

Questioning competence? Children's rights to participation in family law proceedings

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- Make research more accessible for use by policy makers, practitioners, research participants, academics and the wider public.
- Enhance the infrastructure to conduct research on families and relationships.

This morning ...

1. Ground contribution in the UN Convention on the Rights of the Child (CRC)
2. Context of Scottish family law proceedings
3. Challenges for children's views to be given due weight

What does 'participation' mean to you?

Please discuss with the person next
to you how to define 'participation'

Article 12 of the CRC

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

This term [participation] has evolved and is now widely used to describe ongoing processes, which include information sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.

UN Committee on the Rights of the Child (2009) p.3

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When a court is considered whether or not to make an order on parental responsibilities ...

... taking account of the child's age and maturity, shall so far as is practicable –

- (i) give him an opportunity to indicate whether he wishes to express his views;
- (ii) if he does so wish, give him an opportunity to express them; and
- (iii) have regard to such views as he may express.

Children (Scotland) Act 1995, s.11(7)(b)

But, if, by one method or another, it is 'practicable' to give a child the opportunity of expressing his views, then, in our view the only safe course is to employ that method.

Court of Session observed in
Shields v Shields (2002 SC 246)para 11

The welfare paradigm, which sees children as lacking the capacity and maturity to understand and assert their own needs, has been challenged by new paradigms, including children's rights and children as social actors and citizens. Within these new paradigms, children are no longer seen as dependent, vulnerable, at-risk victims of divorce and passive objects of law, but are seen as subjects with agency.

Hunter (2007) p. 283 (writing about England)

<https://www.youtube.com/watch?v=3HmFN5XH>

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1. Age.

‘In this case, the children are too young to be able to express a view’

Age-based concerns about a child’s competence;
age-based concerns about a child’s welfare.

2. Manipulation.

‘I do not believe a 7 year old child would talk in the manner they claim. I am of the opinion they were, so to speak, putting their own concerns into his mouth ... That seems to me to be the ways adults, not young children speak.’

E v W 2014 WL 4063090, para. 11

Arguments that it might be distressing to the child do not normally constitute good reason to disenfranchise the child ... Furthermore, high conflict disputes can be particularly stressful for children and being able to express their concerns and worries can be reassuring and supportive.

Voice of the Child Advisory Group (2015), para 133.

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