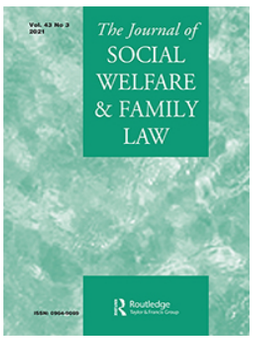

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Journal of Social Welfare and Family Law

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjsf20

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To cite this article: Lesley-Anne Barnes Macfarlane (2021): Practicability in ascertaining children's views: superseding 'the default position', Journal of Social Welfare and Family Law, DOI: 10.1080/09649069.2021.1999108

To link to this article: https://doi.org/10.1080/09649069.2021.1999108

Published online: 27 Nov 2021.

JOURNAL OF SOCIAL WELFARE AND FAMILY LAW
https://doi.org/10.1080/09649069.2021.1999108

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Practicability in ascertaining children's views: superseding 'the default position'

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ABSTRACT

This paper considers the issue of 'practicability' in ascertaining the views of children in family proceedings with reference to the recent, and noteworthy, Scottish Inner House judgment of M v C. As each of the is UK nations contemplate more fully incorporating and implementing the UNCRC, it is argued that statutory provision alone does not guarantee children's rights will be honoured in practice. How the judiciary interpret and balance the child's Convention rights will be crucial.

KEYWORDS

UNCRC; children's views; Scotland; practicability

Just as Scotland is set to implement the Children (Scotland) Act 2020 and shortly will become the first UK jurisdiction to fully incorporate the UNCRC in statute, it is curious to see three decisions, in close succession, considering the issue of practicability in the current law (*M v C* [2021] CSIH 14; *LRK v AG* [2021] SAC (Civ))1; *FBI v MH* [2021] SAC (Civ)). *M v C* [2021] CSIH 14, a judgement of the Inner House, Scotland's highest civil appeal court, considers Children (Scotland) Act 1995 (S 11(7)(b)), which provides that the courts 'shall so far as practicable' give the child an opportunity to 'express his views'. The decision is noteworthy, because the court's reasoning leaves the door open for the judiciary to continue (legislative reform notwithstanding) to qualify the child's right to express a view in family proceedings. This serves to illustrate that statutory provision alone does not guarantee that the voice of the child will be honoured in practice. As each of the UK nations contemplate more fully incorporating and implementing the UNCRC, *M v C* demonstrates that how the judiciary interpret and balance the child's Convention rights will be crucial.

M v C involved a contact dispute in respect of a child who was just under 5. The Children (Scotland) 1995 Act has long provided that 'a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view'. However, this presumption is interpreted in light of two important developments in contemporary law. First, Scottish courts often *do* ascertain the views of child under 12, albeit that – as in England – the child's age and maturity are factors that often affect the weight the judiciary attaches to views expressed (see, e.g. *Shields v Shields* 2002 S.C. 246 (child aged 9); *C v McM* [2005] 75 Fam LB (children aged 6 and 8)). Revised Court Rules also came into effect in June 2019, indicating that children under 12 should routinely be sent formal intimation of family litigation about them, inviting them to express a view, unless 'inappropriate . . . for example,

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where a child is under 5 years of age' (OCR New rule 33.7A(2)). These rules create an expectation that courts will take account of views expressed by younger children. The second development is more radical. The new Children (Scotland) Act 2020 will repeal the age presumption in the 1995 Act and replace it with a positive presumption that all children, regardless of age, are capable of expressing a view (new S. 11ZB). No date has been appointed for its coming into force, but Scottish courts are already mentioning section 11ZB in their judgements (see, e.g. *M v C; LRK v AG* [2021] SAC (Civ)1).

At first instance, the Sheriff in *M v C* deemed that it would not be 'appropriate' to inquire into any views the child might have, citing his concern that 'information might be communicated [to the child] which a child of just under 5 years of age should not be told' ([2021] CSIH 14, para 2). The Sheriff provided no indication as to the nature of that information, nor did he explain why it was not 'practicable' that the child's views be ascertained more generally without, for example, disclosing any inappropriate matters. He refused the contact order sought. His decision was appealed, first to the Sheriff Appeal Court and, thereafter, to the Inner House of the Court of Session. Both appellate courts held that the Sheriff had erred when considering 'whether to explore the [child's] views' (para 1). However, their contrasting analyses of the meaning of 'practicable' reflect clear contradictions in the approach of how best to honour the child's right to be heard (Article 12, UNCRC). These judgements are accordingly relevant now and for the future.

At the first appellate stage, the Sheriff Appeal Court said this:

> 'A child who is capable of forming a view has a right to be heard unless it is not practicable to consult him or her. In this regard "practicable" means "able to be put into practice, able to be accomplished, effected or done, feasible" (*Shorter Oxford Dictionary 6th ed*).'

This indicates that the court must ascertain whether a child wishes to express a view unless no appropriate method for obtaining that particular child's views can be found.

However, on appeal, a different definition of 'practicable' was provided by the Inner House. Lord Malcolm said:

> 'Where necessary the court can imply a meaning which the words used would not ordinarily carry … We have no hesitation in reading the [practicability] test … as importing a consideration of any harmful consequences for the child in question and whether they render all and any steps to explore the child's views not practicable … ' (paras 9; 11)

Elaborating on this, Lord Malcom cited Article 3 of the UNCRC (the child's best interests) and the court's overarching obligation to regard the welfare of the child as 'paramount' in Scottish family proceedings (S 11(7)(a)). He went on to state that, while Article 12 places great weight on the right of a child to be heard, 'weighty adverse welfare considerations of sufficient gravity' could 'supersede the default position' of seeking children's views. This observation, whereby the child's best interests might be permitted to over-ride the child's right to express a view, echoes an old debate upon which the UN Committee on the Rights of the Child has already made its definitive statement: 'there can be no correct application of article 3 if the components of article 12 are not respected' (*General Comment* no. 12, para 74).

There are inherent dangers in Lord Malcolm's approach. First and foremost, Article 12 explicitly provides that States parties 'shall assure' children with the right to be heard, a term noted by the Committee in its guidance on that Article to be one 'which leaves no

leeway for State parties' discretion' (*General Comment no. 12, paras* 19; 50–51). Secondly, it is not necessary that a child (or indeed an adult) 'has a comprehensive understanding of an issue affecting him or her' to form a view (Lansdown 2011, p. 20). In the context of family breakdown, it is often better that sensitive information is not disclosed to children, particularly young children, when asking them if they wish to express a view. But should the existence of sensitive information or, indeed, 'weighty adverse welfare considerations' about the child form the basis of the court's decision not to afford that child any opportunity of being listened to? Would this not, rather, form an example of a situation in which the child would benefit from the involvement of a specially-trained supporter or advocate? Section 21 of the Children (Scotland) Act 2020, once in force, will impose upon the Scottish Government a 'duty to make available child advocacy services' to support, guide and represent children involved in family court cases.

Where *M v C* is concerned, the approach of the Sheriff Appeal Court is to be preferred in terms of respecting the child's Article 12 right to be heard. That judgement also better aligns with *Shields v Shields*, the previous Inner House judgement on this issue. In *Shields*, practicability discussions addressed specific methods that might be used to ascertain views rather than whether the child should be heard at all. Lord Marnoch observed:

> '[s]o far as affording a child the opportunity to make known his views, the only proper and relevant test is one of practicability. Of course *how* a child should be given such an opportunity will depend on the circumstances of each case and, in particular, on his or her age … where younger children are involved or where there is a risk of upsetting the child, other methods may well be preferable' (para 11).

This reference to taking particular care in respect of the participation of younger children is noteworthy because it pre-dates – but reflects accurately – the guidance of the Committee on the Rights of the Child in *General Comment* no. 12 about the need to provide 'differing levels of support and forms of involvement' to children 'according to their age and evolving capacities' (Para 134(e)).

If future judges instead decide to use the reasoning of the Inner House in *M v C* as a justification for refusing to ascertain children's views, this would be a retrograde step and undermine the forthcoming legislative reform.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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