

How Children's Voices are Heard: The Scottish Experience

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In this brave new world where we are all Europeans we are just starting to understand the concept of the law as a living instrument. There are surely few areas of the law where that is as much a day to day reality as in the field of family law. In terms of our social and family structures change has happened incredibly quickly and the law has had to try and embrace that change and develop alongside it. We've come a long way. I suspect though that we sometimes forget just how far we've come in such a short time. I remember being at a four jurisdictions conference not that long ago and realising that the Irish solicitor that I was speaking to had never done a divorce and it taking me a few moments to click that that was because there hadn't yet been any divorces in Ireland. Well look at you now!

It's good to be here today to reflect on some of those changes in the last ten years and to discuss some of the challenges that are before us. Surely one of the biggest is how we better adapt our law, systems and processes to ensure that children's voices are heard and their views taken into account.

In Scotland we've seen huge changes too in the last 10 years, particularly in relation to the involvement of children in legal proceedings, their representation and how account is taken of their views and this invitation to speak and, of necessity to look back over our experience, has been both timely and welcome.

I'm going to focus today in the time available on children in civil proceedings and only touch on children in criminal proceedings to give you a flavour of how taking account of children's views in the court process has developed with us. I'm going to keep it quite practical and tell you about the view from my perspective, which is as a solicitor who acts both for parents and for children and young people direct. I've come armed with some materials from the Scottish Executive, The Scottish Child Law Centre and our Law Society that I'll leave with you and hopefully this will be the start of a cross jurisdictional dialogue between us which will allow us both to learn from each others experience.

There are five ways that a child or young person can become involved in legal proceedings in Scotland. Children and Young People can:-

- Be cited as a witness in either civil or criminal cases
- They can be the accused in criminal proceedings
- They can be the subject of a reference to our children's hearing system, which is a system designed to take children and young people who have suffered harm or who have themselves committed criminal acts out of the conventional court process, where possible.
- They can be a party to civil proceedings in their own right, or
- They may be the subject of civil proceedings, for example in what we call residence and contact disputes, or custody and access as I think you call them, adoption, child abduction or other such hearings.

Starting then with **children and young people as witnesses;**

- The age of legal capacity in Scotland is sixteen, so from then young people will be treated as adults
- There is no lower age limit for when children can be called as witnesses- very young children can be, and have been, called as witnesses
- There is no competency test for children; under statute a court cannot regard a witness' evidence as inadmissible simply because the witness doesn't understand the duty to be truthful or the difference between truth and lies. However, the court obviously will still have to test a child witness credibility and reliability and have regard to the child's age and degree of maturity when assessing the weight to be given to their evidence.
- We have developed various ways of providing an additional layer of protection for child witnesses when they're giving evidence. There have been some measures in place for fifteen or so years including recommendations that wigs and gowns should be removed and that the child should be able to give evidence from the floor of the court rather than being placed in the witness box.
- In the last few years these discretionary measures have been firmed up and we have since 2005 had statutory protection for "vulnerable witnesses". These protections extend to adult vulnerable witnesses too.

- Anyone under sixteen is regarded as a “vulnerable witness” and in criminal cases is entitled as a matter of right to standard special measures to assist them in giving their best evidence which include the use of a live television link in another part of the court building, or if the child is under twelve in another building altogether, the use of a screen in the court room so that they don’t have to see the accused and the use of a supporter to provide social and emotional support.
- There are also further special measures which can be granted at the court’s discretion like the taking of evidence by a commissioner. The intention is to extend these protections to civil cases and the implementation phase for that is underway at the moment.
- We also have guidance for professionals like social workers and the police in relation to interviewing children as well as guidance on the questioning of children in court designed for Sheriffs, Judges, Counsel and Solicitors.
- The Scottish Executive have sent me here with a few copies of the guidance pack which details all of these measures so you can pore over them at your leisure.

Children can then be the **accused in criminal proceedings** or **subject of a reference to our children’s hearing system**. I’m not going to discuss either of these areas today because of the time that we have available however needless to say we have tried to develop ways of ensuring that children and young people are heard in such proceedings and I’ve brought some more

material from the Scottish Child Law Centre and the Scottish Executive which gives you some more information on these areas.

Turning then to the civil arena and what may be more interesting given the rest of the conference programme: children as parties to civil proceedings in their own right, or where children are the subject of civil proceedings.

As far as **children or young people as parties to civil proceedings in their own right** is concerned:

- Children are automatically parties in their own right in cases concerning them before the children's hearing system.
- Children are not automatically parties to family actions in Scotland but they can be sisted (to stay or stop process or to summon or call as a party) as a party to the action, which is called being sisted as a party minuter, with the leave of the court, which whilst it certainly doesn't happen routinely is not uncommon. There is provision within our court rules to allow a child or young person to become a party if they wish to apply to the court to be part of the action. If sisted they then become a party, as any other.
- Children can, and do instruct their own solicitor. Those of us who practice family law often act for children or young people. It may be worth me telling you a little about what that means in practice; it definitely does not mean that there are lots of Scottish children being dragged into acrimonious court actions.

- Scottish solicitors are subject to guidance from the Law Society of Scotland in relation to representation of children and young people. The representation principles make clear that the solicitor must advocate the instructions of the child and that it is not the solicitor's job to advocate what they think is best for the child. The solicitor has to determine whether the child has capacity to instruct them, and should only accept instructions from a child if they have sufficient experience to do so. In Scotland, a child has legal capacity to instruct a solicitor in connection with any civil matter where the child has a general understanding of what it means to instruct a solicitor. A child of 12 or older is presumed to have sufficient age and maturity to have such understanding. In my experience, many children under 12 do have sufficient capacity to instruct a solicitor. I personally have not acted for any children younger than 9, but I am aware of other solicitors who have acted for children who are younger than that, who have had capacity to instruct them. Children and young people as clients often come to us via the Scottish Child Law Centre. In the form that is sent out to children to tell them that a court action has been raised, the Scottish Child Law Centre's free advice-line for children is given. I have had clients who have instructed me after finding my name on the internet. I will only take instructions from a child if he or she has phoned me directly to make arrangements to meet with me, and I will only meet with a child without the presence of the adults who are involved in the dispute. I use email a lot as a way of communicating with my child clients or tend to speak with them by mobile or by text. I have also sometimes met with children at their school if that's easier for

them – they often prefer that, because there is no sense of them being partial to one parent or the other.

- The critical thing about representing children or young people is that the only person who decides who will represent the child and indeed whether there should be representation for the child, is the child or young person themselves. There is nobody else who can force the child to be separately represented, and if the child does not want to be separately represented, he or she cannot be compelled to be so represented.
- Once a child is represented there is no particular path that the child or young person has to embark upon; some children do want to enter the court process and it is necessary for them to do so – I'll give you an example of such a situation shortly – but the vast majority of child and young person clients do not want to get actively involved in the dispute between their parents and don't want to be seen to be taking sides. What they want is to get legal advice about what their rights and responsibilities are, and to get more information about the legal process that they are indirectly involved in. In my experience one of the main things for children is that they want to know the answers to practical questions like who is going to decide things, when are decisions going to be taken, who is going to be listened to when decisions are taken, and so on. For some children separate representation simply means meeting with the solicitor and getting this kind of information, but then doing nothing further; they don't even have to let their parents know that they have had separate representation. For other children, once they have had that

information, they then want to let the sheriff or judge know what they feel. Again, I'll give you a practical example of how this has worked in a case in which I am involved. Other children want their parents to know how they feel, and the solicitor is sometimes instructed to enter into correspondence with the solicitors for the parents to make the child or young person's position known. This can be particularly useful for children who often find it very difficult to be able to tell their parents what they feel. This often allows parents to hear for the first time what their children feel from an impartial source, and this has been extremely helpful. Parents often don't accept a report of their child's views if the report comes from their estranged spouse – they feel inherently suspicious of the report that they've been given. Having an independent advocate involved also gets round the all-too-common situation where a child caught in the middle of a dispute between his or her parents tells one parent one thing and another parent another. Having separate representation for the child allows the child the comfort of a representative, and prevents the need for them to confront their parents with information that they know is going to be unpalatable to those that they love, care about, and do not want to let down or lose.

- What needs to be clearly understood about representing children and young people is that the child has a right to indicate whether he or she wishes to express a view, and then has a right to have that view ascertained. That does not in any way equate to the child having any right to determine any particular outcome. In my experience, children and young people are quite comfortable with this. They recognise that

not everything they want is going to happen. The critical thing for them often is not that what they want happens, but that they have been heard and that their position has been acknowledged, even if not ultimately followed.

- Separate representation has also meant in my experience that as well as amicable settlements being more likely, that decisions are also more likely to stick where there are intractable disputes. Our experience has been that there is a much greater buy-in by all parties, including children themselves (who as many of us will know from bitter experience can all too often be the saboteurs of arrangements imposed upon them). Having separate representation means that children are expressly told that their views are important and valuable, but not determinative. It is explained to them that the adults will decide what is best for them, but this will involve their views being taken into account. This is obviously hugely significant to children and young people.
- By way of illustration of some of these points, I can tell you a little bit of information about two of my current child clients: One is a girl who is under 12, whose parents have been involved in an acrimonious residence dispute for the greater part of this child's life. The child came to me after getting my details from the web. She was very clear that she didn't want to be involved in the court action itself and did not want to be drawn into conflict with either of her parents directly. She did however want her parents to know how she felt, and she had found it very difficult to tell them that up until now. In particular, she wanted to be able to tell her dad how she felt, because he thought that her view

was simply being parroted from her mother, whereas she was very clear that her view was not a view that had been formed under pressure from her mother, but was very much her own independent view. She also wanted the sheriff who was going to have to try and decide matters to know her view. This case had been ongoing for many, many years, and as with many such cases, posed the usual significant difficulties for the court system. Courts do not find it easy to impose resolutions on families in cases like this, for obvious reasons. When I initially met with the child, I was able to advise her about a lot of the practical things that she wanted to know that I have touched on, like who is going to make decisions, where were the decisions going to be taken, and so on. I made arrangements to meet her at the local court, to allow her to physically see where the court building was, where people would stand, and so on. For the short period that I met with her regularly to talk through such things, she decided that she did want me to write to the sheriff to explain what she felt. I drafted up a letter to the sheriff which was sent to her for revisal. After a number of revisals, it was sent to the sheriff and she also gave me authority to send a copy of the letter to the solicitors acting for her parents. The letter was a very full letter extending to some three pages or so, which, crucially, allowed her to make very clear that she loved her father very much, that she didn't want to hurt him, and that she didn't want to see any less of him. The letter explained that she wanted to carry on seeing both parents equally (which was also not entirely what her mother had thought that she wanted either). It then set out in some length practically what she would like to happen, and why she thought that that would work best

for the whole family, given their respective commitments. It was obviously a fairly informal letter, and very much focussed on the positive things that she felt about her relationship with both parents and the extent to which she wanted things to improve rather than deteriorate. Within a very short period of that letter being sent, the child's father, for the first time in the case's history, capitulated entirely and said that he wanted to do what his daughter wished. It appears that for the first time he was able to understand what it was that his daughter wanted, that what she wanted was not simply being driven by her mum, that what she wanted was not threatening to his relationship with her, and why it was that she wanted these arrangements in place. The child felt that she had tried to tell her father this on many occasions, but that he had not been able to hear what she wanted, because he became so incensed during any such conversations because he felt that they were being stimulated by pressure from the child's mother. That case is now at the point of being finally resolved, with an order being made by agreement after the child's parents entering into a contract setting out what is going to happen, which follows almost identically what the child wanted.

- The other case that I can tell you about is a case where I act for a boy who is 12, who is a party to an action between his mother and step-father. As I have said, it is still very uncommon for children to actually become a party in court actions. Part of that is because a child does not have an automatic right to become a party to the action – it is a matter for the discretion of the court. The approach has tended to be that the court will not allow a child to enter the action unless there is some

compelling reason to do so, given that it can obviously put a significant amount of additional pressure, stress and so on, on a child to become involved in a court action in this way. In this case, the child's mother and step-father (who had brought the boy up as his own child from shortly after birth) separated and divorce proceedings were raised. In those divorce proceedings the mother sought a residence order in respect of the boy. The boy ran away from her to go and live with his step-father, and he was very clear that he wanted to live with his step-father, and that it would be best for him to do so. The boy's step-father didn't have parental responsibilities and rights in respect of the boy, and so there was nobody in the divorce action who had parental responsibilities and rights in respect of him and who was able to represent his interests and his position. The boy didn't feel that his mother would, for understandable reasons, represent his views to the court. He received intimation of the action when his mother sought orders in respect of him and his younger sibling. He got in touch with me and ultimately we entered the court process. I would say that it has been a very positive experience for him. He is all too aware that his position is not necessarily going to prevail, and he is quite comfortable with that. What is most important for him is that his view is being heard and taken into account.

- In summary, separate representation for children is not, as the doom-mongers would have you believe, an appalling prospect that inevitably brings children into direct conflict with their parents and causes them harm. Far from it; it can be a very empowering and positive experience for children and young people themselves, and indeed for the wider

families of children involved in such a dispute. I personally have always taken the view that to discriminate against somebody on the basis of their age is as inappropriate if the age is under 16 as it would be if the person's age were over, say, 65. From my, possibly over-simplistic, perspective, a child should have a right to be heard in relation to matters affecting them, and it is our responsibility as adults to find a way to make that both practicable and positive.

- Children can apply on their own behalf for legal aid. Their application is dealt with as any other; with an assessment as to financial eligibility and as to the reasonableness (or otherwise) of public funds being made available for representation being undertaken.
- One of the first cases in which a child became a party to an action was a case in which I acted for the father of three children who opposed an application by the children's mother to be allowed to remove the children to live in her native Australia. In this case- Fourman v Fourman 1998 Fam LR 98, Sh Ct- the eldest of the three children who was, from memory, twelve when the action commenced wished to be heard in the process. The Sheriff was specifically asked at the close of proof to write on the appropriateness of the child entering the process and noted in his judgement,

“P [the child] has a view and a particular position to adopt, although she has not sided with either parent on the issue of going to Australia. Being represented has enabled her to take part in the proceedings as a party but not to be directly involved in the argument between her parents if she chose not to do so, which she

did not. Rather than give oral evidence she lodged an affidavit. It seems to me that the procedure her of P becoming a party minuter was entirely appropriate.”

That then takes us on to how children’s voices are heard in the Scottish courts; **when the child or young person is the subject of civil proceedings;** for example where residence or contact is in dispute, in adoption applications or child abduction cases.

It’s worth starting with the context; the UK became a signatory to the UN Convention on the Rights of the Child in 1991. In terms of our domestic law what that means is that the Convention while it doesn’t have direct effect can be used as an aid to construction of our domestic legislation. The intention was also that our domestic law would implement the provisions of the Convention and our primary piece of child law legislation- the Children (Scotland) Act 1995- seeks to do just that.

Article 12 of the Convention provides that:

“(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.”

To implement the Convention we enacted section 11(7) of the Children (Scotland) Act 1995 which provides:

“...in considering whether or not to make an order...and what order to make, the court-

(b) taking account of the child’s age and maturity, shall so far as practicable-

(i) give him the 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”

So in Scotland our Sheriffs and Judges have an obligation to ascertain whether a child wishes to express a view and then to take account of that view. We have developed various mechanisms to allow this to happen which I’ll come on to but before doing so it’s worth looking at how the Scottish Courts have interpreted that obligation;

The leading case is a fairly recent case, from 2002- Shields v Shields IH 16 January 2002- this was a decision from our supreme court which again derived from an application by a mother to take her child to Australia. When the action started the child was seven and a half years old and he was nine by

the conclusion of proceedings. The decision, which was an appeal from the lower courts, focussed on whether the case was fundamentally flawed because the Sheriff who had heard the case at first instance had “failed to consider giving the child an opportunity to indicate if he wished to express his views...”

It was made clear by the three judges who heard the appeal that there is a duty on the court to give a child the opportunity of expressing his views, if practicable. This is an obligation that is not dependent on the age or maturity of the child- although how the child’s views are to be ascertained will obviously differ depending on the age and degree of maturity of the child. So the starting point now for us is that all children affected by a litigation should be given the opportunity to express a view with the court then having to decide on the weight to be attached to those views.

Before I come onto to how the court is going to give children the opportunity of expressing their views it is interesting to consider how the law has developed since the Shields case and how this obligation has been interpreted.

In a recent case- C v McM 2005 Fam LR 36- before the Sheriff Principal of North Strathclyde, and again this was on appeal from the lower Sheriff court decision, Sheriff Principal Kerr noted that,

“I accept without hesitation (perhaps unlike the Sheriff?) that it is appropriate to afford children aged eight and six, as S and C were by the time of the proof, the opportunity to express their views and that there are practicable methods of so doing (including by way of

interview by the Sheriff in chambers with the Sheriff Clerk in attendance” he went on,

“the court is obliged right up to the making of an order under Section 11 [parental responsibilities and rights, residence, contact or orders regulating any specific issue that has arisen in relation to the child etc] to see to it that the child affected has been given the opportunity to express a view” and

“It would in my view certainly have been necessary to seek the views of both children and not one [the older, eight year old] alone”

And this is not atypical; the courts in Scotland have not had any particular problem with taking account of the views of young children. For example, to give you a flavour of how it works from the reported case of Fairburn v Fairburn 1998 GWD 23- 1149 Sh Ct where the views of siblings who were seven and five were taken by a curator ad litem.

So if the Scottish courts have to give the child the opportunity to indicate whether he wishes to express a view and then if he or she does want to how do we give them the opportunity to express those views?

We have three main methods that have been developed to ensure that this obligation to give the child the opportunity to indicate whether he wishes to express a view and then to take account of that view, is complied with;

- Intimation of the action on the child
- Appointment of a reporter or curator ad litem to advise the court on the children's views, or
- Interviewing of the child by the Sheriff or Judge
- Procedures for the recording of the child's views

Intimation of the action on the child is by far the most common method. In terms of our court rules if any Section 11 Order [parental responsibilities and rights, residence, contact or orders regulating any specific issue that has arisen in relation to the child etc] is sought there must be intimation of the action on the child unless the court dispenses with the requirement for intimation. In practice intimation is made uniformly to children over about six. This involves a form being sent out to them by recorded delivery post. It's in (supposedly-work is required on this!) child friendly language and tells the child for example that "the Sheriff (the person who has to decide about you future) has been asked by your Dad to decide that you should go and live with him...". The child can complete the form and send it back to the Sheriff, or get an adult to fill it in with them. The form also provides the number of the Child Law Centre helpline for children. A copy of the form is included at the end of this presentation for interest. Often it's the sending of this form that often stimulates the child to obtain separate representation.

The second way that the court can meet the obligation to give the child the opportunity to indicate whether he wishes to express a view is by the appointment of a reporter or curator ad litem to investigate and report on the

child's circumstances including their views. The reporters role is restricted to investigation and (depending on the Sheriff and the reporter) making recommendations on interim arrangements. Reporters are generally experienced family solicitors. The curator will, of course still narrate the child's views but also has an obligation to act in the child's best interests and may not agree with the child's views.

The third way that the court can meet the obligation to give the child the opportunity to indicate whether he wishes to express a view and then to take account of those views is for the Sheriff or Judge to interview the child. This is fairly uncommon, but again depends very much on the Sheriff or Judge involved, as you can imagine. Again I think that there are Human Rights issues here if a Sheriff interviews a child outwit the presence of parties and bases his or her decision on information that is not being shared, an issue which was lagged up in the case to which I am about to refer.

If the child expresses a view there are particular procedures that provide for how the child's views should be recorded. The court rules provide that the child's views can be kept confidential but there is some potential for difficulty here both with basic principles of natural justice and also with the ECHR, which has now been incorporated into our domestic law. The first case on this point which arose before the ECHR was incorporated and when it was still just regarded as an aid to construction (which I suspect, therefore may be where you're at currently, as I don't think that you have incorporated the Convention yet either)- Dosoo v Dosoo 1999 SCLR 905- was a case in which I acted for the father of three children a reporter was appointed and interviewed two of the

three children who expressed a view in relation to having contact with my client. The requested confidentiality and their views were not made known to the parties. After considering the views and interviewing all three children in chambers (the youngest was four at the time) the Sheriff varied contact to nil. I was instructed at this point. I found myself acting for a man who had been his children's primary carer until 6 months before (he worked from home whilst his wife worked full-time in a demanding job) who was now being told, without explanation that he couldn't see his children, apparently because of something said by them to which he was not party and which he obviously then could not counter. I made a request to the court to disclose the views to the parties so that he had fair notice of the case against him. The court refused to authorise the disclosure observing that for the children to feel able to express views freely they had to feel confident in privacy for their views if they wished and that privacy should be respected except in compelling circumstances. Subsequent cases have not followed Dosoo and I don't think that it would be followed now.

So, I'll close now after this quick canter through developments in the last ten years with us. I hope that it's been of interest and may stimulate discussion. There's still much to be done to ensure that children's voices are heard in our court system, but we're in a much better place than we were ten years ago...

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Form F9 Form of intimation in an action which includes a crave for a section 11 order

Rule
33.7(1)(h)
PART A

Court Ref. No.

This part must be completed by the Pursuer's solicitor in language a child is capable of understanding

To (1)
The Sheriff (the person who has to decide about your future) has been asked by (2) to decide:-

(a) (3) and (4)

(b) (5)

(c) (6)

If you want to tell the Sheriff what you think about the things your (2) has asked the Sheriff to decide about your future you should complete Part B of this form and send it to the Sheriff Clerk at (7) by (8). An envelope which does not need a postage stamp is enclosed for you to use to return the form.

IF YOU DO NOT UNDERSTAND THIS FORM OR IF YOU WANT HELP TO COMPLETE IT you may get free help from a SOLICITOR or contact the SCOTTISH CHILD LAW CENTRE ON the FREE ADVICE TELEPHONE LINE ON 0800 328 8970.

If you return the form it will be given to the Sheriff. The Sheriff may wish to speak with you and may ask you to come and see him or her.

NOTES FOR COMPLETION

- (1) Insert name and address of child.
- (2) Insert relationship to the child of party making the application to court.
- (3) Insert appropriate wording for residence order sought.
- (4) Insert address.
- (5) Insert appropriate wording for contact order sought.
- (6) Insert appropriate wording for any other order sought.
- (7) Insert address of sheriff clerk.
- (8) Insert the date occurring 21 days after the date on which intimation is given. N.B. Rule 5.3(2) relating to intimation and service.
- (9) Insert court reference number.
- (10) Insert name and address of parties to the action.

PART B

IF YOU WISH THE SHERIFF TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM
To the Sheriff Clerk, (7)
Court Ref. No. (9)
(10).....

QUESTION (1): DO YOU WISH THE SHERIFF TO KNOW WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?
(PLEASE TICK BOX)

YES

NO

If you have ticked YES please also answer Question (2) or (3)

QUESTION (2): WOULD YOU LIKE A FRIEND, RELATIVE OR OTHER PERSON TO TELL THE SHERIFF YOUR VIEWS ABOUT YOUR FUTURE?
(PLEASE TICK BOX)

YES

NO

If you have ticked YES please write the name and address of the person you wish to tell the Sheriff your views in Box (A) below. You should also tell that person what your views are about your future.

BOX A:

(NAME)
(ADDRESS)
.....

Is this person -	A friend?	<input type="checkbox"/>	A relative?	<input type="checkbox"/>
	A teacher?	<input type="checkbox"/>	Other?	<input type="checkbox"/>

OR

**QUESTION (3): WOULD YOU LIKE TO WRITE TO THE SHERIFF AND TELL HIM WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?
(PLEASE TICK BOX)**

YES

NO

If you decide that you wish to write to the Sheriff you can write what your views are about your future in Box (B) below or on a separate piece of paper. If you decide to write your views on a separate piece of paper you should send it along with this form to the Sheriff Clerk in the envelope provided.

BOX B:

WHAT I HAVE TO SAY ABOUT MY FUTURE:-

NAME:

ADDRESS:

DATE: