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**THE VOICE OF THE CHILD IN PRIVATE LAW CONTACT  
DISPUTES IN SCOTLAND**

**(Chapters One to Six)**

**BY**

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**2012**

## DECLARATION

I hereby declare that this thesis has been composed by me and, apart from due acknowledgments, it is entirely my own work. The material in this thesis has not been submitted for any other degree or professional qualification at this or any other university.



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**Kirsteen Margaret Mackay**

## ACKNOWLEDGEMENTS

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Specific thanks must also be extended to those individuals in the Family Law Association of Scotland who raised awareness of the research or took part in it. I am also indebted to Morag Driscoll of the Scottish Child Law Centre who has consistently been supportive of my research. It is hoped the analysis in this thesis will be of assistance to *all* legal practitioners who face making recommendations or taking decisions in respect of contact, by shedding light on the experiences of those affected by these decisions.

Sincere thanks is also extended to the individuals working within agencies supporting children and young people experiencing court ordered contact, who gave their *personal* views gleaned from their professional practice.

Finally, I wish to extend my heartfelt thanks to my dear friend Caroline Hunter whose wisdom and unconditional support has sustained me through the trials (and successes) of my nine year journey in the study of Scot's Law.

## ABSTRACT

*This thesis that is supported by the research findings is as follows: In private law contact disputes between parents, greater weight should be attached to the statutory requirement to give children an opportunity to express their views, as well as to the statutory requirement to protect them from abuse, rather than assuming on-going contact with a both parents is essential for the promotion of a child's welfare. Despite the acquisition of rights by women and children since the late 19<sup>th</sup> century, it is argued, they remain disempowered within private law legal process as the patria potestas (paternal power) once held by married fathers, has evolved into this assumption that a child's welfare requires direct, regular contact with his or her biological father – whether the child wants this or not. Consequently, where children's views are taken, but they express a view contrary to on-going contact with their biological father, their wishes are often overridden and they may be forced by the court into contact arrangements that distress them. This is particularly problematic as the majority of cases coming before the courts involve serious welfare concerns (including domestic violence and the abuse of substances) and children often have lucid reasons for not wishing to be left under the care and control of their non-resident parent. Yet, these children may sometimes be further victimised by the court system charged with their protection.*

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## **LIST OF ABBREVIATIONS AND ACRONYMS**

ECtHR	European Court on Human Rights (in Straasbourg)
EHCR	European Convention on Human Rights and Fundamental Freedoms 1950
NLP	Non Legal Practitioners
NRP	Non-Resident Parent
PRR	Parental Rights and Responsibilities
PWC	Parent with Care
SLAB	Scottish Legal Aid Board
SW	Social Workers
UNCRC	United Nations Convention on the Rights of the Child 1989



## **TABLE OF CONVENTIONS, STATUTES & STATUTORY INSTRUMENTS**

### **Conventions and Declarations:**

- 1924 Geneva Declaration on the Rights of the Child
- 1948 Universal Declaration of Human Rights
- 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
- 1959 United Nations Declaration of the Rights of the Child
- 1980 Hague Convention on the Civil Aspects of International Child Abduction
- 1989 United Nations Convention on the Rights of the Child (UNCRC)
- 1996 European Convention on the Exercise of Children's Rights

### **Statutes:**

- 1886 Guardianship of Infants Act
- 1925 Guardianship of Infants Act
- 1930 Adoption (Scotland) Act
- 1930 Illegitimate Children (Scotland) Act
- 1948 Children Act
- 1958 Matrimonial Proceedings Act
- 1973 Guardianship Act
- 1975 Criminal Procedure (Scotland) Act
- 1981 Matrimonial Homes (Family Protection) (Scotland) Act
- 1985 Family Law (Scotland) Act
- 1986 Family Law Act
- 1986 Law Reform (Parent & Child) (Scotland) Act
- 1991 Age of Legal Capacity (Scotland) Act
- 1991 Child Support Act
- 1995 Children (Scotland) Act
- 1997 Protection from Harassment (Scotland) Act
- 2004 Vulnerable Witnesses (Scotland) Act
- 2006 Family Law (Scotland) Act

### **Statutory Instruments**

- 1993 Act of Sederunt Sheriff Court (Sheriff Court Ordinary Cause Rules)
- 2010 Civil Legal Aid (Scotland) Amendment Regulations (SI 1993.1956)





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*Campins-Coll, Petitioner* (1988) S.C. 305;  
*Casey v Casey* (1989) S.C.L.R 761;  
*Curtis v Curtis* 1858 164 E.R. 1505  
*Corrie v Adair* 22 D. 897,  
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*Dosoo v Dosoo* 1999 S.C.L.R. 905  
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*Elsholz v Germany* [2000] FLR 49  
*Fourman v Fourman* (1998) Fam L.R. 98  
*Fowler v Fowler* (1981) S.L.T. (Notes) 9  
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*J v J* (2004) Fam LR 20  
*Kay v McLauren* June 14 1926  
*Kosmopoulou v Greece* [2004] 1 flr 800  
*Lamont v Lamont* 1998 Fam L.R. 62  
*McKellar (Matha,) Petitioner (Custody of Children) (No. 1)*(1897) 5 S.L.T. 329;  
*McGrath v McGrath* (1999) S.L.T. (Sh Ct) 90  
*McLean v McLean* (1947) SC 79  
*Morrison v Quarrier* (1894) 21R. 1071  
*Oyeneyin v Oyeneyin* (1999) G.W.D. 38-1836  
*Perendes v Sims* (1998) S.L.T. 1382  
*Porchetta v Porchetta* (1986) S.L.T. 105  
*R v Grant* (2000) SLT 372

*Re A (a minor) (residence order)* [1998] 2 FCR 633  
*Sahin v. Germany* (Application No.30943/96) [2002] 3 FCR 321  
*Sanderson v McManus* (1997) S.C. (H.L.) 55  
*Sherwin v Trumayne* (1992) G.W.D. 29-1681  
*Shields v Shields* (sub nom S v S), (2002) SC 246  
*Stokes v Stokes* (1965) S.C. 246  
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## CHAPTER ONE - INTRODUCTION

### 1:1 The Research Question and Thesis

The research question addressed in this thesis is:

*Having regard to the often highly-conflicted nature of the cases before the courts, are existing methods for taking the views of the child, and the treatment of those views once taken, consistent with the promotion of the child's welfare?*

The “cases before the courts” considered by this thesis are private law cases, where two (or more) individuals dispute either the *residence* of a child, or the amount of time a child spends with a parent s/he does not live with (*contact*). Prior to the Children (Scotland) Act 1995 such actions were referred to as ‘custody’ and ‘access.’ In most cases the court action is raised by one of the child’s parents and the defender is the child’s other parent.<sup>1</sup> The Children (Scotland) Act 1995 places the responsibility on a parent who is not living with their child to, “maintain personal relations and direct contact” with their child “on a regular basis.”<sup>2</sup> This same Act requires that children should be given an opportunity to express their views when either their parents, or a court of law, make a major decision that affects the child *such as* the residence of the child or amount of contact between a child and a non-resident parent.<sup>3</sup>

The premise which is supported through evidence in this thesis is, that despite the acquisition of rights by women and children since the late 19<sup>th</sup> Century, they remain disempowered within the legal process as the *patria potestas* (paternal power) once held by married fathers,<sup>4</sup> has evolved into

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<sup>1</sup> Although disputes involving grandparents are also common in private law actions.

<sup>2</sup> s(1)(1) (c). This is also listed as a parental right at s2(1)(c)

<sup>3</sup> s6 and s11(7)(b) of the Children (Scotland) Act 1995 respectively.

<sup>4</sup> Until its final demise in 1973 when s10 of the Guardianship Act 1973 stated, “a mother shall have the same rights and authority as the law allows to a father.”

the assumption that a child's welfare *requires* direct, regular contact with his or her biological father – *whether the child wants this or not*. That is, courts make their decisions based on a narrow field of assumptions in respect of an 'ideal' family where a child's welfare may be deemed dependant on on-going contact with their father (whose historical role has been that of primary decision maker in families).

This research finds that the majority of children are not given the opportunity to express their views by formal means and those that do suffer from being treated as an "add-on" to an adult-centric system which pays insufficient regard to the ethics of consultation with children.

Further, it is particularly where a mother leaves a controlling or violent partner, and her children's views are taken, that the children's wishes may be overridden when they express a view contrary to on-going contact with their biological father. While court reports *do* result in the protection of children from abusive fathers in some (but not all) of the cases where there has been a sustained pattern of physical or sexual violence, too many children remain forced into contact arrangements, by the court which is charged with protecting their welfare.

This is particularly problematic as the *majority* of cases coming before the courts involve high parental conflict and children often have lucid reasons for not wishing to be left under the care and control of one or other of their parents.<sup>5</sup>

Indeed the background in some cases is such that mothers could have been accused of a "failure to protect" their children if they had stayed *in* the relationship, however many face castigation before the private law courts for failing to ensure their children spend time apart from them with their fathers (at least not at the frequency and length desired by that father).

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<sup>5</sup> See in particular the discussion in Chapter Four of this thesis.

The majority of mothers however state they would be happy for their child to exercise contact with his or her father *if only* the father could attend to the perspective of the child and modify his behaviour (and demands) accordingly.

The thesis concludes that at minimum legal practitioners and those sitting on family cases need adequate training in the dynamics of abuse and its effects on children, as well as on ethical consultation with children. Present practice where contact may be ordered against a child's wishes does not address the reason for the child's resistance to contact. If, however, we take the participation rights of children seriously, this may enable contact outcomes which promote the welfare of individual children within the particular dynamics of individual children's families - rather than one consistent only with a simplified version of 'family' which, unfortunately, does not match the child's lived reality in so many of the cases coming before the private law courts.<sup>6</sup>

## **1:2 The Research Question in Context**

Disputes about the residence of children when parents separate have only come before the courts within the last 150 years as, historically, women and children were subjects of the will of the husband and father (Muirhead 1947). That is,

*“the marriage operated in regard to the wife, so as to sink her person in the eye of law. The husband and wife are one; and the unity of persons is so complete, that the legal existence of the wife is said to be suspended during marriage.”* (Fraser 1866)

Similarly, the *patria potestas* was so extensive it was called a right of dominion by a father of his children (Norrie 1999:1.03) and women had no

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<sup>6</sup> The Scottish Child Law Centre launched a “Helping Hands” leaflet in June 2011 enabling children to list the good and bad things about contact and focus adult attention on the *quality* of contact they experience.

rights to the custody of their children upon divorce. It was believed any “liberty of resistance” granted to women would:

*“induce perpetual discord, and prove destructive of domestic happiness and the best interests of society; and this authority could not be controlled by any civil tribunal, because such an intrusion upon the sacred privacy of domestic management must be greatly worse than the evil to be prevented.”* (Fraser 1866:871)

Thus, in a case raised in 1858, a mother pled for custody of her children in the face of her husband’s harsh treatment and the court observed that “the legislature has not presented any rules or principles by which the court is to be governed in dealing with this peculiarly delicate subject.”<sup>7</sup> It was not until the Guardianship of Infants Act 1886, that women were given a statutory right to seek the custody of their (infant) children when they were not longer residing with the children’s father.<sup>8</sup>

The impact of the Act was patchy however and the paternal preference largely survived intact as this dictum from *McNab v McNab* illustrates.<sup>9</sup>

*“I am bound to say that, all things being equal, I think it is against the interests of the child that it should be removed from the custody of the father and put in the custody of anyone else.”*

However, *patria potestas* did not apply in respect of *illegitimate* children, and it was the mother, and not the putative father, who had the right of custody to them - at least for the duration of their infancy.<sup>10</sup> Although, once a child reached this age, an unmarried father could seek to dispatch his obligation to aliment the child (support financially) by offering to take over the custody of the child.<sup>11</sup>

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<sup>7</sup> *Curtis v Curtis* 1858 164 E.R. 1505

<sup>8</sup> The Act applied in respect of children aged under seven years.

<sup>9</sup> *McNab v McNab* 1926 S.C. 778

<sup>10</sup> *Corrie v Adair* 22 D. 897,

<sup>11</sup> *Kay v McLauren* June 14 1926, 4 Shaw, 706 (N.E. 712); *Wilson v Lindsay* (1893) 1 S.L.T. 272). This option was removed by the Illegitimate Children (Scotland) Act 1930.



Between 1855 until the final years of the Second World War, between 7-10% of live births in Scotland were to unmarried mothers (GRO 2004). This rate began to rise in the 1960s and was 15% by 1985 (GRO 2006).

It is now the case in 21<sup>st</sup> century Scotland that just over half of all babies born in Scotland, are born to unmarried parents - although only 5% of births are registered in the name of the mother only (GRO 2009). Since 2006, unmarried fathers whose name is included on the birth certificate, share the same rights and responsibilities as mothers and married fathers.<sup>12</sup> This includes the right to regulate the child's residence and to maintain contact with the child.<sup>13</sup>

This section of the introduction turns to consider what we know about disputes over residence and contact brought to the courts in the 21<sup>st</sup> century. It will be seen that the "welfare of the child" is meant to be the "paramount consideration" and there follows a brief discussion of how the concept of "welfare" has evolved and now usually equates with on-going contact with a biological father.

While most births to unmarried parents are registered in both names, this does not necessarily mean the parents live together, nor that they have ever lived together. A recent Scottish survey found almost one in five non resident parents stated they had never lived with the other parent of their child, and a further 4% stated they had never even been in a 'relationship' with the other parent of their child (SG 2008).

Partly because so large a number of children are now born to unmarried parents, we do not know many children are affected by parental separation each year as there is clearly no mechanism for the registration of the dissolution of cohabiting relationships. Further, while we know there were

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<sup>12</sup> s23 Family Law (Scotland) Act 2006

<sup>13</sup> As well as a responsibility to responsibility to "safeguard and promote" the "health, development and welfare" of their child and to provide direction and guidance to the child and also to act as the child's legal representative.

10,371 divorces in Scotland in 2009 we do not know how many of these divorces affected dependent children under the age of sixteen.<sup>14</sup>

What *is* known is the number of children in Scotland who live with one parent only and, at the time of the 2001 census in Scotland, a quarter of all dependent children in Scotland lived with just one parent (SE 2004). This percentage was replicated in more recent research (SG 2009).

Separating couples are free to make their own arrangements in respect of the residence of their children and the amount of contact a child has with the parent s/he does not live with. Most parents resolve the issue of residence and contact without using the court system and the arrangements they make often fall along traditional gender-role lines - with the mother providing the primary care role as resident parent. In 2001, 92% of children living in a lone parent family were living with their female parent (SE 2004).<sup>15</sup> The majority of non-resident parents state that they see their child at least once a week (68%) (SG 2008, SG 2009) and just over half of *resident* parents report this level of contact between their child and the child's other parent.<sup>16</sup>

The actual *proportion* of parental couples who take a dispute over contact or residence to court is small. Two recent studies found only 5% of parents stated their arrangement had been "ordered by a court" (SG 2008: SG 2009).

Regrettably, it is not known *how many* court actions for residence or contact are raised in Scotland each year, as often it is only the initial crave on the Initial Writ which is recorded on the court computer system (while no craves on Defences are recorded).<sup>17</sup> However, do know that almost 9,000 of

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<sup>14</sup> Unfortunately the statistical bulletins produced by the Scottish Government do not record this information.

<sup>15</sup> A more recent government survey reports 90% of resident parents were female – SG (2008)

<sup>16</sup> Perhaps because resident parent can look forward to the time to themselves when their children attend contact and may keenly feel any cancellations or contact made by the other parent of their children.

<sup>17</sup> In the court data set of the present research only 60% of cases had a *primary* crave of either 'residence' or 'contact,' yet in all cases one or both of these was in dispute.

the 20,000 applications for *civil legal aid* in Scotland in 2009 – 2010 were actions craving a Declarator of parental rights and/or contact with, or the residence of, children. There were also applications for civil legal aid for 3,792 divorce actions and it is highly likely that residence and/or contact was a live issue in some of these cases.<sup>18</sup>

Research has found that the cases before the courts are highly conflicted (SG 2009) and that the basis for the dispute may be that one or both parties express concerns over the parenting ability of the other parent, (Smart et al 2005; Wilson & Laing 2010); while concerns about money, bad behaviour and new relationships entered into by the other parent may also be mentioned. One Scottish study found allegations of domestic abuse had been made in a third of cases involving contact, as well as allegations of mental illness or substance abuse being made in a quarter of cases (McGuckin & McGuckin 2004).

Existing research also refers to a *gender difference* in the narratives of non-resident fathers and of resident mothers in respect of what they consider the nub of the dispute to be about; with fathers emphasising a desire for justice (see Wilson and Laing 2010:2) and struggles over parental *authority*; while mothers' narratives focus on the child's welfare and negotiations over parental *care* (Smart 1999:46, Smart et al 2005:51). Smart et al (2005) suggest the gender differences "can be traced back to cultural understandings of what 'good mothering' and 'good fathering' consist of," and (consistent with an assumption of paternal authority) it has been observed that fathers in one study:

*"were particularly unwilling to negotiate. The very idea was demeaning to them, as if it negated their rights to act autonomously and without accountability"* (Smart 1999:47).

However, once cases are before the courts, findings of fact in respect of allegations of past behaviour will not be made unless the case proceeds to

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<sup>18</sup> Scottish Legal Aid Board Online. Annual Review 2009- 2010. (Table 3:5)

proof and proof hearing are rare.<sup>19</sup> Rather, sheriffs seek to adopt a conciliatory approach by discouraging parents from complaining about or blaming the other, and focus instead on brokering agreement in respect of on-going contact between both parents and the child (see Wilson & Laing 2010:5.23 & 8.16; Welsh 2007).

Additionally, non-resident parents do not have to demonstrate they do, (nor ever have) contributed financially to the raising of their child - with the issue of alimentary support being almost completely removed from the courts by the Child Support Act 1991.<sup>20</sup> While previously, the Law Reform (Parent and Child) (Scotland) Act 1986 removed any distinction between children of married or unmarried parents in respect of the relative rights and responsibilities of parents towards their children.

Significantly fathers' rights groups sprung up at the same time mothers acquired rights *in law* to their children. That is, Families Need Fathers was founded in 1974 – the year after the passage of the Guardianship of Infants Act which afforded mothers equal status with fathers in respect of their children.

In 2000, the European Court of Human Rights held that the refusal of an *unmarried* father's application for contact was an unjust interference with his Article 8 European Convention on Human Rights (ECHR) right to a family life.<sup>21</sup>

Since the ECHR was incorporated into our domestic law by the Human Rights Act 1998 there has been a measureable increase in the numbers of unmarried fathers raising actions for contact or residence in Scotland. Research undertaken in the period 1998/9 found only 10% of non-divorce

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<sup>19</sup> Wilson & Laing (2010) found 4% of cases went to proof.

<sup>20</sup> Although applications can be made for 'top up' aliment where the child is disabled (s8 1991 act); or where the action is raised for educational expenses such as school fees (s8) or where the non resident parent is a high earner (Schedule 1 Para 10:3, 1991 Act)

<sup>21</sup> *Elsholz v Germany* [2000] FLR 49

actions were raised by unmarried fathers (SE 2000) but by 2004 this had increased to 56% (McGuckin & McGuckin 2004). Of course, as referred to previously, the numbers of babies born outside of wedlock increased by a similar percentage also during this time.

Crucially, it can be seen that successive statutes have proactively sought to render *irrelevant* to the decision making process, many factors that parties might find on, in an action for residence or contact, which might hinder the ordering of contact if weight were to be attached to them.

That said, where concerns *are* raised about a child's welfare, which a court believes require investigation, a court report is very likely to be ordered. These are usually undertaken by legal practitioners (rather than welfare professionals), and courts in Scotland usually order contact in line with the recommendations contained within these reports (Whitecross 2011).

The *statutory* framework now used by courts in Scotland to make decisions in respect of residence and contact is contained within the Children (Scotland) Act 1995. The following section considers the principles within this Act – and in particular, the evolution of the concept of 'welfare.' This illustrates that 'welfare' is not a static concept and it is conceivable that our present interpretation of it may be frowned upon by future generations.

### **1:3 Current Statutory Framework: The Principles of the Children (Scotland) Act 1995**

It has been mentioned that mothers, married fathers, and unmarried fathers (whose names are on the birth certificate of their child) now all enjoy parental rights and responsibilities (hereafter PRR's) and, further, that the maintenance of regular direct *contact* with a child is both a parental responsibility and a parental right. This, and the other parental rights and

responsibilities are expressly listed in the 1995 Act,<sup>22</sup> which put the whole law in this area on a statutory basis (Norrie 1999:8.02). Importantly, unlike the previous common law position in respect of awards of the custody of children,<sup>23</sup> under the 1995 Act, *both parents* retain their PRR's *irrespective* of whether a court orders residence of the child with the other parent or not.

The 1995 Act consciously sought to incorporate the principles of the United Nations Convention on the Rights of the Child (hereafter UNCRC), which was ratified by the UK in 1991. Although this Convention has not been incorporated into domestic law by an Act of the UK Government, it is referred to for guidance in reported case law decided in accordance with the 1995 Act.<sup>24</sup>

There are three overarching statutory principles contained within the 1995 Act intended to guide the court when considering whether or not to make an order in respect of parental rights and responsibilities. The first is that the court “shall regard the welfare of the child as its paramount consideration,” while the second is that it shall not make any order unless it considers it would be better for the child that the order be made than none be made at all.<sup>25</sup>

The latter of the two principles is intended to ensure that the circumstances of a settled child will not be disrupted by the claim of one or other of the child's parents which, if ordered, would (in the courts view) do the child more harm than good.<sup>26</sup>

The third principle is that the court should, “taking account of the child's age and maturity,” give the child an opportunity to indicate whether he

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<sup>22</sup> s1 and S2 Children (Scotland) Act 1995

<sup>23</sup> Such as *Stokes v Stokes* 1965 S.C. 246; *Porchetta v Porchetta* 1986 S.L.T. 105

<sup>24</sup> In 2009 Baroness Walmsley introduced the Children's Rights Bill to the UK parliament which but the bill made no process beyond a first reading on 19.11.09 due to the 2009-2010 session of Parliament being prorogued.

<sup>25</sup> s11(7)(a) Children (Scotland) Act 1995

<sup>26</sup> These two principles were previously contained within the provisions of the Law Reform (Parent & Child) (Scotland) Act 1986 at s3(2).

wishes to express his views and, *if* he does so wish then to give him that opportunity *and then* to have regard to those views.<sup>27</sup> This principle was included as “the Scottish Law Commission felt that this factor should be stated expressly, recognising that the child's views were not simply an aspect of welfare but a matter of the child's right” (Sutherland 1997). Children who have attained the age of 12 years benefit from an assumption of competence to express a view, however as this is “without prejudice to the generality” of the section, children under this age may also be deemed competent.<sup>28</sup> It is the extent to which the *implementation* of this provision by the courts can be said to “promote the child’s welfare” that is the focus of this thesis - both in respect of *how* children’s views are taken and also, in respect of the weight that is attached to their views.

Courts were first asked “to consider the welfare of the child” when making decisions about custody by the Guardianship of Infants Act 1886. In the later Guardianship of Infants Act 1925, the welfare of the child ceased just to be a ‘consideration’ but became “the paramount consideration.” At the time these Acts were passed, concerns about the treatment of children in their families were being raised – with the Scottish National Society for the Prevention of Cruelty to Children being established at this time (Mackenzie 1988). However, the pervading understanding of *what* promoted the welfare of the child was not what would generally be considered ideal in early 21<sup>st</sup> Century Scotland. That is, although by the eve of World War One 24,000 children had been removed from their homes for their safety (or because they were found begging), they were then either placed in industrial schools, children’s homes, “orphanages” or poorhouses (Mackenzie 1988:204). From the 1870s to as recently as the 1960s, children from these ‘orphanages’ were emigrated to Canada, South Africa and Australia – whether or not their parents were living (Abrams 1988).<sup>29</sup> Clearly *poor*

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<sup>27</sup> S 11(7) (b)

<sup>28</sup> s11(10) Children (Scotland) Act 1995

<sup>29</sup> An estimated 150,000 children were emigrated between 1870 and 1930 alone.

parents (be they male or female) were often not in a position to have any contact with (let alone residence of) their child.

It was not until the *mid* 20<sup>th</sup> century that the importance of the bonds of attachment between children and their carers began to be recognised. In particular, studies of the post second world-war era began to apply empirical research methods to the study of the development of children and found that early life experiences - particularly the lack of, or separation from, a loving parent - could have a dramatic effect on the emotional well-being of a child.<sup>30</sup>

The Universal Declaration of Human Rights 1948, recognised the import of the mother-child bond and included at Article 25 “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

Regrettably, the reality for the mother of babies born *out of wedlock* in the post-war period was that social workers insisted adoption was the best option for their illegitimate children - statutory adoption having being possible since 1930. Coercive separation of infants from their mothers was therefore actually integral to the practice of state agents during this time (Dewar 1968; Crabbie 1985).

In 1951 an influential paper was authored by Bowlby, one of the earliest developmental psychologists, in which he stated:

*“to grow up mentally healthy the infant and young child should experience a warm, intimate and continuous relationship with his mother (or permanent mother substitute) in which both find satisfaction and enjoyment”* (Bowlby 1951:13).<sup>31</sup>

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<sup>30</sup> These included the *Care of Children Committee Report* (1946) which recommended children should not be removed from Britain unless there was a reasonable certainty of not less than favourable conditions for them in the new country and its recommendations informed the Children Act 1948.

<sup>31</sup> He was commissioned to write a report for the World Health Organisation on the mental health of homeless children in postwar Europe, and this was entitled *Maternal Care and Mental Health*.



Bowlby's focus on the mother-child relationship reflected the social reality that was largely accepted without question at the time he wrote, as women were largely confined to the private sphere of home and the task of child-rearing while men occupied the public sphere of economic activity (and were expected to provide for their dependants). However it is important to note that it is still the case that although over two-thirds of women of working age with dependent children currently engage in *some* paid employment, less than a third do so on a full-time basis (ONS 2008). This compares to only 4% of men with dependent children working part-time (ibid), while becoming a father does not impact on men's employment *rate* (ONS 2008/b:6).

In 1959, the United Nations Declaration of the Rights of the Child declared for the first time (outside of occasional case law)<sup>32</sup> that "a child of tender years" "shall not be separated from his mother." This Declaration also provided, that wherever possible the child shall "grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security."

Thus, the principle incorporated the evolving awareness of a child's need for warmth and acceptance and not mere meeting of material want. Although, the child was seen to be the responsibility of both parents, a mother's particular role as primary carer of a child was acknowledged – at least in the case of children 'of tender years.'

However, a generation later in the mid 1990's , the suggestion by the House of Lords that a maternal preference in respect of infant children existed in *law* caused outrage as being an overt expression of "sexual discrimination" against men.<sup>33</sup>

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<sup>32</sup> *McKellar (Matha,) Petitioner (Custody of Children) (No. 1)*(1897) 5 S.L.T. 329; *Christison v Christison* 1936 S.C. 381 ; *McLean v McLean* 1947 SC 79

<sup>33</sup> *Birxley v Lynas* 1997 S.C. (H.L.) 91

Lord Jauncey of Tullichettle had had the audacity (in the eyes of the commentators) to observe:

*“Nature has endowed men and women with very different attributes and it so happens that mothers are generally better fitted than fathers to provide for the needs of very young children. This is no more discriminatory than the fact that only women can give birth.”*

Such statements resulted in a furore of articles containing comments such as:

*“The suggestion that a modern legal system might be driven by implicit gender bias in reaching decisions about the future arrangements for children is one which might be greeted with concern. That such a system should be quite explicit in adopting this prejudice is astonishing.”* (Sutherland 1997).

Subsequent to the above mentioned case, in 1998, the Court of Appeal in England threw out a mothers reliance on the principle contained in the 1959 Declaration on the Rights of the Child - that a child of tender years should not be separated from his mother.<sup>34</sup> The court pointed out the declaration does not apply to domestic law and is “out of date.” It also claimed that the provision of the 1959 Declaration was inconsistent with more recent provisions of the UNCRC. That is, Article 9 UNCRC is gender neutral, and places the duty on State Parties to ensure a child is not separated from his or her *parents* against their will (unless such separation is necessary for the best interests of the child). It is this Article also that requires state parties to respect the right of a child to have direct contact on a regular basis with any parent from whom they are separated and this that informed the drafting of the Children (Scotland) Act 1995.

Thus, the courts have arrived at a point where express statements preferring one sex of parent over the other will usually be avoided - and would almost inevitably be appealed. Similarly they can no longer discriminate on the grounds of the sexual orientation of a parent.<sup>35</sup> Rather, in the absence of any

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<sup>34</sup> *Re A (a minor) (residence order)* [1998] 2 FCR 633

<sup>35</sup> *Da Silva Mouta v Portugal* 2001 FamLR2

particular welfare concerns in respect of one or other parent, where the *residence* of a child is concerned, increasing weight has come to be placed on the second of the three principles of the 1995 Act - the status quo principle.<sup>36</sup> This allows that a settled child may remain where s/he is at the time the case comes before the courts. In most cases this will actually mean the child remains with his or her mother, reflecting the gender difference in parenting roles that continues in the 21<sup>st</sup> Century,<sup>37</sup> and the positive impact of welfare benefits on women's ability to provide for their children.

In respect of *contact*, courts have arrived at the position that there is an assumption that a child will benefit from regular ongoing contact with his or her non-resident parent (usually their father) – without their being any onus on the part of the applicant parent to demonstrate that this would be in the child's best interests (*White v White*).<sup>38</sup> Prior to this case (and almost always within the context that the father had been violent to the child's mother),<sup>39</sup> courts in the 1980s had held there was no "intrinsic right" of contact on the basis of biological ties alone even when the parents had been married - but rather there was a need to demonstrate contact was in the best interests of the child.<sup>40</sup> However, it may now be enough that there is an assumed benefit from contact with a biological parent, even where there is patently little evidence of "much in the way of positive benefit to the child" (para 62-21) from continuing contact.<sup>41</sup>

Although it might be assumed to be an implicit part of a consideration of the child's welfare, the express requirement to consider the need to protect a child from abuse and from risk of abuse was recently put on a statutory basis by the Family Law (Scotland) Act 2006<sup>42</sup> as a result of lobbying by

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<sup>36</sup> Also at s11(7)(a) Children (Scotland) Act 1995

<sup>37</sup> Smart (1999) observes that the primary care of children post separation "arises as a natural extension of the gendered practices of parenting/economic support operating prior to the separation." (1999:42)

<sup>38</sup> *White v White* 2001 S.L.T. 485

<sup>39</sup> eg: *Porchetta v Porchetta* 1986 S.L.T 105, *Sanderson v Mcmanus* 1997 S.L.T. 629

<sup>40</sup> *Porchetta v Porchetta* 1986 S.L.T 105

<sup>41</sup> *Lamont v Lamont* 1998 Fam L.R. 62

<sup>42</sup> s24 Family Law (Scotland) Act 2006 amending the Children (Scotland) Act 1995.

members of the Safe Contact Alliance.<sup>43</sup> They were concerned that the automatic acquisition of PRR by unmarried fathers (which the 2006 Act was to introduce), would mean that - in abusive relationships - a father could attempt to use his 'rights' to frustrate the mother's care of her child, particularly by raising court actions for contact or residence as an attempt to continue to exercise control over the mother of the child.

This inclusion of this statutory provision is clearly intended to focus judicial attention on an issue that is central to determining *what* outcome will promote the welfare of a child. Too heavy a reliance on the status quo principle may sometimes result in decisions concerning the residence of a child that do not promote the child's welfare - where scant regard is paid to the factors leading to the child living with a particular parent. For example, in 1992 a case was decided which has been referred to as a 'kidnappers charter,'<sup>44</sup> as an unmarried father abducted his infant son from his mother in breach of an order of the Irish court, before successfully obtaining a residence order in Scotland.<sup>45</sup>

Clearly children have to be listened to as they are no longer the property of their fathers (nor their mothers) to be dragged mutely from pillar to post.

Article 12 UNCRC, which also informed s11(7) of the Children (Scotland) Act 1995 states:

*"1. State 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."*

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<sup>43</sup> Made up of representatives of Children First, One Plus and Scottish Women's Aid.

<sup>44</sup> *Sherwin v Trumayne* 1992 G.W.D. 29-1681.

<sup>45</sup> See also *Black v Black* 1990 S.L.T. (Sh Ct) 42

As previously observed, when parents make their own arrangements for the care of their child post-separation they should have regard to the views of their child.<sup>46</sup> In those cases which come before the courts, the *court* has four main means by which it may obtain the views of the child at its disposal being: *intimation*<sup>47</sup> (informing the child of the court action and inviting the child to express their view should they wish); via the appointment of a *court reporter*;<sup>48</sup> via *shrieval interview* (wherein the sheriff interviews the child in Chambers); or, via a child instructing their own solicitor,<sup>49</sup> who may then attend hearings on behalf of the child (although the child does have the right to attend court hearing should they wish). “Child Welfare Hearings” were introduced following the suggestion by a sheriff that this would enable both parents *and their children* (if the child so wishes) to be present to discuss the issues in a less formal situation.<sup>50</sup>

Children in the United Kingdom however do not have a *right* to information about the case affecting them nor an automatic *right* to request direct representation – as they could have if the UK Government ratified the European Convention on the Exercise of Children’s Rights 1996. This Convention was intended to give children the procedural rights necessary for them to exercise their participation rights, having particular regard to Article 4 UNCRC which requires “State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention.” Importantly, the emphasis in the 1996 Convention is on strengthening the information and participation rights of children *in cases where they are in conflict with their parents* and specific reference is made to disputes over residence and contact (Article 1).

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<sup>46</sup> s6 Children (Scotland) Act 1995

<sup>47</sup> The relevant rules of court were amended following the passage of the 1995 Act and are to be found in the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, as amended.

<sup>48</sup> OCR 33.21

<sup>49</sup> s 2(4A) of the Age of Legal Capacity (Scotland) Act 1991 as amended by the 1995 act.

<sup>50</sup> OCR 33.22A

As the UNCRC does not require that children determine the manner in which they are heard, judicial discretion is the key factor determining how children are heard – when they are (with sheriffs favouring the use of court reporters).

It is the case however that in all actions raised concerning contact or residence of a child, the Initial Writ should contain a crave for intimation (or dispensation of intimation) of the child. This intimation should be in the style of the F9 form<sup>51</sup> and *if* the child returns the form, the sheriff may decide to speak with the child. Importantly, a child’s written views are meant to be sealed in an envelope labelled ‘Views of Child – Confidential’ and they are not to be opened or read by anyone else, nor can they be borrowed.<sup>52</sup>

When a court reporter is appointed, this is usually a solicitor practising before the bar making the request. Such reports are usually requested by the sheriff in the terms of Rule 33.21 of the Ordinary Cause Rules; being, “to investigate and report to the court on the circumstances of a child and on proposed arrangements for the care and upbringing of the child.” Solicitors may also be appointed to act in the capacity of *curator ad litem*, where it is felt the child’s best interests may be at odds with those raising or defending the action in respect of the child. It is important to note that while a court reporter or *curator ad litem* will usually speak with a child to ascertain the child’s views, their function is to promote the ‘best interests’ of the child rather than acting as the child’s representative. Either can advise a court that it would not be in the child’s best interests for the court to decide in line with the child’s views and this present research suggests this often happens as courts (and consequently legal practitioners) start with the assumption of contact.

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<sup>51</sup> OCR 33.7

<sup>52</sup> OCR 33.20

#### **1:4 Research Aims and Objectives:**

- To glean the reasons cases come before the courts – given the vast majority of disputes are resolved without such intervention.
- To consider the extent to which current methods for taking children’s views in private law legal process conforms to the principles of ethical consultation with children developed in social science literature since the passage of the UNCRC. Principally, the extent to which children are informed of the purpose for taking their views and how they will be used as well as the extent to which children may choose to participate or not.
- To analyse the impact of children’s views on contact outcomes (ie: the treatment of views once taken).
- To explore the perspectives of different ‘actors’ involved in ascertaining the views of children on the present methods for taking children’s views and the weight that should be attached to their views once taken.
- To analyse and contrast the narratives of legal practitioners (whose recommendations are usually determinative of the outcome of a case) with the narratives of children and their parents, as an aid to understanding whether the welfare of children is promoted by the treatment of their views in legal process.

#### **1:5 Methodology:**

The methodology employed is discussed at length in Chapter Three of this thesis. The literature and data that was analysed leading to the present thesis comprises the following:

1. A review of the law pertaining to the parental rights of custody and access to children and on the rights of children (both historically and in present time).
2. A review of the literature in the following areas:
  - The participation of children.

- The ethics of consulting with children and young people.
- The verbal communication skills of young children & appropriate interview techniques
- Children's experiences of divorce and separation.
- Children's experiences of being heard in legal process.
- Domestic abuse: its incidence, the gendered nature of domestic abuse and its impact on children and on their ability to express their views.

**3. Court Data set (n=208 cases):** All cases in which parents disputed child residence/contact raised at two sheriff courts during a one year period.

**4. Solicitors Questionnaire (n=96 completed).**

**5. Parents Questionnaire (n=28 completed).**

**6. Qualitative Interviews (n=33):** These were undertaken with Sheriffs (n=7); Solicitors (n=9); Parents (n=8); Children (n=2) and non-legal practitioners in support services for children (n=7).

### **1:6 Original Contributions to Knowledge:**

This thesis makes an original contribution to knowledge by rigorously applying the framework of genuine participation and ethical consultation, as developed by social scientists, to existing methods of hearing children in private law courts in Scotland.

Secondly, through a painstaking analysis of the use of standard forms and procedures, the thesis explores the actual *practice* of the taking of the views of children, rather than merely noting whether the child's views were taken or not.



Thirdly, through the use of *quantitative* data analysis, the thesis goes beyond existing studies by measuring the *impact* of the expressed views of children on the contact *outcome* in their case.

Fourthly, the thesis presents in some detail the narratives of mothers who are resisting contact as sought by non-resident fathers. These stories are an important inclusion in the literature in this area, as it is sometimes assumed that mothers resisting contact are ‘obdurate’ or ‘implacably hostile’ or have willingly ‘alienated’ their children from their father.<sup>53</sup>

Fifthly, the thesis develops existing literature in this area through the inclusion of the perspectives of non-legal practitioners who support children experiencing court ordered contact. These practitioners speak lucidly of the underlying reasons for some children’s resistance and of the distress that may be experienced by children ordered into contact against their will. Their narratives lend support to those of resident mothers, and provide a counter balance to the narratives of many legal practitioners who start from the assumption that regular, direct, contact with a non-resident parent will be beneficial for a child.

Sixthly, this thesis is the first research in Scotland to gather data on the implementation of the statutory requirement upon courts to protect children from abuse, and from the risk of abuse, when making an order in respect of contact (s24 Family Law Scotland Act 2006). In combination with data on the nature and prevalence of domestic abuse in the cases coming before the courts, this amounts to persuasive evidence of the need for specialist training for legal practitioners working in family law.

Seventhly, the research has facilitated a candid discussion of some particularly surprising findings such as the absence of specialist training for

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<sup>53</sup> These terms litter the judgements of the English courts in particular. Example cases are: *W (A Minor) (Contact)*, Re [1994] 2.F.L.R. 441; *A (Suspended Residence Order)*, Re [2009] EWHC 1576.

practitioners undertaking court reports into the welfare of a child, the cost of court reports, and the difficulties for children in obtaining legal aid.

## **1:7 Format of the Thesis**

This work is presented in eleven chapters. **Chapter Two** presents a *review of the law and literature* on children's participation in private law legal process. It explores *why* children were given participation rights by UNCRC and what the features of *genuine* participation are – placing particular emphasis on existing research which is inclusive of children's perspectives of being heard in *legal process* specifically.

**Chapter Three** – presents a discussion of the *methodology* used and the ethical considerations of the present research. Key features of the court data set and of the respondents to the two questionnaires and the interviewees are given.

**Chapter Four** – presents a discussion on the *nature of the cases* in the court data set, highlighting the prevalence of a history of domestic abuse. It is seen that in most cases prior subsisting contact broke down due to serious welfare concerns.

**Chapter Five** – presents the *assumptions of legal practitioners* that impact on the extent to which children's views are taken and the extent to which a history of domestic abuse is seen as relevant to the issue of child contact.

**Chapter Six** – considers the extent to which the implementation of the *methods* of taking the views of children in legal process conforms to the principles of ethical consultation developed by social scientists. The focus is on informed consent and confidentiality in particular, and the practice of intimation of children is explored in detail.

**Chapter Seven** – considers the prevalence and practice of the *separate legal representation* of children and also of *shrieval interview*.

**Chapter Eight** – discusses the use of *court reports* – in particular the extent to which reporters are appointed, the triggers for their appointment and the extent to which they speak with children and investigate allegations when appointed.

**Chapter Nine** - considers the *weight* that is attached to children's views once taken, by exploring the impact of court reporters' narratives and children's views on the final *contact outcomes*.

**Chapter Ten** – presents the *perspectives of the children and parents* who took part in this research as well as those of non-legal professionals from services supporting children who are the subject of disputed contact. The concerns raised in the earlier chapters are crystallised in the experiences of the two child interviewees presented in this chapter.

**Chapter Eleven** – Summarises the key findings of the research and considers the *policy and practice implications* of these findings.



## **CHAPTER TWO – A Review of the Law and Literature on Children’s Participation in Private Law Legal Process**

### **2:1 Introduction:**

Previous international instruments such as the Geneva Declaration on the Rights of the Child 1924 and the Declaration of the Rights of the Child 1959 limited their focus to the *protection* of, and *provision* for, children. The United Nations Convention on the Rights of the Child (UNCRC) however, introduced the right of children to *participate* in decisions affecting them. The ratification of the UNCRC in December 1991 not only led to the express changes in law contained within the Children (Scotland) Act 1995 and the corollary changes in the rules of court, but also to “the emergent sociology of childhood” (Hill 1997:171). Research centres and university courses are now devoted to the study of childhood - with Article 12 of the convention, in particular, being founded on as justification for research *with* children. This has resulted in a burgeoning literature on the ethical and methodological considerations of undertaking research with children (such as Morrow & Richards 1996; Cree et al 2002; Cocks 2006), as well a significant amount of ink being spilt debating what exactly constitutes the genuine participation of children in decision making - as opposed to tokenistic inclusion.

Comparisons and contrasts have been made between consultation for research and consultation by professionals making welfare based decisions for a particular child (eg: Hill 2006, Smart et al 2001), as well as the manner and varying degree to which these may amount to participation of the child (eg: Thomas 2000).

Participation has been defined as:

*“the process of sharing decisions which affect one’s life and the life of the community in which one lives. It is the means by which democracy is built and it is a standard against which democracies should be measured”* (UNICEF 2003:14).

It can be seen in the above definition that participation by the individual can impact on decisions affecting that individual at a personal level or can have a broader impact on the society in which the individual lives.

This chapter begins by considering *why* children were afforded the right to express their views freely under Article 12 UNCRC, as well as the theory developed by social scientists on *what* constitutes genuine participation in the decision making process. Thereafter the *case law* on children’s participation in legal process is outlined before, finally, previous research into the taking of the views of children in private law disputes *specifically* is reviewed. This final section includes research with children from other jurisdictions to enable the views of children *with experience of* having their views taken by formal means to be included.

## **2:2 The Benefits of Participation**

The drive to participate is innate in humans and it is through positive participation that a child may learn confidence and assertiveness (UNICEF 2003:10). This then benefits the society in which the child lives as s/he may grow to be an adult with the ability to express themselves, listen to others, and to negotiate differences. Children, who observe powerful adults modifying their own preferences in order that they might accommodate the needs of the child, learn essential skills of negotiation and diplomacy.

Additionally, as participation is not a “free good” (UNICEF 2003:14) but carries costs, children and young people may experience consequences which may not always be unambiguously ‘good’ and therefore they learn that re-negotiation may be needed and how to weigh up the benefits and

costs of participation *for themselves*. Such experiences enable children and young people to develop the ability to take responsibility for themselves, their family, community or society in adult life.

Additionally, as Lansdown (2001) points out, at public policy level, even well-meaning adults can make mistakes in respect of promoting a child's welfare – where the policy is planned without the input of children. She states:

*“adults with responsibility for children across the professional spectrum have been responsible for decisions, policies and actions that have been inappropriate, if not actively harmful to children, while claiming to be acting to promote their welfare.”*(2001:3)

Examples given by Lansdown include the evacuation of children during the second world war and the placement of children in institutions that deny them emotional and psychological wellbeing,<sup>54</sup> as well as a failure to believe children who describe abuse at the hands of adults.<sup>55</sup>

Likewise Smart et al observe that:

*“just as it is no longer ethically acceptable to devise policy for disabled people without (at the minimum) consultation, so it is increasingly unacceptable to exclude children and young people from such discourses.”* (2001: 156)

Additionally denying children rights *to challenge* what is happening to them, may also enable abuse to continue (Lansdown, 2001:3). This is a significant reason why the child's right to participate in judicial and administrative proceedings is particularly important, for:

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<sup>54</sup> eg: Curtis (1946) found a shocking lack of personal interest in and affection for children in children's homes with a failure to regard a child as an individual deserving their own possessions and a degree of self-determination or capable of having any contribution to offer.

<sup>55</sup> Backet-Milburn et al (2006) found one third of children calling childline about sexual abuse had previously disclosed abuse but had not been believed [para 3.2]

*“democratic participation is not an end in itself, It is the means through which to achieve justice, influence outcomes and expose abuses of power. In other words, it is also a procedural right enabling children to challenge abuses or neglect of their rights and take action to promote and protect those rights.”(Lansdown 2001:2)*

Young (1997) stresses the importance of hearing the narratives of less powerful and more marginalised groups as this “provides the basis for understanding across difference.”

Further, as children are not a homogenous groups but have as much individual variation as adults, there is clearly a need to consult with a child on an individual level when they alone are the person affected by the decision being taken.

Clearly, a child’s opinion may differ from that of other children or of the adult decision-maker because of the particular experiences of *that* child – experiences that the adult decision maker may not have had. Where the decision maker listens to the child’s narrative, it is then that they may understand, and then that they may do justice for that child.

Research conducted into the outcomes for children following separation and divorce consistently find children fare better when both their parents are able to accommodate the perspective of the child (Wallerstein & Kelly 1980, Rodgers & Pryor 1998, Neale & Smart 2001). However, where the non-resident parent does not do so, the distress this causes children can be mitigated by a good relationship with their resident parent. Wallerstein and Kelly (1980) state of the children in their longitudinal research that:

*“for all the children and adolescents a good relationship with the custodial parent was the key to good functioning in the post divorce family. A close, nurturant, dependable mother-child relationship was highly related to the youngster’s competent ego functioning, to successful performance at school, social maturity, empathic relationships with adults and peers , and to feeling good about oneself in the world.”(1980:217)*



However, clearly if *only one* parent takes on board the child's perspective then there remains a significant likelihood of sustained conflict and such cases come before the courts – potentially triggering the requirement to give the child an opportunity to express a view.

Smart et al (2001) however sound the cautionary note that “it would be naive to rally to the call for greater participation by children in the divorce process as if this would transform children into ‘open books’” (2001:158). Rather they point out that talking to children may not always be an unmitigated good within the context of speaking to solicitors or ‘court welfare officers’ as, in legal process, children have no guarantee of confidentiality and “the child knows that what they say may have important personal consequences which are beyond their control once their views have been expressed (2001:158).

In respect of consulting with children, whether for research or for legal process, *genuine* participation as we shall see involves *informed choice*.

### **2:3 The Features of *Genuine* Participation**

It has been observed that:

*“Too easily, child participation can drift into being adult-centric, can be imposed on unwilling children, or be designed in ways inappropriate for a child's age and capacities. In its worst manifestations, child participation can be repressive, exploitative or abusive.”* (UNICEF 2003:15)

Writers from social science generally agree that in order for a child's participation *to be* actual participation there have to be certain essential features of the exchange between the child and adult decision makers. These are that the child is *informed*, has a *choice* as to whether they wish to take part (and the extent to which they wish to take part), has a *voice* in the process (or other mode of autonomous expression) and is *supported* through the process.

Interestingly, the author has observed that the literature that focuses on the *ethical* considerations of consultation with children has largely developed *through consultation* with children who have been the subject of state intervention in their private lives (primarily children in the care system). Significantly, this literature also adds to this list the requirement that the child's views remain *anonymous* (eg: Alderson 1995, Morrow & Richards 1996, Thomas & O'Kane 1998).

Indeed Malcolm Hill observes:

*“we know from the child welfare and health literature that privacy, confidentiality and concern about intrusiveness are very important issues for young people, especially with regard to sensitive personal matters.”*(Hill 2006:82)

Further,

*“Children can be concerned that what they say will become known to key adults, whether they are parents at home or teachers at school. This affects what they are prepared to say.”* (Hill 2006:83)

Ideally, those consulting with a child should make the child aware of *how* his or her views are to be used and who will have access to their views before the child decides whether to express their views or not.

Additionally, the child should have *information* about the range of available choices and, if some option is not viable, then the reasons for this should be explained also. Because of their restricted life experiences, children *are* likely to need the *support* of an adult who can obtain the information they need and discuss with the child the options, limitations, and likely consequences of different options. Notably, virtually all adults need this level of support when involved in a dispute before a court. Ideally, the supporting adult should meet with the child on several occasions (and the child should be able to instigate meetings where necessary). The child

should be given time to reflect on their choices and be able to choose to withdraw from the process if they wish.

In 1997, Roger Hart published a book entitled *Children's Participation* which contained a diagrammatic representation of a 'ladder' of children's participation (1997:46). This has eight rungs representing different levels of participation and Roger Hart described these different levels of participation by using examples of the involvement of children in community development and environmental care projects. Perhaps given the fact the subject matter was not particularly 'personal' to the children, his model does not mention the need for confidentiality that is central to the literature on the *ethics* of consultation. His ladder is informative however, as it illustrates clearly the ways in which adults (sometimes well-meaning adults) can use children to suit their own purposes rather than engaging with children on issues that matter *to the child*.

The first three levels of the ladder – 'manipulation/deception,' 'decoration', and 'tokenism' - do not constitute participation, as the essential features (information, choice, voice and support) are absent. In Hart's schema 'Manipulation' involves the adults deliberately using children, their words or their drawings to suit the purposes *of the adult*. It includes instances when adults deny their own involvement and insist *children* have done something unaided by them. An example given by Hart is that of producing a publication with children's drawings in it, where the children had no knowledge of the context in which their drawings were to be used.

The second rung – decoration – is one rung higher as, Hart asserts, 'adults no longer *pretend* the cause is inspired by children.' An example given is that of dressing a child in a t-shirt that promotes a cause the child knows nothing about.

Hart observes that his third rung – tokenism – is an extremely common form of participation, as adults select individual children for symbolic impact,

such as the presence of a child at a conference. The child may have had little opportunity to confer with his or her peers on the matters they wish aired and the views they express may not be particularly representative of those of the other children.<sup>56</sup> In the context of taking a child's views for legal process, a 'one-of' interview with a child may also constitute 'tokenism' where there is no follow up or involvement in the ongoing process (see Treseder 1997:4) or where the views have no impact on the outcome. As will be seen in Chapters Eight and Nine of this thesis, this is often the case when reports are undertaken for the court.

Whether or not the 4<sup>th</sup> rung on Hart's ladder can be said to *be* participation depends on the level of choice involved. This is the level where children are "assigned and informed" and Hart gives the example of involving children in picking up rubbish as part of an environmental clean-up programme. It is not hard to imagine that children *informed* of the purpose of an environmental cleanup would be much more likely to want to take part as they would see the sense of it. However, where they are given no *choice*, they might still feel bullied and resentful. A child pushed in to giving his or her views in legal process would be on this rung.

It is not until the 5<sup>th</sup> rung that a key feature of genuine participation – *voice* in the form of consultation – is referred to. At this level, although adults design and run a programme, children are not only informed of the purpose of a project but are also able to say whether or not they wish to take part. As part of the process of consultation children are also fully informed of the results of any project they have participated in. It is not unreasonable to hope that child's involvement in legal process should reach this level.

The 6<sup>th</sup> rung - "Adult-initiated, shared decisions" differs from the fifth as a greater involvement by children is required at *every stage* of the process

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<sup>56</sup> Hill (2006:73) discusses children's objections to children who self select or who are selected by others – observing the tendency for the same individuals to be selected time and again.

including the planning and design stage of a project and therefore *adults* have to encourage children's sense of competence and confidence if children are to reach this level of participation. Parental separation (in the cases where a child's parents have actually lived together) is not likely to be of the child's volition, although Blow and Daniel (2005) point out that some children actively long for their parents to separate and are relieved when it happens and that: "we need to appreciate and highlight their role as actors" (2005:176). Relevant to this is the finding by Wallerstein & Kelly that mothers described the discomfort they felt about the effect of a toxic marriage *on their children* and a significant number of mothers hoped the divorce would improve the quality of life for their children and themselves (1980:31).

The highest two rungs of Hart's Ladder of Participation have been the most controversial as sociologists debate which of the two more accurately reflects the greatest degree of participation (Hart 1997, Tresedor 1997). Hart labelled one rung "Child-initiated and Child-Directed" and the other "Child-Initiated, Shared Decisions with Adults." In the former of these, children do everything without *any* input from an adult (and as Hart observes examples are rare except in children's play) while, in the latter, *children* initiate a project but then decide to ask an adult for help as they recognise this would be of benefit to them. Hart observes that at this level "children feel sufficiently competent and confident in their role as members of the community that they do not find it necessary to deny their needs for collaboration with others" (Tresedor 1997:6). Although a child may pressurise a parent to leave an abusive parent, dependent children are obviously reliant on that adult to effect that change.

Thomas (2000) observes that a problem with Hart's ladder of participation is that it assumes "participation is *something* that one can have more or less of" (2000:174). He queries, "Is a child who attends a meeting because s/he is told she must, and then takes a very active part in the discussion, higher or lower on the ladder of participation than one who attends as a free choice

but then says nothing?” (2000:175). Thomas suggests as a ‘useful alternative’ the idea of a “climbing wall” made up of six adjacent blocks in the shape of columns - *choice, information, control, voice, support and autonomy*. He suggests a child’s involvement in the decision making process may be strong in some respects and weak in others. His suggestion is an effort to accommodate the participation rights of children with the pragmatic practice requirements of welfare professionals making decisions in respect of vulnerable children. However the remaining difficulty is that it is an adult who decides which elements matter.

In legal process, it is usually an adult – the sheriff – who determines if and by what means a child may be heard. Only in cases where children are intimidated are they provided with information by the court and given (in principle) a choice of whether and how they express their viewpoint.

The discussion turns now to review the treatment of children’s views in reported case law.

#### **2:4 Reported Case Law on the Participation of Children in Legal Process**

There are reported cases from the late 19<sup>th</sup> Century in which references are made to a consideration of the views of the child. It was opined in *Edgar v Fishers’ Trustees* for example, that the “reasonable wishes of the child” were a “material element” in respect of decisions concerning contact where there were concerns in respect of the child’s safety.<sup>57</sup> While in the same year, in *Morrison v Quarrier*, the Court was reluctant to intervene against the will of a minor (being a twelve year old girl).<sup>58</sup> It is no doubt significant that these cases occur at the end of the 19<sup>th</sup> century after the passage of the Guardianship of Infants Act 1886 requiring the welfare of the child to be considered.

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<sup>57</sup> *Edgar v Fisher’s Trs* (1894) 21 R. 1076 [para 1080]

<sup>58</sup> *Morrison v Quarrier* (1894) 21R. 1071

Interestingly, not so very long after these cases, the “burden of choice” a minor child might have in *choosing* where to live after the death of his or her father led to the Custody of Children (Scotland) Act 1939 - expressly giving *courts* the power to award residence in relation to such children (Marshall 2001:2.42). Protection from the burden of direct involvement in the decision making process continues to be a commonly voiced argument against children’s involvement in contact disputes to this day.<sup>59</sup>

Yet, in *Sahin v Germany*,<sup>60</sup> the European Court of Human Rights opined that in principle it is necessary to know the child’s true wishes in respect of contact in order to:

*“strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents.”*  
[Para 64]

Although, it is the “best interests” of the child and not the actual *views* of the child that is meant to be determinative of the case, it is clearly necessary to actually know those views as an essential factor to weigh in the process.

In Scotland, it was established in *Shields*,<sup>61</sup> that the only test for affording a child the opportunity to make his views known is that of practicality. It is, of course, largely judicial discretion which determines if it *is* practicable to take the views of the child.

It was further said in *Shields* that the need to take the views of the child should be considered at *the time an order is made* (referring to a proof hearing), irrespective of the fact that the child’s views may have been taken

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<sup>59</sup> *B v B* (2011) G.W.D. 13-291

<sup>60</sup> *Sahin v. Germany* (Application No.30943/96) [2002] 3 FCR 321

<sup>61</sup> *Shields v Shields* (sub nom S v S), (2002) SC 246

earlier in the process.<sup>62</sup> However, subsequent to this, Sheriff Principal Kerr has stated in *C v McM*,<sup>63</sup> that:

*“I take the position in light of Shields to be that the court is obliged right up to the time of making an order under s 11 to see to it that the child affected has been given an opportunity to express a view **at least once** to the court, but not necessarily more than once, by some appropriate method.”* (author’s emphasis)[Para 40]

Thus, as long as a child has expressed their opinions at some stage in the process, the present position is that there may be no guarantee his or her views will be gauged again should the case go to proof.

Not only does judicial discretion determine *if* the child is to be given the opportunity to express their views but also, the *method* by which the child’s view are taken.

In respect of the separate representation of children (via their own legal representative), initial case law following the passage of the Children (Scotland) Act 1995 was none to promising. In the early case of *Henderson*,<sup>64</sup> Sheriff Bell opined that:

*“The court should normally be able to have regard to the views of the child without the child entering the process and, while there may always be exceptional cases, I would deprecate any general tendency for applications to be made for children to be Party Minuters and to lodge Defences.”* [Para 22-42]

However, in *Fourman*,<sup>65</sup> Sheriff Morrison approved of a 14 year old being represented via *affidavit* evidence rather than actual attendance in court, stating:

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<sup>62</sup> In this case, the child’s views were taken at proof having previously been taken 18 months earlier.

<sup>63</sup> *C v McM* 2005 Fam LR 36.

<sup>64</sup> *Henderson v Henderson* (1997) Fam L.R. 120

<sup>65</sup> *Fourman v Fourman* (1998) Fam L.R. 98



*“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 be that the procedure adopted here of PF becoming a party minuter was entirely appropriate.”*[Para 98-44]

However it will be seen in Chapter Seven that sheriffs continue to discourage practitioners from suggesting children enter the process as a party to the action.

In *Henderson*, a further objection to the appearance of the 10 year old child was that it was unnecessary because *she held the same view* as her mother (that she did not want contact with her father) and therefore her appearance was redundant *and* an unnecessary drain on the legal fund. Yet, in *Shields* it was stated that that the fact that a *parent* presents a child’s views to the court is “no substitute for a proper enquiry into the child’s own views.”<sup>66</sup> Clearly the sheriff in *Henderson* only knew the child did actually express the view that she did not want contact because her representative expressed it on her behalf.

Of course, even when children **do** benefit from separate representation, a court may appoint another representative to attend to the best interests of a child as a curator *ad litem* (*R v Grant*).<sup>67</sup> Thus the court’s concern to protect a child’s best interests creates the unenviable potential that the legal representative of the child may find themselves expressing a *view* in opposition to a person appointed by the court to protect the child’s *best interests*.

In the most recent reported case dealing with a child’s request to enter as a party minuter,<sup>68</sup> the sheriff principal refused the application of a 12 year old

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<sup>66</sup> *Shields v Shields* (sub nom S v S), 2002 SC 246 [para 10].

<sup>67</sup> *R v Grant* (2000) SLT 372

<sup>68</sup> *B v B* 2011 S.L.T. (Sh Ct) 225

boy who had purportedly lost confidence in the curator already assigned to him stating:

*“the possibility of harm caused by the additional pressures on him outweigh his right to be involved as a party.”*[Para 15-21]

Thus while this child had had his views taken, he had no control over the means by which this was done and the benefits of *genuine* participation were not a part of the sheriff principal’s decision.

An alternative means by which a child’s views can be put directly to the decision maker is, of course, via judicial interview. This method of taking a child’s view existed prior to the 1995 Act,<sup>69</sup> and the impact on a decision maker of listening to a child’s directly expressed views is particularly apparent in the case of *Fowler*.

In this case, Lord Stott stated of a ten year old girl:

*“I was quite satisfied that she had not been pressurised or brainwashed by either parent and since her views were reasonable and there was no compelling reason to disregard them I have I confess allowed Denise in effect to decide the issue for herself.”*<sup>70</sup>

However, a more recent case sounded a cautionary note in respect of relying on a judicial interview as the sole means of taking the views of the child. In *W v W*,<sup>71</sup> the Lord Ordinary had determined the outcome of the case on the strongly held views of the nine year old child but, on appeal, the Inner House opined that:

*“We are doubtful whether the kind of general appraisal or impression that can be formed in the course of one relatively short interview by a person who is neither trained nor experienced in the techniques of interviewing and assessing children will ever be sufficient, given the stringent test required by the Convention.”* Lady Cosgrove [Para 28]

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<sup>69</sup> *Casey v Casey* (1989) S.C.L.R 761; *Campins-Coll, Petitioner* (1988) S.C. 305; *Fowler v Fowler* (1981) S.L.T. (Notes) 9

<sup>70</sup> Lord Stott in *Fowler v Fowler* (1981) S.L.T. (Notes) 9

<sup>71</sup> *W v W* (2003) SLT 1253

This case concerned an international convention,<sup>72</sup> rather than the 1995 Act, however it is notable that the assessment of a judge who *did* speak directly to the child was overturned by judges who *did not*, on the basis that he, like they, was trained and experienced in *law* rather than in interviewing or assessing children.

Lady Cosgrove did however take the trouble to observe,

*“We make no criticism of his decision [to interview the child], or indeed of that of any judge who feels that this is an appropriate course to follow in the particular circumstances of the case.”*[Para 28]

It will be seen in Chapter Seven however, that this is not a course many sheriffs do in fact choose to follow.

### **2:4:1 Reported Case law on the Confidentiality of Children’s Views**

By whatever means the views of a child are taken, there remains a problem of how to protect the child from retaliation, while yet adhering with the requirements of due process that all parties should be aware of what is alleged against them. It was restated in a relatively recent child contact dispute before the European Court of Human Rights (hereafter ECtHR) that those appearing before a court have a right to know all the information that may impact on a court’s decision (*Kosmopoulou v Greece*).<sup>73</sup> Although, the author notes that part three of Article 6 of the ECHR (that the accused should be informed of the nature and cause of accusations against him) *only expressly applies to criminal proceedings and not to civil proceedings*.<sup>74</sup>

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<sup>72</sup> Hague Convention on the Civil Aspects of International Child Abduction

<sup>73</sup> *Kosmopoulou v Greece* [2004] 1 flr 800

<sup>74</sup> While Part 1 of Article 6 which *does* expressly apply to both civil and criminal proceedings is limited to “a fair and public hearing” and an independent and impartial tribunal, with judgement pronounced publicly unless the protection of parties requires otherwise.

In *Dosoo*<sup>75</sup> children were interviewed by the sheriff who was made aware that they were afraid of their father and would only speak to the sheriff *if* what they said was kept confidential and not told to their father. The father argued this was a breach of his Article 6 ECHR rights to a fair and public hearing, however the sheriff was of the opinion that if the children's privacy were violated he would be failing to comply with Article 12 UNCRC – in particular the requirement that a child may express their views *freely*.

A different approach was taken in another case appealed in the same year. In *McGrath*<sup>76</sup> a father appealed to the Sheriff Principal, who stated it is necessary to *begin with* the fundamental principle that a party is entitled to disclosure of the materials and *then* to consider whether disclosure of the material would involve a real possibility of significant harm to the child.

Consequently, there is no guarantee of confidentiality for children, and children cannot know at the time they give their views whether what they say will be relayed to their parents at some point in the future or not.

Further, in *Oyenyin*<sup>77</sup> the sheriff opined that although the welfare of the child was a *relevant* factor it was no longer the *paramount* consideration when determining whether a child's views were to be kept confidential.

Thus far, the discussion has considered how children's views may be taken in legal process and the extent to which they may be kept confidential. The discussion turns now to consider the weight that is attached to those views once taken.

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<sup>75</sup> *Dosoo v Dosoo* 1999 S.C.L.R. 905

<sup>76</sup> *McGrath v McGrath* (1999) S.L.T. (Sh Ct) 90

<sup>77</sup> *Oyenyin v Oyenyin* (1999) G.W.D. 38-1836

## 2:4.2 Reported Case Law on the Weight to Attach to Children's Views

In general, where children are negative about contact with a non-resident parent they are assumed to have been influenced by the resident parent and that resident parent will be enjoined by the court to encourage their reluctant child to attend contact.

In the case of very young children (whose views are unlikely to be gauged by the court) it is not sufficient that a parent states the child is reluctant to attend contact - for such statements constitute 'hearsay' only. However, *Sanderson v McManus*,<sup>78</sup> illustrates that a court may sometimes consider statements made by a parent as to what his or her child's views are, *when there is corroborating evidence* from the child's behaviour – at least when observed by non-family members.

A difficulty is just *what* constitutes a sufficiency of evidence of a child's distress to rebut the assumption of contact? In *White*,<sup>79</sup> evidence was led that a child suffered asthma attacks linked to the court proceedings and that these were likely to worsen if contact resumed, the court nonetheless concluded the attacks would subside once the child became 'more familiar' with her father and therefore ordered contact.

Similarly in *J v J*,<sup>80</sup> it was said in respect of two children who had not seen their father for five years (and were clear they did not want to), that:

*“temporary distress should not stand in the way of long-term benefits.”*[Para 11]

The question arises however, of how far the assumption that a child will benefit *eventually* from contact should be applied to cases where there is a history of abuse. In *Perendes v Sims*,<sup>81</sup> two brothers aged ten and eleven described being hit by their father (which he acknowledged, but claimed one

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<sup>78</sup> *Sanderson v McManus* 1997 S.C. (H.L.) 55

<sup>79</sup> *White v White* 2001 SLT.485

<sup>80</sup> *J v J* (2004) Fam LR 20

<sup>81</sup> *Perendes v Sims* (1998) S.L.T. 1382

had called him a ‘black bastard’ - the court accepting this as ‘provocation’). One child also stated he had been shut in a cupboard by his father during contact, but the court accepted the father’s version that this (as well as the squeezing of the boys genitalia) was probably part of ‘horse-play.’ Lord Osborne stated:

*“In this case both Christopher and Paul made it clear to me in their evidence that they did not wish to see their father. While that is plainly a factor of which I must take account, it appears to me [...] the current views of the children on this matter are very largely the product of the respondent's [mothers] determination to cut the petitioner out of their lives.”*<sup>82</sup>

Thus the court, considering the boys view to be largely due to their mother’s influence (and not due to the treatment the boys recounted), ordered contact.

In *W v W*<sup>83</sup> it was observed that the very fact that the child’s views are taken in the context of conflict between parents effectively taints those views. In this case the girl described how her father hit her and her brother around the head and would drink and become “grumpy.” The court determined that such:

*“allegations made by a 9-year-old child in the context of what is clearly a very bitter and unhappy dispute between her parents ought not to be assumed, in the absence of any supporting evidence, to provide an entirely unembellished and wholly accurate account of events.”* [Para 41]

However, in *B v G*<sup>84</sup> it was observed that *practically*, there is a limit to the extent that a child can be physically forced to attend contact. In this case a ten year old boy refused to attend contact with his biological father who had assaulted his mother to her serious injury. When he was meant to leave his home for contact he would lie kicking and screaming on the couch, accusing his mother and her husband of forcing him to do things he did not want to (attend contact with his father). The court stated:

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<sup>82</sup> Judgement of Lord Osborne reported at (1998) S.L.T. 1382 (unnumbered paragraphs)

<sup>83</sup> *W v W* (2004) S.C 63

<sup>84</sup> *B v G* (2010) Fam L.R. 134

*“Short of dragging him physically to the pursuer's car it would have been extremely difficult, if not impossible, for contact to be exercised on those occasions or for [S] to derive any benefit from them.”*  
[Para 12]

and therefore no contact was ordered.

While in *Blance*<sup>85</sup> – a case where a non resident *mother* wished to exercise contact with her children - Lord Stewart began from the position that:

*“The child should be persuaded, encouraged, and instructed, but not physically forced to go with the person to whom access has been granted.”*<sup>86</sup>

Concluding:

*“they are almost 13 and 12 years of age. They are happily settled with their father and seem determined that they do not want to see their mother. [...] I consider that no useful purpose would be served by making an order which would be deeply resented by these boys.”*

Contact was therefore not ordered between these children and their mother but was for two younger siblings – one who wanted contact and one who was ambivalent.

Yet, in cases where the child’s views appear determinative of the outcome, this has sometimes been used as a grounds of appeal on the basis that it infringes the Article 8 ECHR rights of the non-resident parent to a family life (*C v Finland*).<sup>87</sup>

Given the risk of appeal when weight *is* expressly attached to the views of a child, it is perhaps to be expected that courts may expressly diminish the value of the views a child expresses. In *Treasure v McGrath*,<sup>88</sup> the sheriff

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<sup>85</sup> *Blance v Blance* 1978 S.L.T 74

<sup>86</sup> Lord Stewart’s Judgement available at *Blance v Blance* 1978 S.L.T 74

<sup>87</sup> *C v Finland* [2006] 2 FCR 195

<sup>88</sup> *Treasure v McGrath* (2006) FamLR 100

observed that the ten year old girl was assessed as having the “normal maturity of a child her age” and was therefore unlikely to “fully understand the complexities of the current application,” so that it was not appropriate to take her wishes into account. Yet, the actual outcome of the case (no court-ordered contact) was nonetheless consistent with the child’s views. It is unfortunate however that the dicta dismissing the girl’s views appears to mimic the treatment the girl in this case said she received from her father (she had told a clinical psychologist her father ignored her wishes and feelings). However, dismissing her views in this way did potentially protect her from her father’s indignation – which, pragmatically, may be more important. Of course it may just as well be that the sheriff in this case genuinely believes the views of a ten year old child do not require to have any weight attached to them.

This review of case law has highlighted some potential barriers children may face when they seek to influence this major decision affecting their lives. The discussion turns now to review previous research findings in respect of children’s participation in private law contact disputes.

## **2:5 Existing Research: Prevalence and Means of Taking Children’s Views in Legal Process**

Following the passage of the 1995 Act, Scottish studies have found that very few children obtain legal representation or speak directly with the person making the decision in respect of their lives (SE 2000, Tisdall et al 2002, McGuckin & McGuckin 2004).

The McGuckins state:

“Very few children were separately represented in the data set and there is little information in processes to indicate why” (McGuckin & McGuckin 2004:686).<sup>89</sup>

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<sup>89</sup> In this data set of 90 children from 61 cases, no children under eight had their views taken, four children are recorded as having ‘separate representation’ and a unstated number



In the earliest study (Scottish Executive 2000) intimation was craved in just over a third of cases - with returned forms in the processes of a quarter of *these* cases. It is not known the number of children to whom it was granted however.<sup>90</sup> However, in the 2004 study, 8% of children had intimation *granted* in respect of them.

It is indiscernible whether the use of court reports has varied during the period since the passage of the 1995 Act as the earliest research data set (Scottish Executive 2000) contained a significant number of undefended divorce cases which were before the courts only because divorce is a decree of the court. It would be very unusual for a court report to be ordered in an undefended action for divorce. Against this background court reports were ordered in 10% of cases only.

In the 2004 study, ‘curators’ were appointed in a third of cases and the writers of the report equate this with the “recording of the child’s views” [Table 34]. In total 44% of the 90 children in their data set had their views recorded by some means (letters to the court, intimation or a curator/solicitor appointed to report). No children under the age of eight had their views taken. The authors report that curators were more likely to be appointed in cases where there were concerns about the child’s wellbeing (McGuckin & McGuckin 2004 para 5:5). More recent research found court reports were ordered in 39% of cases (Wilson & Laing 2010).

It is clear that *if* a child’s views are taken – they are most likely to be taken by a court reporter appointed to investigate the circumstances of the child. The authors of the 2004 report observe that “recommendations in reports

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of children are recorded as writing letters to the court. Further, although the authors state “In only the most complex cases were children invited to speak to a sheriff” [para 69] no figure is given on the number who did.

<sup>90</sup> As those collecting the data recorded that intimation had been granted in respect of **all** children in the family when it was granted to at least one of them.

were accepted in almost all cases” [para 6.59], while a finding by Whitecross (2011) illustrates the same point.<sup>91</sup>

In the 2002 study (Tisdall et al 2002), no court database was generated, rather the researchers spoke with 27 children (aged from 8 – 18) recruited from youth groups who took part in focus groups. Only 13 of these children had experience of parental separation. The researchers found that of those with experience of parental separation, only one had had his views taken by formal means – via the completion of an F9 form.<sup>92</sup>

These authors conclude that a key barrier to the participation of children in legal process is a lack of information as to how they may be heard in legal process and that that the involvement of children is largely dependent on parents’ initiative. Further, many of the children who took part in their research assumed solicitors would be unapproachable and suggested ways in which involvement in legal process could be made less daunting. These included:

*“ a tour of the court before the hearing, a video to watch to prepare them for the procedures and possible outcomes, and access to a companion (who is not directly involved in the case) when waiting for proceedings in court.” (2002:3)*

They also requested feedback every two or three months and parents and practitioners felt there should be additional specialist training for family law practitioners.

When undertaking the present doctoral research, all these suggestions were also made to the author by participants - some nine years after being

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<sup>91</sup> That is, Table Five of Whitecross’s report, (2011:36) illustrates that sheriffs ordered in line with the *recommendations* of the court reporter in most instances. The table records a total 188 recommendations and 166 were apparently followed by the court. This equates with an 88% compliance rate and illustrates the enormous influence the report has on the contact outcome.

<sup>92</sup> However, the researchers also successfully recruited five children via solicitors who had represented them. Their experiences are recounted later on in this chapter.

suggested by participants in the 2002 study – none having been implemented in the interim period.

## **2:6 Existing Research: Nature of the Cases before the Courts and the Impact on Children**

As well as providing data on the prevalence of the taking of the views of children and the methods employed, these earlier studies also provide some data on the nature of the cases before the courts. The authors of the 2000 study observe:

*“a matter of concern, was the fact that in some of the cases the pleadings suggested that violence had taken place between the adult parties and that this may have indirectly impacted on the children. Processes do not provide for the monitoring of the level of domestic abuse. There needs to be a mechanism in place for monitoring its incidence.”* (Para 4.10.4)

Brown et al (2000) found that domestic abuse, substance abuse, criminal convictions and high levels of unemployment existed among the families taking a dispute over contact to the private law courts in Australia; concluding that these factors “probably contributed to the partnership breakdown” (Brown et al 2000:852). They also found that almost a quarter of families were previously known to the child protection authorities.

The *raison d’être* of the McGuckins 2004 research in Scotland was to ascertain the *extent* to which there were allegations of domestic abuse in private law contact disputes in Scotland. These researchers found *allegations of* domestic abuse in 30% of cases as well as allegations of drug and alcohol abuse in a quarter of cases.

Such findings should not be a particularly surprising however for, as long ago as 1980, the authors Wallerstein and Kelly commented in their seminal work *Surviving the Breakup: How Children and Parents Cope with Divorce*, that violence inflicted on the mother of the children, by the father, was an

ongoing expectable part of life for a quarter of the children in their cohort. Further, over half the children had witnessed this and the violence was “long and vividly remembered by the frightened child” (1980:16). The authors also observe that husbands’ violence towards their wives occurred at all social levels and by no means stopped with the abuse of the spouse. Rather some men were physically or sexually abusive to one or more of the children in the family (1980:16). For example,

*“Mrs. N., for example, filed for divorce after ten years of marriage during which her husband, a political figure, stayed out of the home four or five nights out of seven or staggered in drunk to creep into bed with his oldest child. He was often abusive and demeaning of his wife and children.”*<sup>93</sup> (1980: 18)

These authors also observed that men, who were angry at been rejected by their female partner, frequently become violent, threatened to remove the children from their mothers care and tried to alienate both the children and the courts against the mother of the children. Kidnappings of children by fathers were reported as being “not uncommon.” (1980:28-29)

Domestic violence perpetrated on a child’s parent is abusive towards children because witnessing or hearing attacks upon their mother causes considerable amount of distress; the symptoms of which include headaches, sickness, diarrhoea, bed-wetting and problems sleeping (Mullender et al 2003:151). Children are aware of the violence even when their mothers believe they are keeping it hidden from them (Mullender et al 2002); and are affected as much by exposure to violence as to being involved in it (McCloskey et al 1995; Jaffe et al in Sturge and Glaser 2000:619).

Further, violence towards the mother interferes with the quality of the mother – child relationship, which is in itself an important factor in building

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<sup>93</sup> It is worth noting that at the time of their study ‘wife battering’ was only just emerging from being a misunderstood and largely invisible problem and the womens refuge movement was just evolving.

resilience in the developing child (Bancroft & Silverman 2002:42). Thus, while:

*“children’s needs for reassurance, attention and support are accentuated in situations of domestic violence, [at] the same time ... the resources of the mothers to meet them are taxed to the limit and invariably depleted.”* (Mullender et al 2002:158)

A domestically-violent father is usually contemptuous of the mother, undermining her authority over the children. The children may also absorb from their father that physical violence towards the mother is acceptable (Bancroft & Silverman 2002:34).

Bancroft & Silverman’s (2002) comprehensive work addresses the parenting style of a domestically-violent parent (they use the term ‘batterer’). The authors have worked with men on domestic violence perpetrator programmes<sup>94</sup> and have observed that the underlying attitudes which cause a man to be violent to his female partner, similarly affect his parenting. They have found domestically-violent fathers to be authoritarian parents - expecting their will to be obeyed unquestioningly, having only limited ability to accept any feedback or criticism or to be able to make adjustments in decisions to meet the needs of a child. The dictatorial style is an extension of the batterer’s view of *his* children as “personal possessions with whom he can do as he sees fit” (Bancroft & Silverman 2002:31).

Further, research with children who have lived with a domestically-violent father has found they are often the target of direct physical attacks (Mullender et al 2002:186). Straus (1990) found that 49% of domestically-abusive men physically abuse their children, compared to 7% of ‘non-battering men’ (in Bancroft & Silverman 2002:43); whilst Suh and Abel (1990) found that of 300 women who had escaped to refuge, 40% had

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<sup>94</sup> These are programmes designed to encourage the offender to address the attitudes underpinning his violence and to take responsibility for his actions. Men may be ordered to attend such a programme by way of sentence from a criminal court, following conviction for assault on their partner.

reported physical abuse of their children, with 22% of the children sustaining broken bones, 33% broken noses and 42% bruises (in Bancroft & Silverman 2002:43). The risk of physical abuse of children by a domestically-violent parent rises with the severity and frequency of the violence toward his partner (Straus 1990).

While contact visits may enable the continued abuse of women and their children, the direct abuse of the children may sometimes actually *begin* after separation, during contact visits, as a means of hurting the partner (Bancroft & Silverman 2002:127). In 2005, the Women's Aid Federation of England published a critical report on child homicides committed by fathers during contact visits for the period 1994-2004 (Saunders 2004). This paper prompted an inquiry into the extent of the involvement of the courts in any of the cases, as contact for eleven of the children who had been killed had been ordered by the court.

Lord Justice Wall's inquiry (Wall 2006) exonerated the trial judges of any blame as responsibility for murdering a child lies fairly and squarely on the murderer (Walls 2006:8.5),<sup>95</sup> and because the contact orders were made in 'good faith' (Wall 2006:8.7). However, he notes his concern that, "reliance was being placed on the proposition that it may be safe to order contact where violence has been perpetrated on the mother but not the child" (Wall 2006:8.21). On the issue of 'consent orders' ('voluntary' contact agreements between parties)<sup>96</sup> he recommended that, "the Family Justice Council (of England and Wales) could consider the allegation that parties (particularly mothers) are sometimes pressurised by their lawyers into reaching agreements about contact which they *do not believe to be safe*" (Wall 2006:pp 8.27); and stated that "a judge may not abnegate

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<sup>95</sup> Since his report, in R v S [2007] EWCA Crim 1249, a mother was handed a twenty-year prison sentence for leaving her child alone with her father who had previously assaulted that child. This is a criminal offence (allowing the death of a child) under the Domestic Violence, Crime and Victims Act 2004 s 5(1) (which applies to England and Wales only). Yet this is what courts may *order* women to do on contact visits with a known violent father.

<sup>96</sup> Called Minutes of Agreement in Scotland.

responsibility for an order because it is made by consent.”<sup>97</sup> He also strongly recommended “that no judge should sit in private law proceedings without having undergone training which includes multi-disciplinary instruction on domestic violence” (Wall 2006:8.29).

Laing and Wilson’s recent Scottish research considered *pursuer’s* experiences of child contact disputes and found that a quarter of the mostly male respondents mentioned that the defender in their cases had made allegation of abuse (para 3.19).<sup>98</sup> The researchers observe: “We were usually told that the defender’s allegations were unfounded and had subsequently been dropped” (2010: para 3.19).

They also found the majority of these predominantly male pursuers were negative in respect of their children’s view being taken on the basis that their children were either “too young” (irrespective of their actual age) or because they did “not want to burden” their child (Wilson & Laing: para 7.4). Pursuers said they suspected the influence of the resident parent when children’s written views were sent to the court, with two respondents stating “they believed the other parent had written letters to the sheriff purporting to be from the child.” (para 7.8)

As the legal practitioners interviewed expressed a similar perspective, these researchers appear to accept the non-resident pursuer’s assessment and they suggest that, as children’s views will not be believed, it may not be in the child’s best interests to take them. They state:

*“If sheriffs are to be concerned with children’s welfare first and foremost, any process of determining those views will become contested, with children becoming subjected to intentional or unintentional influence.”* (Para 8.27)

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<sup>97</sup> This is a notable change in view as the previous year in an appeal case, *Re W* (Children)(Contact Order) [2005] EWCA civ 575, Wall, L.J, stated that as the mother had agreed to visiting contact the trial judge was entitled to assume violence was historical.

<sup>98</sup> Most of the 35 pursuers interviewed were fathers (77%, n.27), while a further three were grandmothers.

Further, because Laing & Wilson observe a higher level of antagonism from pursuers who have been accused of domestic abuse, they conclude that the allegation *caused* the antagonism (2010:2) – without considering that the antagonistic attitude is consistent with the behaviour the pursuer has actually been accused of (and that the court action may be the *means* by which the pursuer is attempting to continue the dominance of the other party).

They also state (bizarrely in the present authors view) that:

*“Serious problems with contact are not in themselves a reason for going to court, since if parents can resolve them between themselves they do not need to be taken further.”* (Para 3.21)

Rather, the problem they conclude is due to “poor communication or the intractability of the other party” (para 3.21). This is rather like saying the muddy paw prints on the carpet are not the fault of a dog, but the fault of a Dalmatian - as intractability and poor communication *are* serious problems where the root of the problem is that one person relentlessly seeks to exert their will over others. Such behaviour is characteristic of domestically abusive individuals. However, there is an observable tendency to assume *both* parents must necessarily be being unreasonable, with little or no thought being given to the possibility that some litigants (and their children) need the court to *protect* them from hounding by the other party.<sup>99</sup>

## **2:7 Existing Research: Children’s Experiences of Being Heard in Legal Process**

Tisdall et al (2002) accessed five young people who had been represented via a solicitor. These children all had a positive assessment of that experience:

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<sup>99</sup> This interpretation tendency is also evident in research conducted in England and Wales for the Department of Constitutional Affairs in 2004 (Smart et al 2005) which concluded couples taking contact disputes to court were embroiled in a “parenting competition.”



*“It’s good to know that I’ve got a voice; I could never stand that feeling of being paralysed. To be able to have my own say and to be able to talk out, ‘this is me, I’m involved in this, I’m caught in the middle.’” (Para 4.5.1)*

*“Everything changed when I got a lawyer. You got your own say...they are your voice, you get more respect, because people will listen to you....my letters were being looked at” (Para 4.5.1)*

However, one child who had attended the court hearing *with* her lawyer found the sheriff disputed her presence and had to be shown a “booklet” confirming she could attend before he started to ask her “condescending questions” reducing her to tears (Para 4.5.5.).

Leaving aside this unfortunate incident, the overall favourable assessment by the children who had their own solicitor is often quoted by writers in Scotland. So also is the finding from the same research project that children were often hesitant to burden their parents further during parental separation or divorce, and that the children were concerned they might be asked to choose with which parent they would like to live (eg: Hall-Dick 2008). However, it is important not to lose sight of the fact that over half the children taking part in this 2002 study *had not experienced parental separation* and were therefore talking about a hypothetical situation – quite possibly from a position of relative family harmony. Although not asked about domestic violence, one third of the children in the study volunteered that they had experience of living with domestic abuse - however there is no analysis of whether *they* were the children with actual experience of parental separation nor whether they held different views in respect of having a say in legal process.

Earlier research by Gallegher (1999) however, found that:

*“Of all the children and young people who participated in the survey, those affected by marital breakdown were the most vociferous about their wish to exercise their rights. Specifically, they wished to exercise their rights by expressing either views on who they wanted to stay*

*with, and the level of contact they wanted to have with the absent parent.” (Gallagher 1998:31)<sup>100</sup>*

Further, Neale & Smart’s (2001) study with 52 children who lived in divorced or separated families included *both* children who had lived with abuse and children who had not. They found:

*“children who were in an oppressive relationship with a parent gave different answers to the vignette about a child choosing which parent to live with” (2001:18).*

Such children were adamant the child should choose who to live with, leading the authors to conclude,

*“Where children are frightened of, undermined or neglected by a parent, then the standard rules of fairness about how family members should treat each other are violated and no longer apply.”(2001:16)*

Similarly, Mullender et al (2002) who undertook research with children who had experienced domestic abuse found these children and young people,

*“[want] to be consulted about possible outcomes and to have their opinions - even their advice – considered. They said they wanted ‘to be believed’... they related incidents where their attempts to contribute had not even been noticed, and certainly not heeded, by the adults involved.” (Mullender et al 2002:123)*

Parkinson et al (2007) found such children were also clear that they wanted to speak to the person making the decision in particular and that they:

*“seemingly vested in the judge the hope that they have the power to end the dispute between their parents or to make appropriate orders where they have been subjected to abuse, neglect or disrespect from one parent.” (Parkinson et al 2007:96)*

Although it should not be assumed that all children who have lived with abuse will always express a view at odds with the assumption of contact and

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<sup>100</sup> Gallagher (1999) surveyed 333 young people and undertook group discussions with 213 on children’s access to legal services in Scotland.

Schofield (1998) outlined some of the risks of accepting the views of children who are in favour of contact with a parent who is known to be abusive. For, “vulnerable children who have experienced or are at risk of experiencing significant harm very often struggle to communicate the reality of their lives to others” (1998:373). Her paper includes an example of a 19 year old recalling how, as a young child, she consistently said “my dad does not hurt us” because (despite being sexually abused by her father) she was “just so scared” (1998:372). Her research subjects appear however to be children who lacked a protective parent who *did* listen to them, and it may be that the absence of an alternative model made them particularly vulnerable. That is, for example, Smart et al (2001) describe how a child participant in *their* research had been able to come to reject his father’s violently authoritarian parenting style *because* the child’s mother provided an alternative model of the parent-child relationship when the boy had contact with her (2001:151).

For some children however, neither parent seems willing or able to acknowledge their separate perspective or to accommodate it. Such children may be less able to formulate and communicate views.

As previously discussed, very few children have their views taken by formal means and therefore accessing the views of children *with experience of being heard* is difficult. Researchers are more likely to access children who have experience of *trying to be heard* but not succeeding. Smart et al (2001) described the experience of one 10 year old participant in their study who wrote to a solicitor to see if she could “get something done about going to live with my mum”:

*“in the face of opposition from her father and a refusal by the solicitor to represent her in her own right, Victoria gave in. Her efforts to get independent help failed and her attempt to act autonomously was regarded suspiciously and put down to manipulation by her mother. Doubts were cast on her personal integrity and she found herself in a worse position because her problems with her authoritarian father were ignored.”* (Smart et al 2001:165)

An exceptional study therefore is that undertaken by Douglas et al (2006) in England and Wales, as they were given permission to contact former litigants from court records, enabling the inclusion of the views of 15 children with experience of being heard by formal means in a contact dispute. The children interviewed were aged between 8 years and 15 years and in particular their experiences of how they were treated by the person undertaking reports for the court were gleaned. Some children stated that although they had thought the reason they were being spoken to was to help them sort out their fears, it had become apparent to them this was not the case,

*“they were trying to get me back with my dad and I fell for that one and I went back with him and he, got, he was still like, mistreated me and stuff like that so I stopped seeing him again. What they actually aim to do is get you back with them, not like sort out the problems ‘cause my dad paid them to get me back with them and that’s all they were doing. They never helped me at all, just tried to stitch me up.”* (Lizzie, aged 11 at time of research interview; Morton et al 2006:38).

The lack of confidentiality of their views was also a shock to some children:

*“I thought, ‘I told you that in confidence’ ... its sort of a bit confidence knocking because you build up all this confidence thinking, I’ve got it off my chest now, and then it sort of all goes... bangs the ground when it is fallen down.”* (Elizabeth, age five at time of separation and aged eleven at the time of research interview; Douglas 2006:69)

This child’s father had been charged with assault and affray when he had removed Elizabeth’ younger sister from her mother. The reporter passed on to Elizabeth’s father (during a contact visit she had with him) that Elizabeth only wanted to see him twice a year. Elizabeth was horrified and “asked to go home” (Douglas 2006:69).

Further, it would appear some individuals who prepare reports for the court either do not believe children are genuinely fearful of a parent or that fear is something they just have to learn to live with. One child whose mother was

physically assaulted by her father when he exercised contact commented on the guardian appointed to her<sup>101</sup> that:

*“she wasn’t that sensitive either ‘cos when we were actually at the court on the day when I saw my dad I had a panic attack and I went into shock and I just started crying, and she came up to me and she turned round and said “well it’s a big world and there are plenty of places to hide.” At the time it shocked me because that’s not the kind of thing you’d say. She obviously hadn’t understood anything I’d told her because otherwise she would have been more sympathetic.”* (Kathryn, aged 10 at the time of separation and aged 16 at time of research interview; Douglas 2006:89)

Another child, the elder sister of Kathryn above, had refused to attend contact visits after being head-butted by her father and had this to say of their court reporter:

*“She wasn’t very nice, she didn’t listen to what we said, she wrote down things we didn’t say and the report that came back wasn’t what we’d said at all. She was sat in with all three of us at the same time and what my brother was saying she was then saying back to him but she put the words then into his mouth and he just agreed but it wasn’t what he’d said in the first place. So I actually turned round to her and said, “you’re putting words in his mouth because he is not actually saying that.”* (Jane, aged 11 when her parents separated, age 17 at time of research interview; Douglas 2006:88)

She summarised her view of the likelihood of children trying to be heard by a court thus,

*“from my personal experience the court don’t listen to you so there isn’t any point until you get to a certain age, they just don’t listen to you at all, regardless of what you say, they didn’t listen to me”* (Jane in Douglas 2006:87).

Another child whose mother had alleged domestic abuse during divorce proceedings said of her experience of being interviewed by a guardian appointed by the court,

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<sup>101</sup> Being from the National Youth Advisory Service (NYAS) of England & Wales

*“She didn’t seem to listen to me or understand. If I told her I didn’t want to see my dad she would ask me questions [...]she just kept asking me questions. But I’d already told her I didn’t want anything to do with my dad and I think that she didn’t really like me or my mum and she liked my dad and she was like trying to help him.”(Olivia, aged 8 when her parents separated, aged 11 at time of interview; Douglas 2006:107)*

While another child, Adam, who had a domestically violent father was subject for six years (from the age of six) to demands for contact by his father. He made the following statements at the age of fourteen about the person who had taken his views:

*“I only ever saw her once. She was more the type of person....this will sound harsh but she got her work done to get the big fat cheque at the end of the month. She’d seen a distraught kid, but “oh well, its another kid” as long as I get my cheque at the end of the week I’m happy” (Adam, aged 14; Douglas et al 2006:51)*

The clear message from these children who have experience of expressing their views is they are angry and hurt by what they perceive to be the misrepresentation of their views by those undertaking reports for the court. The purpose of the meeting is not always explained to them, nor is the fact that what they say is not confidential and children’s genuinely held fears may be minimised by report writers.

The damage done by the failure to protect children from domestically-violent fathers determined to have the contact they believe is their ‘right’ is poignantly revealed in Lizzie’s experience;

*“I stopped seeing him because he’s been really bad and it was just yesterday, I was passing down by Woolworths and, you know, just like that, he pointed out the car and went, “you stand there” in an angry voice, I just ran and stuff ‘cause he’s awful to me.” “He’s been chasing me and I’m paranoid to go out anywhere now.”(Lizzie aged 11 at the time of the interview; Morton 2006:29)*

The family therapists, Blow and Daniel (2005) observe the following of the children they see who are referred to them by the courts:

*“they are pessimistic that they will ever be heard. They fear this process will go on and on. They have talked to other professionals who have told them they wanted to hear what the children thought would be best for them, only to be disappointed.”* (Blow & Daniel (2005:174).

These therapists recount the story of one boy (who they call Barney) who they worked with and learnt he had witnessed a terrifyingly violent attack by his father on his mother but:

*“this experience had never found its way into the narrative developed within the legal system, which tended to support the father’s story that the mother was instilling anxiety into her son because of her own antipathy to contact.”* (2005:178)

Barney was apparently angry with both parents – with his father for insisting on contact and with his mother for being too weak to stand up to his father over contact, and too weak to protect herself from violence – both things the mother had, of course, no power over (other than attempting to separate from Barney’s father and resisting contact in court, both of which she had done).

Similarly, another child (called Joe by the authors) was sure she had told a social worker she was frightened of her dad but this, similarly, did not make its way to the court papers. The child had become sad and less willing to talk to subsequent professionals after her earlier disclosure had not been conveyed to the court and she had been the subject of endless litigation for almost all of her 10 years of life (2005:170).

These therapists sum up the treatment of children’s view in legal process - at least in cases where children are negative about contact which are the cases *they* see - thus:

*“children’s voices continue to be unheard and decisions taken which are more in line with being fair to adults than emerging from a thorough consideration of the child’s position.”*(Blow & Daniel 2005:173).

Similar to the experiences of children in the research just cited, Eriksson and Nasman (2008) published a paper presenting their findings of children's experiences of participation in legal proceedings in Sweden.<sup>102</sup> Some of the children interviewed recounted how they were assured that their safety was of primary importance by those taking their views - prior to being ordered *again* to see their fathers against their will. Such treatment literally made them physically ill:

*“ . . . the first time after I had met him I started to feel sick, started to get a stomach ache, I went to the loo, I vomited, but they came again because they did not care about how I felt[.], if I felt good, if I felt sick, I should go there anyway. Even if I felt sick I should go there anyway. I could have stomach ache, I could feel sick, I could . . . it could be anything, but they said you should go there anyway”*  
(Erikson & Nassman 2008:269)

This child also recounted how his father continued insisting the views the boy expressed were his mother's views and, given his sustained protestations, he began to wonder if his father was “mad.” The individuals charged with investigating the boy's welfare in this case however questioned that the boy actually remembered his father's violence while, in the boys view, his memory of it was self-evident (given his views on contact). Eriksson and Nassman conclude that the investigation process in such cases approximates a process of “manipulation and of breaking down the child's resistance” and that the child had been disqualified - both as a participant and as a victim (2008: 271).

## **2:8 Making Sense of Courts Treatment of the Views of Children Opposed to Contact (the message from other jurisdictions).**

As discussed in Chapter One, in *White*<sup>103</sup> it was said that it may normally be assumed that children will benefit from contact and therefore there is no

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<sup>102</sup> They had been allowed to trace children from court records and had interviewed 17 children aged 8 – 17 years, all of whom from families in which there had been allegations of domestic abuse.

<sup>103</sup> *White v White* 2001 SLT 485



onus on the parent seeking contact to demonstrate that the contact is in the child's best interests.

Perry (2006) outlines the line of reasoning taken by the courts as follows:

*“the welfare of the child is the court's paramount consideration; [...] it is almost always in the interests of a child whose parents are separated that he or she should have contact with the parent with whom he or she is not living; the court should use its power to enforce contact orders where necessary; in the occasional cases in which immediate direct contact should not be ordered, [...] there should be indirect contact with a view to establishing direct contact in the future.”* (Perry 2006:13)

Thus courts “have embraced a construction of child welfare that places contact with the father at the centre of child well-being” and the assumption of contact is a ‘normative principle’ that facilitates decision making (Kaganas 2000). Within such a framework the significance of a history of domestic abuse may be minimised as not relevant to the issue of the relationship between the child and his or her father.

However it is not just the emergent rights of unmarried fathers to their children following the passage of the Human Rights Act 1998 that underpins the practice of the courts; but also the predicted poorer outcomes for children when raised by only one parent - and the assumption that this can be mitigated against by ensuring contact between the child and their NRP.

For example, in their research *Divorce and Separation: the Outcomes for Children*, Rodgers and Pryor 1998 state that children of separated families tend to achieve less in socio-economic terms, are at increased risk of behavioural problems, (such as bedwetting, withdrawn behaviour, aggression, delinquency and other antisocial behaviour); tend to perform less well in school and to gain fewer educational qualifications; are more likely to be admitted to hospital following accidents, to have more reported health problems and to visit their family doctor; are more likely to leave school and home when young and more likely at an early age to: become

sexually active; form a cohabiting partnership; become pregnant; become a parent; and give birth outside marriage; tend to report more depressive symptoms and higher levels of smoking, drinking and of drug use (Rodgers & Pryor 1998:unpaginated). This is an astonishing list. However, it is necessary to remain aware that they are reporting a *tendency* for higher numbers of children raised in a lone parent family to do these things - not all will - while some children raised in *two* parent families will fall into some or several of the groups described.

Importantly, Rodgers and Pryor also observe that abusive behaviour is a risk factor for the separation of parental couples and it may be that it is exposure to this behaviour (which may continue for as long as there is contact) that is actually the causal factor. This argument is also put forward by others (eg: Cherlin et al 1991; Craig (2007).

Locking a child into a regime of regular direct contact therefore can be counterproductive where it exposes the child to a continuation of the abuse.

Wallerstein & Kelly (1980) found a subset of children in their 5-year follow up who were “pleased to be away from a disturbed and cruel parent.” The authors observe that, for them, the divorce:

*“led to psychological disengagement from a relationship that was corrosive of the child’s self-esteem or destructive of his psychological and/or physical health.”* (1980:200)

However, 91% of the children in their study were still in contact with their fathers five years post divorce and (bear in mind the previously discussed prevalence of abuse in these families) the authors observe that:

*“The opinion of 56% of children stated there was no improvement in their post divorce family,”* (page 198) *“and ‘fighting’ continued in the parental relationship for 30% of the children – in some cases at a level exceeding that during the marriage.”* (1980:224)

Wallerstein later observes that:

*“Many adolescents are very angry at the court order and the parents that lock them into a custody or visiting schedule that intrudes on their social lives.” (Wallerstein 2005:408)*

Such children reject the parent who insisted on this contact as soon as they “reached majority” and therefore:

*“If the purpose of court-ordered visiting is to enable child and parent to get to know each other and enjoy a friendly, even loving relationship, that strategy has boomeranged badly. Parents cannot rely on the power of the courts to create a loving or enduring relationship with a child.” (Wallerstein 2005:408)*

Fortin (2006) also found that enforced contact with a parent, against the child’s express wishes is not perceived or experienced by children as evidence of a parent’s ‘loving concern.’ Rather these children (who were predominantly university students when consulted) still felt a lot of pain because they had had no control over what happened to them and *because they were not consulted* (Fortin 2006:216 – author’s emphasis). She also found that those who had experienced the worst (life threatening) violence said they had not been protected - even though the existence of domestic violence was confirmed to the court (Fortin 2006:222). Half of the young adults taking part in her study either described the relationship they have now with their father as poor or non-existent. Unfortunately, we are not told which ‘outcomes’ link to cases where there had been domestic violence.

Assuming that a child is vehemently opposed to contact because they have been influenced by their resident parent can have tragic consequences. Carol Bruch (2002) recalls how in conversations with child psychologists she has learnt of children, whose residence had been transferred to their fathers *against their strongly expressed wishes*, who then become suicidal. One such 12 year old boy hanged himself on the day he was to be taken to his father’s home (Bruch 2001: footnote 97).

In 2010, an English court ordered a boy – also twelve years of age to live with his father (*TE v SH and S*),<sup>104</sup> as the court accepted the boy's views were irrational. The court also ordered the boy's *school* should change to the school of the father's choosing. The child was to be transferred to foster carers prior to going to his father's home and to only have telephone or skype contact with his mother with whom he had lived since he was a baby (his parents separating before he was born).

The reason for the transfer was that the boy's reluctance to exercise contact was seen as evidence of his mother's poor parenting.<sup>105</sup>

Two professionals attested to the fact that, in their view, it would have devastating consequences for the boy if he was placed with his father but the court preferred the alternative view.

It is puzzling that telephone contact equates with a sufficiency of contact between the child and his mother. Court's state their function is to "foster a relationship between parent and child,"<sup>106</sup> and yet in cases such as these they effectively attempt to sever the child's ties with their primary attachment – their mothers.

Ottosen observes that *law* originates the rules of the game, defining which arguments are valid and only considers information relevant to *its own* terms (Ottosen 2006: 33). Consequently,

*".. [...] the legal system has selected only those aspects from the complex scientific knowledge about children's welfare that are*

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<sup>104</sup> *TE v SH and S* [2010] EWHC 192 (Fam) – Judge Bellamy presiding

<sup>105</sup> Similar cases have been reported in the media – the case of "C" reported on 20<sup>th</sup> March 2010 <http://www.telegraph.co.uk/news/uknews/7466100/Boy-forced-to-move-in-with-father-will-go-to-foster-home-first.html> and <http://www.telegraph.co.uk/news/uknews/law-and-order/6608541/Judge-orders-boy-to-live-with-father-against-his-wishes.html> 20th November 2009

<sup>106</sup> This exact phrase was used by Lord Justice Wall in *Re A-H (Children) (Contact Order)* 2008] EWCA Civ 630. See also the commentary by Lesley-Anne Barnes (2009) "Dear Judge, I am writing to you because I think it's pathetic" (Case Comment) Citation: Edin. L.R. 2009, 13(3), 528-533

*compatible with the law's own thinking and rationalities.*" (Ottosen 2006:33)

Furthermore Nigel Thomas observes, "there is often an unspoken assumption that, where children use different criteria for making choices, those are necessarily defective or at least inferior to adult criteria." (Thomas 2000:186).

Blow & Daniel also comment that:

*"children are not afforded agency to be able to judge relationships and find them wanting, whereas survival of a relationship depends on what each person does rather than an immutable quality in the relationship itself."* (Blow & Daniel 2005)

Within such a framework, contact is no longer a right of the child which the parent has a responsibility to meet, but a right of the *parent* that the child is obliged to meet.

The research by Wilson and Laing into the views of pursuers previously referred to in this chapter was undertaken concurrent to this thesis. While they found the mostly male pursuers were negative in respect of the child's views being taken, the authors observe that:

*"we are limited as regards what we can infer about the reasons **resident** parents and **non-resident women** go to court over contact."* (2010:3:20 author's emphasis)

They also suggest:

*"Exploring the views of defenders would enable a more rounded picture of how parties experience court action, and would provide a complementary picture of the experience of women in the court system for contact cases. In addition, research with children should be considered in order to ensure that their views of court action are represented."* (Wilson & Laing 2010:8:44)

It is hoped the present research may begin to address the need for the experiences of women and children in Scotland to impact on present

assumptions as these assumptions diminish the genuine participation of children in private law contact disputes - to the detriment of their welfare.

## CHAPTER THREE - METHODOLOGY

### 3:1 The Evolution of the Scope of the Research

The original proposal for this doctoral thesis, submitted to the Economic and Social Research Council (ESRC) in 2005 as part of a 1 +3 application for funding<sup>107</sup> was entitled: “The voice of the child in negotiating contact where there is a history of domestic abuse.” The author proposed this topic for (as the previous chapter illustrates) existing literature indicates the assumption of contact may mean that, where there is a history of domestic violence, children may not be adequately protected and their voices ‘too faintly heard’ (Hunt & Roberts 2004:2).

The original focus therefore was rather narrow, with the aim being to ascertain how *children who had been exposed to domestic abuse* felt about their treatment when their views were taken by formal means in private law contact disputes in Scotland. However such a narrow focus would preclude the experiences and views of children who had experienced parental separation but *not* domestic abuse – while these might arguably be expected to be the majority of children whose parents take their case to court (given for example that McGuckin and McGuckin found *allegations* of abuse in only 30% of cases in their 2004 research).

Clearly therefore, the inclusion of data on the extent and means by which *all* children whose parents go to court are afforded an opportunity to express a viewpoint, as well as the treatment of those views once taken, would provide a broader base for analysis *as well as* enabling the experiences of those with a domestically abusive parent to be contrasted with those who do not.

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<sup>107</sup> This funding enabled the author to undertake a MSc in Criminology & Criminal Justice and the present doctoral research in the School of Law, University of Edinburgh.

This thesis therefore analyses the treatment of *all* cases in which contact was an issue, raised in two sheriff courts during the one calendar year (2007).

Secondly, rather than focusing solely on the experiences of *children* with experience of having their views taken in private law legal process, the remit was broadened to include the perspectives of a range of actors involved in legal process. The reason for this was two-fold. Firstly, the author was informed permission would not be forthcoming to *access the children* of former litigants from the court records which form part of the data set (as Butler et al 2003 / Douglas et al 2006 had done in England and Wales). There was a real possibility therefore, that it might prove impossible to trace children *with experience of* being heard by formal means in private law legal process. It has already been seen that this was the experience of Tisdall et al (2002/b) who were only able to access five children via the solicitor who had represented them - but who accessed *no children* with experience of speaking to a court reporter or of filling in a F9 form, writing a letter to court, or speaking to a sheriff (in their focus groups).

Secondly, the use of mixed methods and the collection of data from a range of participant types would enable the *triangulation* of the findings (see: Web et al, 1966) enabling greater confidence in the research findings (Bryman 2004:275). This is particularly the case as the narratives of legal practitioners provided causal explanations for the observable treatment of children's views in the court data set.

Consequently, the research question was modified to that which is stated on the first page of this thesis.



### 3:2 Research Design

The key 'actors' involved in the process of ascertaining the views of the child in legal process include *family lawyers* (who may crave intimation or dispensation of intimation and who may represent child clients or act as court reporters); and *sheriffs* (who may order or refuse a crave for intimation or a minute asking permission for a child to enter as a party to the action, or suggest/refuse a request for the child to speak to the him/her). Additionally, *parents* may be instrumental in requesting their child's views should be taken, or may challenge the origins of the views expressed by their child; while potentially *children* themselves may actively seek to be heard in legal process when they are unhappy with the arrangements that have been made without their input. Further, *non-legal practitioners*, working in services supporting children who may be the subject of court ordered contact (from organisations such as family mediation, Children First and Women's Aid) could be expected to have a perspective on the treatment of the views of children in these circumstances.

Thus, the author designed the research so as to access *all* such individuals. Consequently, a Questionnaire for Solicitors (Appendix 1) and a Questionnaire for Parents (Appendix 2) were designed (see below at pg 108 onwards). Solicitors receiving a Questionnaire for *Solicitor's* were asked to forward the Questionnaire for *Parents* to former clients who had taken a dispute over child contact to court. Parents receiving their questionnaire were also sent a Research Information Leaflet aimed at children and were invited to consult with their child to see if they would like to take part in the research. In the event that very few potential child interviewees were identified by this means, a specialist law firm who represent children *only* agreed to forward letters directly to former child clients.

Both the questionnaires invited respondents to say if *they* were willing to be interviewed and gave them an option to email the researcher separately if

they were concerned that, by giving their contact details on the completed questionnaire, this might affect the confidential treatment of their views.

Non-legal practitioners were approached by the author at conferences,<sup>108</sup> and existing contacts within organisations that work with children were re-contacted.

In respect of the collation of a court data set on how children's views are treated in legal process, the author noticed previous court data sets in Scotland provide little or no information on the *views expressed* by children by formal means,<sup>109</sup> as well as no analysis of the extent to which *court outcomes* correlate with the views expressed by the child concerned. The author therefore determined to seek this information from court processes (where children's views were borrowable) in addition to data on the *numbers* of children having their views taken, and the *means* by which they were taken.

The next section of this chapter discusses how the ethical issues raised by the proposed methodology were addressed and how approval was obtained from the Research Ethics Committee of the School of Law, University of Edinburgh. It was once this approval was received, that the author was in a position to invite participation in the research and to request access to court data. It was also then that staff at the Graphics Lab, University of Edinburgh were approached who assisted in the design of a poster and Research Information Flyers. These flyers were included in all mailshots, in addition to being displayed within the offices of organisations providing support services to children or free legal advice. The logo and image from the posters and flyers were used in various scales by the author on all correspondence related to the research and on the cover of the Questionnaire

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<sup>108</sup> Various on Child Contact, Child Protection and the Participation of Children.

<sup>109</sup> McGuckin & McGuckin are an exception to this as they do recount some of the content of children's letter to the court in their research (2004).

for Solicitors. These are printed below in grayscale but were in colour on the research literature.

### Listening to Children and Young People Whose Parents Live Apart



### **3:3 Obtaining Approval from the Research Ethics Committee**

The Research Ethics Committee of the School of Law places considerable emphasis on the highest standards of professional and ethical performance - as outlined in the School of Law policy document on research ethics.<sup>110</sup> This policy is compliant with the ESRC Framework for Research Ethics 2010.

The School of Law uses a three level approach to the assessment of the ethical implications of research - Levels 1, 2 and 3. Level 1, is a self-audit checklist for ethical review and is completed by the researcher and supervisor. If there are risks of potential distress or potential problems with

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<sup>110</sup> see: <http://www.law.ed.ac.uk/research/researchethics.aspx>

confidentiality, data protection or consent, conflicts of interest or moral issues, the project requires Level 2 assessment.

As the present doctoral research involved interviewing children, it required this Level 2 assessment to be completed. The key issues addressed concerned how the data would be kept confidential, how informed consent would be obtained and what steps would be taken to minimise the risk of harm to the children or young people who might consent to participate in the research.

The author also submitted for scrutiny copies of the following documents: the research proposal, a consent form for children a Research Information Leaflet for children an Interview Workbook for children and an Interview Schedule for children.

The School Ethics committee then referred the project to Level 3, which requires approval from the College of Humanities and Social Sciences Ethics Committee. They then referred the Research Ethics checklist for scrutiny by an external reviewer with expertise in discussing sensitive issues with children and young people. The ethical dimensions of this doctoral research were thus assessed and approved.

An Enhanced Disclosure Certificate was also obtained by the author / researcher.<sup>111</sup>

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<sup>111</sup> Under the Police Act 1997, Disclosure Scotland was established in 2002, operating within the Scottish Criminal Record Office (SCRO). The service provides information about people seeking positions (including research) involving contact with children under 18 or other vulnerable members of society such as the elderly, sick, people with disabilities or special needs.

### 3:3:1 Key Ethical and Methodological Considerations

The primary ethical issues to consider when undertaking research are those of *confidentiality* and *informed consent* as well as protecting the researcher and the researched from harm (eg: Ritchie & Lewis 2003). These are also the key ethical considerations of undertaking research with *children* (see: Alderson 1995, Thomas and O’Kane 1998; Punch 2002) for, as Christensen suggests, children, like adults, are *human beings* and as such deserve comparable treatment (Christensen 2004).

In respect of the data collected from *adult* participants, the purpose of the study and the way in which the findings would be disseminated (doctoral thesis, academic papers and texts, conference papers and presentations) was explained to all interviewees, as well as the fact that any quotes used would be anonymised.

Legal practitioners were informed in advance of the research by a notice in the Family Law Bulletin and the author wrote to the Family Law Sub Committee of the Law Society of Scotland asking them to raise awareness of the purpose and scope of the research - with a view to increased participation. Both the covering letter and the Questionnaire for Solicitors (Appendix 1) made practitioners aware that their responses would be anonymous.

Covering letters for non-legal practitioners varied according to the role and organisation the person worked within, however the purpose of the research and the anonymity of participant’s responses was always included in requests for interview and/or permission to display flyers/posters or to distribute Questionnaires for Parents from their organisation. Similarly the letter to parents emphasised the anonymity of participation in the research and the inside front cover of the Questionnaire for Parents detailed the purpose of the research. Both the letter and questionnaire included the

contact details of the researcher so that additional information could be obtained if requested.

When interviews were conducted with adults, participants were first given a Participant Information Form to read before being asked to sign two copies of the consent form - one for the interviewee to keep and one for the researcher. The consent forms included specific consent to being recorded and the consent form for non-legal practitioners also asked respondents whether they would be happy for the name of the organisation or service they worked for to be credited with having taken part in this research.

### **3:3:2 Additional Ethical Considerations of Interviewing Children**

Morrow (1999) pointed out there is a risk that the power imbalance between adult researcher and child participant may too easily be overlooked when one approaches research from the perspective that the *same* approach to interviewing adults may be sufficient when interviewing children. Whether the power imbalance between an adult researcher and the child or young person taking part in research is thought to be “because of their relative size and their position within social institutions” (Christensen 2004:173), or because of their lack of knowledge and experience (Morrow & Richards 1996:97), adults usually have power over children.

Further, as Punch observes, many children “may not be accustomed to expressing their views freely and being taken seriously by adults, especially in a one to one situation” (2002:325). Consequently, children can find it hard to say “no” to an adult for, “children are used to having to try to please adults and they may fear adults’ reactions to what they say (Punch 2002:328).

Pragmatically, the children interviewed as part of this research project had first given their ‘consent’ to take part to their *parent*. As Punch observes it is widely recognised that adult gatekeepers limit the adult researcher’s access

to children (Punch 2002:323), and most of the parent interviewees taking part in this research stated they had *not* mentioned the research to their child/ren.

Once within the homes of the two child interviewees for the purpose of interviewing them, the author had to ensure that they *did* appear willing to take part in the research and to obtain both their written consent as well as that of their parent. In strict interpretation of the law, a competent child should be able to consent on their own behalf; however, pragmatically, there was a significant risk that the project would not receive ethical approval without parental consent and the author therefore was bound to obtain the written consent of parents for children under sixteen.

Regrettably, or course, this means that some young people may have chosen *not* to take part in the research as they would not want to raise this issue with a parent. An individual from one of the support services who participated in this research observed that none of the young people using their service (specifically for abused youngsters) would take part *because of the requirement to obtain parental consent*. There is a clear irony that tick boxes on ethics forms may mean some of the most vulnerable children are excluded from research and their voices never heard. As will be seen in this thesis, well meaning adults may similarly choose not to speak to children in legal process out of concern not to cause them distress, also resulting in the children remaining unheard.

All that said, when the author explained the need for their consent as well, to the *parents* of the two children interviewed, they were clearly of the view that this is as it should be – highlighting that if their permission were not sought, parents who were aware of their child's potential participation might actually boycott that participation.

Upon arrival, and after an initial chat on what the young people were doing during their holidays (both interviews fell on holidays from school), the

author began by explaining what the research was about, why it was being done and that they were invited to take part as they had experience of giving their views when their parents could not agree on the amount of time they spent with the parent they did not live with. The author then sat beside the young person and read through the first four pages of the Interview Workbook. It was decided to have a workbook as children are accustomed to visual and written techniques in school (Punch 2002) and this is a means by which the potentially uncomfortable intensity of a one-on-one conversation with an unknown adult can be diffused. During the interview, the children could use stickers and pens provided by the author to draw themselves and their family. The boy interviewed did this enthusiastically at the close of the interview (when his mother showed me the letters from the boy's solicitor to him); however it was suspected the girl interviewed might feel patronised by the suggestion she do a drawing, and so the interviewer pointed out the opportunity was there as all ages of children may use the Interview Workbook and she was welcome to use the page if she was "feeling creative!"

The first pages of the workbook explains that the child's views will be used anonymously and gives an example of what this means; as well as giving the young person the opportunity to choose a "research name" (pseudonym). Actually, neither young person seemed keen to do this, and, in hindsight, the author could have given the child a list of names and asked them to choose one they liked. *However*, it is a matter of some interest that the children themselves seemed to want *their own names* to be next to their words.

The work book explained also that the researcher wanted to speak with the young person on their own, as having someone else there can "make it hard to say what we really think." Regrettably, however the writer suggested to the boy (who was the first young person interviewed) that his mother *could* be present if he preferred, while the child's mother was *in the room*. The boy therefore glanced anxiously at his mother and took his lead from her (she suggested she stayed). While the atmosphere in the room throughout



the interview was happy and relaxed, it did mean that the boy's mother interjected a 'corrected' version of events into the boy's narrative, while the author actually wanted *his* version of events. Interesting points were made by the boy nonetheless, but far more was gleaned from the interview with the other young person as, on this occasion, the author merely confirmed that it *was* intended to interview the girl on her own – when asked by the girl's mother. Then, once the author was alone with the girl, a check was made that she was ok with that - and that she could ask her mum to join us at any time if she wanted. Of course, it may be hard for a young person to put this into effect and, as with the interviews with adults, the author carefully observed the young person for signs of discomfiture.

The Interview Workbook also gave the young people the chance to practice saying “no” to a question asked by the researcher. For this purpose, they were given an cardboard arrow with the word “NEXT” on it, to indicate that they did not want to answer that question and the researcher should move on to another question. The boy interviewed seemed particularly pleased and approving of this and nodded enthusiastically when handed the arrow; while the girl interviewed seemed a bit bemused and agreed with the researcher's suggestion that she did not have to use it - but could just say she did not want to answer that question and that would be just fine. In providing the young people with this tool, the author was attempting to redress the power imbalance by giving the child “control over something physical that has an impact on the behaviour of the adult researcher” as suggested by Christensen (2004:171), amongst others.

A further important ethical issue that required addressing was the appropriate response if a child revealed they are being harmed. In the context of the present research, the author was aware that disputes over child contact often occur against a background of domestic abuse and also knew (through the interview with the mother) that one of the children interviewed had been exposed to domestic abuse, and continued to be subjected to threats made to harm his mother during contact.

It is generally accepted that before speaking to a child, a researcher should make the child aware that *if* they reveal they are being harmed, it may be necessary to report that harm to another adult so that the child may be protected. Further, Thomas & O’Kane state that a revelation of harm may be taken to indicate the child is ready to talk and to pass on the information to a person in a position to do something about it (Thomas & O’Kane 1998:340). Given that there was the possibility that the child interviewees were “being harmed” by forced contact with abusive non-resident parents - and that the children might describe this to the researcher - it was necessary to reflect at length on the most appropriate approach in these circumstances. Clearly, their inclusion in the research meant that these were children whose cases either were, or had been, before the court and where it was the case that the children did not want contact because they did not like the behaviour of their non-resident parent, the court would *be already aware that this was alleged*.

Therefore, any information revealed by the children was likely to be *already known* to those charged with protecting the welfare of the child. The children were therefore told that if they revealed they are being hurt by someone or in fear of being hurt, then it may be necessary to pass that information on to someone who can take steps to protect them, *unless what they tell me is already known* by that person.

Pertinently, neither child was subject to an order to attend contact with their non resident parents if they did not want to *at the time of the research interviews* and neither child revealed harm of a type that had not already been put before the court.

Clearly, given the nature of the topic of this research, there was a further ethical issue that required addressing and that is the risk of psychological stress or discomfort for the children who agree to take part, and therefore the following measures were taken before gaining the child’s consent to take part:

- I acknowledged that *all* people, both adults and children can find it difficult to talk about things that have happened in the past which were difficult at the time.
- I observed that talking about things that have happened in the past can sometimes make you start *thinking* about them more for a while afterwards and we discussed who *they* could talk to if they felt they needed to (this person's name was then put into the workbook).
- We discussed why it is that s/he had agreed to take part in the research as these reasons were likely to be *positive*.
- It was pointed out that I am not in a position to *change* things for them but I wanted to learn from them to see how best to meet the needs of children whose parents separate in the future.

The above points were repeated at the end of the interview when we went over last page of the workbook which contained suggestions of people and organisations the child could contact if s/he wanted to talk to someone. Additionally, to minimize the potential harm which may result from a person 'unburdening' problems to someone with whom they then have no further contact the workbook included details of how the child could contact me again if s/he thought of something else s/he would have liked to have told me.

Finally, during the interview process it was emphasised that when parents cannot agree how often their child should see each parent it is the *judge* who makes the decision. This was intended to reassure the young people who might worry that they could or should have done something differently when their parents were in dispute over contact.

A 'thank you' card with an enclosed £10 store voucher and a certificate of participation was posted to the young people the day after the interviews to

demonstrate that their time and thoughts were respected and appreciated. It was hoped this would contribute to them feeling positive about their participation in the research project. They had not been told they would be receiving this as it might unfairly persuade them to participate despite misgivings.

Thus, *in practice*, the interviews with the two young people differed significantly from those conducted with the adult participants, as not only *informed consent* and *confidentiality* had to be considered but also power imbalances and the comparative strangeness of an unknown adult speaking one-on-one with a child.

### **3:4 Gaining Access to Court Data**

Following advice on the correct procedure, the author wrote to the Scottish Court Service, the Lord President of the Court of Session and the Sheriff Principals of two courts to obtain permission to conduct a census of all contact cases lodged at these courts over a calendar year. Permission to interview sheriffs based in the courts was sought at the same time – with the author being given the direct contact details of sheriffs willing to take part, in order to arrange these.

The sheriff principals of both courts and the Scottish Court Service expressly stipulated two conditions to the access granted being:

1. No identifiable personal details of parties, sheriffs or court staff be collected during court visits and,
2. Any draft report(s) should be submitted to the [sheriff principal/s] for consideration before publication.

These terms of access have been rigorously complied with – with sheriff principals being sent a Background Paper prior to the author making an oral

presentation of the research findings from the court data set at a conference organised by the Scottish Child Law Centre and Murray Stable in June 2011.

This following discussion describes the process of collecting and analysing the court data and the characteristics of the cases comprising the court data set.

### **3:4:1 Court Data Set**

The data set comprises 208 cases from two sheriff courts, concerning 299 children. The author chose to seek permission from *two* courts as it may be that practice varies between courts and because it was possible that one or other sheriff principal might refuse the request. Two courts within reasonable commute from the author's location in Edinburgh were chosen. Both were busy urban courts.

The author meet with the Head of the Civil Department of each court, prior to placement in the courts, so as to become familiar with where the information sought could be found within each process. The year 2007 was selected as the year of study and therefore all cases were raised after the Family Law (Scotland) Act 2006 came into force requiring a court to take account of the need to protect a child from abuse.

Printouts from the computerised Court Management System (CMS) indicated the following numbers of actions had been raised in 2007:

At Court A, there were 1518 family actions lodged and at Court B, 1,893 family actions. In addition to the action types shown in **Table 3:1** less than 10 cases each were lodged for a further five action types at Court A;<sup>112</sup>

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<sup>112</sup> Involving 12 cases in total. These were: specific issue order (1), Aliment for child (5), Debt (2), Declarator (2) s86 Parental Responsibility (1), other (1).

while less than 10 cases each were lodged for a further 10 action types in Court B.<sup>113</sup>

**Table 3:1 Number of Key Action Types raised in the Data Set Courts in 2007**

	COURT A	COURT B
<b>Simplified Divorce/Dissolution</b>	<b>744</b>	<b>906</b>
<b>Divorce</b>	<b>570</b>	<b>619</b>
<b>PRR / Declarator of Paternity</b>	<b>94</b>	<b>157</b>
<b>Residence</b>	<b>31</b>	<b>64</b>
<b>Contact</b>	<b>38</b>	<b>92</b>
<b>Interdict</b>	<b>29</b>	<b>27</b>

Once placed in the courts, the author discovered a significant number of actions are raised by non-parents, particularly grandparents - often following placement of children with them by social services where the child's mother has a substance abuse problem. All but seven of these cases (involving 9 children) were excluded from analysis. Those retained hinged around contact between a *parent* and child (albeit a grandparent raised the action).

Some of the cases lodged in 2007 will have been active at the time the researcher was placed in the court and therefore the processes will not have been in the storage boxes and therefore are not included in the court data set.<sup>114</sup>

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<sup>113</sup>Involving 27 cases in total. These were: specific issue order (1), Aliment (spouse) (6), Debt (1), Declarator (6), other (2), 'Delivery' (3) Division and Sale (1), Guardianship Welfare (2), Maintenance orders Act 1950 (4), Non-Harassment Order (1).

<sup>114</sup> An initial trawl of 2008 cases found a high number were missing from the boxes as still active, while most 2007 cases could be accounted for in storage.

The data was collected from the two courts between 20<sup>th</sup> April, 2009 and 8<sup>th</sup> July, 2009.

### **3:4:2 The Collection of Court Data**

At both courts, the researcher conducted a manual trawl of all family actions disposed of into storage, other than cases of *undefended* divorce and simplified divorce or dissolution raised in 2007. That is, the author read the processes of approximately 480 cases.

#### Court Data Sheets

Once a case was identified as a dispute about contact from either the craves on the Initial Writ or on the Defences, the author entered information taken from the processes onto a Court Data Sheet.

This recorded the following: case number, date action lodged, marital status of parents, period of marriage or cohabitation (if any), the pattern of contact since separation, whether Defences were lodged and defenders craves, whether parties were in receipt of legal aid, a “summary word” in respect of contact eg: “Yes” or “stopped March 2007.” Further, also recorded on the sheets were: the sex of the pursuer and relationship to the child and all pursuers craves; the age and sex of the children and whether intimation was craved and whether granted or, if dispensed with, the reason given. Also included was whether any of the following were appointed/occurred: Solicitor for child, curator *ad litem*, court reporter or other reporter, shrieval interview of the child or a minute for the child to enter the process.

Additionally a record was kept of the total number of hearings and whether a proof was set (and whether it proceeded). A note was made also of the views expressed by the child (where known and borrowable) and any comments made on the veracity of that view by adults; and whether any contact was ordered (and whether it was supervised or in a child contact

centre), as well as the contact outcome of the case (including a “summary word” outcome - such as “stopped,” “no contact,” “contact increased”).

It was known that abusive behaviour, substance abuse and allegations of mental illness would be prevalent as previous research has found this to be so; however, in order that a meaningful analysis might be made of the factors affecting the views a child expressed, it was necessary to have an understanding of the background in the cases in the data set. Therefore the Court Data Sheets also included a tick sheet in respect of the following background information: whether there were allegations of domestic abuse (and who by, and the alleged victim), whether the child was alleged to have witnessed abuse, whether the police had been involved and whether there were allegations of substance abuse, mental illness or abduction of the child. Also, whether there was evidence of criminal convictions, or whether one party was in prison when the case was raised, and whether there was evidence of social work involvement and if so, of what kind (eg: child protection order in place). There was space on the form to write short explanatory notes where necessary.

From Court A, a total of **82** contact disputes between parents were identified and entered onto the computer data set, involving **100** children.

However Court B had a significantly higher volume of cases than Court A and it was unfortunately not possible to manually trawl all the processes within the six weeks the author was based in the court. It was however possible to review all cases raised within the first 37 weeks of the year (until 14<sup>th</sup> September 2007).

Thereafter, in an attempt to include data from as much of the calendar year as possible, during the final days in Court B, data sheets continued to be filled out for disputes over child contact between parents *but only where the views of the children had actually been taken*. This enabled the researcher to cover cases raised up to week 45 (9th November 2007), and the inclusion



of a further 8 cases in which children's views had been taken. A disadvantage of this however, is that at the analysis stage it may appear a greater *proportion* of children had their views taken than is actually the case, however it was decided the additional information gleaned from cases in which children expressed a view, was sufficiently important to justify a relatively minor inflation of the *proportion* of children expressing their views across the data

The data set for Court B comprises **126** cases involving a dispute over contact/residence concerning **199** children.

*This brings the total of the combination of the data sets from both courts to 208 cases, involving 299 children.*

The next sections discusses how the court data was coded and analysed, prior to a section profiling the 299 children comprising the court data set and the extent and manner in which their views were taken.

Thereafter, the chapter discusses the design and dissemination of the two questionnaires before ending by outlining the profile of the respondents and the selection of interviewees.

### **3:4:3: Coding & Analysis of the Court Data**

After collection, the data had to be coded for entry onto computer for analysis using Predictive Analytics Software (PASW).<sup>115</sup> This coding was an extremely time consuming process – taking over three months to complete.

Information was entered onto the computerised data set *for each child* rather than for each *case*, as the views of children within the same family may be

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<sup>115</sup> The author undertook training in Quantitative Data Analysis in the School of Social and Political studies, University of Edinburgh.

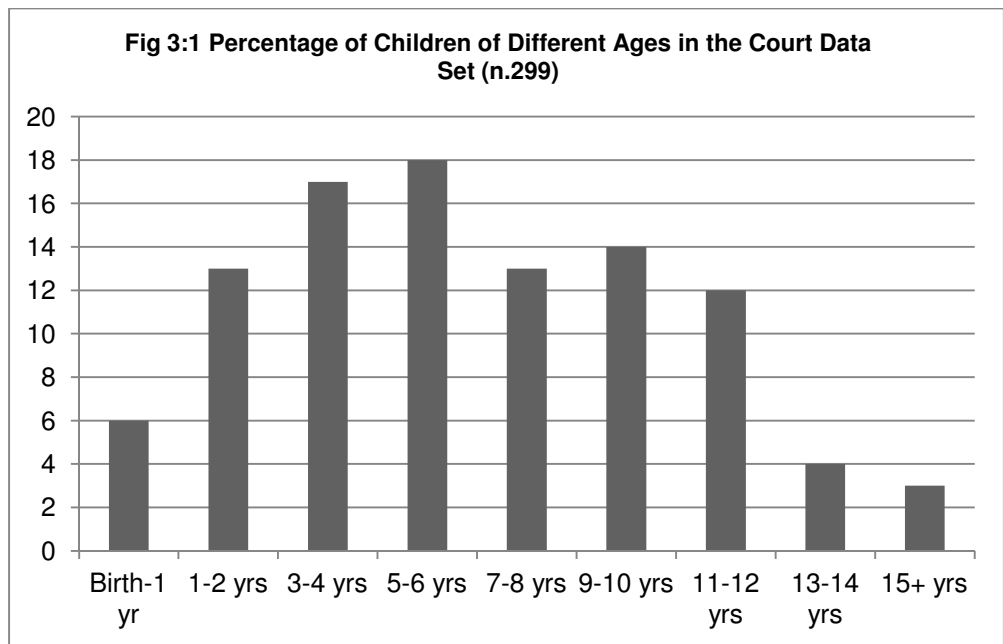
taken by different means, or only the view of older sibling/s may be taken. Furthermore, the views expressed by children within the same family may differ.

The principal methods used for analysing the data once coding was complete was the use of frequency tables and cross tabulations – the latter enabling factors (such as the sex of the resident parent) to be controlled for in order to determine whether this had a measurable effect on, for example, whether or not the child exercised contact with their non-resident parent.

### **3:4:4 Characteristics of the Children in the Court Data Set & How their Views were Taken**

The ages of the 299 children affected by the 208 court actions which comprise the court data set are presented on the next page.

**Fig 3:1** on the next page illustrates the percentage of the children of different ages comprising the court data set.



Over half the children were aged six years and under, while only 14% (n=41) were aged 12 years and over. Twelve years is the age at which there is a statutory presumption of competence to formulate and express a view.

There were almost numbers of male and female children, with 50.5% being male and 49.5% being female. Three-quarters of the children lived with their mothers (n= 220), while sixty-four were living with their fathers *at the time the case came to court* (being 22%). The remainder either lived with a grandparent (n=9) or with both parents, while one child moved between homes (shared care).

The cases in the data set had been lodged between 1.5 and 2.5 years prior to the data collection. 21% of the cases in the data set had lasted between 12-17 months, 12% between 18-23 months and 6% over 2 years from the time the Initial Writ was lodged to the last hearing in the case at the time of the data collection.

At the time the actions were raised 18% of children had been exercising contact with their NRP, while 41% had exercised contact since separation of the parental couple but this had since broken down.

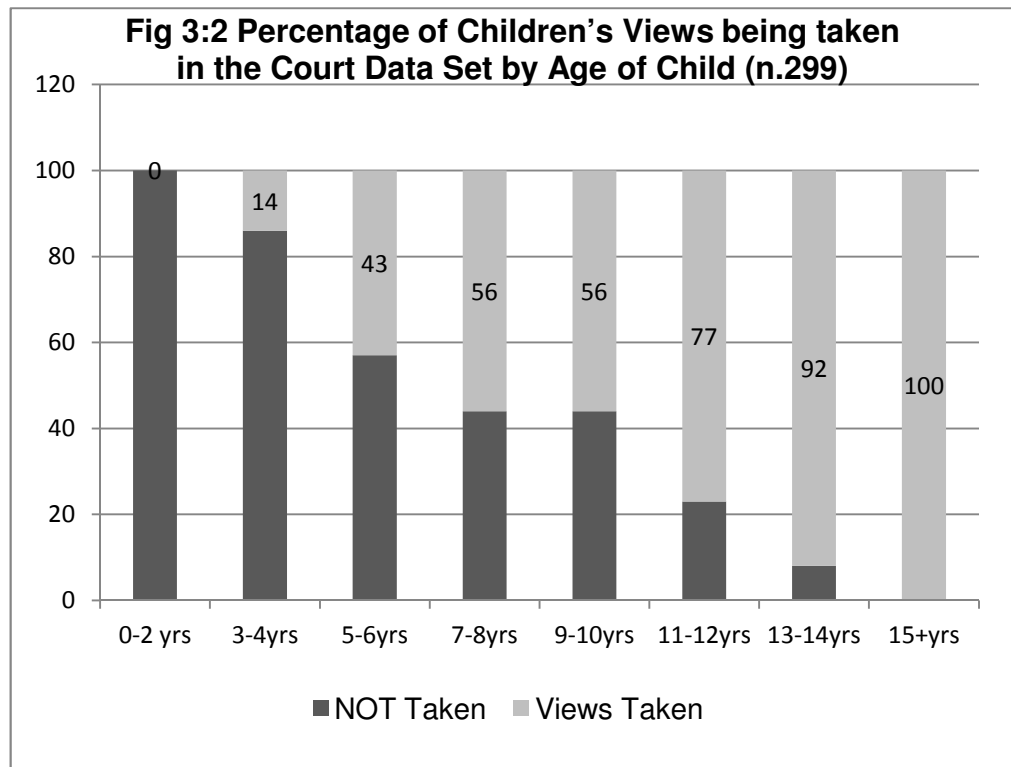
The parents of 38% of the children were (or had been) married to one another, while almost a quarter were former cohabiting couples. However 36% had *never* lived together and a further 1% said there was no underlying relationship between them. Seventeen of the children had been born to unmarried parents after the 4<sup>th</sup> May 2006 and the names of the fathers were on the birth certificates of ten of these – affording their fathers automatic parental rights and responsibilities (PRR). The fathers of two children had entered into agreements with their mothers prior to this date and had PRR in this way.<sup>116</sup>

The views of 125 of the 299 children were taken by formal means - representing 42% of the court data set. It can be seen in **Fig 3:2** on the next page, that by the time a child reached seven years of age they were more likely to have their views taken than not.

The youngest children to have their views taken were three year old twins whose views were taken by a Social Worker. Court reports were the most common method of ascertaining the child's view with 86% of the children *who had their views taken*, having them taken by this means.

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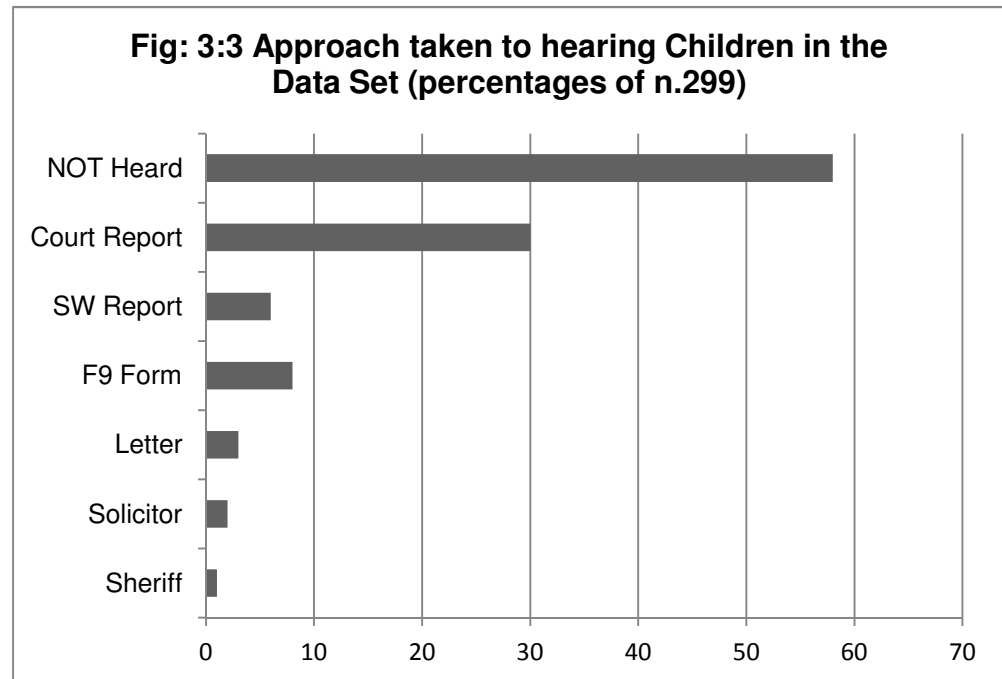
<sup>116</sup> Under s4 of the Children (Scotland) Act 1995



Additionally:

- Intimation was granted to 52 children and 25 returned completed F9 forms
- 9 children sent letters to the court
- 5 children had their own solicitor
- 3 children spoke with a sheriff

Figure 3:3 below shows the means by which the children in the court data set had their views taken. It can clearly be seen that the majority (58%) did not have their views taken.



The majority of children who expressed their views in the data set did so by one means only, however twenty-five children, from seventeen cases expressed their views by more than one means. Children who gave their views by more than one means were significantly more likely to belong to a household where intimation of a child of that family had been granted (see discussion in Chapter Six).

### 3:5 Questionnaire Data

As stated, this research project included *two* questionnaires – one for solicitors and one for parents.

### 3:5:1 Design of the Questionnaires

Careful thought was put into the design of the questionnaires so that they asked the key salient questions but were not so long or complex that they put respondents off completion. Both questionnaires contained 22 questions. Efforts were also made to keep the presentation clear and to give clear instructions such as “tick all that apply.”

When designing a questionnaire, it is useful to look at the research instruments used by others which have yielded fruitful findings and to learn from their observations of the problems they encountered. For the present research, the author started by reviewing the questions used by Gallegher (1999), when she undertook research for the Scottish Child Law Centre, as her research also included a questionnaire for Solicitors. Her questionnaire included a question on whether solicitors present the child’s *wishes* to the court OR what they consider to be in the child’s best interests and whether this varied by *role*. This question was included in the present research also as it seemed particularly pertinent to the research question.

As well as being intended to generate factual information – such as the numbers of children represented by the solicitor-respondents (and in what capacity), it was particularly hoped to gauge the *attitudes* of solicitors to the taking of children’s views in legal process, as well as to the views children express. For example, the questionnaire included questions on the extent to which they believe children will have been “coached” by a parent when they say they are frightened by the other parent (one for children aged under 12 and one for children age 12 and over). When questions were designed to gauge attitudes a variation of the Likert Scale<sup>117</sup> was used – whereby respondents could choose the degree to which they agreed with the statement.

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<sup>117</sup> Named after Rensis Likert who developed the method (Bryman 2004).

After the initial questions gleaned personal factual information, the questionnaire for solicitors was divided into two sections – one pertaining to acting as a curator *ad litem* or court reporter, and the other pertaining to acting as a solicitor for a child client (See Appendix 1 for further details).

The primary purpose of the Questionnaire for Parents was to engage with parents in the hope that this might lead to interviews with children. However, it also provided an opportunity to gauge parents' thoughts on the treatment of their children's views in legal process. The questionnaire began with questions gleaned basic background information such as the gender of the respondent, the age/s of his or her children and which parent the child had been resident with at the time of the dispute. Thereafter respondents were asked "In your dispute about contact, what could you not agree on?" as previous researchers have suggested parents are engaged in a parenting competition (Smart et al 2005), and the author was interested to see if this was replicated in the present research.

Thereafter followed questions on whether the *respondent* spoke to their child to gauge their views (and if not, the reasons why), as well as whether their solicitor had suggested taking the child's views, or given any reason for not doing so. Parents were asked to tick all the ways in which their child had been heard and were given the opportunity to state in open text boxes what they thought of the treatment of their child's views by court reporters (where relevant) or by the sheriff in the cases that s/he had spoken with the child.

Ideally, research instruments such as questionnaires should come out of focus groups with those from the same sector as the intended recipients for comment. However, in respect of legal practitioners, they are extremely busy individuals and this would not have been practical so the researcher instead discussed the content and design of the research instrument with a colleague who is a former family law practitioner. The questionnaire for *parents* was sent to a couple of individuals working in services providing



support to families, and they provided helpful feedback. Given that the primary purpose of the questionnaire was to facilitate *interviews*, it served this purpose adequately.

### **3:5:2 Dissemination of both Questionnaires**

Initially, the questionnaires for solicitors were *posted* to all members of the Family Law Association of Scotland listed on their website with an enclosed postage paid envelope – n.279. Where the practice was known to contain more than one solicitor specialising in family law work, more than one copy of the questionnaire was sent. Initially, thirty-seven completed questionnaires were returned by solicitors by post.

As the author hoped to gain access to children via solicitors who had acted for parents taking a contact dispute to court, an unsealed “Parent’s Information Pack” was also included in this mailshot to solicitors.<sup>118</sup> This Pack included an explanatory letter, the Questionnaire for Parents (Appendix 2), and the Research Information Leaflet aimed at children and young people as well as a postage paid envelope addressed to the author. The Questionnaire for Parents included information on how they could alternatively complete the questionnaire *online* as the author used Survey Monkey<sup>119</sup> to create a survey. The link to this survey was also put on the author’s university webpage, along with a link to the Research Information Leaflet. A total of twenty-nine parents either completed the online questionnaire or returned a questionnaire by post.

Three weeks after the initial mailshot to solicitors, all solicitors listed on the Scottish Family Law Association’s website were sent a reminder email which included a link to an online version of the Questionnaire for Solicitors – the author having again used Survey Monkey to create a

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<sup>118</sup> It was unsealed so that solicitors could peruse the contents and determine if they were comfortable sending this to a former client.

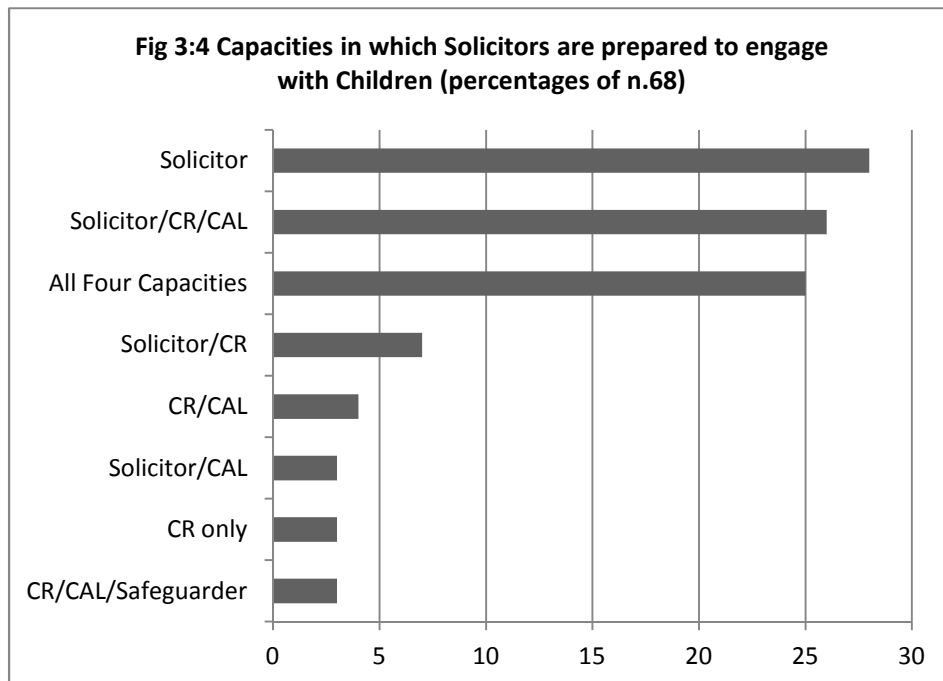
<sup>119</sup> This is available online and enables anyone who is prepared to pay the subscription fee to design and disseminate a questionnaire.

duplicate of the postal questionnaire. This significantly increased uptake – generating receipt of a further 57 questionnaires.

The responses from all postal returns of both questionnaires were entered onto the online versions of the surveys by the author to facilitate the analysis of the surveys using the software integral to Survey Monkey.

### **3:5:3 Profile of Solicitor Respondents and the Selection of Interviewees**

Five recipients of the questionnaire for solicitors contacted the author and pointed out that, as they do not undertake legal aid work, they do not represent children, and therefore *they did not* complete the questionnaire. However, 15 of the 84 solicitors *completing* the questionnaire also fell into the category that *they* never engage with children in the course of their practice (but represent adult clients only). Thus, only 68 of the solicitor respondents indicated they *may* engage with children in the course of their work – either as a solicitor for a child client, a curator *ad litem*, a court reporter or a safeguarder in the Children’s Hearings System. The capacities in which they would do this are illustrated on the next page, in **Fig: 3:4**.



Acting as a court reporter is presented by the initials “CR”, while acting as a Curator *ad litem* by “CAL.” “All four capacities” includes acting as safeguarder before a children’s hearing.

The eight combinations illustrated in the **Fig 3:4** reflect the responses given by all 68 respondents to this question.

Significantly, although in total 61% of respondents were *prepared to* act as a solicitor for a child client, *of these 77%* indicated elsewhere on the questionnaire that they either represent *no children* on average in a calendar year, or less than five. This is consistent with the low numbers of children who were heard by this means in the court data set.

Further, half of the practitioners who act as a court reporters also stated they either do *no* reports, or less than five, in a calendar year. Another third undertake between six to ten court reports in a calendar year and eight practitioners stated they undertake more than 15 court reports in a calendar year.

Eight solicitor respondents were from rural practices, while the remainder were fairly evenly split between *large* urban areas (with a population of over 125,000) and *other* urban areas.

Twenty-one solicitors across Scotland indicated they were willing to be interviewed as part of the research and nine of these were interviewed. Four solicitors were selected as they practice in the geographical areas of the courts from which the court data set was collated (although they were not made aware of this) and the author was interested in what they thought of practice in those courts (and whether this was consistent with the data set findings). The remaining five practiced in a range of sheriffdoms – from rural to large urban areas and ‘represented’ children in a variety of roles. A couple of respondents to the questionnaire had been critical of some aspect of the questionnaire, or made intriguing comments in respect of speaking with children in this context, and the author interviewed them in order to glean more. Two of the interviewees do not undertake legal aid work (although one had earlier in his career). It might be considered unusual to include a practitioner who does not do legal aid work (and therefore does not represent children), however the *majority* of family law solicitors in Scotland *do not do legal aid work* and so this person was included and provided invaluable insights into how lawyers who do not do court work may view those who do. Two of the interviewees undertake legal aid work for *children* only (although one also accepts some legal aid cases such as for women leaving abuse), while the last solicitor interviewed specialises in representing children *only*.

Five of the six sheriffs interviewed were based in the courts from which the court data set was taken. Sheriff Principals, having sounded out individual sheriffs on whether they would like to take part or not, forwarded the contact details of those sheriffs to the author. The sixth sheriff, now retired, was contacted by a friend and colleague who had known him professionally and who was able to pass on the request for interview. With the exception of the now retired sheriff (who did not request anonymity) interviews with

sheriffs were not taped as the author did not feel it appropriate to request this; however sheriffs were happy that notes were taken during the interview.

### **3:5:4 Summary of the Characteristics of Parent Respondents (n=29) and their Children (n=51)**

Once the questionnaires were received by parents, it is possible that those with the greatest motivation to *return* a questionnaire might be the parents whose grievances were greatest. However, the responses of parent participants to the questions about the treatment of their children's views resulted in a roughly even split between those who were negative and those who were positive in respect of the treatment of the child's views.

As solicitors had been requested to forward the Parent Information Packs to clients who were *still in contact* with their child at the close of the court action (as it was hoped their child might then take part in the research), this meant parents not exercising contact were excluded. This may have impacted on the gender breakdown of the parents who returned the questionnaires, as it is likely fathers who had *not* been successful in securing contact may have been more motivated to take part than those who *were* exercising contact, yet they would not receive a questionnaire. Of the parents who returned a questionnaire, two-thirds were resident mothers (n=19), two were resident fathers, and six were fathers who were exercising contact with their children.

The twenty-nine parents responding to the questionnaire had fifty-one children between them. Of these, forty-one had had their views taken by *at least one* formal means while the remaining children were the younger siblings of children whose views had been taken. The youngest child to have their views taken was a four year old who was spoken with by a reporter.

Table 3:2 below illustrates the methods by which the children of parent respondents had their views taken.

**Table 3:2 Methods by Which the Children of Parent Respondents Expressed their Views**

	Under 5 Years	5–7 Years	8–9 Years	10–11 Years	12–13 Years	14+ Years	TOTAL
Report	1	5	11	4	5	2	28
F9/letter	0	2	4	3	5	0	14
Sheriff	0	1	4	3	3	0	11
Solicitor	0	0	1	3	1	0	5
Curator	0	1	0	0	0	0	1

Consistent with the findings of the court data set, the most common method by which the children of the parent respondents had their views taken was via a court reporter, with over half (54%) speaking to a reporter. Thirteen children had filled in a form or written a letter to the court and five had had their own solicitor.

However, a striking eleven children (from seven families) had spoken to a sheriff and it may be the comparative rarity of this happening meant that the cases stuck in the mind of the solicitor representing the parent and therefore the solicitor chose to forward the Parent Questionnaire to this former client. That said, it remains possible that interviewing children may be a more common occurrence in some courts than others.

### **3:5:5 Arranging Interviews with Parents (n=8) and Children (n=2)**

As stated, it was thought that engaging with the parents might result in them agreeing to their child taking part, however children approached in this way may not know they have the opportunity to take part in the research *as their parent may simply not tell them*. It is not known how many parents showed the Research Information Leaflet to their child but a third of parents (n=11)

indicated *they* were willing to be interviewed and all but one was contacted by the author, resulting in eight interviews (six with mothers and two with fathers).

The one parent who was not contacted after expressing willingness to be interviewed was a father whose responses on the questionnaire were particularly angry - leading the author to decide *not* to contact him either for interview or to arrange to speak with his children, even though he had expressed willingness for these to take place.<sup>120</sup>

Two of the eight interviews were conducted by telephone due to the remoteness of the respondents and one father was interviewed in a coffee house. All other interviews took place in the home of the interviewees.

Two further parents who said they were willing to be interviewed (and would consider speaking with their child about the research) left only postal contact details. When the author wrote to them asking them to make contact by email or telephone to arrange an interview, at a venue of their choosing,<sup>121</sup> no further response was received.

One of the two children who took part did so *after* the author interviewed his mother and impressed upon *her* the importance of children's perspectives being heard. The other child interviewee was informed of the research directly by the solicitor who represented *her* and the author received a consent form signed by the child and her mother in the post with their contact details.

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<sup>120</sup> Amongst other comments, this respondent described his solicitor as a frightened rabbit who just did as she was told (by him). Smart et al (2005:222) also excluded a father from interview due to the levels of violence perpetrated by him in the past – offering him a postal questionnaire instead.

<sup>121</sup> The author suggested a meeting in the School of Law at the University of Edinburgh or in a coffee shop. Female respondents were also given the choice of having the researcher visit in their home.

Other parents interviewed indicated some willingness to speak with their children but factors intervened. One mother stated she would ask her son to take part if not for the fact he was going to speak to person at family mediation in the near future and she did not want to over-burden him at that point.

While a non-resident parent who expressed willingness for the author to speak with his children on his returned questionnaire, stated at the time of the interview that he no longer wished this to be arranged as *he* (father) was now happy with the existing contact arrangements.

Another parent respondent is a personal friend of the author who, knowing of the research *asked* to complete a questionnaire but expressed ambivalence about speaking with her children about the research. While this mother is likely to have spoken to the eldest of her children if the author persisted, the author did not want to exploit the friendship in this way – most particularly as her children might pick up on their mother's concerns and experience the interview as coercive which clearly the author does not want.

A fourth parent was keen for her eldest child to be heard at the time of the questionnaire, but by the time interviews were being conducted, the court had agreed her children no longer had to attend contact against their express wishes. She described years of abusive treatment and how her children had been traumatised by contact. She was now of the view they needed peace to recover and not to rake over events they were trying to forget.

### *Conduct of Interviews*

Interviews with parents were semi-structured and biographical in nature. Respondents were asked questions designed to confirm their responses on the questionnaires (such as how long ago they had separated from their spouse/partner and the nature of contact since then), and the author planned



a checklist of topics to cover prior to interviews. However, *all* parent interviewees had a story they wanted to tell and, as it is pertinent to glean the issues that concern the users of legal process, the author allowed them to tell their story, reserving clarifying questions largely to the close to ensure their meaning had been understood.

The author already knew the methods by which the views of the two children interviewed had been taken as this information was provided by the mothers of the children prior to interview. However, the author wanted to glean from the child whose idea it was that the child's views should be given and who arranged this, as well as whether the child felt s/he had been heard and what they thought of the outcome of their involvement. A guiding schedule of the types of questions that could be asked was referred to; however the children (as their parents) had their own key points that they wanted to make and the author listened to *their* stories, as they chose to tell them.

### **3:5:6 Interviews with Non-Legal Professionals**

Seven non-legal practitioners were also interviewed as part of this research project. These include a psychologist, play workers with an organisation which undertakes therapeutic work with children who have lived with domestic abuse, children's workers from Women's Aid, and an individual working with children who have experienced sexual abuse. These interviews were also semi-structured and included questions on the nature of the work undertaken by these non-legal practitioners and the extent to which the children they work with have their views taken for court actions, as well as the professional's views on the treatment of children and their views within legal process.

### **3:6 Lessons from the Research**

#### *The Essential Pragmatism of a Solo Researcher:*

Designing all of the research instruments that comprise the appendices of this thesis (as well as the online surveys) disseminating them and analysing the responses – in addition to two and a half months collecting court data, three months coding it, six months unpacking it (prior to the analysis) and the undertaking of 35 interviews has been a mammoth task for a lone researcher. Early concerns over a lack of data for analysis were suddenly replaced by the potential for an avalanche of original data after permission was gained to access court data. Consequently, piloting the questionnaires was not possible (although both were given to others for comment). In hindsight, both instruments contain a couple of questions or answer choices that could have been better phrased. In particular, the author overestimated the amount of work *with children* undertaken by family lawyers in Scotland and should have used much smaller units of measurement from “none” through “1-2” etc. In the questionnaire for parents, the question asking the age of the child “at the time you were in dispute” was confusing as disputes may last several years. Poor phrasing impacts on the usefulness of any analysis and the reliability of any findings. That said, much useful information was gleaned from the questionnaires and they admirably achieved the aim of engaging practitioners and parents willing to be interviewed.

#### *Including Children:*

Accessing children who have experience of being heard in *private law* court ordered contact is like accessing needles in hay stack (particularly children whose views have been put directly to the court). Ideally, they need to be identified from court records and the resident parent contacted – in the manner used in England and Wales by Douglas et al 2006. That said, the

author was a PhD candidate and therefore extremely fortunate to have been granted access to court processes at all.

Failing this, it would clearly be helpful to be an *insider* in an organisation such as Women's Aid, as consent is much more likely when the researcher has been introduced by a trusted professional (Cree et al 2002:51); although, accessing parents by this specific means would mean excluding cases in which there was no history of abuse as well as male parents – leaving the research open to accusations of bias.

Given that adult gatekeepers largely determine whether or not a child is even informed of the research, it would also be useful to be able to access young people *directly* and, if the author were to return to this topic again in later research, organisations such as Voice Against Violence and Young Scot would be approached – by which time the author would hopefully be in a stronger position to gain adult compliance, having (hopefully) an established academic track record.

### *Conclusion*

Broadening the scope of the present research to include the perspectives of practitioners and parents has enabled a richer understanding of the *treatment* of children's views in legal process than would have been possible from speaking only to the children concerned. For, as subsequent chapters will illustrate, comparing and contrasting the narratives of the different actors revealed that legal practitioners' dominant narratives dovetail with the most prevalent views expressed by non-resident *fathers* and that these act to subordinate the narratives of women and children when children do not want contact.

The inclusion of all cases raised in two sheriff courts (and not just those in which domestic abuse was alleged) also enabled the analysis of the *impact* of exposure to domestic abuse on the views expressed by children (see

Chapter Nine). It will be seen that in *almost all* cases where children were opposed to contact, this was because of the abusive behaviour of their non resident parent.

Further, while it cannot be claimed that the views of the two young people who were interviewed as part of this research project are “representative” of children whose views are taken in a private law contact disputes in general, their experiences (discussed in Chapter Ten) will be seen to keenly illustrate the potential impact on children of an assumption of contact that fails to attend to the *quality* of that contact from the perspective of the young person themselves.

The broadening of the data base for analysis for this thesis has also provided a wealth of data on the *nature* of the cases before the courts and it is to this issue that the next chapter turns.

## **CHAPTER FOUR – THE NATURE OF THE CASES BEFORE THE COURTS**

### **4:1 Introduction**

This chapter explores the family dynamics of the cases before the court – in particular the prevalence of unemployment, criminal convictions, substance abuse, domestic violence, and the prior involvement of social services in the families before the courts. It also explores the circumstances by which some of the mothers in the court data set had become non-resident parents – highlighting women’s vulnerability to force (and threat of force) when making decisions about their future and that of their children. The focus then turns to the patterns of contact exercised by the children in the court data set – finding that children residing with their mothers were more likely to exercise contact with their non-resident parent (NRP) post-separation, *but that this contact* was more likely to break down at a later point.

The findings from the analysis of the court data set highlight how men may use legal process as a means of continuing to try to exert control over former partners – with the initial separation and a mother’s subsequent (or concurrent) re-partnering both acting as triggers for outbursts which may include violence, threats to harm or kill the mother and threats to abduct the child. Fathers were pursuers in three quarters of the cases and women did not always defend the action (sometimes being women who subsequent reports revealed had endured the worst histories of violence).

### **4:2 PROBLEM FAMILIES?**

High levels of unemployment, criminal convictions and allegations of substance abuse were prevalent in the thesis data set - with just under half of all children having a parent who alleged domestic abuse. The chapter begins by exploring the prevalence of such “atypical serious social problems” (Brown 2000).

## 4:2:1 Involvement of Social Workers

Almost a quarter (n=72) of the children in the data set were known to the relevant Social Work Department at the time the action was raised and, *of these*, 44% (n=32) had their views taken for the court by a *social worker*.

In some cases pursuers, 73% of whom were fathers, craved the court either to intimate or to warrant the social work department when they believed social workers would support their application. An example is a father whose child had been placed in his care due to her mother's drug addiction problems, and another is a mother who had been allowed to continue to care for her children by the Children's Hearing System under condition of the supervision requirement<sup>122</sup> that she did not allow the children's father (who had been convicted of the sexual abuse of the children's older siblings) to have contact with them.

Social work departments were also warranted in cases where the whereabouts of the mother (and usually the children too) was unknown,<sup>123</sup> and having ordered the social work department to disclose the whereabouts of the mother, it was often the case that the court asked that the department provide the court with a report under s11 of the Matrimonial Proceedings (Children) Act 1958, rather than appointing a solicitor to undertake a bar report.

In some cases social workers became involved with the family following the disclosure of abuse *by children* to the solicitor undertaking a bar report who then made a referral. On other occasions it was court reporters who uncovered the prior subsisting involvement of social workers, such as a case where the father raised an action for contact in respect of his three children

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<sup>122</sup> see s52 Children (Scotland) Act 1995

<sup>123</sup> Alternatively the court might ordain "the child benefit office, PO box 1, Newcastle upon Tyne, NE88 1AA, in terms of section 33 of the Family Law Act 1986 to disclose the whereabouts of the child (name) and (DOB)." Some fathers had also used private detectives to try and ascertain where their ex-partner and child had fled to.

and it was uncovered that he was *already* having contact sessions in a family centre, supervised by social work. The mother in this case had fled violence for which the father had numerous convictions and the court sisted the case to allow the supervision by the Social Work Department to continue.

It was also largely via reports undertaken for the court that the prior involvement of police with the families of a third of the children (due to domestic violence or suspected child abuse) became apparent.

#### **4:2:2 Unemployment:**

Economic instability clearly has the potential to increase stress within families for a number of reasons including the likelihood of relatively cramped housing and long, relatively unproductive hours, spent cooped up in the same space – certainly for couples who live together.<sup>124</sup>

In the present data set, over two thirds of male pursuers were in receipt of legal aid, while three-quarters of female pursuers were in receipt of legal aid.<sup>125</sup> Mothers were the resident parents in respect of over three-quarters of the children post separation for, as observed in Chapter One, becoming a mother impacts negatively on a woman's likelihood of being in paid employment due to parenting responsibilities. In respect of the fathers in the cases before the courts however, they were often unemployed men - with birth certificates also providing evidence that parents were without a trade or profession or engaged in economic activity at the time of the birth of the child, as they frequently stated "unemployed" in the occupation field of the certificate. Where employment *was* listed on the birth certificates of the

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<sup>124</sup> Nearly 40% of Incidents of Domestic Abuse reported to the police in Scotland occur on weekends <http://openscotland.net/Resource/Doc/292984/0090391.pdf> Chart Four. This may be because of physical proximity but it may also be because neighbours and children are more likely to be present and it is they who may call the police.

<sup>125</sup> In 2007 (the year the actions in the data set were lodged) a litigant with a disposable income above £10,306 would not qualify for Civil Legal Aid.

cases in the data set, it was noticeable that almost all were employees in labouring or menial employment.

Solicitors acting for non-resident fathers regularly asserted that their unemployed status meant they were “able to devote time to caring for said child.” It was also regularly averred on behalf of *fathers* that they either lived with or close to their mothers, (the grandmother of the child of the action) and therefore would be supported in caring for the child. Such statements were absent from the pleadings of mothers – which is suggestive that legal practitioners/courts actually remain aware that mothers most usually provide the primary care of young children at least, despite the express demise of the ‘tender years’ doctrine.

#### **4:2:3 Criminal Convictions**

When entering data from the court processes onto the *computer*, criminal convictions were only recorded where these were in respect of *domestic* violence ‘between’ the parents of the child. In respect of sixteen children in the data set (5%) their father had previously been *convicted* of violence against their mother in a criminal court. In addition, the fathers of twelve of the children were subject to concurrent criminal proceedings for an assault upon their mother at the time the civil contact case was being heard.

The data sheets filled out in the courts however, provide a more detailed record of the prevalence of *convictions* for criminal activity in general, as a box was ticked on the sheet whenever an Extract of Convictions was lodged in process. The fathers in twenty-eight of the 208 cases – that is 10% of *all* fathers in the cases going through the court - had convictions. The offences ranged from murder and rape, through assault, to property and drugs offences as well as drunk driving and carrying a dangerous weapon. Some



fathers had in excess of a dozen such convictions and nine fathers were in prison at the time they raised the action for contact.<sup>126</sup>

No women were in prison at the time the action was raised and no women had been convicted of violence upon their partner, although there was a reference to one mother having served a prison sentence for shoplifting. Sheriff Officers were ordered to apprehend three mothers for Failure to Obtemper orders for contact during the legal process however. These were all women who had been subjected to high levels of violence and in one case the police were on Rapid Response should the mother activate her home alarm.

Notably, no mothers in the data set founded on resident fathers' "failure to obtemper" contact orders by asking the court to find the father in contempt of court; rather when this occurred, the terminology used was a milder request that the father "explain his failure to comply with the contact order."

#### **4:2:4 Substance Abuse<sup>127</sup> and Mental Illness**

Estimates suggest that perhaps 40,000 – 60,000 children in Scotland are affected by their parent's drug use (SE 2006/b), and against this statistic it is perhaps not surprising to find that in the data set, allegations of substance abuse were made in respect of at least one parent of eighty-three of the children (28% of children). In half of these cases just the father was the alleged abuser of substances, while in 42% of cases, it was just the mother (and in respect of six children, both parents). Women were more likely to be accused of abusing prescription drugs such as anti-depressants and drugs such as valium while both sexes alleged their ex-partner abused alcohol and / or heroin or cocaine.

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<sup>126</sup> Receiving legal aid to do so.

<sup>127</sup> Substances include illegal drugs, prescription drugs and alcohol.

When investigated by court reporters, medical records could provide evidential support of the existence and degree of the addiction problem – with one father consuming an astonishing 90 units of alcohol per day. While, alternatively, they evidenced that the allegations were a spurious attempt to discredit the other parent of the child (see discussion on page 115).

Additionally, allegations of mental illness were made against a parent of 10% of the children in the data set – ranging from depression (including post-natal depression) to psychotic disorders such as schizophrenia. Court reports enabled these to be investigated and in some cases confirmed - although in a number of cases, appropriate medication meant the condition was apparently well managed.

#### **4:3 Domestic Abuse**

In the data set, domestic abuse was alleged by at least one parent in respect of 49% of the children in the data set (n=148).<sup>128</sup> This compares to the McGuckin study (2004) which found allegations in 36% of the 90 cases in their data set. It may be that in the intervening seven years since publication of the McGuckin's study, an increased awareness of domestic abuse as a societal problem has resulted in increasing numbers of litigants mentioning abuse (or being asked about it) when in consultation with their legal representatives. Certainly the number of women reporting domestic abuse to the *police* had increased from 36,139 at the time the McGuckin's study was published to 49,000 in 2007 (the year of the court data) – *exactly the same* proportional difference as references to domestic abuse found in the *court processes* of separated couples (See SG 2010/b: Table 3(a)).

Allegations of domestic abuse were recorded on the present data set only where there was a direct reference to *physical or sexual violence or force*, either in the Initial Writ, the Defences, or in the productions of either the

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<sup>128</sup> See discussion on page 130 for the gender breakdown in these allegations.

pursuer or the defender. However, in a number of cases women did *not* allege such violence and it was not until a court report was undertaken, or children were spoken with, that their exposure to domestic violence became apparent. The number of cases in the data set in which “*allegations of domestic abuse*” is recorded is therefore an *underestimate* of cases where descriptions of domestic abuse were in the processes.

Further, while ‘mental/emotional’ abuse such as threats, verbal abuse, withholding money and other types of controlling behaviour such as isolation from family or friends are types of domestic abuse (SE 2000), the nature and severity of these can vary enormously and it may be argued that within the context of a relationship breakdown that verbal slurs, at least, may be expected to exist concurrent to the breakdown. It was felt by the researcher therefore that the data set would be vulnerable to accusations of *over* reporting of abuse if the mention of verbal or emotional abuse in the processes led to the recording of ‘allegations of domestic abuse,’ and such types of behaviour therefore *were not* recorded as “domestic abuse” on the computer database.

However, on the data sheets completed in court, a note was made of cases in which *non-physical* abuse of a parent or the child of the action was alleged. This was alleged by a parent of 27 children in the data set as the *only* form of abuse. More usually however, women who alleged they had been subjected to a *pattern of* dominating and controlling behaviour (but no physical violence) *were* often physically assaulted at the time of separation and therefore their case was among those recorded as one in which there were “allegations of abuse.”

In addition to the numbers of women in the data set who had allegedly been victims of domestic abuse, it was apparent when reading through processes that at least 23% of the children in the data set had been present at the time of the alleged abuse and had witnessed the assault. This was only recorded on the data set where there was a direct reference made to the child being

present by a parent or by a third party spoken to by the reporter, or where the child described what they had seen to a reporter or in a letter to the court. There were a number of additional cases where it is likely the child would in all probability have been a witness to the abuse but as no reference to this was made, these cases were not included. It is likely therefore that 23% is an underestimate of the number of children who witnessed domestic abuse.

#### **4:3:1 Gender and Domestic / Child Abuse**

Although half of the eighty female pursuers and 44% of female defenders alleged physical or sexual abuse, only four fathers in the data set claimed they had been the victim of physical abuse at the hands of their female partners.<sup>129</sup> In the three of these cases that were defended, the mothers alleged that *they also* had been victims of violence (at the hands of the fathers of their children).

#### *Cases where Fathers allege Domestic Abuse*

In one case the parents of the child purportedly separated after the mother pushed the father on some stairs and he called the police - who then left the boy in his care and the father raised the action on the strength of this. The mother's version was that he had been going to hit her and she pushed him away but did not call the police about *him* because he was out on bail and had asked her not to. The court granted this father interim residence. The extract of convictions later obtained by the reporter revealed the father had a criminal conviction for violence upon the child's mother and a total of 20 other convictions – 12 of which were for breach of peace and assault. The residence of the child reverted to the mother (with contact between the child and his father), however the interlocutor made it clear that the change in

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<sup>129</sup> Although the fathers of four further children claimed their child had been a victim of violence at the hands of their mother's new partner.

residence was because the father had *consistently failed drugs tests* during the months of the court case (rather than due to the father's violence).

In the second case, a white collar couple both claimed the other "pushed and shoved" the other, with the mother also claiming her husband had locked her in a cupboard. She fled to a refuge when her husband told her she would not see their child again if she were to separate from him. The court ordered "shared care" with the father having the child 4/7 nights (which meant he could claim welfare benefits and the mother could not) and the reporter suggested to the mother (who had been the child's primary carer for the four years of his life) that *she* find employment. *Given that* a significant number of fathers found on the poor mental health of the child's mother as a reason women should not have residence of their child, it is interesting that, in this case, no weight appears to have been attached to the fact that the child's father was not currently working because of "stress related illness," when it ordered the father should have sole care of the young child for the majority of the week.

In the third case, a father allegedly attempted to rape the mother of their children and goaded her to hit him (an event that was witnessed by one of their children and described by the child to the court reporter). The father had then presented himself to a police station alleging assault and asked the police to photograph the scratch marks on his face before raising the present action for residence. It is notable that although around 480 processes were trawled by the author when undertaking this research, with violence against *women* being prevalent, this was the only case in which a litigant proactively requested police photograph their injuries and then submitted the photographs to a court of law in a dispute over child contact.

In the one *undefended* case in which a man alleged he was the victim of abuse, the father of a girl aged under 6 months who lived with her mother, raised an action for residence, stating the infant's mother had attacked him with a set of keys. The case was allowed to proceed as undefended and there

were seven hearings over a nine month period. Interim contact was ordered, without any report being ordered and at the last hearing in the case the father was granted residence of the infant as the mother (who had had court papers served on her by sheriff officers but had not attended any hearings) was found in default. It is difficult to see how the father's removal of the infant from the mother who had always cared for her was envisaged to be in the best interests of the child.

### *Cases Where Mothers Allege Domestic Abuse*

Where mothers alleged domestic or child abuse, either in the Initial Writ or in their Defences, the alleged perpetrator was the child's father in 92% of cases. Where the father was the alleged perpetrator, the alleged victim was the mother of the child in 70% of cases, both the mother and at least one child in 21% of cases and a child alone in 8% of cases. Other alleged perpetrators were a mother's new partner or a relative of the father of the child who was present during contact.

In virtually all cases fathers denied domestic abuse even when they had criminal convictions for it. Exceptionally – where the assault had occurred in a public place and was witnessed by others - the offence might be acknowledged by a father speaking to a court reporter. Where men had been convicted for assaulting a child they similarly denied wrongdoing.

It is important to emphasise that physical violence raised within child contact cases before the courts does not confine itself to physical violence inflicted on one parent by the other, rather children were allegedly exposed to violence perpetrated by the new partner of their mother. In one case a mother separated from the father of her children due to domestic violence (for which he was charged with Breach of the Peace) and took up with a new man who was *also* violent and who attempted to strangle her 13 year old son. The boy returned to live with his father who raised an action for

residence. By the time the reporter carried out an investigation, the mother had also returned to the home of her son's father.

Children were also exposed to abuse by relatives of their *father's* reconstituted families – with older 'step brothers' being accused of sexual abuse of children in two cases and of physical abuse in a further two cases. Children also spoke of been made to do the chores when they visited their father's household while the children of the 'new' family were favoured and allowed to go out with friends or to sit and watch the TV.

It is worth noting that in a small number of cases (n=3) children spoke of being treated badly by the *female* partner of their fathers. In one case a child told the reporter his dad's girlfriend kicked him when he spilt his juice for example, while in another case a seven year old told how she was left with a lady "who was not a nice lady" when she went for contact and who had pulled off her false nails and she had not wanted her too. A third child spoke of being shut in the room or out of the house and that her father's girlfriend had purportedly told her mother that she was jealous of her.

#### **4:3:2 Leaving Abuse**

Reading through the processes of the cases highlighted the difficulty a woman with an abusive, domineering, and potentially or actually violent partner faces if she wishes to terminate the relationship. If women tell their partner they wish to leave, they face the risk of a violent outburst, ejection from their home and separation from their children. In such circumstances women may resort to moving to an undisclosed address without the knowledge of the father of their children. However, as previously discussed, courts regularly order the disclosure of mother's addresses when this is unknown.

In some cases, the women had been advised by the social workers not to let the child's father have contact with the child after becoming involved with

the family due to his violence - such as the case where a two year old child had witnessed his father tie his mother to a chair, beat her with an implement and threaten to kill her.

In other cases, women fled to a refuge after the father of their child had attempted to take the child from her and 14% of the children living with their mothers in the court data set, were living in a refuge at the time the case came to court. An illustrative case is one where a father who had been violent to the mother during pregnancy and left her before the child's birth, suddenly turned up at the child's nursery and attempted to take the child from the staff. This mother fled with her child to an undisclosed address out of fear that her child's father was going to take the boy; while, in other cases, women fled after the child's father had allegedly threatened to kill the mother or to kill the child.

Two of the mothers living in refuge with a child at the time the action was raised, had had to leave other children behind – one woman had had to leave her four sons as they were too old to go into refuge with her, and one had had to leave her teenage daughters who (she averred) preferred to align themselves with their father and join in his derogatory treatment of her. This mother claimed she finally left with her younger son after years of his pleading and had not done so earlier as she did not want to leave her daughters.

The verbal abuse domestically abusive men may direct towards their partner often includes disparaging comments on her ability to parent, threats to report her to social work and the threat that she will not get the kids if she separates from him as he will tell the court what a lousy mother she is. Where court reports were ordered it became apparent that in a least fourteen cases, affecting twenty-one children, malicious referrals to the police or social work had been made by fathers following the termination of their relationship with their child's mother. In these cases the agencies reported on occasion that they were of the view that the father was trying to drag



them into an acrimonious separation when there was nothing to suggest any form of statutory intervention was required; while in other cases the agencies merely confirmed they had been telephoned by the pursuer (or anonymously) and had investigated but found no cause for concern.

Fathers might also use legal process as the means by which to effect referrals to the children's hearings system - such as one case where the child's mother had fled to a refuge and the father successfully craved the court to refer the child to the Reporter for lack of parental care.<sup>130</sup> This father founded on the fact that the mother of his child was living in a refuge as an example of *her bad parenting* because the mother had been keeping the child off school (for fear the father would abduct her from there).<sup>131</sup> In a further extraordinary case, a father of three who had not actually resided with the mother for nine years and stated their relationship had been "on again, off again" had successfully raised a past action for residence of their two older children. In the present action, having impregnated her again, he successfully craved residence of the baby claiming the mother is not a "fit and proper person" to care for the child, despite the fact that the social work department (whose report he craved) confirmed she provided adequate care of the infant.

Given the prevalence of domestic abuse in the data set it is not clear why only twenty-four women (11%) craved a non-molestation order, however it may be due to the 'normalisation' of abusive behaviour within the context of the separation of parents. A greater number of interdicts were craved Against Removal of the Child - there being 54 such interdicts craved – half of which were craved by fathers.

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<sup>130</sup> Under s52 (2)(c)(ii) Children (Scotland) Act 1995

<sup>131</sup> What the present author found notable however, was that the school attendance record submitted to the court by the father as one of his productions commendably illustrated that *prior to* fleeing to refuge the child had missed no days of school nor ever even been late.

There were also only four cases in which an Exclusion Order was craved and only two of these were granted;<sup>132</sup> while only two Non Harassment orders were craved.<sup>133</sup>

In the two cases in which Exclusion Orders were granted, the degree of violence was extreme yet, interestingly, in one case, the interlocutor records it was granted “because the pursuer is no longer asking for the Power of Arrest to be attached.” In this case the defender had assaulted the pursuer’s elderly mother who had subsequently died. He had subsequently breached his conditions of bail to stay away from the Pursuer, in addition to having a history of assault upon both the mother and the child of the action. In the second case the parties still lived at the same address. The children’s father (who was allegedly violent towards them) had been charged with assault on their mother with the bail condition that he not return to the matrimonial home. However, this father had persuaded the child’s mother to ask for this condition to be lifted (on previous good behaviour) and then allegedly continued to assault her.

The two cases in which Non Harassment orders were granted are cases of sustained abuse – although there were many similar cases in which no such order was craved. In one of the cases the mother successfully sought protective orders on police advice after the child’s father allegedly threatened to take the child away “like Maddie MaCann.”

As observed, not all women who fled to a refuge or other undisclosed addresses were able to take their children with them and it is worth looking in greater detail at how else women – who had usually been the primary carer of the children – became the NRP.

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<sup>132</sup> Under s4 Matrimonial Homes (Family Protection)(Scotland) Act 1981.

<sup>133</sup> Under s85 (2)(b) Protection from Harassment Act 1997.

#### 4:4 The Resident Parent at the Time the Action was Raised

Across Scotland, 90% of children in lone parent families live with their female parent (SG 2008) and this is the pattern for the children of the majority of separated couples who make arrangements without court intervention (SG 2008; SG 2009). It was surprising therefore to discover that 23% of the children lived with their fathers in the cases coming before the two courts (n=64).<sup>134</sup> This was all the more surprising given that, in respect of 36% of the children in the data set, there is no record of their parents living together *at any point* – before, at, or after their birth. When the marital status of the parents was controlled for, it was found whether parental couples had ever lived *together as a couple* made no significant impact on the percentage of children residing with their fathers post the ending of the adult relationship.<sup>135</sup>

It became clear during the course of reading through process after process that the ‘resident parent’ *at the time the action was raised* had often not been so for very long, and indeed the ‘resident parent’ had often been a contact parent for many months or even years prior to the switch in status.<sup>136</sup>

Closer analysis found that thirty-four children across the data set had been retained by their fathers after contact at some stage, and twenty-five of the sixty-four children residing with their fathers *at the time the action was raised* were living with him either as a consequence of their father’s refusal to return the children to their mother after contact – that is Contact Retention (n=18), or after an agreed period of temporary residence (n=7). This accounts for 39% of all children living with their fathers at the time the case came to court. It was decided to look in greater detail at these and the

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<sup>134</sup> Being 23% of the 284 children in the data set living with one parent. The other 15 either living with both parent, had shared care or lived with a grandparent.

<sup>135</sup> 21% of the children of married parents lived with their fathers while 23% of the children of former cohabitants and those who had never lived together resided with their father.

<sup>136</sup> The length of time ranged from 6 weeks to eight years.

other circumstances by which fathers become the resident parent in the cases before the courts.

#### **4:4:1 Resident Fathers (n=64 children)**

As well as Contact Retention (n=18) and retention after an agreed period of residence (n=7), the mothers of seventeen of the children living with their fathers (27%) had allegedly been forcibly ejected or fled from their homes *without* their children, and in two of these cases, it was alleged the fathers informed the mothers they could not have contact with their children unless they reconciled with them. In a further case, the father forced entry into the mother's home and pinned her to the floor while an accomplice took the child.

However, in respect of nine children (14%) living with their fathers, it was unclear in the processes why there had been a change in residence of the children, while a further nine children (14%) were living with their fathers because there were serious welfare concerns around the mothers ability to care for them. Two further children had chosen to reside with their fathers.<sup>137</sup>

In the final case, a mother had tried to secure accommodation for herself and her child from the local housing department but her husband informed the department she would *not* have residence of the child. The mother was therefore unable to either secure a tenancy nor to exercise residential contact.

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<sup>137</sup> In one case the child was living with his father as he preferred to stay in Scotland, while his mother was planning a move south of the border.

### *Contact Retention (n=18 children)*

Of the children retained after contact, a reason was given by the father in respect of third of the children. These all concerned the new partner of the children's mothers, that he was abusive (2 children), or had assaulted him (1 child) or was a heroin addict (2 children) or was a schedule 1 offender (1 child).<sup>138</sup> Most of these retained children (n=15) did not have any contact with their mother at the time the action was raised.

### *Retention after a period of Temporary Residence (n=7)*

In respect of 7 children (from four cases), mothers whose children had resided with them for a number of *years* post-separation, placed the children temporarily with their father in order that they might have a break. This happened when mothers were ill, attending hospital for an operation, negatively affected by prescription medication, or when attempting to overcome addiction problems. In all four cases it is alleged the fathers refused to return the children to the mothers care. All these fathers proceeded to raise actions for residence and in two of these cases the children did not have any contact with their mother following retention.

### *Concerns over Mother's Parenting Ability (n=5)*

The allegations against the mother of the children falling into this category are similar to the welfare concerns women aver when they raise actions. In respect of 5 children (from 2 cases) their fathers stated that the children's mothers abuse alcohol but it is unclear whether the fathers retained the children post separation or they were left in their care voluntarily by the mothers of the children. In one case, the children in the data set had been placed with their father after their mother took up with a man who was a registered schedule 1 offender, while in one case a father alleged the mother

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<sup>138</sup> Being an offence against a child under Schedule One of the Schedule 1 to the Criminal Procedure (Scotland) Act 1975

had assaulted him and in a further case that the mother had assaulted the children. A further child was living with his father after the Children's Hearing System had agreed to a Place of Safety Warrant - s69 (7) Children (Scotland) Act 1995 - as a consequence of his mother's drug addiction and chaotic lifestyle.

### *Fleeing Violence (n=10) & Ejection (n=7)*

After 'retained' children, the second largest group of children living with their fathers were those who continued to live with him after their mothers had either fled violence or had been ejected by him.

In three cases affecting seven children, the mothers were ejected after entering after relationships with other *men*. In one of these cases the mother of three children had been their primary carer all their lives while their father had worked away from home. Fortin (2006) found that when mothers were deemed responsible for parental separation *because she had had an affair*, the cases were significantly more likely to go to a court. In contrast, although double the number of fathers of the young people in her data set had had affairs which led to the breakup of the parents – these cases were usually settled outside of court.

### *Gender Difference*

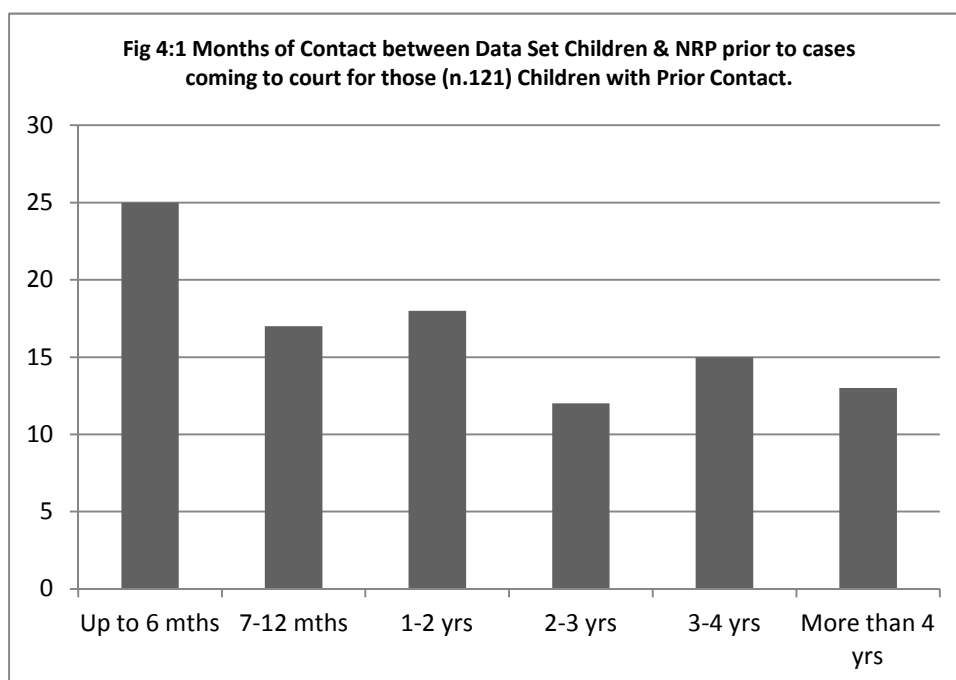
There is clearly a *gender* difference in the manner in which men and women become non-resident parents. None of the children living with their mothers at the time the action was raised had been retained by her during contact and no women had *ejected* a male partner from the family home – although one mother had allegedly excluded the children's father from the family home by changing the locks. Further, no women were alleged to have told the father of their children that he would have to continue to live with *her* should he wish to see his children, and there were also no fathers in the data set who alleged they had fled violence at the hands of their female partner –

either with or without their children. It was also the case that where children resided with their fathers they were less likely to be having contact with their non resident parent and it is the patterns of contact since separation that the chapter turns to consider now.

#### **4:5 Patterns of Contact Since Separation**

It surprised the author to discover that in respect of almost 60% of the children in the data set there *had* been contact between the NRP and the child since either the child's birth (in the case of parents who never lived together), or since the separation of the parental couple, and that the reason the case was before the court was that this prior subsisting contact had broken down. Additionally, a further 18% were *still* having contact at the time the action was raised (and a further four children were still living with both parents at the time the action was raised). A record was kept of the number of months of contact *as agreed* between parties or as supported by other documentary evidence. It was only possible to determine the number of months of contact with any degree of certainty from the processes of 224 of the 299 children in the court data set, with 103 children having *no* contact prior to the case coming to court.

**Fig 4:1** on the next page illustrates the percentages of the remaining 121 children exercising different lengths of contact prior to the action being raised.



In some cases the Initial Writ claimed contact had taken place, while the Defences stated this not to be the case (this happened when the pursuer was a NRP who would found on the fact that he had maintained contact and therefore had a prior subsisting relationship with the child/ren). Not surprisingly, whether there had been a ‘pattern of contact’ since separation or not, depended to some extent on how recently the child’s parents had separated, with half of the children who had not had *any* contact with their NRP having parents whose relationship had ended less than two months earlier. Once the 103 children who had not had *any* contact were removed from the analysis, the correlation between the number of months since separation and number of months of prior contact is a robust **.814**.<sup>139</sup>

In some cases in the court data set there had been an apparent apathy on the behalf of the NRP towards establishing contact (prior to their raising of the court action), but there were only four cases in the data set where the

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<sup>139</sup> Using Cramers V. This is indicative of a strong correlation, suggesting the majority of children had a history of prior contact and that where this was the case it was for most of the time that has elapsed since separation.



parental couple had been separated more than two years and there had been *no contact at all* prior to the raising of the court action.

However, a further factor also impacted on whether children were exercising contact with their non-resident parent or not, and that is the sex of the parent with whom the children lived – with children residing with their mothers being more likely to be seeing their non resident parent than those living with their fathers.

#### **4:5:1 Gender Difference in Contact Facilitation (n=251)**

The analysis presented here is based on data for 251 children as this is the number of children for whom all relevant information was available<sup>140</sup> - after excluding the nine children not living with a parent and the eighteen children who had lived with their mother post-separation *but* were then retained by their fathers.<sup>141</sup>

Nonetheless, it is worth noting here that the children who were subject to Contact Retention by their fathers were very unlikely to be exercising contact with their mothers. Fifteen out of the eighteen retained children (83%) had had no contact with their mothers since retention. Yet, even when Contact Retention children are removed from the present analysis it was found that mothers were *still* more likely to have facilitated contact post separation than fathers – with 62% of children having contact with their non resident *fathers* post separation, compared to 41% having contact with their non-resident *mothers*.

That said, contact was more likely to *breakdown* when fathers were the non-resident parent and, by the time the case came to court only 14% of children resident with their mothers were exercising contact, compared to 30% of children who had been resident with their father *since separation* still exercising contact with their non-resident mothers

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<sup>140</sup> Being - who the child is resident with/whether there has been contact since separation/whether there is contact at the time the case went to court.

<sup>141</sup> The children retained by their father after what their mothers had intended to be a temporary period of residence were left in the analysis.

### **The Three Patterns of Contact (n=251 Children)**

1. No contact since separation (41% of children, n=103)

*of these:*

- n=76 living with their mothers
- n=27 living with their fathers

2. Contact since separation which has then 'broken down'

(41% of children, n=103)

*of these:*

- n=98 living with their mothers
- n=5 living with their fathers

3. Contact since separation which is ongoing

(18% of children, n=45)

*of these:*

- n=31 living with their mothers
- n=14 living with their fathers

Total number of these children with their mothers: 205/251

*of these:*

- 37% No contact since separation
- 48% contact which has broken down
- 14% Contact at the time the action raised

Total number of these children with their fathers: 46/251

*of these:*

- 59% No contact since separation
- 11% contact which has broken down
- 30% Contact at the time the action is raised

As stated previously, the majority of pursuers were non-resident fathers and Initial Writs most usually referred to periods of contact that had taken place and the reason given for the breakdown in contact was usually that the child's mother, since a specific or general date ("on or around"), *was refusing contact*. Yet, an analysis of the court data set revealed there are often significant, evidenced, welfare concerns around contact which led to the cessation of contact between children and their non-resident parent. These are presented in the following analysis of the patterns of contact, by sex of resident parent.

#### **4:5:2 Children resident with their mothers: NO contact: (n=76)**

There were three key reasons for children residing with their mothers having NO contact with their fathers. For 5% this was because less than a month had passed since separation/birth and for 13% no contact had been sought by their father (although in some cases it had allegedly been offered). Of the children who had not had any contact with their NRP as *none had been sought*, the period of no contact ranged from 2 – 12 years.<sup>142</sup>

However for an overwhelming 82% of these children, the reasons the mothers gave concerned risks to the child's welfare.

Specifically, the mothers of thirty-seven of the children stated they had left the family home with their children to protect themselves from physical abuse at the hands of their husbands or partners,<sup>143</sup> while the primary reason the mothers of seven children fled was verbal intimidation and threats. These included threats to abduct the child, threats to kill the mother and

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<sup>142</sup> In one of these cases a father who had left the child's mother when she was 7 months pregnant and would occasionally bump into them in the street, told the six year old boy he could "come and live with me if you want" – prompting the mother to raise an action for residence. In a further case the father was an illegal immigrant and in another, the pursuer turned out not to be the child's biological father. He had raised the action upon discovering the child's existence and calculating he had been in a relationship with the mother around the time of the child's conception.

<sup>143</sup> This includes a case where a mother was imprisoned by her husband to stop her leaving. Her daughter phoned the police who enabled her to leave.

threats to kill the child. While one mother of two children had left to escape verbal abuse from her husband's extended family with whom she lived.

The mothers of a further eleven children left the family home as they believed that their partner had sexually abused a child (4) or following convictions of sexual abuse of a child (7). While the mothers of five of the children left after being advised by social workers that if they continued to live with the fathers of their children, their children would be taken into care (this being verified by letters to the court from the local social work department).

### **Contact Breakdown (n=98)**

It was found that for almost half of these cases there were similar reasons for contact *breakdown* as existed in cases where there had been no contact since separation. That is, the reasons given for breakdown in contact were the physical assault (or sexual assault) of the mother of fifteen of the children, verbal threats directed to the resident parent (including threats to kill her) threats to abduct the child, as well as actual abduction - while in one case the father sent the child's mother a tomb stone with the name of the child of the action inscribed on it.

Additionally, there was a case of suspected sex abuse of the child by the NRP, two children who were allegedly sexually assaulted by an older child living in the NRP's household, five children in respect of whom it was alleged the NRP's had physically assaulted them during contact and five children who were allegedly verbally/emotionally abused during contact – such being told by their NRP that he would kill their mother and/or her partner. There was also a further case in which social workers had advised a mother not to allow contact, a case where paternal grandparents failed to supervise contact between the child and her allegedly violent father and one case in which a mother feared the NRP would take their daughter to Gambia to be circumcised.

These cases account for almost half (48%) of the cases where contact broke down for the children who were living with their mothers.

As observed in the chapter introduction, some of these alleged events occurred around the time the mother either re-partnered or started to date other men and threats were sometimes given directly to the new partner or, via the children or the resident parent. In some cases, fathers alleged it was the 'new' man that was abusive to *him* or blocking contact.<sup>144</sup>

Sometimes the mother getting a social life that need not actually involve *men* was sufficient to trigger an outburst from her ex-partner. This sometimes happened years after the ending of the relationship between the parents. While in one case a mother reported she had stopped attempting to date as her child's father would telephone and put their daughter on the phone distressed and begging her not to go out.

In respect of a third of the children living with their mother post separation, the reasons given by their mother for the breakdown in contact had to do with the *quality* of the contact, (or the resident parent's perception of the degree to which the child was happy with contact). In some of these cases it was alleged that the NRP was unreliable in contact and did not turn up when expected, causing the child/ren hurt and disappointment; or alternatively, that the NRP failed to return the child as arranged post-contact. While in other cases it was alleged that *inter alia*, the NRP neglected the child during contact, abused substances during contact, refused to tell the resident parent where contact was to be exercised, left the child with third parties, or was inflexible in respect of contact arrangements and the child's other activities.

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<sup>144</sup> The breakdown of contact due to a mother's re-partnering found in the thesis data set is consistent with the findings of the Growing Up in Scotland study of Non-Resident Parent Report (<http://www.growingupinscotland.org.uk/>) which found where the mothers of the birth cohort had re-partnered, only 44% of fathers had weekly contact compared to 67% of fathers where the mother remained a lone parent.

The remaining children in this subset include those whose fathers were seeking an increase in the amount of contact and the child was (allegedly) expressing negative views on this.

#### **4:5:3 Children Resident with their Fathers since separation: No Contact (n=27)**

Two thirds of the children in this subset had mothers who had (allegedly) associated with a violent male – whether the child’s father or a new partner - and this was the reason they were prevented from seeing their children.

All the mothers who alleged they had fled the family home due to violence and had not been able to take their children with them, were among this group of mothers who were unable to exercise contact with their children. An example is a case in which a mother, the primary carer of a 2 yr old child, fled when, after an alleged sustained pattern of violence, the child’s father threatened to kill her. The father raised an action for residence and interdict against removal of the child within a week of the mother’s flight. Interim Interdict Against Removal was granted to the father and nursery staff alerted the father when the mother tried to collect her son from nursery. In this case, despite *the absence of any concerns over the mother’s ability to care for her child*, the father was successful in obtaining residence of the child, and the mothers concerns that the child would be brutalised by his father had no impact. The solicitor appointed as reporter in this case did not believe the domestic violence the mother had endured was relevant to the issue of the residence of the child, and when the father allegedly ignored the court’s instruction not to continue to threaten the mother, the court made no finding.

As referred to previously, in other cases father’s refused contact on the basis of a mother’s post natal depression or where a mother had left home to be with another man.

### **Contact Breakdown (n=5)**

This subset includes the only alleged incident of Contact Retention attempted by a female parent in the data set. The father stopped contact between his two children and their mother after their mother had telephoned to explain she could not return the children from contact as she did not have enough money to pay to return them. The father alleged that he then telephoned the social work department and that he “assumed” they got the police involved as he had had to collect his children from a police station. No report was ordered or Defences lodged, so the mother’s version of events is not known.

The father of a third child had taken his son to live with him when the boy’s mother took up with a convicted rapist and although he had reluctantly allowed contact, he did not wish this to continue; while the father of a fourth child stopped the contact after the mother’s new boyfriend allegedly assaulted her. In the final case the parents had initially split the child’s time 50/50 but the father had since determined not to allow contact as he wished the child to live with him permanently.

### **4:5:4 On-going Contact When the Action is Raised (n=45)**

The eclectic mix of cases that come before the courts even though contact is on-going at the time, fall roughly into four categories.

As one might expect, one group are the cases where couples *both* appear to behave in a relatively civilised manner towards each other but were in court as one parent either lived in, or was considering moving to, another jurisdiction or where they were finally getting divorced after years of informally arranged contact and the issue of residence was aired in the court.

Also at the low conflict end of the spectrum also were cases where fathers who had cared for their children for some time were sensibly seeking PRR in line with their lived reality. This includes a case where the resident step-father and the child's biological father both sought residence of a child after the child's mother tragically died.

By contrast, there were cases where contact continued despite a high degree of violence towards the mother and in one of these cases the court reporter was highly critical of the child's mother *for allowing contact*. However these mothers typically described the fathers of their children as very controlling - while the fathers expressed open resentment to court reporters that the children's mother's could exercise PRR independently (with one father stating he wanted PRR so that he could give his ex-partner a "taste of her own medicine)." Some of these fathers expressly stated *they* wanted to control when contact took place and in two cases this also included insisting on being physically present to oversee contact. One of these fathers went so far as obtain work in the same building as the child's mother with the result that she could never be sure she would not bump into him.

A final subset are those cases where a party found existing arrangements unsatisfactory - usually a father wishing to have more contact but the resident mother claiming the child had told her that s/he does not want this. This subset included cases where children complained of contact being boring as they were left in front of the TV all day or left with grandparents while their father went out.



## 4:6 Concluding Discussion

It has been seen that there were high levels of unemployment, substance abuse, domestic abuse and prior involvement of statutory agencies in the families that came before the private law courts. Actions were most usually raised by fathers who were in receipt of legal aid. It is not known the extent to which the availability of legal aid prompted them to raise an action, nor the extent to which the factors discussed in this chapter are experienced by those parental couples which do not end up before a court of law.

However, children from lower socio-economic groups dominated the cases in court and previous research has found that children from lower socio-economic groups are 50% more likely to experience physical violence from their parents compared to children from the highest two socio-economic bands (Cawson et al 2000). As Cawson et al observe:

*“This touches on very fundamental questions about the continued existence of social divisions which support potentially abusive, violent cultures for a minority.”* (Cawson et al 2000:19)

Given the experiences of violence by many mothers in the court data set, it is perhaps surprising that only a quarter of all the cases were raised by them. It was only when women were *separated* from their children (often without contact) that the percentage of actions raised by them increased from 25% to 41% of actions. It may be that there is a degree of normalisation of abusive behaviour by women victims or that women may doubt that they will be believed if they raise it as an issue within this context. However, women may be prompted to raise or defend an action when they believe *their children* are being harmed by contact with their fathers. Certainly the reasons women gave for the breakdown of prior subsisting contact in the court data set support this (as does the discussion of the views of the mothers interviewed, presented in Chapter Ten).

The findings in *this* chapter also suggest that some fathers may raise actions as a continuation of a pattern of dominating and controlling behaviour.

It was noticeable in their pleadings that fathers capitalised on the assumed intrinsic value of a child having contact with both parents which is an express right of the *child* (UNCRC 9), without having to demonstrate any benefit to their child (consistent with the dicta from *White v White*).<sup>145</sup> A sample pleading from one of the data set cases is:

*“As a natural father of the said children, the pursuer has a positive contribution to make to the said children’s upbringing [...] It is important for the children’s self-esteem and development to know the identity of their natural father [...] the said children will become alienated from the pursuer in the absence of a regular pattern of contact.”*

These pleadings were taken from a case in which the children described violence at the hands of their father to the reporter, while the mother reported the girl wet her bed post contact and her older brother had run away from home in advance of contact - resulting in the police being called. The solicitor for the father is unlikely to have been aware of this when he wrote the pleadings but as Wallerstein and Kelly observe:

*“One particularly unfortunate aspect of [these] cases is the attorney’s binding obligation to pursue and achieve his client’s wish, regardless of whether this is compatible with the child’s needs. (Wallerstein & Kelly 1980:30)*

For while it is the duty of *the court* to consider the welfare of the child as its paramount consideration, this it is not the paramount consideration of the parent’s solicitors as they follow their client’s instructions within our adversarial court system.

Intriguingly, there were *no* similar averments in respect of a child’s need to have a relationship with their *mothers* in those cases where women were the

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<sup>145</sup> *White v White* 2001 S.L.T. 485

non-resident parent. That is, there was no assumed *intrinsic* worth attached to this relationship *per se* in the pleadings of the legal representatives of mothers – although the benefit of *re*-establishing an earlier status quo might be founded on in those cases where children had been retained by their fathers.

It may be the lobby groups for fathers that sprung up at the time women began to acquire rights in respect of their children are proving particularly effective in influencing the approach taken in these cases. However, it may well be that the gender difference in customary pleadings simply tap into a pre-existing paternalism – with the key change in the 21<sup>st</sup> Century being that women most usually retain residence (unlike the position 100 years ago) and most deutes now revolve around the issue of *contact*.

The next chapter presents findings from interviews with legal practitioners that reveal the assumptions they make in respect of allegations of domestic abuse in private law contact disputes, as well as their views on the desirability of taking the views of children. These assumptions will be seen in the following chapters to impact on both the extent to which children are given an opportunity to express a view and the weight attached to those views once expressed.



## **CHAPTER FIVE: Legal Practitioner's Filtering Narratives**

### **5:1 Introduction**

Legal practitioner's narratives act as a filter to the narratives of litigants and their children. Accepted narratives pass through the filter whilst concerns raised that might act as barriers to contact are re-interpreted.

It will be seen that many practitioners believe a history of domestic abuse 'between' parents to be irrelevant to the question of on-going contact between a NRP and his children (or at least that that will be the view of the court); while they assume children will not want to express or view and that any view they do express will have been influenced by their resident parent.

The chapter begins by exploring practitioner's narratives in respect of the relevance of domestic abuse to the issue of child contact, while the second half of the chapter considers practitioner assumptions in respect of the taking of the child's views.

### **5:2 Practitioners' Narratives on the Significance of Domestic Abuse in *Private Law* proceedings.**

Faller (1991) presents four explanations for why allegations of the abuse of a child may be made in the context of a parental separation. One is that the separation was a result of the non-offending parent discovering the abuse; with the second being that, post-separation, the child is able to disclose the abuse (as the child no longer fears causing family dissolution). The third reason given by Faller is that the abuse of the child might *begin* after separation as a means of seeking revenge on the other parent. It is, however, the fourth reason which tends to be assumed by legal practitioners – and that

is that the allegation is *false* and motivated by vengeance rather than out of concern for their child (Faller 1991 in Bourg et al 1999).<sup>146</sup>

Yet this is against the background that, in 2009/10, there were over 13,000 child protection referrals made in Scotland and, in the three quarters of the 4,460 which resulted in a case conference, it was a *parent* who was the suspected abuser (SG 2010/c). A further unknown number of children may never come to the attention of statutory agencies during their childhood years (Cawson et al 2000).

The author was therefore astonished when one of the court reporters interviewed stated:

Sol: *“This is going to sound very cynical but there really isn’t any parent who genuinely believes that their child is not safe in the care of the other parent.”* Legal Practitioner n.2

Int: *“sorry, can you repeat that?”*

Sol: *“there really isn’t any parent who genuinely believes that their child is not safe in the care of the other parent.”* Legal Practitioner n.2

As this is an astonishing statement the practitioner was further asked:

Int: *“what about situations where a parent has been physically punitive with the children?”*

Sol: *“ I would always say then let there be contact that we observe in a contact centre and see if there is a relationship and then.... [pause].. Those sorts of people tend to want everything their own way and then they think they have won because they are getting this first shot of contact [but] they start tripping up on the unpredictability and the unreliability, and [contact] falls away.”* Legal Practitioner n.2

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<sup>146</sup> Faller was discussing *sexual* abuse of the child. However, the reasons have a resonance for allegations in respect of other forms of abuse also.

This practitioner therefore would rely on the parent-abuser losing interest or otherwise abandoning the action during the time that the contact was *observed* by others, and before it became unsupervised, even in the context that the child had been a primary victim of abuse. This approach however is not without its pitfalls (as the discussion on the observation of contact in Chapter Eight reveals).

As mentioned in Chapter One, the need to protect a child from abuse was put on a statutory basis as a result of lobbying of members of the Safe Contact Alliance. Consideration had been given by the Justice 1 Committee of the Scottish Parliament as to whether there should be a rebuttable presumption against contact when domestic abuse was alleged (as exists in New Zealand for example)<sup>147</sup> (SP 2005). However this had been dismissed as it was thought, amongst other things, that this might encourage litigants to make false allegations or to exaggerate their experiences.<sup>148</sup> The committee were also unsure what degree of proof would be necessary to ‘judge the validity of allegations’ which rather suggests they were unaware that such allegations are already prevalent in disputes over child contact yet cases rarely proceed to proof. Only 1% of the present court data set cases proceeded to a proof hearing (3 cases).

At the time of the consultation, the view among *legal practitioners* was summed up by Professor Clive when he said it would “add little to the existing law” (SP 2005:113).

An individual associated with one of the groups making up the Safe Contact Alliance explained the motivation behind lobbying for the inclusion of this statutory provision to the author:

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<sup>147</sup> Guardianship Amendment Act 1995

<sup>148</sup> They were also persuaded it might undermine the flexibility of the present system by being too rigid and might open the door to calls for further presumptions.

*“The Family Law Act was at the last stages and was considering enforcing contact and so we had to lobby [...] Grandparents Apart and fathers groups lobbied that contact should be enforced but we did not want to turn this into a gendered ‘men against women’ debate, so we focussed on the children, which is why we got the new section in the Act – a coalition of Children First, One Plus and Scottish Women’s Aid. It follows the model of the Vulnerable Witnesses Act.”*

Non-Legal Practitioner

Pertinent to the inclusion of this provision in the 2006 Act is that an increasing body of research over recent years has found that, not only are women themselves *most* likely to be victims of domestic violence when they attempt to separate from their partners (Mirrless-Black 1999; Mullender 2002; Richards & Stanko 2003; Walby & Allen 2004), but *pre-existing* partner violence is likely to escalate in nature and intensity at the time of separation as a man may adopt the attitude that “if I can’t have you no-one else can” (Richards & Stanko 2003).

Yet none of the legal practitioners interviewed mentioned the increased vulnerability of women and children, upon separation. Indeed, the below quote gives the reaction of one practitioner:

Int: *“...research in this area shows that children who live with violence, hear it even if their mother thinks she has hushed it up and they are affected by it....”*

Sol: *“oh sure but that is when they are living together and by definition they no longer are.”* Solicitor, n.5

Int: *“so the assumption is that because the parents are not longer living together the child is protected from witnessing further abuse of their mother?”*

Solicitor: *“yes.”* Solicitor, n.5

Further, although the Safe Contact Alliance intended the provisions to focus on the safety of the children, it was clearly *seen* as a punitive (possibly anti-male) exercise by some legal practitioners:



Sol: “*you have to focus on the welfare of the child, not the moral judgement against the parent. You see that is the risk – that one says ‘you are a bad man to your wife, therefore we are going to punish you by not letting you see your child’ and the other side of the coin is ‘your dad was bad to your mum and therefore I am not going to let you see him’* Solicitor, n.5

Int: “*so in these circumstances it is surely useful to get the perspective of the child, some children may still want to see their dad despite his violence but others will not – so it would be useful to learn how the child feels...*”

Sol: “*Wife beating is a serious crime and should not be downgraded but do you compare it with murder? If the father has committed a murder and is serving a life imprisonment are we to say the child must not see that father, for that would be a greater crime. Why must we have a rule that if you are guilty of this **one** crime that your child will not be allowed to see you and that was part of the political agenda [...] and no politician was brave enough to say nay.*” Solicitor, n.5

This interviewee seemed unaware that, for children, experience of *domestic* violence usually means witnessing abuse of their primary carer and has a profound impact on their wellbeing and the likelihood that they will feel hyper vigilant and fearful in the presence of the abusive parent.

It was also the case, at least in the cases in the court data set, that where father’s *had* been convicted of murder, the courts actually *did not* order contact between children and their father. Similarly where their fathers had raped or seriously assaulted a *non family member*, contact was not ordered. One sheriff, when asked “Has s 11(7A)-(7E) had an impact on practice since this came into force?” responded:

“*I have not had a proof since it came into force – except for [a well known] rapist. He raised the action from prison for contact with his [child] and it was easy to dispatch that one on the basis of these provisions but I have not had a proof since then.*” Sheriff n.1

The significance of this response from a *sheriff* is that it is suggestive that those on the bench may focus their attention to the statutory requirement when the case proceeds to *proof*. As discussed, this happens only rarely.

Secondly, the case this sheriff referred to was one where the victim had been a stranger to the rapist - who had the misfortune to be in the wrong place at the wrong time. However, in the cases in the data set, where the mother of the child had been the victim of the rapes or assaults, contact was sometimes (but not always) ordered.

The solicitor most recently quoted was asked whether, in his view, the passage of the new provisions had impacted on legal practice.

Sol: *“I have never seen a case in which the court’s decision would have been changed by the inclusion of that in the statute. When it was going through I said this is a piece of arrant nonsense, it’s just a matter of politics [...] It will absolutely no effect at all and, as far as I am aware, it hasn’t.”*Solicitor, n.5

Int: *no effect on practice?*

Sol: *“obviously not, because the court has always taken these things into account and always would, it is just that the law did not actually say that you had to but [certain lobby groups] wanted a political gain, wanted to win something, so they won that.”* Solicitor, n.5

Another practitioner had different attitude towards the provisions, but just as striking a reaction to the question:

Int: *“I wanted to ask you about section 11(7A – 7E) introduced by the 2006 Act....”*

Sol: *“Ha, ha, ha, ha, ha, ha, ha, ha, ha, ha, ha, ha. Yes, what about it?”* Solicitor n.6

Int: *“Has it impacted on practice?”*

Sol: *“It hasn’t. I have tried to use that on many occasions because it says you can do, the wording was quite useful at the time ... but for all the difference it has made! I still get the same attitude from the bench, ‘aye but that was in the past and we need to move forward now’ so yes we can look at it but, well, you **can’t** say:*

*‘if you look at the new Act you can see that Parliament has specifically considered this and made provision for situations such as this where there has been violence and abuse in the past and your lordship is required to take it into account,’*

*because the attitude from the bench is 'we always took it into account anyway' and we don't need to be told, so there is nothing changing and that's it.'* Solicitor n.6

Against this practice context, this practitioner observed that she advises clients who mention their experiences of domestic abuse in the following manner:

*"As long as you start with the truth, you know, I always start by saying 'unless this child is being beaten with large rubber hoses, and the bruises show, contact is likely to be ordered;' whereas a lot of people have the notion that 'in my circumstances' they won't order contact, but it would only be in very unusual circumstances that contact would not be ordered, very unusual. I have had a handful over the years but generally speaking the ethos is that contact is in the child's best interests."* Solicitor n.6

A further solicitor indicated that the sea-change at the time of the dicta in *White v White*, has not been stayed by the new provisions.

Sol: *"I used to be able to say to clients, 'ok, you don't want there to be contact and I may be able to achieve that for you, now I would never say that, I would now be saying there is no point, that guy is going to get contact. To not get contact now you have to be either a paedophile or a serially violent offender, otherwise he will get contact. There has been a major cultural shift."* [emphasis in speech] Solicitor n.3

Int: *What brought that on?"*

Sol: *"When the courts said there was an assumption that contact benefited children; but, certainly I know a child psychologist who says that is 'mince,' but that you have to deal with each case individually, to establish if there is a relationship and, if there is, if it is a good one and if not, can it be made to be a good one. You don't just assume 'it is the parent of the child, therefore, it's got to be good.'" Solicitor n.3*

Int: *"What of the 2006 amendments to take account of domestic abuse?"*

Sol: *"They don't. You just have to ask for contact to be in a child contact centre."* Solicitor n.3

In fact, rather than the 2006 amendments softening the assumption of contact between non-resident parents and their children, practitioners suggested that an increasingly hard line is being taken against women who fail to ensure their children go for contact. Certainly, at the time the interviews were undertaken a mother was imprisoned for failure to obtempur a contact order.<sup>149</sup>

*“I think sheriffs are moving towards a view that mothers who obstruct contact should not be allowed to do so. I have had two or three cases recently where I felt the sheriff wanted to imprison my woman because the contact had not taken place, and you can see those sea-changes in attitude from the bench. What I don’t know is where they come from.”* Solicitor n.6

While another practitioner observed that the impact of domestic abuse on children appears less acknowledged than the risk posed by alcohol abuse:

*“If Dad turns up ‘pissed’ for contact, mum is not going to be in trouble with the court if she says I would not let him take the kids in the car as he was stinking of alcohol and he was stumbling. But if the kids are screaming and clinging to her she will get into trouble with the court for not sending them, and I think we need clarification somewhere on just what circumstances it is reasonable to withhold contact [...]”* Legal Practitioner no. 1

She then proceeded to discuss a case she was dealing with at the time:

*“We are supporting one lady who is opposing contact because her children do not want to go on it. There has been quite a lot of violence. Social work are opposed to contact, the children and families mental health team are opposed to contact, but the sheriff has ordered it.”* Legal Practitioner n.1

Int: *so the children have to have contact basically?*

Sol: *“Yes, unsupervised. And now, overnight. The reason given by the sheriff is that the children are not able to give enough concrete illustrations of what they saw, so maybe it could be coming from mum.”* Legal Practitioner n.1

Int: *so the sheriff does not believe the children that the violence happened?*

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<sup>149</sup> *B v R* 2009 Fam. L.R. 146, also known as *T.A.M v M.J.S* 2009 CSIH 44.

Sol: *“No, I think the sheriff believes there has been violence but not that that has impacted on the children. There has been some suggestion the mother may be imprisoned for failure to obtempur.”*  
Legal Practitioner n.1

All five of the solicitors quoted thus far in this section of the chapter have experience of legal aid work – with one observing that she had seen hundreds of child contact cases in which there had been allegations of domestic abuse since the passage of the 2006 Act because *she is prepared to do that sort of work.*<sup>150</sup> In contrast however, a further solicitor who only does legal aid work for *children* stated she had only acted in five cases in which there had been allegations of domestic abuse, observing

*“Of course I don’t work in an area where there is the volume of cases where domestic abuse is in the background”* Solicitor n.7

She also had a difference response when asked whether contact was refused by the court in any of these cases because of domestic abuse,

Sol: *“In some cases yes, because the children did not want to go because the child had witnessed dad’s physical abuse of mum so that was a non-starter. The girls were 10 and 13 and this was post-divorce and they had had contact for years when their dad entered the house and took the mum by the throat and the girls were terrified and adamant they did not want to see him again. My partner also had a case where the wee girl had horrible recollections of dad assaulting mum and dad denied it and said it didn’t happen but the girl had clear recollections.”* Solicitor n.7

Int: *“Do you think the new section in the 2006 Act has impacted on practice?”*

Sol: *“it does give you another bit of arsenal to remind the court if you have a sheriff who is minded to order contact you can tell him to remember the statutory position.”* Solicitor n.7

It may be therefore that in the tiny percentage of cases before the courts in which *children* have legal representation (1%), the statutory provisions may be proving more useful than for solicitors representing adult clients.

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<sup>150</sup> Although she would no longer do divorce and financial cases on legal aid because of the block fees system introduced by SLAB

In interview, some practitioners clearly felt some disquiet at their experience of the approach taken by courts to contact disputes where there was a history of domestic abuse. While in the questionnaire for solicitors, two thirds of solicitors responding to the relevant questions stated they had acted in cases in which domestic abuse had been alleged since the passage of the 2006 Act, only 14% (n=12) said they had acted in cases where orders for contact had been made which *they believed put the child at risk*. However, one would expect practitioners who do *not* believe domestic abuse is relevant to the issue of contact - at least not sufficient to dislodge an assumption of contact - to not perceive contact ordered in such circumstances to put a child 'at risk.' Clearly, as already seen, some legal practitioners *are* of this view.

Similarly, sheriffs themselves may be expected to vary in the significance they attach to a history of domestic abuse. This is not any more controversial than observing, for example, that not all judges deciding a case in the House of Lords draw the same conclusion from consideration of the facts and of law. In interview, the responses from sheriffs to the impact of s24 of the 2006 Act varied.

One sheriff, when asked, "has section 11(7)(A-E) inserted into the 1995 Act by the 2006 Act made a difference to how these cases are treated?" Responded:

*"Happily not so! It has not had much of an impact as it might erode the principal test of a child's welfare being paramount. The provisions are unnecessary and it is unhelpful to be told we have to take these into account. We have a system that asks us to decide in the best interests of the child and we can use our judgement without having to tick boxes which would make it potentially more difficult to decide these cases."* Sheriff n.2

Another sheriff responded to the question about the new provisions thus:

*“I don’t think they have made a difference. They were rushed through at the end and we now have a duty to consider domestic abuse but there were no resources put into their implementation. We are not told how to make the assessment. Training, information and resources are needed.”* Sheriff no. 3

Intriguingly, *this* sheriff also observed:

*“Very often the information [about domestic abuse] is not put before us, so we don’t know about it. Practitioners tell me that they believe those on the bench will consider domestic abuse to be historical and therefore irrelevant and also that abuse of a parent does not affect the child. This is why they say they discourage clients from making allegations of abuse. We can only make a decision on information that is before us.”* Sheriff no. 3

Thus, in this sheriff’s view, it was the failure of practitioners to *raise* the issue of abuse and *not* the view from the bench that was a barrier to including considerations of abuse allegations into a balanced decision in respect of child contact.

Of course, believing in the *abstract* that it is in a child’s best interests to have contact against a background of abuse, and *actually* recommending it in the face of a child’s stating they do not want contact, are two different things. Chapter Nine of this thesis discusses in depth the treatment of children’s views in the court data set when they were opposed to contact. Almost all (96%) of these children had been exposed to domestic violence. It will be seen that legal practitioner’s assumptions in respect of domestic abuse and the appropriate weight to attach to it does affect the recommendations they make which, in turn, impacts on the case outcome.

This chapter turns now to consider the narratives of legal practitioners in respect of the taking of children’s views in private law contact disputes.

### 5:3 Objections to the Participation of Children in Legal Process

Gerison Lansdown describes four main objections to the participation of children (Lansdown 1995:20). One is clearly motivated out of a desire to *protect* children from the ‘burden’ of participation and is that giving children responsibilities ‘detracts from the right to childhood.’ However, the other three objections are more overtly concerned with the maintenance of the adult-child power differential. These are: that ‘children are not competent to participate in decision making’; that ‘children cannot have rights until they are capable of exercising responsibilities’; and finally, ‘that giving children rights threatens the harmony and stability of family life.’

In the context of a *contact dispute*, children are often expressing a view *about* their parents and, perhaps not surprisingly, it was the last of these four objection types that was most frequently aired by legal practitioners in interview.

It is also the most common objection in the literature on children’s participation in family proceedings, authored by *legal practitioners*. For example;

*“On the private law side, the importance given to children's views can create a situation where children are put under considerable pressure by their parents. There is a risk of damage to the parent/child relationship. There is a risk that children take on the role of caretaker and give views out of a sense of concern for the parents.”* Hall Dick (2008:231)

The above quote illustrates that the predicted harm comes from the belief the child will be pressurised by the parents and that the view they express will not be *what they really think*.

However, this is not the only objection detected in legal practitioner’s narratives. Some also expressly normalised and affirmed adult *authority* over children, while frequently practitioners asserted that children *will not*



want to express a view. This latter was due to a predicted loyalty to both parents with practitioners assuming children would ‘just want their parents to get back together.’ These objections are discussed here in greater detail.

### **5:3:1 Inappropriateness of Taking the Views of the Child in this Context**

When the author was explaining to a court reporter a basic premise on which this doctoral research is based, which is;

*“if we allow children to have a say in major decisions that affect their lives then they are able to develop self-esteem, a sense of self-worth, that adults actually listen to them and attach weight to their views...”*

when the court reporter interjected with:

*“Stop there, stop there! stop there! As a philosophy that is a sound philosophy but that should be a modus operandi within the school [...] so that if that child finds himself in a position of conflict with parents or with friends or neighbours or colleagues or peers or teachers, then he or she knows how to sit down and write and to express his view which is a good thing. But add to that lethal mix that the people you are in conflict with are your parents and you don’t want to upset them and you just want them to get back together again, that undermines all of that.”* Legal Practitioner n. 2

The internal contradiction in this quote reveals an ambivalence towards the ‘empowerment of children’ by affording a child participation rights. This court reporter appears to be of the view that participation of children is a good thing outside of the family – specifically in *school* (as this might equip the child to deal with conflict in the private arena) - but it is not actually a good thing for the child to express those views *if* they might be different from those held by one or other parent.

She observed:

*“When the 1995 Act came out, the big push was that the child’s voice shall be heard. Now in a normal family the child’s voice might be heard at the breakfast table, but mum and dad will take the decision and the child will just have to go along with it.”* [Legal Practitioner n.2]

This view was also expressed by some sheriffs, for example:

*“My decision will not always be based on the child’s views. There are a lot of things in life a child might not want to do. I point this out to the mum. They may not want to eat their greens or to go to school but you know it is good for them and you make them do it. It is part of human experience that adults tell children what to do.”* [Sheriff n.2]

Thus, children are to be ‘made to’ do something they do not wish – on the basis that it is assumed to be ‘good for them.’ In this case, it is contact with a non-resident parent that is the assumed good. Ideally, of course, a parent should *listen* to the child’s concerns and then incorporate the child’s perspective into their own future actions. To use the examples given by the sheriff above for example, the responsible adult *could* provide alternative vegetables that the child does like (at least at the next meal!) and *could* invest the time to find out *why* the child is unhappy at school as unhappiness is *not* normal. This would also involve discussing with the child possible options for resolving their difficulties.

Furthermore, as has been discussed, a significant number of the cases that come before the courts do so *because of* a parent’s concerns surrounding the safety of the child during contact; that is a parent may be resisting contact because they *do not* believe the contact sought will be (or has been) ‘good for them.’ Such a parent can be motivated by a desire to safeguard their child’s welfare – as required by s1(1)(a) of the Children (Scotland) Act 1995. In such circumstances chastising a parent for failing to insist their child attend contact only serves to illustrate to that parent that the court

either does not understand their child's distress or has no respect for their child as an individual.

However, some of those charged with taking the views of children for court reports were of the view that children should not be spoken to about this major decision affecting their lives:

*“if a child has expressed a view they will believe that view has had an impact even if the sheriff tells the parents ‘I am setting aside the child’s views.’ The fact that the child has been involved in the process and after the process his life is different - whether it stays the same and mum or dad is unhappy, or because he has moved and mum and dad are unhappy - he is always going to have a link.”* Legal Practitioner n.2<sup>151</sup>

This practitioner was the most opposed to the participation of children in legal process of all those interviewed. Others expressed the more moderate assumption that children *won't want to* express a view, rather than suggesting they should not be given the choice. Although in practice, the impact on children's choices might be the same.

### **5:3:2 Children Won't Want to Express a View**

The majority of solicitors interviewed confidently asserted children would *consciously* (and expressly) rather not have any input;

*“The norm is the child does not wish to express a view. The child often says, although not in these words, look guys I'm the child, you are the grown ups – you make these difficult decisions. Be parents, act parentally, I'm the child.”* Legal Practitioner n. 5

This may of course *be* the case for a significant number of children, but there is a risk associated with *assuming* this to be the case - if it means children are not even informed that they have the option of expressing a view if they wish.

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<sup>151</sup> Noticeably, this practitioner predicted *only* an unhappy outcome post court action.

When court reports are ordered in the cases before the courts, the assumption that children do not want to express a view may enable practitioners to account for children who sit shaking their heads or change the subject when asked about contact – both of which were described by court reporters in interview. However, a child’s hesitancy may not necessarily be simply because they don’t want to express a view. Children may equally well be wary of the stranger before them, or of a shy disposition, and children who have lived with domestic abuse in particular may be wary of the potential ramifications for the expression of their views – especially if they have been told (or overheard) an abusive parent declaring that ‘no one will believe you’ in respect of the abuse. McGhee (2000) found that the children often *expected* they would not be believed, particularly when the perpetrator of the violence denied their story.

However, as was also evident in the words of the practitioner quoted previously on page 169, it is assumed that:

*“in private law cases, the views of many, perhaps the majority of, children would be that their parents should get back together,” Hall Dick (2008:232)*

Once again, an understanding of the impact of domestic abuse on a child would undermine this assumptions for (as discussed in Chapter Two) children who have been exposed to domestic abuse have been found to be particularly vociferous that children’s views should be decisive, and they should *not* be ordered to exercise contact against their will (Gallegher 1999, Neal & Smart 2001, Mullender et al 2002, Parkinson et al 2007).

### **5:3:3 Parental Influence**

Parental influence was *the* objection most commonly mentioned by legal practitioners in respect of every method of taking children’s views in legal process. While, in the Questionnaire for Solicitors, a quarter of solicitors acting as a solicitor for a *child client* under the age of 12 stated they would

“usually” suspect parental influence in the context that a child said they did not want contact – see **Fig: 5:1**. However, no similar suspicion was raised in cases where children appeared to agree with contact (regardless of the nature of the behaviour they had been exposed to).

Given that a solicitor has to be satisfied the child has a general understanding of what it means to instruct a solicitor<sup>152</sup> it is particularly interesting to note the extent to which they may nonetheless perceive the child as *negatively* influenced by a parent.

**Table 5:1 Solicitors suspecting the influence of the Resident Parent when a child client says they either want no contact or for existing contact to stop.**

Childs Age	Always	Usually	Sometimes	Never
Under 12 (n=53)	13%	25%	60%	2%
12 and Over (n=57)	5%	18%	72%	5%

There was no additional comments box for this question which might have enabled an unpicking of the relevant factors where solicitors would (or would not) suspect such influence, but the following are typical of the statements made by practitioners in interview:

*“It would be very unusual for a child to come off the street and say I am twelve and I understand you can represent me, I don’t want contact. Usually the child will have been brought by someone and so what is that person’s role in the stance the child takes?”* Legal Practitioner n.7

*“In the case of the 14 year old I just told you about, the dad cited the fact that she had got to the solicitors office on her own by public transport – but it was her dad who had looked up solicitors on the internet!”* Legal Practitioner n.6

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<sup>152</sup> Age of Legal Capacity (Scotland) Act 1991 s2(4A)

*“When you are 8 or 10 or 13 your mum or dad are going through this – the people you rely on – you feel their emotions too. So some of these children do want to see their dad but don’t want to say so because it will hurt their mum too much so they won’t say. They will just agree with mum that they don’t want to see dad.”* Legal Practitioner n.1

Although there was a general tone of scepticism over the origins of the views of children in the context of a dispute between parents who do not reside together, as the last of these quotes illustrates, practitioners do not always suggest it is deliberate or tactical on the part of the parent who promotes the taking of the child’s views. Others however, clearly did believe this to be the case (rather than the wish to protect the child):

*“It is a win, lose situation, and it’s a battle and you know the old saying that children should not be used as pawns – it is absolutely true.”* Legal Practitioner n.6

*“It is often that the parent seeking contact has a drugs or drink problem and the child is often prayed in aid to refusal.”* Sheriff n.1

The problem of course (as the first of the above string of five quotes points out), children are very unlikely to be aware they have a right to a voice, nor how to go about achieving this without the aid of *someone* and, although F9 Forms can afford children this opportunity, only a small percentage of the children whose parents take their dispute to court are actually sent these forms (intimation being granted to 17% of the thesis data set).

One practitioner who was unique among interviewees in *only* representing children (and who does pro bono work if this is the only way a child may be heard), made the following observation in respect of barriers to children’s participation:

*“They have to find an avenue to get to the legal process. Unless somebody actually has told them there is a way – that is the first hurdle. Unless somebody has identified that their voice is important whether that is a support worker or a parent; very rarely would a young person without any support from an adult approach a solicitor.”* Legal Practitioner n.9

However, this practitioner was also aware of the conundrum;

*“A big issue for us is that it [the support needed to enable a child to speak to a solicitor] has to come from somewhere and the big difficulty then is that if it has come from a parent then immediately the chances are that the child’s views are supporting that parent, if that parent then contacts you.”* Legal Practitioner n.9

Thus, this practitioner also saw the parent’s involvement in terms of promoting their child’s views *because* they conform to the parents and not in terms of the parent seeking to support the child in being heard. A parent who listens to their child of course, and takes the child’s concerns seriously, is likely to believe others should do the same and seek to support the child in being heard by others when their efforts to effect this fail. Therefore while cases will exist in which parents exert a negative influence on their children’s attitude to their other parent, there will also be cases in which parents are *responding* either to a child’s express views in respect of contact, or to the child’s behavioural distress at the prospect of (and after) contact.

The research conducted by Gallagher (1998) just after the passage of the Children (Scotland) Act 1995, into children’s access to legal services found the children who stated they *had* approached someone for legal advice or information (n=94) most commonly stated this person had been a parent (n=49).<sup>153</sup> While the research conducted for the Scottish Executive (Tisdall et al 2002) found that of the two-thirds of children who named a *parent* as their key support person, for all but two of these children, this parent was

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<sup>153</sup> ‘Parents’ was a single category in this research and they were not separated out into ‘mum’ or ‘dad’ although, of course, children can have quite different relationships with their two parents.

their mother (para 4:2:1). Further, Neale and Smart (2001) observe that the children who had a bullying and oppressive parent,

*“had to find ways to work round their oppressive parent. Their initial strategy was to enlist the help of a supportive parent or wider kin member who could be an effective advocate on their behalf.”* (2001:16)

That children rely on a parent is surely to be expected and indeed what law envisages, for as Gallagher (1999) observes of the UNCRC:

*“the primary responsibility for preparing children and young people for independent life is seen as resting with the parents and, among other things, would include providing them with information of relevance and importance to them. This would include information on their legal rights.”*(1999:1)

The Children (Scotland) Act 1995, consistent with the UNCRC, requires parents to have regard to the views of their child when they reach any major decision in respect of that child.<sup>154</sup> Therefore *listening* to a child expressing their views in respect of contact is something a parent *should* do, as is accessing legal advice on how their child may have their views heard - when the parent's attempts to relay those views fails. Parents – particularly primary carers who may have been a sole parent for some or all of a child's life - are therefore likely to be unprepared for the disempowerment they face in the context of a dispute over contact or residence. Rather, they are likely to be accustomed to discussing their child's wishes with a variety of professionals (such as teachers, organisers of children's activities such as sporting and activity clubs and with health professionals). The children interviewed as part of the present doctoral research found the parent they expressed their concerns to about contact were not believed by the courts. This is also something Douglas et al (2006) found to be the case, with one child's advice to other children being:

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<sup>154</sup> s6 Children (Scotland) Act 1995



*“If you tell your parent something and they tell the court, the court might not really believe them.” (Brian, aged 3 when his parents separated; aged 11 at time of interview; Douglas et al 2006:58)*

The authors of this study observe;

*“Even in our small qualitative sample, several children expressed concern that their own reluctance to have contact with their non-custodial father might be misinterpreted by the court as meaning that their mother was being intractable.” (2006: pp 7:61)*

While Bren Neale (2002) wrote after her research with children undertaken with Carol Smart that,

*“Much of what is currently perceived almost automatically as ‘manipulation’ of a child’s views by a parent might just as appropriately be seen in this light: as a parent consciously seeking to understand their child’s point of view and actively supporting them.”(2002:457)*

Therefore, while it is indeed likely that authoritarian or self-absorbed parents almost certainly exert pressure on their children, in cases where children genuinely do not want to spend time with a parent whose behaviour they find disturbing or frightening, the child faces the very real risk that little weight will be attached to the views they express – whether directly or via a parent who *does* respect and promote their individual perspective.

#### **5:3:4 Combined effect of Practitioner Narratives on Taking Children’s Views**

Even when the more extreme view that children should not be asked their view as it is not appropriate is set aside, the combined effect of practitioners assuming children ‘will not want to express a view’ and that the view they express will not be their own is that, but for the *legal requirement* to take a child’s view where the child has indicated they *want* to express a view, it would otherwise be unnecessary to take children’s views.

For, in the absence of an apparently proactive request from the child to be heard, it may be *assumed* that what the child would really like is for his or her parents to reconcile but, as the parents are incapable of this, it may be *assumed* that the child should spend generous amounts of time with both parents as this is what the child would wish. These assumptions also provide an explanation when a child's views *are* taken. For when children respond that contact is "ok" or observes that "it would be fair to see my dad as much as my mum," their views are likely to be taken at face value, while a child who is negative about contact or does not want contact at all, may be assumed to be mimicking the parent raising concerns over contact.

That is, legal practitioners are alive to the vulnerability of children to parental pressure but not alive to the vulnerability of children who are distressed by contact but are unable to have their concerns taken seriously. Some are also clearly unaware of the particular vulnerability of children who have lived with domestic abuse.

#### **5:4 Conclusion**

This chapter has attempted to illustrate that *practitioner* narratives in respect of domestic abuse are crucial. It is suggested that *if* practitioners were aware of the impact of domestic abuse on children, *it would no longer be tenable* to assume the parental competence of an abusive parent, nor would it be possible to assume children will necessarily feel loyalty to *both* parents, nor that they will just want their parents to resume cohabitation. It would also not be possible to dismiss the views of a child who is opposed to contact as mere evidence of 'parental influence' in instances where the child had been exposed to abuse.

Section 24 of the Family Law (Scotland) Act 2006 was an attempt by the Government to flag up domestic abuse as a highly significant factor to be weighed in the balance when child contact decisions are made. However, the manner by which the amendment was hastily included and the failure to

provide the necessary training for legal practitioners so that they understood the significance of this provision, appear to have impacted on its effectiveness to date.

Without the shift in thinking that effective training could provide, legal practitioners – knowing that law equates *contact* with the best interests of the child – may reinterpret the remonstrations of their clients (whether adult or child) as *irrelevant* to the issue of on-going contact (whether that be a history of domestic abuse or the fear of a parent). For legal practitioners, a successful outcome is the re-establishment of a regular pattern of contact between a child and his or her NRP. Clients who do not agree to this are therefore *problem* clients – to the extent that one of the solicitors interviewed (who does not do legal aid work) considered solicitors are failing when they are unable to broker agreement without resorting to the courts.

It can be concluded that what really may promote the welfare of *individual* children in these cases becomes lost in a (patriarchal) system which assumes ‘welfare’ equates with contact between a child and his or her father.

Just as this chapter has suggested how the *assumptions* of legal practitioners may act as barriers to the participation of children in legal process, the next chapter includes examples of *procedural* barriers to the inclusion of the views of children in legal process.



## CHAPTER SIX – Reconstructing the Twin Pillars Of Ethical Consultation for Legal Process

### 6:1 Introduction

This chapter considers the extent to which our *methods* for involving children in legal process conform to requirements of ethical consultation – specifically the need for *informed consent* and *confidentiality*, these being the twin pillars of ethical consultation.

It has previously been discussed that the confidentiality of children’s views cannot be guaranteed in legal process (see case law in Chapter Two). Theoretically therefore, this fact is something children should be made aware of when they are given the opportunity to express their views – as part of ensuring they make an *informed* choice whether or not to participate.

For, the participation of a child in private law civil legal process is meant to be voluntary. As section 11 (7) of the Children (Scotland) Act 1995 makes clear, a child should be given the “opportunity to indicate whether [they wish] to express a view.” It is this ‘indication’ therefore, that triggers them being given the opportunity to actually express those views.

However, such an “indication” is not possible unless children know they have a right to be heard (and how to exercise that right). In private law contact disputes, intimation via an F9 form is *the* means by which children may be informed not only that they may express a view, but also that they may obtain free help and advice from the Scottish Child Law Centre or from a solicitor. Intimation is also the only formal means by which they can nominate someone they *know* to express a view on their behalf to the court. Yet, in the court data set, intimation was only granted in respect of 17% of children.

The greater part of this chapter explores the practice of the *intimation of children* via an F9 form. This discussion highlights both the assumptive and procedural barriers that exist; examples of the latter being the erroneous practice of sending children a copy of the Initial Writ with the F9 form, as well as the timing of craves for intimation of children at the start of an action (when it is not even known whether the case will even be defended or not). The chapter also describes how the lack of attention to the drafting of F9 forms may be a further barrier to children's participation.

The final section of this chapter discusses the issues of informed consent and confidentiality in the context of *court reports*.

Court reports were the most prevalent means by which children's views were taken and all children who expressed a view via a letter or F9 form in the court data set were in fact *also* the subject of a court report.

It is striking to observe that *unless children are informed of the purpose of the reporters visit* then the taking of the views of children by a court reporter *lacks all* of the features of genuine participation identified by Tresedor (1997).<sup>155</sup>

## **6:2 INTIMATION**

A copy of the F9 form can be found at Appendix 3.

As currently drafted, the F9 form's advice to children is limited to the following words:

“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.”

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<sup>155</sup> See discussion in Chapter Two pages 49-51.

However, by contrast to a court appointed reporter coming to the child's home to speak to the child, F9 forms do afford children a greater opportunity to *choose* whether to give their views to the court or not.

Where a child has returned a Form F9, "or otherwise indicated to the court a wish to express views on a matter affecting him," the Rules of Court state that "*the sheriff shall not grant any order unless an opportunity has been given for the views of that child to be obtained or heard.*"<sup>156</sup>

Further, as current practice stands, F9 forms are the means by which children are most likely to be afforded a limited degree of confidentiality, for upon receipt of a F9 form in the post, sheriff clerks *should* seal the form in an envelope marked "views of the child – confidential."<sup>157</sup>

### **6:2:2 Use of Intimation in the Court Data Set & the Impact on Participation**

Intimation of 53 children in the court data set was craved and this was granted in respect of 52 children, with 25 children returning a completed Form F9.

For clarity, this does not mean sheriffs granted intimation to all but one child in respect of whom it was craved, rather intimation was refused in respect of six children for whom it was craved (aged 4-8 years) *but* it was granted to five children by a sheriff even though a crave for this was omitted from the Initial Writ. This indicates that sheriffs may sometimes take a proactive stance towards giving children the opportunity to express their views.

Apart from one four year old and one five year old, all children in respect of whom intimation was *craved* were aged between 7 – 17 years. As with

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<sup>156</sup> OCR 33.19

<sup>157</sup> OCR 33.20

the taking of views in general, the older the child the more likely they were to be intimated. **Fig 3:3** (in Chapter Three) illustrates the extent to which children’s views were taken by *any* means while **Table 6:1** below illustrates the use made of intimation in the court data set.

While only 48% of children who were intimated returned their F9 Form, a further three children wrote letters rather than returning the form – which, of course, the form invites them to do. Thus 28/52 children apparently responded to intimation (54%) by writing to the court.

**Table 6:1 Ages of Children Intimated (n= 52)**

	Age 7 - 8 (n=43)	Age 9-10 (n=41)	Age 11- 12 (n=35)	Age 13- 14 (n=13)	Age 15+ (n=9)
Intimation craved	<b>19%</b> (n=8)	<b>12%</b> (n=5)	<b>60%</b> (n=21)	<b>77%</b> (n=10)	<b>78%</b> (n=7)
Intimation Granted	<b>9%</b> (n=4)	<b>12%</b> (n=5)	<b>63%</b> (22)*	<b>92%</b> (n=12)**	<b>100%</b> (n=9)¬
F9 Returned	<b>5%</b> (n=2)	<b>7%</b> (n=3)	<b>31%</b> (n=11)	<b>46%</b> (n=6)	<b>33%</b> (n=3)

Percentages given are column percentages – that is the percentage of all children of that age group in respect of whom intimation was craved and/or granted and who returned an F9.

Percentages given are column percentages – that is the percentage of all children of that age group in respect of whom intimation was craved and/or granted and who returned an F9.

\*Intimation was granted for one 12 year old in respect of whom it had not been craved. This child had a 15 year old sibling who was also intimated, although not craved.

\*\*Intimation was granted in respect of all 13 years old for whom it was craved. In addition intimation was granted to a further two 13 year olds for whom it had not been craved in the Initial Writ. For one 13 year old, intimation was neither craved nor granted.

¬ Intimation was granted for all 15 year olds for whom it was craved and, in addition, it was granted for two 15 years olds for whom it was not craved.



The rules of court stipulate that copies of intimation should be attached to the Initial Writ but does not stipulate this to be the case when intimation is to a child in the form of F9.<sup>158</sup> This may explain why copies of the F9 forms *as sent* to the child were not attached to the processes of twenty-three children in respect of whom it had been granted. Where no form was returned this meant there was no evidence of the F9 Form actually being sent. However, a parent's solicitor may very well have given their client a copy to take home to their child to complete.

### *Impact of Intimation on the Child's Expression of Views*

Where intimation was granted, children were more likely to give their view to the court. All the children in the court data set who wrote letters to the court or instructed their own solicitor had either been intimated or had an older sibling who had been. Further, children from households where a child had been intimated were significantly more likely to give their views by more than one means. There were twenty-five children in the court data set who gave their view by more than one means. Three-quarters of these had been intimated, while a further 13% (n=3) had older siblings who had received intimation.

It does appear therefore, that engaging the child via intimation may lead the child (or at least an adult responsible for the child) to inquire into and utilise other methods of being heard in legal process. *However*, children are more likely to be intimated in the first place when a *parent* requests this. Such parents may also push for, or support, their child's views to be taken by other means.

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<sup>158</sup> OCR 33.7

### 6:2:3 Factors Impacting on Intimation

Solicitors rely on the information conveyed to them *about* the child and, in response to the questionnaire question “what factors determine whether to crave intimation or not?” some solicitors responded in the following vein:

*“Depends on what information the client gives me regarding the child’s maturity level and intelligence and likely willingness to express a view for example.”* Respondent n.66

*“How mature the child is. The parents view on whether it would be appropriate to seek the child’s views, would intimation upset the child?”* Respondent n.1.

In the *court data set* the most common reason for craving dispensation of intimation was variously the ‘age’ or ‘maturity’ of the child (and sometimes both). What was particularly surprising however, was that this was given as the reason for children who had reached the age where the presumption of competence applies – as the following examples illustrate:

*“dispense due to tender years”* (age 13)

*“child not of sufficient age and maturity to receive formal intimation by way of Form F9”* (age 12)

*“dispense due to lack of years and immaturity of child”* (age 12)

Clearly, where a child is too young to understand an F9 form even if it is explained to them, intimation via a Form F9 is not practicable. However as the F9 form was intended to be *the means* of informing children of the decision the court has been asked to make about *their* lives, and to inquire whether they have anything they wish the sheriff to know, it is more than of passing concern

that dispensation of intimation was craved in respect of approximately 80% of children in the data set.<sup>159</sup>

If F9 forms are not suitable for children, then surely they need to be changed so that they are.

#### **6:2:4 Assumptive barriers to the Intimation of Children**

In the previous chapter it was observed that assumptive barriers impact on the use of **all** methods for taking the views of the child. In respect of *intimation*, the risk of parental influence was a frequently aired concern.

This is clearly not without reason and one of the mothers interviewed described how the failure to explain the *implications of the choices* facing her son, influenced the view he expressed:

*“Apparently his father had asked him if he wanted to live with him or with (mums new partner) and had not mentioned me at all. Obviously, the child said he wanted to live with his dad in those circumstances. I would have been very worried if he had not. However, when he realised the consequences, he said he wanted to be with his mum but see his dad in the holidays.”* Parent Interviewee no.8

It is of course sheriffs who decide whether or not intimation should be *granted* and the majority of sheriffs expressed the view that this possibility of parental influence undermined the efficacy of the forms:

*“I have reservations about using this method as you have no clear idea how the F9 is presented to the child. Do they understand the form? Are they influenced by their resident parent? You cannot know the circumstances in which the form is completed.”* Sheriff n.3

*“I have very little experience of any child actually filing them up but who is going to fill them up anyway? Are they going to fill them up or is mum going to fill them up.”* Sheriff n.6

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<sup>159</sup> Craves in respect of intimation were missing from the processes of approximately 10 children (3%) of the data set.

*“they are not always terribly helpful as you cannot be sure of the circumstances in which they were filled in – under whose control or influence or if someone else has just told the child what to put in. Children tend to say very little such as “I don’t want to see my dad” they don’t tend to write a lot but then the form lends itself to brevity”.*  
Sheriff n.2

Of the eight parent respondents who had at least one child who had been intimidated, a total of five resident parents completed the additional questions on F9 forms. All agreed with the statement that they had ‘explained the form to their child’ and all said ‘yes’ to the question “Did you talk with your child/ren about what they wanted to write and then leave the child to write it on his or her own?” However all said ‘no’ to “Did you talk with your child/ren about what they wanted to write and then tell them how to write that clearly so that other people would understand?” Parents also denied correcting the F9 form after the child had filled it in, by responding negatively to the question “Did you go over the completed letter / form checking for spelling mistakes and bits that did not make sense?”

Of course, parents responding to the questionnaire were ‘veterans’ of legal process and may have been very careful in their responses as they would be acutely aware that they are viewed with suspicion by legal practitioners and that anything that *may* be construed as ‘influence,’ almost certainly would be.

Assumed lack of competence – even of children who are of the age where competence is to be assumed – is also a formidable barrier and one sheriff queried whether children would be able to understand the F9 Form;

*“Would a nine year old be able to understand the form, would the child be literate? I mean how many 14 year olds would understand the form? I was sentencing a 20 year old yesterday and he was illiterate – could not read or write, what are the chances that he would have understood a F9 if it had been sent to him at the age of 14?”* Sheriff n.5

However, despite frequent problems with the drafting of forms (discussed in the next section) all parents agreed with the statement that the form had been ‘easy to understand’; although as all had *also* agreed with the statement that they had ‘explained the form to their child,’ it is likely their explanations may have assisted the child to overcome any initial problems with the form.

### **6:2:5 Procedural Barriers to the Intimation of Children**

As well as assumptive barriers, two key procedural barriers were also identified which increased the reluctance of solicitors and sheriffs to seek the intimation of the child. One is the timing of craves for intimation and the other, the (erroneous) practice of sending Initial Writs along with F9 forms.

#### *Timing of Intimation*

At the time the Initial Writ is lodged (when intimation may or may not be granted by warrenting), it is not known whether the other party will even lodge a Notice of Intention to Defend, let alone Defences, and it may be that the matter will be resolved between parties or will be abandoned by the pursuer. Therefore it is perhaps not entirely surprising that, certainly at the time of warrenting, sheriffs generally prefer to wait to obtain more information prior to granting intimation:

*“There was a case [Shields] which stated that the duty continues throughout the process and so I put on my interlocutors that I dispense with intimation of the child ‘in the meantime’.”* Sheriff n.5

*“Rather than a refusal to intimate it is more a deferment – I prefer to wait to the first child welfare hearing where I can seek to find out more about the maturity of the child. It is then possible to intimate or to appoint a curator.”* Sheriff no 4

While this is an accurate statement of shrieval competence, in the cases in the court data set, intimation was either granted by the first hearing in the case or *not at all*, in all but one case. Rather, when sheriffs deferred intimation and later sought the child's views, they did so via a court reporter or, occasionally, the appointment of a curator *ad litem* – a process the child does not have a say in.

### *The Problem of Initial Writs*

In 1999 Rosemary Gallegher optimistically observed that the Sheriff Court Ordinary Cause Rules 1993 had been amended “so that now the child or young person only receives an intimation form” (1998:62). Four years later Tisdall et al (2002:4.5.7), found that some sheriffs and practitioners remained unaware that only the F9 should be sent to a child and not the Initial Writ.

Regrettably, the cases raised in 2007 which are the focus of this study (as well as the interviews with practitioners in 2009/10) indicate that some practitioners *still* believe the Initial Writ should be sent along with the F9 form - with the consequence that large numbers of children continue *not to be intimated because of it*.

When one sheriff was asked “When do you think intimation of a child should be dispensed with?” The response was:

*“Well age is the obvious starting point. If they are still in primary school, I would not consider it appropriate for them to receive the papers.”*

Int: *Which papers are they?*

*“It would not be appropriate for them to receive the Initial Writ.”*  
Sheriff n.2

This was also often expressly stated as *the* supporting reason for dispensation of intimation by solicitors acting for the parents of the child in the court data set. For example:

*“so that the Initial Writ is not intimated on her”* (age 10)

*“the children are incapable of understanding the nature of these proceedings or the terms of this Initial Writ”* (Siblings aged 7 & 6).

*“he is only 8 years of age. It would not benefit him to see these written pleadings”*

Further, in the Questionnaire for Solicitors, 15% of the seventy-nine respondents who filled in the optional text box gave the ‘nature of the allegations/averments’ to be *the* determining factor in respect of whether they crave intimation or not - an indication that they may not be aware the child should not have sight of these.

It is perhaps only when one has read through Initial Writs in child contact cases that the enormity of the distress that could be wrought on children receiving such a document may be fully comprehended. They often contain some very unpleasant allegations, including descriptions of savage beatings of one parent by another, and clearly should not be sent to children along with the Form F9. Even without such content, there is usually a foreseeable likelihood they will distress the child. One example from the data set is a case in which an eleven year old boy was sent the Initial Writ in which his resident father claimed that in the past his mother had pawned the presents his father had bought the child, in order to buy alcohol. He also alleged that when the child’s mother said she could not collect her son to exercise contact (for example if she was unwell), he would take the boy to *her* as he did not want her to call the police and insist he deliver the child (over whom he has no PRR). This boy was also sent a copy of Form F14 (form of warrant of citation in family action) which included the words:

*“meanwhile, ad interim interdicts the defender from removing the child (his name) born on (his birthdate), from the care and control of the pursuer without the pursuers express written permission”*

In this particular case all the papers were returned to the court and attached to the process, as intimation of the child via Form F9 had proved unsuccessful when sheriff officers had been unable to find the boy at the address provided by the pursuer. However, this Initial Writ should never have been sent to him in the first place.

In another case a copy of the Initial Writ that was put before the court was also sent to the 14 year old boy. The father claimed in his writ that his son had “engaged in fights with local gangs, drinks alcohol and smokes cannabis.” When the boy’s mother lodged her Notice of Intention to Defend she craved that intimation on all three of the children in the family be dispensed with as:

*“the Initial Writ has already been intimated to [oldest child], causing him a great deal of upset and distress and to further intimate parts of the process would cause further distress.”*

It may be that if practitioners were more convinced of the desirability of giving children the opportunity to express their views in this context, robust means of ensuring practitioners conformed to correct procedure could have been implemented. However, as *not* involving children in legal process in the context of a dispute between parents is considered preferable in the view of many practitioners, there may be little motivation to address the problem of sending Initial Writs.

The review of court processes however also revealed that *even when* intimation is granted, children face additional barriers to their use of this form and it is to these that the focus of the chapter now turns.



## **6.2:6 Additional Barriers to Participation once Intimation is Granted: Drafting of F9 Forms**

The observations made here are based on reading the copy F9 Forms as sent to the children which were attached to the processes of 19 cases (involving 29 children who had been intimidated).

The author was somewhat bemused to discover when reading these F9 forms that most forms still contained some or all of the “notes for completion” intended to guide solicitors as to how to fill in the form including the words at Part A “This part must be completed by the Pursuer's solicitor in language a child is capable of understanding.” The instructions could readily have been deleted after completion and, where they remained, the forms were unnecessarily difficult to follow as a child would be very likely to think the notes were meant to guide *them* to completing the form. Additionally, in all but one process there was no covering letter explaining why the Form F9 was being sent, although it remains possible solicitors may have elected not to send a copy of the covering letter to the court.

A further problem was that the positions of the page break(s) varied widely from form to form and were sometimes in the most ludicrous of places including the mid-point of Q.1 of Part B, the middle of Box A and the middle of Box B. There were only six forms out of nineteen which did not have either the instructions left or a badly placed page break. The case discussed earlier in the chapter where an 11 year old boy was sent a copy of the Initial Writ (pg 189-190), was one of the cases where all the notes for completion remained and just the child's name and the words “your father” and “where you should live” had been added to the form at Part A.

Even where the basic presentation of the form had been attended to, the words inserted by solicitors (or possibly by a paralegal) could be confusing. To carry on with the example from the previous paragraph, the words “where you should live” could mean a number of things of course,

particularly in the context that there was no covering letter. In fact what the sheriff in this case was *actually* being asked to decide (and what the form should have said) was, “which parent you should live most of the time” and “when you will visit the parent you don’t live with.”

However, this was by no means the most confusing of the words inserted onto F9 forms sent to children. In one case a mother was seeing her daughter for three hours per week and wanted to increase this to three evenings per week. However the child’s view on this was not canvassed, instead she was asked:

*“(a) whether you should have contact with your mum.”*

Other examples include a case in which a child was informed the sheriff had been asked by her father to decide:

*“(a) Whether he should see you in person.”*

The author was left wondering whether the sheriff was trying to decide if *he* should speak with the child OR the issue of contact between father and daughter. The ambiguity might very well have confused the child too. While in a further case the form merely stated:

*“The sheriff has been asked by (2) your parents to decide: Parental Rights and Responsibilities.”*

No explanation of what Parental Rights and Responsibilities are, nor which parent wanted them was provided and, again, there was no covering letter.

In a further case, the form stated the sheriff had been asked by the child’s mother to decide:

*“(a) whether or not to grant an order to say that now that your parents have separated you will live with your mum. If the sheriff makes this order sh/e can grant an order for you to have contact with your dad.”*

On the face of it, this may seem harmless enough. The first sentence is clear and the second could be read as a reassurance that she will still be able to see her dad. However, this was a case in which the child was (allegedly) in terror of her father<sup>160</sup> and when that is borne in mind, the second sentence reads rather as though *if* the sheriff orders she live with her mum (and only if), an order might be made that she have contact with her father. A child in this situation may be fearful to say she wishes to live with her mother if to do so appears to mean she will be ordered to have contact with her dad.

It is crucial that children are accurately informed, particularly as their competence can be judged on whether the view they express demonstrates they have a grasp of the relevant issues (see *W v W*)<sup>161</sup> and we do them a serious disservice by *misinforming* them of the nature of the dispute.

By way of contrast, solicitors completing three of the forms had taken care to ensure the form was both well presented and comprehensible to a child and in one case a well drafted covering letter was also included. An example is a form to a fourteen year old explaining the sheriff had been asked by her father to decide,

*“(a) whether to make a Residence or Contact order, which means an order where you would reside with your FATHER, or an order which will allow your father the opportunity to see you each week while you continue to live with your MOTHER.”*

However, even in this case it would have been clearer if ‘residence’ was dealt with at (a) and ‘contact’ dealt with at (b), as they are separate issues.

Ironically, poor drafting *renders* children dependant on parents to complete the form, which is the key objection to the *use* of the forms given by legal professionals.

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<sup>160</sup> The 12 year old who was intimidated did not return the form. Her older sister spoke to the reporter and told of high sustained violence and terror and of dad padlocking their mother inside the family home.

<sup>161</sup> *W v W* (2003) SLT 1253

## Time to Complete Forms

It was also noticed that some F9 forms gave children very little time from the date of citation to post their completed forms back to the court. For example the date of citation of intimation in one case was the 11th July and the instructions at the end of the form had been altered to read:

*“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 **and return to the court by the 15<sup>th</sup> July**. 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.”* [author’s emphasis].<sup>162</sup>

It is possible this might not be immediately noticed by the child and gave her very little time to digest the contents of the F9 and Initial Writ, let alone to seek advice and to think about whether she wished to return the form and what she might want to say.

## Use of Sheriff Officers

It was also noted that some solicitors used Recorded Delivery to intimate children while in other cases Sheriff Officers were used. Possible reasoning behind the use of the latter is perhaps to ensure it is the child that receives the F9 Form and not a parent, but then in some processes Sheriff Officers had recorded that they had delivered the papers into the hands of the child’s parent as they were satisfied the child was not at the address at the time.<sup>163</sup>

The use of Sheriff Officers may, in the authors view, be alarming for children and this certainly was the view of one child interviewee who described how:

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<sup>162</sup> The actual month has been changed to further protect anonymity.

<sup>163</sup> This is consistent with OCR 5.4(1)b which state that a sheriff officer can leave documents in the hands of a resident at the person’s dwelling place.

*“The man who came to the door he had a brief case and it was me that first answered the door to the guy and I had no idea what was happening so I called my mum and he came in and spoke to mum and she told me to go up the stairs [...] and I was crying as I felt that he [dad] just could not listen to what I wanted.”*

Although it is recognised that the use of sheriff officers is the usual practice when craves are granted at the time of warranting, it is submitted that the use of Recorded Delivery where papers are sent to children might be a less frightening mode of delivery and is of course permitted by the Rules of Court.<sup>164</sup>

### **Treatment of Returned F9 Forms**

Over half the children who received intimation responded either by returning the form or by writing letters to the court. However, as the fact the author was able to read the returned forms testifies, the returned forms were often *not* treated in accordance with the Rules of Court. That is, 19 of the 24 returned forms lay open in process (rather than being sealed in envelopes and marked as confidential).

In two cases the processes included evidence that the F9 form had been handed to the solicitor of one of the child’s parents, with the consequence that a copy was also sent to the solicitor of the other parent. Clearly, this meant the views of the child were not confidential as those devising the Rules of Court had intended.

Significantly, although the child is *not* actually advised on the F9 form itself whether their views will be confidential or not, the suggestion is that the form will be given to the *sheriff* with no indication that s/he will then tell the child’s parents what has been written. A child is probably therefore unlikely to expect their views to be shared.

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<sup>164</sup> OCR 5.3(1)

An experienced sheriff clerk observed to the author that, as returned F9 Forms are a relatively rare occurrence, junior clerks usually wave them in the air and ask “what am I meant to do with this.” *Completed* and returned forms were found in various parts of the process – including one being stapled to the F14 (form of warranting).

One further point in respect of the practice of intimation is that children are not sent any acknowledgment of receipt of their form and, unless a parent mentions their letter was referred to in a court hearing, the child will remain unclear whether it has been received. Clearly children would benefit from an acknowledgment when they have undertaken such an important and potentially quite daunting task of writing to a court of law. If there are concerns that an acknowledgment letter might fall into the wrong hands and cause trouble for the child, the F9 form could be modified to ask the child if they would like a letter back telling them the court has received their letter. The form could point out that it may be possible that someone else living with the child might get the letter when it came through the door and in this way, the child could decide whether they were happy with this or not. Although clearly, sheriff clerks would have to be made aware of the importance of heeding these requests.

Notably, there were no cases in the data set where a sheriff arranged to take the views of the child via a *person appointed by the child* on his or her returned Form F9. Tresedor (1997), lists having a trusted *independent* person to provide support and to act as a representative as a key feature of genuine participation. Parents cannot be considered to be ‘independent’ in this context and so another adult who the child is able to communicate easily with could provide a crucial function.

The sheriffs interviewed also could not think of any occasion when they had taken a child’s views by speaking to a person nominated by a child on their F9 Form. For example:

*“They may state that they would like a particular person – such as a teacher or an older sibling – someone who is over 16 – to express their views for them. Sheriff no.4*

*Int: would you then speak to the older sibling or the teacher?*

*The potential is there but I would prefer to let things come out naturally in the wash – at the child welfare hearings. If they don’t then I would instigate further inquiry by appointing a curator ad litem usually.” Sheriff no.4*

However, this may reflect the customary practice of the courts from which the court data was taken and the interviews with sheriffs conducted. Fiona Raitt (2007) refers in her research to a sheriff mentioning a child’s teacher enabling the parents to reach agreement *in the court room*; while one of the non-legal practitioners interviewed for the present research described attending a hearing to put the child’s view, so clearly it does happen in some courts.

Thus far the chapter has unpacked the barriers to the primary means of obtaining the child’s *informed consent* to participation in legal process – *intimation*. The chapter turns now to discuss the extent to which *court reporters* can be said to obtain the *informed consent* of children and how they handle the thorny issue of *confidentiality* in legal process.

### **6:3 COURT REPORTS: Ethical Consultation with Children who are the Subject of a Court Report**

In chapter three of this thesis, the author reviewed the approach taken in the present research to ensure the child’s *informed consent* was obtained. This included sending a Research Information Leaflet to the child as well as going over the purpose of the interview and obtaining the child’s express (signed) consent *before* the interview. The children were also told they could *choose not to* answer a question (and this was practiced) and it was also explained how their views would be anonymised. Further, use was made of a workbook to diffuse the intensity of the one to one consultation

and this also enabled a focus on who the child could speak with if they wanted support post-interview.

*If* court reporters were to conform to the ethical and methodological considerations of undertaking *research* with children, they would similarly need to inform children - using 'child friendly' material – in advance of their visit. They would also need to ensure the child actually *wanted to* speak with them – rather than feeling they had no choice – and the child would be given the opportunity to *not* answer the reporter's questions. Reporters would also have to explain to the child that the child's views **are** usually included in the report but that they could be sent directly to the sheriff (and not included in the report) if the child wished. The child would need to be made aware that *even then* there is no guarantee that their views would remain confidential. Only then could a child be said to have given informed consent to speak with a court reporter.

However, the principles of ethical consultation for the purpose of anonymised research *do not* transfer comfortably to decisions that are made concerning the welfare of a *specific named* child in the context that the confidentiality of that child's views cannot be guaranteed. Further, if the element of choice was introduced into whether or not a child spoke to a *court reporter* then a parent who did not want a child's views to be known could exert a lot of pressure on their child to remain silent. In all actuality, children may avoid answering questions when they do not wish to as Griffiths and Kandel (2000) found in their observations of (public law) children's hearings in Scotland.

The following discussion therefore suggests ways in which a compromise position could be reached where reporters are obliged to attend to informed consent and confidentiality as live issues when undertaking the writing of court reports.



### 6:3:1 Informing Children of the Reporter's Visit and Purpose

In the court data set, only six out of every ten children who were the subject of a court report were spoken to *about* contact with their NRP (see discussion in Chapter Eight).

At present there is no procedure by which a court reporter communicates directly with a child to inform them either of their impending visit or its purpose. One reason solicitors give for not informing the child is the fact the child may not know they *have* a father:

*For instance, if the child has never had explained to him that he has a biological father, who is seeking contact, then that explanation needs to come from the resident parent. Questionnaire for Solicitors n.6*

In the court data set 15% of children who were the subject of a dispute had neither lived with, nor had any contact with, their fathers since birth, while 60% of children *not* asked their views were aged three or under.

Interviews with practitioners also revealed that children may actually be intentionally *misinformed*, where it is felt this will enable the reporter to gauge the child's views.

One court reporter gave the following example:

*"There was one case where the child's mummy did not tell the child I was from court. She just said I was coming for tea because the children were used to that, and that she would make an excuse to leave the room at some point and that worked very well. [...]*

*.....mum had remarried and I suggested that mum bring out the wedding pictures and this little girl absolutely adored these wedding pictures and so I was able to look at the wedding pictures and ask who people were [...]and I said "oh and you've got another daddy haven't you?" and she said "yes, my smacking daddy.*

*.....I said "what's a smacking daddy, I haven't heard of that before and she said "it's a daddy that smacks and hits you." I don't suppose to this day that that little girl knows that the lady that came to tea that day was from the court. That mother was not in the room at the time so it was quite clearly not manufactured." Solicitor n. 1*

It can be seen that in the above case, that the reporter and resident parent had met and *agreed* an approach which they were apparently both happy with. However, parents are not sent guidance on how to or when to prepare their child for a court reporter's visit and they may risk being accused of either 'influencing' their child or 'speaking too freely' about matters they should be protecting a child from, when a child is able to tell a reporter why s/he is there.

For example, in one case in the court data set, a mother told her children the reporter was "an auntie from the court – you will be safe with her," causing the court reporter to express annoyance that the children were aware of the court action. However, the mother clearly had to find some explanation to give her children as she was having to regularly take them to exercise contact in a child contact centre against the background that the children were (allegedly) scared of their father (and did visibly shy away from him during contact). The phrase "Auntie from the court" was likely to have been intended to reassure them.

Clearly, parents with residence of the children or exercising contact would benefit from an information leaflet suggesting ways of preparing their child for a court reporters visit. This could include the advice to wait till they meet with the reporter (where practicable) and to discuss it then. While some reporters may benefit from being made aware that children *do* want explanations from their parents and *will* continue to raise issues that concern them – at least with a parent they trust to take action on their behalf.

Yet it remains the case that if *children* were sent standardised information leaflets in *advance* of a visit by a court reporter this could also result in parents being suspected of 'influence' when they look at the leaflet with their child. Therefore, perhaps the best option would be if the reporter, once present in the home and having discussed the appropriate approach with the parent, was able to use an age appropriate information leaflet with the child as a focus of discussion - particularly where the child *is already aware* that

their parents are using a court to make a decision about contact. In such circumstances, the leaflet could explain terms the child may not understand and could allay the potential concerns a child might have.

Aldridge et al (1997) for example, found children were aged seven before half of them knew the correct meaning of 'judge,' and age eight before half of them knew the meaning of the words 'court' and 'law.' While Tisdall et al (2002/b) and Douglas et al (2006) found many children (like adults) associate 'courts' with 'bad people being punished' and may be frightened to say anything that might get a parent into trouble. For, even when children have been victims of abuse they, like many adult victims of domestic abuse, may just want the abuse to stop, but are less likely to want the perpetrator punished (Hoyle & Saunders (2000), Mullender et al (2002).

It should be possible to dispel a child's fear that someone will be punished by asking a child what they think courts do, or judges do at the start of the interview. A difficulty here however is that contact disputes *can* result in a parent being punished due to the potential imprisonment of a parent who fails to obtempur (comply) with an order for contact.<sup>165</sup> Thankfully, this is a very rare occurrence and few would agree that children should be informed of the potential imprisonment of their PWC if they don't attend contact, or fail to attend at the times ordered by a court, as this would be coercive in the extreme.

Further, it may also assist court reporters if they are aware of the theoretical considerations of consulting with children and were required, in their reports, to account for a decision not to inform the child of the reason for their visit, or not to speak with a child, (where these apply) as this would

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<sup>165</sup> "Failure to obtempur" is always used in this context to describe a PWC who does not effectively insist a child attends contact, rather than to a NRP who fails to exercise contact or who is not present during contact but leaves the child with third parties.

focus their attention to these key issues. That is, they should have to *justify* with quite specific reasons why the child was not informed.<sup>166</sup>

It is likely these would only be appropriate in respect of very young children as, in most cases, children would clearly benefit from understanding the purpose of the visit in advance so that they may express views that they have had time to formulate.

#### **6:4 The Lack of Confidentiality: Current Practice**

The case law dealing with confidentiality was reviewed in Chapter Two and it was seen that in *Oyenevin*<sup>167</sup> the sheriff opined that although the welfare of the child was a *relevant* factor it was no longer the *paramount* consideration when determining whether a child's views were to be kept confidential.

It was held in *Oyenevin* that there required to be further discussion in court with the curator *ad litem* present in order to glean *why* the children were anxious about disclosure and what justification there was for anxiety. The inherent problem of course is that revealing ‘why the children are anxious’ often means revealing that the children have spoken of either disturbing behaviour, maltreatment by a parent or of that parent’s treatment of their other parent. Even if the child has *not* then gone on to state they do not want any contact with the parent, the fact they apparently criticised a parent is very likely to lead to retaliation where a parent tends to aggression or has a particularly authoritarian parenting style.

The implications of the present stance concerning confidentiality is thus likely to be greater for children who have reason to fear repercussions from

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<sup>166</sup> Although there is the risk that the reasons given could become formulaic – just as the ubiquitous justification for craving dispensation of intimation due to the “tender years of the child” has become.

<sup>167</sup> *Oyenevin v Oyenevin* (1999) G.W.D. 38-1836

a parent and yet these are the same children who are likely to state they do not want contact with a parent.

Guidance from the European Court of Human Rights and our own domestic courts restates general principles – the right of litigants to know what information the court has in respect of them, tempered by (but in *Oyeneyin* not trumped by) the ‘welfare’ of the child. This broad brush approach affords members of the judiciary both discretion and a degree of uncertainty when dealing with cases. In the present author’s view, more detailed guidance from the European Court of Human Rights in regard to *what* aspects of welfare may trump disclosure of the child’s views, and *how* to ascertain those views without exposing children to the harm the request for confidentiality seeks to avoid, would be helpful.

It is submitted that the ideal model would put the protection of children from harm (whether sexual, physical or emotional) as the trump component of ‘welfare’ and be alive to the fact that disclosure of harm may only occur in the context that the child’s view will be kept confidential – certainly where a child has requested this - unless there are compelling reasons for this to be otherwise. The child contact disputes that are being discussed in this thesis are, after all, civil actions not criminal.

In the questionnaire for solicitors, a quarter of the 51 solicitors responding to the relevant question indicated they would only ‘sometimes’ explain to children *that their views would be shared with their parents*. The most common explanation for this was that “it depends what they [children] are saying” which is suggestive that when children *are* advised their views will not be kept confidential this may not happen until *after* they have expressed their views.

Further, in the court data set there were a handful of cases in which reporters recorded *both* what the child said *and* that the child had asked that these views were not put in the report. That is, it was effectively the court reporter

who determined the child was not at risk of ‘significant harm’ (McGrath),<sup>168</sup> rather than the sheriff, and to make the child’s views known to the parents in the court report.

One example is a case where the reporter records that the boy “is clear he hates his father but he does not want his father to know this is his viewpoint.” The inclusion of the boy’s views by the reporter left the child exposed to retaliatory abuse during the contact that was subsequently ordered, particularly against the background that the boy and his mother were in a refuge as a result of alleged abuse.

It is submitted that reporters have the option to note that they spoke with the child/ren but to submit the child’s views separately in a sealed letter marked as ‘confidential’ and ‘for the attention of the sheriff only’ in such cases. This is the same treatment intended to be given to views expressed in F9 Forms. In one case in the court data set, this is what happened with the reporter stating:

*“[child’s name] asked that her views not be included in this report and she gave lucid reasons for this request. Therefore, I consider it in her best interests that I respect this request.”*<sup>169</sup>

While in another case, the court reporter referred the children to the Reporter of the Children’s Hearing System because of the treatment the children described (without stipulating in the report what this treatment was).

One sheriff in interview also commented that:

*“I have had reporters furnish me with some information separately from the main report when the child has been particularly anxious. It is still difficult to determine how to tell parents, but it protects the child.”* Sheriff n.3

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<sup>168</sup> *McGrath v McGrath* (1999) S.L.T. (Sh Ct) 90

<sup>169</sup> The processes of this case included a sealed letter marked “confidential” and “for the attention of the sheriff” which presumably contained her views.

Notably, children can never be sure at the time they express their views how much of the detail of their views will be shared with their parent.

## **6: 5 Conclusion**

The potential to protect children by careful treatment of their views does exist in legal process, however the necessary training and customary procedures to ensure this are lacking (while some procedures actually act as a barrier to children's participation).

Although the key principles of ethical consultation for the purpose of anonymised research (being informed consent and confidentiality), do not transfer comfortably to decisions that are made concerning the welfare of a *specific named* child, this chapter has suggested ways in which legal process could be adapted to facilitate sensitive treatment of children and promote the inclusion of their views in this context.

The apparent lack of motivation to address the barriers to the inclusion of the views of children may be seen to reflect the paternalistic assumptions unpacked in the previous chapter – where some practitioners suggested it is better not to take the views of children when those views are likely to differ from those of one or other of their parents. It is possibly for this reason that the majority of children are not informed of the dispute and of their right to state whether or not they wish to express a view, nor how they may go about doing this.

The impact of the assumption that children will not actually want to express a view, and that any view they express will be the consequence of parental influence, also impacts on the extent to which children are afforded the opportunity to have their views *directly presented* to the court as will be seen in the next chapter. The impact of common assumptions in respect of the relevance of a history of domestic abuse to the issue of child contact is most evident in the context of court reports, and this is discussed in Chapters Eight and Nine.

**THE VOICE OF THE CHILD IN PRIVATE LAW CONTACT  
DISPUTES IN SCOTLAND**

**(Chapters Seven to Eleven)**

**BY**

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**Doctor of Philosophy**

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## **CHAPTER SEVEN – Direct Presentation of Children’s Views: Judicial Interview and Solicitors for Child Clients.**

### **7:1 Introduction: Hearing Children ‘directly’ or ‘through a Representative.’**

Theoretically, in order for a child to be a fully engaged participant in legal process, *their* preferred method for expressing their views should be accommodated. However, as previously observed, children in the United Kingdom do not have an automatic *right* to request direct representation as the UK Government has not ratified the European Convention on the Exercise of Children’s Rights – Article 4 of which gives children the right to apply for the appointment of a special representative.

Rather, the UNCRC requires (in part two of Article 12) that children should be provided with the opportunity to be heard in judicial proceeding affecting the child *either* ‘directly, *or* ‘through a representative’ *or* through ‘an appropriate body’ in a manner consistent with the procedural rules of national law. Consequently, in our domestic law, although children are afforded the “legal capacity” to instruct a solicitor in connection with any civil matter,<sup>170</sup> it will be seen that this by no means translates into an automatic *right* to do so.

It is a pertinent finding of this research that almost all children whose views *are* actually taken in private law contact disputes are, ‘provided with this opportunity’ through ‘the appropriate body’ of *court reporters*. Only three of the 299 children in the data set were interviewed by a sheriff (1%) and only 5 children had a solicitor appointed to represent their views to the court (1.6%).

This chapter reviews why so few children were afforded the opportunity to put their (unfiltered) views directly to the decision maker – either via

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<sup>170</sup> Age of Legal Capacity (Scotland) Act 1991 s2(4)A

judicial interview or by representation by their own solicitor. These include practitioner objections to their participation, being: parental influence; the lack of confidentiality; the inappropriateness of children in court; and, that children's views may be inconsistent with the promotion of their own welfare. Additionally, the difficulty obtaining legal aid to represent children and the barely modified procedures for child litigants also undermine the participation of children in legal process via separate representation.

It will be seen that most sheriffs and legal practitioners actively discourage the direct presentation of children's views based on their experiences of utilising barely modified procedures. However, it is suggested in this chapter that such modifications are possible to enable the inclusion of children in this way - particularly as children who have found their views inaccurately interpreted by those undertaking reports for the court are adamant they should be able to exercise a right to be heard directly (see literature review in Chapter Two).

## **7:2: POTENTIAL BENEFITS OF DIRECT PRESENTATION OF VIEWS**

### **7:2:1 Benefits of Judicial Interview**

Potentially, a key benefit of judicial interview is that it may enable the sheriff to judge the veracity of the child's views. One sheriff interviewed stated:

*“When you speak with a child you get a flavour of what is going on in his life, to hear a little child himself say “my dad keeps doing this and I don't like it” can strike with a cogent force that does not exist in a report” Sheriff n.2*

Children believe the option *should* be available when the views as expressed by a parent are not believed:

*“obviously it would be really, really, scary but - if there is no parent there - then they would **know** you are not saying what you have been told to say, so, for that reason, it might be better ‘cos then they would know it is them that is saying this and not their parent.”* Amy, age 12 (participant in the present research).

Earlier researchers similarly found:

*“[children] wanted their views to be heard by the person making the decision because they wanted to have a say and to be acknowledged [...] they wanted the judge to know exactly how they felt without any mixed messages or misinterpretation.”* (Parkinson et al 2007)

While one of the child interviewees taking part in the research by Douglas et al (2006) had written to the court asking to speak to the judge as “she thought it was unfair a complete stranger [the reporter] would decide something that would affect the rest of their lives,”(Douglas 2006:85).

In the thesis court data set, although three children were afforded the opportunity to speak to the sheriff – it is not clear if one of them actually did. It is also not clear why *these* three children were given the opportunity that the other ninety-six children of a similar age to themselves in the data set (age 9 and over) did not have. In one of the cases, the child’s view expressly influenced the recommendations made by the sheriff.

### **Case Study: Judicial Interview**

In this case, the pursuer sought contact for all of every 2<sup>nd</sup> weekend and one mid week visit and was the father of an 11 year old girl. The parents had been married for ten years and separated 15 months earlier. The girl had had contact as craved until two months before the action was raised. The pursuer claimed contact had stopped because the girl’s mother had been “verbally abusive” and had “pushed him on financial matters” while the

defender alleged it was because the pursuer had assaulted her with the police being called at that time. She also expressly stated that the child said she did not want contact with the pursuer.

At the time of warranting, intimation was dispensed with as “the child is aged 11 and intimation will upset the child” and the *pursuer* was granted an interim non-molestation interdict.

The interlocutor of the second child welfare hearing in the case records that:

*“the sheriff “directs the views of the child [name] born [DOB] should be expressed to the sheriff, assigns [date] at 3.30pm as a date and time to interview the said child, thereafter assigns [date two weeks later] at 2pm as the Child Welfare Hearing.”*

It was however, a different sheriff who was on the bench on the date of the hearing that was set for after the sheriff had spoken to the child. That sheriff therefore thoughtfully assigned a further child welfare hearing “before the sheriff who heard [the child’s] views.”

At that further hearing the sheriff who had spoken to the child, expressly directed that s/he was ordering contact in line with that requested by the girl:

*“interim residential contact be subject to the following conditions specified by the child (name)(dob) a) the child (name) shall not meet the pursuer’s girlfriend b) the pursuer is not to receive phone calls during contact c)there will be no bickering between the pursuer and defender during contact handovers; thereafter makes no further order.”*

Later in the process, when divorce decree was granted the affidavit explains that the girl’s father is having contact with her “as agreed between the parties” from 12- 6pm on alternative Saturdays.” This is less considerably less than the alternative *residential* weekend contact granted earlier by the sheriff at the time the conditions were attached and it may be the ‘no girlfriend’ and other rules led the father to reassess the amount of contact he really wanted, if he was to be so constrained.

It may be that when a sheriff suggests speaking to the child, the sheriff is of the view the child may actually have something worthwhile to contribute and is therefore more likely to attach weight to the child's views.

### **7:2:2 Benefits of a child having their own Solicitor**

Potentially, a child's solicitor may ensure the child understands how courts operate (and the possible consequences of their involvement), is consulted throughout the process, kept fully informed of the purpose and outcome of all court hearings, and ensure only the views the child wishes to be shared with the court, are. Where these criteria are met then the child's solicitor may be said to be facilitating participation at the highest levels of Hart's (1997) *Ladder of Participation* (Chapter Two).

Further, as discussed in Chapter Two, children who have instructed their own solicitor, and who then obtain the outcome they desire, express a sense of relief at no longer being 'paralysed' when they are represented in this way (Tisdall et al 2002/b).

It may be that the fact a child has their own legal representative makes clear to *parents* the fact that the child does have a right to be heard in law and that that right will be upheld. Both the children who were interviewed as part of this doctoral research had eventually instructed solicitors after attempts to express their views by other means failed to have any impact. *Significantly, it was not until they obtained their own legal representation that their views impacted on the contact outcome.*

One of these children had become accustomed to not being listened to by her father and she contrasted her experience of speaking with her solicitor in the following way:

*“But (solicitor) I did feel listened to me. You see I thought she would be someone who would just listen, take things on board but then not really do anything about it because, obviously I was quite young, and I thought she would think I was too young to make decisions but she took what I was saying on board and really did help me.”* Amy, age 12

For a child, having their own solicitor may alter the usual power imbalance between parents who are legally represented and the child (who most usually is not).

## **7:3 OBJECTIONS TO DIRECT PRESENTATION OF VIEWS**

### **7:3:1 Re-Emergence of Seminal Objections to Children’s Participation in Legal Process**

One of the key objections to the *direct presentation* of children’s view in legal process was the same as raised in respect of all other methods for hearing children – parental influence, while one of the key difficulties – the lack of confidentiality – was given as a reason for not affording children the opportunity to speak with the person making the decision about their future.

#### **Parental Influence**

Although *children* may think a judge will be able to tell the views they express are their own - and this is a principal reason they want to speak to the judge - sheriffs are not so confident:

*“how can one know if the views they express are genuine or their views have been influenced. Even in a ten to fifteen minute chat one cannot necessarily form an opinion whether their views are genuinely held beliefs. So I have reservations.”* Sheriff n.5

Consequently most sheriffs never or only rarely interview children.

Sheriffs similarly queried the reliability of views put to the court by a solicitor acting as a representative of the child:

*“If say a mid-age child instructs a solicitor how did that child find the solicitor? Who took the child to the solicitor’s office? I think in such cases a child will always be subject to influence in some way, so if they express views in a solicitors letter, I think those views are questionable.”* Sheriff n. 3

This sheriff questioned a practice that may enable children’s views to be put directly to the court *without the need for the child to be present in court* (in a letter to the court from the solicitor). Yet, seeing a solicitor is something children are advised they may do on the F9 form sent to them under the rules of court and, where a child has filled in a form or letter *in a solicitors office, prima facie* it was not the parent who filled it in (this being an objection to F9 forms raised in the previous chapter.)

Given shrieval disapproval of the representation of children, most solicitors expressed extreme caution in respect of entering an action as a party minuter:

*Int: How often have you represented a child as a party minuter?*

*Sol: “Rarely. When it started off it was more regular than it is now and now it is very rare [...] It doesn’t happen very often.”*

*Int: “Why do you think that is?”*

*Sol:” I think over time sheriffs have become very concerned about how children can be manipulated I expect [...] it can be held against a parent that they have enabled a child to allow a solicitor to represent them.”*

*Int: Does that put you off representing a child?*

*Sol: “Oh absolutely yes. It puts me off attempting to represent a child in the court setting, rather I would wait for the curator to be appointed.”* Solicitor n. 8

Although sheriffs expect parental influence *however* children's views are taken, the intensity of this suspicion is evidenced by practitioner's views on the *separate representation* of children – given that children speak to their solicitor outwith the presence of a parent.

### **Lack of Confidentiality**

Given that children's views are rarely confidential when they are taken by court reporters, it is interesting that it was specifically within the context of *judicial interview* that sheriffs readily volunteered this as a reason for *not* interviewing children.

*“Confidentiality – that is a problem, one has to go about it in a roundabout way it can be tricky, have to explain to children the parent's right to know.”* Sheriff n.5

Sheriffs also commented on why the gist (at least) of the child's views has to be shared:

*“Legislation gives discretion as to whether the views should be kept confidential or not but how can one explain the decision to a parent if one does not communicate the children's views.”* Sheriff n.3

While another stated:

*“I would have to explain that I have no choice but to tell them [parents]. The starting point is disclosure.”* Sheriff n.4

The author asked sheriffs what they would do in the event that a parent was likely to hold against the child something the child had said to the sheriff.

*“It is difficult to withhold information but how to go about it? You can interpret the views or summarise or explain in as neutral a way as possible but you still have to share that information.”* Sheriff n.3



However, this is more of an objection to the participation of children generally in legal process, as judicial interview potentially affords the child more protection than a court report that records in writing for perpetuity a child's views of his or her parents.

It would appear that sheriffs appreciate the diffusion of responsibility for the treatment of the views of a child which the appointment of a court reporter or curator *ad litem* affords (albeit that the final decision remains theirs).

### **7:3:2 Specific Objections to Direct Presentation of Views**

There are two other objections made by legal practitioners which apply specifically to children being afforded the opportunity to express their views *directly* to the court via judicial interview or their own solicitor. These are: concerns around the physical presence of children in court and practitioner's concerns that a child's views may not be consistent with their promotion of their welfare.

These will each be considered in turn. The discussion includes a focus on the failure to modify legal process to facilitate children's participation as litigants.

### **Inappropriateness of Children in Court: Judicial Interview**

In respect of judicial interview, one sheriff observed:

*"I have reservations about this method of taking children's views as the child has to be told they are going to the court, to speak to the sheriff to tell the sheriff their views on contact. It is a totally foreign environment and I am not sure all this is fair on a child."* Sheriff no.5

Certainly one mother responding to the questionnaire for parents had concerns about the manner in which the interview was carried out. She was concerned that her son had been left alone with the sheriff and that even

though the child had not seen his father for ten weeks at the time of meeting with the sheriff, he was required to walk past his father for the interview:

*“My son had to walk through the court room with his father and I just sitting there – unable to talk to him – and I could see it had not gone well. He was taken to a wee witness room and by the time the hearing ended, as you can imagine he was quite upset.”* Parent Interviewee n.8

On balance this mother felt the sheriff *had* actually been sympathetic to the views expressed by her son, and had shared them with them “in a tactful way;” yet the court’s inability to accommodate the taking of the views of the child in an appropriate manner stunned her. She felt:

*Children should have someone to support them if they are to speak with a sheriff – someone they meet with beforehand, perhaps even on the same day, who they speak with – who supports them and is there during the meeting [...] although a sheriff is very well qualified in all manner of things they don’t necessarily know how to speak to children.”* Parent Interviewee no.8

This experience illustrates that it is not just the *fact of* a judicial interview, but also the manner in which it is conducted, that is important. Her suggestion that children should have a dedicated support person is also worthy of serious consideration.

Other mothers responding to their questionnaire asserted that despite the daunting prospect for their child, it was good that the child was afforded this opportunity.<sup>171</sup>

*“I think in my case the sheriff option was right and proper if children have to be spoken to. She is representing the court, not the individuals. But I would say it would depend on the communication skills and relationship skills of the individual sheriff. Some can be ‘scary.’* Questionnaire Respondent n.15 (resident mother)

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<sup>171</sup> Although two non-resident fathers assumed the fact the judicial interview did not result in increased contact indicated the children had merely echoed their mothers views.

*“My son did want to speak to the sheriff. I thought it was excellent as it was face to face and took a bit of strength and courage for any child.”* Questionnaire Respondent n.11 (resident mother)

As most sheriffs do not consider children’s presence in court to be appropriate they state they prefer to utilise other means of ascertaining children’s views. Extraordinarily (given that the 1995 Act envisaged increased participation of children in legal process) sheriffs cited the *introduction of F9 forms* as a reason for *not* inviting a child for judicial interview:

*“Pre the 1995 Act it was common to interview children, I was in practice at the time and sheriffs were relieved when the 1995 Act introduced the F9 form and they would not have to do that anymore [...] I have not interviewed a child since 2004 [...] there used to be a lot of interviews but the problem was a lot of sheriffs were unsure about speaking with children.”* Sheriff n.3<sup>172</sup>

The F9 form was meant to offer large numbers of children a means of writing their views in the comfort of familiar surroundings rather than having to attend a formal and intimidating court room. However, it would appear the F9 form may also have afforded sheriffs a much wanted reason *not* to interview children.

Further, as Fiona Raitt (2007) also found, sheriffs doubted their own competence to speak with children and for this reason also may prefer to pass the task on to reporters.<sup>173</sup> The case of *W v W*<sup>174</sup> drew attention to the vulnerability of judicial interview to appeals on the basis of the lack of competence of sheriffs for this particular task, however court reporters are

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<sup>172</sup> It is worth noting that this sheriff also observed that sheriffs at the court where s/he is based only do an 8 week stint in civil cases per year.

<sup>173</sup> Riat (2007) describes how in her interviews with them, the three main reasons sheriffs gave for a reluctance to interview children was that they, believe children will have been coached by a parent, the problems presented by the fact they cannot keep a child’s view confidential and that they feel they lack the necessary skills.

<sup>174</sup> *W v W* (2003) SLT 1253

not trained in speaking with children either (see Chapter Eight), and theoretically there is no less reason for appealing their reports.<sup>175</sup>

### **Inappropriateness of Children in Court: Own Solicitor**

Concerns over children in court were also frequently voiced by sheriffs in respect of a child instructing *their own solicitor* - with the view from the bench consistently being one which was concerned to protect children from being present in a court room in the context of either a child welfare hearing<sup>176</sup> or a proof hearing.

This is against the background that Child Welfare Hearings were introduced following the suggestion of a sheriff who, following his *own child's* suggestion, had sat down with his ex-spouse and (teenage) child to make arrangements for the future care of that teenager - finding this particularly productive.<sup>177</sup> However, where *both* parents *are* able to speak civilly and to detach discussion of their child's welfare from other differences between them, they are probably unlikely to find themselves embroiled in a court action in the first place (!) The process therefore has not transferred readily to the court environment and children were not present at any child welfare hearings in the court data set. When the author asked, one sheriff stated the strengths of child welfare hearing to be:

*“the involvement of the parents and, where appropriate, of the child. I would usually discourage a child from attending a child welfare hearing however.”*

*Int: why is that?*

*“Because you cannot regulate what the parents will say.”* Sheriff n. 4

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<sup>175</sup> in *J v J* there was a successful appeal as the reporter had failed to speak with the father of the child and therefore the report was said to be biased.

<sup>176</sup> Under OCR 33:22A (5) children who have indicated a wish to attend “shall, except on cause shown, attend the Child Welfare Hearing personally.”

<sup>177</sup> The author was told of this by a sheriff in interview who was a colleague of the sheriff at the time.

This quote illustrates the tension between the theoretical ‘good’ that children can *potentially* be involved, but that *in this context* it is generally not a good thing for them to actually *have* that direct involvement.

One sheriff was quite direct in his objections:

*“It is the wrong way to get a child’s views and far better to avoid.”* Sheriff n.5

However, a solicitor may attend a hearing on behalf of his or her child client without formally applying to enter the process by minuting or can send a letter to the court from their client (see Cleland & Hall-Dick 2001:149-150).

Yet sheriffs also objected to the very fact of a child *instructing* their own solicitor:

*“Of course you can’t stop them instructing a solicitor but I think it may be more divisive than helpful but then, it depends on all the circumstances of the case.”* Sheriff n.3

While sheriffs may not choose to prohibit a child visiting a solicitor’s office and seeking advice and assistance, they can of course stop a child entering the action by refusing a minute to sist as a third party to the action.

Sheriffs also expressed concern over a child attending proof hearings. Proof hearings are problematic when a child has entered as a party minuter as, of course, they and their witnesses would normally be present and should be cross-examined. However affidavit evidence can be sufficient in such cases, making the child’s presence in court redundant.<sup>178</sup>

Alternatively the provisions of the Vulnerable Witnesses (Scotland) Act 2004 can also be useful when the child wishes to give evidence in a civil case.<sup>179</sup> In one of the contact cases in the court data set a 12 year old child

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<sup>178</sup> *Fourman v Fourman* 1998 Fam. L.R. 98

<sup>179</sup> s 271H and s1 Vulnerable Witnesses (Scotland) Act 2004

asked that special provision under this Act be made available for her so that she could give evidence at a proof hearing concerning contact, however this hearing was later discharged.<sup>180</sup>

Despite the existence of alternative ways of enabling a child's views to be put directly to the court there are two cases in the court data set which highlight the failure to modify legal process so that children are able to comprehend proceedings, and are protected from distressing averments, when they *do* enter the process as parties to the action. These case studies are presented below.

## **Failure to Modify Standard Procedure for Child Litigants**

### **Case One**

In this case an 11 year old boy who had lived with his mother and sister for four years post separation (having regular contact with his father), refused to return home after contact. His mother raised an action in which her primary crave (Crave 1) was contact, and a solicitor on behalf of the child lodged a Minute to sist the child as a party minuter, for which the fee of £26.00 was paid, and which was worded as follows:

*“[the child] states to the court that he wishes to be represented to deny Crave 1 in respect of the Initial Writ of the pursuer. The minuter is a child in respect of which this action relates. His date of birth is [...]. No warrant to intimate the Initial Writ was made. The minuter is eleven years old and has expressed a clear view that he wishes Crave 1 of the writ to be denied. The minuter craves the court to grant leave to the said [name of child] to enter the process as a party minuter.*

*IN RESPECT WEREOF [signature and address of solicitor].”*

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<sup>180</sup> The father, who was serving a sentence for serious assault, had been violent to both the child and her mother and had threatened to kill them once he was released from prison.

The minute was granted. However it appears the child's solicitor may not have been successful in convincing the legal aid board to fund his action and the solicitor withdrew from the acting for the child, triggering the following standard interlocutor for such an event to be sent to the child:

*“The agent for [the child] having withdrawn from acting, the sheriff ordains the minuter to appear or be represented within [x] sheriff court [address] at [date][time] to state whether or not he intends to proceed under certification that if he is not present or represented Decree may be granted against him. Appoints the solicitor for the pursuer to intimate a copy of the interlocutor on [the child].”*

While this is standard procedure when a solicitor notifies a court of their withdrawal from acting, the wording has not been modified to take account of the fact that the litigant is an eleven year old child. The words “if he is not present or represented Decree may be granted against him” could readily be perceived by a child to be a threat – that *if* the poor child, who is now without a legal representative, does not present himself at the court room at the right time something will be ‘decreed’ against him. It is unlikely to be clear to him what that might be.

An irony, of course, is that the child is now being ordered to participate rather than being given a *choice* and also the child might *actually still want* to be in a position that his former representative could appear on his behalf but this cannot happen possibly because one public body has determined not to fund the presentation of his views before another public body.

In the event, the boy's solicitor did lodge a further minute to sist the action a month later.

The outcome of this case was that the court granted PRR and residence to the boy's father without making an order for contact between the boy and his mother. That is, in line with the express views of the child that Crave 1 of the Initial Writ (contact) should be denied.

## Case Two

In this case an eight year old boy was unfortunately sent a copy of the Initial Writ when intimation was granted in respect of him.

Consequently, he was clearly stressed by his involvement in proceedings and this may even have made him more reluctant to see the father who had raised the action hoping to increase the contact he had with his son to include overnight stays.

Following intimation, the child spoke with a solicitor who assisted him to complete his F9 Form. The F9 form and letter from the child were sealed in process and therefore not borrowable, however the reporter provided the court with a letter explaining that the boy had been spoken to at length on his own at his mother's house and had been adamant he did not wish to stay over at his father's home (who was now remarried with other children) and that his father was putting him under pressure to stay with him. The child had explained he was getting headaches and a sore tummy worrying so much about it.

After receiving this correspondence, a reporter was appointed to investigate all the circumstances of the child and "in particular to report on the question of whether there should be residential contact between the said child and the father (pursuer)."

Following this report this father asked to sist the action and explained he did not wish to put his son under any pressure and would not insist on something that was against the child's wishes - explaining he had mentioned it to his son and *thought* he was enthusiastic.

Reading the process of this case (and the words of a father who *was* clearly prepared to listen to his son) led the author to wonder to what extent intimation of the *Initial Writ* on this eight year old boy had been



instrumental in the boy having “headaches and a sore tummy?” What might the outcome have been if ‘intimation’ had entailed sending a truly ‘child-friendly’ form and covering letter and *not* sending the Initial Writ.

While this boy, through expressing his viewpoint by formal means was able to effect a change of attitude in his father, it does appear to illustrate also that the barely *modified formality of legal process in respect of children is a barrier to their participation*. It may also – in this present case – have added to the pressure the boy felt and his decision not to stay over at his dad’s home.

### **Child Client’s Views are Inconsistent with the Promotion of Welfare**

Solicitors for child clients are meant to represent their client’s *views only* to the court and not what *they* consider to be in that clients best interests. However, the responses to the Questionnaire for Solicitors reveal what practitioners may do when they feel a degree of discomfiture about so doing:

*“As a solicitor for any client one has to act on instructions. I would let the child have advice as to what was best for them (but would not tell that to the court) but would suggest to the child that a curator would need to be appointed.”* Questionnaire for Solicitors Respondent n. 68

This practitioner reveals that promoting what s/he perceives to be in the child client’s best interests is *not* something s/he can entirely disengage from. The family law practitioner Anne Hall Dick (2008) observes that when she has been involved in organising courses for other solicitors on ‘working with children,’

*“.. it emerged consistently from each course how strongly solicitors preferred to have the role of curator to that of a representing solicitor. [...] Even acting as solicitor for young teenagers created a strong anxiety and risk of drifting into a parental rather than legal role.”*(Hall Dick 2008:231).

This may explain why half the children in the court data set who had curators *ad litem* appointed in respect of them were aged eleven and over (see **Fig 8:1** in Chapter Eight). That is, as children approached the age where they were deemed competent to express a view, the court specifically appointed someone with the remit of advising the court what would be in the child's *best interests*. This is despite the fact that the Age of Legal Capacity (Scotland) Act 1991 stipulates that no person shall be subject to the curatory of another person by age alone.<sup>181</sup>

Given the lower numbers of older children in the court data set, the proportions of older children 'protected' in this way are striking - with 17% of all eleven to twelve year olds having a curator *ad litem*; rising to 23% for those aged thirteen to fourteen and 28% for children aged 15 years. This compares with an average of 5% of children appointed a curator below the age of eleven years (as these children very rarely attempt to instruct a solicitor).

Further, even when a child does obtain the services of a solicitor, *this person*, may not necessarily present only the view the child wishes to the court. In the Questionnaire for Solicitors, practitioners were asked: "When you act as a solicitor representing a CHILD CLIENT and the child's express wishes conflict with what you consider to be in his or her best interests, how do you usually proceed?"

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<sup>181</sup> S 5(3) Age of Legal Capacity (Scotland) Act 1991

Their responses are presented in **Table 7:1** below:

**Table 7:1 Solicitors who act for child clients (n=58): whether present child’s view or promote best interest (Not including those not acting for particular age groups).**

	Under 8 years (n=22)	8-10 years (n= 41)	11-12 years (n=56)	13-14 years (n= 53)	15-16 years (n= 51)
Present Only the Child’s Expressed Wishes	18%	22%	36%	55%	67%
Present the Child’s Wishes and my Concerns	68%	71%	59%	40%	29%
Present Only what I consider to be in the Child’s Best Interests	14%	7%	5%	6%	4%

Note: the number of respondents for each age group is listed at the top of the column.

This table reveals that the majority of solicitors *acting for child clients* adopt the approach that is expected of *court reporters* or *curators ad litem* – in that they present both the child’s views and their concerns. It demonstrates how difficult it may be for children to put their *unfiltered* views before a court, even when they succeed in reaching a solicitors office. As many as one in three 15-16 year olds may not be able to have their unfiltered view put to a court when they instruct a solicitor.

However, *curators ad litem* may present a view totally opposed to the view the child expresses. One solicitor in interview spoke about a recent case she had had in which an eleven year old girl approached her with a view to her acting as her solicitor. The girl had stated a clear view that she did not want to see her father to the curator *ad litem* appointed by the court. However the curator believed it to be in her best interests to continue to have contact:

*“.. so the child was very unhappy and I met with her but I did not represent her because there had been a clear steer from the curator against her having representation [...] I knew it would not help the situation , my appearing , because then I will be up against the curator that the sheriff appointed of course. So [the child] wrote a letter and I sent it to the sheriff along with a letter saying I have been instructed and that I would be happy to come and meet with the sheriff if that was appropriate. That left an open door.” Solicitor n.9*

Clearly solicitors who seek to represent the views of the child directly to the court have to tread carefully. Clearly also, there may indeed be cases where the views of the young person concerned may not appear consistent with what is in their best interests. The following case from the court data set is a good example of this.

### **Case Study**

The boy in this case study had always lived with his mother and saw his father when it suited him but, at the age of eleven he took off to stay at his father’s house (who lived a few streets away).

The father of the child raised an action and at the first hearing the interlocutor records that a solicitor for the child was present. The case was then “sisted to await developments” and several months passed.

When the boy was twelve, his solicitor lodged a minute to sist as a party minuter in response to the mother lodging a motion for delivery of the child.

At that point the *child’s solicitor* then wrote a letter to the *mother’s solicitor* expressing concern at the state of the boy – who attended the solicitor’s office in his father’s grubby oversized clothes, dirty, smelling of body odour and visibly upset. The solicitor for the child observed in the letter to the mother’s solicitor that the child might be better placed living with his mother but that this was not what the child would want.

At the next hearing a reporter was appointed. The reporter met the boy on two occasions and faithfully recorded the boy's expressed views that he wanted to live with his dad and stay with his mum on alternative weekends. The reporter concluded that the status quo – the boy continuing to live with his dad but having regular contact with his mum - would best suit him.

However, despite the boy having his own solicitor and expressing clear and consistent views that he wanted to live with his father, the court gave residence to the boy's mother with contact with his father, three evenings per week and alternative weekends. The child's unkempt state, his solicitor's letter to the mother's solicitor and the details provided in the subsequent court report (in particular the squalor the father lived in)<sup>182</sup> appear to have impacted on the court's decision.

Therefore, although one might *start* with the principle of child participation and the promotion of the expressed views of the child, there are occasions where *other* aspects of the welfare of the child require promotion also. The circumstances of this case lend certain sympathy to many practitioners' candid acknowledgment that they *do not* represent *only* the views of child clients.

Pertinently however, if this case allows one to conclude that 'protection from distress' may trump rigid promotion of a child's *views*, equally, 'protection from distress' should trump rigid insistence of contact – where that contact is causing distress to the child.

The discussion thus far has presented practitioners' objections to the direct presentation of children's views in court. However, as well as the assumptive and procedural barriers that exist, pragmatically solicitors are

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<sup>182</sup> This father, who was in his forties, was proud that he had never worked a day in his life and expressed satisfaction that he could claim certain benefits now that his son was living with him.

unlikely to receive payment if they represent a child. It is this concern the chapter turns to now.

#### **7:4 The Cost Barrier to Children's Participation: Legal Aid**

Children rarely have the means to pay for a solicitor themselves and therefore a solicitor who undertakes legal aid work has to be found for them - whether they require advice only, or hope to be represented in court by that solicitor.<sup>183</sup>

A parent can of course pay a solicitor to represent their child, however this is clearly problematic, as one practitioner who does not do legal aid work explained:

*"It is more likely that a parent or grandparent will say "I will fund you to see a specialist solicitor so that you can express your view, I will pay for you. Now that is unfortunate because then is the child just the talking box or the mouthpiece for the funder and if that happens and the funder is one of the parties then that is unacceptable."*  
Solicitor n.5

Obviously, given the perspective expressed above, it is important for a child to be represented independent of funding by a family member in order to increase the likelihood for a child that their views may be accepted as being their own.

However, in contradiction to this, the Civil Legal Aid (Scotland) Amendment Regulations 2010 which came into force on the 31<sup>st</sup> of January 2011 now require the resources of a child's parents (or anyone else owing an obligation of aliment under the Family Law (Scotland) Act 1985) to be "treated as part of the child's own resources."<sup>184</sup> Although this will not apply "if its application in the particular circumstances would be unjust or

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<sup>183</sup> Not all solicitors do court work with some firms instructing larger firms to do this for them. There were eighty-one solicitors Scotland wide registered with the Family Law Association as doing legal aid work (at 31<sup>st</sup> August 2010).

<sup>184</sup> s 3(b) Civil Legal Aid (Scotland) Amendment Regulations 2010

inequitable,”<sup>185</sup> this does constitute an additional hurdle for a solicitor requesting legal aid for a child as they now have to satisfy the board that it *would be* unjust or inequitable.

Pertinently, although a parent may not qualify for legal aid, they may nonetheless have little ‘disposable’ income - particularly if they are paying for their own part in the action - and they may be unable or unwilling to fund their child as well. While a parent who does not wish their child’s views to be taken into account may simply refuse to fund their child.

Additionally, in rural areas there may only be one or two firms providing legal aid (if any) and the child’s parents may already be represented by them (see comments in Law Society of Scotland 2007: Annex). Where this happens, unless someone else is prepared to pay for the child’s representation and travel to that representative, a child may be effectively prevented from having their own solicitor.

Even where a child finds a solicitor who undertakes legal aid work however, that solicitor will have to be able to persuade the Scottish Legal Aid Board of the need for a child to present his or her views by *separate representation specifically*, if they are to receive remuneration for court attendance. However children’s applications for legal aid for direct representation by their own solicitor are rarely successful.

As observed in Chapter Two, in *Henderson*<sup>186</sup> the sheriff expressed displeasure that a ten year old girl had joined the divorce action as a party minuter given that she held the same view as her mother (she wanted no contact with father). Thus he stated her appearance was redundant and an unnecessary drain on the legal fund.

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<sup>185</sup> s 3 (b) (3) Civil Legal Aid (Scotland) Amendment Regulations 2010

<sup>186</sup> *Henderson v Henderson* (1997) Fam L. R. 120

This opinion is conformed to by the Scottish Legal Aid Board (SLAB) and the most frequent comment made by respondents to the Questionnaire for Solicitors in respect of legal aid was that SLAB assumes parents can represent their children's views to the court as this quote illustrates:

*“SLAB often refuse legal aid on advice and assistance on the basis that the child's parent can represent their views and often fail to appreciate the complexities involved and the need for a child to have separate representation.”* Questionnaire for Solicitors respondent no. 9

Alternatively, other questionnaire respondents referred to a “general reluctance” on the part of the board to grant full civil legal aid for a child “except in highly unusual circumstances” and two observed that it would not be granted if a curator *ad litem* had been appointed already. A further solicitor pointed out SLAB query the application “far more than with an adult,” while one volunteered the following reasons for this – “SLAB has targets!” and others complained of ‘bureaucratic nitpicking’, a system that is “complex and ill-suited” and which asks “inane questions followed by refusal of legal-aid on the basis that the child’s view is the same as a parent’s.”<sup>187</sup>

Refusing legal aid to a child on the basis that a parent can present the child’s view to the court, ignores the fact that the parents may have very different versions of what the child’s view is (often the reason the case is in court). Further, a parent sincerely endeavouring to put their child’s view is unlikely to be believed where that view is at odds with the assumption that contact benefits children. Yet, the fact that the parent *is* putting that view may actually dissuade the court from granting the child independent representation and dissuade the SLAB from funding the child. The sheriff in *Henderson* only knew the child did indeed express the view that she did not want contact *because* her representative expressed it on her behalf.

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<sup>187</sup> The annual reports of the SLAB contain *no* statistical information on applications for legal aid by children under Part I (private law) of the Children (Scotland) Act 1995 – presumably as the numbers are so low.



Solicitors clearly face hurdles when seeking to act on behalf of a child client. Sheriffs generally disapprove of children entering actions as party minuters, as does the Scottish Legal Aid Board. Solicitors have to cover costs and also do not wish to annoy a sheriff they are likely to appear before on many occasions, in many cases. Solicitors therefore have significant reasons for *discouraging* a child who approaches them seeking separate representation.

### **7:5 Conclusion:**

When parents take a dispute about contact before the private law courts in Scotland, triggering the requirement to give the child an opportunity to express a view, their children have little say in how they are heard. Rather concerns over a child seeking independent legal representation are such that curator *ad litem* are regularly appointed to protect their interests when the child of the action is of the age that competence to formulate and express a view is, in law, to be assumed.

Although children may be deemed capable of formulating and expressing a view, it is not believed they are capable of understanding the consequences of either their involvement in legal process or of that view itself. While the United Nations Convention on the *Exercise of Children's Rights* provides that children have the right to apply for the appointment of a special representative (Article 4) and be informed of the possible consequences of compliance with their views and the possible consequences of any decision as part of their rights to express their views in legal proceedings (Article 3) – this Convention has not been ratified by the UK Government.

This is unfortunate as the Convention was intended to provide state parties with a template when they focused on how they might enable the participation rights of children in conflict with their parents to be affected (with the Convention expressly referring to actions on contact and residence).

However, fourteen years after the passage of the 1995 Act, sheriffs and legal practitioners provided the author with an array of objections to the direct participation of children based on their experience of seeking to hear or to represent children using barely modified procedures in the sheriff courts. It is suggested that the Rules of Court and standard forms could be modified so that children are able to be active participants in legal process – if only the collective will to do so was there. Participation by representatives of family lawyers in present and future consultations on children’s rights<sup>188</sup> could raise awareness of the barriers posed by the restricted availability of funds to represent children, potentially freeing practitioners to find creative ways of representing children. However, it is clear many practitioners remain to be convinced of the desirability of the participation of children in legal process and legal *practice* therefore reflects this, including their approach to the consultation of children when undertaking *court reports* – as will be seen in the next chapter.

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<sup>188</sup> Such as the present consultation on the Children’s Rights Bill before the Scottish Parliament (October 2011).

## CHAPTER EIGHT – THE USE OF COURT REPORTERS AND CURATORS *AD LITEM*

*“The reporter has an enormously influential role as it is rare for a decision to be made against the recommendation of such a report.”*

Hall Dick (2008:229)

### 8:1 INTRODUCTION

Speaking with a court reporter is by far the most common means by which children’s views are taken in private law contact disputes and 27% of the entire data set of 299 children had their *views taken* by this means; while 7% of the entire data set had a curator appointed to them.

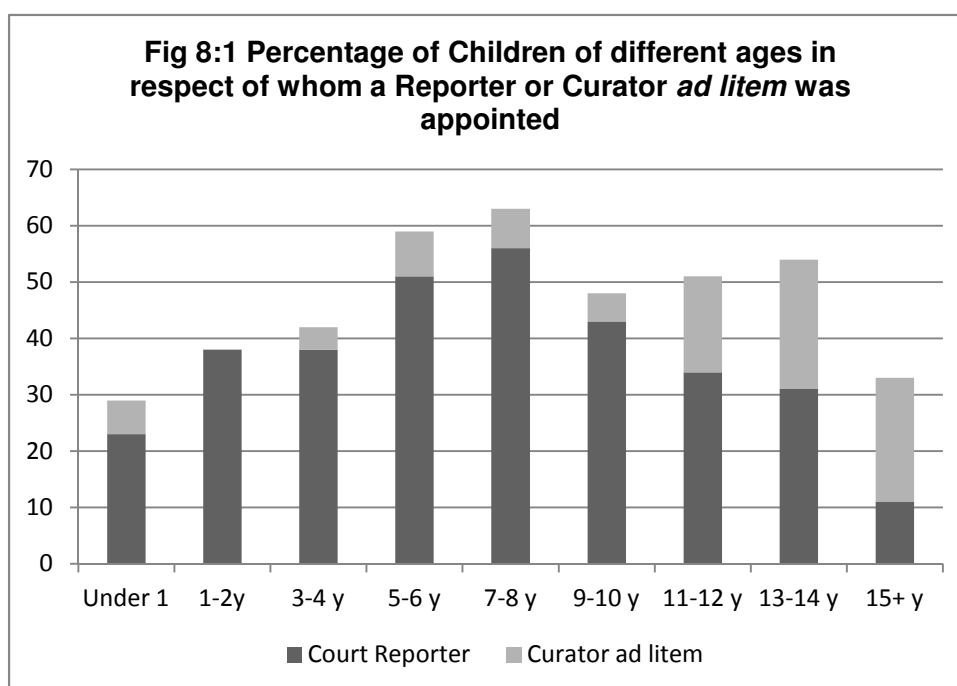
As the quote at the head of this chapter observes, reporter’s recommendations are enormously influential in respect of the contact outcome of a case, and in the court data set, sheriffs almost always ordered contact in line with the recommendations of the court reporter. The only exception to this was where a reporter or curator was reluctant to recommend contact but contact was ordered.

This chapter begins by reviewing factors that increase the likelihood of a report being ordered, as well as the present lack of training for reporters. This is followed by examples of the variation among reporters in the extent to which they investigate allegations and speak with children – including the approaches to ascertaining the views of children employed by some reporters. The chapter ends with a brief summary of the views of parents on the treatment of their children’s views by a court reporter. This shows a mixed response; with resident parents being negative in cases where their child had said “no” to contact (or wanted less) but had not achieved this, while non-resident fathers were negative when they had failed to secure the quantity of contact they wanted. The brevity of the time a reporter spent

with a child and the acceptance of a child's statements with no further probing also shocked some parents.

## 8:2 The Appointment of Court Reporters

In the court data set there were 76 initial reports ordered in respect of 141 children and all but 18 were undertaken by solicitors (the others being undertaken by social workers). A further 23 children had curators *ad litem*.



As can be seen from **Fig 8:1**, children between the ages of five and eight were more likely than not to have a court reporter appointed in respect of them. Two-thirds of all court reports were ordered at the first hearing in the case. In many cases a court report may be ordered *prior* to contact being ordered and therefore it may be necessary for a 'supplementary report' on the contact when this takes place – at least in the event of concerns being raised. In the court data set there were supplementary reports in twenty cases (affecting 34 children) and '2<sup>nd</sup> supplementary reports' in five cases.

This research found court reports were more likely to be ordered in cases where there was *no ongoing contact at the time the case came before the court*. In such cases, reports were ordered in respect of over half the children (54%). However, when children were still exercising contact with their NRP, reports were ordered in respect of less than a third of the children (29%).

One sheriff in interview observed that:-

*“One only really needs a report if it is residence that is being disputed or if contact is being **refused** altogether. If it is merely a matter of dad wants contact once a week and mum says ‘no only once a month’ well the case should not even be in court actually, the solicitors should be able to negotiate.”* (author’s emphasis) Sheriff n. 5

Notably, as seen in Chapter Four, contact is *less* likely to be occurring where a party alleges there has been domestic or child abuse.<sup>189</sup> Thus court reports were ordered in a greater percentage of cases in which such allegations were made – 58% - compared to cases in which there were no allegations (35%).

However whether it is ‘allegations of domestic abuse’ or the fact of ‘no-contact’ that triggered the ordering of a report is not clear. Certainly one of the sheriffs interviewed expressed a clear view that domestic violence indicated the need for a court report:-

*“Where domestic violence is alleged I would put contact on hold until this is investigated by a reporter [...]if, after making an inquiry, I am satisfied that it is better for the child that there be contact than no contact, I would begin by ordering contact in a child contact centre.”* Sheriff n.4

Notably reports were ordered in respect of all sixteen of the children in the court data set whose father had *previous convictions* for abuse of the child’s mother. Of course, *importantly*, to some extent ‘previous convictions for

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<sup>189</sup> By the time the cases came to the court there was contact in only 14% of cases where allegations were made, compared to 28% of cases where no allegations were made.

domestic abuse' may correlate with the ordering of a 'court report' in the court data set *because the history of domestic abuse was uncovered by the reporter*, as battered mothers did not always enter the process to defend actions (see next section). Similarly, it was only in cases where reports were ordered that it was found that the allegations made against the mother of the children were unfounded and malicious (affecting 21 of the data set children).

The findings cited here are therefore suggestive of the potentially vital investigative role reporters undertake.

### **8:2:2 Appointment of Court Reporters in *undefended* cases**

Twelve of the reports in the court data set were ordered *even though* there was no Intention to Defend lodged.

Ordering a court report in these circumstances enables a sheriff to learn the circumstances of the child which may have been misrepresented in the Initial Writ. One example is a case where the pursuer (who was not named on the birth certificate of the child) submitted a motion for decree in terms of the Initial Writ (ie: the craves were for Declarator of Paternity, PRR, Contact). The clerk prepared an interlocutor for the sheriff to sign in terms of the Initial Writ but the sheriff returned this to the clerk with the following note attached:

*“The child is not just one year old! He (the pursuer) “believes” he is the father as a result of a “brief” sexual relationship [...] A reporter should be appointed to investigate the circumstances and report in relation to Craves 1, 2 and 3.”*

In the court data set also, *curators* were similarly appointed in four *undefended* cases affecting young children.<sup>190</sup> As a result, significant welfare concerns were uncovered and the caution exercised by the sheriffs in these cases was clearly consistent with ensuring the welfare of the children involved could be protected.

For example, in one case the reporter gleaned that the father who was seeking residential contact of a baby, had convictions for murder (amongst other crimes/offences), and that the baby had been born prematurely to him by a women who had previously reported domestic violence by him to the police.

In a further case the father raising the action claimed his child's mother was suicidal and the court referred the case to a Reporter of the Children's Hearings System<sup>191</sup> as well as appointing the curator - who found the claims had been malicious.

In some cases it appeared that the nature and pattern of violence mothers had been subjected to (which was uncovered by reporters) meant they were unable to defend the action – possibly because they did not want to anger a man they felt no-one could protect them from and very possibly because in order to defend the action they would be required to *attend the court hearings* at which their ex-partner would be present. In interviews women spoke of their anxiety around exposure to their ex-partner in court proceedings; while in three of the cases in the court data set there were references to women being assaulted outside the sheriff court.

The author was invited by a sheriff at one of the courts to observe some Child Welfare Hearings and witnessed in one case the father of the child in question form his thumbs and forefingers into a gun shape and make a

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<sup>190</sup> In undefended cases, OCR 33.31 states that a sheriff may hear the case in chambers and that “decree may be pronounced after such inquiry as the sheriff thinks fit.”

<sup>191</sup> under s54(1) of the 1995 Act

‘shooting’ gesture at the mother of the child as they sat across the table from each other in the court room. The parties’ solicitors were outwith the court room negotiating at the time and the sheriff had not yet entered the room - the clerk being the only other person in the room and she was busy organising her notes. It is appreciated that this (the parties being in the court room before the sheriff) was probably an unusual occurrence; however parents will often encounter each other in and around the vicinity of the court at the time of a hearing.

It is submitted that parents should at least be afforded the protection of separate waiting areas (for men and for women) prior to their hearing and that one party (logically mothers as they are the most vulnerable to serious physical assault) could be permitted to leave the building at least 15 minutes before their ex-partner. Clearly also, parties should not be left alone without their representatives in the court room. It is appreciated however that court resources are unlikely to extend as far as the split hearings which exist in the Children’s Hearings System where a party has been exposed to abusive behaviour.

### **8:3 Cost Barrier to Court Reports**

Given the essential protective function of court reports, it is of some concern that because reports cost so much, parties may be placed in the position that they cannot afford the report that could enable investigations into the concerns they raise.

An example from the court data set is a case in which a mother of children aged 6 & 7 was ordered by the court to pay for a report into her children’s welfare after she lodged her Notice of Intention to Defend. Five weeks later, a letter from her solicitor advised the court that she would not be instructing a court reporter for,



*“Since reports regularly cost £3,000 or more (often more than the entire cost of the case), this caused my client alarm and she was not prepared to instruct the report.” “I am unable to act without instructions as we cannot incur this expense. For this reason, the report has not been commissioned.”*

There was no evidence in this case that the defender’s legal aid application was ever approved. However, there was prior evidence of the involvement of statutory agencies with this family and the social work department was later instructed to undertake a report which the mother would not have been expected to pay for. This led to the production of the father’s criminal convictions for assault and harassment and previous abduction of the older child during contact, as well as a report into the child’s disturbed behaviour as at only 8 years of age she threatened to kill herself and would stand with a knife pressed to her chest. This case was not the only one in which the *cost* of a report might have prevented a court being informed of matters pertinent to the promotion of the child’s welfare.

In another case, unmarried parents had separated a year earlier (allegedly due to domestic violence) and the father had had regular contact with his daughter who was now aged 11. It was the second report in this case that almost did not happen due to the cost, as the father had been ordered to pay for the report and his legal aid was at that time suspended. This second report, when finally submitted, uncovered that since the court had ordered contact the girl was now fearful to see her father due to his overbearing behaviour.

Women, as primary carers, are usually eligible for legal aid because their caring responsibilities limit their earning capacity. However, almost a third of women in the data set were not eligible for legal aid and one mother wrote a letter to the court asking the court not to “take my son away from me” and explaining that she could not afford to instruct a solicitor. Her letter stated that she was happy for her child’s dad to continue to have contact but that she could not afford to defend the action as she worked full time to

support her son without any maintenance from his father. She asked the court that she be allowed to have some “quality time” with her son (which she would lose if he was at his father’s every weekend) and therefore asked that contact be every 2<sup>nd</sup> weekend only.

It appears that when courts are aware of the financial barriers to investigating the welfare of the child, they (or the parties solicitors) may try to find ways in which reports can be undertaken while, in one case, a solicitor stated that although she was unable to continue investigations and submit a *written* report (due to parties lack of funds) she would nonetheless attend the court to give a verbal report.<sup>192</sup>

One of the suggestions considered by Lord Gill’s Scottish Civil Courts Review (2009) was that there be a specialist body of court reporters, who need not necessarily be *legally* trained but who could receive training similar to that given to panel members for the Children’s Hearing System (Gill, 2009:pp 204-205). This would certainly be one way of reducing the cost as currently solicitors calculate their costs on their usual hourly fee. At the time of the cases in the data set, this was usually £120 per hour.

#### **8:4 The Training of Court Reporters and Curators *ad litem* in Scotland**

Court reporters in Scotland need only to be holders of a current practice certificate to work as a solicitor as well as experience undertaking litigation (court work) in order to write reports into children’s welfare. These same individuals may also be appointed as a curator *ad litem*.

At present courts have a “Roll” of solicitors willing to undertake reports and when a sheriff orders a report, a clerk at the court who is responsible for family cases moves his or her way down the list. There is no requirement for

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<sup>192</sup> This letter to the court was in the process.

additional training or even that the solicitor undertakes (or has ever undertaken) family law work and one sheriff in interview observed;

*“What we need is a forum of family law sheriffs and practitioners.”*

Sheriff n. 1

However, when the author inquired whether there would there be requirements for additional training – such as how to interview children on a sensitive topic - it was explained that:

*“We have not gone into that much detail but minimum standards would need to apply. In order to be accredited to write court reports, practitioners would have to have the necessary experience.”* Sheriff n.1

It appears therefore, that the model envisaged (at least by some) may be very similar to the present requirements put on practitioners who wish to be accredited by the Law Society of Scotland as a “Family Law Specialist,” with an emphasis on experience of legal practice rather than the undertaking of additional training on assessing children’s welfare or on communicating with children.

Presently, the financial motivation for writing a court report is significant, with reports regularly costing £3,000, while one sheriff in interview spoke of a report costing £12,000.<sup>193</sup>

One practitioner interviewee who specialises in family law, but does not do legal aid or court work observed,

*“People who are on the roll for court reports tend to be down at the court a lot and they get well known that way, but it is a bone of contention as the fact that you are before the sheriff regularly could indicate you are either rushing to court or not doing a good job of sorting it out by negotiation.”* Solicitor n. 4

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<sup>193</sup> This particular sheriff now specifies the maximum cost s/he is willing to tolerate when ordering a report.

This solicitor's comments are interesting as, because he does not do court reports, he has no reason to try and justify the appropriateness of lawyers undertaking these:-

*"I do wonder what the credentials are, shall we say, of some of the people who do reports [...] and what is the basis for this reporter's ability? What is their expertise? People find it astonishing that court reporters are not trained, but observe contact and then write a 30 page report saying 'yes' or 'no' to contact."* Solicitor n.4

Indeed, in interview, one court reporter observed:

*"I remember doing my first court report. I asked an experienced colleague how I should approach the task and was given an earlier report to look at for guidance. I had to take it from there."* Solicitor n. 1

The present financial crisis was also suggested by a couple of practitioner interviewees to have encouraged practitioners to undertake family law work,

*Sol: "Of course we are now getting people coming back to do family law who did not do it before because of the credit crunch, because there is not the other work available and, particularly in large firms in main cities, you may get your conveyancing partner starting to dabble in family law."*

*Int: "How can they be updated on family law?"*

*Sol: "well the law society had a road show recently updating people as to what the changes had been but not many people come to that sort of thing."* Solicitor n.7

This 'dabbling' in family law may also extend to a practitioner undertaking a court report in a child contact or residence case:

*"At some courts they [court reports] are sent to lawyers who have never done family law work at all. I know of one that was sent to a firm at 'X' as a favour as his business was failing. Court reports are a very nice earner so of course you do it if asked."* Solicitor n.4

It is not just practitioners who don't do litigation work (and therefore aren't eligible to undertake court reports) that raise concern over the lack of training. In the Journal of the Law Society of Scotland, practitioners Hall Dick & Ballantine (2007) observe that,

*“For the client who sees the arrangements for residence and contact for his or her child as the most important thing in life, it is, for the more thinking client at least, a matter of astonishment that crucial decisions on the welfare of their children are being made based on recommendations from untrained individuals working without guidelines. Justice is not being seen to be done if justice involves the application of consistent and fair processes by a trained practitioner.”<sup>194</sup>*

In the same article, these practitioners contrast the situation in Scotland with that of England and Wales, where reporters working for the Child and Family Court Advisory and Support Service (CAFCASS) have to have a degree in social work and at least three years post qualification experience, as well as mandatory registration with the General Social Care Council with re-registration every three years, dependant on demonstrating sufficient ongoing training has been engaged in.

Clearly, there is a chasm of difference in the training requirements of those undertaking reports on either side of the border. However, training *per se* need not be a guarantee children's voices won't be over-ridden by a different forum of practitioners *if* the training emphasises on-going contact with both parents as the 'primary/superior' factor to ensure promotion of the child's welfare - while minimising the significance of the child's views and the impact that living with domestic abuse may have on a child's wish not to be left under the control of a particular parent. Certainly the children who took part in the study by Douglas et al (2006) *were* the subject of reports undertaken by CAFCASS and they spoke of being *misrepresented*, their fears dismissed, and of being forced into contact against their will. While, Steven Adams the acting head of CAFCASS in 2007 commented that:-

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<sup>194</sup> Unpaginated. Available at <http://www.journalonline.co.uk/Magazine/52-12/1004790.aspx>

*“the presumption of contact in effect obliterates the question of children’s interests by assuming they are synonymous with parental contact” (Adams 2007:258).*

And,

*“in my experience, when children are reported to give clear messages that they do not want contact, courts are just as likely to order further reports as they are to end proceedings” (Adams 2007).*

The *content* of any training given thus is clearly important, as is the weight (or emphasis) attached to the various factors relevant to the promotion of a child’s welfare.

At present, the limited training which is available in Scotland is optional and is provided for practitioners by other practitioners. These courses have to be paid for by practitioners as well as taking busy practitioner’s time.

While, practitioners *may* include non-lawyers in the delivery of the training, the messages heeded by practitioners tend to be those that conform to legal practitioners pre-existing assumptions. So for example, Hall Dick (2008) recounts that at one of the courses she organised:

*“Brenda Robson, a child psychologist, pointed out that if young people are asked views which they know will be taken as a preference for one parent rather than the other it is putting them in the same emotional situation as the mother in the novel Sophie’s Choice (William Styron, Sophie’s Choice (Jonathan Cape, 1979)). That mother, in a concentration camp during the war, was told she could save the life of only one of her two children and that she had to chose which one should live and which should die.” (2008:233)*

Comparing a child expressing a view in a child contact dispute with a parent deciding which of her two children should die is, *inter alia*, an extreme view, and is not one supported by research literature that *includes* the views of children who have an abusive parent. It is particularly dangerous when it is presented – as it is in this quote – as a general principle. From a practitioner’s perspective however, this view confirms their commonly held

assumption that ‘children do not wish to express a viewpoint’ as well as supporting their assumption that children ‘just want their parents to get back together again.’ While this may sometimes be the case, a tendency towards a blanket assumption is problematic as it may leave children with an abusive parent exposed to abusive behaviour.

## **8:5 PRACTITIONER APPROACHES TO WRITING A COURT REPORT**

### **8:5:1 The Standard Content of a Court Report**

In the majority of reports, reporters recount the respective versions of the history and nature of the relationship between the parties, as well as the reasons parties give for the present dispute and their attitude towards whether contact should take place – including the frequency, duration, place of contact and any other conditions they seek and why.

Thereafter reports often include information gleaned from in excess of ten other individuals. These may be relatives, friends, neighbours (particularly where there has been a history of domestic disputes with police involvement), general practitioners, staff on drugs monitoring programmes, psychologists (where one party has had contact with these services), staff on domestic violence perpetrator programmes, school or nursery staff members and, occasionally, women’s aid support workers. In the process, documentary evidence is often collated – such as letters from a general practitioner (which may comment on an injury related to abuse or whether their patient abuses drugs or alcohol as alleged), extracts of criminal convictions, police records of calls to incidents at the home address, school reports and so forth.

Children’s views are usually presented before the recommendations, in a section including details of when and how often the child was seen, where, whether anyone else was present, often a description of the child’s bedroom

(as most children are interviewed by the reporter in their rooms which may be the only private space in the home) as well as the general presentation of the child. Reporters then usually recount what they asked the child, the child's responses, and the impression they had of the child as they spoke – such as “he look slightly confused” or “she shook her head and said ‘because’ but as she was smiling all the time I don’t think there is any need to attach weight to her views,” “she expressed very clear views and had clearly been thinking about what she wanted to tell me.”

The final section of a court report gives an overall summary of the report, the reporter's observations on which version of events they found more credible as supported by the evidence (and the demeanour of the parties), before suggested recommendations are made – such as contact to take place for two hours every Saturday in a child contact centre to “re-assure the defender” and to enable observation of the contact to take place.

### **8:5:2 VARIATION BETWEEN PRACTITIONERS: *Fact Finding and Collating Evidence***

Not surprisingly – given the lack of training, there is a noticeable variation between the extent to which practitioners investigate, or even mention, allegations made by parties in their reports. Some simply state they “do not intend to rehearse the allegations made by the parties against one another.”

In respect of what to include, one practitioner observed:

*“I do a lot of reports and sheriffs will ask me why I put in the section headed ‘background’ and I give both the pursuers and the defenders version and the sheriffs will say ‘what is that all about’ and I will say, ‘well, you don’t have to read it actually, it is for the parties so that they can see that somebody somewhere has listened so they can’t stand up and say ‘aye but in 1997 he battered my mother and raped my sister’ because that will be in the report and I know that and having looked at that and considered it, that is still the recommendation.”* Solicitor n. 6



This practitioner explained that the reason some sheriffs do not consider it relevant for reports to include parties' accounts of why they cannot agree in respect of contact is that,

*“There is very much an ethos you know that ‘it’s all behind us, let’s move forward’, well yes but you have to acknowledge what has gone on in the past.”* Solicitor n. 6

However, in contrast to this practitioner who includes background detail (even though apparently experiencing judicial discouragement from doing so), some solicitors stated that they *avoid* ‘rehearsing’ the party’s allegations, or investigating allegations of past behaviour between the parties, as they believe these have no bearing on *future* contact.

The author asked sheriffs whether they *expect* the reporter to undertake an investigative role:-

*“Yes, that is what they do. Speak to the parties, to friends, relatives, GP’s, maybe school reports attached.”* Sheriff n.3

*I find reports invaluable as they communicate to the sheriff what is not presented by any of the parties as they don’t want you to know. They can investigate factual matters so if one party is crying “black” and the other “white,” the reporter can get factual clarity.* Sheriff no.5

The author also asked one sheriff if s/he specifically would expect a reporter to investigate allegations of domestic abuse and the sheriff stated:

*“I would expect a schedule of convictions to be obtained where one exists – yes.”* Sheriff no. 4

Notably however, only a small percentage of cases of domestic violence actually result *in* convictions. This is partly because women often do not want to press charges but just want the violence to stop (see Hoyle & Saunders 2000). In the court data set, *convictions* for domestic abuse only

existed in respect of a third of children where police records of *incidents of domestic abuse* were present in the court processes.

In some cases court reporters did not include the fact that allegations of domestic abuse had been made – even when the allegations were previously absent from papers before the courts. Where the case is undefended, the only clue as to what the defender may actually have alleged to the reporter are statements such as, “the pursuer denies he was ever violent towards the defender.” In such cases, the reporter, by choosing to exclude domestic abuse from their investigations, excludes establishing whether there is evidence of a factual basis to the defender’s version of events or not.

Somewhat inconsistently, in two of these cases, the *fathers’* claims that the mothers of their children were mentally ill and unfit to care for the children *were* included in the reports. This appears to indicate that maternal mental illness may be more widely understood by practitioners to be relevant to contact, while an adult being of a controlling or violent disposition is not.

Aggression by men on their female partners appears therefore to be normalised and the link between domestic abuse and parenting style is not acknowledged.

One of the most extreme examples where domestic abuse was minimised by a reporter was a case in which a mother had described a sustained pattern of violence in her Defences. The reporter stated early in his report that,

*“I do not think it necessary to set out what each of the individuals I have spoken to has said at length.”*

This reporter did *not* then follow up the mother’s allegations of physical abuse by contacting the police to obtain a record of incidents at the family home. This is despite the fact that the mother also stated in her Defences that she had contacted the police when the child’s father refused to return the child *after contact*. Further, while the reporter did actually record that

the eight year old child said her father had kidnapped her, he then dismissed this as having being fed to the child by her mother.

Rather, the reporter stated (without making inquiries of the police), that he believed “there has been at least one occasion that the defender (mother) had reported the pursuer to the police for ‘abduction’ when it was that she simply did not want contact to take place.” Further, while the reporter did *acknowledge* the arrest of the child’s father for physical assault of the mother outside the sheriff court after a child welfare hearing (which led to criminal proceedings), he then stated he did “not believe this is of any significance.”

The reporter recommended the child spend every 2<sup>nd</sup> weekend with her father and all Saturday on alternative weekends as well as half her holidays. The eight year old girl had stated she did not want to see her father but the reporter dismissed *the child* as lacking in competence and asserted that there was no need to attach any weight to her views.

Cases where a reporter’s approach to the task of *investigating* allegations showed such bias were rare however and usually reporters did impartially follow up allegations with investigations – although *having investigated* these, they sometimes dismissed the relevance of domestic abuse when it came to recommending contact between a child and a NRP (as is discussed in the next chapter).

Domestic abuse is not necessarily the only factor that a court reporter might choose not to investigate. In particular, reporters did not usually concern themselves with whether or not a parent had *ever* exercised contact, nor whether the mother had been abandoned in pregnancy or been told to terminate the pregnancy by the pursuer. One solicitor in interview observed:

*“I have a couple of clients, you quite often get this, who say that the father of the child’s default position was to get rid of the child, to terminate the pregnancy and they say that there would not have been a child if they had agreed to that. However, you have to say “well, whether or not they said that, the fact is now you have a child of a year or eighteen months and a changed set of circumstances.”*  
Solicitor n. 4

Another solicitor observed that it would be ‘up to a party’s solicitor’ to obtain evidence of alleged *drug abuse* rather than the responsibility of the reporter. However it is submitted that, although a solicitor could very well obtain such evidence about his or her *own* client (with their client’s permission), they could not insist in respect of the other party without the authority of the court.

Indeed, even *with* the authority of the court, one reporter described how the general practitioner (GP) of the mother of the action had refused to disclose to her whether the mother had presented with injuries subsequent to assaults by her husband. The GP told the court reporter he owed the *father* - who was also his patient - a duty of confidentiality. The reporter in this case however spoke with the practice nurse who confirmed injuries to the mother *and to the infant child*. Cases such as this are illustrative of the point that where reporters *are* convicted of the relevance of the broader ‘circumstances of the child’ to the issue of contact, and consider the investigation of allegations to be a part of their role, they may be able to obtain the ‘factual clarity’ (pg 247 above) that sheriffs require.

### **8:5:3 Whether Reporters Speak to Children or Observe Contact Only**

This section reviews factors impacting on the confidence (and competence) of untrained court reports to ascertain the views of children – including some examples of effective questioning techniques.

Theoretically children's views in private law civil cases are not 'evidence', but merely a record of what a child has said. They nonetheless can give a flavour of the nature of the contact experienced by the child of the action and, where a child has lived with domestic abuse, often provide clear accounts of that abuse. Potentially, therefore the child's views may lead to the instigation of protective measures for the child.

Four out of every ten children in respect of whom reports were ordered, were either not spoken to *at all* or were not asked their views on contact.

In some reports the recorded verbal exchange between reporters and children was limited to the sort of interaction an interviewer engages in when building rapport with the interviewee at the start of an interview - and never progressed beyond that. That is, there were no questions designed to establish what they do during contact and the extent to which they enjoy it (or, where the child was not having contact, their view on the contact that was craved). Consequently, as their views on contact were not gauged, these cases were coded in the data set as "no views taken."

Examples of this approach were described by some of the practitioners interviewed:

*"I think we have to observe the children and chat with them. But because of the nature of lawyers and the legal system we call it "seeking the child's views" Solicitor n.2*

*"You may not approach a five year old at all unless it is something pretty radical going on and you don't question children who are very young, you let them talk. [...] you must not ask anything direct and very often if you talk to a child that is that young, you can say you spoke to the child but nothing came up." Solicitor n. 5*

The difficulty here is that the onus to raise the issue of contact may, in some cases, be left to the child - whereas children are accustomed to adults (at least those who are unknown to them) setting the parameters of the

conversation and then responding to their prompts.<sup>195</sup> This is especially the case where the child has been told the adult has ‘come to speak to’ the child and where the adult has been left alone to speak with the child or gone off to a separate room with the child to do so. In such circumstances it is likely to be confusing for the child to just be asked about school or friends or hobbies.

A problem appears to be some practitioners’ concern that children “are so suggestible” and for this reason will not question them – presumably to avoid the risk of putting words into their mouths. Clearly, appropriate training in *how* to interview children could enable practitioners to become more confident for, ‘asking questions’ need not equate with ‘asking leading questions.’ Leading questions are of course questions which assume or imply the answer (or facts) (Alridge & Wood 1998:116), an example being asking someone ‘when’ something happened where they have not actually said that it did.

It *is* possible however to ask questions such as “Do you know why I am here today?” or “Do you have anything you would like to say about [the proposed contact]?” without being leading. However, this very open approach is not without its drawbacks as it requires the child to narrow the field of potential responses to those which are relevant. This was described by Walker (1999:63) as rather like leading an adult to a window and asking “what’s there?” That is,

*“Knowing how to answer would depend on knowing what is important to tell, which in turn would depend on understanding the context of the question and the needs of the hearer. Adults would know the right questions to ask to narrow the field if they could not do so by themselves. Children generally do not.”*(1999:64)

Additionally, such questioning is not something children are generally accustomed to in the conversations adults initiate with them, and may result

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<sup>195</sup> see Nigel Thomas (2000:177)

only in “yes” or “no” answers or head shaking or shrugging. For, as Aldridge & Wood (1998) observed, “in terms of conversational experiences, children are more used to being asked specific questions by adults,” such as whether they have finished their homework or handed in the note to school.

Another pertinent point in respect of taking children’s views on contact for a court report is that most children have a significantly limited vocabulary for describing *feelings*; so, for example, young children may only have the word “sad” to describe any negative feeling and are unlikely to be able to have a word for fear before the age of six (Aldridge & Wood (1998). This does not mean children do not feel these things; rather they lack the vocabulary to express them.

Given that 49% of the children in the court data set had a parent who alleged domestic abuse, it is particularly pertinent that reporters are aware children may not have the vocabulary to describe the impact of that on them.

Further, *ambivalent* feelings, such as caring about a parent whilst also being afraid of that parent are particularly problematic for children to describe. Aldridge and Wood (1998) recount an example of how an eight year old who had been sexually abused by her father was asked “Do you like Daddy?” and responded “yeah” (1998: 175).

Clearly a number of barriers exist for untrained reporters in respect of gauging the views of a child. Some may worry about asking leading questions and therefore ask no relevant questions at all, while some may determine a child lacks competence when they are actually responding in a manner to be expected for their age - with regard to the type of question they are being asked.

In the court data set, social workers were 1.6 times more likely to speak to a child than a court reporter.<sup>196</sup> This is likely to be a reflection of the differences in training, work experience, and sense of personal competence in respect of speaking to children between Children and Families Social Workers and lawyers. The former group were also more likely to include the views of *very young* children in their investigative report with *all children aged from four years* being spoken with in respect of contact with their NRP. However, 28% of all children from the age of four who were the subject of a court report carried out by a *solicitor* were *not* asked their views on contact.

In the cases where the child's views were *not* taken in the court data set, reporters usually either stated that they did not take the views of the child because the child was too young, or that they did not wish upset the child. For example:

*"I met the children but their views were not canvassed by me due to their tender years." It was evident the children were well cared for and happy in the company of both parents." Children aged 4 & 6 years.*

Although reporters might choose not to speak with a child, they almost always observed a child on at least two separate occasions - with each of their parents. One reporter explained;

*"I observe the contact and if the child is not distressed then there is no reason not to recommend contact. The mum may say the child is distressed but again, unless this is confirmed by third parties such as a teacher, there is no reason not to recommend contact." Solicitor n.2*

Later in the same interview this reporter gave an example of a case in which there was nothing in the *observed* child's demeanour that alerted her to how the child was feeling:-

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<sup>196</sup> With 13 out of 18 children spoken with by the social worker (72%) compared to 55 out of 123 children spoken to by the court reporter assigned to their case (45%).



*“I remember a case where dad had been beating up mum and the boy and a lawyer had got hold of the dad in a criminal capacity and said ‘oh and we will get you contact with your son as well.’ So we had contact in a contact centre and it went well enough, [...]. and at the end the dad stood up and said “well would you like to come and see me again” and the wee boy stood up and said, absolutely innocently ‘well, will you stop hitting me?’” Solicitor n.2*

Without the child’s verbal utterance, the observing reporter would have been unaware that the child remembered the past abuse and was apprehensive about being with his father because of fear that the abuse would continue.

The assessment of contact that court reporters are able to make is clearly rather crude and as one solicitor observed:

*“You would have to be mad not to be able to control your temper in a child contact centre.” Solicitor n. 3*

Yet reporters may be dependent on a child displaying obvious distress in a public place - although children who have lived with an abusive parent will often have learnt *not* to provoke that parent by making themselves as quiet or invisible as possible (Mullender et al, 2002; Radford & Hester 2006). The only indications of a child’s anxiety might be a lack of eye contact or only speaking where this appears required by his parent (rather than instigating conversation), as well as lack of physical contact and a non-response or tension when touched.

That said, some children do display overt signs of distress which may be witnessed by others during contact. One solicitor in interview told me of such a case:

*“I know of a case where the court ordered contact despite the fact that the child was distressed and continued to be distressed each week. Every week social work would bring the child down to the centre for contact and by the end of it the contact centre staff were saying ‘this is emotional abuse of the child by the court, this should not be going on.’ [...] So yes, I agree children should be able to have a good relationship with their dad but in some circumstances, it doesn’t work and you have to accept that.” Solicitor n. 6*

This solicitor said that in this case the contact was eventually stopped. However in cases such as this, where children are visibly distressed, the distress may sometimes be attributed to the *conflict* between the parents over the *issue of contact* rather than a child being distressed by being left under the control of a particular parent.

For example, in Chapter Six, reference was made to a court reporter being annoyed by a mother explaining her presence as that of an “auntie from the court.” In this case, the children aged 3 & 4 years had (allegedly) witnessed their mother being assaulted as well as being primary victims of physical and verbal abuse. The reporter observed contact ordered in a contact centre and recorded that the children visibly shied away from their father and struggled to extricate themselves from his grasp. That is she *did* observe behaviour which indicated their distress. However, in this case, the reporter appeared to accept the father’s explanation that the children did this as their mother had “threatened to pinch them” if they were affectionate towards him. Thus, in this case, even the observed and clear behaviour of the very young children was still not enough to overturn the presumption of contact.

Solicitors may prefer the opinion of adults who know and work with the children - once children are of an age that they are at school or nursery:

*Sol: “A good place to go for views on the child and the child’s relationship with parents is the school. The strain will start to show [...] I ask if they have noticed a change in behaviour.”*

*Int: “How can you tell if the strain is due to separation or due to contact?”*

*Sol: “You can’t. You can’t say this happened and caused this reaction in a child.”*

*Int: “What if the child seems more **settled** post separation?”*

*Sol: Oh mums will always say that! [...] but the reason the child is settled is because there is no acrimony going on around him but this does not mean he doesn’t miss his dad or want to see him but there is no hassle if he doesn’t. The mum is not upset because she is not having to take him for contact and it can be calm, the child does not have to move between two different factions – which is what it is - of course he is settled!” Solicitor n.6.*

This preferred narrative to account for a child's behaviour may, in some cases, be an accurate assessment of the situation. However the tendency to assume distress is due to the conflict between the parents - rather than a child not wanting to be left with a parent s/he fears – will be seen in the following chapters to result in some children who *are* in well-founded fear of a parent being forced into contact and their distress perpetuated.

Of course, where children *are* actually asked their views they may, potentially, be able to explain *why* they don't want contact (where this is the case) and it often emerges that this is because of the behaviour of the NRP.

### **8:5:6 How (some) Reporters Question Children**

Some reporters in the court data set resorted to an apparently effective mode of questioning in which they asked young children if they could think of “three good things” and (thereafter) “three bad things” about each of their parents. This form of questioning proved informative as the following examples illustrate.

In one case a four year old's responses revealed the mix of behaviours children may be exposed to. The girl said the three good things about her father were that “he leaves sweets,” “he takes me to nursery” and “he takes us to the beach.” The three bad things were “He broke our letterbox off,” “He shouts at mum” and “he keeps coming to the door.” In respect of her mother, the good things were “She buys us stuff,” “She takes us to the park” and “takes us to [friends] house.” When asked the bad things about mum, the girl could not think of any.

In another case the father of 6 and 4 year olds stated he had had contact until this had been suspended by the defender following a “verbal disagreement.” This reporter spoke to the children and asked the 6 year old boy to name “three good things” about his dad. The boy replied he “can't remember.” The reporter then asked if he could name “three bad things” about his dad

and the child said “He drinks. He shouts. He hits.” His younger sister however was asked a closed question (one in which the choices are limited to those suggested) being; “Is your dad a nice dad” or “not a nice dad” and the girl replied that he was “not nice.” The reporter then asked her how he was “not nice” to which the girl replied “he hits me.”

In a further case a reporter supplemented asking about “three good” and “three bad” things, by first asking a 7 year old boy who his three favourite men were. The boy responded with “Grandad,” “Uncle [x]” and “Don’t know.” When asked who his three favourite women were he said; “Mum” “Gran” “Aunty [y]”. The reporter then asked the boy if he could tell her three good things about his *dad* (who notably had been absent from the list) and the boy replied “No.” So she asked him if he could tell her three bad things about his dad and the boy responded “He always comes in drunk,” “He smashed the window” and “he kicked holes in the door and walked into the house.” Interestingly, this slightly older child was able to give a more detailed response than the six year old in the previous example. The reporter in this case then observed that there were indeed holes in the living room door of the defender’s house.

Clearly this simple question may extract more information than asking a child “why” s/he says s/he does not want contact or wants less contact – particularly as children are known to struggle to answer “why” questions before at least the age of eight (Aldridge & Wood 1998).

When children appear ambivalent or reluctant to express a view, this can pose a significant barrier to obtaining their views. One reporter described how she assisted a boy to express a view on whether he would go to high school in his father’s town or his mother’s (he was currently living with his mother). The boy did not seem to want to choose and so the reporter suggested they toss a coin and just see what comes up. So she produced a coin and said “heads” was the school in mum’s town and “tails” was the school in dad’s town. She tossed the coin and it was “heads,”

*“He looked relieved and pleased and I asked him how he felt but he could not say so I drew line on the table and said ‘ok this end is zero and this end is ten. Zero is unhappy and ten is pleased. Where are you on the scale?’ and the boy pointed to near ten. I then asked ‘what if it had been other school?’ and boy pointed near zero. Now that boy did not actually put his views into words at all. So he does not think he has told me anything and I did not put it in writing but gave a verbal submission to a visiting sheriff.” Solicitor n. 2*

It is of particular interest that the boy this reporter spoke with, although of high school age, could not *verbalise* his feelings. Without her efforts to engage with him, his view on the subject (ie: his feelings on the topic) is unlikely to have been available to the court.

In interview one solicitor described a different approach to obtaining a child’s view in a case in which she had acted as reporter:

*“I had one case in particular that was horribly acrimonious, there had been a horrible incident with blood up the walls – literally, but mum and dad both said ‘the child was in bed, he knew nothing about it, he’s fine.’ He was a wee boy of six or seven and I said to him ‘mum and dad were telling me there was this big argument but you were in bed so you won’t remember any of that.’ ‘Oh yeah I do’ he said ‘that is when the blood was all up the yellow walls.’ Solicitor n. 6*

Clearly, both *what* reporters choose to investigate or dismiss as irrelevant, as well as whether or not they choose to speak with children can impact on their assessment of how best to promote the welfare of a child and, potentially, on the contact outcome of a case (discussed in the next chapter).

## **8:6 Parents Views on Court Reports**

Just over half (n=28) of the children of respondents to the Questionnaire for Parents had been spoken with by a court reporter and eighteen parents responded to the question “please say what you think about the treatment of your child’s view’s in that report?”

Where children said ‘no’ to contact (or where the child wanted less contact than was craved) but the practitioner undertaking the report did not attach weight to those views, resident parents were critical of the report. Conversely non-resident fathers seeking contact, were critical of court reporters who had not recommended contact at the level they craved.

Examples of negative responses given by parent participants include:

*“I don’t think his views were taken into account at all”*

Questionnaire respondent n.25 (Resident Mother)

*“Disastrous. He seemed to accept the children’s views without question and did not feel a psychological assessment of their views was necessary - despite many examples of alienation having been brought to his attention. If children continue to be assessed in this way you will continue to give fathers a very poor chance of reasonable contact after break up.”* Interviewee no. 7 (Non-Resident Father)

While sample positive comments are:

*“The report was good. My son’s views were written exactly as he expressed them.”* Questionnaire Respondent n.16 (Resident father)

*“The children were treated very well throughout and didn’t feel in any way uncomfortable giving their views. The report reflected their views very accurately.”* Questionnaire Respondent n.10 (Resident Mother)

*“The report was a balanced description of the children's views and wishes in so far as contact and their schooling were concerned. Their ages were taken into account in the style of questioning and answers given.”* Questionnaire Respondent no.13 (Non-Resident Father)

Notably, all four of the parents who agreed to being *interviewed* and had a child who had been the subject of a court report were negative about their experience and, in one case, this was *the* factor that had propelled the interviewee into participating in the research:

Parent: *“I was very disappointed because I felt there was really very little care and thought behind what was happening. He [court reporter] was very keen for his money upfront and it just felt shoddy and careless and skimming the surface. It did not feel as though there was genuine care to get to know them.”* Parent Interviewee n.6

Int: *What would the right approach look like?*

Parent: *“The key thing is more time and the other key thing is the skill of knowing how to talk to people, and how to draw things out of them, and this man did not have a clue and that shocked me.”* Parent Interviewee n.6

This interviewee later elaborated that she was concerned that it was taken at *face value* when a child agreed with the contact being sought:

*“A while after [child] had spoken to the reporter he told me he had said ‘50/50 was fair’ – which is, of course, an objective statement and is what his father wanted. But [child] told me ‘I don’t want 50/50, I want to stay with you, but what could I say?’ It was this that motivated me to pick up that pen and write to the children’s commissioner. That horrified me. That was that child being let down as far as I was concerned. That he was not given a safe place to express that view.”* Parent Interviewee no.6

Although this mother did not believe *her* son would not be able to cope (as he would have his siblings with him), she observed:

*“There are children in situations where they are desperately emotionally unsafe, if not physically, and if the reporters just say ‘that’s fine’ and off they go! How inadequate is that? They could have been threatened, intimidated or otherwise silenced.”*

An example of this is one of the child interviewees in the present research (Kyle), whose mother observed of the court reporter:

*“She was very nice and spoke to me and to the kids and to him [father of children] and his family and of course they are all in denial, and so the reporter said she really could not make up her mind what was for the best and so just to continue contact. Because she could not decide what was best for them! That cost £5,500.”* Parent Interviewee no. 1

This mother gave the author the report to read – in particular the pages concerning the views of the children, which ran to three A4 pages. *Inter alia* the reporter records Kyle telling her that when their dad lived with them they had to be in bed by 8 o'clock or he would hit them when he came in. The children also told her how they did not want to go to their old home as there were too many bad memories. When asked, the one good thing they suggested about seeing their dad was having things bought for them. The bad things were the 'things dad says' to them, that 'dad thinks he is better than everyone else' and 'won't listen to anyone else' and that 'they have to do what *he* wants during contact'.

The reporter however, appears not to have asked the children if they could 'tell me more' (or similar) when they mentioned the bad things their dad said to them and therefore appears not to have gleaned that the key 'bad things' were threats to kill their mum or to see to it she went to court and did not come back. This is something that the reporter might have had the competence and confidence to do – if she had been trained.

### **8:7 Conclusion**

As both *what* reporters choose to investigate (or dismiss as irrelevant), as well as *whether* or not they take the views of the child, impacts on their assessment of how to best promote the welfare of a child, it is clearly essential that they are provided with appropriate training. That training should include the pertinence of domestic abuse to child contact, as well as the value of ascertaining the views of the child the decision is about. The training should also provide them with interview skills and at least a rudimentary understanding of the use of language by children of differing ages.

It may also be preferable (as Lord Gill suggested) to have a body of individuals specifically trained for undertaking court reports - not least because the cost of court reports may act as a barrier to investigations. It



cannot be acceptable that the welfare of a child (which is to be court's *paramount* consideration) may not be promoted due to a parent's inability (or unwillingness) to pay for the report that might (and often does) facilitate the child's protection.

The next chapter continues by considering the impact of children's views and legal practitioners' narratives on the *outcomes* of the cases before the courts.



## CHAPTER NINE – THE IMPACT OF PRACTITIONER NARRATIVES AND CHILDREN’S VIEWS ON CONTACT OUTCOMES

### 9:1 Introduction

Across the court data set the final contact outcomes (at the time the data was collected) was discernible in respect of 83% of the court data set (n=249 children).

This chapter describes the *contact outcomes* observed in the court data set depending on whether a court report was ordered or not, and on whether domestic abuse was alleged or not. This reveals that although the majority of children in the court data set were exercising contact by the last hearing in the case, this was less likely to be the case when a court report was ordered - because of the serious welfare concerns reporters uncovered.

However, whether or not reporters investigate allegations of abuse and whether or not they speak with the child of the action, influences the *recommendations* they make. What they recommend is of crucial significance to the *outcome* of the case as sheriffs almost always order contact in line with the recommendations of the reporter. As previously observed, the only exceptions in the court data set were cases where the reporter was hesitant to recommend contact, but contact was ordered.

The chapter also focuses on the extent to which the outcomes in the cases correlated with the *child’s views*, revealing that the contact outcome was broadly consistent with the views of most children who did not express a view opposed to contact; however over a quarter of children who *did not* want to exercise contact were nonetheless ordered to do so.

The treatment of the views of the children *not wanting contact* is focused on as this was both the most prevalent view expressed by children in the court data set *and* the viewpoint that was most likely to be over-ridden.

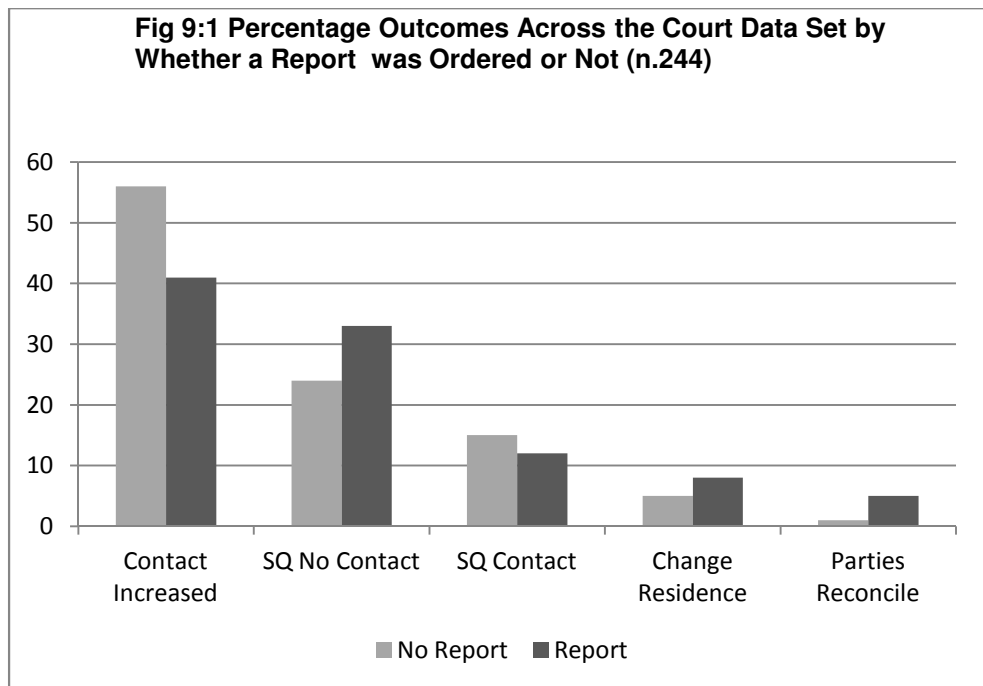
Focussing on these cases reveals that the extent to which reporters start with the assumption that contact between a child and his or her *father* is *essential* for the welfare of the child, significantly impacts on their recommendations. So also does the prior involvement of statutory agencies (police and social work) - with the view formed by the first professional in the case almost always being determinative of the later recommendations made by the reporter.

However, perhaps a more surprising finding it that the *sex* of the parent seeking contact also impacts on the approach practitioners take to determinations of whether contact will be in the child's best interests or not. That is, there is some evidence that non resident *mothers* who have either left their children (or been ejected), as well as those with a substance addiction, may be less likely to exercise contact with their children than domestically violent fathers who are separated from their children.

Across all cases the final factor determining the outcome of a case is of course judicial discretion; and the chapter ends by reviewing a couple of the cases in which reporters were cautious about recommending contact but contact was ordered.

## **9:2 Impact of Court Reporters Findings on Contact Outcomes**

Because reports are more likely when there is no subsisting contact between a non-resident parent and the child of the action - and this is more likely when there are allegations of domestic abuse - cases where court reports were ordered were *less* likely to result in an increase in contact. See **Fig 9:1** on the next page.



Note: In the above chart “SQ” stands for “Status Quo” and refers to the pattern of contact when the case came before the court

The contact outcomes were discernible from the court processes in respect of 244 children. For 40% of these children (n=101) the contact outcome of legal process was a continuation of the situation at the time the case came to court – that is the maintenance of the Status Quo – consistent with the status quo principle in the 1995 Act.<sup>197</sup> A total of one third of *these* children *were* having contact at the time the case came to court, however, for sixty-eight children the status quo maintained by legal process was that of *no* contact.

In **Fig 9:1** above, it can be seen that the status quo of *no* contact was more likely to continue when a report had been ordered, as was the change in residence of the child. However it was *less* likely for contact to increase in cases where a report into the child’s circumstances had been undertaken (41%, compared to 56% of children for whom no report was ordered). Clearly it is not the fact of the ordering of the report *per se* however that

<sup>197</sup> s 11 (7)(a) Children (Scotland) Act 1995

impacts on the contact outcome in the case but the *facts* uncovered by the reporters. The undertaking of court reports often resulted in evidence of the prior involvement of statutory agencies. As **Table 9:1** below illustrates, the prior involvement of the police had a particularly significant impact on the likelihood that a status quo of ‘no contact’ would continue.

**Table 9:1 The Impact of the Prior Involvement of Statutory Agencies on Contact Outcomes (n=232)<sup>198</sup>**

	No Prior Involvement (n=131)	Police Only (n=44)	Both Agencies (n=39)	SW only (n=18)
<b>Contact Increased</b>	62% (n=81)	43% (n= 19)	33% (n=5)	22% (n=4)
<b>SQ No Contact</b>	14% (n=18)	43% (n=19)	53% (n=21)	11% (n=2)
<b>SQ Contact</b>	12% (n=16)	7% (n=3)	5% (n=2)	55% (n=10)*
<b>Change Residence</b>	8% (n=11)	5% (n=2)	3% (n=1)	11% (n=2)
<b>Reconciliation</b>	3% (n=4)	2% (n=1)	5% (n=2)	0%

\*This includes contact that continued to be supervised by social workers.

In total, forty-two children who were known to the police and/or social services, continued to have *no* contact with a NRP at the last hearing in the case and this is clearly evidence that the need to *protect* the child is something the courts factor into child contact decisions.

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<sup>198</sup> There were eleven children in cases where it was unclear whether or not there had been the involvement of statutory agencies.

**9:3 Understanding “No Contact” Outcomes:** Twenty-seven percent of the children in the court data set had a contact outcome of “No Contact” and of these, there had been the prior involvement of statutory agencies in respect of 70%. These children were from some (but not all) of the cases with the most disturbing histories – in particular child physical and sexual abuse (n=22) and *extreme* violence upon the mother such as attempted murder and repeated rape.

It is important however that the reader does not simply infer that an outcome of “No contact” means the court *refused* to order contact. Rather, in cases where a court reporter uncovered evidence of the abuse, the pursuer often abandoned the case – especially if a proof hearing was set.

In respect of nearly a third of the children in this sub-group (n=20), the action was *abandoned* by the pursuer (sometimes as a consequence of the views the child expressed); while in respect of a further third (n=21) an *undefended* party motion or joint motion was lodged asking that the case be dismissed.<sup>199</sup> These were often cases where the NRP appeared apathetic in their attempts to have contact. Where this was the case, the attachment of *conditions* to the exercise of contact such as that it be exercised in a child contact centre or that the pursuer stop spending contact hours in a pub or stopped going to the defender’s home and threatening her, led to abandonment of the case by pursuers.

By way of illustration, an example of a case which was *abandoned* as the pursuer found the conditions of contact too onerous, is a case where the court required the father travel the 130 miles to the child’s place of residence. The father had wanted the child’s mother to take all three of her young children on a train to where he lived in order that he might see his son. As the father was not prepared to travel this distance himself, he

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<sup>199</sup> That is the pursuer could have objected to the dismissal of the case but did not. However, they may have been advised that on the basis of the facts uncovered by a reporter they were unlikely to be granted contact.

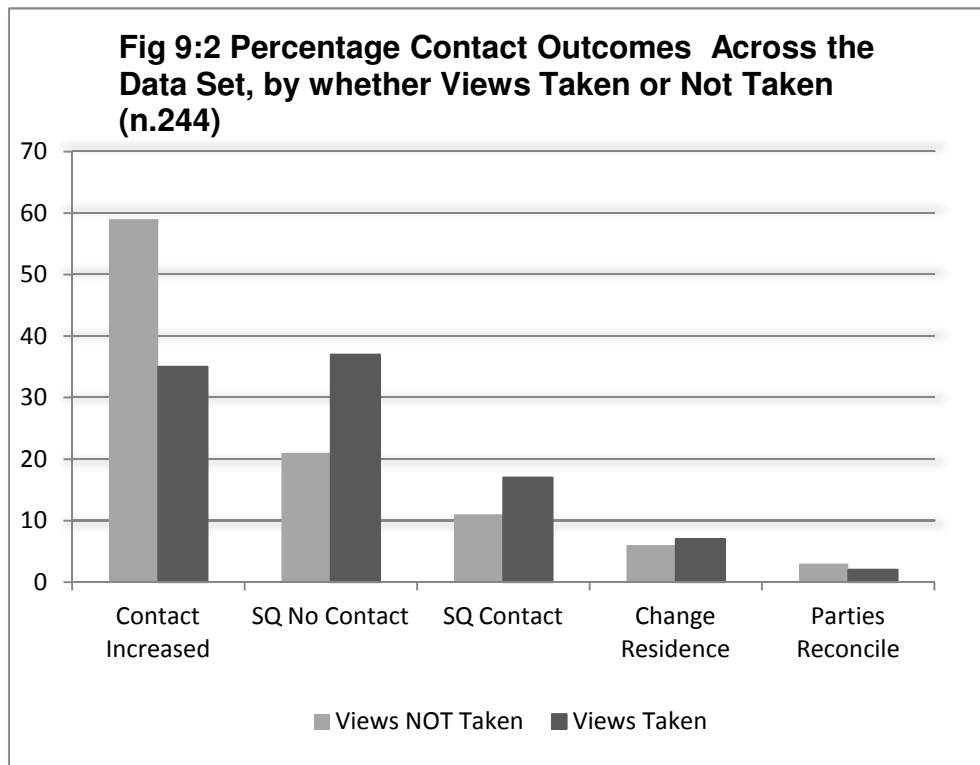
informed the reporter he would instead pursue contact with another child he had sired by a different woman who lived closer to him.

A further example of a case which was dismissed due to abandonment by the pursuer, is one where the mother and her four children had been helped by social workers to flee her family home when the older girls disclosed their step-father was sexually abusing them. Their younger brother also described direct physical abuse by his father to the reporter. After the initial hearing in which the report was ordered, the father failed to appear in court and was given two further occasions to appear before the case was dismissed. It is likely the circumstances uncovered by the reporter led the father to realise he was unlikely to get the contact he sought.

It is important to note also, that a quarter (n=16) of the children who had a final contact outcome of 'no contact' were *expressly subject to a contact order* at some point during the legal process.

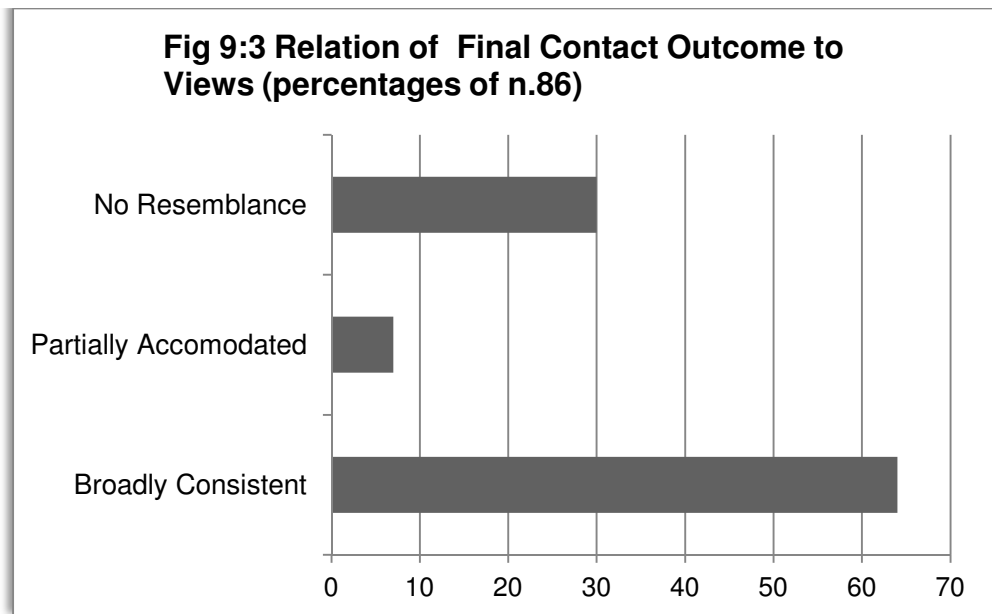
**9:4 Impact of Children's Views on Contact Outcomes:** Because children's views were most likely to be *taken by court reporters*, it can be seen in **Fig 9:2** below, that the outcome pattern for children having their *views taken* is almost identical to that for children for whom a court *report was undertaken* (shown in **Fig 9:1** on page 267). The only obvious shift is in respect of "SQ Contact" but this may be explained by the increased percentage of those for whom contact *increased* for children who were *not* consulted.





As stated in Chapter Three, across the data set as a whole, the views of 125 children in the data set *were taken* by formal means. However the *actual expressed views* of only 107 of these children are known (the views of the remaining 18 being either not borrowable or given directly to the sheriff).

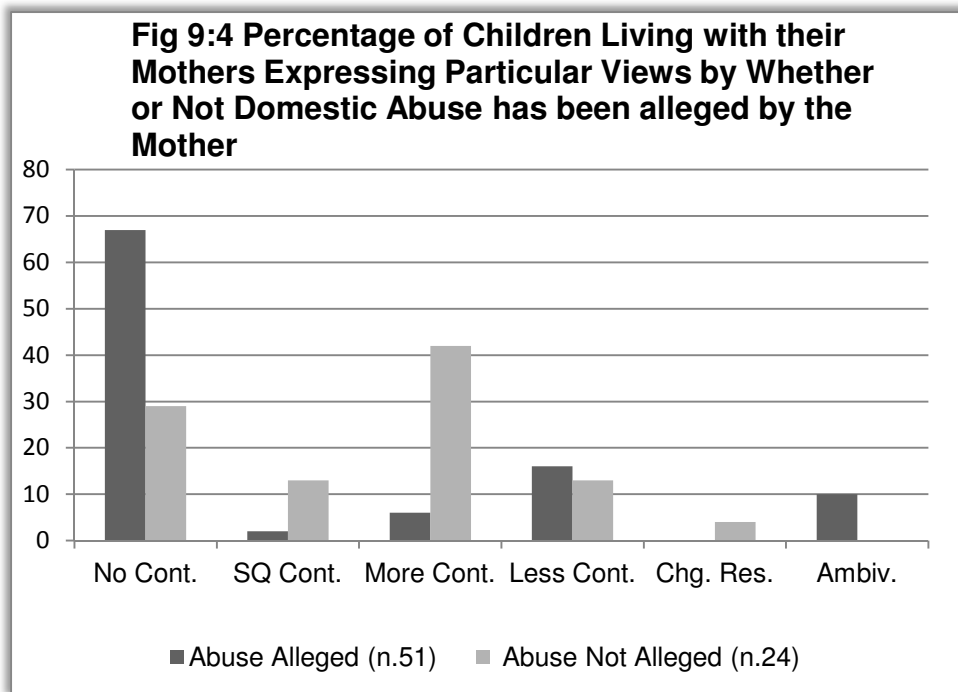
Of the 107 children, the *contact outcome* in the case is known in respect of eighty-six. **Fig 9:3** below illustrates (in percentages) the extent to which the child's express views correlated with the contact outcome in their case.



It can be seen that the contact outcome was broadly consistent with the express views of the child in just under two-thirds of cases. These were overwhelmingly children who either *wanted* contact or were ambivalent. While the contact outcome partially accommodated the views of 7% of children such as, if a child wished only to have contact on alternative weekends but the non-resident parent wanted contact every weekend, a court might order contact three weekends a month. However, for a third of these 107 children, the contact outcomes bore no relation to their express views. These were all children who either wanted *no* contact or less contact than they were exercising at the time the case came to court and 96% of these children were from cases where domestic abuse was either alleged, described by the children in letters to the court, or uncovered by a court reporter.

## 9:5 The Impact of Exposure to Domestic Abuse on Children's Views

Fig 9:4 depicts the views of children by whether their *mother* alleged abuse.



Note: All the children who wanted an outcome of "SQ Contact" in the above chart were exercising contact with their NRP. "Chg. Res" means "Change Residence" and "Ambiv." means "Ambivalent."

As children with a resident mother are commenting on the contact they want with their *father*, whilst children with a *non*-resident mother express views in relation to contact with their mothers the two subsets could not be combined.

It is clearly observable that the most prevalent view of the children whose mothers alleged domestic abuse was they wanted "no contact" with their NRP, while the majority of children whose mothers *did not* allege domestic abuse wanted more contact with their NRP.

It is important to be aware however that although a *mother* might not allege domestic abuse, the children in some cases nonetheless described abusive behaviour by their NRP. Five of the seven children in the category “domestic abuse NOT alleged by the mother” who stated they wanted “no contact” with their NRP, actually described abusive behaviour by that parent.<sup>200</sup>

From all cases where the child’s express views are known, there were only two children who wanted “no contact” from cases where domestic abuse had *neither* been alleged *nor* unearthed by reporter *nor* described by children in their letters to the court. These were a child who believed her mother to be her *sister*, and did not wish to see more of her,<sup>201</sup> and a child whose father regularly failed to exercise planned contact - repeatedly disappointing her.<sup>202</sup>

Overwhelmingly, in the absence of abusive behaviour, children wished to remain in contact with their NRP.

### **9:5:1 Children’s Descriptions of Abusive Behaviour**

McGuckin and McGuckin (2004) recounted some of the abusive behaviour described by children as part of their research into the prevalence of allegations of domestic abuse in the private law courts in Scotland. In the present research court data set, there were nine letters from seven cases sent to the courts and six of these letters lay open in process rather than being sealed in an envelope and marked as “Confidential – Views of the Child.”<sup>203</sup>

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<sup>200</sup> These include the 10 year old girl and the 13 & 10 year old boys whose letters to the court are cited later in this chapter .

<sup>201</sup> Both the parents of this child had learning difficulties and she lived with her paternal grandmother and had SW supervised contact with her mother.

<sup>202</sup> While contact was ordered between the father and the younger sibling of this girl (aged 5), the twelve year old (who had returned a F9 form) was not ordered to have contact.

<sup>203</sup> There were four letters from girls aged six to ten years and five from boys aged seven to fourteen.

One of the children (the only child in this subset who was living with his father) was not seeing his mother at the time the case came to court and he stated he wanted to “choose whether I visit my mum or not.” However all of the other children described abusive behaviour and, in all cases, the children had experienced this from their fathers. All but one of the children stated they did not want to see their father and the one exception said that, although he still wanted to see his dad, he did not want to stay overnight anymore.

Carefully selected extracts from these children’s letters are presented here as they give a poignant flavour of the concerns of children who want contact to stop.

*“dad says he will throw out my toys and won’t let me see my friends. He made me give my birthday money to charity and shouted at me when I cried.”* Girl, aged 8

*“I don’t want to see you because you shout in my face when I was sick.”* Girl, aged 6

*“I don’t want to see Gran because she made me see my dad who 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

*“Our dad is very competitive but he takes it too far. He tells us we are fat and makes us go for runs which we hate.... he shouts at us and swears and calls us bastards...I feel sad and powerless that we don’t get our say.”* Boy, aged 13.

*“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.

Care has been taken when selecting these statements from the hand written letters of the children to remove any identifying information or too specific details. The letters sometimes extended to two pages listing many things that children found upsetting. That is, the author did not merely select the

few bad things a child mentioned from a list of things – some neutral, some positive. Although the oldest child of the five quoted above observed that what they did with their father *should* have been enjoyable if it were not for the way they were treated when doing it – such as when they went on holiday with their father.

A contact order was made in respect of the first two of these five children (the youngest to write letters) but not for the third. The last two children were siblings and the dad abandoned his action for contact after the children's letters were received by the court.

A contact order was also made for the one child – an 11 year old boy – who was living with his father and not having contact with his mother. Although the child's letter (which was brought to the court by his resident father) expressed ambivalence “I want to choose whether I visit my mum or not,” the court reporter later appointed, found the boy missed his mum and sibling as his father had taken him to live with him three years earlier when his mother re-partnered. The court ordered residential contact between the boy and his mother and sister for one night a week.

In contrast to the cases where domestic abuse is alleged, those cases where no domestic abuse was alleged, *nor* uncovered by a reporter *nor* spoken of by a child, it is possible to glimpse scenarios that may appear compatible with practitioners narratives that all children want is ‘both their parents’ and to not be asked to ‘choose’ between them and it is this that the chapter now turns to consider.

### **9:5:2 Children's Views in Cases in which Domestic Abuse is NOT alleged**

Cases where there were no allegations of abuse represent four out of every ten of the cases in the court data set in which the views of children were taken by formal means in legal process.

When these children do not want contact (or want less contact) this is often due to boredom or the absence of the parent who is meant to be spending time with them.

Some of these children had had contact for some time but it had broken down – like a nine year old boy who wanted contact with his father (from a current position of none since his father had shouted as his mothers new partner), but *not* actually as much as he had had prior to the breakdown.

His reasons for this were listed by the reporter to be “it is boring, he can't play with his pals and he also hates what parents say about each other.” However the boy also commented that his dad “does not shout so much now that he has a new girlfriend.” While contact did increase *from the time the case came to court* (to two weekends per month), this accommodated the child's view as this was less than he had had previously.

Another case in which no domestic violence was alleged and the children stated they wanted contact, is a case in which a father had not seen his children for six years but turned up out of the blue (allegedly) and told the children they were going to live with *him*. Their mother raised the action to protect the residence of the children, and the 11 & 13 year olds were intimidated. The children returned their F9 forms and they lay open in process. The younger of the two said she was happy to see her father every “to” weeks and the older sibling said “All I want is to see both my parents and Gran and Grandad” – while rather touchingly inserting “P.S I will always protect my family” at the base of the form.

In a further case a thirteen year old (with three younger siblings) had her views taken and said she wanted less contact. Her mother said she had fled to a women's aid refuge with her children, *not* because of actual assault but because her marriage had broken down<sup>204</sup> and she had no income of her own and nowhere to go. The girl was of the view that contact is "ok" but she would "rather sleep at mum's house and certainly did not want to have to sleep over at her dad's midweek." The girl also commented that her dad is actually out when they go to his house and it is his parents who care for them anyway. She said she misses her mum and her baby brother when she is at her dad's house and that her younger sister cries when there. The younger sister was not spoken too. The court ordered the contact to continued every alternative weekend with a reduction only to the Wednesday night contact which was reduced to end at 7pm.

In the final case example to be given in this subset, a mother told the reporter she was not opposed to contact *per se* and she had not spoken to her son about it as she did not want him to think he "had to choose." Consequently, the boy (aged 6) – when asked his views had not had an opportunity to consider this and asked the reporter if he could speak with his mother. This he then did in view of the reporter, before returning to say he would like to see his dad. The reporter learned from the boy that his father has been verbally abusive to his mother and the boy observed "dad is a good guy but bad to our mum."

It is worth noting that the boy in this case said his father had spotted him in the street and the boy had run away when called. The reporter asked why him why he had run away and the boy volunteered that it was because he thought his "mum would want him to" – which raises an interesting point. In this case the mother had been careful not to influence the boy against his father (as she was clearly attempting to be neutral) and yet we see how normal it is for a child (or adult for that matter) when faced with a new and

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<sup>204</sup> She said her husband refused to give her any money and did not want a relationship with her – rather she slept on the couch.



potentially threatening situation, to think what a person we trust would be likely to advise us to do if they were there. As the boy's father is "bad to mum," it is sensible for the boy to assume his mum would advise him to run away. This is a response to the verbally abusive treatment of his mother that the boy has observed and not due to the mother herself – but conforms to what legal practitioners referred to in interviews as 'loyalty to mum.'

## **9:6 Practitioner Variation: Impact on Outcomes**

The discussion turns now to review the impact of practitioners' narratives on the recommendations they make.

### **9:6:1 Assumption of Contact and Minimisation of Fears**

Analysis of the cases in which children said 'no' to contact reveals that the extent to which the person appointed to undertake the report started from an *assumption that contact is fundamental to the promotion of a child's welfare* had a major impact on the weight the practitioner attached to a history of domestic abuse or a child's express fear. It was far more likely that legal practitioners would assume the child's fear is due to the failure of the parent who has been the victim of abuse to minimise the child's fears.

**Table 9:2** on the next page depicts the responses given by respondents to the Questionnaire for Solicitors when asked if they believe it remains in the child's best interests to exercise contact with their non resident parent, when the child expresses fear of that parent.

**Table 9:2 Percentage of solicitors (n=74) believing it remains in child’s best interests to have contact when the child has expressed fear of their non-resident parent**

	Always	Usually	Sometimes	Never
Child aged Under 12	1%	26%	68%	5%
Child aged 12 years or Older	4%	16%	77%	4%

It can be seen that over a quarter of legal practitioners believe it is usually in a young child’s best interests to continue to have contact with a parent a child has expressed fear of, although the vast majority opted for “sometimes.” There was no free text box available for this question so it is not known what factors impact on their assessment.

An example of a case in which a reporter believed it remained in the best interests of the children to exercise contact with their father is one where two children had observed their mother being punched in the head by their father, and the children’s screams had alerted a neighbour who informed the reporter she had taken the children and called the police.

The reporter in this case *did* investigate this incident and obtained an Extract of the father’s previous convictions for breach of the peace (as well as for drink-driving). However she stated:

*“There appear to be no child welfare based reasons why contact should not operate. The children have however, indicated that they do not want to see their father. I do not feel that either of the girls are sufficiently mature to be able to evaluate their feelings objectively. I am not convinced that they genuinely do not want contact with their father. The girls are obviously fearful of their father, but I do suspect this is a result of the perception of their mother’s reaction rather than a genuine fear of spending time with the pursuer.”*

In contrast to this, a different approach was taken in a case where the reporter *did* accept the child's views as genuine and allowed this to influence his recommendations.

In this case the older of two children (aged 6) had witnessed her father attempt to strangle her mother when she told him she was leaving. Police records confirmed they had been involved with the family and the family health visitor reported that the child psychologist who had worked with the child since the event was of the following view:

*“While it is generally accepted that is in theory positive for children to have a contact relationship with a parent post separation, there are some cases in which that is simply not the case because of issues between the parents. This is one such case in her view.”*

The child told the reporter that she did not want to see her father and, when the reporter suggested they could arrange it “in such a way that would be safe for her and her mum,” the child responded that she would not like this because she would *feel* scared.

The reporter put it to the father in this case that the child might feel fear given the circumstances, but the father responded that “if the child was expressing fear, that must have been created in her by the pursuer [mum].” This reporter concluded that the father “appeared to have no insight into the affect of his behaviour on the children” and concluded that “in all the circumstances, I cannot recommend that an order for contact be made as there is a risk that to do so would be injurious to the well-being of the children.”

In this case therefore, it is evident that the reporter was aware of the potential impact of domestic abuse on a child (or at least accepted the opinion of the social work department and psychologist). Consequently, the reporter is sensitive to the child's express fears and also attempted to explain the child's perspective to the father. It is not known of course, what

the court would have concluded at proof, as this was one of the cases in which the spectre of a proof led a father to abandon the action.

Notably in this case there had been prior involvement of welfare professionals with the family and the reporter took her cue from them.

### **9:6:2 Impact of the Perspective of the *First* Professional in the Case**

As referred to in the introduction to this chapter, reporters were more likely to take domestic abuse seriously when statutory agencies reported it and it was *they* and not the mother (or not *only* the mother and/or child) who were opposed to contact between the child and his or her father.

For example, in one case the court reporter observed that:

*“social work have supported the defender [mum] to relocate and will not divulge her whereabouts. They believe the children’s allegations and believe the defender is doing all she can to protect her children. [social work] believe the pursuer poses a risk to the children.”*

A letter in the process from the social work department then recounts what it calls “regular and systemic sexual abuse of [a child] over a two year period.” The views of the two older children are reported in this letter by the social worker and they are clear they do not wish to see their father. The court reporter recommended in line with the view of social workers and a proof was ordered but the father failed to attend the hearing and the case was dismissed.

In another case, the court reporter learned that the social work department intended to make an application for a Child Protection Order if contact were awarded to the children’s father and did not recommend contact.<sup>205</sup> The

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<sup>205</sup> Under s57 Children (Scotland) Act 1995

thirteen year old child of the action also returned a F9 form which lay open in process and made *inter alia* the following statement:

*“As you all well know, my father is not a pleasant human being to live with. He is violent and dangerous. I would not want to be miserable or permanently in hospital. I want nothing whatsoever to do with him in the future or now.”*

Thus the views of the child, her mother, the social worker and the court reporter converged.

However sometimes in cases where there was a history of domestic abuse, the first professional involved with the family minimised the significance of the abuse to the on-going relationship between the parent and child. In such a case, the court reporter then usually followed suit. For example, in one case the statutory agency having *first contact* with the PWC was highly critical of this mother as she withheld contact between her younger child (aged 2) and the child’s father in order to protect her from the abuse her older sibling had been exposed to.

The social worker undertaking the report lambasted the mother, *both* for the earlier exposure of her oldest child (aged 5) to domestic abuse (in which the mother had been the victim) *and* for preventing her younger child from having direct contact with their father. This social worker observed,

*“[older child’s name] was exposed to significant harm whilst in the care of her mother due to the presence of serious domestic abuse and exposure to risk.”*

This five year old child displayed disturbed behaviours as a consequence of living with domestic abuse - such as pulling out her hair, scratching her eyes and face and asking to be taken into care. The social worker stated that the child’s view was that she “does not want to see [her father] because he drinks alcohol, shouts and is angry.”

However, the social worker observed of this five year old, “she was not able to add detail or context to this statement during interview.” Presumably she was referring to the child not giving ‘concrete examples’ of specific events – however such detail is not to be expected at her age.

The social worker in this case applied a framework of the ‘primacy of contact’ in the promotion of a child’s welfare to the circumstances of the case. S/he stated:

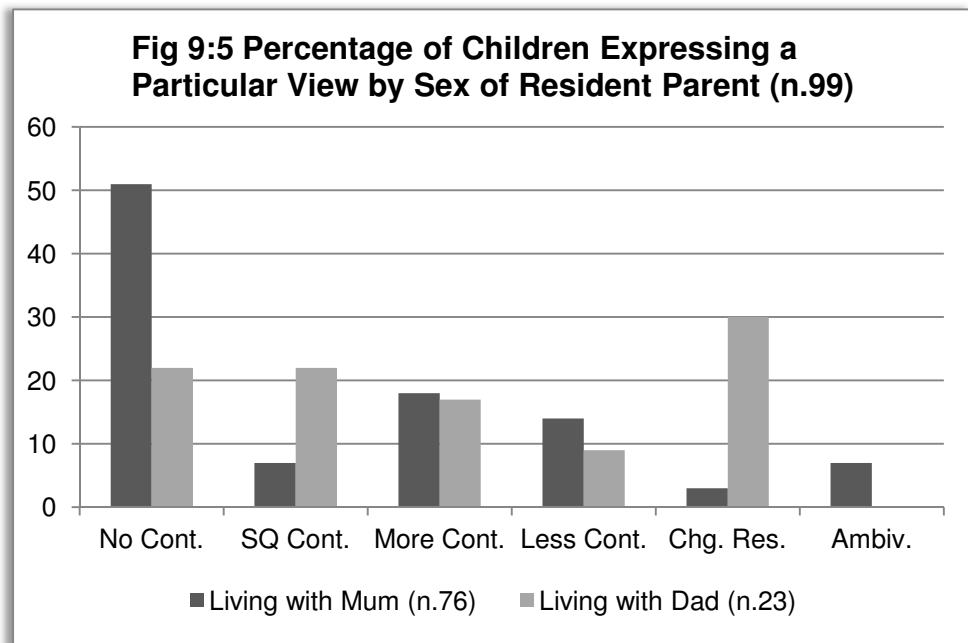
*“Beginning from the basis that children should grow up knowing who their birth parents are, that they are loved and wanted and that nothing they did contributed to the breakdown of the adult relationships, or the conflict that exists between the parents, the writers recommendation is that [younger sibling] should have contact with [their father].”*

Contact *was* therefore ordered between the two year old and the mother was instructed to also “try to persuade [five year old] to go.”

The promotion of on-going contact as essential to the welfare of the child was less evident in practitioners’ narratives when *mothers* were the non-resident parent however. This is considered in more detail through the presentation of sample cases, after the views children actually express - depending on whether they are living with their mothers or fathers - is explored.

### **9:7:1 Impact of the Sex of the Non-Resident Parent on Children’s Views**

There was an observable difference in the views children expressed when the sex of the non-resident parent was controlled for and these are presented in **Fig 9:5** on the next page.



Note: Seven children whose views are known lived with their grandmothers while one child lived with both parents. Their views are not included above.

It can be seen from Fig 9:5 that just over half of the children living with their mothers, who expressed a view that is known, stated they did not want contact with their fathers (n=39); while the most prevalent views for children living with their fathers) was that they wished to live with their mothers (n=7).

A point of caution when interpreting these data however is that clearly the numbers of children living with their fathers whose views are known is small, both in actual terms and in comparison to the numbers living with their mothers, so the above chart is indicative only of the possible trend that *might* be verified by a larger scale study.

To make sense of the data it is important to recall the circumstances by which women became NRP as unpacked in Chapter Four. That is, the mothers of seventeen of the sixty-four children living with their fathers had allegedly been forcibly ejected or fled from their homes *without* their children, while 25 children had been retained after contact or a period of

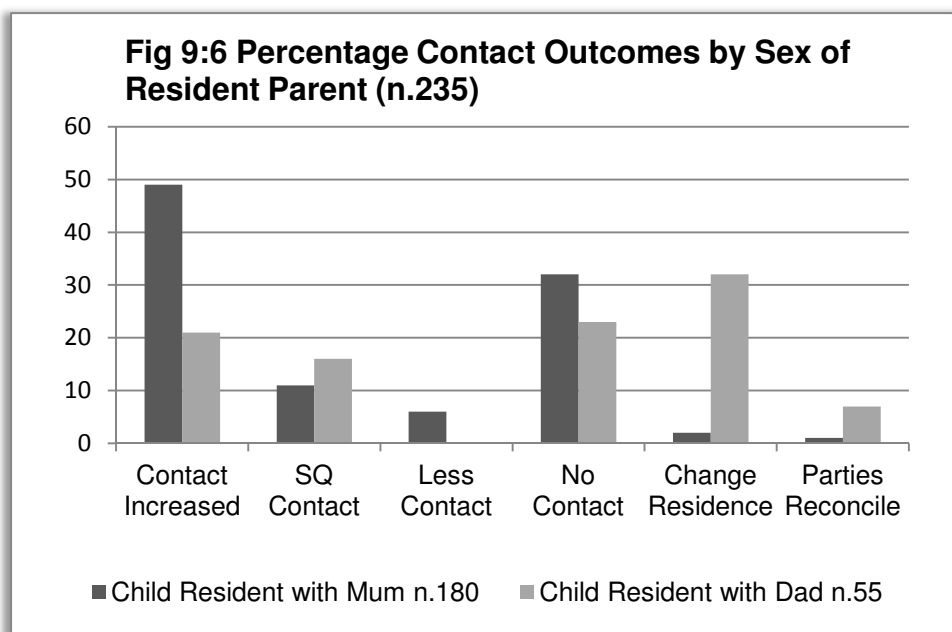
temporary residence. Eight of these retained children had their views taken. The views of one child were not borrowable, however six stated they wished to return to live with their mothers.

Importantly, the observation that some children living with their fathers wanted to return to live with their mothers reveals that children do not merely parrot the views of the parent *they are living with*.

The contact *outcomes* were also visibly different when the sex of the resident parent was controlled for.

### 9:7:2 Impact of the Sex of the Non-Resident Parent on Contact Outcomes

**Fig 9:6** below reveals that, when children lived with their *mothers* the most likely outcome was that contact between the child and his or her father would increase (n=89).



Note: Of the 249 of children for whom the contact outcome was discernible only 235 lived with either one or the other parent.



However, when fathers were the resident parent, the most prevalent outcome was a change in residence of the child (n=18). Notably, eleven of these eighteen children were children who had been subject to Contact Retention and *all these children had been living with their fathers for less than two months at the time the case came to court*. Additionally, in over half of these residence change cases, it was the paternal grandmother who was undertaking the bulk of the care as the fathers either lived with *their* mothers or the paternal grandmother moved in with the father after he retained the child. The *next* largest group of children – whether they were living with their mothers *or* with their fathers had a contact outcome of “No Contact.” However the reasons mothers were not seeing their children differed from those of fathers - reflecting the different ways in which they became non-resident in the first place.

### **9:7:3 Impact of the Status Quo Principle on Ejected Mothers & Retained Children**

Over half of retained children continued to live with their fathers by the final hearing in the case. Analysis of these cases revealed that the status quo principle could disadvantage children (and their mothers) as sometimes very short time periods were held to dislodge the former status quo.

In one case, a father retained an eight year old girl who had lived with her mother only, since birth. Although the child told the social worker undertaking the report that she missed her mum, her friends and her school, the court nonetheless gave residence to the father after a stay of *six months* with him. Crucially, the social worker’s report was *neutral* in respect of the comparative adequacy of the care that either parent could give the child and the social worker addressed the issue of the child’s homesickness by advising “the [father] to allow [the girl] to invite some friends around.” Without a clear steer from the social worker undertaking the report, the court appears to have applied the status quo principle. Thus, for this child, six months of residence with her father appears to have been sufficient to

dislodge what had been the status quo for the child for the first 7.5 years of her life.

In the above case there were no welfare concerns around the ability of the *mother* to care for her child, however in some cases there were and notably a greater significance was generally attached to *maternal* substance abuse than to a history of violence against the child's mother or even, in some cases, to *paternal* substance abuse. For example, in one case, the mother of children aged 9 & 10 left the children temporarily with their father. However he refused to return them to her care and after they had been with him for 6 weeks, he sought a residence order from the court. The children's views were taken, with the daughter preferring to stay with her father because of her *mother's alcoholism* but her brother asking to return to mum as his father had "hit him more in six weeks than his mother had in six years."

The *social worker* undertaking the report stated "the [father] is not a suitable person due to violence, short temper and *drug abuse*" [author's emphasis]. The son also told the social worker that when his mother had visited to have contact with them (which had been ordered by the court) she had had to stay over in their room as she did not have any money to go back to where she stayed, and that his father had then assaulted his mother by knocking her to the ground and dragging her forcibly out the door.

At the hearing following this assault, the children's mother (understandably in the author's view) was absent from the court hearing. The court therefore granted residence to the father as well as granting him PRR. It is not clear how their mother was to exercise contact with her children under these conditions.

A further example which illustrates how difficult it can be for women who have been separated from their child due to domestic violence to regain care of (or even contact with) that child concerns the mother of a four year old

girl. This mother claimed she had changed her tenancy on several occasions to escape violence from the father but had acquiesced to contact to 'keep the peace.' However, she alleged (against a background of sustained abuse) that she had heard that the child's father had threatened to assault her and so fled her home at the time he was due to return the child to her. The father then raised an action for Residence. The mother's Defences recounted how on one occasion,

*"[The pursuer] punched the defender. [The child] had to get off the bed and was screaming. The pursuer dragged the defender from the bed and threw her against a wall. She fell on the floor. He started to kick her and jump on her. He pulled her back onto the bed by the hair. He knelt on her chest, gripped her hair and banged his head against hers. Then he assaulted her with a [implement]."*

The father had received two years probation for this assault, during which time he threatened to return to destroy the mother's property and during which time her property was damaged, as was that of her family members. The reporter assigned in this case, unusually, did not submit any written reports but stated in letters to the court that s/he would submit oral reports to the court. The court ordered some contact between the child and her mother during the process and there was one letter from the reporter in the process which merely stated s/he did "not propose to recommend any alteration to the present arrangements for the care and upbringing of the child." It is difficult to see how her mother would be able to exercise contact in these circumstances and the court did not address the issue of contact when it granted residence to the father. Significantly, the mother in this case had a problem with alcohol but stated "if she drinks it is because of the violence."

### **9:7:4 Obtaining Contact through "Reconciliation"?**

The numbers of parental couples reconciling was small (only four couples). There is evidence some of these women may have reconciled in order to regain access to their children, as in two of the four cases the mother was not having contact at the time the action was raised – one being a contact

retention case and one a case where the father had (allegedly) told the mother she could not see her children unless she reconciled with him. In one of the other cases the mother alleged she had originally separated from the father of her child due to an assault by him when she was 7 months pregnant with the child – however at *that* time she had asked for the condition of his bail (that he stay away from her) to be lifted as she had not wanted to give birth alone. Her reconciliation therefore was not without precedent.

As observed in Chapter Four, no men alleged the mothers of their children had told them they had to return to live with them or forego seeing their children.

### **9:7:5 Weaker Assumption of Contact with Non Resident Mothers?**

Noticeably, in the one case in which children described physically abusive behaviour perpetrated by their *mother*, the final contact outcome was *no contact*. In this case, it was alleged that the mother had punched and kicked her six year old son in his groin. His eleven year old girl sister said she did “not want to see or even to call her mum because of what she did to her brother.” While her brother said he did “not want to see his mum as she hit him for telling the truth to his dad.” Contact was not therefore ordered.

Similarly, in the two cases in which children stated they *did not* enjoy contact with their mothers on the basis that it was boring (or the mother was too busy entertaining her new boyfriend) the contact outcome was also *no contact*.

This was also the outcome for a mother who had walked out on her family two years previously. In this case the mother of two children had left her children with their father stating she was “going out” and she did not return. The oldest child (age 13) told the reporter “in the strongest possible terms that he does not want contact with his mum as two years have passed since

he last saw her. He is very critical of [his mum] for not keeping in touch. He said [his mum] told him over the phone she did not love him or his brother anymore and that he has no good memories of the time [his mum] lived with them.” In the light of these express views the remoter concluded,

*“the writer considers it is extremely difficult to envisage any situation here in which contact between the boys and their mother could take place in a way that does not cause distress to the boys and operates in their best interests.”*

There were forty mothers in the court data set living apart from at least one child at the time the case came to the court. It would appear that, when mothers are the NRP, the *assumption* of contact is more easily refuted. Further, children’s wishes not to see their mother are more likely to be accepted as genuinely held (and not the consequence of paternal influence), while their wishes *to see* her were over-ridden if she had a substance abuse problem (including alcohol). Further, while drug addiction might prevent a court ordering contact between children and their *father*, paternal alcoholism in particular was generally ignored.

A final observation is that three of the four fathers who alleged *they* had been the victim of their partners violence, were awarded primary care of the child – although in two cases the mothers *also* alleged violence.

### **9:8 Judicial Discretion: a final filter**

Ultimately of course it is the sheriff deciding the case who determines the outcome. While they almost always ordered in line with the reporter’s recommendations, this was not always the case.

An example is a case where the oldest child stated he wanted no contact with his father, having been assaulted during contact, while his younger siblings wanted less. The reporter in the case expressed disquiet that the father could calmly lie by denying all violence (including the rape of the

children's mother two years after separation for which he had been convicted), despite there being several witnesses to his violence over the years. Most chilling of all in the reporters view was the fact that he "capability to breakdown in tears to add authenticity to his lies." Because of the nature of the violence, the court initially ordered only a few hours contact a week, however this father repeatedly lodged motions (every few weeks) asking for ever increasing amounts of contact and succeeded in securing parental rights and responsibilities eighteen months after being convicted of the rape of the children's mother. After a further seven months, he violently assaulted his nine year old child during contact and the police family protection unit advised the mother not to allow contact. It was at this stage that the children's views were taken by the reporter, in a report that the *mother* (who was following police advice and trying to protect her children) was ordered to pay for.

The reporter in this case *did* take the allegations of abuse seriously against the background that the father had convictions for violence and the statements of several individuals (including individuals from statutory agencies) who spoke of either witnessing the violence or dealing with the aftermath of it.

It was not therefore, due to the reporter's dismissive attitude that at the last hearing in the case, the court ordered contact between the younger children and their father, *including residential contact*.

In a further case where the court ordered contact against the recommendations of the reporter, the mother did not defend the action when a father (who had been absent for six years) raised the action. The elder two children told the social worker undertaking the report that they remembered their father "drinking, shouting, arguing, name calling and assaulting her mother", which occurred in front of them. They did not want to see him.

Somewhat bizarrely, in this case the social worker undertaking the report learned initially from the father that he had a string of convictions for assaults upon the mother (resulting in hospitalisation for fractures) as the father *showed her* his list of convictions!<sup>206</sup>

The social worker submitted an interim report recommending against contact because of “the father’s, long-standing alcohol abuse, his propensity to violence and that this violence had taken place *in front of* the children.” She stated:

*“Research indicates that witnessing domestic violence can have a serious detrimental effect on the emotional and behavioural development of even very young children. [...] were this to re-occur, it would place them at increased risk of developing emotional and behavioural problems later in life.”*

However, the sheriff in this case made a ‘final order’ ordering the children to have four hours contact per week with their father. No supervision was specified.

### **9:9 Conclusion:**

The factors impacting on the outcome of a case are complex. Children’s views largely correlate with the outcome because the views they express are often consistent with the behaviours they have been exposed to and court reports often led to a child being protected. However, a quarter of all family law practitioners taking part in the research said they usually believe contact to be in the child’s best interests *even when* a child has expressed fear of that parent. Consistent with this, one quarter of children in the data set who described abuse and did not want contact *were* ordered to have contact with their non-resident fathers.

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<sup>206</sup> Also bizarrely, this father who had fractured the bones of his children’s mother told the social worker undertaking the report that he did not work but claimed *incapacity benefit* because of a fracture he sustained at work.

In most cases, the assumption of contact is likely to be undermined when there has been prior involvement of the statutory agencies; yet social workers *also* vary in the extent to which they equate the welfare of the child with 'protection from abuse' OR with 'paternal contact.'

When *mothers* are the non-resident parent, the assumption of contact appears weaker as practitioners take the abandonment of children by their *mothers* or *maternal* alcohol abuse seriously. However, abandonment by fathers, *paternal* alcohol abuse and *paternal* abuse of mothers are less likely impact on contact decisions. Children with non-resident *mothers* are also vulnerable to their views being over-ridden when they express a wish to live with their mother or, at least, to exercise contact with her. While it is not suggested that maternal substance abuse is not a serious concern, the differential outcomes are evidence of the disempowerment of women and children in a patriarchal legal system.



## **CHAPTER TEN – The Perspectives of Children, their Parents, and their Support Services, on the Treatment of their Views.**

### **10:1 INTRODUCTION:**

This chapter presents the perspectives of the children and parents who took part in this research, as well as those of non-legal professionals from services supporting children who are the subject of disputed contact.

After first exploring the experiences of the child interviewees, this chapter presents two discussions – one on an apparent gender difference in parents’ assessment of the *desirability* of taking children’s views; and secondly, a discussion of the key concerns of non-legal practitioners (NLP) who support children who are in continuing contact with a parent whose behaviour causes them distress.

The former discussion reveals that the most prevalent complaint from male participants is that children’s views cannot be relied upon, as the child would be influenced by his or her mother. This narrative dovetails with the primary objection to all methods for taking children’s views as expressed by legal practitioners.

Female participants however, had come to conclude they *had* to facilitate the taking of their child’s views by formal means as, in this context, they found themselves unable to speak for their children. All but one of the children of the twenty-one female respondents had purportedly either wanted less (or no) contact or wanted their NRP to stop certain behaviours during contact and were therefore expressing a view at odds with the assumption of contact.<sup>207</sup>

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<sup>207</sup> While in one case the mother wished to move a considerable distance to take up a new job and to take her son with her. There were no other welfare concerns about this child.

The discussion proceeds by focussing on the experiences of two mothers who believe their children are being sexually abused during contact, highlighting the particular difficulties they face in the context that they have separated with their former partners and are believed therefore to harbour hostility against them.

The final discussion in the chapter explores the narratives of the non-legal practitioners interviewed - being a psychologist, play workers with an organisation which undertakes therapeutic work with children who have lived with domestic abuse, children's workers from Women's Aid, and an individual working with children who have experienced sexual abuse. These practitioners' narratives largely support those of the mothers who participated in the research and they are of the view that when children say "no" to contact this needs to be taken seriously.

The practitioners also state that the best way mothers can support children who don't want to attend court-ordered contact is to *inform* the child that the court has said they have to – otherwise the relationship between *mother* and child may be seriously damaged as she forces her child to do something which is distressing to that child. The practitioners also describe strategies they give children to help them cope with contact that distresses them.

### **10:2 The Experiences of the Child Interviewees – Kyle (11) and Amy (12)**

Two of the children of the parents who returned the questionnaires were interviewed. These were an eleven year old boy and a twelve year old girl. As these children's views *had* been taken, their primary complaint was not that they had **not** been listened to but that:

*"It's not that they don't listen, it's just that it doesn't make any difference"* Kyle.

Both children clearly would have liked to have been able to have a good relationship with their fathers and were grappling with the realisation that this was probably not going to be possible. Both children had explained their distress around contact to their mothers and that they did not want to *have to* go to see their dads (at least not as long as their fathers behaved as they did). However this had had no impact as neither the non-resident parents nor the court had taken heed of their views and both children had been ordered to continue to have contact.

Kyle had also been spoken with by a reporter and had written three letters to the court – one apparently in the kitchen of his Granny’s house, one with the aid of a support service for children affected by domestic abuse and finally one which his solicitor forwarded to the court for him. Neither child was aware of being intimidated via an F9 form, although one had answered the door when the sheriff officer delivered court papers to her home.

It was only when the children obtained their own legal representatives that weight was attached to their views and it was left up to the children if they wished to see their NRP or not.

Amy - who presented as a thoughtful young woman – was clearly aware of the powerlessness of her mother in this situation, although Kyle continued to insist his mother was the best person to give his views to the court (when asked this by the author).

It became apparent in interview that *both* the mothers of these children had been subjected to abusive treatment by their fathers. Kyle’s mother had been interviewed prior to her agreeing to ask her son if he would like to take part, and so the author was aware of the alleged background in that case, in particular, that not only had she and her children fled violence, but that she had continued to be threatened, to have property damaged and to be assaulted by the children’s father (for which he had pled guilty to breach of the peace before being released on bail). She had also had to sell her motor

vehicle, on the advice of the police, as the children's father had retained a set of keys and on several occasions planted items in the car – from excreta to illicit drugs (found by the police following a 'tip-off' in exactly the spot the informant had advised).<sup>208</sup>

During contact, Kyle's father regularly told the children he intended to destroy their mother and would "see to it she went to court and never came back." However, he did not say things such as this in public places and therefore the children had a mixed experience of contact as they did fun activities *but* if they were taken back to their father's house, he threatened to kill their mother (and more recently, her new boyfriend).

In Amy's case, although her mother later returned the questionnaire for parents, it was Amy who wished to be interviewed and it was from Amy that the background to the case was gleaned. The author learned she had been two when her parents had separated and her mother had not explained to her why that had happened. However as she got older she had started to piece together what had happened by observing her father's treatment of herself, as well as his child from an earlier relationship, and his girlfriend. As she got older, she also found herself "making tea for him and doing the ironing." She began to realise certain of her father's behaviours were not acceptable, especially the disparaging way he spoke of her mother:

*"I don't like them [dad and step sister] talking about my mum and if they are going to do it, then don't do it in front of me. My mum has never spoken about him because I used to think my dad was amazing and [pause] I kind of got more, well I believed him when he said things that weren't nice about my mum but then I realised dads aren't meant to do that."*

Amy also became worn down by how he verbally assaulted her and made her feel worthless.

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<sup>208</sup>Kyle's mother was known to the police as the Family Protection Unit had assisted her at the time she left the children's father, they were also aware of the ongoing dispute over contact.

*“my dad he just talks at you in a really patronising manner and makes you feel like two centimetres tall [...] it makes you feel really scared whereas when my mum shouts at me I just think “huh well, so what, she is shouting again;” but my dad [pause] I don’t know what it is, but I am scared of my dad and what he will do next. I mean the way he will talk to you and the things he says, and when he sees you next whether he will bring it up again, whereas with mum, we go away, we calm down, we say sorry and we hug and it’s alright.”*

Amy decided she wanted a break from seeing her father every weekend:

*“I was about ten and I started to feel uncomfortable about the things my dad was saying and he started being really nasty and so I told my mum about that, as it was just getting too much and then I thought I needed to get like a break or something, so I stopped seeing him for a couple of months and he ended up saying mum was refusing to let me see him. I don’t know anything about that but I know we got taken to court and I got forced to see him.”*

The author asked Amy how it was when she first saw her dad after the court hearing.

*“Well, my dad is like this. Nothing is ever his fault. Everything is always mum’s fault. And I told him ‘you have to stop it, I don’t like it, she is my mum. But he kept up with ‘oh, it’s your mum that’s saying this, it is you mum that’s done that, it’s your mum, it’s your mum.’ And then I wrote a letter to him saying, ‘you know these things aren’t my mum, it is me. Why can’t you accept things? You need to stop it, I don’t like it. My mum is not bothered what you say about her. She is over that. But I don’t like it, so don’t do it.’ But he just said it was all from my mum.”*

Although the court had ordered contact, Amy explained how she spoke again to her mum and “said I wanted to stop seeing him as it had gone on for too long.” This led her mother to look online and to locate a solicitor for Amy.

*“She [solicitor] wrote to my dad’s solicitor and then he told my dad. It was just like explaining things, and my dad said that he did not want to have to go to court again and he would just leave things like for my decision, as this would cost too much money as he had already been to court. So that is how things kinda ended like. (Solicitor) just said ‘you are free to start seeing him whenever you want’ and that he did not want to take things to the court.”*

The author asked Amy how she felt about not *having* to go to her father's.

*“I kinda felt like I was free to make my own decision and no one was going to influence me, and if I wanted to start seeing him again then I could, and it was only just before August that I started seeing him again because (step sister) had a baby.”*

However, once Amy started seeing her father again – albeit with the primary aim of seeing her step-sister and her baby, her father continued as before. She recounted one recent incident that had particularly distressed her, triggered by an allergic reaction she had to some animals.

*“I was not well and I had to come home as I was struggling to breathe and stuff, and he kept moaning at me and tell me that I was a liar, and I was in floods of tears and he was saying ‘if you leave now, you won’t be coming back’ and I was crying so much, and so I asked (step-sister) if she could take me home.”*

Amy also recounted incidents of being bombarded by texts by her father and of receiving cards saying “I will always love you” from him, sandwiched between verbally abusive conversations. She clearly had a lot to contend with and the author found speaking with her, more like speaking with a (mature) fifteen year old than a twelve year old. At the time of the interview Amy said she was waiting to speak with a psychologist as she was ‘having problems at school.’ She hoped this person might be able to help.

Kyle also had experienced difficulties when he decided on one occasion he *would* attend contact with his younger siblings as they were going swimming – an activity he usually enjoyed. His younger brother phoned their dad and told him that Kyle wanted to come that day and, as he agreed, all three children went to the end of the street to wait for their father (there was an interdict in place to keep him from their mother's home). However, rather than accepting his son's presence warmly, this father chose to punish his son for telling the court he wanted the right to choose whether to go for contact or not. In interview, Kyle's mother explained what happened:

*“So they went along and five minutes later Kyle came in, in tears, and said ‘dad says I am not allowed to go and I will have to write a letter to the court because I told the judge I did not want to go.’”*

We see in both these cases that although the children’s wish not to be *ordered* to have contact was accepted by some, it was not accepted by their fathers and they continued to be subjected to direct pressure and abusive behaviour from their NRP’s.

Because of their experiences (particularly the threats to kill their mother) Kyle and his younger brother were being supported by services who work with children who are or have been exposed to domestic abuse.

One final observation to be made on the interviews with the children comes from an interesting comment Amy made during our conversation together. She observed that her father “would never change” and therefore she “might not see him much at all” if not for her step-sibling but “*just on family occasions like birthdays.*” Thus she reveals that ‘knowing’ her father is important to her and his inclusion in significant life events or, as the Social Anthropologist Janet Carsten termed it, ‘ritual times’ is also important to her.<sup>209</sup> However, she does not wish such regular direct contact<sup>210</sup> as is routinely ordered by courts and the amount of which is generally set by the parent craving the contact.

### **10:3 Unpacking the Gender Difference in Parents Attitudes to Taking Children’s Views.**

This section explores the narratives of mothers and fathers in respect of their dispute over contact and *against this background* whether they believe their child’s views should be taken, or not. It will be seen that the mothers interviewed do not express their motivations in terms that suggests they wish to ‘win’ something, or achieve a gain, at the other parent’s expense –

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<sup>209</sup> Carsten was writing about reunions between adults, adopted in infancy and birth kin.

<sup>210</sup> The wording of s1(1)(c) and s2(1)(c) Children (Scotland) Act 1995 is “direct contact with the child on a regular basis.”

as the researchers in (Smart et al 2005) appear to suggest by describing contact disputes as a “parenting contest.”<sup>211</sup>

None of the mothers interviewed for the present research had been opposed to contact *per se* at the time of separation, rather often the mothers had been instrumental in setting up initial contact. However they are clear that the contact should accommodate the child’s perspective – which, in their cases, did not conform to the amount of contact sought by the non-resident parent.

Non-resident parents, who were all fathers (n=6), viewed any ‘reason’ that would impact negatively on the amount of contact they exercised as tactical. Not surprisingly given that mothers ‘reasons’ often revolved around the child’s express views, fathers were generally negative in respect of the worth of any views expressed.

As neither of the two *resident* fathers returning a questionnaire agreed to be interviewed, it is not known why they resisted contact between their children and their children’s mothers. While both men stated they were the resident parent at the time the case was before the court, there is no indication of the circumstances by which they became the resident parent. Both fathers retained residence of their child at the close of the action and both express satisfaction with the treatment of their child’s views by the court. It is not known if their children have any contact with their mothers.

It could be suggested by some that *residency*, rather than the gender of the parent, is the key determinant of whether a parent wishes a child’s views to be taken; however this theory cannot be tested here given the small numbers of parents taking part in this research project. There are also no non-resident mothers among the parent respondents.

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<sup>211</sup> In particular in Chapter four. Although these authors also note a gender difference in the parents’ narratives (see also pg 25 of this thesis).



This analysis is based primarily on the qualitative data obtained from *interviews* with parents (all resident mothers and non-resident fathers). It is offered as a counter to the assumption that mothers resisting contact are ‘obdurate’ or ‘implacably hostile’ or have willingly ‘alienated’ their children from their father, or are engaged in a ‘parenting competition’ with the father of their children.<sup>212</sup> The following discussion also reveals that non-resident fathers, whose ‘parenting’ may be limited by circumstances (rather than choice) to a few hours a week post-separation, understandably focus on securing *certainty of regular ‘contact’* with their children. However, in some cases they appear happy for others to provide the care during that scheduled time.

### **10:3:1 Father’s Narratives**

Two of the six non resident fathers agreed to be interviewed. The key concern in one case was that he had been unable to obtain regular scheduled contact which the child’s mother could not vary (Parent Interviewee n.4); while for the second father, his primary concern was securing overnight contact (Parent Interviewee n. 7).

Post separation, the first of these two fathers had arranged contact with his estranged wife via a minute of agreement wherein he saw his son every week. However, when he re-partnered he found it became necessary to establish a fixed pattern of residential contact, as it no longer had just to fit around his shift patterns, but also around his new partner and her children.

This father explained that, since he re-partnered, his ex-wife had used *his* shifts as a means of stalling the court from ordering precise contact (despite his going to considerable lengths to acquire his shift pattern for the next five

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<sup>212</sup> Though these terms are rarely included in Scottish court judgements, they litter the judgements of the English courts and, consequently, the literature in this area. Example cases are: *W (A Minor) (Contact)*, Re [1994] 2.F.L.R. 441; *A (Suspended Residence Order)*, Re [2009] EWHC 1576. Sample commentary in the literature includes Wallbank (1998) *Castigating Mothers: The Judicial Response to ‘wilful’ Women in Disputes over Paternal Contact in England*. JSWFL, Vol. 20, issue 4.

years to present to the court). Ideally, he wanted a fixed pattern of residential contact with his 12 year old son - from Friday after school until Sunday, every second weekend. He said:

*“you see, it does not really matter if I am here all the time now with (new wife) being here. I would still see him every day, so he could stay here. But she[ex-wife] is now trying to dictate that I only get him when I am not working and not taking into account now that (new wife), being my **wife**, would be able to care for him and the thing that really annoys me is that she is not interested in (new wife) or her family or concerns or anything.”* Parent Interviewee n.4

This father was clearly under a lot of pressure to accommodate the wishes of a number of individuals as well as a responsible and demanding position at work – however the focus of the dispute seemed to have become securing a claim on his child’s time, rather than actually being in the same physical space as his son.

However, when his son’s views *were* eventually taken via an F9 form the child stated that he wanted to be able to *choose* whether he went to his dad’s house or not.

The second father interviewed had been in dispute for five years around the issue of *overnight* contact, whilst seeing his daughters every Saturday and on Wednesday evenings. At the time his wife separated from him she had contacted social services as she thought her daughters may have been sexually abused.

He stated that:

*“they [social workers] were in at the beginning as the mother went to social work as [sigh] er well [pause] she thought they might have been sexually abused. Her sister is a social worker so she is not stupid and there seemed to be information going to her from social work that was not coming to me.”* Parent Interviewee n. 7

He further explained:

*“they [social workers] arranged six weeks of play session for my daughters. They said they were not accusing or prosecuting but it was to make the mother feel more comfortable.”*

Int: “When you took the case to court, were the court aware of this background?”

*“I don’t think this was mentioned to the court but it was communicated [by social services] that they didn’t have any concerns. There was no suggestion of abuse from anyone since the mother made it.”*

Whether or not the court was aware of the allegations by the children’s mother and (although dependant on the individual reporter) there is a strong likelihood that it would have been, the reporter had recommended,

*“There could be contact as she said the children agreed to contact but that it could not be overnight, and not at my address in (x).”*

However, by the time of the interview with this father, he had just returned from a week’s residential holiday with his daughters. He explained that a proof hearing had been set and therefore the case had gone before a different sheriff and *that* had changed everything:

*“The sheriff said he could not see why we had to have a proof so it did not happen. He said he would just call us in and we could explain our positions. I was amazingly encouraged as half way into her usual speech the sheriff stopped her and told her it was not about what she thought about me, but about encouraging the children, which she clearly was not doing. So we were sent away to sort it out and the sheriff set another child welfare hearing.”*

He further explained:

*The first sheriff had made a statement at a hearing that he did not like me and said that my body language told him everything he needed to know and that had encouraged the mother, but his second sheriff was different and the mother had to change tactics.”*

His children subsequently had been ordered to stay overnight with their father, including holidays and, in the absence of the proof, the mother's allegations appear to have remained untested by the court.

Reviewing the comments made by the non-resident fathers who took part in this project revealed certain similarities between their dominant narratives and those of legal practitioners. In particular the emphasis on parental influence - specifically *maternal* influence. The father whose case was just discussed stated,

*“It must be recognised that mothers exercise tremendous power over their children and they are often quite happy to exercise this power for reasons other than the best interests of the children.”* Parent Interviewee (n= 7)

This was a sentiment voiced by other fathers responding to the questionnaire also:

*“They [children] have been heavily alienated against me and fill in these forms saying they did not want contact. In severe cases like this they need assessing by a clinical psychologist with experience in parental alienation. Something I am still fighting to have done. The system does not work in this situation, asking the children is not helpful in this situation.”* Questionnaire Respondent n.12 (non-resident father)

and similarly:

*“He [child] was just a mouthpiece for what their mother told them to tell the sheriff [...] In an acrimonious case a mother scorned uses the child to control the system to her own benefit.”* Questionnaire Respondent n.22 (non-resident father)

However, the first of the two fathers interviewed also suggested that his son would ‘not want to’ express a view – which correlates with the other key narrative of legal practitioners (see discussion in Chapter Five). For, when this father was asked if he had considered his son putting his view to the court, he responded:

*“I didn’t think he would want to do that, he just wanted to be left out. I hoped the sheriff would look at her [mothers] behaviour and realise that “mutually agreed” contact would not work”* Parent Interviewee n.4

He also later commented,

*“and anyway – whose views were they really in that letter? It’s a nonsense really.”*

The author asked this father if *he* had ever spoken with his son about when he wanted to come to see him (they had never disputed residence). He immediately referred to the issue which was at the forefront of his mind at the time of the interview; that is, he hoped to have take his son away with his new wife and step-children for a fortnight in the summer, but his son’s mother would not agree to it as the child’s birthday fell in the middle of those two weeks.<sup>213</sup>

*“I think he is frightened to say one thing or the other but the thing is, he is very open with his views about every subject under the sun but he will clam up when it comes to this and he will not give anything away which is infuriating in some respects. I wish I knew, because if he did not want me to pursue something I would not do it, do you know what I mean? If that is what he wants, but he won’t tell me [...] I think he does not want to be in the middle.”*

He continued:

*“Basically I sat him down and explained I need a holiday, I work hard all year and (new wife) does and (step-children) and it is not fair on them. He basically said nothing and I was exhausted and had to get away. He was basically just crying so I gave up and said ‘would you like me to sort it?’ and he said ‘yeah.’”*

Apparently, the mother of the boy in this case was alleging that he was emotionally disturbed,

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<sup>213</sup> Being the only two weeks this father could have away during the summer due to his shift pattern.

*“The mum makes up he is a mentally disturbed kid but it is nonsense. We have a great time. But when we are taking him home and get closer to his mums he gets very quiet because he is worried there will be conflict.”*

He explained that the mother of the child took every little thing and used it against him. For example:

*“Just recently I said to him – as he was going around like a shaggy dog ‘don’t you think you are going to the wedding like that’ you know? I got an email from his mum after I had taken him home saying (son) was concerned I was going to get his hair cut and that she would make sure it was cut before the wedding. I mean, really, his hair was a mess and he would be getting it cut, like it or lump it because as a parent I can decide this.”*

This case is one in which the conflict between the parents had been relatively low and post-separation they had remained civil and fallen into informal contact. It was the father’s re-partnering that propelled the case into the courts. In a follow up conversation four months after the interview, he had clearly let go of the conflict and was no longer pushing for a fixed pattern of regular, scheduled, contact. He said he had come to the realisation that it was not doing anyone any good, and mentioned how his son had just stayed over in the last couple of days as the weekend fell on one where he was home from work and that they had had a “great time.” It is notable that this change happened shortly after his son expressed the wish in an F9 form to be able to “choose” when he saw his father.

This case may be more typical of the bulk of cases seen by solicitors – particularly the bulk of solicitors who don’t do legal aid and who don’t do court work. As such it is an interesting indicator of why legal practitioners may have the default narratives they have in respect of taking children’s views (ie: that they don’t want to ‘choose’ and they want their parents to ‘sort it’). However, if it *is* the case that *most* children don’t want to ‘choose,’ then surely that suggests that where they DO want to choose or where they ARE opposed to contact, then something is wrong that needs investigating

and taking seriously - albeit that these cases constitute the bulk of cases that come before the courts (as oppressive parents *insist* on contact on their own terms, while victims of that oppression have lucid reasons to *resist*).

### **10:3:2 Mother's Narratives**

Mothers indicated they would have preferred it if it had not become necessary for their child's views to be taken by formal means and *in cases where there had not been domestic abuse*, the mothers interviewed had initially tried making arrangements by speaking with the father of their child/ren directly (as opposed to through an intermediary or in the presence of a mediator).

*"I didn't really talk to them [children]. We really decided. We did not talk to them about it. We just told them that was what was going to happen."* Parent Interviewee No. 6

*"I wanted us to be able to sort it between us and not to involve him [child] you know, I did not want him to be unduly traumatised."* Parent Interviewee n. 8

However, where children became distressed or voiced their reluctance or discontent with the arrangements, as well as in cases where there had been abuse and mothers were anxious for their children, the taking of the views of the children by formal means became necessary. All but one of the mothers interviewed fell into one of these two categories and their resistance to *the amount of contact craved* was founded on concern for the child's wellbeing.

Mother's concerns were, variously: children being repeatedly told by their father that he was going to kill her (parent interviewee no.1); child returning from contact distressed and asking "what will we do when daddy burns the house down?" (parent interviewee no. 2); concern that children were being sexually abused during contact (Parent Interviewees no's 2 & 5); and,

concern at the total lack of say in *when* and for how *long* the child exercised contact (Parent Interviewees n. 3 & n.6).

One of the children of the last two mothers mentioned, seemed to cope moderately well as he attended contact *with his siblings*, and thus his mother had accepted the order of the court for shared care (parent interviewee no. 6). However this lack of say had a particularly negative impact on the young only child of the other mother (parent interviewee no. 3). This child's mother explained that the child's reluctance to have contact could probably have been prevented except the girl's father had made a point of **not** telling her mother where he was taking the child during contact – something the small child had found particularly frightening.

*“She was five and was desperate for me to know where it was she had been and could not understand how I could not know as the world is the size of your back garden at that age, ‘the place with the purple frog in it, you must know the place!’ So there was no working together from the beginning.”* Parent Interviewee no. 3

Although none of the mothers had wanted to prevent contact between their child/ren and their fathers at the time of separation, Kyle's mother and the mother who believed her child was being sexually abused by her father had since moved to this position.<sup>214</sup>

When asked in interview if they were opposed to contact *per se*, mothers responded:

*“No. But it had to be at (child's) pace. Her ability, her emotional state and what suited her, not him. I could never get that across.”* Parent Interviewee no. 3

*“You have to step back with all those feeling and think ‘this is their father, this is the only father they are ever going to have. However best can you support them in what they need.’ That is very difficult thing but you must. You need grace to do that.”* Parent Interviewee no. 6

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<sup>214</sup> While the mother who believed the son of her child's father's new partner was the perpetrator would have accepted contact but outwith the presence of that boy.



*“I did not try to prevent (child’s) father having contact despite all that [sustained violence] as he is her father. I tried to set up contact through Family Mediation, to see if we could get some agreement.”*<sup>215</sup>  
Parent Interviewee no. 2.

Rather, mother’s narratives focused on their children’s *wellbeing* and on enabling their child’s views to be heard. ‘Well-being’ encompassed children’s emotional well-being so that, for example, when a child’s behaviour dramatically deteriorated after weekend long contact, mothers would ask that their child’s distress be taken into account and contact reduced to a manageable amount for the child.

One example of this was the daughter of an interviewee who responded to the court ordered contact by lashing out at other children at school, going to the ‘toilet serially’ and locking herself in the toilet cubicle.<sup>216</sup> This led her school to arrange a meeting with her parents, and to suggest a referral to an educational psychologist, however the school dropped this referral after receiving a letter in opposition to this from the father’s solicitor.

This mother observed,

*“It is not just the child’s views but it is the child’s views and the child’s behaviour **and** what the mother is saying. It is also the child’s behaviour in school. It is not standing out on its own on a wee blade of grass, there are other things to back them up.”* Parent Interviewee no. 3

This mother spoke of the importance of a child *having a say* in the arrangements - so that the child would be willing to attend contact:

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<sup>215</sup> However, the two other mothers interviewed who had left because of violence (in one case because the children were being hit by their father and in the other because she was assaulted while holding the baby), had been taken to court by the fathers of their children prior to any contact between the child/ren and their fathers.

<sup>216</sup> Her mother stated that when for a time she did not have to go for overnight contact her behaviour improved enormously and that she was a different child.

*“It would have helped (child) to have had some leeway, some say in the process. But she has had **no** say in the process. In fact one of the things that was said against me is that ‘(child) thinks she is in control’ and ‘if she says she is not going she doesn’t’ and ‘how terribly wrong that is that the parent is not in control’ and I ‘should just demand she gets into the car.’”*

She also explained how *she had* tried encouraging her young daughter to go with her father for contact thus,

*“I don’t see how I can bully (child) in front of her father. I did it once. When we tried it took me 1 hour and 40 minutes to get her to go with him and we both made her do it and I look back now at what I did and I am appalled at what I did. And although she went that time, the next time she did not want to go out the house with him **at all** – not surprising really is it?”*

Such mothers felt under *sustained pressure* to promote the views of their child as an order of the court did not change their child’s perspective:

*“When she was to stay overnight she would say to me ‘mum, I don’t want to go. Please be on my side, please help me;’ [yet] I find I am in a position where I cannot speak for my daughter and that she has to do it for herself? This is what I have picked up from my solicitor.”*  
Parent Interviewee n.3

Another mother commented’

*“(youngest child) keeps telling me the things he is not happy about – like he can never have his friends around at his dad’s as his dad is very insular and he doesn’t feel he can come home here, and he doesn’t feel he can go out and see people, as it’s his dad’s time.”*  
Parent Interviewee n. 6

The mothers who had been interviewed had become aware that the ‘nub’ of the dispute was seen by others (legal professionals, the father of the child and by the bench) to be a conflict between themselves and the father of their child and not, as the mothers perceived it, because their child’s father would not accept the views of the child as expressed to their mother. The consequence of this assumed hostility (labelling) is that women found they were “damned if I do and damned if I don’t.” Furthermore, decisions

mothers would reasonably have made unilaterally if the father of their child was residing under the same roof as them, became constructed as ‘tactics’ to thwart contact if they impacted on the scheduled time a child was to spend with his or her father. One example given was:

*“If my daughter is not well and I take her to the doctor, I am told I am an over-anxious mother because he [father] is in possession of the medical notes and if I don’t take her to the doctor then there wasn’t anything wrong with her in the first place and he [father] claims she could have gone for contact. That is just one example.”* Parent Interviewee no. 3

Even where contact had been on-going for a number of years, if the developing child wanted a change to the arrangements, this also was likely to be viewed as tactical by the courts as well as by the NRP – such as happened to Amy and her mother.

From a NRP’s perspective however, a reduction in an established pattern of contact without their agreement could motivate the raising of an action,

*“We couldn’t agree on the amount of contact I could have. I had almost unchallenged weekend access for over 5 years and then this was reduced which triggered a court action by me.”* Questionnaire Respondent no.7 (non-resident father)

Some women found being viewed with suspicion and labelled as hostile by the court particularly baffling and difficult to deal with when their actions were motivated by a desire to promote the best interests of their child:

*“I don’t know what is underpinning the attitude towards me. Is it just that the courts so want contact to go ahead and that that has to be the amount asked for and they don’t want to know if it is good or not good? I have always thought contact is good, but actually, where there is such an enormous amount of conflict for the child, I’m no longer sure.”* Parent Interviewee no. 3

The mothers pointed out that they had nothing *personally* to gain by resisting contact.

*“If I were to engage with all the hostility from him, I would never get away from him. I might as well have stayed. So I have to do something else. I am not going to be defined by this and have my life stopped at this point.”* Parent Interviewee n.3

*“Why would a parent want to keep their kids around them all the time? I have three kids I am bringing up on my own. Do you not think I would love to have a weekend on my own? To be able to say ‘away you go and have a good time with your dad.’ Instead I fight to have them here to drive me mad and I wonder why a sheriff can’t see that? I mean at the end of two years you may be bitter but not that bitter!”* Parent Interviewee n.1

Half of the mothers interviewed had been before the courts on at least one charge of contempt of court (for which they faced imprisonment), when their children did not attend for contact.

The mother of Kyle had been called before the court on charges of contempt when the children hid from their father. She observed,

*“He [dad] just got told to ‘be a good dad’ and was not put in contempt for not doing that, but instead continuing his abuse. But I got put in contempt for not handing them over to him because of trying to protect them [...]. I am the only one who can defend my kids and if it means going to the jail then I’ll do it, but I’ll still be back in court defending my kids.”* (Parent Interviewee n.1).

In another case, the mother had found herself called to appear for contempt of court even though the sheriff had written into the interlocutor that the child was to be taken home from contact if she became distressed.<sup>217</sup> However her daughter worked herself into a state, shutting herself in the bathroom and refusing to come out and therefore did not even go for contact.

She explained:

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<sup>217</sup> This was after a child psychologist noted the enormous improvement in the child since she was no longer being forced to attend overnight contact against her will and suggested ‘a single night’ could be attempted and, if successful, could be brought in gradually at (child’s) pace.

*“I don’t actually feel myself to be ‘in contempt’ but maybe that will be the best place to be, because what are they going to do then? I have to say “she does not want to go” because she doesn’t. Put me in prison. Just put me in prison. Let’s get it over with but I will continue to speak for my child from what she is saying. If (child) wanted to go, I would be delighted. I would be really pleased. But I can’t be pleased about a child who is made to go, and comes back and locks herself in her bedroom and says she wants to kill herself.” (Parent Interviewee n.6).*

Of course, what a court *can* do when it finds a mother in contempt of court is not just imprisonment. The court can also take her child away from her by giving residence to the other parent. Two of the mothers who agreed to be interviewed were women who had either experienced this or been threatened by it. Both these mothers believed their daughters were being sexually abused during contact and, as these are particularly extreme cases they are discussed at this point and separate from the accounts of the other resident mothers. At the time of the interviews the mothers were still struggling to have what their daughters had said to them taken seriously – and not just perceived as something the children had said to ‘please mummy.’

### **10:3:3 When Mothers Allege Child Sex Abuse**

In the court data set, sexual abuse of a child was alleged in 6% of cases.<sup>218</sup> In seven of these cases the father had been convicted of the abuse and in two cases it was an older child in the reconstituted home of the NRP that was the alleged perpetrator.

It needs to be remembered that research into child abuse in Britain has collated evidence that 1% of children in Britain are sexually abused by a parent or carer during their childhood years - that is one child in every one hundred children, rising to 11% if sexual harm involving physical contact by others (such as siblings and other children or young people) is included

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<sup>218</sup> Being thirteen out of 208 cases.

(Cawson et al 2000).<sup>219</sup> It is also likely that the majority of children who have experienced sexual abuse may not come to the attention of the statutory agencies during their childhood years (NSPCC 2007),<sup>220</sup> however significant numbers *do* tell their mothers (27%) (NSPCC 2007).<sup>221</sup>

Mothers raising the issue of child sex abuse in the context of a dispute over contact face a monumental evidential barrier. Only where it was the intervention of social services in their family that initiated the separation of themselves from the alleged perpetrator are their concerns likely to be taken seriously. Otherwise they are very likely to be labelled as vitriolic to suggest such an awful thing.

Where child sex abuse is the issue, there may be very little physical evidence – either because the abuse stops short of actual penetration or because the perpetrators ply the child with muscle relaxant drugs beforehand. Sexually abusive behaviour however includes touching a child's genitals for sexual pleasure, making the child touch someone else's genitals, making the child play sexual 'games,' deliberately exposing adult's genitals to a child, photographing a child in sexual poses and encouraging a child to hear or watch sexual acts (Stop It Now n.d). However agents from statutory services may rely on evidence of *penetration* specifically and in the absence of evidence of this, even where older children describe sexual abuse, they may not be believed.<sup>222</sup>

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<sup>219</sup> A random sample of 2,689 18-24 years olds were surveyed by the researchers about their childhood experiences.

<sup>220</sup> Social Services were only involved with 2% of the 9,279 children calling childline about sexual abuse between April 2005 – March 2006. While only 12% of children/young people had reported it to the police, rising to 20% if the perpetrator was a non family member.

<sup>221</sup> Only 3% had told their fathers – however fathers were the most commonly cited perpetrators for both male and female victims.

<sup>222</sup> See for example the English case of *Re H* [1996] AC 563, 587. In which a 13 year old girl alleged her step father had been sexually abusing her since she was 7 and had been taken into care. The court was determining what to do with her younger three sisters but the judge of first instance determined the evidence did not reach the required standard and rejected the testimony of the girl and of her mother.

It was the experience of both the mothers interviewed that their child had described sexually abusive behaviour to them and also to third parties but, in the absence of evidence of vaginal penetration, and *in the context of a child contact dispute*, it was determined the children made the statements to please their mothers.

One parent interviewee whose child had been having contact visits to her father for 3.5 years discovered - when she raised her concerns of possible sexual abuse - that the father of her child was now living with a woman whose teenage son had a “history of sexually inappropriate behaviour with a child” (and her daughter was therefore staying overnight in the same house as this boy during contact). However, she claims that the social worker who wrote the first report merely repeated her husband’s allegations that *she* is mentally unstable and ‘invents’ abuse. She detailed how she appealed to the Sheriff Principal, who ordered the removal and destruction of this report, yet the report continued to be regurgitated in subsequent reports written by the discredited social worker’s colleagues. She also stated that her complaints led to the investigation and suspension of the social worker from practice for three years, which she feels may have caused his colleagues to close ranks against her.

This mother described how on one occasion her daughter:

*“returned from contact and curled up in the foetal position clutching her female parts. I asked her if it was sore and (child) said ‘daddy checked my flower and said it was not sore.’ [pause] I asked to see but (child) refused so I said I had better phone the doctor at which point she flung herself at me with such force she almost tore my dress” and said “no, no, no, I will show you then and took off the skirt and pants...*

[pause]

*...I can’t cry, I have to keep it together. I can’t show (child) I am upset. When she tells me what happens, I just hug her. Social work say I am putting all this in her head by talking in front of her but is it just the opposite – when she tells me, I have to appear to stay calm.”*  
Parent Interviewee n.2

She explained how, although her suspicions were investigated, in the absence of evidence of penetration, contact nonetheless continued. This was the case even though:

*“(child) told the social worker what (boy) did to her, how he lies on top of her and pushes himself onto her and how she lies with her legs in the air. (Child) was due to go for contact the next day and I said to [social worker] that ‘I do not want her to go but there is a contact order in place from the court’ so [social worker] said ‘I cannot support you in **not** sending the child.’ I was astonished and asked her to repeat that and again she said ‘I cannot support you in not sending the child!’”*

She explained how, on an earlier occasion, she had been asked to appear in court for breach of the contact order:

*“On that occasion I was told by the sheriff that I ‘had better start behaving or I would lose residence of (the child).’ So I felt trapped. I had no choice. So this time I let her go and I phoned the social work department and said that because they had said they would not support me in not sending her, I had sent her. They then told me ‘we did not advise you to let the child have contact - that was your decision.’”*

Over time, her daughter has started to display sexualised behaviour. On one occasion she played the ‘game’ with her younger cousin and as the cousin’s mother saw this, this led to a further investigation – but contact continued to be ordered.<sup>223</sup>

*“(child) said to me ‘I told her [social worker] about the game mummy but nothing happened;’ [pause] I think that when she is older, when this is all sorted out (child) will turn against me. She will ask me how I could have sent her to contact knowing what was happening to her there.”*

The author asked this mother why she thinks she is not being believed. She was thoughtful and responded:

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<sup>223</sup> This led to her daughter being referred to a service for children who sexually abuse other children, under the care of the same individual who was working with the boy she suspected of abusing her daughter.



*“My solicitor tells me some women make false allegations. The problem is all women are tarred with the same brush as some women make false allegations. But why would I lie? Why would I make all this up? What do I stand to gain? I have spent over £17,000 so far. I have endured a character assassination and going bankrupt remains a real possibility. I cannot receive any financial settlement on divorce as I can’t divorce until contact is agreed. I have not had holidays or social times for years as I spend all my time, when not at work, contacting agencies to try to get help and advice so that I can protect (child).”*

The other parent interviewee who suspected her child was being sexually abused during contact believed it was the child’s father who was the perpetrator. She had the additional hurdle that the things her daughter told her were suggestive of organised, possibly ritual, abuse.

*“Some of the things (child) says are fantastical, it is like a sick Roald Dahl stuff. You can imagine if Roald Dahl wrote really bad stories they would be quite badly fantastical. Like the time we were sitting having a fish supper by the TV and she noticed a kid in a boxing ring and she said “daddy took me to that” and I said “what? Daddy took you to a boxing match?” and she said “Daddy took me there and pulled my pants down and he said ‘ha, ha, you have no knickers on.”*  
Parent Interviewee n. 5

She explained her reaction to the things her daughter told her:

*“the scenarios she was giving me were quite bizarre and it was the bizarreness of them that was the most challenging to have to listen to. It is stuff that [pause] I wondered where in her capacity of her imagination she could have pulled that from... and I think the services are probably of the same view.”<sup>224</sup>*

As she raised her concerns, her daughter was physically examined on three separate occasions, but no evidence of penetration was found. Rather, this mother found her child placed on the Child Protection Register as being at

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<sup>224</sup> This mother was asked by social workers to keep a record of the things her daughter told her and how she responded – which she gave the author to read. She recorded how her child repeatedly referred to her father hitting her, tying her up and swinging her upside down, waking her in the night, making her wear a black dress, rubbing faeces in her face, describing behaviour that suggested he masturbated over her, as well as the child’s claim that he bit or licked her ‘bits.’

risk of emotional abuse because of the “repeated allegations from (mum) that (child) had been sexually abused by her father.”<sup>225</sup>

She recounted how she was at times weary of her daughter’s allegations,

*“I was so tired and I dinnae ken, I just said ‘why did you not just tell him to go away?’ ken. She sat bolt upright and tugged at me and said ‘listen, listen,’ and I had to open my eyes and listen to what she was saying, and she banged her fists off her thighs, above her knees, and said ‘he says mummy, he says, I just can’t stop, I just can’t stop’ and it was the way she said it and her face [pause].”*

When her daughter’s father raised a court action for contact, she told her daughter that the reporter was coming and might want to talk to her however:

*“the reporter insinuated in her report that I had set (the child) up to talk to her and she (reporter) refused to talk to (the child). Instead her attitude to it all was that they [statutory agencies] can definitely say that (child) is not being abused and she queried the credibility or reliability of what I said (child) had told me because, she said, there was no physical evidence.”*

At the next child welfare hearing a psychologist was appointed to undertake investigations, who *did* speak with the child.

The author was given a copy of the psychologist’s reports to read in their entirety. This was very brave on this mother’s part as, although *at no point* does the psychologist suggest the child is *not* telling her mother that her dad does bad things to her, she concludes that the child says these things because;

*“young children can be encouraged to make certain statements through leading questions, attention and reinforcement. The child receives attention for making statements and feels that she is pleasing her mother. Having made statements, the child is then frightened to tell the truth.”*

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<sup>225</sup> This mother gave the author a copy of the social work report in her case. This is a direct quote from that.

The psychologist recounts asking the child how things were going for her and, out of a choice of options, the girl choose 'terrible.' When asked, she said that this was because her dad was still 'trying to get in our family.' The Psychologist then asked the child to choose from the same choices in respect of *where* she was living and the child choose 'great' - giving the reason that her dad was 'not trying to get near to her family.'

This psychologist concludes that,

*"(Mother) has pushed in order to try and involve professionals in (child's) life. She has coached the child and prepared her for interviews to such an extent that anything that the child now 'discloses' will be seen as invalid and unreliable."* [authors emphasis]

She then recommended the child be "made subject to compulsory supervision order in respect of emotional abuse in relation to her mother," as well as being "removed from her mother's care and placed with foster carers" – which is what happened.

Thus, in this case, the concern to *promote contact* between *father* and child meant that the child's primary carer from birth – her mother - only spent one (supervised) hour with the child per calendar month, at the time of the interview with her. Residence of the child was later given to her father as the mother refused to agree to her child having *unsupervised* contact with her father – which was the condition of her return to her mother.

One non-legal practitioner who works in an organisation supporting children who have been sexually abused said she knew of several cases like this which she referred to as "a modern day Sophie's Choice – you can't have your child, if you want to keep your child safe."<sup>226</sup> One of these cases in particular stuck in her mind because she had become aware of the 'follow on' of the child's removal from her mother.

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<sup>226</sup> A reference to the novel by William Styron, in which a mother has to choose which child to keep with her when she arrived at a concentration camp in World War II (and previously referred to by a psychologist on page 244 of this thesis).

*“I had a case many years ago, a really horrible case involving a three year old [...] When the case went to court the child was taken from mum and given to dad and the reason for that was that mum would refuse access [because of suspected sexual abuse] and dad wouldn’t. The child is 16 now and at the age of 13 or 14 she went to court to get back to her mum, she had had enough [...] The last time I saw them she was just hugging into mum and saying , “thank God we made it.” But you know the child was very young but there were signs, the child clearly did not want to go for contact and was dragged screaming to contact. She does not see her dad at all now.” NLP n. 7*

This NLP also observed that once residence had been given to the child’s father, he had controlled when the child could see her mother and that this therefore had been extremely limited. She observed:

*“Now the State sanctioned that arrangement, it gave all the power to the father and it took all the power away from the child and from her mother - who they labelled as ‘vindictive’, without any evidence that she was, in fact, vindictive.” NLP n.7*

Even without the spectre of possible sexual abuse of the child, this case is illustrative of the point that placing a child with a parent s/he becomes distressed at the prospect of seeing is likely to backfire (given that the practice is presumably meant to ‘encourage’ a reasonable relationship to develop). It is the parent the child was forcibly removed from, that this child spent her childhood years yearning to be with and who – without her father’s insistence otherwise – she *would* have been with. It is not possible to ‘force’ a relationship and, as a psychologist interviewed observed, “we are not actually trying to break the will of a wild animal.” (NLP n.1)

Obviously, the experiences of these mothers are at the extreme end, in terms of the distress the issue of ongoing contact between children and the children’s father wrought in their lives. These women had been very resourceful in contacting a range of services for help and advice and both mothers did have at least one professional who supported their concerns - however greater weight had been (or continued to be) attached to the alternative perspective by the court.

Of the twenty-seven respondents to the questionnaire for parents, the majority had sought advice from elsewhere and not just from their solicitor. A third indicated that they had been in contact with the Scottish Child Law Centre for guidance on their child's rights and two indicated they had sought advice from a Citizens Advice Bureau. Ten respondents listed other sources of support and advice spoken with as being social services (n=4), family mediation (n=2), a child psychologist (n=1), a domestic abuse worker (n=1), a health visitor (n=1), a Barnardo's Children's Rights worker (n=1) and one had written to the (then) Scottish Commissioner for Children and Young People, Kathleen Marshall.<sup>227</sup> Eighteen parents also stated they sought advice from a friend or family member.

One of the mothers commented:

*"I went to see someone as I wanted to find out if (child) has any rights under European Human Rights law because he [dad] had had his childhood. It was 100 times better than (child's). This is her formative years and they are being destroyed as far as I can see and I feel powerless."* Parent Interviewee n.3

It is therefore to the perspectives of individuals working in agencies such as these that this chapter now turns, in the final of the three discussions.

#### **10:4 The Perspectives of Agents from Support Services for Children**

This section presents the key concerns of those working to support children who are in continuing contact with a parent whose behaviour causes them distress; including their views on the treatment of the views of such children in legal process. Their experiences are an important inclusion in this thesis, as this is the 'other side' of the story – the one solicitors and those ordering

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<sup>227</sup> Notably Genn & Patterson (2001) Found adults with a 'non-trivial justiciable problem' were most likely to seek advice where that problem concerned their *child* - 56% of all problems in this category concerned contact/residence, while 95% of all respondents to their survey who had such a problem had sought advice (pg 67).

contact against a child's express wishes do not see. Further, as they are professionals, their views may be more likely to be attended to than those of the mothers of the children passing through the courts.

Two key observations made by these non-legal practitioners are that very few children they support actually have their views taken for legal process and that, when they are, they are usually assumed to be the result of maternal influence and are over-ridden. They commented also on the need for training of legal personnel so that they understand the impact of an abusive home environment on children.

In the previous chapter it was seen that there were eleven children who were ordered to have contact against their express views in the court data set and nine who wanted less contact but were unable to affect this, with almost all of these children having been exposed to domestic abuse. Importantly however, there were also 70 children from families in which domestic abuse was alleged whose views were *not taken* by any means (representing 49% of children from cases in which domestic abuse was alleged). It is children such as these that the non-legal practitioners interviewed support.

The aim of individuals working to support children who had lived with abuse was explained to the author as:

*“We have to be able to show we are helping children to understand what domestic abuse is and that it is wrong and that it is not their fault and that is a key thing that children need from us.”* NLP n.2

Most of the children seen by those undertaking therapeutic work were children whose parents had *separated*. They commented that this was because:

*“Our work would be very very limited if the dad was still in the family because it is very complex and those are the harder families to reach as the secret is still being kept then and mum is too scared to come forward and ask for services to get involved.”* NLP n.3

They explained that all they can do in such cases is discuss “safety planning” – such as who the child can phone, or how to escape from the abuser. However,

*“Recovery is not possible as long as they are still subjected to abuse or to the threat of abuse.” NLP n.2*

All NLP’s mentioned that mothers were unable to voice their child’s views on behalf of their child in these circumstances and they had to find ways of helping women to manage sending their distressed child for contact:

*“we have conversations about this all the times with mums [...] all this pressure and with women being charged with contempt of court and the mum is knowing and is feeling that the child has got to go on Saturday but the child does not want to go so what does she do? She either does not allow the child to go or she does her best to prepare the child and part of that is “you will have fun, I know there will be bits you don’t like but you are going ice-skating or going swimming, it will be fun won’t it” And the utter relief when contact is over for another fortnight you know. It is terrible, terrible pressure for a woman to feel to have to put her child away like that.” NLP n.3*

I asked these play therapists what statements a mother could make to her child when, for example, the children *did not* actually engage in activities they enjoyed, but were confined to a house or room.

*“well she continues to have to take a very helpless approach and all she can say to the child is well I have a meeting with my solicitor in a couple of weeks and I will speak to him and see if we can get some changes and I will do the best I can but there is nothing I can do [...] it does render a woman very helpless I think.” NLP n.2*

The author pointed out that legal practitioners might object to a parent talking to the child about the ongoing court process, as they may feel the child should not be being told about the conflict between the parents. There response was:

*“How can you make a child understand why they are being forced to go? You have to help a child understand. This is basic advice that I give to the mums of the children we work with [as therapists] as the child will sometimes blame the mum - that it is her that is pushing them as she is the one taking them to the contact and the children don’t understand how mum can do that to me when I don’t want to. So they become angry with mum. So what she can do is she can say to them during the week “this is a choosing time and you can choose if you want to do this, this or this” but when it comes to contact “this isn’t a choosing time and it is the Sheriff that is making this decision.” You know, and that takes the blame of her you know as it is not up to mum.” NLP n.2*

One interviewee observed that by always assuming children are voicing their mother’s opinion, legal practitioners and the courts do children a disservice.

*“it always seems to fall back to folk saying the child is influenced by mum. They have got minds of their own! They have feelings of their own. Their mums practically have to push them aside and say “go and speak to somebody else, I am not going to help here” because it keeps coming back “influenced by mum.” NLP n.4*

The interviewees also spoke of strategies they give to the children to help them through the difficult times during contact, and to build their resilience:

*“We came up with ‘Powershields’ and they wrote on the ‘Powershields’ what helps them feel protected and safe and who makes them feel protected and safe and then there was the ‘Helping Hand’ of who they can talk to and when they can talk to them or ‘Fairy Wands’ and strength kind of symbols.” NLP n.3*

The interviewees were then asked:

“During the contact though, if the dad’s behaviour is scaring them there is nothing at that particular point in time that they can do is there?”

*“That is where we feel very frustrated as what can you do? We have come up with different things we can do with them afterwards such as having worry boxes at home so that they can come back from contact and put all the horrible things in there that happened. Some have taken some wee toys from here with them on contact but even then, we*



*had one little boy who was five and he took a little toy away with him from here because he had a ten day contact over Christmas and he did not want to go, and his worry box was stuffed full of worries about what might happen and it was horrendous. When he came back he said he did not take the toy with him. He said he did not think it was safe to take the toy - which is quite symbolic isn't it - that that was the level of fear for that wee boy.” NLP n.3*

It was the experience of the non-legal practitioners that most of the children using their services who were the subjects of *court ordered* contact, had not actually had their views taken for the court process.

*“It is making me realise as I go through in my head all the children I have worked with that, in their case, contact has been ordered without the views of the child being sought, that's it and there you are [...] This is a bigger group of children – those who have not had their views taken and that needs to be screamed about really doesn't it?” NLP n.3*

An individual doing therapeutic work with children explained how they prioritised children who were *not* able to express what they were feeling – the same children who would have difficulty formulating and expressing a view for legal process.

*“If they are showing high levels of anxiety then they will be more of a priority and those children are usually those who are not able to express what they are feeling.” NLP n.2*

This tallies with the discussion in Chapter Eight that children may only be able to make flat statements such as “he hits” or “he shouts” but cannot express how that makes them *feel*. In that earlier discussion it was observed that the word “sad” may be the generic term young children use to cover all negative feelings. However, some children may not even have that:

*“a five year old I worked with, because he had experienced domestic abuse from quite a young age there was a developmental delay there and he was not able to understand what some of the basic feelings were that he was experiencing [...] he actually did not understand what sad meant, you know, as he was that limited.” NLP n.2*

Another NLP commented how this lack of language for what they are feeling can prevent any weight being attached to young children's views when they are taken for legal process:

*"I think unfortunately, because it is children we are dealing with, they know what they are thinking and what they are feeling, but children don't have the vocabulary of adults to articulate it and I think that is the stumbling block."* NLP n.5

Although the majority of the children the NLP interviewees had worked with, had *not* had their views taken for legal process, they had all been involved in at least one case where they had supported a child to present their views to the court and had insightful comments to make in respect of this.

The psychologist interviewed had written numerous reports for courts in respect of child contact. He recalled a case in which both children (aged 5 & 8) were adamant they did not want to go for contact. The younger – a girl – flatly refused. She was becoming so distressed she had nose bleeds in the days leading up to contact, while her brother started to soil himself. The court did eventually remove the order for contact on the basis of the clear distress it was causing the children (as reported by the psychologist), but it was several years before the *cause* of the daughter's distress became known.

*"Five years after that case ended and no contact had taken place for five years, so the girl was around 10 years of age, she finally disclosed that her father had sexually abused her during a contact visit on at least one occasion. It took five years for her to be able to do that and five years of having been left alone and five years of having had the threat of contact removed.[...] I think it would be wrong to present the case as typical but nonetheless it is a real case."* NLP n.1

This NLP also had experience of attempting to advocate *on behalf of* a child he was working with, when the child returned perplexed after speaking with a sheriff:

*“I got a bit of a grilling from the sheriff I have to say because he did not like his original decision being challenged [..]however in the end he acknowledged what the child was **actually** saying rather than his interpretation of either what he thought the child was saying, or what he hoped or wanted the child to say.” NLP n.1*

However rarely do children receive support such as this of course, and not all are so successful when they do. One children’s worker had accompanied a child to a solicitor’s office with a view to the child obtaining her own representation. Her colleague was supporting the child’s mother and she was asked to accompany the child, as a person not involved with the family:

*“she [child] was trying to describe why she did not want to see dad and how she felt around him, insecure around him and fearful around him and his behaviour and how she was not always able to feel free to express herself and to do the things she felt she should be able to do around him and the solicitor just said “Aye but that parents for you, that’s what it is like, that is historical that dad’s have always been domineering like that” and I thought to myself well it may be ‘historical’ but that does not mean that it is right and I just thought that illustrates the lack of understanding there.” NLP n.6*

Other NLP’s had struggled to glean the correct way to get the child’s written views to the courts. One commented that their “needs to be a mechanism in place to seek the views of the child, a fairly standard letter that gets sent out to each child” such as the “Having Your Say” forms used by the children’s hearings system. The author then told her about F9 forms.

*“I have never heard of an F9 form! Children get really lost in the process.[...] It requires women and workers to be very proactive about that, we don’t see the court being proactive about that in terms of actively seeking the views of the child. Rather the views seem to have to be forced upon them.” NLP n. 3*

This NLP’s colleague had some experience of helping children in the process of writing to the court – something few children receive - however became unstuck on the issue of confidentiality:

*“I did a specific piece of work with them to help them understand what court was and what was happening and I explained that this is the sheriff who is going to decide if you see your dad or not so it is good for you to share what you would like. They were quite clear that they did not want to see dad, and that he was a bad man; so then I had to say that I had to share this and ‘who would they feel comfortable with me sharing this with? The sheriff? Mum?’ And I got nods, nods, and then it came to ‘dad?’ and the body language you could just tell NO so then I had the difficulty of how do I share the children’s views but do it in such a way that their dad does not find out that they are actually too scared of him, to see him?” NLP n.2*

This practitioner had eventually gleaned the correct procedure – enclosing the views of the child in an envelope marked confidential. It had taken a meeting with a sheriff clerk to obtain this information.

Yet, even when children receive assistance from support services *and* the correct procedure is followed, the views they express may not affect any change in the ordered contact:

*“I think as well, you know the form the children have to fill in for the court, [they need] to make sure they are read and listened to cos the young person I am thinking of, there was no mention of it, she was so frustrated that everything she had taken the time out and built up the courage to think about and to write down was not heard. All her views and all her thoughts, no one heard them.” NLP n.4*

## **10: 5 Chapter Summary**

The discussions in this chapter have come out of the analysis of seventeen interviews as well as twenty-seven questionnaires. The main messages to be taken from the chapter are the sheer scale of the barrier posed by the assumption of maternal influence in the face of a child’s opposition to contact with their father, as well as the inappropriateness of the assumption of contact as the starting point for decision making in all cases that come before the courts. Entrenched cases are often entrenched for a reason; ordering contact *does not* address the underlying problem.

These perspectives also illustrate how dependent children are on adults to support them to express their views - especially when they have lived in an abusive home environment and their views may not conform to the assumption of contact.

It can be seen that many fathers are reluctant for the views of the child to be taken as mothers 'reasons' for resisting the contact sought often revolve around the child's (alleged) express views. Rather, fathers believe anything negative the child says will have been fed to the child by his or her mother. In this respect the narratives of fathers dovetails with the dominant narrative of legal practitioners which is usually determinative of the outcome of a case.

However, very often the alternative narrative given by children and their resident mothers is that they would like contact to be able to take place *if* the parent exercising contact could take into account the perspective of the child, and/or stop behaviours that the child finds distressing. It is usually where the non-resident parent persists in ignoring the child's perspective, or in abusive behaviour or threats of abuse, that children - distressed by contact - no longer wish to exercise that contact. This explanatory narrative is supported by NLP working in services for children, all of whom knew of cases where, in their view, children had been harmed by being ordered into contact (or even residence) with a domestically abusive parent.

Our present court based legal process is not geared to hear the voices of these children easily, nor to attach weight to them. However, the work of the non-legal professionals interviewed is suggestive of ways in which children may be assisted to express their views.

The next (and concluding) chapter, draws together the threads of this and the previous chapters, in an attempt to answer the research question whilst also suggesting the implications for future policy and practice.



## CHAPTER ELEVEN: SUMMARY OF KEY FINDINGS AND THE POLICY & PRACTICE IMPLICATIONS OF THESE.

This doctoral research has addressed the following question:

*Having regard to the often highly-conflicted nature of the cases before the courts, are existing methods for taking the views of the child, and the treatment of those views once taken, consistent with the promotion of the child's welfare?*

The key findings of this research suggest courts make their decisions based on a narrow field of assumptions in respect of an 'ideal' family where a child's welfare may be deemed dependant on on-going contact with their father. Women and children's role within legal process is often as the passive subject (or problem) under consideration, as fathers found on the intrinsic worth of the father-child relationship. Further, the narratives of legal practitioners (the minimisation of the significance of domestic abuse and the assumption that children will want on-going contact with both parents) dovetail with those of fathers and may over-ride the alternative narrative presented by women and those children whose views are taken.

Notably, women's narratives emphasise the *child's* perspective and those representing mothers avoid any suggestion that women as *mothers* may be uniquely placed to continue to meet certain of their child's needs. As such, women themselves become invisible and children's desire to see more of their mothers (or less of their fathers) may have little impact; while the opposite is the case when they wish to see less of their mothers or more of their fathers – with these views being more likely to be accepted without challenge or further inquiry.

This chapter proceeds by presenting the key findings in respect of each of the aims and objectives of the research project (see Chapter One) and by discussing the implications arising from these.

**11:1 The reasons cases come before the courts – given the vast majority of disputes are resolved without such intervention.**

In order to consider whether children's views are treated in a manner consistent with the promotion of their welfare, it is clearly necessary to know the circumstances of the child – it is for this reason that court reports are ordered.

Key findings from the analysis of the court data set confirm earlier research in this area with the factors leading to the case being contested being similar to those found in *public law* proceedings. In particular domestic abuse was alleged in half the cases, with police involvement because of domestic abuse in a third of all families. Substance abuse by at least one parent was also alleged in a quarter of all cases and a quarter of families had experienced the prior involvement of social workers. Three quarters of litigants had a sufficiently low disposable income that they qualified for legal aid. It is known that the use of physical force against children is more likely in lower socio-economic groups.

Although *all* the children in the court data set had lived with their mother at some stage, by the time the case came to court there were more than double the national average of children living with their *fathers* in the court data set. This was usually because women had either been ejected or fled violence, or the children had been retained by the father during contact. Children living with their fathers were less likely to be exercising contact with their NRP than children living with their mothers.

When mothers were the resident parent, the reasons for cessation in contact were violence or threats of violence from their ex-partners in half of the cases; while the mother re-partnering could sometimes be a trigger for these events. In a further third of cases, contact faltered due to concerns around the quality of the contact the child experienced such as allegations that the NRP neglected the child during contact, abused substances during contact, refused to tell the resident parent where contact was to be exercised, left the child with third parties, or was inflexible in respect of contact arrangements



and the child's other activities. Children approaching high school age also wished to have a greater say in when they saw their non-resident parent.

The policy implication of this is the clear need for the training of legal practitioners on the gender dynamics of domestic abuse and its impact on children. However, even in the wake of the passage of the 2006 Act which introduced the statutory requirement to attend to the need to protect the child from abuse, this training was not provided.

### **11:2 The extent to which current methods for taking children's views in private law legal process conform to the principles of ethical consultation.**

In the light of the literature on ethical consultation with children which followed the passage of UNCRC, this thesis has paid particular attention to the extent to which children are *informed* of the purpose for taking their views (and how they will be used), as well as the extent to which children may *choose* to participate or not.

A key finding was that, what the author termed the "twin pillars" of ethical consultation – informed consent and confidentiality - do *not* transfer easily to decisions made in a court of law in respect of a known, named child. This is because Article 6 ECHR requires that parties in an action are aware of any allegations made against them, and this may trump the welfare of the child as the primary consideration (*Oyenyin*).<sup>228</sup> However, the author has suggested that the discretion afforded to sheriffs (*Dosoo v Dosoo*,<sup>229</sup> *McGrath v McGrath*)<sup>230</sup> could provide protection for children in cases where they are at risk of retaliation and, that the training of family practitioners to be alive to these risks would mean practitioners more

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<sup>228</sup> *Oyenyin v Oyenyin* (1999) G.W.D. 38-1836

<sup>229</sup> *Dosoo v Dosoo* 1999 S.C.L.R. 905

<sup>230</sup> *McGrath v McGrath* (1999) S.L.T. (Sh Ct) 90

consistently utilised the option to send the views of the child direct to the decision maker, marked as confidential.

The 1995 Act envisages children being given a *choice* as to whether they wish to express a view or not. However this thesis has provided examples of cases where the views of children (particularly very young children) might not have been obtained at all if court reporters ensured the child understood the purpose of the reporters visit. Given the nature of many of the cases before the courts, it is accepted that court mandated reporters (whose findings can lead to the protection of children), should not be required to give children a formal ‘choice’ whether to speak to the reporter or not - as this could leave them exposed to undue parental pressure. This is said, of course, with the caveat that due regard is paid to the issue of confidentiality (discussed in the previous paragraph).

However, starting from the premise that children *should be informed* when they are consulted, reporters could be required to account for any decision they take *not* to inform the child of the purpose of their visit in advance of obtaining the child’s views. Ideally, they should also be required to account for any decision *not* to talk to the child in order to gauge the child’s views. Age appropriate information leaflets for children could also be available for use by reporters – particularly when a child associates courts with someone doing something bad and going to prison.

In respect of information more generally, children in the UK do not have an automatic right to receive “all relevant information” or to be “informed of the possible consequences of compliance with these views and the possible consequences of any decision” as the UK has not ratified the UN Convention on the Exercise of Children’s Rights. However, given that our domestic law requires children should be given the opportunity to say whether they wish to express a view or not, it cannot be acceptable that only 17% of children had intimation granted in respect of them. In present practice, intimation is often deferred while courts make a number of

‘interim orders’ and only attended to when a proof hearing is imminent. Yet proof hearings are rare – occurring in 1% of data set cases.

It was also found that when the views of children *are* proactively sought by the court, they may suffer from the failure to attend to the specific requirements of involving a *child* in legal process. In particular, children are often sent copies of the Initial Writ which causes unnecessary distress and deters children from participation. It may also make a child reluctant to see the parent who raised the court action. Further, many F9 forms are so badly drafted that they render children dependant on an adult to explain the form before completion. This is disrespectful of children and of their participation rights and particularly ironic given practitioners’ concerns over parental influence when the forms are completed.

Perhaps because so few children enter the process as litigants, the motivation to amend the court rules (and standard forms) so that they are comprehensible and do not threaten children has not been attended to; while, (more cynically) these may actually provide a reason for *excluding* children. Regrettably, the recent changes requiring the resident parent’s income to be assessed when determining whether legal aid will be provided for children, has *diminished* the potential participation rights of children as well as the likelihood that the views of the child will be accepted as the child’s.

The policy and practice implications of all the listed findings are that greater involvement of children in legal process - so that their views may potentially be taken into account - could be facilitated by the ratification of the UN Convention on the Exercise of Children’s Rights. This would provide the ideal opportunity for a review of the standard procedures and the standard forms used in legal process, so that they are comprehensible to children.

Further, Article 4 of the UN Convention on the Exercise of Children's Rights also provides that children should have the right to apply for the appointment of a 'special representative.' It is suggested that individuals working in support services for children are well placed to provide support of the type children require, if the funding for them to do so were put in place *and* training on the use of legal process was provided to them. If we do not want young people to grow up disaffected and lacking respect for a legal system that bullied them as children, this would be a worthwhile investment. At present individuals with the specialist skills necessary for helping children to formulate and express their views (as well as understanding the consequences of those views) are largely excluded from legal process – to the detriment of the children they support.

### **11:3 The impact of children's views on contact outcomes**

The third aim of the research was to analyse the treatment of children's views once taken. This was undertaken by analysing the extent to which the views of children correlate with the contact outcomes, as well as the express comments made by practitioners on the appropriate weight to attach to specific viewpoints.

Two key findings are: firstly, that the extent to which the views of the child impacted on the contact outcome in the case was not straightforward; and secondly, that there appears to be a differential treatment of children's views depending on whether they are expressing a view about a *mother* or a *father*. These are considered here in turn.

Firstly, the reason assessing the weight afforded the views of a child is not straightforward is because the child's view of contact often reflects the behaviours they have been exposed to when in the care of their non-resident parent. It is not always clear therefore, the extent to which it was the behaviour the child described to a reporter, or the other evidence of that behaviour gathered by the reporter, which impacted most on their recommendations.

That said, because court reports generally start from the assumption of the primacy of contact between a child and his or her non-resident *father* when making recommendations, *this* also impacted on the weight reporters were prepared to attach to the child's views when that child did not want contact with his or her father. However, the prior involvement of statutory agencies with the family (especially the police) increased the likelihood that the final contact outcome was consistent with a child's wish not to have contact with a non-resident *father*.

Yet, as observed, the outcomes were different for the cases where *mothers* were the non-resident parent. For, in the handful of cases in the court data set where children expressed a wish *not* to have contact with their mothers, this was accepted at face value and no contact was ordered, while, the status quo principle in Scot's law sometimes had the unfortunate consequence that children's wish to see *more* of their mothers, or to return to live to her, were sometimes over-ridden (or simply ignored when residence was granted to fathers). Further, a history of substance abuse consistently reduced the chances of women securing either residence *or* contact with their children – while in a number of cases, the *father's* substance abuse or his history of domestic violence was overlooked. In relation to this, it was noted that Initial Writs (which are after all written by legal practitioners) often referred to a child's need to exercise direct regular contact with his or her father in order to develop *self esteem*, while the inherent worth of contact with a *mother* was not founded on in any of the Initial Writs written on behalf of female pursuers (rather they focussed on assertions of the existing relationship between the child and mother).

These findings in respect of the impact of the child's views on contact outcomes leads to the conclusion that, despite the acquisition of legal rights by women and children, they remain disempowered in legal process. Well-meaning practitioners may prioritise regular direct contact with a male parent as essential to a child's welfare, while women – particularly those who have been separated from their children – are viewed less favourably. In this way, the legal system may perpetuate the punitive and controlling

behaviour women have experienced from their ex-partners, while supporting the normative view of ‘family’ historically – wherein the male parent is the ‘head’ and, importantly, the primary decision maker.

Notably, those campaigning on behalf of the victims of domestic abuse have focussed on the welfare of the *child* to be protected from abuse, rather than championing the need for a mother in a child’s life. Women become invisible in both narratives.

#### **11:4 The perspectives of different ‘actors’ on the *methods* for taking the views of children and the *weight* that should be attached when taken.**

The ‘key actors’ are sheriffs and solicitors, children, parents, and non-legal practitioners.

##### *Sheriffs & Solicitors*

In respect of the different methods for taking the views of the child, sheriffs prefer to appoint a court reporter or a curator *ad litem* as this person will offer advice to the sheriff on the appropriate weight to be attached to the child’s views. Many sheriffs do not trust their own ability to determine whether a child has been influenced or not (and wish to avoid the difficult task of feeding back to parents the view their child has expressed) and so avoid judicial interview. Although the 1995 Act put the participation rights of children on a statutory basis, sheriffs in the data set courts were less likely to speak with a child since the passage of this Act due to the introduction of F9 Forms. Crucially, sheriffs suspect parental influence by whatever means the child’s views are taken, making them cautious about attaching weight to their views as well as doubting the competence of a child to know what is in his or her best interests. While sheriffs actively discourage practitioners from minuting to enter a child as a party to the action, they are aware of the rules requiring the child to be given the opportunity to express a view and if a proof is imminent they will attend to the need to obtain the views of the children affected.

Taking their cue from the bench, legal practitioners may actively avoid requests for judicial interview or to enter a child as a party to an action. They also express wariness about the origins of the views of the child, and believe the participation of children in legal process is best avoided. The weight they attach to the views once taken is exemplified by the approach they take when they write court reports (see 11:3 above).

### *Children*

The children spoken with in the present research are not claimed to be representative of children whose parents dispute contact, however (as for a significant subset of children in the court data set) the primacy of contact with their non-resident father had been promoted, against their express wishes, and against a background of abusive behaviour. These children's primary concern was not so much with the method by which their views were taken, as the weight attached to them. That is, they wanted to be believed. That said, consistent with the children in the literature reviewed in Chapter Two, they liked the idea of being able to put their views directly to the person making the decision about their lives. While both also approved of having a solicitor as it was not until they had this person putting their views *directly* to the court that they obtained the outcome they wanted.

### *Parents*

Generally speaking a parent's assessment of their child's treatment when their views were taken depended on the outcome. Fathers generally expressed the view that children were so susceptible to influence by their mothers that this would taint the views they expressed by whatever means those views were taken. Mothers' overall assessments were favourable when the outcome was consistent with the view they said their child had expressed to them; however they had often had to persist in finding ways of enabling the view their child expressed to be taken seriously. Mothers raised concerns over the absence of mechanisms to *support* their child to express that view - in particular that there was no information about the court

process for children and that children were not given a support worker who could accompany them to court if necessary. The absence of training given to solicitors undertaking the role of court reporter also shocked some mothers – particularly when it resulted in a rushed consultation that lacked any probing or discussion of options and potential outcomes. In one case a mother expressed her concerns around the reporter’s reliance on the conclusions of a social worker despite the social worker later being suspended following enquiries.

### *Non-legal Practitioners*

Many non-legal practitioners were unaware of the means by which a child’s views could be put to the court as (consistent with the finding of this research) the majority of children they supported had not had their views taken. When they had tried to support a child to be heard *they* had found it difficult to obtain information on how to go about this and therefore felt that children had to rely on someone being very proactive on their behalf if they were to stand a chance of being heard.

The overwhelming policy and practice implications arising from the perspective of different ‘actors’ on the different methods for taking the views of the child and the weight to be attached to those views once taken, is that legal practitioners need training as at present they operate within a very narrow field of assumptions – possibly because they are unaware of the impact of the decision they take on the lives of the children concerned.

Secondly, children clearly need independent support in order to formulate and express their views and the nature of that support could be informed by those services which already exist, but are currently marginalised from participation in legal process.



### **11:5 The *Relative Impact* of the perspectives of the different ‘actors’ involved in legal process**

Not surprisingly given that the ‘court’ is comprised of legally trained individuals who are charged with making the decision in respect of child contact, it is *their* preferred narrative that usually determines the outcome of the case. The narratives of legal professionals is therefore of crucial import.

As legal practitioners work within an institutional context that assumes the model of a functioning family unit that has broken down, and which seeks to broker agreement in respect of child contact, practitioners’ have developed the dominant narrative that (all) children feel loyalty to both parents and just want them to get back together, and therefore ‘children do not want to express a view in this context.’ Further, where children are asked their views, but are negative about contact, practitioners often assume the child has been influenced by their resident parent. Practitioners also tend to minimise the significance of a history of domestic abuse to the issue of on-going contact between parent and child, and thus minimise the weight that should be attached to children’s descriptions of abusive behaviour.

An alternative narrative is given by children and their resident mothers however. Generally they would like contact to be able to take place if the parent exercising contact could take into account the perspective of the child, and/or stop behaviours that the child finds distressing. It is where the non-resident parent persists in ignoring the child’s perspective, or in abusive behaviour or threats of abuse, the children - distressed by contact - no longer wish to exercise that contact. This explanatory narrative from women and children is supported by those working in services for children. Those non-legal practitioners who knew of a child who had given his or her views to the court, were shocked by the dismissive approach taken to the child’s concerns as the legal practitioner or the court assumed it was just ‘teenage rebellion’ or a child “taking the humph” for not getting their own way - rather than genuine distress. These support workers were also largely resigned to supporting mothers to equip their child to *cope* with the contact

that distressed them, rather than being of the view that *their professional assessment* might impact on the decision of the court.

A key finding of the research therefore is that the dominant narratives of legal practitioners' dovetail with the narratives of fathers, while the narratives of children and their mothers and support workers are subordinated.

## **11:6 Conclusion**

The majority of children are *not* given an opportunity to say whether they wish to express a view when courts make decisions in respect of contact with a non-resident parent despite the statutory requirement to do so. They also have little choice in *how* they may express their views and, when they do, they may suffer from being treated as an 'add on' the adult-centric legal system.

'Having regard to' the nature of the cases coming before the private law courts reveals that although a significant number of children *are* protected from on-going abuse by shrieval concern to learn the circumstances of a case (and through the thorough investigations of the court reporters then appointed), in a number of cases the assumption of contact is promoted above the need to protect a child from abuse and above the concerns of the children affected and these children may therefore be ordered into contact that distresses them.

There is evidence that legal practitioners apply the assumption of contact more rigidly when the non-resident parent is a *biological father* suggesting that the *patria potestas* which was removed from our statutes in 1973 may never have been completely laid to rest. For, although mothers do most usually continue as the resident parent, courts are noticeably extremely reluctant to actually order that there should be *no* contact between a child and his or her father. While *patria potestas* applied only to *married* fathers,

the present assumption of contact applies to any *biological* father other than anonymous sperm donors.<sup>231</sup>

By contrast, women who are separated from their children (often by force or fear) are viewed with suspicion. Significant weight is attached to allegations of sub-optimum behaviour; while the ‘status quo’ principle in Scot’s law can disadvantage women (and the children who wish to see more of them), as mothers may have been unable to establish a pattern of contact because of the abuse they are subjected to when they approach their children.

As long as solicitors are charged with undertaking court reports, legal practitioners need to be trained so that they are aware of the gender dynamics of domestic abuse (and its impact on children), as well as receiving training on how to undertake ethical consultation with children in the context of legal process. This would facilitate contact outcomes that more consistently promote the welfare of children in the cases going through the private law courts of Scotland.

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<sup>231</sup> s 28 Human Fertilisation and Embryology Act 1990



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## Appendix 1 – Questionnaire for Solicitors

University of Edinburgh  
School of Law

Doctorial Research Project

*“The Voice of the Child in Private Law Contact Disputes in Scotland”*

### QUESTIONNAIRE FOR SOLICITORS

#### This questionnaire:

- has **21 questions**
- most require you just to **tick the relevant box**
- Apart from Questions 4 & 5 (which ask if you ever act as a safeguarder) all questions concern private law contact disputes.
- These include cases in which the primary crave is Divorce, Residence or Contact, Declarator of Paternity, Parental Rights and Responsibilities.

#### Your responses are anonymous.

You are only asked whether you practice in a city, town or a rural area and how long you have been in practice.

1. Approximately how many **adult** clients (with children) do you represent per annum where one of the following is their primary crave?

Primary Crave	Cases per annum							
	0-5	6-10	11-20	21-30	31-40	41-50	51-60	60+
Divorce								
Contact or Residence								
Parental Rights and Responsibilities								
Declarator of Paternity								

2. At what age(s) do you consider it appropriate to crave intimation of the child in these actions?

Age of Child			
	Always	Sometimes*	Never
0-3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4-5	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6-7	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8-10	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11-12	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13-14	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15-16	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you have ticked 'sometimes' can you indicate here what factors determine this?

.....

3. On average, how often in a calendar year does the child of an **adult client** of yours speak with a sheriff, either in chambers or at a Child Welfare Hearing?

Times per annum					
Never	0-1	2-3	4-5	5-10	10+
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

4. Please indicate below in what capacity/ies you 'represent' **children** of different age groups by ticking all relevant boxes.

	Age of Child						
	0-3	4-5	6-7	8-10	11-12	13-14	15-16
<i>Curator ad litem</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Court reporter	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Solicitor for child client	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Safeguarder	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other (please Specify what) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

5. Please indicate how *many* children per annum you represent in these capacities.

	Number of Children								
	0-5	6-10	11-15	16-20	21-30	31-40	41-50	51-60	60+
<i>Curator ad litem</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Court Reporter	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Solicitor for child client	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Safeguarder	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other (specify) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Questions specifically on acting as a Solicitor on behalf of a child client** (If you have not acted as a solicitor on behalf of a child client, please go to Question 11)

6. When acting as a solicitor on behalf of a child client do you use any of the following when assessing whether a child has the 'general understanding'\* necessary to instruct a solicitor?

	Always	Sometimes*	Never
<b>The child has:</b>			
A general understanding of what the dispute is about	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The ability to give reasons for his or her views	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
A reasonable grasp of the English language (vocabulary, grammar)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Thought through the consequences of what s/he says s/he wants.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Attained the age of 12 when the presumption of competence applies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

\*as per S2(4A) Age of Legal Capacity (Scotland) Act 1991

If you have ticked 'Sometimes can you indicate here what factors determine this?

.....

.....

.....

7. When you act as the solicitor representing a *child client* and the child's express wishes conflict with what you consider to be in his or her best interests, how do you *usually* proceed?

	Age of Child				
	Under 8	8-10	11-12	13-14	15-16
Present only the child's expressed wishes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Present the child's wishes and your concerns	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Present only what you consider to be the child's best interests	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Do not act as solicitor for this age group	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

8. If a child client who is **12 years or older** tells you they do not want contact with their non-residential parent (or want existing contact to stop), Do you:

	Always	Usually	Sometimes	Never
Advise them that a court is likely to insist they see their non-resident parent	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Advise them that a court is <i>unlikely</i> to insist they have contact against their express wishes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ask them why they do not want contact / want contact to stop	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Suspect they have been influenced by the resident parent	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

9. If a child client who is **under 12** tells you they do not want contact with their non-residential parent (or want existing contact to stop), Do you:

	Always	Usually	Sometimes	Never
Advise them that a court is likely to insist they see their non-resident parent	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Advise them that a court is <i>unlikely</i> to insist they have contact against their express wishes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ask them why they do not want contact / want contact to stop	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Suspect they have been influenced by the resident parent	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

10. When you act as a solicitor representing a child client do you experience difficulty obtaining **legal aid** for:

	Always	Usually	Sometimes	Never
<b>Advice and Assistance</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Representation</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you do experience difficulties obtaining legal aid, it would be helpful if you could state what these are **here**

.....  
 .....



**Questions pertaining to acting as a Curator ad litem or Court reporter** (if you have not acted in this capacity, please go to Question 17)

11. When you act as a *curator ad litem* or Court Reporter how usual is it for you to talk to the child to obtain their views?

	Age of Child						
	0-3	4-5	6-7	8-10	11-12	13-14	15-16
Always	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Usually	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sometimes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Never	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Don't act in this capacity for this age group	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

12. When you see a child do you usually see him or her:-

- In your office                       In the child's home
- Elsewhere  
(please specify).....

13. When you DO take a child's views, do you usually speak with them:-

	Age of Child						
	0-3	4-5	6-7	8-10	11-12	13-14	15-16
On their own	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
With their siblings if there are any	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
With a parent present	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Don't act in this capacity for this age group	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

14. Do you explain to children that their views may not be kept confidential from their parents?

- Always                      Sometimes\*                       Never

\*If you answer 'sometimes' can you say here what factors affect your decision to explain this to the child

.....

15. Where you are acting as a Curator ad litem or Court reporter and a child's expressed wishes **conflict** with what you consider to be his or her best interests, do you:

	Age of Child					
	0-5	6-7	8-10	11-12	13-14	15-16
Present only the child's expressed wishes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Present the child's wishes and your concerns	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Present only what you consider to be the child's best Interests	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Do not act in this capacity for this age group	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

16. Do you tell a child what you are going to **recommend** and why?

Always       Sometimes\*      Never

\*If you answer 'sometimes' can you say here what factors affect your decision to explain this to the child

.....

.....

.....

.....

**Questions pertaining to acting as EITHER a solicitor or a court reporter or a curator ad litem.**

When Children say they do not want contact:

17. Check all that apply:

If a child **under 12** says they do not want contact *because* their non-resident parent frightens them, do you:

	Always	Usually	Sometimes	Never
Believe they have been coached to say that	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Believe there is likely to be a factual basis to this claim	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Believe that it remains in that child's best interests to have direct contact with both parents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Encourage the child to give some reasons for their fear	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
If the case goes before a court, ensure the Sheriff is made aware the child has said this	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Recommend contact in a contact centre	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

18. If a child Aged **12 and over** says they do not want contact *because* their non-resident parent frightens them, do you:

	Always	Usually	Sometimes	Never
Believe they have been coached to say that	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Believe there is likely to be a factual basis to this claim	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Believe that it remains in that child's best interests to have direct contact with both parents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Encourage the child to give some reasons for their fear	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
If the case goes before a court, ensure the Sheriff is made aware the child has said this	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Recommend contact in a contact centre	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

19. Since May 2006 when the new provisions at s11(7)(A-E) of the 1995 Act came into force, have you acted in any cases in which domestic abuse has been alleged?

YES	<input type="checkbox"/>	NO	<input type="checkbox"/>
-----	--------------------------	----	--------------------------

If 'Yes', how many.....

20. Was contact refused in any of these cases because of the domestic abuse?

YES	<input type="checkbox"/>	NO	<input type="checkbox"/>
-----	--------------------------	----	--------------------------

21. Since May 2006 when the new provisions came into force, have you acted in any cases where orders for contact had been made which you believe put the child at risk?

YES	<input type="checkbox"/>	NO	<input type="checkbox"/>
-----	--------------------------	----	--------------------------

**Finally,**

Can you indicate how long you have been in practice?.....

Do you practice:

<b>Large Urban Area</b> (population over 125,000)	<input type="checkbox"/>
<b>Other Urban</b> (population 10,000 – 125,000) eg Ayr, Dumfries, Inverness, Greenock, Perth, Stirling	<input type="checkbox"/>
<b>Rural or Remote area</b> (population less than 10,000) eg: Callander, Lewick, Moffat, Oban, Tobermory	<input type="checkbox"/>

**Are you willing to be interviewed as part of this research project?**

YES	<input type="checkbox"/>	NO	<input type="checkbox"/>
-----	--------------------------	----	--------------------------

If 'Yes' please either give your name and contact details below or email me separately at [K.M.Mackay@sms.ed.ac.uk](mailto:K.M.Mackay@sms.ed.ac.uk) (telephone 07535 047 033) if you would prefer.

.....  
.....

**Please return this Questionnaire to me in the enclosed postage paid envelope at: Kirsteen Mackay, School of Law, University of Edinburgh, Old College, South Bridge, EH8 9YL**

## Appendix 2 – Questionnaire for Parents

### What is this questionnaire?

This questionnaire is one part of a larger research project being undertaken by a doctoral researcher in the School of Law at the University of Edinburgh and funded by the Economic and Social Research Council (ESRC).

You may have obtained this questionnaire from the offices of a number of organisations such as family mediation, women's aid or the Scottish Child Law Centre. These organisations have very kindly agreed to display or post out this questionnaire but they are not connected to the research in any other way.

### What is the research project about?

The purpose of the research project is to find out how much say children and young people have in the decisions courts make about the amount of time children spend with parents they do not live with.

### Why is the research being done?

This research is being done to find out whether children and their parents feel they have been treated fairly by the family legal system in Scotland. In particular, whether children feel *their* views have been taken seriously.

### Who is this questionnaire for?

This questionnaire is for parents who have *experience* of going to court because of a 'dispute' (disagreement) with the other parent of their child over how much time their child should spend with each parent.

### Can my child or children take part in this research project too?

Yes. Children and young people aged 8 – 18 are invited to speak with the researcher who is very interested to learn from them what they think is good and bad about the way the court made this decision about their future. In particular, whether they think anyone who took their views understood what they wanted and whether their views were treated with respect. To take part, children or their parent/carer are welcome to contact Kirsteen Mackay using the contact details at the end of this questionnaire. **Children under 16 should check with a parent or carer that they agree they can take part** - this is to make sure children have an adult on hand who can support them.

## THE CONTACT DISPUTE

### 1. Were you ever married to the other parent of the child/ren the dispute was about?

YES		NO	
-----	--	----	--

### 2. If you answered YES to the question above, did you see a solicitor about getting a divorce?

YES		NO	
-----	--	----	--

3. How recently were you STILL in dispute over contact?

Still in dispute		Between 5-10 years	
In the last 2 years		Over 10 Years	
Between 2 – 5 Years			

For over 10 years, how many? .....

4. What Gender are you?

MALE		FEMALE	
------	--	--------	--

5. At the time of the disagreement over contact who did your child/ren live with?

With Me ONLY	
With his or her other parent ONLY	
We had more than one child together and AT LEAST one of them lived with me	
We had more than one child together, who lived in different places but NONE of them lived with me	

6. At the time of the dispute how many children did you have in the following age groups? (Remember to ONLY enter the details of the child/ren the dispute was about.)

Number of Children				
	1 child	2	3	4
Age 0-3				
Age 4-5				
Age 6-7				
Age 8-9				
Age 10-11				
Age 12-13				
Age 14-15				

**7. In your dispute about contact, what could you not agree on? Tick as many as apply.**

We could not agree whether our child/ren should see the parent s/he did not live with AT ALL	
We could not agree how much time our child/ren should spend during the DAYTIME with the parent s/he did not live with	
We could not agree whether our child/ren should stay with the parent s/he did not live with OVERNIGHT	
We could not agree WHERE the parent our child/ren lived with could MOVE to, to live.	
We could not agree about how the parent our child/ren did not live with should care for the child/ren during contact visits.	

OTHER.....

**YOUR CHILDREN'S VIEWS**

**8. Did YOU ask your child/rens views on how much contact time they wanted with the parent they did not live with?**

<input type="checkbox"/>	<b>Yes – I asked at least one child this</b>
<input type="checkbox"/>	<b>No (Go to Question 10)</b>
<input type="checkbox"/>	<b>Did not see the children at the time</b>
<input type="checkbox"/>	<b>Can't remember / Not sure</b>

**9. Please tick the age(s) of any child/ren you ASKED about how much contact they wanted to have.** (If you did not ask any children then please go to Question 10)

Tick all that apply.

Under 4	Age 4/5	Age 6/7	Age 8/9	Age 10/11	Age 12/13	Age 14/15
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

10. If you did NOT ask your child (or some of your children) about how much contact they wanted to have, to what extent was that BECAUSE of the following reasons?

	Not at All	A Little Bit	Quite a Lot	A Major Reason
Because they were too young				
Because I did not have contact with my children at the time & could not ask them				
Because children don't always know what is best for them				
Because children should do what their parents ask & not the other way around				
Because it might make them think about sad or upsetting things				
Because they might worry that they are being asked to make the decision all by themselves				
Because they might think that they would be listened to & then be upset when they did not get what they wanted				

Other Reason: .....

### HELP AND ADVICE

11. Did you ask any of the following people for help and advice on what your rights are and what you could do?

<input type="checkbox"/>	Solicitor
<input type="checkbox"/>	Citizens Advice Centre
<input type="checkbox"/>	Scottish Child Law Centre
<input type="checkbox"/>	Friends or relatives

OTHER (please specify) .....

12. If you DID NOT see a solicitor, why was that? TICK ALL THAT APPLY

Because I do not qualify for legal aid and could not afford it	<input type="checkbox"/>
Because I didn't think they would understand my concerns	<input type="checkbox"/>
Because there is nothing they could do to make our child/ren have contact with the parent they didn't live with	<input type="checkbox"/>
Because there is nothing they could do to STOP out child/ren having contact with the parent they didn't live with	<input type="checkbox"/>

OTHER (please specify).....



**ADVICE ON CHILDREN'S VIEWS**

**13. If You saw a solicitor, did YOUR SOLICITOR suggest finding out the views of your child/ren and telling these to the court? TICK all that apply**

Yes, my solicitor suggested this	
No, my solicitor did not suggest this	
I suggested this to my solicitor	
Can't remember / Not sure	
Did not see a solicitor	

**14. If you have MORE THAN one child, did your solicitor suggest finding out EACH child's views for the court?**

No (please go to the next question – Q.15)	
Yes (Go to Question 16)	
Don't remember (Go to Question 16)	
Did not see a solicitor (Go to Question 16)	

**15. What reason(s) did your solicitor give for NOT taking the views of ALL your children?**

No reason that I can remember	
The younger child/ren would be too young to UNDERSTAND why the person was talking to them	
The younger child/ren would be too young for their views to be TAKEN INTO ACCOUNT by a court	
The younger child/ren could be upset by being asked their views by someone they didn't know	
Because children have to be 12 before they can get their own lawyer	
Because I have a disabled child who would not understand or be able to make him/her self understood	

**Other Reason:** .....

## TELLING THE COURT

16. Did your child/ren receive a letter or a form (called an F9 form) from a solicitor which gave your child/ren the choice to write to the court and say what they wanted?

Yes		No		Can't remember	
-----	--	----	--	----------------	--

17. If you answered YES to Question 16, please answer the following questions otherwise to go Question 18.

	Yes	No
Did you tell your child /ren about the letter when it arrived?		
Was the letter /form easy for your child to understand?		
Did your child need someone else to explain what the letter or form was about?		
Did YOU explain the letter or form to your child?		
Did you talk with your child/ren about what they wanted to write and then leave the child to write it on his or her own?		
Did you talk with your child/ren about what they wanted to write and then <i>tell them how to write that clearly</i> so that other people would understand?		
Did you go over the completed letter or form checking for spelling mistakes and bits that did not make sense?		
Did you ask someone else to talk to your child/ren and HELP him/her fill in the form or write a letter?		
Did your child post the letter him/herself?		
Did you post the letter for your child?		
Did your child get any reply to the letter or completed form?		

**18. Please tick any of the ways in which a child of yours told the court their views.**

**Do this by ticking the relevant boxes NEXT to the age of the child who did these things.**

Age of child	Spoken to by person who wrote report for court	Had own Solicitor	Spoke to the Sheriff	Wrote a letter or filled in a Form	None of these things
Under 5					
Age 5-7					
Age 8-9					
Age 10-11					
Age 12-13					
Age 14+					

### **TREATMENT OF CHILD'S VIEWS**

**19. Did the Sheriff discuss the views expressed by your child/ren at any of the court hearings you attended?**

<b>Yes</b>	
I did not attend any court hearings (Go to Question 21)	
Don't know / Can't remember (Go to Question 21)	
<b>No (Go to Question 21)</b>	

**20. Please say in the box below whether you think the Sheriff understood what your children wanted and whether s/he respected those views.**

**21. If someone wrote a report for the court after speaking to your child/ren, did you get a chance to READ that report?**

No one wrote a report	
Not sure / Can't remember	
No	
Yes	

If “yes,” Please say in the box below what you thought of the treatment of your child’s views in that report.

**22. If your child spoke to a Sheriff please say in the box below what you think about this method of taking your child’s views. Alternatively, please say if your child *wanted* to speak with a Sheriff but was not given the opportunity.**

If a child of yours would like to take part in this research and have THEIR SAY in how courts should listen to children (and how their views should be treated), please contact Kirsteen at the address below or: or email [K.M.Mackay@sms.ed.ac.uk](mailto:K.M.Mackay@sms.ed.ac.uk)

Kirsteen Mackay  
Doctoral Researcher  
School of Law  
University of Edinburgh, Old College, South Bridge, EH8 9YL

## Appendix 3 – FORM F9

### Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993

Form of intimation in an action which includes a crave for a section 11 order  
Court Ref. No.

#### PART A

**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.

(3) Insert appropriate wording for residence order sought.

(5) Insert appropriate wording for contact order sought.

(7) Insert address of sheriff clerk.

(9) Insert court reference number.

(2) Insert relationship to the child of party making the application to court.

(4) Insert address.

(6) Insert appropriate wording for any other order sought.

(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.

(10) Insert name and address of parties to the action.

**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: .....