FACULTY OF ADVOCATES

Response from the Faculty of Advocates

The Children (Scotland) Bill

The Faculty of Advocates, as the independent referral bar in Scotland, is pleased to offer its comments on the Children (Scotland) Bill.

Part I of the Children (Scotland) Act 1995 was designed to provide a framework for parental responsibilities and parental rights, and for court orders about those responsibilities and rights.

The proposed amendments change the nature of the law to introduce prescriptive provisions in respect of some aspects of a case, affording the decision maker less flexibility and narrowing the area in which discretion may be exercised.

This is liable to promote disputes regarding what the legislation means, which may have the result of prolonging litigation, delaying resolution and thereby detracting from the best interests of the child. It is acknowledged that provisions with wide discretion can also have this effect.

Voice of the child

The Faculty is supportive of the views of the child being heard and all appropriate methods being explored to enable that to happen.

We note that the presumption that a child of 12 years or more is of sufficient age and maturity to form a view remains in the proposed section 11ZB(4), which appears to be inconsistent with the removal of the presumption elsewhere.

The wording elsewhere in relation to the views of the child makes it mandatory for the judge to give a child the opportunity to express a view unless the judge is satisfied that the child is not capable of forming a view.

The introduction of an express test of "capacity" is liable to result in additional litigation and promote the use of expert evidence. It is more restrictive than the current position, where the only restriction on affording the child an opportunity to express a view is "practicability" (see ***S v S 2002 SC 246***).

The introduction of this test may prolong litigation, delay resolution and thereby detract from the best interests of the child.

We are concerned as to the means by which a judge is to form that view of capability. In the case of ***W v W 2004 SC 63*** the Lord Ordinary was criticised by the First Division on appeal for coming to a view on whether a child had attained an age and a degree of maturity at which it was appropriate to take account of her views without any assessment by a person trained in this area.

The present legislation contains a presumption that a child of 12 years of age or older is of sufficient age and maturity to express a view, but there is no limitation on a judge taking the views of much younger children. Some sheriffs have been known to interpret the current legislation as meaning that there is no need to take the views of younger children, but that is a problem with the current legislation being misinterpreted, rather than being insufficient in its terms.

The proposed change is potentially retrogressive. The court should be given the

maximum flexibility to decide the most suitable way of obtaining a child's views. The legislation should give a child of whatever age the opportunity to express a view. The test should remain that of practicability.

Child's best interests

The Faculty is of the view that the present legislation, where the best interests of the child is considered as a matter of principle, is preferable to and more flexible than consideration of a list of factors which must be considered in making a decision in the best interests of the child, and particularly preferable to a partial and selective list.

The present legislation allows issues, important in themselves, such as domestic abuse, the rights of fathers, the rights of grandparents, and the rights of siblings, to be taken into account in considering what is in the best interests of the particular child.

We have a concern that in listing the issues which are presently of most concern to particular groups, that will have the effect of limiting the issues which should be considered in respect of individual children leading to an incomplete focus on that child.

In relation to para 21 of the Bill, the proposed amendment confuses the procedure for making a decision with the substantive task of forming a judgment on the order to be made.

We suggest that avoidance of delay is a matter for court rules and case management rather than primary legislation.

Child welfare reporters and curators ad litem

The Faculty's view is that registers of child welfare reporters and curators ad litem are best maintained at local rather than national level. Sheriffs are aware of the

standard of local reporting and the strengths and weaknesses of local reporters.

We favour training requirements being made clear, but propose that training is better offered at a local level. We are aware that the issue of training requirements for child welfare reporters in the Court of Session is being actively considered via the Court Users Group.

There is a line of court authority which has rejected the regulation of expenses, making it clear that curators ad litem may charge judicial expenses- ***Scottish Borders Council, Petitioners 2014 SLT (Sh Ct) 140, City of Edinburgh Council v MO's Curator 2016 SC 813, Clackmannanshire Council v LK's Curator 2016 SC 818.*** The justification for this is, in part, the quality of the work the court expects, and the need for solicitors and counsel to be prepared to take on these appointments.

We are of the view that reassessing appointments every 6 months will simply create an extra procedural step and increase the expenses of litigation. Our experience of the current position is that the court will take active steps to discharge the appointment of the curator ad litem when his or her function is completed.

Factors for court when making contact and residence orders

The Faculty is unclear as to what is being added here to the requirements in the present legislation to consider the issue of abuse.

In relation to para 12, our view is that the simple welfare test allows all factors to be taken into account and that there is a risk where a check list is introduced that other matters are lost.

If this provision is to be added, we suggest that it is made clear that all circumstances are to be taken into account, and that the factors listed are without

prejudice to other factors.

Decisions explained to the child

The Faculty is of the view that it is not appropriate to make the explanation of decisions to children mandatory. Such an explanation will not always be in the best interests of the child nor necessarily practicable, and this should be left as a matter for the discretion of the judge. There will require to be consideration of the method by which a judge is to explain a decision to a child, where that is appropriate.

Vulnerable witnesses

While we welcome the consideration of further protection for vulnerable witnesses, there are a few issues which we would highlight as arising, which make the measures proposed more contentious in a family action than in, for example, criminal proceedings. We covered this in some detail in our response to the Scottish Government in respect of the proposal, when they consulted in June this year. There are many cases where both financial issues and child related issues arise in the same case. There are also difficulties in parties being awarded legal aid. These are cases where it may be necessary to instruct counsel and engage expert witnesses.

In our experience allegations of abuse in family cases involve a very wide range of circumstances, from the most serious allegations of assault and coercive control to cases where allegations have the appearance of having little or no foundation, but cause prejudice to an opponent. These are difficult issues, where it is important that the sheriff or judge is able to exercise discretion as to how best to manage a case.

The Faculty would also highlight that where special measures are taken and a solicitor is appointed to act on behalf of a party, the solicitor is directed to act in that party's best interests where they give no instructions or perverse instructions. In some such cases this may arise from a lack of capacity, and necessitate the appointment of a curator ad litem to the party concerned. This is at present the only circumstance in which an adult may be represented in accordance with best interests and even then this is not consistent with, for example, the principles for representing incapable adults, recognised in the Adults with Incapacity (Scotland) Act 2000.

Contact centres

The Faculty considers that the proposed provisions do create issues in relation to access to services and indeed access to justice in remote areas where there may be no regulated contact centre. There is a risk of closing down opportunities for contact.

At present, contact may be supervised in community settings such as in a church, by a rabbi, or most usually by grandparents.

We suggest a provision whereby where a regulated contact centre exists, the judge should consider using that in preference to other centres, but that the absence of a regulated contact centre should not create a bar to supervised contact taking place in other venues.

Enforcement of orders

The Faculty's view is that the court already has the power to appoint a child

welfare reporter at any stage of a case, including at the point where a party is failing to obtemper an order of the court. A court will normally investigate the reason for a party's failure to comply with a court order.

Contact with siblings

A local authority already has the obligation to promote contact with a sibling with whom a child has been enjoying family life, in terms of Article 8 of the European Convention on Human Rights.

It must be remembered that there are circumstances where a permanence order is sought where contact between siblings is not appropriate, such as where contact retraumatises children in being reminded of or reliving abuse or neglect which they have suffered together.

The amendment suggested at paragraph 10, page 16 onwards sets out that such steps to promote contact should be taken as are both practicable and appropriate. We agree with the wording used here.

Children's Hearings

Paragraph 18 of the Bill sets out that there shall be no appeal to the Court of Session unless the Sheriff Appeal Court gives permission. Our view is that the sheriff court is often dealing with serious allegations equivalent to those tried in the High Court in criminal matters, which merit the attention of the Inner House. While the Sheriff Appeal Court can remit to the Inner House, time is often of the essence and extra steps in the process should be avoided.

Our view is that the direct right of appeal to the Court of Session should be maintained.

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