is likely to be significantly impaired, or they are disabled. These children are therefore entitled to all the rights and services accorded to 'children in need' under the Act. In such cases, a local authority shall safeguard and promote the welfare of the child and so far as is consistent with that duty, promote the upbringing of the child by his/her family. The provision of services shall include the provision of day care for children in need.

<sup>48</sup> **Vulnerable Witnesses (Scotland) Act 2004**, section 11(1).

<sup>49</sup> *ibid.*, section 18(1).



## 2 Child-friendly justice in civil judicial proceedings

### 2.1 The child as an actor in civil judicial proceedings

#### The child as a plaintiff/complainant

Under the **Age of Legal Capacity (Scotland) Act 1991**, where a person is considered to have legal capacity to instruct a solicitor, they shall also have legal capacity to sue or to raise an action, or to defend, in any civil proceedings<sup>50</sup>.

A person under the age of 16 years shall have legal capacity to instruct a solicitor, in connection with any civil matter, only where that person has a general understanding of what it means to do so<sup>51</sup>. A person who is 12 years of age or more is presumed to be of sufficient age and maturity to have such an understanding. Where a child has legal capacity to sue, or to defend, in any civil proceedings, he/she may consent to be represented in those proceedings by any person who, had the child lacked that capacity, would have had the responsibility to act as his/her legal representative, i.e. usually the parents<sup>52</sup>. Where a child decided not to be represented by another person, he/she may represent him/herself.

Despite this, there has been some doubt as to whether children can raise family law proceedings themselves. In the case of *D v H*<sup>53</sup>, a 15 year old child sought a contact order, but the action was refused as incompetent. On appeal, it was noted that there was no title to sue because D had not seen his sister for over 10 years. Also in another case, *E v E*<sup>54</sup>, a 14 year old child sought contact with his/her siblings. While a plea to the competency was raised based on the ruling in *D v H*, it was argued that the child had a legitimate interest in seeking contact with his/her siblings and that a child was presumed to have sufficient understanding at the age of 12 years, and therefore was able to instruct a solicitor. The court held that it would be possible either to make an order in favour of the child or to place parental responsibility on the defender to enable supervised contact to take place. While the case did not state that it would be competent for a contact order to be made in favour of a child, it emphasised the due process aspect of a child's ability to raise proceedings. However, it is suggested that the merits of the case may have played a part in the decision to allow the case to proceed, as the sheriff commented that the merits in the case were strong, because E had lived together with her half-brother for five years and her half-sister for three years. Whereas, in the case of *D v H*, there had been no contact for over 10 years<sup>55</sup>. It therefore appears that the principle of access to justice is not necessarily the overriding factor in deciding on the right of the child to raise proceedings, but that the merits of the case will also be considered.

Once a child turns 16 years of age, he/she would no longer be a child and therefore can make his/her own decisions. Turning 18 does not therefore affect proceedings as by this age they will already have been able to make their own decisions.

As regards how a child can file a claim/lawsuit, the process is no different to where an adult raises judicial proceedings. No specific provisions apply in relation to a child bringing a case before court. If a party wishes to raise an action in the sheriff court, the pursuer is required to draw up an initial writ (or summons in the case of a small claims or summary action) including articles of condescendence setting out the grounds of jurisdiction, signed by the pursuer or his/her solicitor. Separate formats for the initial writ are provided depending on whether the action is an ordinary cause, a commercial action or a personal injuries action. The initial writ then has to be lodged with the sheriff clerk, along with the appropriate fee. The court shall then issue a warrant for service, which the pursuer must serve on the defender along with the initial writ. There are no specific measures to facilitate either an adult or a child filing a claim/lawsuit.

<sup>50</sup> **Age of Legal Capacity (Scotland) act 1991**, as amended, section 2(4B).

<sup>51</sup> *ibid.*, as amended, section 2(4A).

<sup>52</sup> **Children (Scotland) Act 1995**, section 15(6).

<sup>53</sup> *D v H*, 2004 S.L.T. (Sh. Ct) 73.

<sup>54</sup> *E v E Unreported 12 August 2004, Dundee Sheriff Court, judgement* (last accessed 3 April 2013).

<sup>55</sup> *Children's Rights in Scotland*, 3<sup>rd</sup> edition, at para 9-58.

## The child as a defendant

As above, under the **Age of Legal Capacity (Scotland) Act 1991**, where a person is considered to have legal capacity to instruct a solicitor he/she shall also have legal capacity to defend any civil proceedings<sup>56</sup> and therefore can be sued. A person who is 12 years of age or more is presumed to be of sufficient age and maturity to have such an understanding. Therefore, where a child is under 12 years of age and is considered not to have legal capacity, he/she would not have capacity to defend civil proceedings and therefore the case would have to be brought against his/her legal representative.

Again, where a child has legal capacity to defend, in any civil proceedings, he/she may consent to be represented in those proceedings by any person who, had the child lacked that capacity, would have had the responsibility to act as his/her legal representative. Where a child decided not to be represented by a solicitor, he/she may represent him/herself.

Where a child is served with an initial writ (or summons), he/she will then have a specified period of time in which to advise the court whether or not he/she is intending to defend the action, and must respond by lodging the appropriate forms in court, or instruct a solicitor to do so on their behalf.

## The child as a witness

A child can participate in civil proceedings as a witness. Children aged under 16 are considered as vulnerable witnesses<sup>57</sup> and may apply for special protective measures under the **Vulnerable Witnesses (Scotland) Act 2004**, which include the use of a live television link and use of a screen amongst other measures (see 2.4 below). It should be noted that the **Victims and Witnesses (Scotland) Bill** which was introduced to the Scottish Parliament on 6 February 2013, proposes to amend the **Vulnerable Witnesses (Scotland) Act 2004**, in order that the age at which a child is considered a vulnerable witness is raised from 16 years to 18 years<sup>58</sup>.

There is no provision allowing the child to refuse to appear as a witness.

There is no requirement for the parent to consent to the participation of the child as a witness. In certain family law cases such as contact cases, this would be inappropriate since the parent is the other party to the proceedings.

## The child in any other role

Aside from a child's role as plaintiff/complainant, defendant or witness, there are a number of civil proceedings, for example family actions, child protection cases and adoption cases, in which the child will be the subject of the proceedings.

In such cases, provision is made to hear the views of the child. Decisions regarding the placement of children into care (compulsory measures) can only be taken by a court or by a decision of a children's hearing. Following a referral to the SCRA, the children's reporter will investigate the case and determine whether a hearing is warranted. The reporter investigates the case with regard to the individual circumstances and best interests of the child. Applying a civil evidence standard (balance of probabilities) in relation to non-offence grounds, the reporter instigates a hearing if a) the required grounds for referral exist, and b) compulsory measures of supervision are necessary to either protect the child, or correct his/her behaviour. Where the grounds of referral relate to offending behaviour, the criminal standard of proof is applied. If in the view of the reporter a hearing is not appropriate, then they may recommend alternative measures or individually tailored programmes<sup>59</sup>.

## Precautionary and interim measures

There are a number of precautionary and interim measures available under the Children's Hearings (Scotland) Act 2011 and the **Adoption and Children (Scotland) Act 2007**, as well as interim measures such as interdict and interim interdict under general court procedures.

<sup>56</sup> **Age of Legal Capacity (Scotland) act 1991**, as amended, section 2(4B).

<sup>57</sup> **Vulnerable Witnesses (Scotland) Act 2004**, section 11(1).

<sup>58</sup> **Victims and Witnesses (Scotland) Bill 2003**, section 18.

<sup>59</sup> See section on the role of the reporter on the website of the SCRA.

Under the Children's Hearings (Scotland) Act 2011<sup>60</sup>, a child in Scotland can be given emergency protection through a Child Protection Order (CPO) granted by a sheriff. Either a local authority or any person (including the child), can apply to the sheriff for a CPO. However, it is required<sup>61</sup> that there are reasonable grounds to believe that the child is suffering or is likely to suffer significant harm, that the child has been or is being neglected, or that the child will be treated or neglected in such a way that is likely to cause significant harm to the child, if not removed to a place of safety or does not remain in the place where the child is staying, and that the order is "necessary to protect that child from that harm or from further harm" and therefore they will have to accompany the application with supporting evidence in order to show that such harm is or may be caused. Following the grant of a CPO, a children's hearing shall be arranged in order to conduct an initial hearing of the child's case in order to determine whether the CPO should be continued. This serves to ensure both that emergency removal was necessary and that full participation of the family members is permitted. In every case therefore, the removal of the child will be looked at afresh by a children's hearing very shortly after the implementation of the CPO<sup>62</sup>, and if requested this will be followed by a sheriff's review also<sup>63</sup>. The child and parents must attend such reviews and their views must be taken into account<sup>64</sup>.

Under the **Adoption and Children (Scotland) Act 2007**, a child may also be removed from his/her family environment by way of a "permanence order" which affects a transference of parental responsibilities and parental rights from the parent to the local authority which is intended to be permanent<sup>65</sup>. This is justified only in exceptional circumstances, and the grounds upon which the order can be made without the parent's consent include that the parent or guardian is dead, cannot be found or is incapable of giving consent, is unable to satisfactorily discharge his/her duties or the welfare of the child otherwise requires the consent to be dispensed with<sup>66</sup>. The grounds are the same as those for dispensing with parental consent to adoption. The court must therefore be very clear as to their reasons for making such an order, specifying not only why it is necessary now to transfer parental responsibilities from the parent to the local authority, but why that transference needs to be permanent. The consent of a child aged 12 years or over is required in order for a permanence order<sup>67</sup> to be granted, unless the child is incapable of consenting. The child or the child's representative must therefore be permitted to make representations to the court, if he/she wishes to do so<sup>68</sup>.

## 2.2 Provision of information

### General rules applicable to children involved in civil judicial proceedings regardless of their role

The **Children (Scotland) Act 1995** makes provision for the publication of information about services for children. Under the Act, local authorities are required to prepare and publish information about relevant services which are provided by them for, or in respect of, children in their area or by any other local authority for those children. Local authorities shall also, where they consider it appropriate, publish information about services which are provided by voluntary organisations and by other persons for those children. While it is not specified in the legislation, it is presumed that such information would include details of how to access the relevant services. It should also be noted that local authorities are required<sup>69</sup> to prepare and publish a plan for the provision of relevant services for or in respect of children in their area.

It should be noted that the right of the child to receive information is given special recognition in Scotland under the **Freedom of Information (Scotland) Act 2002**. Any person who has not yet attained the age of 16 years is able to exercise any right under the Act where they have a general understanding of what it means to exercise the right<sup>70</sup>. A person who has attained the age of 12 years is to be presumed to be of sufficient age and maturity to have such an understanding and can

<sup>60</sup> **Children's Hearings (Scotland) Act 2011**, section 37.

<sup>61</sup> *ibid.*, sections 38(2) and 39(2).

<sup>62</sup> *ibid.*, sections 45 and 46.

<sup>63</sup> *ibid.*, section 48.

<sup>64</sup> *ibid.*, section 51.

<sup>65</sup> **Adoption and Children (Scotland) Act 2007**, section 80.

<sup>66</sup> *ibid.*, section 83(2).

<sup>67</sup> *ibid.*, section 84.

<sup>68</sup> *ibid.*, section 86.

<sup>69</sup> **Children (Scotland) Act 1995**, section 19.

<sup>70</sup> **Freedom of Information (Scotland) Act 2002**, section 69.

therefore request information under the Act. In such cases a child could request the information in his/her own right.

While provision is made for co-operation between authorities<sup>71</sup>, and the effect of orders made in different parts of the United Kingdom<sup>72</sup>, there are no special arrangements in place in order to protect the best interests of a child where they are resident in a different Member State. In cases of adoption, there are restrictions on bringing children into the UK, and restrictions on removal of children for adoption outside Great Britain<sup>73</sup>.

### *The child as a plaintiff/complainant*

For each of the civil procedures described in **Section 1**, rules exist regarding the provision of information to the other party in the action, regardless of whether this is an adult or a child.

In general, there is a requirement for the parties to set out in writing the details of their claim, known as written pleadings, in advance of any hearing of evidence about the case. Following defences having been lodged, both parties will have a period during to which to adjust their arguments. Each party is also required to intimate to the other party a list of documents, which he/she intends to use or put in evidence at the proof. A party who has received a list of documents may inspect those documents at a fixed place and time which is reasonable to both parties. Each party must also intimate to the other a list of witnesses, which in addition to other information provided, shall indicate whether the witness is considered a vulnerable witness and whether any child witness notice application has been lodged in respect of that witness<sup>74</sup>. In addition to the party or his/her legal representative making submissions to the court during the hearing of evidence, each party could be called as a witness.

Where the pursuer is legally represented, intimation of documents and all other information relating to the case shall be sent to their solicitor. The court decision shall also be sent to the pursuer's solicitor, who shall provide advice regarding rights of appeal. A child would therefore only be informed in his/her own right of the decision where they did not have legal representation and in such cases there are no specific requirements to ensure that the child is informed about his/her rights of appeal. There are no provisions however regarding the provision of documentation to the child, or requiring that information related to the case is to be provided in a child-friendly manner. Rather, information relating to the case will generally be in language and refer to processes that only a legal representative would be able to understand. There are no requirements for a parent, guardian, or curator ad litem to be informed of all aspects of the judicial proceedings.

While the **Children (Scotland) Act 1995** makes provision generally for the publication of information about services for children, where a child raises an action in the sheriff courts or Court of Session, there are no specific support services available.

### *The child as a defendant*

The same rules apply to child defendants as to child plaintiffs.

### *The child as a witness*

Where a child is to appear as a witness, he/she shall receive a citation to attend court at on a specific date and time. They do not require to be legally represented and information regarding their appearance as a witness will be sent directly to them. As a witness is generally not a party to an action, there is no requirement for the child to be informed of the court's decision, or to be provided with information on the right to appeal the decision as the witness will not have rights of appeal.

As set out in **Section 2.1**, children aged under 16 are considered vulnerable witnesses<sup>75</sup> and may apply for special protective measures. 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 special measures for the purpose of taking the child witness's evidence, or that the child witness is to give evidence without the benefit

<sup>71</sup> **Children (Scotland) Act 1995**, section 21.

<sup>72</sup> *ibid.*, section 33.

<sup>73</sup> **Adoption and Children (Scotland) Act 2007**, sections 58 and 60.

<sup>74</sup> **Ordinary Cause Rules 1993**, Chapter 9A.

<sup>75</sup> **Vulnerable Witnesses (Scotland) Act 2004**, section 11(1).

of any special measures (see [Section 2.4](#)). In taking such a decision the court must have regard to the best interests of the child and take account of any views expressed by the witness or his/her parents. The court may review the arrangements for taking the witness's evidence at any stage in the proceedings.

While the [Children \(Scotland\) Act 1995](#) makes provision generally for the publication of information about services for children, where a child is a witness in an action in the sheriff courts or Court of Session, there are no specific support services available.

### *The child in any other role*

Specific rules for children are set out in relation to family law matters, adoption and child care and relate to the child as the subject of the proceedings. Under the relevant rules applicable to ordinary actions in both the sheriff courts and the Court of Session, a specific chapter is included dealing with family actions (Chapter 33 of the OCR and Chapter 49 of the [RCS](#)) which makes provision for children in such proceedings and requires intimation of the child in family law proceedings in order to seek the views of the child. In addition, specific procedural rules are set out for applications under the Adoption and Children (Scotland) Act 2007 and again, provision is made for children in such proceedings. Specific provision is also made for information to be provided to the child during the children's hearing process.

Chapter 33 of the [Ordinary Cause Rules from 1993](#) deals with family actions, and sets out the procedure to be followed in sheriff courts where a writ includes a crave for an order in relation to residence and contact orders, parental responsibilities and other rights. The writ requires to be intimated on the child by way of Form F9 for sheriff court actions<sup>76</sup>, which asks whether the child would like to tell the sheriff his/her views. Equivalent requirements are set out in Chapter 49 of the [RCS](#), which specify that Form 49.8N is to be used for Court of Session actions<sup>77</sup>.

There is no guarantee that the child will receive the form as this is not served on the child in person, but sent by post, in which case the parent may withhold this from the child.

Where the child does receive the form, the child can either write his/her views in the space provided on the form or on a separate piece of paper or appoint a friend, relative, or teacher, etc. to put forward his/her views<sup>78</sup>.

Where the child returns the relevant form to the court, the sheriff may then speak to the child. The purpose of this discussion is to ascertain the views of the child. There are no specific requirements regarding what matters the sheriff shall cover in such a discussion. Where a child has returned Form F9<sup>79</sup> (intimation to the child of the action) to the sheriff clerk or otherwise indicated to the court a wish to express views on a matter affecting him/her, the sheriff shall not grant any order unless an opportunity has been given for the views of that child to be obtained or heard. A pursuer may however crave that intimation of the child be dispensed with.

A study carried out for the Scottish Executive in 1995, 'Monitoring The Children (Scotland) Act 1995, Pilot Study'<sup>80</sup>, showed that, based on data from five courts in Scotland, intimation on the child was craved in 34% of cases, while the pursuer craved to dispense with intimation on the child in 35% of cases<sup>81</sup>. The crave to dispense with intimation on the child was however only granted in 21% of divorce cases and 5% of non-divorce cases<sup>82</sup>. In 26% of cases where there was intimation on the child, a form F9 was attached to the court process<sup>83</sup>. However, in the case of *Shields v Shields*<sup>84</sup>, it was recognised that the use of form F9 was not the only option open to the court to intimate to the child and that less formal methods may be more appropriate in certain cases.

<sup>76</sup> [Ordinary Cause Rules 1993](#), rule 33.7.

<sup>77</sup> [Rules of the Court of Session](#), rule 49.20, 1994.

<sup>78</sup> [Form F9](#) (last accessed 14 August 2013).

<sup>79</sup> [Ordinary Cause Rules from 1993](#), Rule 33.19,

<sup>80</sup> Scottish Executive, 'Monitoring The Children (Scotland) Act 1995, Pilot Study 1995' (last accessed 29 March 2013).

<sup>81</sup> *ibid.*, at section 4.9.1.

<sup>82</sup> *ibid.*, at section 4.9.2.

<sup>83</sup> Scottish Executive, 'Monitoring The Children (Scotland) Act 1995, Pilot Study 1995', at section 4.9.5.

<sup>84</sup> *Shields v Shields*, 2002 S.L.T. 579, at 582.

More recent research<sup>85</sup> looked at 208 child contact cases in two sheriff courts in Scotland, in which a total of 299 children were involved. Of these, while 42% had their views taken by some means, only 14% were sent the F9 form. The F9 form is the only modification to the civil court procedure where the case involves a child. All other standard forms that follow in the action are the same, irrespective of whether a child is involved or not. It was found that dispensation is sought in lots of cases “due to the tender years of the child”.

Besides the above there are no requirements in the **Ordinary Cause Rules 1993** regarding the provision of documentation to the child, or how information is to be provided to the child. Where the child is legally represented, he/she would be provided with advice by their solicitor. However, as the child is not a party to the proceedings, there is no requirement for the child to be informed of the court’s decision, or to be provided with information on the right to appeal the decision. Similarly, there are no requirements for parents, guardians or curators ad litem, etc., to be informed on all aspects of the judicial proceedings.

While the Children (Scotland) Act 1995 makes provision generally for the publication of information about services for children, where a child is the subject of an action in the sheriff courts or Court of Session, there are no specific support services available.

### **Children’s Hearings**

Under the Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Rules 2013<sup>86</sup>, there are various requirements concerning the notification of children’s hearings and provision of documents. The Principal Reporter is to notify the chairman and members of the children’s hearing of the time and place of the hearing, at least seven days prior to the hearing, and provide them with certain documentation (local authority report, statement of grounds for referral, any views of the child given to the Principal Reporter etc.) at least three days before the hearing<sup>87</sup>. Copies of these documents are also to be made available to the child, any relevant person and any appointed safeguarder, as soon as possible before the beginning of the children’s hearing<sup>88</sup>.

The child also receives notification in writing of the hearing by the Principal Reporter at least seven days before the hearing<sup>89</sup>. The notification shall inform the child of his/her duty to attend the hearing and of the date, time and place of the hearing. The notification shall also provide information on the availability of legal advice and on the means by which the child may express views to the children’s hearing, as well as confirm the right of the child to request a pre-hearing panel or children’s hearing to determine certain preliminary issues, and the right of the child to give any report or other document for the consideration of the children’s hearing or pre-hearing panel<sup>90</sup>.

Notice of the children’s hearing is also to be given to any relevant person and certain parents who have a right to and are obliged to attend all stages of the hearing, and the chief social work officer of the local authority<sup>91</sup>.

While various items of documentation are to be provided to the chairman and members of the children’s hearing, previously only the statement of grounds for referral to the children’s hearing was provided to the child and any relevant person<sup>92</sup>. However, the right of the child only to receive a copy of the statement of the grounds of referral was challenged in the case of *S v Miller*<sup>93</sup>. Following this, Practice Guidance Note 24 required all relevant documents to be provided to a child aged 12 years or over unless this would cause significant distress or harm to the child or another person. Documents are not provided to children under 12 years old unless requested by the child or his or her representative. There is therefore a presumption also that any child over 12 years old should receive the papers,

<sup>85</sup> Dr. Kirsteen Mackay, *The Child’s Voice in Contact Disputes: Genuine Participation in Private Law Court Actions*. An article summarising the research is forthcoming. The Centre for Research on Families and Relationships (CRFR) Briefing Paper 65, ‘*Hearing children in court disputes between parents*’, however provides a summary of the findings.

<sup>86</sup> It should be noted that the **Children’s Hearing (Scotland) Rules 1996** were replaced by the **Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Rules 2013**, with effect from 24 June 2013.

<sup>87</sup> **Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Rules 2013**, section 25.

<sup>88</sup> *ibid.*, section 26.

<sup>89</sup> *ibid.*, section 22(1).

<sup>90</sup> *ibid.*, section 23.

<sup>91</sup> **Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Rules 2013**, section 22.

<sup>92</sup> **Children’s Hearings (Scotland) Rules 1996**, section 18(1).

<sup>93</sup> *S v Miller*, 2001 S.L.T. 531.



though parts of the information could be hidden if this could affect the child. Whether children under 12 years old will receive the papers will depend on the individual circumstances.

However, following the introduction of the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, the Reporter is now required to give the child, each relevant person and any appointed safeguarder, a copy of the compulsory supervision order to be reviewed, copies of all decisions and reasons for those decisions made at any previous pre-hearing panel or children's hearing, a copy of any relevant reference or remit by a court to the children's hearing, by a sheriff to the children's hearing, any relevant requirement made by a sheriff on determination on appeal, a copy of any notice by the implementation authority to require review, any available reports or other information prepared by the safeguarder or provided by the local authority, a copy of the views of the child, and a copy of any other report or document which is material to the children's hearing's consideration<sup>94</sup>.

During the hearing, the purpose of the hearing is to be explained to the child, any relevant person and any representative<sup>95</sup>. Following a decision being made disposing of the case, the chairman is also to inform the child, any relevant person, any safeguarder, and any representative of the decision of the hearing, the reasons for the decision, and the right of appeal to the sheriff<sup>96</sup>. This information shall also be sent to the child, any relevant person, any safeguarder and the local authority within five days of the children's hearing<sup>97</sup>. Where the children's hearing have decided to issue or continue a warrant or order under certain provisions of the Act, the Principal Reporter is required to send to the child, any relevant person and any safeguarder appointed in the proceedings, a copy of the warrant, order, continuation or other document issued and notice of the right of the child to appeal the decision to the sheriff, as soon as reasonably practicable<sup>98</sup>.

Finally, it should be noted that work has been carried out by Scotland's Commissioner for Children and Young People (SCCYP) and the SCRA to ensure that information on the children's hearing system is provided in a child-friendly manner. SCCYP has produced a number of web-based tools in order to get information to children, including information on children's rights and an illustrated guide of children's rights in pictures<sup>99</sup>. The SCRA also produce a 'Your Rights' card and letter, which are deliberately worded for children and designed for different ages. Other tools that have been developed include a DVD and the use of flashcards. These have been driven by the SCRA Participation Group, which includes representatives from Children's Hearing Scotland and the Modern Apprentices. The Modern Apprenticeship scheme takes in young people for a two-year apprenticeship with the SCRA, and is aimed at improving the experience of children and young people attending Children's Hearings. As part of this they are looking at better ways of communicating with children and young people, and are currently designing new information leaflets, posters and are exploring ways to improve services from a child and/or young persons' perspective<sup>100</sup>.

## 2.3 Protection of the child's private and family life

### General procedural rules applicable to children involved in civil judicial proceedings regardless of their role

There are various general legal requirements in place in order to protect a child's identity and personal data. The personal details of a child, like any sensitive data, are protected by the UK's data protection law<sup>101</sup>. The child can access any data held on them<sup>102</sup>. The exemptions from disclosure are set out in Part IV of the Act, the grounds for which include national security and disclosures made by law or in the course of legal proceedings, but apply to both adults and children and therefore do not differ depending on the age of the child. The **Data Protection Act 1998** provides a wide range of remedies where the obligations under the Act have not been complied with. There are various offences set out under the Act, including the offence of knowingly or recklessly obtaining

<sup>94</sup> *Ibid.*, section 34(2) and (6).

<sup>95</sup> *Ibid.*, section 58.

<sup>96</sup> *Ibid.*, section 88.

<sup>97</sup> *Ibid.*, section 88(1).

<sup>98</sup> *Ibid.*, section 88(3).

<sup>99</sup> [The website of the Scotland's Commissioner for Children and Young People](#) (last accessed 8 August 2013).

<sup>100</sup> [Website of the Children's Reporter on modern apprenticeship schemes](#) (last accessed 8 August 2013).

<sup>101</sup> **Data Protection Act 1998**.

<sup>102</sup> *Ibid.*, section 7.

or disclosing personal data or information contained in personal data, or procuring the disclosure to another person of the information contained in personal data. Remedies can be sought either through the courts or by referring the matter to the Information Commissioner, who has powers to investigate any breach of the Act. A number of enforcement tools are available under Part V of the Act, including enforcement notices and information notices. Provision is also made for compensation for failure to comply with certain requirements. Therefore any breach of the Act which causes damage can give rise to a claim for damages. All claims for compensation must be made to a court as the Commissioner has no power to award damages. The level of compensation awarded will be at the discretion of the judge, who will take a number of factors into account including the seriousness of the breach and the effect upon the party making the claim. Where a child has legal capacity, he/she can file a claim in his/her own right.

The **Ordinary Cause Rules 1993**, which apply to a wide range of civil actions, specifically require any audio or audio-visual recordings of children to be treated as confidential. Such recordings must be marked as 'confidential' and lodged in a sealed envelope with the sheriff clerk. A separate inventory of productions must be prepared and the recording will not form a borrowable part of the process. The seal on the recording shall be broken only with the authority of the sheriff and on such conditions as the sheriff thinks fit<sup>103</sup>.

The rules of procedure for both the sheriff courts and the Court of Session also provide that in any proceedings the court may, where it appears necessary to avoid a substantial risk of prejudice to the administration of justice in those or any other proceedings, order that the publication of any report of the proceedings, be postponed for such period as the court thinks necessary for that purpose<sup>104</sup>.

In order to avoid any risk of adverse consequences (e.g. generating conflicts between parent(s) and the child) of the judicial proceedings on family relations, the courts may appoint a curator ad litem to investigate and report on the child's circumstances, including the views of the child. This not only occurs in family cases, but has historically been used by the courts in civil cases involving a child. Rather than acting as a representative, the curator is an officer of the court, and is appointed for the purpose of protecting the interests of the child and ensuring that they are not acting under any undue influence from a parent, carer or other party. A curator ad litem appointed by the court is required to treat all information obtained by them in the exercise of their duties as confidential.

### ***The child as a plaintiff/complainant***

The general rules described above apply.

### ***The child as a defendant***

The general rules described above apply.

### ***The child as a witness***

The general rules described above apply.

### ***The child in any other role***

A representative of a newspaper or news agency does have the right to attend a children's hearing<sup>105</sup>. However, in order to protect the privacy of a child in relation to media reporting during children's hearings, the children's hearing may exclude a representative of a newspaper or news agency from any part of the hearing where it is satisfied that it is necessary to do so to obtain the views of the child, or the presence of that person is causing, or is likely to cause, significant distress to the child<sup>106</sup>. Once a journalist has been excluded from a hearing, the chairperson of the hearing may inform him or her about what has taken place when he/she was excluded, but the chairperson is not obliged to do so<sup>107</sup>.

The identity of the child is also protected under the children's hearings system because it is an offence to publish protected information if the publication of the information is intended or likely to

<sup>103</sup> **Ordinary Cause Rules 1993**, Chapter 50.

<sup>104</sup> *ibid.*, Chapter 48.

<sup>105</sup> **Children's Hearings (Scotland) Act 2011**, section 78.

<sup>106</sup> *Ibid.*, section 78(5)

<sup>107</sup> *Ibid.*, section 78(6)



identify a child mentioned in the protected information, or his/her school address<sup>108</sup>. Protected information is any information in relation to a children's hearing, an appeal against a decision of a children's hearing, proceedings before the sheriff or an appeal from any decision of the sheriff or sheriff principle, or information given to the Reporter in respect of a child in reliance on, or satisfaction of a legislative provision<sup>109</sup>.

Under the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013<sup>110</sup>, any documentation provided to the chairman and members of children's hearings is to be kept securely in their custody, shall not be disclosed during the hearing or be made known to any person, and shall be returned to the Principal Reporter immediately after the conclusion of a children's hearing. Where the Principal Reporter considers that the disclosure of the whereabouts of the child or any relevant person may place that person at risk of serious harm (whether or not physical harm) he/she may withhold such information as is necessary to prevent such disclosure and indicate the address of the person as that of the Principal Reporter<sup>111</sup>. Panel members must follow guidelines to ensure that information is kept safe at all times<sup>112</sup>.

With regard to family proceedings and adoption cases, there are no specific provisions in the **Ordinary Cause Rules 1993** regarding the protection of a child's identity. Cases are reported and are in the public domain on the [Scottish courts website](#), although details of the parties are anonymous. Under the **Ordinary Cause Rules 1993** however, where a child expresses a view to the sheriff or to a person appointed by the sheriff, or provides a view in writing, the sheriff may direct that the views of the child are recorded in writing and sealed in an envelope marked as "confidential", be kept in the court process without being recorded in the inventory of process, be available to the sheriff only, not be opened by any person other than the sheriff, and not form a borrowable part of the process<sup>113</sup>. However, this right has to be balanced with the right of other parties to a fair hearing, the result of which is that disclosure may be sought in certain cases. In addition, any reporter or curator ad litem appointed by the court is required to treat all information obtained by them in the exercise of their duties as confidential.

In order to avoid any risk of adverse consequences (e.g. generating conflicts between parent(s) and the child) of the judicial proceedings on family relations, in some cases the children's hearing may appoint a safeguarder, to safeguard the interests of the child during the proceedings<sup>114</sup>. This may arise for example where there is a conflict of interest between the parents and the child. The reasons for appointing a safeguarder must however be provided in writing<sup>115</sup> and safeguarders are required to report to the court or hearing as well as to any relevant person. While the child's view should be considered in the report, the safeguarder is not required to advocate the child's view as they are not appointed by and cannot be dismissed by the child. Their role is to provide support and advice for the proceedings and may become party to the proceedings. Any safeguarder appointed by a children's hearing shall be entitled to be present throughout the duration of any hearing of the case until the disposal of that case. A safeguarder will prepare a report in writing on the case of the child and prepare any further report in writing on the case as the hearing may require, and give the report to the Principal Reporter.

## 2.4 Protection from harm and ensuring a child-friendly process

### The child as a plaintiff/complainant or defendant

As stated above, no child-specific provisions apply in relation to a child bringing or defending a case before court. In a defended action, each party will set out in writing the details of their claim/defence, known as written pleadings, in advance of any hearing of evidence about the case. The sheriff clerk shall then fix a date and time for an options hearing and intimate to the parties the last date for

<sup>108</sup> *ibid.*, section 182(1) and (2).

<sup>109</sup> *ibid.*, section 182(9).

<sup>110</sup> **Children's Hearings (Scotland) Act 2011** (Rules of Procedure in Children's Hearings) Rules 2013, section 5.

<sup>111</sup> *ibid.*, section 16(2).

<sup>112</sup> **CHS ISMS Guidance – Keeping Information Safe – Panel Members v1.0** (last accessed 18 October 2013).

<sup>113</sup> **Ordinary Cause Rules**, rule 33.20.

<sup>114</sup> **Children's Hearings (Scotland) Act 2011**, section 30.

<sup>115</sup> *ibid.*, section 30(4).

lodging defences, for adjustment, and the date of the options hearing. At the options hearing, the sheriff shall seek to determine what matters are in dispute and information about any other matter, and appoint the case either to a proof (hearing of evidence of the material facts of a case), proof before answer (hearing of evidence before deciding legal questions) or a debate.

There are no provisions however to ensure that proceedings involving child plaintiffs or defendants are fast-tracked or prioritised, although a **Practice Note** does set out for practitioners the procedures to be followed in adoption and permanence order applications.

Either party can raise preliminary pleas, which raises an issue which the party wishes to have resolved by the court as a preliminary to any evidence being heard about the subject matter. There are a variety of preliminary pleas which can be raised in written pleadings, which if upheld by the court at a diet of debate or procedural role hearing, would result in the case being disposed of. The most common form of preliminary plea is a plea to the relevancy asserting that the pursuer's written pleadings do not disclose sufficient facts to demonstrate that they have a stateable case, and therefore that the action should be dismissed.

Finally, interdict<sup>116</sup> and interim interdict<sup>117</sup> measures are also available in all types of civil actions, though are most commonly used in family actions. Usually when preparing the initial writ or summons, a crave will be included seeking interim interdict to prevent the other party from doing something, pending the outcome of the overall action. This will be heard before the sheriff immediately who will grant or reject the interim interdict. Where it is granted, as this is based only on one party's arguments, a date will usually then be set to hear both parties in order to determine whether or not the interim interdict should continue.

There are no mandatory provisions ensuring that the places where the proceedings are held or where the child is heard are non-intimidating.

There are no specific support measures for those involved as a plaintiff or defendant in civil proceedings. However, where the parties choose to represent themselves, they may request the court to allow them to have someone to sit beside or behind them to assist them in the conduct of proceedings. The named individual may provide the party with moral support, help to manage the court documents and other papers, take notes of the proceedings, and quietly advise on points of law and procedure, issued which the party may wish to raise with the court, and questions which the party may wish to ask witnesses<sup>118</sup>.

The Ordinary Cause Rules also provide that a party may apply to the court to have all or part of their submissions to be made through a live link<sup>119</sup>. This could be used to avoid the need for the child's presence in court or to protect the child from harmful images or information. The rules also specifically require any audio or audio-visual recordings of children to be treated as confidential. Such recordings must be marked as 'confidential' and lodged in a sealed envelope with the sheriff clerk. A separate inventory of productions must be prepared and the recording will not form a borrowable part of the process<sup>120</sup>. In each case, these provisions apply to any ordinary cause action and therefore are not specific to actions involving children.

No other measures have been identified to protect the child from harm.

There are no legal measures in place to ensure that court sessions and other actions during civil judicial proceedings are adapted to the child's pace and attention span or to any communication difficulties the child may have.

## The child as a witness

The Scottish Government guidance on interviewing child witnesses emphasises the importance of, and gives instruction regarding providing facilities appropriate for children and conducting child-friendly interviews<sup>121</sup>. These include broad guidelines such as to take into account the individual

<sup>116</sup> An order prohibiting certain actions.

<sup>117</sup> An interim order prohibiting certain action, pending a full hearing of both parties arguments.

<sup>118</sup> Ordinary Cause Rules 1993, Chapter 1.3A.

<sup>119</sup> *ibid.*, Chapter 32A.

<sup>120</sup> *ibid.*, Chapter 50.

<sup>121</sup> Guidance on Interviewing Child Witnesses in Scotland, [Supporting Child Witnesses guidance pack](#) (last accessed 3 April 2013).

child's level of maturity and emotional needs; provide a safe and comfortable interview setting; minimise interference with the child's normal routine; and tailor interview questions to the child's maturity and emotional needs. While the guidance focuses primarily on criminal proceedings and the practices used by police and social work services for gathering evidence, it is also relevant for all professionals who carry out interviews with child witnesses, thus also to civil proceedings.

There are no specific procedures for fast-tracking cases involving child witnesses. Moreover child witnesses are not heard at child-friendly court premises. As referred to above, interview questions posed to children should be tailored to their maturity and emotional needs. It is not a requirement to tailor the questions to the child's pace and attention span and to any communication difficulties the child may have.

Measures exist however to avoid the need for the child's presence in court completely or at least to make the court appearance more manageable. The **Vulnerable Witnesses (Scotland) Act 2004** provides that any witness in the High Court or a sheriff court (whether an accused or not) aged under 16 when the complaint or indictment is served is a vulnerable witness<sup>122</sup> and may apply for special measures<sup>123</sup>. 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 special measures for the purpose of taking the child witness's evidence, or that the child witness is to give evidence without the benefit of any special measures. The special measures are taking of evidence by a commissioner (a person nominated by the court will take evidence from the witness prior to the court case), use of a live television link, use of a screen, use of a supporter (a person that can be present alongside the witness during the giving of evidence), and such other measures<sup>124</sup>. The taking of evidence by a commissioner allows the child to give evidence behind closed doors, which can be at the home of the child or some other familiar place.

The party citing or intending to cite the child witness is required to lodge a child witness notice (CWN) with the court, which specifies what they consider to be the most appropriate measures for taking the child witness's evidence or stating that they do not consider any special measures to be required. The court will consider the matter in the absence of the parties. There is no debate involved when the party citing the child seeks special measures (use of a live television link, screen or a supporter), in which case the court must make an order authorising their use. However, the court may only make an order that the child witness is to give evidence without the benefit of any special measure if it is satisfied that the child witness has expressed a wish to give evidence without the benefit of any special measure and it is appropriate for the child witness to do so, or that the use of any special measure 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 any risk of prejudice to the interests of the child witness if the order is made<sup>125</sup>. The court may review the arrangements for taking the witness's evidence at any stage in the proceedings. Court familiarisation visits are provided for children and other vulnerable witnesses<sup>126</sup>.

In addition, the Ordinary Cause Rules also provide generally that a party may apply to the court to have all or part of the evidence of a witness to be made through a live link<sup>127</sup>. The rules also specifically require any audio or audio-visual recordings of children to be treated as confidential<sup>128</sup>.

## The child in any other role

Under the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, the child is to be given notification in writing of the hearing by the Principal Reporter at least seven days before the hearing<sup>129</sup>. The notification shall inform the child of his/her duty to attend the hearing and of the date, time and place of the hearing. The Reporter is required to give the child, each relevant person and any appointed safeguarder, a number of documents including copies of all decisions and reasons for those decisions made at any previous pre-hearing panel or children's hearing, any available reports or other information prepared by the safeguarder or provided by the

<sup>122</sup> **Vulnerable Witnesses (Scotland) Act 2004**, section 11(1).

<sup>123</sup> *ibid.*, Part 2.

<sup>124</sup> *ibid.*, section 18(1).

<sup>125</sup> *ibid.*, section 11(4).

<sup>126</sup> Scottish Government guidance, 'Special Measures for Vulnerable Adult and Child Witnesses'.

<sup>127</sup> **Ordinary Cause Rules 1993**, Chapter 32A.

<sup>128</sup> *ibid.*, Chapter 50.

<sup>129</sup> **Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013**, section 22(1).

local authority, a copy of the views of the child, and a copy of any other report or document which is material to the children's hearing's consideration<sup>130</sup>. While there are no statutory timescales to ensure that the initial hearing commences without undue delay following the reporter's decision to proceed to a hearing, one of the overall aims of the children's hearing system is to avoid delay. The reporter will take account of family circumstances and commitments when arranging a suitable date for a children's hearing and hearings will be scheduled to take place within a maximum of 20 working days of the reporter's decision in order to minimise delay<sup>131</sup>.

The approach to the scheduling of hearings aims to ensure that due attention is given to the needs of the child in the hearing and that hearings should be properly timed so that children, families and relevant persons are not kept waiting for lengthy periods of time. Each hearing should be allocated a standard time of one hour, unless there are reasons to suggest that the hearing may require more or less time<sup>132</sup>. Where siblings are involved, consideration will be given to whether to lengthen the time or to schedule separate hearings, taking into account factors such as the age and individual circumstances of each child (differing methods of communication and/or levels of understanding).

Work has been carried out to ensure that premises for children's hearings are non-intimidating and child-friendly by repainting and decorating all facilities in a child-friendly manner. In exceptional cases, the hearing can take place elsewhere. For example, in Dundee, an arrangement has been established whereby the sheriff and the sheriff clerk now come to the hearing centre in order that the court is held in the hearing centre. This is also being encouraged in other areas in Scotland, where possible. In all cases, the court room is closed and the sheriff comes down off the bench and does not wear a wig<sup>133</sup>.

The child has a duty to attend all stages of the children's hearing<sup>134</sup>. However, the child can be freed of the obligation to attend where the children's hearing are satisfied that the hearing relates to specific grounds and the attendance of the child at the hearing is not necessary for a fair hearing, that the attendance of the child would place the child's physical, mental or moral welfare at risk, or taking account of the child's age and maturity, the child would not be capable of understanding what happens at the hearing or that part of the hearing<sup>135</sup>. Where a business meeting or hearing dispenses with a child's obligation to attend, the child still has the right to attend where they wish to do so, and therefore cannot be excluded from the hearing. Where a child does attend a hearing he/she must attend the hearing in his/her own right, but adults involved in the child's life also have a right and a duty to attend all stages of the hearing if they are considered to be a "relevant person"<sup>136</sup>. Relevant persons have parental responsibilities or parental rights over the child or have care of or control over the child. It is an offence for a relevant person who is obliged to attend a children's hearing to fail to attend it<sup>137</sup>.

During the hearing, the purpose of the hearing is to be explained to the child and the chairman is to ask whether the child has received all relevant information and documents sent and whether the child has had the opportunity to review these and understands them<sup>138</sup>. Following a decision being made disposing of the case, the chairman is also to inform the child of the decision of the hearing, the reasons for the decision, and the right of appeal to the sheriff<sup>139</sup>. This information shall also be sent to the child, any relevant person and any appointed safeguarder within 5 days after the children's hearing has made a decision disposing of the case<sup>140</sup>. Following a challenge made to the right of the child to receive only a copy of the statement of the grounds of referral, Practice Guidance Note 24 now states that all relevant documents are to be provided to a child aged 12 years or over unless this would cause significant distress or harm to the child or another person and this is reflected in the provisions of the Children's Hearings (Scotland) Act 2011.

<sup>130</sup> Ibid., section 34(2) and (6).

<sup>131</sup> [Blueprint for the Processing of Children's Hearing Cases, Inter-agency Code of Practice and National Standards](#) (last accessed 18 October 2013).

<sup>132</sup> [Hearings Management Practice Guidance](#) (last accessed 18 October 2013).

<sup>133</sup> Information received from representative of SCRA.

<sup>134</sup> [Children's Hearings \(Scotland\) Act 2011](#), section 73(2).

<sup>135</sup> Ibid., section 73(3).

<sup>136</sup> Ibid., section 74(2).

<sup>137</sup> Ibid., section 74(4).

<sup>138</sup> [Children's Hearings \(Scotland\) Act 2011](#) (Rules of Procedure in Children's Hearings) Rules 2013, section 58(1).

<sup>139</sup> Ibid., section 88(3).

<sup>140</sup> Ibid., section 88(1).

As stated above, there are also a number of precautionary and interim measures available under the Children's Hearings (Scotland) Act 2011 and the [Adoption and Children \(Scotland\) Act 2007](#), which are described under [Section 2.1](#).

## 2.5 Protecting the child during interviews and when giving testimony

### Rules applicable to a child as a plaintiff/complainant or defendant

As stated above, no child-specific provisions apply in relation to a child bringing or defending a case before court. There are no specific rules permitting a judge to allow a child not to testify. Where a child plaintiff or defendant is to testify, the provisions regarding vulnerable witnesses (see below) will apply in order to protect him/her from harm. There is no provision however requiring that the number of interviews is as limited as possible and that the length of the interview is adapted to the child's age and attention span.

The Ordinary Cause Rules 1993 provide that a party may apply to the court to have all or part of their submissions to be made through a live link<sup>141</sup> and that any audio or audio-visual recordings of children are to be treated as confidential<sup>142</sup>.

Where the pursuer is legally represented, there are no requirements for a parent, guardian or curator ad litem to be present during the court proceedings. However, where a party chooses to represent him/herself, he/she may request the court to allow him/her to have someone to sit beside or behind him/her to assist him/her in the conduct of proceedings, which includes quietly advising on questions which the party may wish to ask witnesses<sup>143</sup>. This person can be anyone that the pursuer or defender chooses, unless the sheriff is of the opinion that the named individual is an unsuitable person to act in that capacity or the sheriff is of the opinion that it would be contrary to the efficient administration of justice to grant such a request.

With regard to the admissibility of evidence, the test to be applied is whether the child has a sufficient understanding of the concept of truth, an understanding of the duty to tell the truth, and is able to give a coherent testimony. Evidence from a very young child may therefore detract from the weight to be attached to the evidence. In order to establish the competence of a child to give evidence, the judge or sheriff has to be satisfied that the child knows the difference between truth and lies, and the child must be admonished to tell the truth<sup>144</sup>.

### *The child as a witness*

Children aged under 16 are considered vulnerable witnesses<sup>145</sup> and may apply for special protective measures under the [Vulnerable Witnesses \(Scotland\) Act 2004](#)<sup>146</sup>. 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 special measures for the purpose of taking the child witness's evidence, or that the child witness is to give evidence without the benefit of any special measures. The special measures are taking of evidence by a commissioner, use of a live television link, use of a screen, use of a supporter, and such other measures as may be prescribed by statutory instrument<sup>147</sup> (see further [Section 2.4](#) above). The court may review the arrangements for taking the witness's evidence at any stage in the proceedings.

As explained under [Section 2.4](#) the Scottish Government guidance on interviewing child witnesses emphasises the importance of, and gives instruction regarding, providing facilities appropriate for children and conducting child-friendly interviews<sup>148</sup>.

<sup>141</sup> [Ordinary Cause Rules 1993](#), Chapter 32A.

<sup>142</sup> *ibid.*, Chapter 50.

<sup>143</sup> *ibid.*, Chapter 1.3A.

<sup>144</sup> Children under 12 are admonished to tell the truth, children between 12 and 14 are sworn to tell the truth if the judge or sheriff considers that they understand the oath, and children over 14 are sworn to tell the truth.

<sup>145</sup> [Vulnerable Witnesses \(Scotland\) Act 2004](#), section 11(1).

<sup>146</sup> *ibid.*, Part 2.

<sup>147</sup> *ibid.*, section 18(1).

<sup>148</sup> [Guidance on Interviewing Child Witnesses in Scotland](#), [Supporting Child Witnesses guidance pack](#) (last accessed 3 April 2013).

There are no specific rules allowing children not to testify. Moreover, there is no provision requiring that the number of interviews is as limited as possible and that their length is adapted to the child's age and attention span.

With regard to the admissibility of evidence, the test to be applied is whether the child has a sufficient understanding of the concept of truth, an understanding of the duty to tell the truth, and is able to give a coherent testimony. Evidence from a very young child may therefore detract from the weight to be attached to the evidence. In order to establish the competence of a child to give evidence, the judge or sheriff has to be satisfied that the child knows the difference between truth and lies, and the child must be admonished to tell the truth<sup>149</sup>.

### *The child in any other role*

There are no specific rules allowing children not to testify as the nature of the provisions concerning family actions and those governing children's hearings is to enable the child to give its views where it is the subject of the proceedings. A child is under no obligation however to provide his/her views.

Where a child is given notification of the case and asked if he/she wishes to express his/her views, he/she can indicate that he/she wishes a friend, relative or other person to tell the sheriff his/her views. Such persons can therefore accompany the child and offer support to the child when providing his/her views. The presence of a legal representative, guardian, curator ad litem or solicitor is therefore not mandatory. However, a child can also receive assistance, either through the appointment of a safeguarder, or the right to have a representative present at the hearing. A children's hearing may appoint a safeguarder, to safeguard the interests of the child during the proceedings<sup>150</sup>. Their role is to provide support and advice for the proceedings and may become party to the proceedings. Similarly, a representative can assist the child, in particular to give its views.

There is no provision requiring that the number of interviews is as limited as possible and that the length is adapted to the child's age and attention span.

A child aged 12 years or over is presumed to be able to form and express a view, this is not to say that the views expressed by younger children will not also be taken into account by the children's hearing. The children's hearing is under no obligation however to follow the view of a child of any age, though if it does make a decision which is different from the child's view, the reasons why it has reached a different decision should be carefully explained to the child.

Rule 33 of the **Ordinary Cause Rules 1993** (family actions) requires that where a child expresses views, these must be recorded in the process in a prescribed way<sup>151</sup>. The sheriff may direct that the written record of the child's views is treated as confidential by being sealed in an envelope marked "confidential" and passed to the sheriff. However, this right has to be balanced with the right of other parties to a fair hearing, the result of which is that disclosure may be sought in certain cases.

In a children's hearing, relevant persons may be excluded from the hearing where this is regarded as necessary to obtain the child's views. This does not provide confidentiality, but is aimed at encouraging them to freely express their views without feeling pressure from parents or other parties during the hearing. The **Children's Hearing (Scotland) Act 2011** provides that a children's hearing need not, at any time prior to their disposal of a case, disclose to a person any information about the child, or about the child's case, if disclosure of that information would be likely to cause significant harm to the child<sup>152</sup>. Under this, there will be no requirement that the hearing had evidence of information suggesting that actual harm – whether physical or mental – might result from the disclosure of what the child has said.

<sup>149</sup> Children under 12 are admonished to tell the truth, children between 12 and 14 are sworn to tell the truth if the judge or sheriff considers that they understand the oath, and children over 14 are sworn to tell the truth.

<sup>150</sup> **Children's Hearings (Scotland) Act 2011**, section 30.

<sup>151</sup> **Ordinary Cause Rules**, rule 33.20(2).

<sup>152</sup> **Children's Hearing (Scotland) Act 2011**, section 178.



## 2.6 Right to be heard and to participate in civil judicial proceedings

### The child as a plaintiff/complainant or defendant

Where a child has legal capacity to sue, or to defend, in any civil proceedings (see details in 3.1 above), he/she may consent to be represented in those proceedings by any person who, had the child lacked that capacity, would have had the responsibility to act as his/her legal representative<sup>153</sup>. If the child is over 12 years old, he/she is presumed to be of sufficient age and maturity to instruct a solicitor<sup>154</sup>. If the child is under 12, then this is up to the solicitor to decide whether the child understands enough to have a stateable case.

There are no requirements for children to be given information or explanations about the consequences of participating in civil judicial proceedings, although where a child is represented by a solicitor, the solicitor shall advise him/her on the consequences of taking or defending such an action.

A party to the proceedings has the right to be heard and will typically make submissions to the court and have a period in which to reply once the defence has made its submissions.

Where a child is not called as a defender to the action, he/she may apply by minute for leave to enter the process as a party and to lodge defences. The minute must specify the applicant's title and interest to enter the process and the grounds of the defence he/she proposes to state. If the sheriff is satisfied that the applicant has shown title and interest to enter the process, the court may grant leave to enter the process as a party, and to lodge defences<sup>155</sup>.

There are no provisions requiring that court rulings are communicated to a party in a language that they understand. Rather, information relating to the case will generally be in language and refer to processes that only a legal representative would be able to understand. No specific steps have been taken to remove obstacles to access courts for children.

There are no specific rules on limitation periods for children who do not pursue their claims before they reach the age of majority. Prescriptive or limitation periods do not begin to run against a child until he/she has reached the age of 16 years<sup>156</sup>.

### The child as a witness

Where a child is not a party to the proceedings, he/she does not have a right to be heard. Witnesses are required to appear before the courts as a witness in their own right. They do not require to be legally represented and information regarding their appearance as a witness will be sent directly to them. There are no requirements for children to be given information or explanations about the consequences of participating as a witness in civil judicial proceedings given that they are obliged to appear as a witness.

Children aged under 16 will however be considered vulnerable witnesses and may apply for special protective measures, which include the use of a live television link, use of a screen, use of a supporter, and other measures (see further [Section 2.4](#) above). The court may review the arrangements for taking the witness's evidence at any stage in the proceedings.

As explained under [Section 2.4](#) the Scottish Government guidance on interviewing child witnesses emphasises the importance of, and gives instruction regarding, providing facilities appropriate for children and conducting child-friendly interviews<sup>157</sup>.

As a witness is generally not a party to an action, there is no requirement for the child to be informed of the court's decision, or for it to be provided in language that they understand.

<sup>153</sup> *ibid.*, section 15(6).

<sup>154</sup> *Age of Legal Capacity (Scotland) Act 1991*, as amended, section 2(4A).

<sup>155</sup> *Ordinary Cause Rules 1993*, Chapter 13.

<sup>156</sup> *Prescription and Limitation (Scotland) Act 1973*, s.17(3), 18(3), 18A(2), 22B(4) and 22C(3).

<sup>157</sup> *Guidance on Interviewing Child Witnesses in Scotland*, [Supporting Child Witnesses guidance pack](#) (last accessed 3 April 2013).

There are no specific rules on limitation periods for child witnesses who do not pursue their claims (e.g. claim on the ground that their rights were breached during the proceedings) before they reach the age of majority.

## The child in any other role

There are a number of proceedings in which the right to be heard arises, within the context of family law proceedings dealing with parental responsibilities, parental rights, guardianship of the administration of a child's property, as part of a children's hearing and in adoption cases.

As referred to under [Section 2.1](#) it is not a legal requirement for a child to be represented by his/her legal representative during civil judicial proceedings.

### *Family law proceedings*

During proceedings in the Court of Session or sheriff courts, when considering whether to make a court order relating to parental responsibilities, parental rights, guardianship or the administration of a child's property, 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/she wishes to express his/her views;

(ii) if he/she does so wish, give him/her an opportunity to express him/herself; and

(iii) have regard to such views as he/she may express”<sup>158</sup>.

While children aged 12 years old or more are presumed to be of sufficient age and maturity to form a view<sup>159</sup>, an element of discretion is left to the court in deciding whether children under the age of 12 should be allowed to express their view during such proceedings. By including the words “so far as practicable” within the legislative provision, a limit is placed on the requirement to allow a child to express his/her view. In the case of *Shields v Shields*<sup>160</sup> the court stated that the test of practicality should be applied in deciding whether to allow a child to express his/her views, highlighting that “if, by one method or another, it is ‘practicable’ to give a child the opportunity of expressing his/her views then, in our view, the only safe course is to employ that method”<sup>161</sup>. The court should therefore consider any method that could be used in order to allow the child to express his/her views, taking into account the child's age, maturity and any particular circumstances. The “practicable” limitation should not therefore prevent the child's views being heard, it being a question of how the child can express their views, rather than whether they should express their views<sup>162</sup>.

Problems can therefore arise regarding the right to express a view for children between the ages of 8 and 11 as while those aged 12 years and over are presumed to be of sufficient age and maturity to form a view, those under 12 years may also have a strong opinion yet are not presumed to be capable of forming a view. This seems at odds also when considering children in criminal proceedings as, while children aged 8 years can be held criminally responsible in Scotland, the courts do not necessarily consider them old enough to form a view.

Chapter 33 of the [Ordinary Cause Rules 1993](#) deals with family actions, and sets out the procedure specifically in respect of children. [Ordinary Cause Rules 1993](#) provides that where a child has returned Form F9 (intimation to the child of the action) to the sheriff clerk or otherwise indicated to the court a wish to express views on a matter affecting him/her, the sheriff shall not grant any order unless an opportunity has been given for the views of that child to be obtained or heard. While intimation of the case by way of Form F9 will be served on children over the age of 12 years, this is not always the case for those under the age of 12 years. Again, an element of discretion is left

<sup>158</sup> [Children \(Scotland\) Act 1995](#), section 11(7).

<sup>159</sup> *ibid.*, section 11(10).

<sup>160</sup> *Shields v Shields*, 2002 S.L.T. 579.

<sup>161</sup> *Shields v Shields*, 2002 S.L.T. 579, at 582.

<sup>162</sup> F.E.Raith, ‘Judicial Discretion and Methods of Ascertaining the Views of a Child’ (2004) C.F.L.Q. 151, at 154.



to the courts, and intimation may be dispensed with where it is considered inappropriate. However, as the obligation to give a child the opportunity to express his/her views is a continuing one, even if the initial intimation of the action is dispensed with, an opportunity should still be provided at a later stage in the proceedings<sup>163</sup>.

Where a child has indicated his/her wish to express his/her views, the sheriff shall order such steps to be taken as he/she considers appropriate to ascertain the views of that child. The sheriff shall not grant an order in a family action, in relation to any matter affecting a child who has indicated his/her wish to express his/her views, unless due weight has been given by the sheriff to the views expressed by that child, having due regard to his/her age and maturity. It is at this stage that any intellectual disability would be taken into account by the sheriff in deciding the weight to be given to the views expressed by the child.

In the judgement in *H v H*<sup>164</sup> a child with an attention disorder, Asperger's syndrome and Tourette's syndrome was allowed to express his/her views, yet it was then left to the sheriff to decide what weight to apply to those views. Following this judgement, disabilities should not prevent the participation of a child in proceedings, but may be taken into account when deciding what weight to apply to the views of the child.

The **Ordinary Cause Rules 1993** contain various mechanisms by which the child can be allowed to express his/her view. These include intimation on the child (see 2.2 above), appointment of a reporter or curator to advise the court of the child's views and judicial interview of the child.

Under **Ordinary Cause Rules 1993**<sup>165</sup>, a sheriff may appoint a reporter or curator ad litem to investigate and report on the child's circumstances, including the views of the child. This not only occurs in family cases, but has historically been used by the courts in civil cases involving a child. Rather than acting as a representative, the role of the curator is more akin to that of a safeguarder, as is appointed by the court and therefore is an officer of the court, and is not bound to take instructions from the child or to advocate the child's wishes. A curator is appointed therefore for the purpose of protecting the interests of the child and ensuring that they are not acting under any undue influence from a parent, carer or other party.

The final mechanism by which the child's view could be sought would be through a judicial interview, which involves the sheriff speaking directly with the child in chambers.

Finally, in any family action in which an order in relation to parental responsibilities or parental rights is an issue, the sheriff may, at any stage of the action, where he/she considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation<sup>166</sup>.

The fact that children in any other role are involved in the civil judicial proceedings does not affect the lapse of limitation periods.

### **Adoption cases**

In adoption cases, the ability of a child to express his/her views is specifically recognised. Under the **Adoption and Children (Scotland) Act 2007**, the consent of a child aged 12 years or over is required in order for an adoption order<sup>167</sup> or permanence order<sup>168</sup> to be granted, unless the child is incapable of consenting. In each case the requirement to have regard to the child's views "so far as is reasonably practicable" applies. Again, a child aged 12 years or over is presumed to be capable of forming a view<sup>169</sup>, although children under 12 may also be mature enough to form a view.

The main way in which the court allows the child to express his/her views in a case concerning an adoption order or permanence order, is for the sheriff court to appoint a curator ad litem. The views of the child may be set out in the curator's report, which will be passed to the sheriff, or provided orally to the sheriff<sup>170</sup>. The sheriff may also direct that the curator's report, or any other written record of the child's views, are treated as confidential by being sealed in an envelope marked "confidential"

<sup>163</sup> *Shields v Shields*, 2002 S.L.T. 579, at 582.

<sup>164</sup> *H. v H.*, 2000 Fam. L.R. 73, at 75.

<sup>165</sup> **Ordinary Cause Rules 1993**, rule 33.21.

<sup>166</sup> **Ordinary Cause Rules**, rule 33.22.

<sup>167</sup> **Adoption and Children (Scotland) Act 2007**, section 32.

<sup>168</sup> *ibid.*, section 84.

<sup>169</sup> *ibid.*, section 14(8) and 84(6).

<sup>170</sup> **Child Care and Maintenance Rules 1997**, rule 2.26.

and passed to the sheriff<sup>171</sup>. In the Court of Session, a curator should also be appointed in order to safeguard the interests of the child.

## Children's Hearings

In children's hearing proceedings, hearings and courts are under an identical obligation to that imposed in family proceedings, i.e. to give the child an opportunity to indicate whether he/she wishes to express his/her views and, if so, to give him/her an opportunity to express him/herself and have regard to such views as the child may express<sup>172</sup>. As with family proceedings, there is a presumption that the child is able to form views at the age of 12 years<sup>173</sup>. Where a child has indicated that he/she wishes to express his/her views, the children's hearing shall not make any decision or take any action unless an opportunity has been given for the views of the child to be obtained or heard and they have regard to those views<sup>174</sup>.

As stated in 2.2 above, the child is required to be notified of the date, time and place of the hearing, and his/her right to express his/her view. There are various mechanisms by which the child can be allowed to express his/her view. These include by the child, or by his/her representative, individually or together in person, by the child in writing, on audio or video tape or through an interpreter, or through the appointment of a safeguarder.

The fundamental principle is that the child is at the centre of the hearing and his/her views are critical. The children's hearing will first ask if the child agrees and accepts or denies the grounds of referral. If the child does not accept these, the case goes to Court, and a sheriff will decide if the grounds are true or not (a key division is made as the establishment of facts is kept within the forum of the court, while decisions regarding disposal are for the children's hearing). Where a hearing is to be held, the child will be sent a letter inviting him/her to the hearing as well as an **'All About Me' form** (there are two different versions of the form depending on the age of the child), which seeks to obtain information on how the child is feeling, whether he/she is happy with his/her situation, whether he/she wants things to change and whether he/she has enough information about what is happening to him/her. The social work report also has a section on the child's views. The children's hearing will seek the views of the child, too.

The fact that children in any other role are involved in the civil judicial proceedings does not affect the lapse of limitation periods.

## 2.7 Right to legal counsel, legal assistance and representation

### The child as a plaintiff/complainant or defendant

Where a child has legal capacity to sue, or to defend, in any civil proceedings (see details in 3.1 above), he/she may consent to be represented in those proceedings by any person who, had the child lacked that capacity, would have had the responsibility to act as his/her legal representative<sup>175</sup>. A parent, in order to enable him/her to fulfil his/her parental responsibilities in relation to his/her child, has a general right to act as the child's legal representative<sup>176</sup>.

The right to legal counsel, legal assistance and representation apply to both the child as a plaintiff or a defendant.

Under the **Age of Legal Capacity (Scotland) Act 1991**, a person under the age of 16 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<sup>177</sup>. A person 12 years of age or more is presumed to be of sufficient age and maturity to have such an understanding, and can choose which solicitor

<sup>171</sup> Court of Session Rules, rule 67.16.

<sup>172</sup> Children's Hearings (Scotland) Act 2011, section 27(3).

<sup>173</sup> *ibid.*, section 27(4).

<sup>174</sup> *Ibid.*, section 27(1).

<sup>175</sup> Children (Scotland) Act 1995, section 15(6).

<sup>176</sup> *ibid.*, section 2(1)(d).

<sup>177</sup> Age of Legal Capacity (Scotland) Act 1991, as amended, section 2(4A).

he/she wishes to instruct. If the child is under 12, then it is up to the solicitor to decide whether the child understands enough to have a stateable case, and therefore whether or not they will represent them.

Scots law places the responsibility for judging the above referred capacity of the child on the solicitor and the judiciary has not interfered. The test of competence which the Scottish solicitor should apply, i.e. whether or not the child has a “general understanding of what it means” to instruct a solicitor, may be regarded as a relatively low test, compared to the test of whether the child is “capable of understanding the nature and possible consequences of the procedure or treatment”, which is applied in medical cases<sup>178</sup>.

Recent research<sup>179</sup>, which looked at 208 child contact cases in which the child was a party to the action, in which a total of 299 children were involved, found that just five children got legal representation from a solicitor. Therefore, while there is a right to have legal representation, a solicitor has to agree to represent the child (overcoming the hurdle of legal aid) and the sheriff has to agree to it (minute to be added as party to the action). Any solicitor approved under the Scottish Legal Aid Board (SLAB) Code of Practice<sup>180</sup> (see [Section 2a](#) above) can now be appointed.

The availability of legal aid directly affects accessibility of legal representation by a child. For the rules on availability of legal aid, see [2.10](#) below.

## The child as a witness

Child witnesses do not need to be legally represented during proceedings, though can choose to instruct a solicitor if they wish. The expenses incurred in appearing as a witness will be reimbursed by the party calling the child as a witness.

## The child in any other role

Aside from legal representation as a plaintiff or defendant in civil judicial proceedings, where the views of a child are sought or the child is involved in the children’s hearing process, there are a number of ways in which the child can be represented.

Where legal representation is sought, the Scottish Legal Aid Board now maintains a register of solicitors who are eligible to provide children’s legal assistance, and the firms with which such solicitors are connected. Only those solicitors who are included in the register may provide children’s legal assistance<sup>181</sup>. Solicitors and firms included in the register must comply with a code of practice prepared by the Scottish Legal Aid Board in relation to the carrying out by solicitors of their functions with regard to the provision of children’s legal assistance<sup>182</sup>.

Provision is also now made allowing the children’s hearing to pass details on to the SLAB, in order that a solicitor can contact the child, which acts as an additional safeguard. Previously, if a child was unrepresented, the onus was on them to contact a solicitor. While a child over 12 years old is presumed to be of sufficient age and maturity to instruct a solicitor<sup>183</sup>, it is up to the solicitor to decide whether a child under the age of 12 understands enough to have a stateable case. Where a solicitor agrees to represent the child, even if he/she is under the age of 12, in all cases they are then a fully-fledged client of the solicitor. The child will therefore instruct the solicitor directly and can decide to withdraw instructions at any time and no longer be represented. Where the child is in receipt of legal aid (see [Section 2.10](#) below), this will cover the fees of the solicitor.

Under the Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Rules 2013, any child whose case comes before a hearing may also be accompanied by one person, who

<sup>178</sup> *ibid.*, as amended, section 2(4).

<sup>179</sup> Dr. Kirsteen Mackay, ‘*The Child’s Voice in Contact Disputes: Genuine Participation in Private Law Court Actions*’. An article summarising the research is forthcoming. The Centre for Research on Families and Relationships (CRFR) Briefing Paper 65, ‘[Hearing children in court disputes between parents](#)’, however provides a summary of the findings.

<sup>180</sup> Scottish Legal Aid Board, *Code of Practice in relation to Children’s Legal Assistance Cases*, (last accessed 7 August 2013).

<sup>181</sup> *Legal Aid (Scotland) Act 1986*, section 28M(3).

<sup>182</sup> *Ibid.*, section 28P(1).

<sup>183</sup> *Age of Legal Capacity (Scotland) Act 1991*, as amended, section 2(4A).

may be legally qualified, for the purpose of assisting him/her<sup>184</sup>. Any representative attending a children's hearing may assist the person whom he/she represents in the discussion of the case of the child with the children's hearing. The [Children's Hearing \(Scotland\) Act 2011](#) now also makes provision for children's advocacy services<sup>185</sup>, whereby children can receive support and representation for the purposes of assisting them in relation to their involvement in a children's hearing. It remains the decision of the child though as to whether they wish to appoint an advocate or not, for the purpose of helping them to communicate.

### *Appointment of curator ad litem*

Where a child wishes to express his/her view in family law, child protection and adoption cases, some sheriffs will ask to see the child, whilst others will appoint a bar reporter, who shall speak to whoever they wish to, and prepare and submit a report to the court, or a curator *ad litem*, who will be involved for the duration of the case. A curator *ad litem* can be appointed in order to speak for or be party to the proceedings.

### *Appointment of safeguarder*

In family law, child protection and adoption cases the court or children's hearing may appoint a safeguarder, to safeguard the interests of the child during the proceedings<sup>186</sup>. This may arise for example where there is a conflict of interest between the parents and the child. While the ability to appoint a safeguarder had existed for some time prior to the introduction of the [Children \(Scotland\) Act 1995](#), the introduction of the Act widened the circumstances for appointing safeguarders no longer requiring an actual or potential conflict of interest between the parent and child. The Act simply required the court or hearing to consider if it is necessary to appoint a person to safeguard the interests of the child, and if so, to appoint a safeguarder on such terms and conditions as appear appropriate. The Children's Hearings (Scotland) Act 2011 maintains this position, requiring the children's hearing to consider whether to appoint a person to safeguard the interests of the child to whom the children's hearing relates. The reasons for appointing a safeguarder must however be provided in writing<sup>187</sup> and safeguarders are required to report to the court or hearing as well as to any relevant person. While the child's view should be considered in the report, the safeguarder is not required to advocate the child's view as they are not appointed by and cannot be dismissed by the child. Their role is to provide support and advice for the proceedings and may become party to the proceedings. Any safeguarder appointed by a children's hearing shall be entitled to be present throughout the duration of any hearing of the case until the disposal of that case. A safeguarder shall prepare a report in writing on the case of the child and prepare any further report in writing on the case as the hearing may require, and give the report to the Principal Reporter.

A panel of safeguarders is maintained by each local authority in Scotland, and the fees and expenses of safeguarders are to be met by the local authorities. Whilst the role of safeguarders in relation to children's hearing is relatively clear, it is less so in relation to sheriff court proceedings. For example, the Guidelines do not say what factors should be taken into account when a safeguarder is required to decide whether or not to become a party to the proceedings, or to appoint a legal representative, other than that this is to be based on a judgement about the child's interests.

## 2.8 Alternatives to judicial proceedings

### *The child as a plaintiff/complainant or defendant*

Alternative dispute resolution mechanisms (ADR) have become an established part of the Scottish legal landscape, in particular in areas such as employment law and family law, and there are a number of organisations providing ADR services. ADR mechanisms include arbitration, mediation and conciliation and are available on a voluntary basis to both the plaintiff and the defendant. In some cases however, parties may agree in advance, for example by including it as a condition of a contract, that should any dispute arise this will be resolved through arbitration or other means of ADR.

<sup>184</sup> [Children's Hearings \(Scotland\) Act 2011](#) (Rules of Procedure in Children's Hearings) Rules 2013, rule 11(1).

<sup>185</sup> [Children's Hearings \(Scotland\) Act 2011](#), section 122, though this provision is not yet in force.

<sup>186</sup> [Children's Hearings \(Scotland\) Act 2011](#), section 30.

<sup>187</sup> [Children's Hearings \(Scotland\) Act 2011](#), section 30(4).

In the field of employment law for example, arbitration, mediation and conciliation are all available to parties. Under powers set out in the Employment Rights (Dispute Resolution) Act 1988, the Advisory, Conciliation and Arbitration Service (ACAS)<sup>188</sup> now provides an arbitration scheme which is available as an alternative to employment tribunal hearings in certain cases. Where parties agree to go to arbitration, they accept that the decision of the arbitrator is legally binding, and therefore the matter cannot subsequently be taken to an employment tribunal or court, unless to enforce the decision of the arbitrator.

While an arbitrator will reach a decision based on the written evidence of both parties, and sometimes after holding a hearing, a mediator will act as a go between for the parties in order to aid discussion and help them reach agreement. If an agreement is reached, a settlement agreement will be drawn up which will be legally binding unless the parties state otherwise.

ACAS is also under a statutory duty to provide conciliation on matters that could become the subject of employment tribunal proceedings, and it is therefore open to either party to contact ACAS prior to raising a claim. Even where a claim has been raised without resort first to conciliation, ACAS will contact parties following the submission of the claim to see if the matter can be resolved without going to an employment tribunal.

There are no specific provisions however setting out a requirement to refer a case to ADR procedures, regarding information to be provided to parties on the availability of ADR, or specifically to protect children in accessing (on their own or through their legal representatives) ADR procedures.

Where a child has legal capacity to sue, or to defend, in any civil proceedings (see [Section 2.1](#) above), he/she could also be a party to an ADR procedure in his/her own right. There are no specific provisions regarding access to ADR by children or legal safeguards in place to protect children while accessing and during the ADR. There are no specific provisions regarding legal representation of children during ADR, and therefore the general rules on the representation of children apply.

## The child as a witness

Child witnesses play no role in the above proceedings.

## The child in any other role

In any family action in which an order in relation to parental responsibilities or parental rights is an issue, the sheriff (or the judge) may, at any stage of the action, where he/she considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation<sup>189</sup>. Specific statutory provision is therefore made for the sheriff to refer a case to mediation in the context of family actions relating to parental rights and responsibilities. The mediator's role is to facilitate an agreement being reached by the parties and it is hoped that, since it is their own solution, these adults will be committed to making it work.

More recently, collaborative law has altered the picture offering the parties the protection of having the advice of their own lawyers at the same time as they commit to resolving the dispute without resort to litigation. While the child cannot initiate and participate in ADR processes in his/her own right, the various processes must however be subject to scrutiny for their compliance with the requirement to have regard to the views of the child. As specific provision is made regarding seeking the views of the child in family actions, the child should not be prevented from doing so where the case is referred to ADR. Thus, the child must also be given the opportunity to participate in the decision-making process in these non-court settings. It is certainly possible to involve children in the mediation process and it is open to the court to police the matter, at least when its declaration of an agreement is sought<sup>190</sup>. There are no specific rules or guidance however regarding the involvement of a child during mediation in such cases and in particular on the way children can exercise their rights.

During mediation, parents and other family members may agree on future arrangements for the care of children and there is often no judicial scrutiny of these arrangements. The Scottish Executive

<sup>188</sup> [Website on training courses.](#)

<sup>189</sup> Ordinary Cause Rules, rule 33.22.

<sup>190</sup> Information received from academic in field of child law.

launched a whole range of tools in 2006, designed to enable parents to work out their own parenting arrangements, which included a guide to parenting agreements<sup>191</sup>. While these are not designed to be legally binding, they enable parents (and others) to sit down together, address important aspects of parenting in the future, plan for possible areas of disagreement and work out an acceptable arrangement.

Whilst in the majority of cases, parents reach an informal agreement, legally enforceable Minutes of Agreement which have to be registered and executed in the Books of Council and Session, are also used, and can include provisions on children too. However, as the child is not a party to such agreements, they will not have the right to enforce the provisions of the agreement. These differ from Joint Minutes of Agreement which follow after a court case<sup>192</sup>.

## 2.9 Remedies or compensation for violation of rights and failure to act

### General rules applicable to children involved in civil judicial proceedings regardless of their role

In addition to the rights of appeal and other legal remedies available under civil law, after using the complaints mechanism of public bodies, such as local authorities, if a child still has not found a remedy for a violation of rights or failure to act, he/she may contact the **Scottish Public Services Ombudsman (SPSO)**. The SPSO may conduct an investigation and if wrongdoing is found, ask the organisation concerned to correct its actions and repair their effects. It is also proposed in the Children and Young People Bill that Scotland's Commissioner for Children and Young People should have the power in the future to undertake investigations on behalf of individual children and young people, to allow investigation into whether a service provider has properly considered the rights, interests and views of the child when making decisions or taking actions affecting him/her (see **Section 2** above).

#### *The child as a plaintiff/complainant or defendant*

Where the child has legal capacity under the **Age of Legal Capacity (Scotland) Act 1991**, he/she can raise and defend legal proceedings in his/her own right, or instruct a solicitor to do so on his/her behalf. Where there is a conflict of interests between the child and his/her parents, the child can therefore choose to be separately represented. This therefore also includes raising or defending an appeal or judicial review. Interdicts can also be used as means of preventing further violation of rights or obtaining interim measures by way of an interim interdict. However, there are no specific legal remedies or compensation for violation of rights and failure to act available to a plaintiff or defendant that is a child and children do not receive specific assistance or support concerning these procedures. Where a child care authority is a party to an action involving a child, they would also have the right to appeal against the decision of the court.

Where the pursuer is legally represented, the court decision will be sent to their solicitor, who shall provide advice regarding rights of appeal. A child would therefore only be informed in his/her own right of the decision in the case where he/she did not have legal representation. There are no provisions requiring that information related to the case is to be provided in a child-friendly manner or for the rights of appeal to be explained. There are no requirements for a parent, guardian, or curator ad litem to be informed of the decision in the case. Where a plaintiff or defendant is represented, an appeal or submissions in a case can only be made by a solicitor who has received instructions from his/her client to do so. Where a child is represented by a parent, curator ad litem etc. they can raise an appeal on behalf of the child in accordance with the child's wishes.

Enforcement of the right of the child to be looked after and protected by his/her parents is unlikely, although a person seeking a child protection order may, at the same time, apply for an order<sup>193</sup> relating to parental responsibilities and parental rights, for example if the parent is failing to fulfil his/her parental responsibility of contact, or to provide direction and guidance. Indirect sanctions may be applied against a parent who fails to fulfil his/her parental responsibilities. In private law disputes over, for example, residence or contact, parental failure will be a significant element in the

<sup>191</sup> Parenting Agreements for Scotland – Guide.

<sup>192</sup> Information received from academic in field of child law.

<sup>193</sup> Children's Hearings (Scotland) Act 2011, section 42.



determination of where the child's welfare lies, which is the paramount consideration of the court. Similarly, failure to fulfil parental responsibilities might be used to found a ground of referral to the children's hearing<sup>194</sup> or a ground for dispensing with parental consent to the child's adoption<sup>195</sup>.

There are no specific rules on limitation periods for children who do not pursue their claims before they reach the age of majority. Prescriptive or limitation periods do not begin to run against a child until he/she has reached the age of 16 years<sup>196</sup>.

### *The child as a witness*

Where the child is a witness in a case, he/she does not have a right of appeal.

There are no specific rules on limitation periods for child witnesses who do not pursue their claims (e.g. claim on the ground that their rights were breached during the proceedings) before they reach the age of majority.

### *The child in any other role*

As noted in [Section 2.3](#) above, in order to avoid any risk of adverse consequences, in some cases the court or children's hearing may appoint a safeguarder, to safeguard the interests of the child during the proceedings<sup>197</sup>. This may arise for example where there is a conflict of interest between the parents and the child. Their role is to provide support and advice for the proceedings and may become party to the proceedings.

Following a decision being made disposing of the case by a children's hearing, the chairman is to inform the child, any relevant person, any safeguarder, and any representative of the decision of the hearing, the reasons for the decision, and the right of appeal to the sheriff<sup>198</sup>. This information shall also be sent to the child, any relevant person, any safeguarder and the local authority as soon as reasonably practicable after the children's hearing has made a decision disposing of the case<sup>199</sup>. Where the children's hearing has decided to issue or continue a warrant or order under certain provisions of the Act, the Principal Reporter is required to send to the child, any relevant person and any safeguarder appointed in the proceedings, a copy of the warrant, order, continuation or other document issued and notice of the right of the child to appeal the decision to the sheriff, as soon as reasonably practicable<sup>200</sup>. The relevant local authority does not have rights of appeal under the Children's Hearing (Scotland) Act 2011 as only the child, relevant person or safeguarder may appeal to a sheriff against a decision of a children's hearing.

## 2.10 Legal costs

### *The child as a plaintiff/complainant or defendant*

#### *Legal costs*

As a general rule, the unsuccessful party will be ordered to pay the costs of the successful party, unless the court makes a different order. However, when deciding on costs, the courts have a wide room for discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. Costs can include not only the court fees such as the cost of filing an application, the lawyer's and any experts' fees, but also costs for copying and travelling, and VAT. Court fees are fixed and they are payable according to the steps of the proceedings.

#### *Legal aid*

The availability of legal aid directly affects accessibility of legal representation by a child as, unless legal aid is granted, it is unlikely that a child could meet the legal costs of the action. The availability

<sup>194</sup> *ibid.*, section 67(2)(a).

<sup>195</sup> *Adoption and Children (Scotland) Act 2007*, section 31(4).

<sup>196</sup> *Prescription and Limitation (Scotland) Act 1973*, s.17(3), 18(3), 18A(2), 22B(4) and 22C(3).

<sup>197</sup> *Children's Hearings (Scotland) Act 2011*, section 30.

<sup>198</sup> *Children's Hearings (Scotland) Act 2011* (Rules of Procedure in Children's Hearings) Rules 2013, section 88.

<sup>199</sup> *ibid.*, section 88(2) and 89(2).

<sup>200</sup> *ibid.*, section 88(3)(c) and (d).

of legal aid generally is now more limited following the amendments made to the **Civil Legal Aid (Scotland) Regulations 2002** by the Civil **Legal Aid (Scotland) Amendment Regulations 2010**. There are also specific provisions in the Legal Aid (Scotland) Act 1986 on children's legal aid in children's hearing proceedings.

Regulation 6 of the **Civil Legal Aid (Scotland) Regulations 2002**, provides that an application for legal aid may be made by the child's legal representative or by any person in whose care the child is, or by a person acting for the purposes of any proceedings as the child's tutor or curator. The resources of an applicant for legal aid are to be determined in accordance with Part III of the Regulations, which following the amendments introduced by the **Legal Aid (Scotland) Amendment Regulations 2010**, now make provision specifically in relation to the assessment of a child's resources<sup>201</sup>. For the purposes of determining the disposable income and disposable capital of a child, the resources of any person who owes an obligation of aliment to the child are to be treated as part of the child's own resources<sup>202</sup>. This implies that parental income is also taken into account while deciding on the eligibility of the child for legal aid.

While legal aid is made available to children in certain circumstances, the number of children actively instructing solicitors appears to be limited. As highlighted above, where a child does apply for legal aid, there are a number of tests that the SLAB will apply in deciding whether to grant an application. While in most cases a child will pass the financial test where required, the requirement that the child or relevant person has substantial grounds for making or responding to the appeal and that it is reasonable, in the particular circumstances of the case, that legal aid should be made available, may prove more difficult to overcome. In efforts to avoid potential waste of public funds, the SLAB may consider whether there is a need for separate representation where the child could speak to the sheriff or to a reporter or curator, or where the child's interests appear to be aligned with one of the adult parties. Regarding the latter point, the approach taken by the SLAB is that a child who wants the same outcome as one of the adult parties requires no separate representation. For example, in the case of *Henderson v Henderson*, where a father's crave for contact was refused, after the court heard evidence from the child that she did not wish to see her father, the Sheriff commented on the child's views being exactly the same as the defender's and that the fact that all three parties were on legal aid appeared to be an unnecessary expense<sup>203</sup>. However, even where a child seeks the same outcome, this may be for different reasons and therefore children must be respected as individuals capable of forming an independent view and allowed separate representation.

The specific provisions on children's legal aid and assistance, set out in Parts VA and VB of the Legal Aid (Scotland) Act 1986 were amended by the Children's Hearings (Scotland) Act 2011. Legal aid is available in case of certain proceedings relating to children<sup>204</sup>. Legal aid is available to a child in relation to the following actions –

- (a) proceedings before the sheriff in relation to an application for variation or termination of a child protection order;
- (b) proceedings before a children's hearing following the making of a child protection order;
- (c) proceedings before a children's hearing or a pre-hearing panel if the children's hearing or the panel considers that it might be necessary to make a compulsory supervision order including a secure accommodation authorisation in relation to the child to whom the proceedings relate;
- (d) proceedings before a children's hearing following the arrest of a child and detention in place of safety; and
- (e) proceedings under Part 10 (proceedings before sheriff) or 15 (appeals) of the Children's Hearings (Scotland) Act 2011<sup>205</sup>.

When legal aid is granted, legal assistance at the hearing will be provided for the child. Legal aid is an automatic right for a child at certain types of hearings, in order to protect their rights and interests. If assistance by way of representation has not been made available to the child, children's legal aid

<sup>201</sup> Regulation 3 of the **Legal Aid (Scotland) Amendment Regulations 2010**, introduced a new Regulation 11A into the **Civil Legal Aid (Scotland) Regulations 2002**.

<sup>202</sup> **Civil Legal aid (Scotland) Regulations 2002**, Regulation 11A(1).

<sup>203</sup> *Henderson v Henderson*, 1997 Fam. L.R. 120.

<sup>204</sup> **Legal Aid (Scotland) Act 1986**, section 28B(2).

<sup>205</sup> *ibid.*, section 28B(3).



is automatically available in proceedings before the sheriff in relation to an application for variation or termination of a child protection order, review by a children's hearing or deferred children's hearing of a child protection order where the child has been taken to a place of safety or which prevents the removal of the child, and before a children's hearing or pre-hearing panel which is to consider whether it might be necessary to make a compulsory supervision order in relation to a child<sup>206</sup>.

There is no provision of automatic legal aid for relevant persons. However, children's legal aid is available to a relevant person in relation to the child to whom the proceedings relate, in the proceedings listed under (a) and (e) above<sup>207</sup>.

For proceedings before the sheriff or appeals, children's legal aid is available to the child to whom the proceedings relate, if the Scottish Legal Aid Board is satisfied that the following conditions are met:

- it is in the best interests of the child that children's legal aid be made available,
- it is reasonable in the particular circumstances of the case that the child should receive children's legal aid, and
- that, after consideration of the disposable income and disposable capital of the child, the expenses of the case cannot be met without undue hardship to the child<sup>208</sup>.

In cases of application for children's legal aid for a relevant person, the Scottish Legal Aid Board must be satisfied that it is reasonable in the particular circumstances of the case that the relevant person should receive children's legal aid, and that, after consideration of the disposable income and capital of the relevant person, that the expenses of the case cannot be met without under hardship to the relevant person<sup>209</sup>.

In each case, where the proceedings relate to an appeal to the sheriff principal or the Court of Session however, the Scottish Legal Aid Board must be satisfied that the child or relevant person has substantial grounds for making or responding to the appeal, in addition to the above conditions<sup>210</sup>.

## The child as a witness

Where the child is a witness in a case, he/she will be required to appear in person, the costs of which will be reimbursed by the party calling the child as a witness and therefore included in the legal costs of that party to the action.

Witnesses cannot be requested to cover legal costs.

Child witnesses cannot benefit from the same legal aid mechanisms as plaintiffs/defendants.

## The child in any other role

In the context of a children's hearing, a safeguarder may be appointed, to safeguard the interests of the child during the proceedings<sup>211</sup>, where for example there is a conflict of interest between the parents and the child. A panel of safeguarders is maintained by each local authority in Scotland, and the fees and expenses of safeguarders are to be met by the local authorities.

Children in any other role cannot be requested to cover the legal costs.

Children in any other role cannot benefit from the same legal aid mechanisms as plaintiffs/defendants.

<sup>206</sup> Ibid., section 28C(1) and (2)

<sup>207</sup> Ibid., section 28E(1).

<sup>208</sup> Ibid., section 28D(3).

<sup>209</sup> Ibid., section 28E(3).

<sup>210</sup> Ibid., section 28D(5) and 28E(5).

<sup>211</sup> Children's Hearings (Scotland) Act 2011, section 30.

## 2.11 Enforcement of civil court judgements

### The child as a plaintiff/complainant or defendant

The procedure in the ordinary courts is that the court will issue its judgement like in any other case. There is no specific provision made for particular steps to be taken to inform the child party of the decision or for this to be explained to the child. In most cases, agreement is reached between the parties, without the court having to take a final decision on the matter, and therefore the matter of informing the child of the outcome is left to those legally representing the child.

Where the pursuer is legally represented, the court decree will be sent to their solicitor. There are no legal requirements setting out how a solicitor should communicate and explain the decision to the child, or that child-friendly language should be used. A child would therefore only receive the decree in his/her own right in the case where they did not have legal representation. Thereafter, where a decree relates to payment, the party wishing to enforce the decree is required to obtain an extract of the decree. Once the extract is available, a charge will have to be served on the defaulting party along with the decree, which will provide the defender with a certain length of time in which to make payment of the decree.

Where payment is not made, further steps can be taken to arrest funds in the defender's bank account, pouncing (where property belonging to the defender is sold in order to pay off the decree) or to sequester the defender.

If decree is issued against a child defendant, enforcement shall take place against his/her property. Enforcement of decrees of court and service of court documents is generally effected by sheriff officers, in relation to sheriff court matters and messengers-at-arms in relation to Court of Session proceedings.

There are no specific measures in place to ensure that decisions which concern children are immediately enforceable. Enforcement of a decision can be suspended where an appeal is raised or other interim measure such as an interdict is obtained.

In order to protect the child from harm, there are a number of precautionary and interim measures available such as an interim residence order, an interim contact order, and supervised contact order, as well as interim measures such as interdict and interim interdict under general court procedures.

A child in Scotland can also be given emergency protection through a Child Protection Order (CPO) granted by a sheriff<sup>212</sup>, where there are reasonable grounds to believe that the child is suffering or will suffer significant harm if not removed to a place of safety, and that the order is "necessary to protect that child from that harm or from further harm".

Under the children's hearings system, where a compulsory supervision order is made, the implementation authority must give effect to this and ensure that any requirements imposed on it in relation to the child under the order are complied with<sup>213</sup>. Where it appears to the children's hearing that the implementation authority is in breach of any duty in relation to the child, it must give notice to the authority to perform its duties within a period of 21 days<sup>214</sup>, following which, if the authority continues to be in breach of its duties, the National Convener may apply to the sheriff principal for an order to enforce the implementation authority's duty in relation to the child<sup>215</sup>.

### The child as a witness

Child witnesses do not play a role during the enforcement phase of civil judicial proceedings.

### The child in any other role

Following a decision being made by a children's hearing disposing of a case, the chairman is to inform the child, any relevant person, any safeguarder, and any representative of the decision of

<sup>212</sup> Children's Hearings (Scotland) Act 2011, section 37.

<sup>213</sup> Children's Hearings (Scotland) Act 2011, section 144.

<sup>214</sup> Ibid., section 146(3).

<sup>215</sup> Ibid., section 147.

the hearing, the reasons for the decision, and the right of appeal to the sheriff<sup>216</sup>. This information shall also be sent to the child, any relevant person, any safeguarder and the local authority as soon as reasonably practicable after the children's hearing has made a decision disposing of the case<sup>217</sup>. Where the children's hearing has decided to issue or continue a warrant or order under certain provisions of the Act, the Principal Report is required to send to the child, any relevant person and any safeguarder appointed in the proceedings, a copy of the warrant, order, continuation or other document issued and notice of the right of the child to appeal the decision to the sheriff, as soon as reasonably practicable<sup>218</sup>. In each case, there are no specific requirements regarding the way in which the decision is to be explained to the child or that the language used should be adapted to the child's level of understanding.

Finally, it should be noted that where a children's hearing arranged to consider a child's case and is unable to dispose of that case, it may, if there is reason to believe that the child may not attend a hearing of the case or fail to attend or reside at any clinic, hospital or other establishment for a specified period of time, grant a warrant to keep the child in a place of safety for a specified period, or to bring a child before a children's hearing. At any time prior to the expiry of that warrant, an application may be made to the Sheriff for a warrant for further detention of the child<sup>219</sup>.

There are also interim measures available, which include the power for the children's hearing to grant an interim compulsory supervision order<sup>220</sup>. An interim compulsory supervision order can only be issued if the nature of the child's circumstances is such that the child has previously absconded and is likely to abscond again, and if so, it is likely that the child's physical, mental or moral welfare would be at risk, or that the child is likely to engage in self-harming conduct or cause injury to another person<sup>221</sup>. The order must include one or more of a number of measures, which can include that the child resides at a specified place, a contact direction or any other condition which the child must comply with.

<sup>216</sup> [Children's Hearings \(Scotland\) Act 2011](#) (Rules of Procedure in Children's Hearings) Rules 2013, section 88.

<sup>217</sup> *ibid.*, section 88(2) and 89(2).

<sup>218</sup> *Ibid.*, section 88(3)(c) and (d).

<sup>219</sup> *ibid.*, section 29.

<sup>220</sup> *Ibid.*, section 86.

<sup>221</sup> *ibid.*, section 83(6).

# Conclusions

## Institutional and legal framework

The legal framework relevant to civil judicial proceedings in Scotland is made up of a large number of different civil procedures. In most cases civil litigation will be conducted either in the sheriff courts or the Court of Session, which each has a number of different forms of procedure depending upon the nature of the claim, as well as the value of the claim in some cases. Specific types of claim relating to tort, personal injury, consumer law, contract, inheritance, property, rights of individuals, legal capacity, labour/employment issues and family matters can therefore be brought under one or more of these procedures. In addition, certain disputes concerning land or property, or employment issues, can come before tribunals which in effect act as independent civil courts.

In principle, for each of the above areas of law, the same procedural rules that apply to adults, also apply to children. In each case the rules for proceedings before the sheriff courts or the Court of Session include a chapter on family actions and make provision for children in such proceedings. Specific rules for children are also set out in relation to adoption and child care.

Children involved in judicial proceedings are however also subject to a specialised legal framework, the Children's Hearings System which takes place in lieu of court proceedings. Cases concerning children in need of care or protection will be heard before a children's hearing.

A children's hearing is held before a lay tribunal of three specially trained and qualified volunteers, who are members of the **Children's Panel**.

## General approach towards children under civil law

A child is defined as a person under the age of 16 years, or where it concerns a parental responsibility to provide guidance, a person under the age of 18 years. Under the children's hearing system, where a child is subject to a compulsory supervision order, he/she will remain subject to supervision requirements beyond the age of 16 years, and up to age 18.

The child's best interests are of primary consideration across all services according to guidelines under Getting it Right for Every Child (GIRFEC), which is a national programme to improve outcomes for all children in Scotland. The Children and Young People (Scotland) Bill proposes to create a statutory definition of 'wellbeing' and require that anyone assessing a child has regard to the general principle of wellbeing when it exercises functions in relation to a child who it looks after or who is in need.

## A child as an actor in civil judicial proceedings

Under the **Age of Legal Capacity (Scotland) Act 1991**, where a person is considered to have legal capacity to instruct a solicitor, he/she shall also have legal capacity to sue or to raise an action, or to defend, in any civil proceedings. A person under the age of 16 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 person 12 years of age or more is presumed to be of sufficient age and maturity to have such an understanding. Where a child has legal capacity to sue, or to defend, in any civil proceedings, they may consent to be represented in those proceedings by any person who, had the child lacked that capacity, would have had the responsibility to act as his/her legal representative.

As regards how a child can file a claim/lawsuit, the process is no different to where an adult raises judicial proceedings. No specific provisions apply in relation to a child bringing a case before court. There are no specific measures to facilitate either an adult or a child filing a claim/lawsuit.

A child can also participate in civil proceedings as a witness. Children aged under 16 are considered as vulnerable witnesses and may apply for special protective measures under the **Vulnerable Witnesses (Scotland) Act 2004**, which include the use of a live television link and use of a screen amongst other measures. It should be noted that there are currently proposals to raise the age at which a child is considered a vulnerable witness from 16 years to 18 years.

Aside from a child's role as plaintiff/complainant, defendant or witness, there are a number of civil proceedings, for example family actions, child protection cases and adoption cases, in which the child will be the subject of the proceedings, as well as within the specialised forum of the children's hearing. In such cases, provision is made to hear the views of the child.

## Provision of information to children

For each of the civil procedures covered, rules exist regarding the provision of information to the other party in the action, regardless of whether this is an adult or a child. Where the pursuer is legally represented, intimation of documents and all other information relating to the case shall be sent to his/her solicitor or to the child where they are not represented by a solicitor. There are no general provisions however regarding the provision of documentation to the child, or requiring that information related to the case is to be provided in a child-friendly manner. It is only in family actions, where the views of the child are to be sought that the relevant notification form will be sent directly to the child.

Under the Children's Hearings (Scotland) Act 2011, there are various requirements concerning the notification of children's hearings and provision of documents.

## Protection of the child's personal and family life

In addition to general legal requirements in place in order to protect a child's identity and personal data under the Data Protection Act 1998, the procedural rules of the sheriff courts and the Court of Session specifically require any audio or audio-visual recordings of children to be treated as confidential. In order to protect the privacy of a child in relation to media reporting during children's hearings, the basic rule is that children's proceedings are to be held in private, and only persons who need to be there for the proper consideration of the case being heard are to be present. Under the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, any documentation provided to the chairman and members of children's hearings is to be kept securely in their custody, shall not be disclosed during the hearing or be made known to any person, and shall be returned to the Principal Reporter immediately after the conclusion of a children's hearing.

## Protection from harm and ensuring a child-friendly process

The procedural rules of the sheriff courts and the Court of Session provide that a party may apply to the court to have all or part of their submissions to be made through a live link, which could be used to avoid the need for the child's presence in court or to protect the child from harmful images or information. The rules also specifically require any audio or audio-visual recordings of children to be treated as confidential. The rules of procedure also provide that the court can order that the publication of any report of the proceedings, be postponed for such period as the court thinks necessary for that purpose in order to avoid a substantial risk of prejudice to the administration of justice. In each case, these provisions apply to any ordinary cause action and therefore are not specific to actions involving children.

Under the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013, there are various measures to ensure that the children's hearing system is a child-friendly process.

## Protecting the child during interviews

The Ordinary Cause Rules 1993 provide that a party may apply to the court to have all or part of their submissions to be made through a live link and that any audio or audio-visual recordings of children are to be treated as confidential.

Children aged under 16 are considered vulnerable witnesses and may apply for special protective measures under the [Vulnerable Witnesses \(Scotland\) Act 2004](#).

In a children's hearing, relevant persons may be excluded from the hearing where this is regarded as necessary to obtain the child's views.

## Right to be heard and participate in civil judicial proceedings

During proceedings in the Court of Session or sheriff courts, when considering whether to make a court order relating to parental responsibilities, parental rights, guardianship or the administration of a child's property, the court shall regard the welfare of the child concerned as its paramount consideration and taking account of the child's age and maturity, shall so far as practicable give him an opportunity to indicate whether he/she wishes to express his/her views.

## Right to legal counsel, legal assistance and representation

The right to legal counsel, legal assistance and representation apply to both the child as a plaintiff or a defendant. Under the **Age of Legal Capacity (Scotland) Act 1991**, a person under the age of 16 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 person 12 years of age or more is presumed to be of sufficient age and maturity to have such an understanding, and can choose which solicitor he/she wishes to instruct. If the child is under 12, then it is up to the solicitor to decide whether the child understands enough to have a stateable case, and therefore whether or not he/she will represent the child. Where a child wishes to express his/her view in family law, child protection and adoption cases, a bar reporter or curator ad litem can be appointed to the child.

## Alternatives to judicial proceedings

Alternative dispute resolution mechanisms (ADR) have become an established part of the Scottish legal landscape, in particular in areas such as employment and family law, and there are a number of organisations providing ADR services. ADR mechanisms include arbitration, mediation and conciliation and are available on a voluntary basis to both the plaintiff and the defendant. In some cases however, parties may agree in advance, for example by including it as a condition of a contract, that should any dispute arise this will be resolved through arbitration or other means of ADR.

There are no specific provisions however setting out a requirement to refer a case to ADR procedures, regarding information to be provided to parties on the availability of ADR, or specifically to protect children in accessing (on their own or through their legal representatives) ADR procedures

## Remedies and compensation for violations of rights and failure to act

In addition to the rights of appeal and other legal remedies available under civil law, after using the complaints mechanism of public bodies, such as local authorities, if a child still has not found a remedy for a violation of rights or failure to act, he/she may contact the **Scottish Public Services Ombudsman (SPSO)**. It is also proposed in the Children and Young People Bill that Scotland's Commissioner for Children and Young People should have the power in the future to undertake investigations on behalf of individual children and young people, to allow investigation into whether a service provider has properly considered the rights, interests and views of the child when making decisions or taking actions affecting him/her.

## Legal costs

As a general rule, the unsuccessful party will be ordered to pay the costs of the successful party, unless the court makes a different order. However, when deciding on costs, the courts have a wide room for discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid.

Children's legal aid is available in case of certain proceedings relating to children.

## Enforcement of civil court judgements

The procedure in the ordinary courts is that the court will issue its judgement like in any other case. There is no specific provision made for particular steps to be taken to inform the child party of the

decision or for this to be explained to the child. Where the pursuer is legally represented, the court decree will be sent to their solicitor. Thereafter, where a decree relates to payment, the party wishing to enforce the decree is required to obtain an extract of the decree in order for a charge to be served on the defaulting party, which will provide a certain length of time for payment to be made.

Under the children's hearings system, the National Convener may apply to the sheriff principal for an order to enforce a compulsory supervision order in relation to the child.

## Strengths and gaps

Overall, the main strength of the system in Scotland is the Children's Hearings System which places the child at the centre of decisions concerning the need for state intervention in the life of a child, and provides the child with a lot of power within that system, for example to reject the grounds of referral to a children's hearing, or to go to court to challenge the grounds of referral. The children's hearing system cooperates closely with other authorities such as social workers, and significant steps have been taken to ensure that the whole process is child-friendly and that the child is provided with information and assisted in giving his/her views.

With the exception of family actions, child protection cases and adoption cases coming before the civil courts in Scotland, no provision is made for the involvement of children in civil judicial proceedings and therefore the same procedural rules apply to a child as apply to an adult. In general, due to the nature of the process and the complexity of the procedures for raising a civil case, children are likely to face difficulties in participating in civil judicial proceedings. While provision is made in family actions, child protection cases and adoption cases for the views of the child to be heard, even in these types of cases coming before the sheriff courts or the Court of Session, the only mechanism for the involvement of the child is a form that is sent to the child seeking his/her views. Research has shown that in practice, less than half of children involved in civil proceedings have their view taken, and the form, which is the only modification to the civil court procedure where the case involves a child, is served in a very low number of cases.

While provision is made for the protection of the child during proceedings in terms of how he/she provides his/her view or give evidence, as a vulnerable witness, other mechanisms such as the appointment of a bar reporter or curator ad litem to assist the child, have been subject to criticism. The legislation does not specify any criteria for the selection of a reporter or curator ad litem, there being no requirements regarding their qualification or training or setting out what their tasks are. Other criticisms concern the fact that in many cases the report they provide cannot be challenged since it is only provided at a late stage in the proceedings. However, a working group is currently looking into these criticisms, and is to consider the role of bar reporters, what training they require, how their work is monitored and how parties involved in a case can challenge the contents of a report.

Finally, another gap that was identified was with regard to a child's access to legal aid. Access to legal aid can be restricted where parental income is taken into account, and also where it is considered that separate representation of the child is unnecessary. While in most cases a child will pass the financial test where required, the requirement that the child or relevant person has substantial grounds for making or responding to the appeal may prove more difficult to overcome where the SLAB consider that the child's interests appear to be aligned with one of the adult parties. Even where legal aid is made available to children, the number of children actively instructing solicitors appears to be limited.



## List of legislation

- Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013
- Children's Hearings (Scotland) Act 2011
- The Civil Legal Aid (Scotland) Amendment Regulations 2010
- Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009
- Adoption and Children (Scotland) Act 2007
- Vulnerable Witnesses (Scotland) Act 2004
- Victims and Witnesses (Scotland) Bill, introduced on 6 February 2003
- Freedom of Information (Scotland) Act 2002
- Children's Hearings (Legal Representation) (Scotland) Rules 2002
- Civil Legal Aid (Scotland) Regulations 2002
- Act of Sederunt (Small Claims Rules) 2002
- Children (Protection at Work) (Scotland) Regulations 2000
- Act of Sederunt (Summary Applications, Statutory Applications and Appeals Etc. Rules) 1999
- Working Time Regulations 1998
- Data Protection Act 1998
- Child Care and Maintenance Rules 1997
- Act of Sederunt (Child Care and Maintenance Rules) 1997
- Act of Adjournal (Criminal Procedure Rules) 1996
- Children (Scotland) Act 1995
- Act of Sederunt (Rules of the Court of Session) 1994
- Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993
- Act of Sederunt (Child Support Rules) 1993
- Ordinary Cause Rules 1993
- Age of Legal Capacity (Scotland) Act 1991
- Legal Aid (Scotland) Act 1986
- Children and Young Person (Scotland) Act 1937

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