

Patrick v Patrick and *Re A letter to a Young Person*: Judicial Letters to Children – an Unannounced, but not an Unwelcome, Development

A. INTRODUCTION

“A letter”, Nietzsche once wrote, “is an unannounced visit, the postman the agent of rude surprises”.¹ Given the extremely personal nature of many family law judgments, it is rare and rather surprising when parties, their children² or, indeed, the judiciary set out their views in the form of a published letter. Two recent cases in which courts have communicated their decision by letter (*Patrick v Patrick*³ and *Re A letter to a Young Person*⁴) are therefore worthy of note. In each case, the letter was addressed to the children in respect of whom orders were sought. The children ranged in age from 6 to 14 years.

Patrick, a decision of Sheriff Anwar at Glasgow, concerned a “bitter and acrimonious dispute” regarding whether a father should be entitled to “contact, in any form” with his three children described as being “aged between 12 and 6 years”.⁵ In *Re A letter to a Young Person*, Mr Justice Peter Jackson determined a relocation dispute involving a 14 year-old boy who had been the subject of repeat family court orders since he was one year old.⁶ Both judicial letters received publicity, with excerpts from each being published in national newspapers.⁷

¹ F Nietzsche, translated by R J Hollingdale, *A Nietzsche Reader*, 1977 (2003 reprint), [WS 251].

² See, eg, *Re A-H (Children)* [2008] EWCA Civ 630, in which the letter from the child, reproduced at para 18 of the court’s judgment, began “Dear Judge, I am writing to you because I think it’s pathetic...”

³ *Patrick v Patrick* [2017] SC GLA 46 (hereafter “*Patrick*”).

⁴ *Father v Mother and Stepfather*, also known as *Re a letter to a Young Person* [2017] EWFC 48 (hereafter “*Re a letter to a young person*”).

⁵ *Patrick* para 1. All names used in the judgment were fictitious.

⁶ *Re a letter to a Young Person*, letter to child, para 2. See also *Lancashire County Council v M* [2016] EWFC 9, para 13, in which the same judge used emojis in his judgment conveying, simply and accessibly, to the family involved the terms of his decision concerning the children’s care and protection. It is perhaps worth noting that this recent trend towards rendering more accessible judgments is not restricted to any one field of law. In *McKendrick v Cumming & Cumming* [2016] SC EDIN 61, Sheriff T Welsh QC included a number of photographs in his judgment about a contractual dispute illustrating the bases on which he had made certain findings.

⁷ See, eg, “Judge writes to teenager to explain why he can’t live with his father”, *The Daily Telegraph*, 27 July 2017: <http://www.telegraph.co.uk/news/2017/07/27/judge-writes-teenager-explain-cant-live-father/>; “Give dad a chance to make things better: Judge pens

B. PATRICK v PATRICK

The three children at the centre of the action lived with their mother and had, historically, “enjoyed extensive residential and holiday contact”⁸ with their father, the Pursuer. However, in a turn of events depressingly familiar to family lawyers, when relations between the adult parties had descended into “ill-will” and “bitter reprisals”,⁹ relations between the children and their father had similarly soured. Allegations of sexual abuse were made against the Pursuer, which the court ultimately did not find established. From November 2015, the children had no contact with him.

Proceedings culminated in a particularly lengthy proof¹⁰ where evidence was heard from many quarters, including the Detective Constable who interviewed the children and Dr Khan, the clinical psychologist appointed to take their views. Sheriff Anwar made an order for indirect contact in the first instance, while noting that “a great deal of preparatory work would be necessary with both parties and with the children, before any form of contact could take place.”¹¹

Her letter to the children, dated 20 March 2017, followed a lengthy *ex tempore* decision of 1 March 2017 setting out her rationale. The Sheriff also produced a summary of the case background, which precedes the letter in her published judgment. In that summary, it was explained that Dr Khan would arrange a meeting with the children to read the Sheriff’s letter to them.¹² The psychologist was invited to exercise her professional judgment as to whether she included the youngest child, aged 6, in that meeting.

By the time the Sheriff handed down her letter to the children, their parents had agreed “to meet with family therapists, attend mediation and to instruct a psychologist to work with the children”.¹³ The Pursuer had also promised to attend a parenting course. Sheriff Anwar’s candid letter aptly demonstrated that she had considered everything “very carefully... especially” the children’s feelings. She was, she wrote, aware that they did not “want to see... dad”, but had nonetheless decided, after listening “carefully to... everyone”, that:

[I]t is better for you to get to know your dad again and to give him a chance to make things better... I have decided that your dad should write to you once a month, so that

heartfelt letter to kids explaining custody decision”, *Daily Record*, 22 August 2017: <http://www.dailyrecord.co.uk/news/scottish-news/give-dad-chance-make-things-11033817>.

⁸ *Patrick*, para 1.

⁹ *Patrick*, para 4.

¹⁰ *Patrick*, para 2, proof lasted 11 days.

¹¹ *Patrick*, para 7.

¹² *Patrick*, paras 9-10. The judgment stated that the youngest child was 6, and the eldest child was 12 but did not provide the middle child’s age.

¹³ *Patrick*, para 8.

you can start to get to know each other again. I hope that you will feel able to write back to him.¹⁴

The court's ruling did not, of course, resolve the issues in the case. It merely signposted the proposed next steps in this troubled family's story; steps that would be impossible without the cooperation of the children. In writing directly to them, the Sheriff expressed her desire to be "fair" to the children she had "not met... but... heard a lot about".¹⁵ She also sought to avoid either of the adult parties conveying to the children the terms of her judgment selectively "in order to vindicate themselves or to apportion blame".¹⁶ It is hoped that, together with the investment of long-term professional support, the Sheriff's novel approach of writing a letter to the children assists in producing a satisfactory outcome.

C. RE A LETTER TO A YOUNG PERSON

Here, the 14 year-old subject of an application to relocate was given the pseudonym "Sam" in the English court judgment.¹⁷ He lived with his mother and stepfather and enjoyed regular contact with his father, who wished to move to "an identified Scandinavian country"¹⁸ and take Sam with him. The adult parties represented themselves in the action. Sam, who was represented by his own solicitor throughout the proceedings, made the original applications to relocate and to apply for Scandinavian citizenship. His father later took over these applications,¹⁹ which were opposed by Sam's mother and stepfather who wished him to remain with them in England where he had lived to date.

Sam had expressed a wish to give evidence, which was another source of contention between the disputing adults.²⁰ In the end, and in order to allow him to feel that he had been heard, Jackson J "decided that Sam should give evidence briefly at the beginning of the hearing, but that he should not be questioned directly by either of his parents".²¹ Sam spoke in support of the relocation, which failing said he wished to see more of his father. His evidence was taken in less

¹⁴ *Patrick*, letter to children, 4th and 5th last paras.

¹⁵ *Patrick*, letter, paras 2-3.

¹⁶ *Patrick*, para 6.

¹⁷ Referring to children by pseudonym within judgments, as opposed to the traditional approach of using letters, is a growing practice in family law, spear-headed by Lady Hale. See, eg *In the matter of S (A Child)* [2015] UKSC 20: "We are concerned... with the seven year old, whom I shall call Amelia...", per Lady Hale at para 2.

¹⁸ *Re a letter to a Young Person*, para 1.

¹⁹ *Ibid.*

²⁰ *Re a letter to a Young Person*, para 2.

²¹ *Ibid.*

than half an hour, and immediately afterwards the teenager set off for “a school trip for the rest of the week”.²²

The court’s judgment of 26 July 2017 comprised four introductory paragraphs, briefly outlining the factual and procedural background of the case, followed by the decision itself, which was set out in the form of a letter, dated 13 July 2017, addressed to Sam. Jackson J dismissed the relocation applications because Sam was settled in the UK and his father had provided no evidence of realistic planning for the proposed move. The judge also explained, briefly, why he was not putting in place the alternative living arrangements that Sam had requested. The judgment records that Sam, who was “satisfied that he had got his point of view across, and been seen to do so” responded to the court’s ruling with “apparent equanimity”.²³

The letter to Sam began by outlining the judge’s role and responsibilities in terms of making decisions. It narrated specific factors considered and painted the following, rather uncompromising, picture of Sam’s situation:

The fact that your parents don't agree is naturally very stressful for you... All fathers influence their sons, but your father goes a lot further than that. I'm quite clear that if he was happy with the present arrangements, you probably would be too. Because he isn't, you aren't... That's how subtle and not-so-subtle pressure works.²⁴

Unlike *Patrick*, in which the Sheriff’s letter to the children had been sparing in its criticism of the parents, the Family Court’s letter was peppered with adjectives describing Sam’s father. He was, wrote Jackson J, a man with “some great qualities” who was nonetheless “troubled, not happy”, “self-centred”, and took “no responsibility” for relationship problems, behaving with “little respect” towards “anybody who disagrees with him”. The judge went further: “your father has a manipulative side”, noting that Sam’s “mother certainly finds his behaviour difficult, so difficult that she avoids contact with him whenever possible”.²⁵

Given his obvious alignment with his father, Sam might, on reflection, find the above comments particularly unwelcome. He may require longer-term support in processing the terms of the letter. Regardless of the court’s desire that there should be no further legal proceedings about Sam, the judge had foreseen the possibility that the teenager might wish to respond. In his penultimate paragraph, Jackson J left an open door:

²² Ibid.

²³ *Re a letter to a Young Person*, para 3.

²⁴ *Re a letter to a Young Person*, paras 2, 4, and 5.

²⁵ *Re a letter to a Young Person*, paras 4, 5, and 6.

[I]f you want to reply to this letter, I know that your solicitor will make sure that your reply reaches me.²⁶

D. JUDICIAL LETTERS TO CHILDREN: OBSERVATIONS, ANALYSIS AND POSSIBILITIES

Letters of the kind exemplified in the above cases are a refreshing departure from normal judicial practice. They also accord with the following guidance offered by the United Nations Committee on the Rights of the Child, emphasizing the importance of children receiving feedback on the impact their views have had in the decision-making process:

Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered. [This] feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously. The information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint.²⁷

The judgments of *Patrick* and *Re A letter to a Young Person*, together, also provide some useful indications as to when judicial letters might be considered particularly useful in family litigation. A number of observations on the practice are offered. The first three relate to what might be termed the psychology of persuasion. The final two points are more practical in nature.

First, although the facts were very different, in both cases judicial letters were used to communicate decisions to children that contradicted, unequivocally, their expressed wishes. Each letter appealed directly to the child, seeking to persuade in a way that conventional judgments do not. The letters demonstrated a tacit acknowledgment that the child's investment in any such solution was crucial to its success. Secondly, each case concerned an intractable dispute in which some or all of the adult parties involved were considered incapable of communicating the contents of a traditionally-delivered judgment in an unbiased manner to their children. A child-focused attempt to circumvent negative parental influence was therefore being made. This leads on to the next point. Thirdly, the children in each case were (or were certainly perceived as being) victims of an unhealthy degree of parental pressure. In *Patrick*, the Sheriff circled this issue in her letter to the children whereas in *Re A letter to a Young Person* the matter was addressed explicitly. The extent to which it might ever be regarded as the court's responsibility or role to educate a child on his or

²⁶ *Re a letter to a Young Person*, para unnumbered.

²⁷ General Comment No. 12: *The right of the child to be heard* (20 July 2009), CRC/C/GC/12, para 45.

her parents' character flaws and missteps is, the writer suggests, a matter requiring particularly careful consideration.

Fourthly, in practical terms, the children to whom the letters were principally addressed were approaching, or were over, 12 years of age. This is the age around which children are generally considered mature enough to express a view and to instruct their own solicitor,²⁸ albeit that the views of considerably younger children are routinely canvassed and recorded throughout family proceedings.²⁹ If judicial letters to younger children become a practice, then it is suggested that Sheriff Anwar's approach of appointing a clinical psychologist (or another appropriately trained adult) to convey the terms of the letter to the children should be considered. Indeed, this might well be a prudent step regardless of the age of the child concerned.

A final observation: in each of the judgments discussed above, the letter to the children was intended to signal the close of the legal process even if, as in *Patrick*, it was the harbinger of further professional involvement. A letter of this sort to a child, whether unannounced or unwelcome, is not the beginning of communications between judge and child, but rather the end. Admittedly, the family court has discharged its basic legislative duty³⁰ after the child's views have been taken into account (which is, of course, prior to the making of any final order). However, at least some children will require support after receiving a letter from a judge and it is arguable that all children should be afforded a right of reply. The United Nations Committee on the Rights of the Child has provided further guidance on this matter:

The child's right to be heard imposes the obligation on States parties to review or amend their legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support... and procedures for complaints, remedies or redress.³¹

Certainly, conveying the terms of family law judgments to children via personally addressed letters is an innovative development – and by no means an unwelcome one. However, it is also not difficult to envisage situations³² in which judicial letters of this sort may be an

²⁸ See Age of Legal Capacity (Scotland) Act 1991, section 2(4)(a) and for England see, eg, *Mabon v Mabon* [2005] EWCA Civ 634.

²⁹ For notable Scottish instances of this, see for example *City of Edinburgh Council v H (A Child)* 2000 SLT (Sh Ct) 51; *Shields v Shields* [2002] ScotCS 342; 2002 SC 246; *Stewart v Stewart* [2007] CSIH 20; 2007 SC 451; *JGC v NW* [2016] SC EDIN 26.

³⁰ Children (Scotland) Act 1996, section 11(7)(b); Children Act 1989, section 1(3)(a). No order in respect of a child need necessarily be final since all orders can be varied on a material change of circumstances.

³¹ General Comment No. 12: *The right of the child to be heard* (20 July 2009), CRC/C/GC/12, para 48.

³² In the case of, for example, a young child or a child or young person with a mental illness or a learning disability. Or, the nature of the decision itself might render a letter

inappropriate or unhelpful way to explain a particular decision. Various factors can be expected to impact upon whether courts determining family law disputes opt to write directly to children in this manner. These factors are likely to include the age and maturity of the child concerned, the child's mental and emotional health, the strength of his or her views (and those of the adults involved) and the nature and complexity of the dispute. The court may also wish to consider whether the letter is read out to the child(ren), as in *Patrick*, by a professional trained to answer questions and provide support. Significantly, many members of the judiciary might themselves wish to receive training before writing letters to children.

Perhaps it is also time to consider a broader range of means by which family court judgments could be communicated to the young? Considerable, and often laudable, efforts have been made to date by UK law and policy-makers to ensure that children's views and feelings are taken into account before family law decisions about them are made.³³ Yet little has been done formally to provide children with clear information, feedback or support once such decisions have been reached.³⁴ While the question of resources would inevitably feature in discussions of this kind, potential means of communication might include a face-to-face meeting with the judge or another appropriately qualified person such as a Court Welfare Reporter, specialist solicitor or psychologist. It may also be appropriate, for example, to use pictures and photographs³⁵ in judgments concerning younger children, Social Stories³⁶ for children with certain disabilities, or a

inappropriate, eg, in certain child protection cases involving complex, salacious or criminal aspects.

³³ For example, the Family Law Committee of the Scottish Civil Justice Council has done much recent work regarding redrafting the F9 form used to gather children's views in private family proceedings:

<http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/annual-reports-and-libraries/annual-report-2016-2017-and-annual-programme-2017-18.pdf?sfvrsn=2>. This work generated a Children's Parliament consultation on draft F9.1 and F9.2 forms and the published paper, "*If an adult just listens...*", 8 May 2017, available at: <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-08-may-2017/paper-4-1c-children-39-s-parliament-feedback-report-on-form-f9.pdf?sfvrsn=2>.

³⁴ Or, indeed, throughout the months or years that the process of litigation continues. Concerns about the general lack of feedback and support for children in the Scottish system were voiced by consultees in the recent review of the F9 form (see note 33 above). In February 2016, the English body, CAFCASS, launched its "refreshed" Quality Assurance and Impact framework, designed to "[improve] the experiences of children in family proceedings, one by one": <https://www.rip.org.uk/news-and-views/blog/improving-the-experiences-of-children-in-family-proceedings/>.

³⁵ See note 6 above, judgment of Sheriff T Welsh QC, in which this means of communication was recently used to render more accessible the court's findings in a contractual dispute.

³⁶ A Social Story is a widely used method of communicating information, including information about events and routines, in a clear and reassuring manner to someone with an

video message³⁷ for older children and teenagers. Consideration could also be given to empowering children further, by enabling them to pre-select from a standard “menu” their preferred means of communication of the judgment concerning them. After all, the court’s decision is crucially important to the child to whom it relates: his or her future day-to-day life is likely to be dictated by its terms.

The judicial letters written to children in *Patrick* and *Re a letter to a Young Person* potentially represent a turning point in family law judgments. They certainly provide much scope for discussion and constructive debate regarding making judgments most accessible to those most affected by them. A review of current practice and a discussion of the wider possibilities for communicating family law decisions to children (both north and south of the border) would be timely and very welcome indeed.

Lesley-Anne Barnes Macfarlane
Lecturer in Law, Edinburgh Napier University

Autistic Spectrum Disorder. Social Stories have also been used for younger children and people with intellectual disabilities. See C Gray, *The New Social Story Book*, 15th edn (2015).

³⁷ Given the wide range of social media apps and platforms now available, numerous possibilities for conveying information exist.