

Hearing children in court disputes between parents



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Authors and acknowledgements

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Mackay, K., (2012) *The Child's Voice in Contact Disputes: Genuine Participation in Private Law Court Actions*. Saarbrücken, Germany, Lambert Academic Publishing

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Hearing children in court disputes between parents



The Children (Scotland) Act 1995 gives children the right to have their views taken into account when their parents take a dispute over the child to court. This is consistent with Article 12 of the United Nations Convention of the Rights of the Child (UNCRC). The most common dispute concerning children which comes before the court is over the amount of contact a child should have with the non-resident parent. This briefing reports key findings from a recent study that examined court cases affecting just under 300 children. The research found that the majority of children do not have their views taken into consideration as part of the court process. When children's views are heard, many struggle to be taken seriously if they do not wish to see their non-resident parent because of the conflict their decision has with the court's assumption that contact with both parents is the best outcome for the child.

Background

The UNCRC states that children should not be separated from a parent 'against his or her will' (Article 9:1); while, if they no longer live with a parent, a child has the right 'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests' (Article 9:3). In practice, the vast majority of parents who live apart make their own arrangements for contact between the non-resident parent and the child and only 5% of separated parents state their arrangements were 'ordered by a court' (SG 2008; SG 2009). In those cases which do come before the courts, concerns over the parenting ability of one or other parent are often raised (Smart et al 2005; Wilson & Laing 2010) and one previous study found allegations of domestic abuse in a third of cases concerning contact (McGuckin & McGuckin 2004). However, courts start from the assumption that contact with both parents will be in the best interests of the child and there is therefore no requirement for either parent to provide evidence that this will be the case. Although, since the passage of the Family Law (Scotland) Act 2006, courts are required to consider the need to protect a child from abuse when deciding whether or not to make an order for contact.

In Scotland, the views of children can be taken by a variety of means when their parents take a dispute to court.

- They may be sent a 'F9' form giving them an opportunity to write back stating 'what I have to say about my future.'

Key points

- Almost half of contact cases before the courts involved allegations of domestic abuse.
 - The views of less than half the children (42%) were put before the court. However by the time a child was seven years old they were more likely to have their views taken than not.
 - A key barrier to children's views being taken is the belief by legal practitioners that the views they express will not be their own but those of a parent.
 - The view most commonly expressed by children whose views were taken was that they did not want contact with their non-resident parent (42%); however notably almost all (96%) of these children described abusive behaviour perpetrated by that parent. In the absence of abuse, most children wanted contact.
 - Children's views are most commonly taken by a Court Reporter. Reporters varied in the extent to which either a history of domestic abuse or the child's expressed views impacted on their recommendations - with contact between a child and father being the assumed ideal outcome.
 - Contact was almost always ordered in line with the recommendations of the reporter.
 - Children's views were most likely to correlate with the outcome of the case when they wanted contact and were least likely to correlate with the outcome when they did not.
- They also have the right to enter the court action with their own solicitor representing them, as long as they 'have the general understanding' of what it means to instruct a solicitor (such 'understanding' is to be presumed from the age of twelve).
 - Their views may be taken as part of a court report into the circumstances of the child, usually by a solicitor. Alternatively a curator *ad litem* may be appointed to protect the child's interests, and they may sometimes present the child's view to the court.
 - Finally a child may be spoken to by the sheriff deciding the case.

How does this research contribute to what we already know?

Previous research in this area has found that the majority of children do not have their views taken when parents take a dispute over contact to court (Scottish Executive 2000, McGuckin & McGuckin 2004). The present research is the first to collate data on the actual views expressed by children and on the impact of those views on the outcome of the cases. It is also the first court based research collating data on domestic abuse and contact outcomes

since the Family Law (Scotland) Act 2006 put the need to protect a child from abuse onto a statutory basis. It also goes some way to plugging the gap left by Wilson and Laing's (2010) research into the views of (mostly male) pursuers in contact cases through the inclusion of the views of defenders and children to 'enable a more rounded picture of how parties experience court action' (2010:844).

The study

This study reviewed the court papers of 208 contact disputes, concerning 299 children, which were raised in two urban Sheriff Courts during 2007. Questionnaires were also sent to family law practitioners (96 responses) and (via solicitors) to parents who had been involved in a court based contact dispute and had a child whose views had been taken by formal means (28 responses). Interviews were conducted with 9 of these solicitors and with 8 parents as well as with 2 children accessed via their parents. Some 7 sheriffs working within the sample courts and 7 non-legal practitioners supporting children experiencing court ordered contact were also interviewed.

Research Findings

Key Statistics

- 299 children comprised the court dataset (from 208 cases)
- 141 children were the subject of at least one court report
- 125 children had their views on contact taken
 - 68 children had their views taken by the court reporter
 - 15 children had their views taken by a curator ad litem
 - 42 children expressed their views directly to the court (in writing/own solicitor/spoke to sheriff)
- The views of 18 children were marked as confidential. 107 children's views were included in the study.

Nature of the cases before the courts

Almost 40% of the children had never lived with both parents and three-quarters of all children were living with their mother alone at the time the case came to court. Domestic abuse was either alleged by a parent and/or described by a child in 49% of the cases. Half of all female pursuers alleged domestic abuse and in 92% of cases the child's father was the alleged perpetrator. Only four fathers alleged the mother of the child was domestically abusive and in three of these cases the child's mother also claimed to be a victim.

Court reporters were appointed in respect of 141 children from 47% of cases. Reporters were more likely to be appointed when there was no on-going contact between the non-

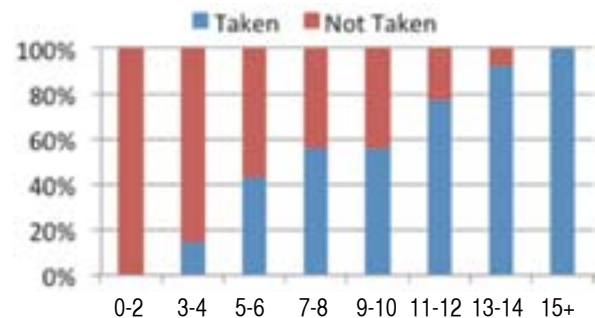


Fig 1. Percentage of children whose views were taken by the age of the child.

resident parent and the child at all, and this was most likely to occur in cases where there were allegations of domestic abuse. Through the contributions made by reporters, there was evidence that a quarter of the families were known to social workers and that the police had been called to incidents of domestic abuse in respect of a third of the families. There may also have been police or social work involvement in some of the cases where no report was ordered. Additionally, 10% of fathers had criminal convictions and half of these were for domestic abuse towards the child's mother. The cost of a court report (regularly £3,000) was prohibitive where the parents were not in receipt of legal aid (31% of parents being self-funding). Consequently, not all parents could afford to instruct the report and it was sometimes only when social workers later become involved in the case that serious welfare concerns came to light.

Whether Children's Views were Taken or Not

Of the 299 children included in the study, 125 (42%) had their views taken by at least one of the means described above. More than half of these children (68 in total) had their views taken as part of a court report into the circumstances of the child. A further fifteen children had their views taken by a curator *ad litem*.

Notably, children are rarely given a choice as to whether they speak to a court reporter or not and across the entire data set only 52 of the children (17%) were sent an 'F9' form inviting them to express a view if they wished. Consequently very few children had the opportunity to put their views directly to the

court – 25 children returned the F9 form, 9 children sent a letter to the court as the F9 Form says they may, 5 children instructed their own solicitor and just 3 children spoke to the sheriff.

The views children expressed

The views of 107 of the 125 children who expressed a view by any means are known. The views of the remaining 18 were marked as confidential. The most prevalent view, expressed by 45 children, was that they did not want to be made to have contact with their non-resident parent. Almost all of these children (96%) described abuse by that parent which they had either witnessed or experienced:

My dad [...] made me do all the chores and if I didn't he hit me. He treats the other children [step siblings] like they are number one and I am invisible. They wouldn't let me phone home and would not let me go home. This makes me really sad. (Girl, aged 10)

I don't want to go to dad because he shouts and swears. He grabs my collar and he hurts me....He makes us clean his house. When he drinks he falls asleep on the couch. (Boy, aged 10)

I don't want to see you because you shout in my face when I was sick. (Girl, aged 6)

In the absence of threat or actual harm, children usually wanted contact with their non-resident parent. Some 35 children wanted contact to continue or to increase. A further 13 children wanted less contact, while 9 wanted to live with their other parent and 5 children were ambivalent.

Weight attached to children's views

It is of course not possible to know the extent to which the contact outcomes were consistent or not with the wishes of the children who did not have their views taken by formal means. However, of the 107 children whose express views are known, the contact outcomes for 86 are known. Of these 86 children, almost two-thirds (54 children) received an outcome that was broadly consistent with their wishes; while a further six children had their wishes partially accommodated.

Children's expressed views were more likely to equate with the contact outcome when they wanted contact. For 30% of children who expressed a view however, the contact outcome bore no resemblance to their expressed wishes. All of these children either wanted less contact or no contact with their non-resident parent and all but two were from cases where domestic abuse was alleged.

Although the Family Law (Scotland) Act 2006 introduced the requirement to consider the need to protect a child from abuse in deciding disputes between parents, no training was given to legal practitioners or to sheriffs on the significance of abuse to the issue of child contact at that time and some solicitors therefore expressed confusion as to the need for the statutory provision:

Why must we have the rule that if you are guilty of this one crime that your child will not be allowed to see you?
(Solicitor)

Family justice and court implications

The Civil Justice System in Scotland is under review by the Scottish Government who are considering the implications of a recent report (Gill, 2009). Key implications from this research are:

- Legal practitioners and sheriffs hearing family cases require specialist training on the impact of domestic abuse on children, given its prevalence in the cases before the courts (as recommended by Lord Gill 2009:pp199 & 95).
- Given the prevalence of domestic abuse in those families which take a dispute over child contact to court, it is not appropriate that they should be required to go through collaborative law procedures such as mediation, particularly as they may need protective court orders.
- Court reports clearly enable evidence of a history of domestic abuse and other welfare concerns to come to light and therefore any restriction on the number of reports ordered or on the legal-aid available for such reports would negatively impact on the protection of children from harm. Solicitors or any other existing or future body who may be appointed to undertake court reports require training in the impact of abuse on children and should also undergo regular review of their work (consistent with the recommendations by Lord Gill 2009:pp 111).
- Those appointed to investigate the circumstances of the child need specialist training in engaging with children in order to obtain their views as currently some reporters avoid questions about contact.
- This research also provides evidence that the changes to legal aid provision to children in the Civil Legal Aid (Scotland) Amendment Regulations 2010 (so that their resident parent may be expected to fund them) will negatively impact on children's views being believed to be their own.

Those undertaking reports therefore varied in the weight they attached to children's descriptions of abusive behaviour and to their wishes not to be ordered into contact, with many assuming that a child's unwillingness to see their non-resident parent was due to the failure of the parent who had been the victim of abuse to minimise the child's fears - rather than the child's natural reaction to the abusive behaviour they had been exposed to. Children with well-founded fears in respect of contact may therefore struggle to have their reluctance to be left alone with a domestically abusive parent taken seriously. One such child who took part in this research summed this experience up by saying:

It's not that they don't listen, it's just that it doesn't make any difference. (Kyle, aged 11)