Child Contact Proceedings for Children Affected by Domestic Abuse

A report to Scotland’s Commissioner for Children and Young People

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Contents

Commissioner’s Foreword v
Acknowledgments vi

1 Introduction 1
   Methodology 2
   Definition of ‘domestic abuse’ 3
   About this report 4
   Further information 4

2 International obligations: UNCRC and ECHR 5
   2.2 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 6

3 Legislative framework for disputed contact 8
   3.1 Family actions: court orders in relation to parental responsibilities and rights 9
      3.1.1 Best interests of the child in family actions 9
      3.1.2 Views of the child in family actions 10
   3.2 Children’s hearings proceedings: the current framework under the Children (Scotland) Act 1995 14
      3.2.1 Best interests of the child in children’s hearings proceedings 14
      3.2.2 Views of the child in children’s hearings proceedings 16
   3.3 Children’s hearings proceedings: the future framework under the Children’s Hearings (Scotland) Act 2011 19
      3.3.1 Best interests of the child in children’s hearings proceedings – the future 19
      3.3.2 Views of the child in children’s hearings proceedings – the future 19
   3.4 Adoption and permanence orders 22
      3.4.1 Best interests of the child in adoption and permanence orders 22
      3.4.2 Views of the child in adoption and permanence orders 23
   3.5 Reports and background information: Children’s hearings and courts 25
   3.6 Summing up 25

4 Analysis of reported court decisions on disputed contact 27
   4.1 Best interests of the child in reported case decisions on disputed contact 27
      4.1.1 Best interests of the child in family actions 27
      4.1.2 Best interests of the child in children’s hearing proceedings 36
      4.1.3 Best interests of the child in adoption and permanence orders 39
   4.2 Views of the child in reported case decisions on disputed contact 44
      4.2.1 Shields v Shields: the leading case on the question of ascertaining a child’s views 44
      4.2.2 The age and maturity of the child 45
      4.2.3 Weight to be attached to a child’s views 47
      4.2.4 Subordination of the child’s view to the child’s welfare 51
      4.2.5 Methods by which child’s views are communicated 52
      4.2.6 Confidentiality in relation to the child’s views 60
   4.3 Summing up 61
5 Consultation with Key Adults Stakeholders

5.1 Safeguarders: training and guidance on domestic abuse and contact
  5.1.1 Current training for safeguarders
  5.1.2 Changes to the management and operation of safeguarders

5.2 Children’s panel members: training and guidance on domestic abuse and contact
  5.2.1 Current training
  5.2.2 The term ‘intergenerational cycle of violence’ – a note
  5.2.3 In-service training

5.3 Children’s Reporters: training and guidance on domestic abuse and contact

5.4 Social Workers: training and guidance on domestic abuse and contact
  5.4.1 Pre-qualifying training for social workers
  5.4.2 Post-qualifying training for social workers
  5.4.3 Case study: Edinburgh City Council

5.5 Solicitors: training and guidance on domestic abuse and contact

5.6 Advocates: training and guidance on domestic abuse and contact

5.7 The judiciary: training and guidance on domestic abuse and contact
  5.7.1 The Current Training

5.8 Training and guidance on children’s rights

5.9 Inter-agency guidance and resources

5.10 Stakeholders’ views on disputed child contact where there is domestic abuse
  5.10.1 Children’s views differing from their best interests
  5.10.2 Confidentiality of children’s views
  5.10.3 The effectiveness of mechanisms for children to express their view

5.11 Challenges in determining children’s best interests in contact where there is domestic abuse

5.12 Implications of introducing domestic abuse to grounds for referral to the children’s hearings

5.13 Other issues

5.14 Summary – consultation with key stakeholders

6 Key points and future action

6.1 Defining domestic abuse

6.2 Best interests, children’s views and domestic abuse when contact is disputed

6.3 Defining a child’s best interests when contact is disputed

6.4 Children’s views within contact proceedings

6.5 Future action
  6.5.1 Work towards a common and evidenced definition of domestic abuse
  6.5.2 Encourage sound information to inform practice and policy
  6.5.3 Influence training and guidance on the impact of domestic abuse on children, and particularly on disputed contact

6.6 Final Comment
<table>
<thead>
<tr>
<th>Appendix 1:</th>
<th>Methodology</th>
<th>96</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appendix 2:</td>
<td>Stakeholders consulted</td>
<td>98</td>
</tr>
<tr>
<td>Appendix 3:</td>
<td>Interview schedule</td>
<td>99</td>
</tr>
<tr>
<td>Appendix 4a:</td>
<td>Court forms requesting children’s views in family actions – Form F9</td>
<td>102</td>
</tr>
<tr>
<td>Appendix 4b:</td>
<td>Court forms requesting children’s views in family actions – Form 49.8-N</td>
<td>105</td>
</tr>
<tr>
<td>Appendix 5:</td>
<td>International child abduction cases</td>
<td>107</td>
</tr>
</tbody>
</table>
Commissioner’s Foreword

I am pleased to introduce this report into child contact proceedings for children affected by domestic abuse. I hope it adds to our understanding of the issue, from the perspective of the children and young people caught up in the processes we have for dealing with domestic abuse. It also seeks to place the issue within the context of children’s rights.

The report is derived from the results of a RIGHT blether – a national consultation involving 74,059 children and young people, indicating the issues on which they thought I should focus the work of my office. One of the results was that children and young people said they wanted help to be safe and secure in the home. My interpretation of this was that children and young people have a right to be free from abuse and neglect, and the area in which I chose to focus was that of domestic abuse. Further consultation with a wide range of professionals confirmed my view that contact arrangements for children and young people in situations of domestic abuse was the cause of great anxiety and variable practice – and worthy of closer examination.

The context for the report is that since devolution in 1999, Scotland has given a consistently high priority to the issue of domestic abuse. This has increased greatly our understanding of the issue and how it plays out in the family dynamic. Recently, there has been a growing acknowledgement of the impact of domestic abuse on children and young people living with it and the requirement to respond to their needs. The result is a range of innovative responses to domestic abuse in Scotland.

However, we are currently sitting on top of the highest ever number of police reported instances of domestic abuse since recording started. We know that this is a small proportion of all instances of domestic abuse because most instances go unreported. So, we have a very long way to go in tackling the issue of domestic abuse and in the meantime, very many children are caught up in the consequences of living with it.

This report seeks to do two things. The first objective is to review legislation, regulations and guidance as well as considering the latest case law. The purpose of this was to gain an insight as to the processes whereby the perspective of the child is taken into account in decision making practices in court or tribunal settings.

The second objective was to complement the review of decision making processes with insights provided by a range of professional stakeholders. The purpose of this was to develop a better understanding of how current processes actually worked and where improvements could usefully be made.

I believe the combined elements of the report provide the reader with a very well informed view of the legal processes and some useful insights into how it actually operates. All of this activity has been prompted from the perspective of the child. The intention of the report is to provide a platform for improvements to be made and for indicating where there is a need for further study.

I hope that you find the report informative and useful in developing an understanding of the issue of domestic abuse and how our court or tribunal systems take account of the perspective and rights of the children and young people involved.

Tam Baillie

Scotland’s Commissioner for Children & Young People
Acknowledgments

We would like to thank all those who advised the project and who agreed to participate.

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1 Introduction

Disputes over child-parent contact have become the focus of increasing policy and practice attention. A range of legal proceedings in Scots law can determine a child’s contact with one or more parents, directly impacting on children’s rights and parental responsibilities and rights. This interaction of rights and responsibilities has proven difficult: in ensuring positive processes particularly for children, while meeting principles of ‘natural justice’ for parents; and making satisfactory decisions when there are competing interests between family members.

When domestic abuse is alleged, these issues of disputed contact can become even more fraught. Domestic abuse, and its impacts on children, has gained increased policy, practice and now legal attention. In relation to contact, courts are now directed to consider ‘abuse’ in determining the child’s best interests in family actions under section 11 of the Children (Scotland) Act 1995, while children’s hearings will soon have a new ground of referral in relation to domestic abuse.

This preliminary research study arose because the Commissioner identified the issue of safe contact as particularly important to children and young people who have experienced domestic abuse. Children, young people and their parents have told the Commissioner that children and young people often feel their views are ignored in contact proceedings. Their views may be overridden because they are contrary to what is decided in the child’s ‘best interests’.

This preliminary research study examines current practices and procedures in child contact proceedings where there is domestic abuse, from a children’s rights perspective. Three proceedings were considered:

1. Family actions – where courts can make orders in relation to parental responsibilities and rights, often in situations of parental divorce or separation.

2. Children’s hearings proceedings, including emergency orders – where children in need of care and protection, or who commit offences, can be subject to supervision requirements or emergency court orders, which in turn can impose conditions regulating contact; and

3. Adoption and permanence orders – where courts can make an adoption order; or where courts can make a permanence order, giving a local authority the right to regulate a child’s residence and provide guidance to the child, otherwise vesting parental responsibilities and rights in other people, and which may grant authority to adopt the child.

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The study examines how the concepts of a child’s ‘best interests’ (Article 3 of the UNCRC) and ‘the voice of the child’ (Article 12 of the UNCRC) are used in these proceedings. It investigates where guidance and/or training on this topic may already exist. It identifies where there are current gaps in knowledge and/or practice and offers advice on how the Commissioner can work to address these.

**Methodology**
Three approaches were adopted to carry out this preliminary research study and to answer the research questions (See Appendix 1):

*A review of relevant legislation and associated regulations and guidance*
This established the current legal framework for dealing with disputed contact. It set out the processes for making decisions. It identified where the concepts of ‘best interests’ and the ‘voice of the child’ appeared in legislation and highlighted how these concepts feature in any guidance relating to child contact proceedings for courts and children’s hearings. It built on the original analysis of the Children (Scotland) Act 1995 in this regard, published in 2002.2

The review identified which reports and background information may be requested by the court or children’s hearing to enable them to reach a decision on disputed contact. This part of the research examined the impending legislative changes made by the Children’s Hearings (Scotland) Act 2011.

*Analysis of reported cases*
Case law is critical for interpreting the legal framework. Reported case law was analysed, to examine current decisions, issues and commentary about child contact decisions particularly when cases dealt with the question of domestic abuse. This analysis paid particular attention to how the concept of ‘best interests’ was applied and how children and young people’s views were regarded in decision-making processes.

*Desk-top research to identify relevant professionals’ training and guidance, complemented by consultation with 12 adult stakeholders*
The consultation complemented the desk-based research, seeking to identify current guidance and training. It focused on the guidance and training on domestic abuse and children’s rights (with particular attention to the right of children to express a view and the requirement that these views are taken into consideration when making orders relating to contact). Stakeholders were asked to identify any existing written guidance or training materials, future plans, and to reflect upon the research questions.

The consultation was carried out with individuals from the following professions and organisations: child and family law solicitors and advocates, children’s hearings training, Judicial Studies Committee (now The Judicial Institute of Scotland), Sheriffs, the Scottish Children’s Reporter Administration (SCRA), safeguarders, and those that train social workers. A total of 12 interviews were undertaken, by telephone or in person.

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Definition of ‘domestic abuse’

There is no one accepted definition of ‘domestic abuse’ in Scottish policy and legislation. This research study begins with a working definition from the Scottish Government’s National Domestic Abuse Plan for Children and Young People (2008):³

Domestic abuse (as gender-based abuse) can be perpetrated by partners or ex-partners and can include physical abuse (assault and physical attack involving a range of behaviour), sexual abuse (acts which degrade and humiliate women and are perpetrated against their will, including rape) and mental and emotional abuse (such as threat, verbal abuse, racial abuse, withholding money and other types of controlling behaviour such as isolation from family and friends).

Domestic abuse is most commonly perpetrated by men against women. The existence of violence against men is not denied, nor is the existence of violence in same sex relationships, nor other forms of abuse, but domestic abuse requires a response which takes account of the broader gender inequalities which women face.

In accepting this definition, it must be recognised that children are witness to and subjected to much of this abuse and there is a significant correlation between domestic abuse and the mental, physical and sexual abuse of children.

About this report

This report was compiled to provide a working document for the office of Scotland’s Commissioner for Children and Young People.*

The report is divided into two parts with two quite different approaches and styles. In Part One, there is a detailed narrative of the legislative framework and case law. It focuses on technical and legal aspects and provides a reference tool for those who wish to delve in to the detail and legal argument of contact issues.

In Part Two you will read the findings from a select number of interviews with key stakeholders and a concluding section, summarising the key points and suggested areas of action.

Appendices provide further detail of the study:

- Appendix 1 for fuller details of the methodology and research questions
- Appendix 2 for details of the stakeholders who participated in the consultation
- Appendix 3 for the interview schedule
- Appendix 4 for court forms requesting children’s views in family actions.

Anonymity

The study followed ethical procedures, with particular regard to informed consent within the consultation. Anonymity was not provided generally, although some opinions have not been attributed due to their sensitivity.

*It is important to note that this research work reviewed case law up to summer 2012 and does not include any cases since that date.

³ http://www.scotland.gov.uk/Publications/2008/06/17115558/0 (accessed 25.6.12), page 9
Further information

The report presumes some knowledge of the three types of proceedings. For more information about these proceedings, see:


2. Children’s hearings proceedings, including emergency orders
   - cl@n childlaw has factsheets on the children’s hearings.
     See http://clanchildlaw.org/factsheets/
   - The Scottish Children’s Reporter Administration have accessible descriptions of the children’s hearing system, for parents/carers and children/young people. See http://www.scra.gov.uk/children_s_hearings_system/information_for_parents_and_carers.cfm

2 International obligations: UNCRC and ECHR

Before examining the Scots legislative framework in which decisions about disputed contact between children and their parents are made, it is important to set out the international obligations that underpin the domestic decision making processes, firstly under the United Nations Convention on the Rights of the Child (UNCRC), and secondly under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

2.1 United Nations Convention on the Rights of the Child (UNCRC)

The study examines how the concepts of a child’s ‘best interests’ and ‘the voice of the child’ are used in contact proceedings. In Scots law, there is a tradition of such proceedings taking the child’s welfare as the paramount consideration. This is an even higher standard than that required by the UNCRC.4 In the UNCRC, Article 3 sets out the ‘best interests’ principle:

**Article 3(1)** In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Thus, Article 3 has a wide remit – all actions concerning children – but a lower threshold than ‘paramountcy’. A child’s best interests are ‘a primary consideration’. No sharp legal distinction has been made between the concept of a child’s ‘best interests’ (used in the UNCRC) and a child’s ‘welfare’ (used in Scots law).

The requirement to have regard to children’s views, when making decisions about children, has gained increasing recognition in Scots law. This has been influenced by Article 12 of the UNCRC, which states:

**Article 12(1)** States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The UNCRC is binding on the United Kingdom as a party to the treaty. The UNCRC has not, however, been incorporated into United Kingdom or Scots law and is, therefore, not enforceable in support of private rights and interests. It may, however, be used to

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4 The UK ratified the UNCRC in 1991. The UK is thus bound by the UNCRC in international law.
interpret domestic legislation. It is presumed that Parliament does not intend to legislate in a manner incompatible with treaties to which the United Kingdom is a party.

Reference has already been made to Articles 3 (best interests) and 12 (children’s views). In addition, several other Articles within the UNCRC are particularly relevant to disputed contact decisions:

**Article 7(1)** The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

**Article 9(1)** States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.

(2) In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

(3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

**Article 18(1)** States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

A child therefore generally has a right to live with both parents and both parents are responsible for the child’s upbringing and development. These rights are qualified by consideration of the child’s best interests. The child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents, unless that is contrary to the child’s best interests.

### 2.2 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

In contrast to the UNCRC, the provisions of the ECHR are largely incorporated into domestic law. This is through the Human Rights Act 1998, which requires all Scots law to be compatible with ‘Convention Rights’. Further, public authorities – like courts and children’s hearings – must not act incompatibly with such rights.

For this study, two Convention Rights are particularly relevant:

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Article 6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 8(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The following two chapters examine the relevant legislation and reported case law in Scotland, all of which must be seen in the context of the international obligations in the UNCRC and ECHR, set out above.
3 Legislative framework for disputed contact

Having set out the international obligations under the UNCRC and the ECHR in chapter 2, this chapter goes on to examine the domestic Scots legislative framework in which decisions about disputed contact between children and their parents are made and examines the processes applicable to different types of disputes. It is divided into the following sections:

- **Family actions** – where courts can make orders in relation to parental responsibilities and rights, often in situations of parental divorce or separation. Situations involving international child abduction are also included in this section. (See 3.1)

- **Children’s hearings proceedings** – where children in need of care and protection, or who commit offences, can be subject to supervision requirements or emergency court orders, which in turn can impose conditions regulating contact:
  - the current framework under the Children (Scotland) Act 1995 (see 3.2)
  - the future framework under the Children’s Hearings (Scotland) Act 2011 (see 3.3)

- **Adoption and permanence orders** – where courts can make an adoption order; or where courts can make a permanence order, giving a local authority the right to regulate a child’s residence and provide guidance to the child, otherwise vesting parental responsibilities and rights in other people, and which may grant authority to adopt the child. (See 3.4)

In each process, reference is made to the appropriate provisions concerned with, firstly, the best interests of the child, and, secondly, to the views of the child. The relevant legislative provisions are referred to and reproduced in detail, to ensure accuracy and for ease of reference.

In sections 3.1 and 3.2, the provisions of the Children (Scotland) Act 1995 can be seen as integral to the different processes involved in family actions and in the current framework for children’s hearings proceedings. It plays a central role in determining the approach taken in these different processes to the best interests of the child and the views of the child. Headings are intended to allow the reader to navigate to any part of the legislative framework of particular interest.
3.1 Family actions: court orders in relation to parental responsibilities and rights

This section is concerned with family actions, where courts can make orders in relation to parental responsibilities and rights, often in situations of parental divorce or separation.  

The primary legislation for disputed contact in family actions is the Children (Scotland) Act 1995 (the 1995 Act). Sections 1 and 2 set out parental responsibilities and rights. Section 1 contains the parent’s responsibility in relation to contact:

Children (Scotland) Act 1995

1(1) … [A] parent has in relation to his child the responsibility – …

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis …

The corresponding parental right is set out in section 2:

Children (Scotland) Act 1995

2(1) … [A] parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right – …

(c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis…

3.1.1 Best interests of the child in family actions

Section 11 of the 1995 Act applies when contact is disputed in court proceedings, whether in the sheriff court or Court of Session. The paramountcy of the child’s welfare is set out at section 11:

Children (Scotland) Act 1995

11(7) … in considering whether or not to make an order … and what order to make, the court:

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all;

By virtue of amendments to the 1995 Act, by the Family Law (Scotland) Act 2006, section 11 now includes specific reference to ‘abuse’, in the following terms:

Children (Scotland) Act 1995

11 (7A) In carrying out the duties imposed by subsection (7)(a) above, the court shall have regard in particular to the matters mentioned in subsection (7B) below.

(7B) Those matters are —

(a) the need to protect the child from —

(i) any abuse; or

(ii) the risk of any abuse,

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6 Special provisions apply when courts are considering a child’s views in cases involving international child abduction and are detailed in Appendix 5.
which affects, or might affect, the child;
(b) the effect such abuse, or the risk of such abuse, might have on the child;
(c) the ability of a person —
   (i) who has carried out abuse which affects or might affect the child; or
   (ii) who might carry out such abuse,
to care for, or otherwise meet the needs of, the child; and
(d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.

The term ‘abuse’ is defined in section 11, as follows:

**Children (Scotland) Act 1995**
11(7C) In subsection (7B) above —
“abuse” includes —
(a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;
(b) abuse of a person other than the child; and
(c) domestic abuse;
“conduct” includes —
(a) speech; and
(b) presence in a specified place or area.

No further definition of ‘domestic abuse’ is given in the legislation.

Another amendment was introduced, relating to parents’ co-operation with one another:

**Children (Scotland) Act 1995**
(7D) Where —
(a) the court is considering making an order under subsection (1) above; and
(b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child,
the court shall consider whether it would be appropriate to make the order.

### 3.1.2 Views of the child in family actions

Provision is made at section 11 in relation to the child’s views:

**Children (Scotland) Act 1995**
11(7) … in considering whether or not to make an order … … and what order to make, the court:
b) taking account of the child’s age and maturity, shall so far as practicable —
   (i) give him an opportunity to indicate whether he wishes to express his views;
   (ii) if he does so wish, give him an opportunity to express them; and
   (iii) have regard to such views as he may express.
There is a presumption\(^7\) in relation to the child’s age and maturity:

**Children (Scotland) Act 1995**

11(10) Without prejudice to the generality of paragraph (b) of subsection (7) above, a child 12 years of age or more shall be presumed to be of sufficient age and maturity to form a view ...

The mechanisms for a child to express views to the court in family actions are, substantially, to be found in the relevant Sheriff Court Ordinary Cause Rules (OCR) and Rules of the Court of Session (RCS).\(^8\)

Should a section 11 order be applied for in relation to a child, that child can receive notice of the application for a section 11 order (called ‘intimation of a court action’). This is done through Form F9 (33.7(1)(h) OCR) or a Form 49.8-N (49.8(1)(h) and 49.8(7) RCS). Copies of the Forms are in Appendix 4.

Where a child returns the Form F9, or otherwise indicates to the court a wish to express a view, then:

**Sheriff Court Ordinary Cause Rules**

33.19 (1) … the sheriff shall not grant any order unless an opportunity has been given for the views of that child to be obtained or heard.

(2) Where a child has indicated his wish to express his views, the sheriff shall order such steps to be taken as he considers appropriate to ascertain the views of that child.

(3) The sheriff shall not grant an order in a family action, in relation to any matter affecting a child who has indicated his wish to express his views, unless due weight has been given by the sheriff to the views expressed by that child, having due regard to his age and maturity.

Equivalent provision is made in Court of Session proceedings (RCS 49.20).

Further provision is made in the Sheriff Court for recording a child’s views:

**Sheriff Court Ordinary Cause Rules**

33.20 (1) This rule applies where a child expresses a view on a matter affecting him whether expressed personally to the sheriff or to a person appointed by the sheriff for that purpose or provided by the child in writing.

(2) The sheriff, or the person appointed by the sheriff, shall record the views of the child in writing; and the sheriff may direct that such views, and any written views, given by a child shall —

(a) be sealed in an envelope marked “Views of the child-confidential”;

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\(^7\) This type of legal presumption is a rule of law, “which permits a court to assume a fact is true until such time as there is a preponderance (greater weight) of evidence which disproves or outweights (rebuts) the presumption” (http://legal-dictionary.thefreedictionary.com/presumption). This legal presumption does not bar children under the age of 12 from having the opportunity to express their views.

\(^8\) The report includes references to the relevant rules found in Chapter 33 of the OCR, which apply to Family Actions. Broadly, these rules are replicated in Chapter 33A, which apply to applications of dissolution or declarator of nullity of a civil partnership or separation of civil partners. Chapter 49 of RCS applies to actions in respect of civil partnerships.
(b) be kept in the court process without being recorded in the inventory of process;
(c) be available to a sheriff only;
(d) not be opened by any person other than a sheriff; and
(e) not form a borrowable part of the process.

The court can appoint a local authority, or another reporter, to “investigate and report to the court on the circumstances of the child and on proposed arrangements for the case and upbringing of the child”.

The rules do not specify that the local authority or reporter must have regard to the child’s views.

In proceedings in the Sheriff Court, there is specific provision for Child Welfare Hearings where section 11 orders are sought. The OCR provides for the child to attend:

**Sheriff Court Ordinary Cause Rules**

33.22A(5) All parties (including a child who has indicated his wish to attend) shall, except on cause shown, attend the Child Welfare Hearing personally.

In addition to the above, three further methods for children to express their views should be noted:

- legal representation of the child;
- appointment of a curator *ad litem* to safeguard the child’s interests;
- giving evidence by the child.

**Legal representation of the child**

Section 11 makes specific reference to legal representation:

**Children (Scotland) Act 1995**

11(9) Nothing in paragraph (b) of subsection (7) above requires a child to be legally represented, if he does not wish to be, in proceedings in the course of which the court implements that paragraph.

Section 2 of the **Age of Legal Capacity (Scotland) Act 1991** provides that:

2(4A) A person under the age of 16 years shall have legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; and ... a person 12 years of age or more shall be presumed to be of sufficient age and maturity to have such understanding.

A child with that legal capacity is also able to sue or defend in any civil proceedings (section 2(4B)).

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9 OCR 33.21 and RCS 49.22
10 The Child Welfare Hearing was introduced following the Children (Scotland) Act 1995 to provide an early hearing to resolve any disputed issues in family actions, particularly in relation to children.
When a child consults a solicitor, the solicitor is the one who assesses whether the necessary general understanding is present. Again, the presumption does not bar a younger child, with sufficient understanding, from instructing a solicitor.

In proceedings under section 11, the child concerned may instruct a solicitor to raise proceedings, or to apply to the court to become a party to the proceedings. It may be, however, that the legal representation of the child in the court action will be confined to the solicitor writing a letter to the court expressing the child’s views.

**Appointment of a curator ad litem to safeguard the child’s interests**

In family actions, a curator ad litem may be appointed by the court to safeguard the child’s interests so far as that child is affected by a particular litigation. The curator is thus not acting as the child’s representative. There is no statutory basis for the appointment of a curator in such actions (unlike in adoption and permanence proceedings, see below). Anecdotally, practice varies across sheriff courts as to the circumstances and frequency of such appointments. Concerns have arisen as to the lack of clarity surrounding the curator’s role (see chapter 4.2).

**Giving evidence by the child**

A further means of communicating a child’s views in all civil proceedings is by their giving evidence as a witness at a proof. By virtue of section 11 of the **Vulnerable Witnesses (Scotland) Act 2004**, a person under the age of 16 is a ‘vulnerable witness’. Various ‘special measures’ can be used to help a child to give evidence. The court must authorise “the use of such special measure or measures as the court considers to be the most appropriate for the purpose of taking the child witness’s evidence” (section 12).

Special measures are defined in section 18 as:

- taking of evidence by a commissioner
- use of a live television link
- use of a screen
- use of a supporter

The court may order that the child witness gives evidence without the benefit of any special measure only if: (a) the child has expressed a wish to give evidence without the benefit of any special measure and it is appropriate to do so; or (b) the use of any special measure would “give rise to a significant risk of prejudice to the fairness of the proceedings or otherwise to the interests of justice” and the “risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made” (section 12(4)).
3.2 Children’s hearings proceedings: the current framework under the Children (Scotland) Act 1995

This section deals with children’s hearings proceedings, where children in need of care and protection, or who commit offences, can be subject to supervision requirements or emergency court orders. These supervision requirements or court orders can impose conditions regulating contact.

The legislative framework that regulates children’s hearings proceedings is to change in mid-2013. In this section, the current framework under the Children (Scotland) Act 1995 is examined, followed in the next section by an examination of the future framework set out by the Children’s Hearings (Scotland) Act 2011.

The primary legislation relevant to consideration of the child’s best interests and hearing the views of the child within children’s hearings proceedings is, at present, the Children (Scotland) Act 1995. Below, provisions for best interests are considered first, following by children’s views. The latter includes considerations of representation of the child.

3.2.1 Best interests of the child in children’s hearings proceedings

Relevant subsections of section 16 are:

Children (Scotland) Act 1995

16(1) Where … a children’s hearing decide, or a court determines, any matter with respect to a child the welfare of that child throughout his childhood shall be their or its paramount consideration. …

(3) … no requirement or order … shall be made with respect to the child concerned unless the children’s hearing consider, or as the case may be the sheriff considers, that it would be better for the child that the requirement or order be made than that none should be made at all. …

(5) If, for the purpose of protecting members of the public from serious harm (whether or not physical harm) —

(a) a children's hearing consider it necessary to make a decision … which (but for this paragraph) would not be consistent with their affording paramountcy to the consideration … they may make that decision; or

(b) a court considers it necessary to make a determination … which (but for this paragraph) would not be consistent with its affording such paramountcy, it may make that determination.

A child has a right and an obligation to attend at all stages of the hearing (section 45(1) and (2)). A child may be released from his or her obligation to attend where a hearing is satisfied, “that it would be detrimental to the interests of the child for him to be present at the hearing of his case” (Section 45(2)(b)).
Section 46 gives the hearing the power to exclude a relevant person\textsuperscript{11} or their representative from any part or parts of the hearing for so long as is necessary in the interests of the child:

**Children (Scotland) Act 1995**

46(1) ... where they are satisfied that — ...  

(b) the presence of the person or persons in question is causing, or is likely to cause, significant distress to the child ...  

(2) the chairman of the hearing shall, after that exclusion has ended, explain to any person who was so excluded the substance of what has taken place in his absence.

Section 41(1)(a) requires the appointment of a safeguarder to be considered, “... if it is necessary to appoint a person to safeguard the interests of the child in the proceedings”.

A safeguarder within children’s hearings court proceedings has the powers and duties at common law of a curator ad litem in respect of the child (see *Act of Sederunt (Child Care and Maintenance Rules) 1997* 3.8 (c) (CCMR)). A safeguarder will try to ascertain the child’s views, in the course of preparing a report for the children’s hearing. Unlike reporters in family actions in court, a safeguarder will usually be present at the children’s hearing when the safeguarder’s report is considered.

The paramountcy of the child’s welfare applies to emergency orders made by the court. These orders are: Child Protection Orders (CPO), Child Assessment Orders and Exclusion Orders\textsuperscript{12}. However, when a court is considering making a CPO under section 57 of the 1995 Act, and making directions in relation to contact in terms of section 58, the provisions of section 16(3) do not apply.

Instead, under section 57(1), the criteria for granting a CPO are that there are reasonable grounds to believe that the child is suffering or will suffer significant harm and that a CPO is necessary to protect the child from harm. Local authorities may also apply for a CPO in terms of section 57(2), if they have reasonable cause to suspect a child is suffering or will suffer significant harm, if their inquiries are being frustrated by denial of access to the child, and access is required urgently.

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\textsuperscript{11} “Relevant person” is defined by section 93(2)(b) of the Children (Scotland) Act 1995, as amended by the Court of Session and the Supreme Court:  
(a) any parent enjoying parental responsibilities or rights or a right of contact in terms of a contact order under Part I of this Act;  
(b) any person in whom parental responsibilities or rights are vested by, under or by virtue of this Act;  
(ba) any person in whom parental responsibilities or rights are vested by, under or by virtue of a permanence order (as defined) in section 80(2) of the Adoption and Children (Scotland) Act 2007;  
(c) any person who appears to be a person who ordinarily (and other than by reason only of his employment) has charge of, or control over, the child or who appears to have established family life with the child with which the decision of a children’s hearing may interfere.

\textsuperscript{12} A Child Protection Order allows for a child to be removed or kept in place, may require a person to produce a child, and other specifics.  
A Child Assessment Order allows for a child to be taken away for assessment of the child’s health, development or treatment, or may require a person to produce a child for an assessment.  
An Exclusion Order allows for an alleged abuser to be excluded from a child’s family home or from contact with a child.
3.2.2 Views of the child in children’s hearings proceedings

For the vast majority of children’s hearings and connected court proceedings, the views of the child will be taken into account. Section 16 states:

**Children (Scotland) Act 1995**

16 (2)… [A] children’s hearing or as the case may be the sheriff, taking account of the age and maturity of the child concerned, shall so far as practicable —

(a) give him an opportunity to indicate whether he wishes to express his views;  
(b) if he does so wish, give him an opportunity to express them; and  
(c) have regard to such views as he may express;  
and without prejudice to the generality of this subsection a child 12 years of age or more shall be presumed to be of sufficient age and maturity to form a view.

The details for applying this provision in connection with children’s hearings are contained within Rule 15 of the **Children’s Hearings (Scotland) Rules 1996** (CHR):

**Children’s Hearings (Scotland) Rules 1996**

15(1) The children’s hearing, taking account of the age and maturity of the child … shall so far as practicable give the child an opportunity to indicate whether he wishes to express his views. …

(3) Where he has indicated his wish to express his views –

(a) the children's hearing and the chairman of the hearing may exercise any of their powers under the Act or these Rules as they or, as the case may be, he considers appropriate in order to ascertain the views of the child; and  
(b) the children's hearing shall not make any decision or take any action … unless an opportunity has been given for the views of the child to be obtained or heard and … they have had regard to such views as he may have expressed.

(4) … [T]he views of the child may be conveyed to the children's hearing –

(a) by the child, or by his representative, individually or together in person;  
(b) by the child in writing, on audio or video tape or through an interpreter; or  
(c) by any safeguarder appointed by the hearing.

(5) For the purpose of this rule, a child of 12 years of age or more shall be presumed to be of sufficient age and maturity to form a view.
When the child has been released from his obligation to attend and Rule 15 above applies, Rule 6 CHR sets out the Reporter’s duties:

**Children’s Hearings (Scotland) Rules 1996**

6(4)... [T]he Principal Reporter shall inform the child –

(a) of the entitlement by virtue of section 16(2) of the Act and these rules to indicate whether he wishes to express his views;

(b) that if he does so wish, he will be given an opportunity to express them; and

(c) that any such views as may be given by the child to the Principal Reporter before the time at which the children’s hearing is to be held will be conveyed by the Principal Reporter to the members of the children's hearing, to any relevant person and to any safeguarder, for the purpose of the hearing.

Section 46 of the **1995 Act** also gives the hearing the power to exclude a relevant person from any part or parts of the hearing. This can be done in order to obtain the child’s views, in relation to the case before the hearing. The relevant person can be excluded as long as it is necessary, in the interests of the child. The chairman of the hearing must explain to the person excluded the substance of what took place, when that person was absent.

Rule 3.5 of the relevant court rules (**Act of Sederunt (Child Care and Maintenance Rules) 1997**) sets out the procedure in the majority of cases where a child wishes to express a view before a sheriff. This does not apply to applications to a sheriff to establish grounds of referral.

3.5 (1) Where a child has indicated his wish to express his views, the sheriff –

(a) may order such steps to be taken as he considers appropriate to ascertain the views of that child; and

(b) shall not make any order or disposal ... unless an opportunity has been given for the views of that child to be obtained or heard.

(2) ... [T]he views of the child may be conveyed –

(a) by the child orally or in writing;

(b) by an advocate or solicitor acting on behalf of the child;

(c) by any safeguarder or curator ad litem appointed by the court; or

(d) by any other person (either orally or in writing), provided that the sheriff is satisfied that that person is a suitable representative and is duly authorised to represent the child.

(3) Where the views of the child are conveyed orally to the sheriff, the sheriff shall record those views in writing.
(4) The sheriff may direct that any written views given by a child, or any written record of those views, shall –

(a) be sealed in an envelope marked “Views of the child - confidential”;

(b) be kept in the court process without being recorded in the inventory of process;

(c) be available to a sheriff only;

(d) not be opened by any person other than a sheriff, and

(e) not form a borrowable part of the process.

Section 16(2) in relation to the child’s views does not apply when a sheriff is considering making a Child Protection Order (CPO) under section 57 of the 1995 Act, and making directions in relation to contact in terms of section 58. Directions as to contact do not regulate parental rights and responsibilities in the manner of section 11, and CPOs can only last for a maximum of eight working days. The direction as to contact is given to the applicant, usually the local authority, to allow, or prohibit, contact between the child and another person, and should only be given if it is necessary to do so. On an application to vary or recall the CPO, or should the Reporter decide to proceed with grounds of referral, the child’s views will be regarded in the normal way, in terms of section 16(2).

**Representation of the child:**

A child can be accompanied by a ‘representative’, who may assist the child in discussing the child’s case within the children’s hearing (Rule 11(2) CHR). In court proceedings, a child may be represented by an advocate or a solicitor, or another representative who can satisfy the sheriff on suitability (Rule 3.21 CCMR).

**Legal representation of the child:**

Two circumstances allow for the appointment of a legal representative to a child: (1) to allow for effective participation; and (2) where the child is likely to meet the criteria for authorisation for secure accommodation. The detailed criteria are found in Rule 3 of the Children’s Hearings (Legal Representation) (Scotland) Rules 2002 (Legal Rep Rules). The appointment may be made either by a business meeting or by a children’s hearing. It may be made even if a safeguarder is already appointed.

In considering whether a child can effectively participate, the business meeting or children’s hearing will be guided by rule 3B:

**Children’s Hearings (Legal Representation) (Scotland) Rules 2002**

3B A person’s ability to effectively participate in a Children’s Hearing may be affected, in particular, by —

(a) the complexity of the case, including the points of law in issue;

(b) the nature of the issues involved;

(c) the ability of the individual, with the assistance of a representative under rule 11 of the 1996 Rules, to consider and challenge any document or information before the Hearing;

(d) the ability of the individual, with the assistance of a representative under rule 11 of the 1996 Rules, to present their views in an effective manner.
3.3 Children’s hearings proceedings: the future framework
under the Children’s Hearings (Scotland) Act 2011

Changes to the Children’s Hearings System introduced by the Children’s Hearings (Scotland) Act 2011 (the 2011 Act) are expected to come into force in June 2013. Below, major changes that impact on this study are described.

3.3.1 Best interests of the child in children’s hearings proceedings – the future

Section 25 of the 2011 Act differs slightly from section 16(1) of the 1995 Act by referring specifically to the need to safeguard and promote a child’s welfare, and reads:

Children’s Hearings (Scotland) Act 2011

25 (2) The children’s hearing, pre-hearing panel or court is to regard the need to safeguard and promote the welfare of the child throughout the child’s childhood as the paramount consideration.

Section 26 of the 2011 Act is in equivalent terms to section 16(5) of the 1995 Act, with one exception. Where the children’s hearing or court decide that it is necessary to make a decision inconsistent with the paramountcy of the child’s welfare in order to protect members of the public from serious harm, the court or hearing must:

Children’s Hearings (Scotland) Act 2011

26(2) … regard the need to safeguard and promote the welfare of the child throughout the child’s childhood as a primary consideration rather than the paramount consideration.

3.3.2 Views of the child in children’s hearings proceedings – the future

The views of the child are dealt with in section 27. This section applies where a children’s hearing or the sheriff is coming to a decision about a matter relating to a child. The exception is when a sheriff is deciding whether to make a CPO (this is the same under the 1995 Act). In the Explanatory Notes to the 2011 Act, the rationale is: “As an emergency protection measure, it would not be possible to seek the child’s views before making a CPO”. Again, by virtue of section 41 of the 2011 Act, the sheriff must consider whether to make a contact direction, although there is no test of necessity.

The provisions in section 27 about hearing a child’s views are substantially the same as those contained in section 16 of the 1995 Act.

Exclusion of Relevant Person

Some change has been made by section 76 of the 2011 Act to the hearing’s power to exclude a relevant person. (Section 77 extends the power of exclusion to the relevant person’s representative.) Where the hearing is satisfied that the presence of a relevant person in relation to the child is preventing the hearing from obtaining the child’s views, or is causing, or is likely to cause, significant distress to the child, then the hearing may exclude the relevant person for as long as is necessary. The chair must then explain to the relevant person what has taken place in their absence. Previously, under section 46

of the 1995 Act, as noted above, the explanation was merely of the ‘substance’ of what had taken place. No such restriction appears in the 2011 Act, and it may be that the new provisions will operate to limit the child’s confidence in speaking up during the exclusion of the relevant person or their representative.

However, the effect of the requirement to explain, in terms of section 76, is tempered by section 178. This provides that:

Children’s Hearings (Scotland) Act 2011

178(1) A children’s hearing need not disclose to a person any information about the child to whom the hearing relates or about the child’s case if disclosure of that information to that person would be likely to cause significant harm to the child.

Non-disclosure can thus occur even where there is a requirement to explain under section 76.

Accuracy of child’s views in documents

Section 121 of the 2011 Act is an important addition. A chairing member of the children’s hearing must “ask the child whether the documents provided to the child … accurately reflect any views expressed by the child”, unless taking account of the child’s age and maturity it would not be appropriate to do so.

Children’s advocacy services

Provision is made in section 122 for the use of children’s advocacy services within a children’s hearing. The chairing member must inform the child of the availability of advocacy services, unless, taking account of the child’s age and maturity, it would not be appropriate to do so. ‘Children’s advocacy services’ are defined as “services of support and representation provided for the purposes of assisting a child in relation to the child’s involvement in a children’s hearing”. The detailed provisions for advocacy services will be made by regulations, which are not yet finalised.

Legal representation of children

In terms of legal representation within the 2011 Act, this will be administered by the Scottish Legal Aid Board rather than by local authorities or by sheriffs. Section 191 inserts a new section 28B of the Legal Aid (Scotland) Act 1986 and alters the range of proceedings for which children’s legal aid may be available. This includes, for example, children’s hearings after the making of a child protection order.

Legal aid will automatically be made available in certain circumstances for children wishing to be legally represented at children’s hearings, including where it might be necessary to make a compulsory supervision order with a secure accommodation authorisation. If a child does not qualify under this automatic provision, another form of legal aid – Assistance by way of Representation (ABWOR) – may be available, the precise details of which will be contained within regulations yet to be finalised. Solicitors will have to register with SLAB and sign up to a Code of Practice.
In relation to sheriff court proceedings, the following three conditions will have to be met for legal aid to be granted by the Scottish Legal Aid Board:

- It is in the best interests of the child;
- It is reasonable in the circumstances; and
- The expenses of the case cannot be met without undue hardship to the child (the child’s income and capital being considered).

Full information as to how these new provisions will work in practice will be available once the regulations and Code of Practice are finalised. It follows that there is an opportunity to contribute to their development.

**Grounds for referral: domestic abuse**

The most significant change for this study is the addition of a new ground for referral in section 67(f): “the child has or is likely to have a close connection with a person who has carried out domestic abuse”.

The circumstances in which a child is defined as having a close connection with a person is set out in section 67:

**Children’s Hearings (Scotland) Act 2011**

67(3)

(a) the child is a member of the same household as the person; or

(b) the child is not a member of the same household as the person but the child has significant contact with the person.

Norrie (2011) notes that the new definition of ‘domestic abuse’ in the Domestic Abuse (Scotland) Act 2011 is narrower than would be appropriate for the children’s hearing system (i.e. it would not include a child potentially being harmed by witnessing his or her sibling being beaten by a parent). He notes the potential confusion due to this, between proceedings.

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Norrie, K. (2011) ‘Families in Fear’, Journal online, [http://www.journalonline.co.uk/Magazine/56-7/1009965.aspx](http://www.journalonline.co.uk/Magazine/56-7/1009965.aspx) (accessed 28.6.12). In relation to determining whether it is a domestic abuse interdict, section 3(2)(b) states: The court may make the determination if satisfied that the interdict is, or is to be, granted for the protection of the applicant against a person who is (or was) —

(a) the applicant’s spouse,
(b) the applicant’s civil partner,
(c) living with the applicant as if they were husband and wife or civil partners, or
(d) in an intimate personal relationship with the applicant.
3.4 Adoption and permanence orders
This section is concerned with proceedings where courts can make an adoption order; or a permanence order, giving a local authority the right to regulate a child’s residence and provide guidance to the child, otherwise vesting parental responsibilities and rights in other people, and which may grant authority to adopt the child.

The primary legislation in relation to adoption and permanence in Scotland is the Adoption and Children (Scotland) Act 2007 (the 2007 Act), which came into force on 28 September 2009.

3.4.1 Best interests of the child in adoption and permanence orders
The paramountcy of the child’s welfare is expressed in the 2007 Act, but the nature of the decision being taken will determine whether the child’s welfare throughout life or the child’s welfare throughout childhood will be paramount.

Section 14 applies to “decisions relating to the adoption of a child”. Section 14(3) states:

Adoption and Children (Scotland) Act 2007
14(3) The court or adoption agency is to regard the need to safeguard and promote the welfare of the child throughout the child’s life as the paramount consideration.

In relation to adoption orders, section 28(2) reads: “The court must not make an adoption order unless it considers that it would be better for the child that the order be made than not”.

Sections 84 sets out conditions and considerations for making a permanence order, and contains the following:

Adoption and Children (Scotland) Act 2007
84(3) The court may not make a permanence order in respect of a child unless it considers that it would be better for the child that the order be made than that it should not be made.

(4) In considering whether to make a permanence order and, if so, what provision the order should make, the court is to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration.

Curators ad litem
In applications for adoption orders and for permanence orders, the court must appoint a curator ad litem, whose duty is, in general terms, to safeguard the interests of the child (see section 108 of the 2007 Act).

The relevant sheriff court rules are found in the Sheriff Court Adoption Rules 2009 (AS). Rule 12 specifies the duties in an adoption order application and Rule 44 specifies the duties in a permanence order application. Safeguarding the child’s interests is the curator’s paramount duty. Further duties are imposed in relation to the child’s welfare. The curator must “ascertain whether it would be better for the child that the court should make the order than it should not make the order” and must establish whether the order is likely to safeguard and promote the child’s welfare (throughout childhood, or throughout life, depending on the order sought).
The curator *ad litem* reports to the sheriff in writing, within four weeks of being appointed.

Provisions applicable to Court of Session proceedings in relation to adoption and permanence are similar.\(^{15}\)

### 3.4.2 Views of the child in adoption and permanence orders

Where a child is aged 12 or over, an adoption order or a permanence order may not be made without the child’s consent unless the court is satisfied that the child is incapable of consenting to the order (see sections 32 and 84).

Section 14 imposes duties on the court and adoption agency, in decisions relating to the adoption of a child:

*Adoption and Children (Scotland) Act 2007*

14(4) The court or adoption agency must, so far as is reasonably practicable, have regard in particular to — …

(b) the child’s ascertainable views regarding the decision (taking account of the child’s age and maturity), …

(8) … [A] child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view for the purposes of that subsection.

Section 84 sets out the duties of the court in relation to hearing the views of the child in permanence order applications:

*Adoption and Children (Scotland) Act 2007*

84(5) Before making a permanence order, the court must —

(a) after taking account of the child’s age and maturity, so far as is reasonably practicable —

(i) give the child the opportunity to indicate whether the child wishes to express any views, and

(ii) if the child does so wish, give the child the opportunity to express them,

(b) have regard to —

(i) any such views the child may express …

The wording above is very similar to section 11 of the 1995 Act, under family law actions, but not the same as for adoption in section 14 of the 2007 Act. A child aged 12 or over is presumed to be of sufficient age and maturity to form a view.

**Curators ad litem and reporting officers**

Where a curator *ad litem* has been appointed in the sheriff court in relation to adoption, Rule 12 of AS requires the curator *ad litem* to ascertain the child’s views:

*Sheriff Court Adoption Rules 2009*

12(3) A curator ad litem … … must —

(u) ascertain from the child whether he wishes to express a view and, where a child indicates his wish to express a view, ascertain that view. …

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\(^{15}\) See RCS r.67.12(3) and r.67.38
Where a child wishes to express views, by virtue of Rule 17 of the:

Sheriff Court Adoption Rules 2009

17(1)(a) may order such procedural steps to be taken as he considers appropriate to ascertain the views of that child; and
(b) must not make an order ... unless an opportunity has been given for the views of that child to be obtained or heard.

Where the child’s views have been recorded in writing, Rule 17 provides as follows:

Sheriff Court Adoption Rules 2009

17(2) ... [T]he sheriff may direct that such a written record is to —
(a) be sealed in a envelope marked “Views of the child – confidential”;
(b) be available to a sheriff only;
(c) not be opened by any person other than a sheriff; and
(d) not form a borrowable part of the process.

There are similar provisions where a curator ad litem has been appointed in the sheriff court in relation to permanence.16

Provisions are similar in Court of Session proceedings, in relation to adoption and permanence.17

In applications for adoption orders and for permanence orders, the court will appoint a reporting officer in addition to a curator ad litem (although the two roles will usually be carried out by the same person). The duties of a reporting officer are found in rules 12 and 44 of AS, with the equivalent rules for Court of Session proceedings in rules 67.12 and 67.40 of RCS.18

In adoption applications, no reporting officer is appointed if there is in existence a permanence order with authority to adopt. In permanence applications, no reporting officer is appointed unless authority to adopt is sought. However, in all applications where the child concerned is aged 12 or over, a reporting officer must be appointed in order to witness the child’s consent.

16 See rules 44 and 46 of AS
17 See rules 67.12, 67.16, 67.38 and 67.40 of RCS
18 For further information, see rules at http://www.scotcourts.gov.uk/library/rules/Sheriff%20Court%20Adoption%20Rules/index.asp (accessed 2.7.12)
3.5 **Reports and background information: Children’s hearings and courts**

In reviewing legislation above, reference has already been made to reports by:

- Court Reporters in family actions
- Safeguards
- Curators ad litem
- Reporting officers in adoption and permanence proceedings

Further reports are provided for in children’s hearings proceedings, and in adoption and permanence proceedings:

**Children’s hearings**

- For the purposes of a reporter making an initial investigation, the reporter may request a report from the local authority and the local authority must do so.\(^{19}\) A reporter must make such reports available to the children’s hearing, as well as other specified documents relevant to the child’s case being considered by the hearing.\(^{20}\)

**Adoption and permanence orders**

- When an application for adoption or for permanence is lodged with the court, certain documents must accompany the application. They include a report by the local authority or, where appropriate, an adoption agency. The content of such reports is prescribed by Rule 8 AS (adoption) and Rule 31 AS (permanence)\(^{21}\). The rules specify certain matters relating to the welfare of the child concerned and the child’s views, if appropriate.

3.6 **Summing up**

Legislation has been passed, with the explicit intention of proceedings paying greater attention to the (negative) impacts of domestic abuse on children. When courts make decisions about parental responsibilities and rights, under section 11 of the 1995 Act, courts must now take account of ‘abuse’ when determining the child’s welfare. Under the 2011 Act, children can now be referred to the children’s hearings, on the grounds of the child having – or likely to have – a close connection with a person who has carried out domestic abuse. Yet, there is no definition of ‘domestic abuse’ in either legislation.

Scots law continues its tradition of prioritising a child’s welfare when making decisions about contact, within all three types of proceedings. Indeed, it is the paramount consideration for courts and children’s hearings. There is some variation across the legislation and there is the children’s hearing exception in order to protect members of the public from serious harm. No definition of ‘welfare’ is given within the legislation.

The principle of having regard to children’s views, in matters affecting the child, is being threaded ever more into the relevant legislation and court rules. The mechanisms to

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\(^{19}\) Section 56(2) of the 1995 Act  
\(^{20}\) Rule 5(1) of the Children’s Hearings (Scotland) Rules 1996  
\(^{21}\) The equivalent Court of Session rules are found at 67.8 and 67.28
support this continue to expand, such as the proposed provision of children's advocacy services for the children's hearings. Yet there continues to be multiple people who may be appointed to represent a child’s ‘best interests’, who may or may not be required to ascertain the child’s best views as part of this. There are possibilities for some children to be represented legally. The law continues to show a ‘balancing act’ between protecting a child’s best interests and having regard to the child’s views.

The next chapter examines reported court decisions on disputed contact. The legislative frameworks set out in this chapter are interpreted and applied by the courts in the course of their decisions on contact.
4 Analysis of reported court decisions on disputed contact

This section analyses reported case law. The first part (4.1) looks at how the child’s best interests are dealt with in family actions, children’s hearings proceedings, and adoption and permanence orders. The second part (4.2) examines how the child’s views are assessed in the various decision making processes, divided into five issues:

- The age and maturity of the child;
- The weight to be attached to the child’s views;
- The subordination of the child’s views to the child’s welfare or best interests;
- The methods by which a child’s views are communicated; and
- Confidentiality in relation to the child’s views.

Cases that specifically deal with the question of domestic abuse are included along with cases dealing more generally with contact, best interests and views of the child. The principles derived from decisions on contact generally apply equally to cases in which domestic abuse is raised as an issue.

4.1 Best interests of the child in reported case decisions on disputed contact

As a child’s welfare has long been a principle in Scots law, there is a lengthy history of its interpretation by the court. There has been resistance to having a ‘welfare checklist’ – i.e. a legislative list of criteria to take into account – with the preference for courts to be able to take account of the particular circumstances of each case. Thus, reported case law is central to how a child’s welfare has been determined, defined, and judged.

Below these issues are addressed across the three proceedings covered by this study: family actions, children’s hearings proceedings, and adoption and permanence orders.

4.1.1 Best interests of the child in family actions

No presumption of contact with parent

There is no presumption in favour of contact. Even before the 1995 Act came into force, the courts rejected a presumption in favour of contact between a child and their non-resident parent. As Lord Dunpark in Porchetta v Porchetta 1986 S.L.T. 105 put it:

A father does not have an absolute right to access to his child. He is only entitled to access if the court is satisfied that that is in the best interests of the child.

In Sanderson v McManus 1997 S.C. (HL) 55, the House of Lords had to construe the provisions of section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986, which provided that: “In any proceedings relating to parental rights the court shall regard the welfare of the child involved as the paramount consideration ...”.

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In deciding that the matter did not involve applying a presumption, Lord Hope said:

The relationship between the natural father and the child can never be dismissed as irrelevant. The natural relationship is a fact of life which it will always be proper to take into account. But the importance which is to be attached to it must vary according to the circumstances. This is a matter which must be decided not by applying any presumption but upon an evaluation of the evidence.

He went on to examine the approach to be taken by the court:

As with any other factor which the court is asked to take into account, the question is whether contact with the parent has something to offer which is likely to be of benefit to the child’s welfare. This question must be examined from the point of view of the child. It may normally be assumed that the child will benefit from continued contact with the natural parent. But there may be cases where it is plain on the evidence that it has nothing to offer at all. There may be other cases where the evidence will show that continued contact is likely to be harmful. Whatever the view which is taken on this matter in the light of the evidence, the child’s welfare is paramount. The decision of the court will depend on its analysis of all the factors which bear on the question what is in the best interests of the child.

**General principle: maintaining contact with a parent is conducive to the child’s welfare**

There is a general principle that contact with a parent is conducive to a child’s welfare. While not being bound by the Sanderson decision, the Inner House in White v White 2001 S.C. 689 paid respect to Lord Hope’s observations insofar as they were relevant. Lord Rodger expressly referred to “Lord Hope’s formulation of the assumption as to the value of a parent’s contact with his child”. In construing section 11(7)(a), Lord Rodger observed:

… [O]ne can infer from section 1(1)(c) that Parliament has proceeded on the general principle that it conduces to the welfare of children if their absent parent maintains personal relations and direct contact with them on a regular basis. … … [T]his general principle is to much the same effect as part 9.3 of the United Nations Convention on the Rights of the Child which has been ratified by the United Kingdom. …

Parliament has itself recognised that there is a limit to the extent to which parents can be expected to comply with the responsibilities laid upon them. They cannot be expected to do so if it is impracticable, for instance, because they are working far from home. Similarly, there may be particular circumstances where the discharge by a parent of his parental responsibilities would not in fact operate in the interests of the child. … … Parliament therefore places a limit on the parental responsibilities and does not require that a responsibility which is intended to be for the benefit of the child should be exercised so as to work to his detriment. But that necessary qualification does not detract in any way from the general principle which is to be deduced from the provision in para (c): that it is conducive to the welfare of children if their absent parents maintain personal relations and direct contact with them on a regular basis.
Again, Lord Rodger underlined that an individual decision on the child’s welfare must be made in every case, dependent on the facts and circumstances:

... The court must consider all the relevant material and decide what would be conducive to the child’s welfare. That is the paramount consideration. In carrying out that exercise the court should have regard to the general principle that it is conducive to a child’s welfare to maintain personal relations and direct contact with his absent parent. But the decision will depend on the facts of the particular case and, if there is nothing in the relevant material on which the court, applying that general principle, could properly take the view that it would be in the interests of the child for the order to be granted, then the application must fail.

Lord McCluskey described the court’s task:

[T]he possibility and the advantages of maintaining the link between the father and his daughter fall to be taken into account when the court comes to make the judgment required of it under the 1995 Act; but, however its importance may be assessed in the circumstances of any particular case, it is one factor among many. It may be determinative; it may not. It must always be a matter of weighing all the material bearing upon welfare and the interests of the child.

In rejecting the use of a checklist, Lord McCluskey went on:

It would be impossible to list all the other matters that might be relevant, because life constantly throws up unprecedented circumstances; and the law has to be flexible enough to cope with the unforeseen.

**The court’s interpretation of the amendment to section 11, in relation to ‘abuse’**

Since White was decided, section 11 of the 1995 Act has been amended (see chapter 3.2). In the first reported case dealing with the amended section 11, Treasure v McGrath 2006 Fam. L.R. 100, Sheriff Morrison made the following observations about the new provisions:

These additional provisions provide that ... the court must consider the need to protect the child from abuse; and, where two or more people would have to cooperate with one another in matters affecting the child, whether it would be appropriate to make the order. These are already matters that a court would consider, amongst many others. It is not clear why these two have been selected for specific reference by Parliament, although there is always concern about dealing with abuse. “Abuse” can be a pejorative term, and counsel for the defender was conscious of its emotive connotations.

The case involved an application by a father for parental rights and responsibilities. The sheriff was referred to the three tests of “commitment, attachment and motive”, which have been enunciated in similar English cases, saying:

... Those tests are not the end of the matter because the overriding consideration is the child’s welfare or best interests. I think that the considerations of commitment, attachment and motive will feature amongst the factors a court would have regard to.

He elaborated on the court’s task as follows:
... In any application for parental responsibilities and rights, there is no onus of proof on a party and ... the test is: what is in the best interests of the child? In answering that question one would consider all the factors relevant to the paramount consideration of the welfare of the child which would certainly include the following: (1) the degree of commitment by the applicant to the child; (2) the degree of attachment between the applicant and the child; (3) the importance of that commitment and attachment to the child’s welfare; (4) the reasons or motives of the applicant in applying for the order; (5) whether the applicant would take account of the child’s views, where appropriate; (6) any need to protect the child from conduct of a person; (7) where the applicant and a parent or other person having parental responsibilities and rights have to co-operate in matters affecting the child, whether they can do so; and (8) whether it is better for the child that the order be made than that no order should be made.

It follows that, whilst the sheriff listed factors relevant to the consideration of the child’s welfare, these should not be regarded as exhaustive.

The amended provisions of section 11 were examined in some detail by Sheriff Holligan in R v R 2010 Fam. L.R. 123. That case involved an application for parental responsibilities and rights and contact with a nine year old child by a man who, although not actually her father, had treated her as his child. The relationship between the man and the child’s mother was described as volatile, involving arguments and shouting, and threatening and violent behaviour by him towards the mother and two older children in the household. In examining the definition of ‘abuse’, the sheriff said:

Whatever the dictionary definition of “abuse” may be it seems to me that the statutory definition is deliberately wider than the meaning the word itself might necessarily carry. Whether the definitions of the words are intended to be exhaustive is something that I do not require to decide. Before I leave the definition section I note that the definition subsection includes within the definition of abuse “domestic abuse” ... ... On first view it does seem that there is a degree of circularity in the definition. There is no definition of “domestic” and “abuse” is defined, inter alia, as including “domestic abuse” ... ...

He went on to say that if there is evidence of behaviour which amounts to “violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress”, and it happens within a family setting, then it was difficult to see that including “domestic abuse” in the definition of “abuse” added anything.

The sheriff went on to examine the factors to which the court should have regard:

... [T]here is nothing in these provisions which requires that the abuse, or for that matter risk of abuse, need be directed against the child. Nor is there any requirement that the abuse be intentional on the part of the person carrying out the abuse. ... So if a child lives in an atmosphere of violence or constant shouting and alarming behaviour that might give rise to the application of s11(7B).

However, in rejecting any presumption arising from the amended provisions, Sheriff Holligan stated:
...[I]t appears to me that if the court has material before it which evidences abuse, or the risk of abuse, then in reaching a conclusion as to the welfare and no order principles in s 11(7)(a) it must include in its deliberations the matters set out in s 11(7B). However, it also seems to me that the Parliament has not gone so far as to provide that findings of abuse or the risk of abuse give rise to any presumption against the granting of an order.

The sheriff concluded that the evidence demonstrated that there was abuse as the term was defined in section 11(7C). He took that into account as a factor when assessing whether granting the orders sought was conducive to the child’s welfare. He refused to grant an order for parental responsibilities and rights, and restricted contact to 'letterbox', or indirect, contact.

In S v B 2010 G.W.D. 32-663, a father sought contact with his two year old daughter. The mother opposed contact and sought removal of the father’s parental rights and responsibilities. The parents had separated during the pregnancy due to the father’s use of illicit drugs. He and his family had then threatened the mother with violence and threatened to kidnap the child. They assaulted the mother’s step-father and vandalised her and her parents’ homes. The mother and her family all moved away from Aberdeen as they were so frightened of the father and his family. The child did not know her father, nor did she know that he was her father. Sheriff Cusine approved of the principles applied by Sheriff Holligan in terms of the amended section 11 provisions. In applying those principles, the sheriff assessed the evidence as follows:

Given the understandable and justified fear which the [mother] has of the [father] and also his family, I see no prospect of their ever co-operating with each other in relation to matters affecting the child. Given that the [father] and his relatives have been prepared to resort to threats to the [mother], inter alia to kidnap the child, there is a risk that they would continue to threaten the [mother] in relation to the child. That would militate against any co-operation ...

He then went on to consider the issue of ‘abuse’:

The [mother] has been subjected to abuse as defined by s. 11(7B) of the 1995 Act, and there is an obligation on the court to protect any child from such abuse or the risk of a recurrence of abuse. Any repetition of the abuse is almost certain to have an adverse effect on the [mother], who continues to be treated by her doctor for anxiety and stress. The abuse does not need to be directed at the child, but the child already senses an anxiety in her mother and any contact is likely to increase that anxiety and stress which could have an adverse effect on the [mother] and the child.

The child’s continued association with her father would not be beneficial to her, as the sheriff observed:

...[T]here is a considerable risk that the child’s welfare will be adversely affected by the abuse which has taken place already, and any future abuse there might be, whether from the [father], his family, or both.

Referring to the paramountcy of the child’s welfare, the sheriff removed parental rights and responsibilities from the father and refused to grant an order for contact. The sheriff
stated that he sought to provide finality and remove uncertainty for the child and her mother.

The issue of abuse in a section 11 application was considered recently in \textit{S v J} [2012] CSOH 49. The child was nearly 2 and lived with her mother in Scotland. She had had no direct contact with her Iranian father, who lived in England, since she was about 7 weeks old. Her father sought parental rights and responsibilities and a contact order. Temporary Judge Beckett found that, before the child was born and while the mother and father had been living together, the mother had been emotionally volatile and the father had been violent and abusive towards the mother's older child aged about 10 years. He had thrown a pan of hot cooking oil, while the older child and the mother were in the room, and had struck out at various objects in temper. His behaviour towards the mother had been controlling and he had been aggressive towards her parents. He had never been violent towards the younger child or towards her mother.

The judge concluded that the findings of abusive behaviour did not conclusively rule out direct contact between the child and her father. Under reference to the general principle enunciated in \textit{White}, he weighed the abuse in the balance with other factors, including the benefits to the child in having direct contact, and the disadvantages for her in not having such contact. Her father was an important link with her Iranian heritage. In examining the various factors, the judge assessed the risk of the father physically abusing his daughter, with whom he would not be living. He found that:

\begin{center}
What risk there may be could be all but eliminated by ensuring that contact takes place under supervision.
\end{center}

In all the circumstances, the judge considered it to be in the child's best interests for the father to have the parental responsibility of contact, and the right to supervised contact.

In approaching his decision in that case, the judge appears to have followed the approach taken by the English Court of Appeal in \textit{In re L (A Child) (Contact: Domestic Violence)} [2001] Fam 260, to which he was referred during submissions. That Court of Appeal case is also referred to in the \textit{Equal Treatment Bench Book, 2008}, para 9.11, in the section headed "Children indirectly affected by Domestic Abuse: Residence and Contact", where it says:

\begin{center}
It is virtually impossible to offer any general guidance in such cases, as so much will inevitably turn on the particular facts and circumstances. A full and interesting discussion of the general issues can be found in … … Re L (a child).
\end{center}

Since this is the only reference to any guidance in the \textit{Equal Treatment Bench Book}, it may be helpful to examine what the English Court of Appeal had to say in that case. In rejecting the operation of any presumption, Dame Butler-Sloss observed:

\begin{center}
There is not, however, nor should there be, any presumption that, on proof of domestic violence, the offending parent has to surmount a prima facie barrier of no contact. As a matter of principle, domestic violence of itself cannot constitute a bar to contact. It is one factor in the difficult and delicate balancing exercise of discretion.
\end{center}

She continued:
The court deals with the facts of a specific case in which the degree of violence and the seriousness of the impact on the child and on the resident parent have to be taken into account. In cases of proved domestic violence, as in cases of other proved harm or risk of harm to the child, the court has the task of weighing in the balance the seriousness of the domestic violence, the risks involved and the impact on the child against the positive factors, if any, of contact between the parent found to have been violent and the child.

She concluded that:

... [A] court hearing a contact application in which allegations of domestic violence are raised, should consider the conduct of both parties towards each other and towards the children, the effect on the children and on the residential parent and the motivation of the parent seeking contact. Is it a desire to promote the best interests of the child or a means to continue violence and/or intimidation or harassment of the other parent? In cases of serious domestic violence, the ability of the offending parent to recognise his or her past conduct, to be aware of the need for change and to make genuine efforts to do so, will be likely to be an important consideration.

When there is an application for interim contact, before the court has reached a final decision on allegations of domestic violence, Dame Butler-Sloss observed that the court should give particular consideration to the likely risk of physical or emotional harm to the child, if contact is granted or refused:

The court should ensure, as far as it can, that any risk of harm to the child is minimised and the safety of the child and the residential parent is secured before, during and after any such contact.

According to Lord Justice Waller in the same case:

There should however be no presumption against contact simply because domestic violence is alleged or proved; domestic violence is not to be elevated to some special category; it is one highly material factor amongst many which may offset the assumption in favour of contact when the difficult balancing exercise is carried out by the judge applying the welfare principle.

That approach appears to be consistent with the Scottish approach, where all factors are assessed, including abuse, to determine what is in the child's best interests. Thus, just as there is no presumption for contact between a child and a non-resident parent, there is no presumption against contact when there have been allegations or proof of domestic abuse.
**Welfare of child as the paramount consideration of the courts**

A recent example of the court carrying out the balancing exercise described in *White*, is found within *R v M* 2011 G.W.D. 1-33. The sheriff summed up his task, referring to the general principle expressed by Lord Rodger:

> It follows … … that my responsibility in this case is to have regard to the welfare of [the child] as the paramount consideration and not to make any order under s.11 of the 1995 Act unless to do so is both necessary and conducive to her welfare. One of the considerations that I have to have regard to in undertaking my responsibility is that it is generally considered to benefit a child to maintain personal relations and regular direct contact with the absent parent.

The sheriff went on to examine the upheaval and instability in the three year old’s upbringing, concluding that:

> Such instability is not conducive to the welfare of the child, nor is it conducive to the welfare of the child to have a mother whose confidence and self-esteem have been battered by such instability and lack of support from the child’s father.

He decided that the child needed structure and routine and that contact between the child and her father was, at present, contrary to the child’s best interests.

Scottish courts have rejected applying the criteria and guidance set out by the Court of Appeal in England in *Payne v Payne* [2001] E.W.C.A. Civ. 166 for cases involving relocation by one parent. In that case, emphasis was placed on what the effect on the future psychological and emotional stability of the parent applying for relocation was likely to be if the application to relocate were refused, on the view that the health and wellbeing of a child depends on its emotional and psychological stability and security and that such stability and security come from the child’s emotional and psychological dependency upon the primary carer. In *M v M* 2011 Fam. L.R. 124, the father argued on appeal to the Inner House that excessive weight had been attached to the mother’s wish to relocate, and insufficient consideration had been given to future contact arrangements. In rejecting the guidance given in *Payne*, the Inner House observed:

> … [T]he guidance embodied in *Payne* and other English decisions forms no part of the law of Scotland, and would appear to be at variance with the approach affirmed by the House of Lords, for Scottish purposes, in the case of *Sanderson*. Even in England, a common criticism of the *Payne* doctrine is … … that it ‘… inappropriately ‘relegates’ (the harm done [to] children by a permanent breach of the relationship which the children have with the left-behind parent) to a level below that of the harm likely to be sustained by a child through the negative impact upon the applicant of refusal of the application.’…

What matters, in this as in any other case, is that the welfare of the children must at all times be the paramount consideration, and that the wishes and interests of either parent must receive no greater weight than they truly deserve in the circumstances.

The Inner House recently reaffirmed that approach in *S v S* 2012 Fam. L.R. 32. The “child’s interests was the sole criterion for the decision” and there was no presumptive rule or guideline in favour of parental interests.
The Supreme Court has considered the question of paramountcy of the child’s welfare very recently in *B v G* [2012] UKSC 21. After an over-long proof, the sheriff had refused to grant an application for contact. The Supreme Court was satisfied that the sheriff was entitled to conclude that contact with his father was not consistent with the nine year old child’s welfare. In its judgment given on 23rd May 2012, the Supreme Court agreed that:

... the sheriff treated the welfare of the child as the paramount consideration, and considered whether it was in the child’s best interests that an order for contact should be made.

The court quoted from the sheriff’s decision with approval: “In considering what is in [the child’s] best interests, it is a question of now balancing the disadvantages or risks against the benefits of contact.” In carrying out that balancing exercise, the sheriff considered that forcing the child to have contact would inevitably re-expose him to his parents’ conflict. To do so would be against the child’s wishes. On the other hand, if no contact order were made, there was the risk of “emotional consequences of a psychological nature” and possible resentment against his mother for cutting his father out of his life. There had, however, been a two and a half year period of no contact already and the child had shown no sign of distress nor that he missed his father or wanted to see him. The sheriff concluded that it was in the child’s best interests that he have no contact with his father.

Lord Reed regarded the length of time the court proceedings had taken overall, not just the very long proof, had “overshadowed the life of this young child, perpetuating and deepening the conflict between his parents which has caused him such distress”. Commenting further:

There is no need for a dispute over contact to take so long to resolve. It did so in this case only because the court allowed the parties to determine the rate of progress. The duty to avoid undue delay in the determination of disputes of this nature, in order to comply with the obligations imposed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, has been made clear many times by the European Court of Human Rights. ... [U]ndue delay in such proceedings may have irreversible effects upon the child... ...[T]he principle is obvious, and is amply demonstrated by the present case. 23

**Summary of 4.1.1: best interests of the child in family actions**

Certain conclusions can be drawn from the cases examined above, from the cases immediately preceding the coming into force of the Children (Scotland) Act 1995, through *White v White* to the cases concerned with the application of the amended section 11 provisions (including those mentioning ‘abuse’), and up to the recent decision of the Supreme Court in *B v G*. Whilst many of these cases are not directly concerned

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23 For English and Welsh proceedings, section 1(2) of the Children Act 1989 provides that ‘in any proceedings in which any question with respect to the upbringing of a child arises ... any delay in determining the question is likely to prejudice the welfare of the child’. There is no equivalent provision in the Children (Scotland) Act 1995.
with the matter of domestic abuse, the conclusions to be drawn generally are relevant to the issue of disputed contact in cases involving domestic abuse.

Overwhelmingly, the courts have confirmed the paramountcy of the child’s welfare in decisions on disputed contact. The following additional conclusions can be drawn:

- In relation to contact, courts do not apply a presumption when determining the child’s best interests. No presumption exists for continued parental contact nor is past domestic abuse presumed to be against contact being in a child’s best interests.

- The courts have gone so far as to support the ‘general principle’ expressed by Lord Rodger, in White v White that “it is conducive to the welfare of children if their absent parents maintain personal relations and direct contact with them on a regular basis”. This principle is qualified by matters of practicability and still has to be seen in light of whether it is, in fact, in the child’s best interests to have contact.

- In practical terms, the courts carry out a balancing exercise based solely on the evidence before them, without regard to any checklists or presumptions. Whilst such an approach can give the impression of arbitrariness or unpredictability in arriving at decisions, it has the advantage of enabling the court to give appropriate weight to particular considerations in the individual circumstances of each case.

The courts have noted the lack of definition of ‘domestic abuse’ and whether its inclusion in the amended Section 11 adds to the more general definition of ‘abuse’.

### 4.1.2 Best interests of the child in children’s hearings proceedings

Unlike cases determined by a sheriff, children’s hearings decisions are not publicly reported. Only those that reach the sheriff court, or those that are appealed to a higher court, are liable to be reported. Reported case law thus gives limited insight into the application of the welfare principle by children’s hearings.

The Inner House in O v Rae 1993 S.L.T. 570 did consider the welfare principle, but prior to the 1995 Act\(^\text{24}\). In considering what was in the child’s best interests, the court held that the hearing might need to have regard to information that went well beyond the accepted or established grounds of referral: “The test of relevancy in this context ... is whether the information is relevant to a consideration of what course should be taken in the child’s best interests”. The court decided that, in the circumstances of that case, the children’s hearing was clearly entitled to consider whether the father was a suitable person to look after his children, and an allegation of sexual abuse by the father was clearly relevant, although it did not form part of the grounds of referral. The Inner House quoted with approval Lord Justice Clerk (Ross)’s opinion in Kennedy v A 1986 S.L.T. 358 that natural justice principles must yield to the child’s best interests.

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\(^{24}\) Section 43(1) of the Social Work (Scotland) Act 1968 required a children’s hearing “to consider on what course they should decide in the best interests of the child”. There was no express paramountcy principle.
O v Rae predated the Human Rights Act 1998 and the court thus might not come to the same decision, for the same reasons, today. According to Sheriff Principal Taylor in M v Authority Reporter 2011 G.W.D. 2-94:

It may well be that if a case with facts similar to O v Rae was to come before the Inner House today, a different decision would be reached standing the introduction of article 6 rights to those appearing before a Children’s Hearing.

In M, a children’s hearing had required that a child live with foster parents. The reasons for the decision included serious concerns regarding the child’s recent sexualised behaviour. However, no reference was made in the established grounds to this sexualised behaviour. The child’s parents appealed the children’s hearing decision, arguing that reliance should not have been placed on the sexualised behaviour nor upon historical allegations of sexual abuse of another child. The Sheriff Principal held that there had been no breach of the parents’ Article 6 rights:

A supervision requirement may continue long after grounds have been established. It therefore seems to me to be highly desirable that when considering what is in the best interests of a child, up to date relevant material is before any Children’s Hearing convened after grounds of referral have been established or accepted. One is dealing with a dynamic situation and it would be artificial for a subsequent hearing to be limited to looking only at the grounds of referral.

The Sheriff Principal expressed the view that, if Lord Justice Clerk Ross meant that the child’s welfare was more important than due process, that could no longer be the case, given the terms of Article 6: “Parents and other relevant persons have rights which require to be protected as well as the interests of the child”. In order to reconcile this with the paramountcy of the child’s welfare expressed in section 16 of the Children (Scotland) Act 1995, a distinction can be drawn between the process of arriving at a decision and the decision itself. The process should take account of Article 6 rights of all those involved, while the decision would still be made with the paramount consideration being the child’s welfare.

P v P 2000 S.L.T. 781 concerned the relationship between family actions (Part I) and children’s hearings proceedings (Part II) under the Children (Scotland) Act 1995. An application was made by the child’s grandmother, for parental responsibilities and parental rights in terms of section 11(2)(b). The child had a supervision requirement, with an attached condition of residence. The Inner House was of the opinion that:

... Parts I and II of the Act do not operate as separate and distinct schemes. They are in important respects interrelated. Thus it is clear that the primary purpose which underlies both Parts, and is either explicit or at least implied throughout, is to ensure the welfare of the child.

It follows that guidance on welfare, or best interests, derived from cases concerning family actions will be relevant to children’s hearing cases – unless the court or children’s hearing is applying the provisions of section 16(5) permitting derogation from the

25 Right to a fair and public hearing, see text in chapter 3.1.
welfare principle “for the purpose of protecting members of the public from serious harm”.

In C v Principal Reporter 2010 Fam. L.R. 14, three children aged 7, 9 and 11 were each the subject of a supervision requirement, with a condition of residence with their father. Contact with their mother was “at the discretion of the child and supervised by social work”. On appeal by the mother to the Sheriff Principal, the court held that such a condition was competent and depended “… upon a balancing of the rights and responsibilities of relevant persons, including the child, in each case looked at in the light of the best interests of the child”.

In Authority Reporter v S 2010 S.C. 531, the Inner House held that an unmarried father with a contact order under section 11 of the 1995 Act should be included in the definition of ‘relevant person’, since a children’s hearing could reach a decision which would have the effect of suspending or materially restricting the exercise of the rights afforded by that order. The court read words into the definition accordingly.

The definition of ‘relevant person’ was considered again, this time by the Supreme Court in Principal Reporter v K [2011] 1 W.L.R. 18. The court read words into the statutory definition, in order to make it compatible with the ECHR. That case was concerned with a father who had been excluded from children’s hearings as he was not treated as a ‘relevant person’. In their discussion of Article 8 of ECHR, the Supreme Court made the following observations about information available to a children’s hearing when making decisions about a child:

…[T]he child as well as her father has an interest in the full participation of her father in important decisions about her future. The children’s hearing has to have the best and most accurate information that it can in order to make the best decisions about the child. Everyone is deprived of that information if findings of fact are made by agreement without the participation of the very person whose conduct is in question. If decisions are then made on an inaccurate factual basis the child is doubly let down. Not only is the everyday course of her life altered but she may be led to believe bad things about an important person in her life. No child should be brought up to believe that she has been abused if in fact she has not, any more than any child should be persuaded by the adult world that she has not been abused when in fact she has.
Summary of 4.1.2: best interests of the child in children’s hearing proceedings

The case law is limited on children’s hearing proceedings as most decisions are taken by children’s hearings rather than the courts. Even so, three key points can be taken out of the available case law, pertinent to this study:

- **M v Authority Reporter** suggests a distinction between the process of making a decision, and the decision itself. Thus Article 6 rights must be considered during the process, alongside a child’s welfare, but the decision itself must treat a child’s welfare as the paramount consideration.
- The rights and responsibilities of relevant persons, parents and children, must be weighed in each case.
- Court decisions in family actions may well be relevant to children’s hearing cases when looking for guidance as to consideration of the best interests, or welfare, of the child.

4.1.3 Best interests of the child in adoption and permanence orders

In considering applications for adoption or permanence orders under the *Adoption and Children (Scotland) Act 2007* (the 2007 Act), the court must regard the need to safeguard and promote the child’s welfare, either throughout life or throughout childhood, depending on the order sought, as the paramount consideration (see section 3). Since the coming into force of the 2007 Act, on 28 September 2009, several cases have dealt with the issue of ongoing contact. The court has only ordered face-to-face, or direct contact, in two reported cases. The various cases are set out below, in chronological order.

In *Inverclyde Council v T* [2011] CSOH 27 Lord Pentland made permanence orders with authority to adopt, in respect of three children. In refusing face-to-face contact, he made the following findings:

In my opinion, face-to-face contact between the [birth parents] and the children would be completely inappropriate. The [birth parents] are strongly opposed to adoption in principle. They also expressed ... a distrust of the prospective adoptive mother... In these circumstances, I would have grave concerns that the [birth parents] would seek to undermine the proposed new family arrangements in a way that would be disturbing and unsettling for the children. In addition, there have been considerable problems with contact between the [birth parents] and the children in the past. What the children need more than anything now is a sustained period of stability. This would not be promoted, in my view, by face-to-face contact with [their birth parents].

The question of ‘letterbox’ contact then arose. The local authority proposed that the prospective adopters should write twice a year to the birth parents, about the children.

Lord Pentland did not think that this went far enough, however:
I see no good reason why the [birth parents] should not be allowed to write to the children twice a year and to send them photographs. Such correspondence should be sent by the [birth parents] to the Social Work department, who would then pass it to the prospective adoptive parents. It should be left to the prospective adoptive parents to decide when and how to pass on the letters to the children, but they would be expected to do so at some appropriate stage, so long as the correspondence contained nothing unsuitable.

He went on to consider the purpose of the contact which he granted:

The purpose of these arrangements would be to allow the children to retain some level of awareness of [their birth parents]. This would, I think, be in the children's best interests. Part of the idea behind letterbox contact, as I understand it, is to allow adopted children to be given some basis for possible re-establishment of a relationship with their natural parents later in life, should the children wish to do so.

In City of Edinburgh Council v X 2011 G.W.D. 27-603, the prospective adopters were, in principle, supportive of the child having direct and indirect contact with the birth mother. At the time of the proof, contact was taking place once a month. Sheriff Pyle made some general observations about post-permanence contact:

... [W]hile there is the power to make an order for direct contact within a permanence order there is no suggestion in the Act that this is to be regarded as a presumptive right of the parent.

Expert evidence was led from Professor Triseliotis that “a presumption now exists that post-adoption face-to-face contact is the preferred option unless it is shown to be detrimental to the child”. However, the sheriff disagreed that there was a presumption in favour of post-adoption contact. He concluded from the evidence that:

...[T]he child does enjoy contact with her mother, but ... she would not suffer unduly if it did not occur – and that this is becoming clearer the more that time goes by and the more she settles into her present carers' family.

Indirect contact, by letter from the mother to the child, and by written information from the local authority to the mother about the child’s welfare and development, was a matter of agreement. No order for direct contact was made.

Sheriff Ross in D, Petitioner 2012 S.L.T. (Sh.Ct.) 73 considered whether or not an adoption order should contain a condition of contact with the child, and by written information from the local authority to the mother about the child’s welfare and development, was a matter of agreement. No order for direct contact was made.

Sheriff Ross in D, Petitioner 2012 S.L.T. (Sh.Ct.) 73 considered whether or not an adoption order should contain a condition of contact with the child, and by written information from the local authority to the mother about the child’s welfare and development, was a matter of agreement. No order for direct contact was made.

While section 28(3) of the 2007 Act allows for conditions to be attached to an adoption order that is no more than was possible in the past. I do not think that it alters the general principle ... ... that “in normal circumstances it is desirable that there should be a complete break from the child's natural family”. There was nothing exceptional in the circumstances of the present case to allow or justify departure from that.
In **Orkney Islands Council v H** 2012 G.W.D. 6-110, the local authority applied for a permanence order with authority to adopt. During the court proceedings, the parents withdrew their initial opposition to a permanence order. The remaining issue in the case was whether there should be face-to-face contact between each parent and the child, on a limited basis. The sheriff recorded the opinion of the expert witness, a clinical psychologist, as follows:

... [T]he question which must be asked is what the contact was for. It is only to help the child with her identity and is not for the purposes of forming attachments. She was very clear that it was vital for a child to form secure attachments to become a healthy adult and that there was a danger of losing sight of the priority from the child’s perspective.

Sheriff Johnston concluded:

There was not a great deal of evidence led about the effect of ongoing direct contact within an adoption and even less about the potential effect on this particular child. I have taken the least interventionist approach because in the particular circumstances of this case on the information available at this point in time I consider that the child’s rights and freedoms will be best served by the order to allow direct, annual face-to-face contact. I consider that the combination of direct and indirect contact will provide the child with an understanding of her identity and place in the world. Within a nurturing and permanent adoptive home I consider that to be in the child’s best interests throughout her whole life.

In **East Lothian Council v S** 2012 Fam. L.R. 7, on granting a permanence order with authority to adopt, the court had restricted future contact between the birth parents and the child. Contact would be annual, by the local authority providing up to date written information about the child and a photograph. On appeal, considering the terms of section 84(4) of the 2007 Act, the Inner House set out the test for ongoing contact:

Regarding the matter of contact ... we note that at its highest, the submission for the [parents] was that there was no evidence of [the child] having come to harm from there being ongoing contact. That, however, is not the test. The issue was whether or not ongoing contact would safeguard and promote [the child]’s welfare. ... There is no basis on which the wish of a parent for continuing contact can, of itself, be relied on as being a bar to the granting of a permanence order.

Sheriff Way in **C v G** 2012 G.W.D. 12-228, when determining post-permanence contact, observed:

It is clearly a matter for the court to determine in each case based on its own circumstances having regard to the welfare of the child whether or not there should be ongoing direct face-to-face contact.

In examining the evidence and making an order for face-to-face contact twice a year, together with letterbox contact twice a year, the sheriff said:
I agree with Sheriff Pyle that the statute does not create any presumption that post adoption contact will be granted. [The parties] were at one in their submission that the comments of Professor Triseliotis in evidence to Sheriff Pyle were wrong in both fact and law. There is no presumption in favour of direct contact in England and Wales nor is there credible academic support for any such contact being the norm. I, however, consider that the basic import of the legislation is to ensure that this issue is actively addressed and not just sidelined.

He heard evidence to the effect that whilst face-to-face post adoption contact should not serve to retain or develop the former parent child relationship it may assist a child in forming a secure bond with adoptive parents by confirming that the former parent is safe, accepts the placement and that their affection remains constant. This can help to reduce the risk of anxiety, especially in adolescent children who may begin to question their origins and disrupt the placement. Such contact requires the birth parent to: accept the fact of and support the new placement; give time for adjustment to the new setting; demonstrate an interest in the child’s new life and continue to lead a life themselves of which the child can be proud. Against that background, he decided that it was in the best interests of the child to continue to have direct contact with her birth mother and that it was reasonably practicable to do so. Such an order would, however, only work if all parties co-operated and most importantly if the child wished the contact to continue.

In Midlothian Council, Petitioners 2012 Fam. L.R. 25, the child had lived with the prospective adopters (paternal aunt and her husband) since birth. There were tensions within the family as a result of involving family members as prospective adopters. In granting a permanence order with authority to adopt, Lord Malcolm declined to make any order regarding contact:

...[T]he decision to authorise [the child’s] adoption … … has been taken primarily because of the positive benefits of allowing her to be nurtured and to thrive in the same loving and secure environment which she has enjoyed since birth.

In my opinion the best way to secure and protect these positive benefits is for the court to make no order regarding contact, but to encourage [the prospective adopters], the [birth mother] and her mother, aided by professional help from the authorities, to lay aside their personal feelings, accept the decision which has been taken, and work together in a spirit of co-operation so that the child can develop an appropriate and beneficial relationship with all her family members, including her brother. I am optimistic that in due course this can be achieved, but it will involve a degree of self sacrifice on the part of all involved and a commitment to giving priority to the child’s best interests.

Lord Malcolm indicated that a contact order could only be made at a time when the prospective adopters could be confident that others would support, not undermine, their status as adoptive parents.

Sheriff McCulloch considered contact in Fife Council, Petitioners 2012 G.W.D. 17-350. The mother sought twice yearly direct contact, whereas the local authority proposed indirect contact. In awarding indirect contact only, the sheriff found as follows:
Whilst I can well understand the mother’s desire to see her child, and be part of her life, I think that having regard to the child’s long term interests it is best to sever the connection now. The child should at an appropriate age, be provided with information about her birth parents, and the mother should be able twice yearly to provide communications to a nominated social worker, which at a suitable time can be passed on to the child. Additionally, social work should provide information on an annual basis to the mother concerning the welfare and progress of the child, but not in such a way as to disclose her whereabouts.

Finally, a decision was made by Sheriff Holligan on 22nd May 2012 in an application for a permanence order at Edinburgh Sheriff Court which is unreported. It is understood he made a condition of direct contact three times a year and once annually on an indirect basis. We further understand that Sheriff Holligan made it clear in his judgment that such conditions should not only be made in exceptional circumstances, as had been suggested by the decision of Sheriff Ross in D, Petitioner, above.

**Summary of 4.1.3: best interests of the child in adoption and permanence orders**

Certain conclusions can be drawn about the courts’ approach to ongoing contact:

- The wish of a parent for continuing contact cannot, of itself, be relied on as being a bar to granting a permanence order.

- The **2007 Act** provisions allowing an order for post-adoption contact do not alter the general principle that “in normal circumstances it is desirable that there should be a complete break from the child’s natural family”. A presumption in favour of post-adoption contact has, so far, been rejected by the courts. There is some authority that direct contact will only be ordered in ‘exceptional’ cases, although the recent decision of Sheriff Holligan, as yet unreported, may be authority against such a proposition.

- The birth parent’s acceptance of the placement is an essential pre-condition to an order for direct contact being granted. If birth parents oppose an adoption, this is seen as potentially undermining the placement and thus direct contact by birth parents is seen as a risk to the placement.

- The courts have been more ready to award indirect contact, allowing a child to retain some level of awareness of their birth parents, and giving an adopted child some basis for possible re-establishment of a relationship with birth parents later in life, should the child wish to do so.

- Contact with a birth parent can be justified in assisting a child’s identity and “place in the world”.

Beyond those general conclusions, each case will depend on its circumstances, the paramount consideration being whether or not ongoing contact will safeguard and promote the child’s welfare.
4.2 Views of the child in reported case decisions on disputed contact

This section begins by considering the leading case on obtaining children’s views: **Shields v Shields** 2002 S.C. 246. (See 4.2.1) The section then considers five issues in detail, and how these effect having regard to children’s views in the relevant proceedings:

- The age and maturity of the child (4.2.2);
- The weight to be attached to the child’s views (4.2.3);
- The subordination of the child’s views to the child’s welfare or best interests (4.2.4);
- The methods by which a child’s views are communicated (4.2.5); and
- Confidentiality in relation to the child’s views (4.2.6).

Where appropriate, matters specific to particular processes are identified. Again, cases involving domestic abuse are considered along with cases concerned generally with disputed contact.

4.2.1 Shields v Shields: the leading case on the question of ascertaining a child’s views

The leading Scottish authority on the views of a child in the decision-making process is the Inner House decision in **Shields v Shields** 2002 S.C. 246. In that case, the child lived with his mother but his father had overnight contact. The mother wished to move to Australia, to further her career. She applied to the court for a residence order and a specific issue order to allow her to take the child to Australia. The father opposed the mother’s application and also sought a residence order. When the action was raised, the child was aged 7½. The court dispensed with intimation on the child by way of a Form F9. By the time the sheriff granted the orders sought by the mother, the child was 9. Throughout the proceedings in the Sheriff Court, no question of ascertaining the child’s views was raised.

The court was of the opinion that the sheriff erred by not ascertaining whether the child wished to be heard on the matter of whether or not he should go to Australia. In any event, the time lapse between intimation being dispensed with, and the decision being taken, amounted to a “material change of circumstances”. The duty on the court imposed by section 11(7)(b) in relation to ascertaining the child’s views was a continuing one, which the court ought to have performed when making its decision.

The court went on to discuss the appropriate test:

... [S]o far as affording a child the opportunity to make known his views, the only proper and relevant test is one of practicability.

Consideration was given to the different methods by which a child’s views could be communicated:

Of course how a child should be given such an opportunity will depend on the circumstances of each case and, in particular, on his or her age. ... But, if, by one
method or another, it is ‘practicable’ to give a child the opportunity of expressing his views, then, in our view, the only safe course is to employ that method. What weight is thereafter given to such views as may be expressed is, of course, an entirely different matter.

4.2.2 The age and maturity of the child

The courts have given further consideration to the question of the age and maturity of the child whose views are being considered. Even before the decision in Shields v Shields, the courts did not necessarily feel that children under the age of 12 should not be able to express a view. In Fairbairn v Fairbairn 1998 G.W.D. 23-1149, the sheriff sought the views of children aged 7 and 5, by appointing a curator ad litem. He took the view that the court was not prevented from seeking the views of children under 12 and their views were to be taken into account.

In C v McM 2005 Fam. L.R. 36, Sheriff Principal Kerr expressed the following view:

Except in the case of children so young as to be incapable of understanding what is going on when they are asked to express a view or too young to articulate a view, 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.

In that case, the sheriff principal accepted “without hesitation” that children aged 8 and 6 could express their views. There were practicable methods of doing so. The children had expressed their views, as to where they wanted to live, to social workers who compiled a report ordered by the court. The sheriff principal took the view that the sheriff’s obligation in terms of section 11(7)(b) was fulfilled by this, and the sheriff’s decision not to interview the children at the stage of making his final decision was within his discretion.

Some assistance as to the age below which it is impracticable for views to be sought can be found in Stewart v Stewart 2007 S.C. 451, in which the sheriff did not take account of the views of a 2½ year-old child in relation to a residence order in a divorce action. In holding that the sheriff did not err in the application of section 11 of the 1995 Act, the Inner House observed:

It was not suggested at any time that [the child] wished to express a view, or indeed that she was able to do so. In terms of sec 11(7)(b) of the Act, the sheriff has a discretion to decide what is practicable in this regard, and no reasons were advanced which would suggest that he erred in the exercise of that discretion. Accordingly, there was no realistic failure to consult the child in this matter at that time; and even if it can be said that there was such a failure, it would in our view be of no significance.

One decision that appears to be out of step with the court’s approach in Shields is McG v McG 2007 Fam. L.R. 62, in which Lord McEwan agreed with the father’s counsel that children aged 7 and 5 were too young to be interviewed. No steps were taken to ascertain their views by any other method. The decision in Shields does not appear to
have been cited to Lord McEwan, and it may be that the case can be disregarded as it is so out of step with the Inner House authority. Interestingly though, in the decision of Sheriff Sheehan in Glasgow on 17th July 2012, in the case of P v M 2012 G.W.D. 26-549, children aged seven and five were considered of insufficient age and maturity to express a view about possible relocation from Scotland to Northern Ireland.

In recent permanence and adoption cases the court has, frequently, been concerned with a very young child, too young to express a view. In Inverclyde Council v T, Lord Pentland did not take the views of any of the children, who were aged 2, 4 and 6. In that case, all the parties had agreed that the children were too young for their own views to be taken into account.

However, in C v G, Sheriff Way spoke directly to a girl who was 8, in the local Children’s Reporter’s offices in the presence of the sheriff clerk and the child’s social worker. The sheriff records the meeting as follows:

> The child and I introduced ourselves and broke the ice by discussing a mutual interest in dragons. The meeting was necessarily brief but I came away with at least the impression that she understood what the plans for her future were and she wanted to be adopted. She spoke of her mother but in a detached way. … [T]he child could have been speaking about an aunt rather than her mother.

The sheriff made the following finding in fact:

> The child is well aware that she has been offered for possible adoption. She spoke directly to the Sheriff and she perceives this as a good move in her life. She wishes to be part of a new family. She wants a Mummy and a Daddy. She thinks her Mum treats her like a baby when she is not.

However, in his Note, the sheriff concluded:

> … [I]t is my judgment that the child lacks the necessary age and maturity to express a view on the orders sought and taking her views is therefore not reasonably practicable.

Such an approach is not easy to reconcile with the courts’ approach generally in contact and residence disputes in family actions. Here, the issue for an 8 year-old would likely not be the practicability of obtaining her views but rather the weight attached to them.

In S v S 2012 Fam. L.R. 32, the court had remitted to a person skilled in the conduct of child related investigations, to see whether the views of a 6 year-old child could be obtained. The child was unaware of the proposal by his mother to relocate to Texas, which was the subject of the dispute. The reporter took an oblique approach to questioning the child, which produced some contradictory responses. The sheriff recorded that the child’s “views, such as they are, have been obtained”.

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26 In this case the children were otherwise discussed as being ‘coached’ to make statements to their parents (64), which may offer an explanation for the judge’s reluctance.
The Inner House observed the following in relation to the sheriff’s approach:

… [W]e can well understand why the sheriff should have introduced that important qualification. Even now [the child] is only six years old. At the material time he knew nothing of the relocation proposal, nor of its implications for his relationship with [his father], nor indeed of the likely consequences if relocation did not take place. In such circumstances, there was no reason to attach material significance to any views which [the child] might be thought to have expressed...

Then, under reference to the case of Shields and the test of practicability:

… to our mind [section 11(7)(b) of the 1995 Act] is also clearly concerned with what is appropriate having regard to the age and maturity of a given child. It would, we suggest, be most unsatisfactory if considerations of physical practicability obliged this court to follow a course which risked causing further distress, and perhaps lasting harm, to a young child.

Summary of 4.2.2: age and maturity of the child

Having regard to the test enunciated in Shields, as modified by the court in S v S, it follows that the age or maturity of the child will not of itself operate necessarily as a barrier to the child from expressing a view. The presumption that a child aged 12 and over is of sufficient age and maturity to form a view does not operate as a bar to the younger child having capacity to express a view.

In applying the test of ‘practicability’ and ‘appropriateness’, the following conclusions can be drawn as to the approach by the courts:

- Age and maturity will be taken into account in deciding if it is appropriate to seek the views of a child, in circumstances where there is a risk of further distress or lasting harm being caused by the seeking of the views.
- Some methods of seeking views may be more appropriate than others, having regard to age and maturity.
- When it comes to assessing what weight should be attached to a child’s views, then the child’s age and maturity might be a factor.

4.2.3 Weight to be attached to a child’s views

In addition to age and maturity, other factors may affect the weight given by the court to a child’s views. The confidence with which a child expresses a view may affect the weight which the court attaches to it. For example, in Fowler v Fowler 1981 S.L.T. (Notes) 9, which pre-dated the 1995 Act, Lord Stott interviewed a 10 year old girl about the arrangements she would like in relation to custody and access. He made the following observations about the weight to be attached to her views:

… [I]t appeared to me that a good deal of importance might properly be attached to the attitude of [the child] whom … … I saw in my room after the evidence had been led. In a full and frank discussion of the problem she made it clear to me what her own views were. I am fully conscious of the fact that while in questions of custody the interest of the child is of paramount consideration it cannot by any
means be assumed that a child’s interests necessarily coincide with her wishes. All the witnesses however agreed that [the child] was a highly intelligent child with a mind of her own and that was fully confirmed by my own impressions of her. 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 [the child] in effect to decide the issue for herself.

In H v H 2000 Fam. L.R. 73, an 11½ year old boy expressed unequivocal views opposed to contact with his father. The boy had attention deficit disorder, Asperger’s syndrome and Tourette’s syndrome. There was professional evidence to the effect that enforced contact, against his wishes, was likely to have an adverse effect upon his behavioural problems. Under reference to the child’s opposition to contact and the professional evidence, the sheriff principal held:

... [The] evidence points clearly to the conclusion that there should be no contact. In my opinion, that evidence substantially outweighs the relatively slight considerations which influenced the sheriff in deciding that there should be contact.

In M v M 2000 Fam. L.R. 84, Lord Kingarth interviewed three siblings, aged 8, 10 and 12, individually in chambers. This was at the end of a proof concerned with the mother’s application to live in the United States with the children. Issues arose of contact with the father, who would remain in Scotland. It is evident that the 12 year-old girl communicated her views clearly and confidently to the judge, who said he could not ignore her feelings which were clearly expressed. In examining the views of the children, he said:

Further, and significantly, [the 12 year old] – who seems old enough to know her mind and who has, it seems a reasonably clear idea of what is at stake and who has been to the States ... recently – very clearly expressed her wish to go. [The 8 and 10 year olds] are not only younger but are plainly much less able to form clear views as to what the prospects are.

Further examples of the weight which the court will give to the clearly, confidently expressed views of a child can be found in K v K 2004 Fam. L.R. 25 and H v H 2010 S.L.T. 395. In each of these cases, the court accorded substantial weight to the clearly articulated views of the eldest siblings. For younger siblings who were less certain or confident, the court weighed their views in the balance with other factors, and described the decision in each case as anxious and difficult.

Another important factor which can affect the weight that the court will attach to the views of a child is the influence which one or other parent, or indeed another sibling, may have had on the content of the views expressed. Generally, the greater the influence, the less the weight attached to the views.

In Perendes v Sim 1998 S.L.T. 1382, children aged 10 and 11 gave clear evidence to the effect that they did not wish to see their father. Referring to that clear evidence, Lord Osborne said this:
While that is plainly a factor of which I must take account, it appears to me to be important also to recognise what I consider has been established, that is to say that the current views of the children on this matter are very largely the product of [their mother's] determination to cut [their father] out of their lives and also the acrimony which unfortunately tended to develop whenever the [mother] and the [father] met in connection with access or attempted access. I consider that the evidence clearly demonstrates that both children have been misled by [their mother] in relation to their situation vis a vis [their father].

In that case, the judge concluded that, although he recognised the views the children had expressed, he should accord them “limited weight”.

G v G 2002 Fam. L.R. 120 concerned an order providing that a 12 year old girl attend a boarding school. Her father had not been consulted before an application was made to the boarding school by the girl’s mother. The girl was awarded a scholarship to attend the boarding school. In two letters written to the court, the girl clearly expressed the view, on which the Lord Ordinary relied, that she wished to attend the boarding school. However, the Inner House criticised the Lord Ordinary in the following terms:

... [T]he Lord Ordinary did not sufficiently address the question of the weight to be given to the expressed wish of [the child] to go to boarding school. In the circumstances, determination of its weight required to take into account that there had been no prior discussion between the parents about the change of school. The expression of such a wish, however genuine at the time of the writing of the letters, must inevitably have been influenced by the fact that the award had been made. In particular it may have coloured [the child]’s statement that she had always wanted to go to boarding school.

The court considered the views of an 8 year old boy in Ellis v Ellis 2003 Fam. L.R. 77. He spoke to a psychologist and expressed a preference to live with his father. There was some indication that the child’s view was not consistently expressed but was expressed more strongly when the boy was at his father’s house. It was suggested that the boy had been subjected to influence and bribes. Whilst the sheriff considered that the 8 year old boy was “mature enough to explain his wishes” in relation to residence, he concluded as follows:

... [W]hile I am prepared to hold that [the boy’s] expressed and fairly fixed desire at the moment is to live with [his father], I have come to the view that it is one that has been shaped by circumstances, rather than by any inherent qualities in the respective characters of the parties.

The circumstances referred to by the sheriff included: the mother’s post-natal depression; her trait as a strong disciplinarian, unlike the father; the immediate material attractions for the boy in the father’s house; and the fact that the father had “dangled allurements in front of [the boy] that would come to pass should he be awarded residence”. The sheriff acknowledged that he was bound to and did have regard to the child’s views but could not allow them to have decisive weight given the child’s immaturity and “the various transitory factors that have given shape to those views”.

49
Even with children approaching adulthood, the courts may consider that parental influence weighs heavily in the balance when the child’s views are assessed. In C v C 2008 Fam. L.R. 28, Lord Turnbull had to consider the views of children aged 11 and 14 (very nearly 15). The children objected to being returned to their mother’s care in France, in an application by their mother for an order for their return under the Hague Convention on the Civil Aspects of International Child Abduction. Lord Turnbull was satisfied that the father had “throughout exercised a degree of control and influence over each of the children as should cause me to doubt the extent to which the objections advanced are authentically those of the children concerned”.

He assessed the weight to be attached to the children’s views in the following manner:

I have been particularly conscious of the age of [the older child] and the need to bear that fully in mind in assessing the weight to be attached to what she has to say. However, I have found that their father’s influence is a strong factor in what both [children] say and I have taken account of that in deciding what weight to attach to the concerns expressed by each. Insofar as they have objections which are authentically their own, I have sought to assess the strength and validity of those in light of the countervailing factors which I have identified and discussed. In the end I have come to the view that I ought not to give effect to the objections stated. Instead I ought to make an order for their return as sought by their mother.

In C v M 2012 G.W.D. 9-170, the children aged 8, 10 and 12 had expressed clear views in the Form F9 and to a reporter appointed by the court to the effect that they wanted to move with their mother to New Zealand. The sheriff expressed his concerns about the mother’s influence on their expressed views:

... [T]he manner in which [their mother] has planned and presented to the children the proposal to relocate is a matter of concern. Firstly, the children were introduced to the idea while on holiday [in New Zealand]. Secondly, [their father] had no opportunity to properly contribute in any meaningful manner to the views formed by the children. He has a responsibility to do so. In the circumstances, the children’s views appear to have been formed to a considerable extent on the basis of unbalanced information, and in exceptional, holiday, perhaps irresistible, circumstances.

The sheriff concluded:

In my opinion, significant caution requires to be employed in assessing the weight to be given to those views. ... [I]t is clear that [the] manner in which the children’s views have been formed has been managed and influenced by [their mother]. This has been the case to the extent that [their father] has been effectively disabled from communicating with any of the children about the major decision to relocate to New Zealand.

He refused to grant the mother a specific issue order to remove the children from the United Kingdom and relocate them to New Zealand.

More weight will be given to the child’s views in cases where the view is “clear, strongly felt and apparently genuine”, as in S v S 2004 Fam. L.R. 127, or where the child “knew her own mind”, as in H v H 2010 S.L.T. 395.
Influence over the child’s views need not necessarily be exercised deliberately. In M v M 2008 Fam. L.R. 90, a 10 year old boy was opposed to moving to Spain with his mother. His father accepted that the boy’s views would be influenced by seeing how upset his father and extended family were when they heard of the proposed move. The boy’s views had not changed, however, even though he loved his mother very much; he was concerned that, should he move to Spain, he would be away from his extended family. The sheriff concluded that, in the circumstances, “... this must be his own opinion. Some weight must be given to it, recognising that it cannot be based on having weighed up all the relevant factors.”

**Summary of 4.2.3: weight to be attached to the child’s views**

In conclusion, the following factors will affect the weight given by the court to the child’s views, when the court is carrying out its assessment of all the facts and circumstances:

- The age and maturity of the child: the older and more mature the child, the greater the weight.
- The confidence and to some extent consistency with which the views are expressed.
- Any influence on the child’s views, whether deliberate influence by a parent or another, or influence as a result of the child’s own perception of the circumstances, e.g. the reaction of others to one outcome or another.

**4.2.4 Subordination of the child’s views to the child’s welfare**

One further matter affects the manner in which a child’s views will be dealt with by a court or children’s hearing arriving at a decision: the paramountcy of the child’s best interests. A child’s views will always be subordinate to the child’s welfare. Examples of this in operation include the following:

In J v J 2004 Fam. L.R. 20, the Inner House examined the sheriff’s treatment of a report prepared by Professor Triseliotis. According to his report, the children, aged 11 and 8 at the date of proof, consistently said they did not wish contact with their father. However, the report was seen as lacking balance, as the children had only been seen in their mother’s home, and no-one from the father’s side of the family had been interviewed.

The Inner House was satisfied that the sheriff took account of the relevant factors in deciding what was in the children’s best interests, making the following observations:

… [The sheriff] took account of the children’s wishes … [He] considered the weight to be put on their wishes in the particular circumstances and he weighed that factor against other relevant factors. He recognised that they were liable to be upset at the outset if contact were resumed but balanced that against the long term considerations. These long term considerations worked entirely to the children’s benefit and there were no disadvantages.

In C v M 2012 G.W.D. 9-170, the sheriff refused to grant the mother a specific issue order to remove the children from the United Kingdom and relocate them to New Zealand, concluding that the children’s views favouring the move had been managed and influenced by their mother. He addressed the question of the decision’s impact on the children:
I have considered the impact upon the children of not making the specific issue order which they ask the Court to make. In my view, these children ought not to have been placed in the stressful position in which they presently find themselves. The parties and their partners are urged, as a matter of the greatest priority in the children's best interests, to ensure that normality is resumed immediately. The pursuer said in her evidence that, if the order sought is not granted, the pursuer ... ... and the children would re-group and get on with it. I encourage the pursuer in that course of action for the benefit of the children.

The decision arrived at was contrary to the children's express views. But when the sheriff had regard to all the circumstances, and proceeded on the basis that the children’s welfare was paramount, he refused to grant the order sought.

Summary of 4.2.4: Subordination of the child’s views to the child’s welfare
The case law makes clear that the court’s paramount consideration, in making its decision, is the child’s welfare. This is paramount, even if the decision is against the child’s expressed views.

4.2.5 Methods by which child’s views are communicated
As described in chapter 3, there are various means by which a child’s views may be communicated. These are examined below, in the following categories:

- Using written forms
- A child giving views in person to judge or children’s hearing;
- Appointing a reporter/curator ad litem/safeguarder;
- Legal representation of the child

Using written forms
In section 11 applications, there may be the opportunity for children to express their views via the Form F9, and in children’s hearings by means of the All About Me form.

In Shields, Lord Rodger considered the various methods by which a child might be given the opportunity to express views to the court:

Of course how a child should be given such an opportunity will depend on the circumstances of each case and, in particular, on his or her age. At one extreme, intimation in terms of Form F9 may be appropriate whereas, at the other extreme, a much less formal method will be appropriate. Seeing a child in chambers is, of course, always open to the court but, in the case of a very young child, we do not discount the possibility that his or her views, or the lack of them, could properly be made known to the court through the agency of, for example, a private individual who is well known to the child or perhaps by a child psychologist. But, if, by one method or another, it is ‘practicable’ to give a child the opportunity of expressing his views, then, in our view, the only safe course is to employ that

method. ... ... It follows that we do not agree ... ... that the formal process of intimation in terms of Form F9 should necessarily be seen as the principal mode of compliance with sec ll(7)(b). In particular, where younger children are involved or where there is a risk of upsetting the child, other methods may well be preferable.

Thus, methods beyond or instead of Form F9 were encouraged, to suit the child in question.

**A child giving views in person to judge or children’s hearing**

Children may give their views in person, by means of an interview with the judge or sheriff in contact/residence cases in court, or by direct participation in a children’s hearing, at which they have a right to attend.

In contact cases in court, the judge or sheriff may decide to see the child at chambers, as described above in *Shields*. It is within the court’s discretion, however, to determine if that is, in fact, the appropriate method.

In *X v Y* 2007 Fam. L.R. 153 the views of the two 10 year old children had been taken four times by a Consultant Psychologist over the three years before the case came to proof. Two separate reports by him had been lodged with the court. The children had consistently said to him that they did not want to move to the United States with their mother. However, there was a suggestion by the mother that the children told her that they had lied to the psychologist. The mother had successfully applied to the court for an order (granted by a sheriff other than the sheriff who ultimately heard the proof) to have the children’s opinions obtained before the start of the proof. The children were brought from Greenock to Dunoon expecting to see the sheriff on the morning of the proof.

However, Sheriff McFarlane took the view that the court’s duty to give the children the opportunity to indicate their views to the court had been fulfilled by means of their interviews with the psychologist. In any event, he was not the appropriate person to try and ascertain whether they had lied to the psychologist. That matter would be better raised with the psychologist in his evidence. Against that background, the sheriff declined to attempt to elicit the children’s views about the proposed move to the United States, although he did speak to the children about very general matters, as they had been brought specially to court expecting to see him.

The question of speaking directly to the sheriff arose in *C v M* 2012 G.W.D. 9-170. The children aged 8, 10 and 12 had expressed clear views in the Form F9 and to a reporter appointed by the court to the effect that they wanted to move with their mother to New Zealand. On the morning of the proof, the sheriff was told that the two older children wanted to speak directly to him to communicate their views. He did not agree that, in the circumstances, this was appropriate, and requested a supplementary report. That report recorded the children’s views again, consistent with the views they had previously expressed.

In *City of Edinburgh Council v H* 2001 S.L.T. (Sh. Ct.) 51, the local authority applied for a parental responsibilities order in respect of a boy of 10½. His mother had agreed to the granting of the application but the boy was opposed to it. He became a party to the
action. The sheriff met him in chambers during the course of the proof. In his opinion, the sheriff recorded the boy’s views in some detail and the sheriff said:

[The boy] is opposed to the making of the order presently applied for. He feels that the implications of the order are that he would be further distanced from his mother and from the possibility of being returned home. There is nothing illogical in this, although my view is that [the boy]’s attitude is based on an incomplete appreciation of all the circumstances. In particular, it seems to me, he fails to appreciate his mother’s consistent failure in discharging her parental responsibilities with regard to care and contact.

However, the sheriff agreed with the view expressed by Professor Triseliotis, that granting the order would exacerbate the present situation, alienating the boy from his social worker and making him feel as though he were being distanced from his mother. Against that background, the sheriff refused to grant the order.

**Appointing a reporter/curator ad litem/safeguarder**

A child’s views may be represented to a court or children’s hearing through the medium of a reporter, a curator *ad litem* or a safeguarder. There is often confusion about the different roles.

In determining whether to grant an order for contact under section 11, and in certain other disputes, the court will frequently request a report from a reporter as to the arrangements for the care of the child concerned. The reporter’s role is limited to the preparation of a report in line with the remit given in the court’s interlocutor appointing the reporter. In the course of preparing a report, the reporter will meet the child or children and attempt to ascertain their views about contact, should they wish to express them.

The treatment and status of reports by reporters was considered by the sheriff principal in *Bailey v Bailey* 2001 Fam. L.R. 133. He observed:

Reporters appointed to report to the court are independent officers of court. They report the results of their investigations. They should not normally be cited as witnesses at a proof, as if they were witnesses to matters of fact, nor should they normally be regarded as persons whose opinions, following such investigations as they consider necessary, are open to cross-examination.

The sheriff principal held that the sheriff had erred in ignoring a report prepared by a reporter, to assist the court at the time of the proof. The sheriff had, however, correctly ignored a report prepared at an earlier stage in proceedings.

In *K v K* 2004 Fam. L.R. 25, the sheriff considered that remitting to a reporter was a competent and appropriate method of ascertaining facts, in a case where an order for contact was disputed. The sheriff did so even after hearing evidence at a proof, in order to find out the children’s up to date views, in light of a recent attempt at contact. He observed that no decision he made under section 11 could be regarded as final, given that it was open to parties to apply to the court to vary any contact order. He did not distinguish between ‘final’ and ‘interim’ orders in substance.
Another example of a court instructing a reporter to ascertain children’s views is found in S v S 2004 Fam. L.R. 127, which concerned a Petition under the Child Abduction and Custody Act 1985. In terms of Article 15 of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children, the court had to attempt to ascertain the child’s views. In that case, the court remitted to a reporter to enquire into and to report to the court on the child’s views.

The Scottish Government undertook research on court reporters, in child welfare hearings in family actions. While courts valued the reports provided, the appointment, commissioning and preparation of reports had poor quality controls. For example, the research found:

- Appointment of bar reporters reflected local knowledge and practice rather than a standardised transparent process
- No formal guidelines existed on the qualifications or criteria for appointment as a bar reporter
- No formal practice notes govern the commissioning, preparation and submission of reports
- The rights of parties to challenge statements in the bar report should be more clearly specified

More training was required, to ensure children were included in the process.

In some cases, a curator ad litem will be appointed rather than a reporter. Unlike the reporter, the curator has a continuing duty throughout the proceedings to protect the interests of the child and can enter the process as a party, should that be necessary to protect those interests. The curator will, generally, also try to ascertain the child’s views. The role of the curator was discussed by Lord Reed in his opinion in B v G [2012] UKSC 21, in which he made certain criticisms of the curator appointed in that case:

… it appears from the relevant interlocutor that the appointment of the ... ... curator was intended to enable the court to be provided with information by means of a report. The sheriff subsequently allowed the [curator] to become a party to the proceedings. The [curator] then lodged extensive pleadings covering all aspects of the case, and attended every day during the proof, cross-examining witnesses and giving evidence himself. As this court was informed, this involved his questioning witnesses about events and conversations in which he had been personally involved, and later removing his gown and entering the witness box in order to give his own account of the same events and conversations.

… [I]t is difficult to avoid the impression that there may have been a lack of clarity as to the role of the curator ad litem, in particular (but not only) at the proof. ... [I]t was inappropriate in the circumstances of this case for the [curator] to conduct the proof in person, given that it concerned matters in which he had been personally involved and in relation to which he might require to give evidence.

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Lord Reed went on to comment on the findings of the Scottish Civil Courts Review:

The Report of the Scottish Civil Courts Review noted concerns about the appointment and remuneration of curators (and other persons appointed to safeguard a child’s interests), their qualifications and training, the standards of their work, and a lack of clarity and consistency about what is expected of them. A number of recommendations were made in relation to these matters. The present case highlights the need for these matters to be addressed.

The review itself recommends:

- Clarity for appointees as to what is expected of them. For some appointments this may be laid down in rules of court, for others it may be appropriate to have non-statutory guidance. In any event, the sheriff or children’s hearing making the appointment should always ensure that the person appointed is clear as to what is required of them, if necessary by specifying this in detail in the order.  

These recommendations have not yet been implemented.

The safeguarder appointed by a children’s hearing or by a sheriff is appointed to safeguard the child’s interests, and to prepare a report for the hearing. In compiling the report, the safeguarder should meet the child and obtain the child’s views if possible. The safeguarder can become a party to court proceedings and has a right of appeal independent of the child in whose case they have been appointed. As observed by Lord President Rodger in S v Miller 2001 S.L.T. 531, “the appointment [of a safeguarder] is made only to safeguard ‘the interests’ of the child and not to vindicate his rights”. There is a clear distinction, therefore, between the safeguarder’s role on the one hand, and a legal representative on the other.

**Legal representation of the child**

In contact proceedings, legal aid can be difficult to obtain for children who wish to be represented in family actions, if their wishes appear to coincide with those of one or other parent. These difficulties have been compounded by the effect of regulations that came into force on 31st January 2011, which introduced changes to assessing an applicant’s financial eligibility for legal aid if the applicant falls within the definition of ‘child’. The financial resources of any person who owes an obligation of aliment to a child applicant are to be treated as part of the child’s own resources, unless it would be unjust an inequitable to do so. A ‘child’ is defined as a person under 18, or over 18 and under 25, in education or training. It is not known at present how many children do not have separate legal representation in contact proceedings due to the difficulties in obtaining legal aid.

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31 The Advice and Assistance (Scotland) Amendment Regulations 2010 and the Civil Legal Aid (Scotland) Regulations 2010.
By instructing a solicitor, a child can communicate views to the court in different ways, including by asking the lawyer to write a letter to the court. It may be that the child wishes to become a party to the action. However, the court will not always take the view that such a course is appropriate. In *Henderson v Henderson* 1997 Fam. L.R. 120, an 11 year old child became a party to her parents’ divorce action. She was opposed to contact with her father. The sheriff was of the opinion that there had been no need for her to become a party when her views were exactly the same as her mother’s. He observed that the court should be able to consider the views of a child without the child entering the process.

However, in *Fourman v Fourman* 1998 Fam. L.R. 98, a 14 year old became a party minuter in an application by a mother to be allowed to remove her children to Australia. In his opinion, the sheriff commented on “the usefulness of a child being a party minuter”, as follows:

> The Children (Scotland) Act 1995 envisages children taking part in proceedings which concern them. One way of achieving this is the provision of procedures to enable children to express their views to the court. Another way is for a child to become a party to proceedings. It would always have been possible for a child to become a party and, if under age, to have a curator ad litem appointed to represent his or her interests. In this case [the child] is old enough to instruct a solicitor and be represented herself. She has a view and a particular position to adopt, although she has not sided with either parent on the issue of going to Australia. Being represented has enabled her to take part in the proceedings as a party but not to be directly involved in the argument between her parents if she chose not to do so, which she did not. Rather than give oral evidence she lodged an affidavit. It seems to be that the procedure adopted here of [the child] becoming a party minuter was entirely appropriate.

The age and maturity of the child, and the fact that she did not align herself with one or other of the parties may account, at least to some extent, for the positive view taken by the sheriff, in contrast to that taken by the court in *Henderson*. In *City of Edinburgh Council v H* 2001 S.L.T. (Sh. Ct.) 51, a boy of 10½, described by the sheriff as “remarkably mature” for his age, was able to enter the court process as a party minuter. In that case, the child was, again, not aligning himself with any other party to the action.

A further example of children’s views being communicated to the court by means of legal representation can be found in *Fergus v Eadie* 2005 S.C.L.R. 176. Two children aged 11 and 15 (very nearly 16) instructed a solicitor and sought to become parties in an action by their father seeking contact with them. They were represented at the child welfare hearing by their solicitor.

Recently, in *B v B* 2011 S.L.T. (Sh Ct) 225, a 12 year old boy sought to enter process and lodge defences in an action concerned with contact between the boy and his father. He sought to do so after five days of proof had already taken place. The boy’s mother, father and curator *ad litem* all agreed that contact was in the boy’s best interests. The boy’s position was that he did not wish to see his father. The sheriff refused to allow the boy to enter the process and lodge defences.
On appeal, the sheriff principal also declined to allow the boy to enter the process and lodge defences. He did so for three reasons. First, the proceedings would be disrupted, as five days of proof had already occurred. Witnesses might need to be recalled and cross-examined. Second, this could cause further delay, which would not be in the best interests of the boy or his brother. Third, permitting the boy to enter the process would only “add to the pressures to which he has already being subjected ... In short, this is a boy who may well feel under pressure to take 'a particular line'''.

The sheriff principal concluded:

[T]he sheriff will remain bound by the terms of OCR 33.19 in terms of which he shall not grant any order unless an opportunity has been given for the views of [the boy] to be obtained and heard. It is a matter for the sheriff to be satisfied that the views of [the boy] are properly before the court, whether they be presented by the curator, conveyed by [the consultant psychologist working with the family] or obtained by way of personal interview.

It may be that B v B can be seen as consistent with the approach of the Inner House in S v S, in that the sheriff principal was concerned not only with the practicability of the boy entering the process, but also the appropriateness of his doing so, with the attendant possibility of harm caused to him. The recent Supreme Court decision in B v G in which the court approved the principle that any delay in determining the question is likely to prejudice the welfare of the child might also lend support to the sheriff principal's decision in B v B.

Children have sought to raise actions themselves, rather than simply enter an existing court process. In D v H 2004 S.L.T. (Sh Ct) 73, a 15 year old boy sought a contact order in terms of section 11(2)(d) of the 1995 Act in respect of his younger sister, who had been adopted. The sheriff, with whom the sheriff principal agreed, refused to grant a warrant for citation on the grounds that the action was incompetent. However, she also decided that, even if the action were competent, she would not have been satisfied that the boy had sufficient interest to give him title to sue. The sheriff principal’s observations on this point appear to support the view that the sheriff acted prematurely in relation to that matter.

The decision in D v H on competency was not followed by the sheriff in E v E 2004 Fam. L.R. 115. In that case, the sheriff allowed a 14 year old girl to proceed with an action she raised seeking contact with her 12 and four year old half-siblings, who lived with her mother and step-father. The sheriff decided that it would be possible for the court either to make an order in favour of the girl or by placing parental responsibilities on the mother and step-father to enable supervised contact to take place between the girl and her siblings.

Different issues of competency and procedure arise in children's hearings proceedings. In R v Grant 2000 S.L.T. 372, two children aged 11 and 15 appealed to the Court of Session against a decision of the sheriff principal in relation to the sheriff establishing grounds of referral to a children’s hearing. The children had not been parties to the proceedings before the sheriff or the sheriff principal. A question arose about the effect of the children entering proceedings and being represented, on the position of the safeguarder. The Inner House was of the view that “so long as he remains safeguarder,
his responsibilities remain the same, whether or not the position adopted by the children is different”. This decision also illustrates that the safeguarder’s role is to safeguard the child’s interests, rather than simply to communicate the child’s views. If there is divergence between the child’s views and the safeguarder’s assessment of the child’s best interests, the safeguarder is still under the duty to safeguard the child’s interests.

The lack of legal representation at a children’s hearing was raised as an issue in S v Miller 2001 S.L.T. 531. It was argued on behalf of a 15 year old that his rights under Article 6 of ECHR had been breached. The court agreed. Lord President Rodger said, in relation to proceedings where the child was likely to meet the criteria for secure accommodation to be authorised, that “where deprivation of liberty is at stake, in principle the interests of justice call for legal representation”. He considered effective participation by children in children’s hearing, observing:

It may, of course, be that in some cases the issues are so straightforward and the child so mature and capable that he can indeed conduct his own case quite satisfactorily, especially since the procedure before the hearing is designed to be informal and is intended to enable the hearing to elicit the child’s views. On the other hand, it is important to bear in mind that many of the children who appear before hearings will be young, unable to read well and unused to expressing themselves beyond the circle of their family and friends, especially to adults whom they do not know. I find it quite impossible to conclude that all the children appearing before a hearing would be able to understand, far less to criticise or to elucidate, all the reports and other documents and all the factors which the hearing may be called upon to consider when deciding what measures are most appropriate to deal with their case.

Legislation followed, in the Children’s Hearings (Legal Representation) (Scotland) Rules 2002 (see chapter 3.2).

In terms of legal representation within the 2011 Act, this will be administered by the Scottish Legal Aid Board rather than by local authorities or through court proceedings (See chapter 3.3).

**Summary of 4.2.5: methods by which child’s views are communicated**

The court has underlined its own discretion to decide how a child’s views will be communicated to the court. Reported case law has at times opened up possibilities for children to be involved – e.g. for a child to seek contact with a sibling, through family action proceedings – or closed them off – e.g. because of concerns around time delay and the child’s best interests.

It is recognised that the roles of reporters, curators ad litem and safeguarders need to be clarified, particularly in relation to their roles in protecting and reporting on a child’s best interests and in representing a child’s views. The legal representation of the child is clearer in terms of representing a child’s views but there are questions raised about the availability of legal aid.
4.2.6 Confidentiality in relation to the child’s views

Confidentiality of children’s views was much debated over ten years ago. In Dosoo v Dosoo 1999 S.L.T. (Sh Ct) 80, a father sought contact with his sons. An interim interdict was granted against the father from approaching his children, and from coming within 100m radius of the boys’ home, where they lived with their mother, and their schools. Interim contact was reduced to nil. A reporter was appointed by the court. She interviewed the two older boys, who were aged 14 and 12. The boys asked that their views be held as confidential as they feared repercussions should they be disclosed to their father. The expression “palpable fear” on the part of the boys was used by the reporter at one stage. The father asked the court to open up the sealed envelopes which contained the reports of their views. He referred to Articles 6 and 8 of the ECHR. In declining to do so, under reference to Article 12 of the UNCRC, the sheriff made the following observation:

[F]or a child to be able to express his views ‘freely’ he must be able to feel confident in privacy if he so wishes and the court should respect that privacy except in very compelling circumstances.

In McGrath v McGrath 1999 S.L.T. (Sh Ct) 90, a seven year old girl gave her views on contact to the curator ad litem appointed by the court. The child specifically asked the curator that her views should not be repeated to her parents. The curator communicated the girl’s views to the sheriff, who decided to take into account what he had been told but not to reveal it. The sheriff principal allowed an appeal against the sheriff’s decision. Firstly, since the views expressed by the child remained a secret shared only amongst the sheriff, the curator and the child, the appeal court could not consider whether the discretion to withhold disclosure was exercised properly. Secondly, the sheriff principal applied the principles enunciated by Lord Mustill in the House of Lords case of Re D [1996] A.C. 593, in the following manner:

The practicalities involved in reconciling the right to a fair hearing and a child’s right to express his views are thus of immense difficulty. They can best be resolved in my view by having regard to the principles set out by Lord Mustill, which involve taking the fundamental principle that a party is entitled to disclosure of all materials as the starting point and next considering whether disclosure of the material would involve a real possibility of significant harm to the child.

Confidentiality of views contained in reports was an issue in Oyeneyin v Oyeneyin 1999 G.W.D. 38-1836. Two children, aged 13 and 10, were anxious that their views on contact with their father, expressed to a curator, should not be disclosed to their parents. The sheriff took the view that the approaches in Dosoo and McGrath, above, were irreconcilable. It appears that he approved the approach in McGrath, saying that it was a fundamental principle that a party was entitled to know the basis on which a court was dealing with an issue, the onus being on the person seeking to persuade the court to keep the views confidential. However, the right to express views freely was also a fundamental principle and the interests concerned had to be balanced. The sheriff also observed that the child’s welfare was relevant but not the paramount consideration in deciding whether a child’s views should be kept confidential. He cautioned reporters to
explain to a child who did not wish his views revealed to parties to explain that this could not be guaranteed.

The issue arose again in Grant v Grant 2000 G.W.D. 5-177, in which the sheriff principal held that the father had not been denied access to the curator’s reports and could have explored the contents of them during her evidence. He reserved his opinion as to whether section 11(7) or the UNCRC created a right of confidentiality.

Reported case law has not continued with these debates.

**Summary of 4.2.6: Confidentiality in relation to the child’s views**

Over a decade ago, there was considerable reported case law in family actions on the confidentiality of children’s views. On one hand, providing confidentiality was seen as supporting children’s right to express their views. On the other hand, it was seen as potentially breaching a parent’s rights under ECHR. More recent reported case law has not continued this debate.

**4.3 Summing up**

The reported case law underlines the key role the courts have played, in interpreting the principles of a child’s best interests and having regard to a child’s views in all matters that affect them. There is less reported case law on children’s hearings, but P v P showed that guidance on a child’s welfare articulated in family law cases would be relevant to children’s hearings cases.

This chapter extensively documents how courts have exercised their discretion. The courts have consistently underlined the need to judge each case on its facts. While general principles have been accepted (e.g. qualified support for most children benefiting from contact with a non-resident parent), the courts have resisted accepting the stronger legal concept of a ‘presumption’ for contact, or against contact in situations of domestic abuse.

The case law review found very few cases referring to section 11(7A) and (7B) of the Children (Scotland) Act 1995, which require courts to have regard in particular to ‘abuse’ in treating a child’s welfare as the paramount consideration. Yet, situations that might be defined as domestic abuse, as defined in section 11, may well be taken into account in relation to disputed contact. (see, for example, the comments of Sheriff Morrison in Treasure v McGrath.) The lack of a definition of ‘domestic abuse’ in the amended provisions of the 1995 Act (as highlighted by Sheriff Holligan in R v R) may give rise to some difficulty in characterising abuse as ‘domestic’.

Attention to, and mechanisms to support, children stating their views have multiplied in recent years. Pivotal case law decisions have underlined children’s right to have their views considered, so far as is practicable and using methods appropriate for the children. However, concerns continue to be raised about the quality and effectiveness of the mechanisms.

Building on the analysis of legislation and reported case law, the next chapter reports on the consultation with key adult stakeholders. Their responses assist in assessing current provisions and practice, as well as pointing to possibilities for improvement and future action.
5 Consultation with Key Adult Stakeholders

This chapter reports on the consultation carried out with key adult stakeholders. The consultation examined what training and guidance on domestic abuse and children's rights were available to professionals working in the area of domestic abuse and child contact. It also explored stakeholders’ views of the challenges that exist when determining a child’s best interests and taking a child’s views in contact disputes where domestic abuse is a factor. The final part of the consultation examined stakeholders’ perspectives of the likely impact of changes to grounds for referral to the children’s panel made by the Children’s Hearings (Scotland) Act 2011.

The stakeholders (12) in the consultation represented a spread of expertise across the professional roles and organisations of: child and family law solicitors and advocates, children’s hearings training, Judicial Studies Committee, Sheriffs, the Scottish Children's Reporter Administration (SCRA), safeguarders, and those that train social workers.

This chapter explores the following in turn:

- training on domestic abuse and child contact (5.1 – 5.7)
- training and guidance on children’s rights (5.8)
- stakeholders’ views on current processes and future possibilities. (5.9-5.12)

5.1 Safeguarders: training and guidance on domestic abuse and contact

5.1.1 Current training for safeguarders

A safeguarder can be appointed by a children’s hearing or sheriff to protect the interests of a child during proceedings. They provide support, advice and written reports to hearings and court cases about the best interests of the child.32

Local authorities are currently responsible for maintaining a panel of safeguarders. Before making an appointment, the local authority must ensure that the experience and qualifications held by an individual are suitable for carrying out the role of safeguarder.

On appointment, safeguarders must take a two-day induction-training course provided by the Children’s Hearings Training Unit. This focuses on: the legal framework safeguarders operate in, the role of a safeguarder, courts and a safeguarder’s personal safety. Child contact features in the induction course. A further workshop on child contact is always offered on a follow-up training day, open to newly inducted safeguarders.

Induction training is compulsory for all new safeguarders and is provided to the majority of safeguarders before they start their role. However there may be occasions where this is not the case, as described by Richard Peacock (Scottish Safeguarders’ Association):

32 The information on safeguarders brings together information from the interviews with Richard Peacock (Scottish Safeguarders’ Association), Joan Rose (Children’s Hearings Training Unit) and Margaret Cox (CHILDREN1®).
Local Authorities mainly adhere to it [induction training] but sometimes they don't. Prior to safeguarders embarking on the first case they are supposed to attend a two-day induction course. But that doesn't always happen. If a Local Authority is short of safeguarders or needs safeguarders then [induction training] has been dispensed but probably in the main and in most Local Authorities that wouldn't be the case.

Presently there are no formal mechanisms for providing continual professional development (CPD) or training opportunities to safeguarders. This means that individual safeguarders are responsible for identifying and pursuing their own training needs. Training fees and associated costs (e.g. travel and subsidence) are paid at the local authority’s discretion. Safeguarders are able to participate in training or seminars that are provided by local Children’s Panel Advisory Committees. Attendance is not compulsory nor is it monitored. The lack of formal mechanisms for CPD or training, coupled with the discretionary nature of funding, is problematic. It means that there is not a coherent or consistent level of training available to safeguarders. As Richard Peacock from the Scottish Safeguarders’ Association comments:

At the moment safeguarders, if they don’t go to training, they don’t go to training. There is nothing done, nothing said. There is no obligation other than hope that the safeguarder will personally want to do something and improve knowledge. And Local Authorities can say, ‘No we are not paying for that (training)’. You know for travel expenses or for any expenses.

He confirmed that no specific guidance or training exists for safeguarders on child contact and domestic abuse, despite this being an issue that safeguarders often encounter. This is especially salient as many safeguarder appointments by children’s hearings are related to disagreements or clarifications in relation to contact. As Richard Peacock said:

When you think about it, it is probably one of the things that safeguarders come into contact with on quite a regular basis … I think the whole system relies on the experience of the safeguarder. Not as a safeguarder but from their previous (work) experience...

As with general training, safeguarders can benefit from seminars and conferences on domestic abuse offered through local Children’s Panels Advisory Committees and by external organisations. However it is up to individual safeguarders to pursue these opportunities and attendance is not monitored.

5.1.2 Changes to the management and operation of safeguarders

The ways in which safeguarders are managed and operate in Scotland is changing. Section 32 of the Children’s Hearings (Scotland) Act 2011 gave Ministers powers to establish a national Safeguarders Panel and to make provisions for its operation and management. This includes provisions for recruiting and selecting safeguarders, the appointment and removal of safeguarders, the qualifications to be held by safeguarders as well as the training and monitoring of safeguarders.

The Children’s Hearings (Scotland) Act 2011 enabled Scottish Ministers to enter into contractual agreements with organisations other than Children’s Hearings Scotland
(CHS) or SCRA to fulfill these requirements. CHILDREN1st was successful in securing the contract to assist Scottish Ministers with the operation and management of the Safeguarders Panel. The changes relating to safeguarders will come into force in June 2013. Until then responsibility for safeguarders will remain with Local Authorities.

5.2 Children’s panel members: training and guidance on domestic abuse and contact

5.2.1 Current training

New panel members are required to undertake compulsory induction training. This has three stages: Pre-Service Training, 2nd Stage Induction (review and revision) and 3rd Stage Induction (chairing hearings).

Domestic abuse features in the pre-service training that is compulsory for panel members. In the Children’s Hearing System Training Manual (2003) it is listed under the types of abuse that children may be subjected to. The training manual highlights that children are affected by domestic abuse and lists some of the effects that it can have.

Supplementary handouts are also provided to panel members. There is a specific handout on domestic abuse. This is not guidance for panel members on how to deal with cases of domestic abuse. The handout provides background information on domestic abuse. The handout adopts the gendered definition used in the Scottish Government’s National Strategy to Address Domestic Abuse (see chapter 1) and recognises that it can occur in same sex relationships and that men can also be victims. The handout provides information about the extent of domestic abuse as well as the impact it has on women. The handout’s main focus is the impact that domestic abuse has on children. This details a range of physical, behavioural, emotional and social impacts that domestic abuse can have on children.

5.2.2 The term ‘intergenerational cycle of violence’ - a note

The training handout above refers to the concept of the “intergenerational cycle of violence”. Deriving from developmental psychology, this theory argues that men who perpetrate domestic abuse against their partners do so because of their own childhood experiences of violence and abuse or women who experience abuse as adults do so because of their own childhood experiences of abuse. This would suggest that there was a causal relationship between witnessing domestic abuse as a child and becoming an adult perpetrator or victim of domestic abuse. While there are many studies about the

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33 The information on children's panel members is drawn from the interview held with Joan Rose (Children’s Hearings Training Unit). The organisation and delivery of children’s panel member training is the responsibility of the Children’s Hearings Training Units that are based within four Scottish universities (Aberdeen, Glasgow, St. Andrews and Queen Margaret).


35 p. 162

36 p. 82-91
cycle of violence, the evidence base does not substantiate the notion that violence always begets violence.\(^{37}\)

The handout uses the terms ‘domestic abuse’ and ‘domestic violence’ interchangeably. Whilst the lack of consistency in terminology replicates different terminology and definitions used across countries (even across the United Kingdom) and across research, it can lead to confusion about what domestic abuse or domestic violence is. This is more important when we consider criticism made by one commentator, Stark, that the use of ‘violence’ instead of ‘abuse’ is reductionist.\(^{38}\) Even if definitions of ‘domestic violence’ mirror those of ‘domestic abuse’, the use of ‘violence’ has the potential to focus attention on physical violence and ignore other behaviours like emotional abuse that is used by the perpetrator to exert power and control.

### 5.2.3 In-service training

As well as induction training, panel members are invited to in-service training throughout their appointment as panel members. This training is not compulsory and attendance varies. In-service training tends to focus on practice in hearings. Domestic abuse has not recently featured in this type of training. Children’s rights however were recently covered in training sessions provided by cl@n childlaw. These focussed on legal representation for children as well as the role of safeguarders. Panel members undertake re-appointment training. This focuses on panel members’ basic skills and knowledge as well as on procedural issues. Domestic abuse appears in some of the case studies used for re-appointment training but it is not the key issue discussed or explored.

### 5.3 Children’s Reporters: training and guidance on domestic abuse and contact\(^{39}\)

The Reporter’s primary role is receiving referrals for children and young people who are believed to require compulsory measures of supervision. Upon receipt of a referral a Reporter is responsible for deciding whether a child needs to be referred to a children’s hearing or not. They draft grounds for a referral to the children’s hearing. They carry out an administrative role for the children’s hearings system and keep a record of hearing proceedings. A Reporter is responsible for promoting fair process during children’s hearings and deals with establishing the referral grounds in court, if needed, and with appeals and reviews.

Margaret Main commented that referrals made to the Reporter about domestic abuse tend to have other issues occurring alongside domestic abuse. However, a referral can


\(^{39}\) The information on Children’s Reporters is drawn from the interview with Margaret Main (SCRA).
be made to a children’s hearing solely about domestic abuse. When a referral is made, the child’s life in its entirety is examined and contact would be part of this. However, the specific issue of child contact in the context of domestic abuse is seen as a “narrower issue” for Reporters.

All reporters will receive training on the **Children’s Hearings (Scotland) Act 2011**, which will include the introduction of a specific grounds relating to domestic abuse.

The **Framework for Decision Making by Reporters** is used by all Reporters to guide their initial decisions about investigation and final decisions about the need for compulsory measure of supervision. Reporters receive training on using the Framework, which includes a day on using research to inform decision-making.

‘Domestic violence’ is identified in the Framework as an issue that should be considered in assessing the “extent of the concern regarding the child’s welfare”. It appears as a family and environmental risk factor that can impact on parenting or the child’s development. Margaret Main commented that the Framework and the training for it emphasises that assessing the extent of concern for a child is a matter for a Reporter’s professional judgment and this will take account of the gravity of incidents of domestic abuse as well as the impact that negative family relationships have on the child.

The framework provides information on specific risk factors relating to domestic abuse that are drawn from the Spousal Assault Risk Assessment (SARA). SARA is one of many specialist risk assessment tools used for cases of domestic abuse. It was originally designed for use with convicted offenders, to screen for those at risk of reoffending. It was not designed for assessing the impact that domestic abuse has on a child’s welfare. A key criticism of SARA is that it does not include children in its assessment of risk. The framework for reporters however does provide additional guidance on assessing the “gravity of incidents of domestic abuse”. These risk factors relate to both the child and adult victim:

- child directly physically harmed during the incident
- child used as a way to get at the other parent e.g. direct threats to harm the child
- child showed extreme emotional distress during or after incident
- incident involved the use of a weapon or other implement
- incident involved credible threats of death
- incident caused serious physical injuries or involved sexual violence
- incident involved a violation of ‘no contact’ interdict or bail condition

These risk factors relate to specific ‘incidents’ of domestic abuse. While Reporters are reminded that “the presence or threat of violence can significantly affect the whole of a

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42 p. 25
child’s life”, the emphasis on ‘incidents’ and reference to ‘violence’ has the potential to obscure the cumulative effect that the different types of domestic abuse can have on a child’s life. Stark argues that framing domestic abuse as a series of incidents does not reflect women’s accounts (and arguably children’s accounts). Women describe domestic abuse as on-going and not as discrete incidents. Furthermore a focus on incidents does not take account of the full range of behaviours that encompass current definitions of domestic abuse, for instance emotional and psychological abuse, negating domestic abuse as a pattern of “intimidation, isolation, and control”, which leads to high levels of fear and ‘entrapment’ even once violence has ended.

As noted in the discussion about panel members’ guidance, the interchange between the terms ‘domestic abuse’ and ‘domestic violence’ is potentially problematic.

A range of other issues associated with domestic abuse are also identified throughout the guidance. This includes regular changes of address and a family being socially isolated. Reporters have access to research on domestic abuse and the impact it has on children, via their intranet, a ‘good practice’ library that has up-to-date resources on domestic abuse, and participate in external conferences and seminars which can include those on domestic abuse. They can also access a child development course that addresses domestic abuse, provided by the University of Stirling.

5.4 Social Workers: training and guidance on domestic abuse and contact

The Scottish Social Services Council (SSSC) is responsible for regulating and promoting the education and training for qualifying and post-qualifying social workers. As part of this, the SSSC approves Social Work degrees (both under- and postgraduate). From 2004 the minimum qualification to be professionally qualified as a social worker has been an honours degree in social work or an equivalent postgraduate award. The Scottish Government’s Framework for Social Work Education in Scotland (2006) sets out standards for pre-qualifying social work education. It was developed to enhance the quality and standards of social work training. Standard 3 is particularly relevant to this consultation: “Assess and manage risk to individuals, families, carers, groups, communities, self and colleagues” (p35).

The Key capabilities in child care and protection (2006) elaborates on the standards for social work education. It establishes specific learning competencies for social work

44 The information about Social Workers brings together information from interviews held with Anni Donaldson (Glasgow School of Social Work at the University of Strathclyde and West Dunbartonshire Council), Janice McGhee (Social Work, University of Edinburgh), Heather Smith (Principal Officer Childcare and Protection Training and Development, City of Edinburgh Council) and Maureen Wylie (Violence Against Women Network Co-ordinator, Improvement Service and National Child Protection Committee Coordinator, WithScotland).
degree programmes. The document states that, “The purpose of the capabilities are to ensure that qualifying social workers are aware of their roles and responsibilities relating to child care and protection” and “to ensure that qualifying social workers can demonstrate knowledge, skills and understanding in child care and protection” (p3). The document stresses that meeting the key capabilities does not qualify social workers to undertake child protection investigations. Rather this responsibility is shared by employers and qualified workers and will be achieved through post-qualifying continuous professional development.

Key capabilities in child care and protection are grouped under the headings: Effective Communication, Knowledge and Understanding, Personal Confidence and Competence and Values and Ethical Practice. ‘Domestic violence’ appears under the ‘Knowledge and Understanding’ capability. It establishes that:

‘Students need to have some understanding of factors which will affect optimum development and increase vulnerability and risk – such as disability, diminished parenting capacity (because of substance misuse, mental health and domestic violence.’ (p19)

‘Students should build on their knowledge of child development to identify key factors which increase vulnerability and risk and reduce resilience in children and young people. We recommend that students should receive specialist up to date teaching on the impact of substance misuse, domestic violence and mental health, on parenting capacity and child development’ (p22 and 55).

Below, the information is divided into qualifying and post-qualifying training and guidance for social workers. This is followed by a case study from the City of Edinburgh Council, of how training can be provided to social workers in a local authority.

5.4.1 Pre-qualifying training for social workers
Scottish universities incorporate domestic abuse into their social work curriculum in different ways. For example:

- The University of Edinburgh threads domestic abuse throughout their curriculum and supplements this with ‘specific’ inputs about domestic abuse, from organisations like Shakti Women’s Aid.

- The Glasgow School of Social Work is currently reviewing their existing teaching materials on domestic abuse and developing new course materials. The school aims to ‘raise the profile’ of domestic abuse, as a key issue for social workers and also to incorporate new research and good practice into their social work degree programmes. It is also developing an elective module for undergraduates that specifically focuses on domestic abuse and is developing a Masters degree specifically on domestic abuse/ violence against women.

- Other universities in Scotland have also developed stand-alone modules and courses that address domestic abuse and violence against women. These include
Glasgow Caledonian University’s ‘Responding to Domestic Abuse’ and Queen Margaret University’s ‘Gender Justice, Masculinities and Violence’.

5.4.2 Post-qualifying training for social workers

The Scottish Social Services (Registration) Rules 2006 set out the mandatory requirement that newly qualified social workers undertake a minimum of 24 days (144 hours) of learning and development activities within the first 12 months of registration (or 18 months, if a newly qualified social worker works less than full time). At least five days (30 hours) of these activities must focus on ‘working effectively with colleagues and professionals to identify, assess and manage risk to vulnerable groups in order to ensure that all social workers are assisted to meet their primary responsibility of protecting children and adults from harm’.

The Rules state that SSSC registered social workers undertake 15 days (90 hours) of learning and development per registration period. As with newly qualified workers, at least five days (30 hours) of these activities must focus on ‘working effectively with colleagues and professionals to identify, assess and manage risk to vulnerable groups’.

The SSSC have established Codes of Practice for employers and social service staff. These include high-level standards about training and development:

As a social service employer, you must provide training and development opportunities to enable social service workers to strengthen and develop their skills and knowledge. (p11)

As a social service worker, you must be accountable for the quality of your work and take responsibility for maintaining and improving your knowledge and skills. (p32)

The consultation with Anni Donaldson, Heather Smith and Maureen Wylie indicated that there was variation amongst local authorities between the levels and types of domestic abuse training available to social workers. An audit of social work training across all local authorities would be necessary to gain a comprehensive picture of the training available.

The ending of Scottish Government’s funding for Violence Against Women Training Consortia was identified as an issue that might compound variation in training provision. Anni Donaldson (Glasgow School of Social Work and West Dunbartonshire Council) highlights:

There is no longer central funding for violence against women training which spells out what people have to deliver. People are now making their own arrangements. We have no money for training. But we have built up our local capacity and are in the midst of developing our training, including basic domestic abuse and violence against women awareness courses, and specialist

48 http://www.gcu.ac.uk/hls/studyoptions/cpdprofessional/ accessed 20.08.12
49 http://www.qmu.ac.uk/courses/PREPS_CPD_Course.cfm?c_id=654 accessed 20.08.12
developments course for working with survivors of domestic abuse and other forms of violence against women.

Some stakeholders felt that stronger links between Violence Against Women Multi Agency Partnerships and Child Protection Committees could help to embed domestic abuse into post-qualifying training for social workers across local authorities. This was something that is being developed in both Edinburgh and West Dunbartonshire Local Authorities.

5.4.3 Case study: Edinburgh City Council
Edinburgh City Council provides training on domestic abuse to social workers in a number of ways.

- Induction training: Domestic abuse forms part of their induction training to all newly qualified social workers
- Tiered training: Tiered training on domestic abuse is also available to any member of staff working in children and families. The first tier provides an introduction to domestic abuse. The second tier focuses on the impact domestic abuse has on children. The third tier looks at developing practitioner’s skills for working with all members of a family affected by domestic abuse. This includes the adult victim, children and the perpetrator.
- Child protection training
- Core child protection training that is available to staff includes domestic abuse.

As well as the training provided on domestic abuse, a key development has been a more standardised approach to children’s individual plans. This will require staff working with families to ensure, where domestic abuse is present, for it to be noted on the child’s individual plan. Heather Smith (Principal Officer Childcare and Protection Training and Development, City of Edinburgh Council) comments on how this will bring domestic abuse into sharp focus:

I think with a more standardised approach to children’s plans will bring things to the fore, domestic abuse being one of them. It’s a great turn around for an authority to have this. If domestic abuse is there it is in the plan – what is being done? How are we working with perpetrators?

5.5 Solicitors: training and guidance on domestic abuse and contact\textsuperscript{51}

The Solicitors (Scotland) (Continuing Professional Development) Regulations 1993 require solicitors to undertake continuing professional development (CPD) to develop their professional knowledge, skills and abilities. They also require solicitors to keep a record of the CPD they have undertaken.

In November 2011, a number of changes to solicitors’ CPD came into force. The Law Society of Scotland issued \textit{CPD Requirements and Guidance for Scottish Solicitors}.\textsuperscript{52} This

\textsuperscript{51} The information on solicitors is drawn from the interview held with Lesley McFall (Family Court Users Group Solicitors).
re-establishes that all solicitors with a Practicing Certificate and all Registered European Lawyers are required to undertake a minimum of 20 hours of relevant CPD per annum. Individual solicitors are responsible for identifying and planning their own CPD. There are no prescribed courses that solicitors must undertake. However, solicitors must demonstrate why the CPD they undertake is relevant to their professional development. A minimum of the 15 hours of CPD they undertake must be ‘verifiable’. This means it must have educational aims and objectives relevant to the solicitor’s development, have clear outcomes, have quality controls and be evidenced. A maximum of five hours private study can be used towards a solicitor’s minimum 20 hours of CPD.

Solicitors can access training from a variety of sources. It is therefore difficult to assess what training is available to them. From the interview, it appears that neither training nor guidance is readily available, on the effects that domestic abuse has on children. In reviewing the training calendars of membership organisations providing training for solicitors, one particular course provided by the Legal Services Agency on domestic abuse and the law was identified. This course made particular reference to children. As there are no specific requirements for solicitors to undertake prescribed courses, it is difficult to assess the impact that a course like this would have on solicitors’ practice across the board.

Lesley McFall (Family Court Users Group Solicitors) commented that solicitors might welcome training on domestic abuse. It could help raise awareness of domestic abuse and the effects it has on children. She commented that solicitors can find it difficult to evidence the emotional impact that domestic abuse has on children and addressing an issue like this in training could be helpful.

5.6 Advocates: training and guidance on domestic abuse and contact

Like solicitors, advocates are required to undertake CPD. Advocates have a professional responsibility if they are practicing in a particular area (for example child and family law) to be up to date with current case law, articles and legislation. There are no further requirements about the topics advocates must cover in their CPD. Advocates are required to complete a minimum of 10 hours of accredited CPD per annum. This can take the form of training courses, conferences and other events that are provided by training providers that are accredited by the Faculty’s Director of Training and Education.

The Faculty of Advocates’ Family Law Association is a faculty-wide organisation that brings together issues of concern or training for advocates practicing in family law. The Association assists its members to maintain up-to-date knowledge of family law. They do not provide a formal calendar of ongoing training but provide seminars and training on topical issues to family law advocates. For instance when the new provisions about child contact and domestic abuse were introduced by the Family Law (Scotland) Act 2006, the Family Law Association held a seminar which included content on child contact and domestic abuse.


53 The information on advocates is drawn from the interview held with Morag Wise QC (now Lady Wise).
The Faculty of Advocates website advertises accredited CPD courses. These are organised by a range of training providers. In reviewing CPD offered during the period March – September 2012, one conference was identified as relevant: 'What’s wrong with child law'. This course had a variety of speakers and included an expert on domestic abuse. As for solicitors, it is difficult to assess the impact that a conference would have as there are no prescribed topics that advocates must undertake training on.

The study did not identify specific guidance available to advocates on the issue of domestic abuse and child contact.

5.7 The judiciary: training and guidance on domestic abuse and contact

5.7.1 Current Training

The Judiciary and Courts (Scotland) Act 2008 establishes a statutory responsibility for “making and maintaining appropriate arrangements for the welfare, training and guidance of judicial office holders” (section 2(2)). This responsibility is placed on the Lord President. The Judicial Institute for Scotland (previously The Judicial Studies Committee) fulfils this statutory responsibility by providing training to the judiciary.

The Judicial Institute for Scotland is reviewing the curriculum provided to judges across Scotland. Currently, new judges are required to undertake a mandatory induction program of training covering a broad range of issues including: criminal law, civil law, judicial ethics, contempt of court, sentencing, court management as well as judicial writing. They are also required to undertake a period of 'sitting in' where they visit different courts and observe other judges. Newly appointed judges are provided with mentors to support their induction as a judge.

Judges also undertake refresher training, which takes the form of a three-day residential programme. This is offered on a rotational basis to judges every 26-30 months. The content of this training can change according to the issues that are particularly salient at the time.

One of the three-day refresher training programmes offered by the Judicial Institute for Scotland contains a one-day module on domestic abuse. This uses a training DVD to show a number of typical courtroom scenarios where domestic abuse features. The course focuses primarily on criminal law. It addresses a range of issues including the cross-examination of the victim, domestic abuse in same sex relationships, and black and minority ethnic experiences of domestic abuse. Although the training is not specifically about children, children have a particular focus in part of the training that examines bail conditions. Sheriff T Welsh QC commented that impact of domestic abuse is drawn out

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54 Details of all accredited providers can be found at www.advocates.org.uk/downloads/profession/2010/ListofAccreditedCPDProviders.pdf (accessed 26.6.12)


56 The information in this section is drawn from interviews with Sheriff F Crowe and Sheriff T Welsh QC the Director of the Judicial Studies Committee (now the Judicial Institute for Scotland).
throughout the course during group discussions and during input from experts. Around 80 of the sheriffs in Scotland have undertaken this training.

The Judicial Institute for Scotland also offers one-day specialist training programmes on particular areas of law. Around 12-15 different specialist courses are offered each year. The Judicial Institute for Scotland provides financial support to allow judges to organise their own training and attend externally provided training and conferences.

As well as the training, the Judicial Institute for Scotland also provides judges with briefing notes on important cases as well as information about changes to existing or new legislation.


This manual, which is currently under review, is a publication of the Judicial Institute for Scotland. Their website includes the following introduction to the Equal Treatment Bench Book:

Equal treatment for all appearing in court in any capacity is a key principle in ensuring that justice is done in the Scottish court system. All must be treated with respect and impartiality.

The aim of the Equal Treatment Bench Book is to offer assistance and advice to judges who have to ensure that all who come before the courts are dealt with in an understanding and sensitive fashion regardless of their personal backgrounds.

Chapter 9 is headed "Domestic Abuse", which is defined as follows:

... any form of physical, non-physical, or sexual abuse which takes place within the context of a relationship, committed either in the home or elsewhere. This relationship will be between partners (married, cohabiting or otherwise) or ex-partners.

The definition is elaborated on, in the following terms:

The abuse may involve physical violence or it may involve abuse of a sexual, emotional or financial kind. Often the victim of abuse is subjected to abuse of more than a single kind; and on occasions the abuse of a partner is accompanied by the abuse of one or more children. While most domestic abuse is perpetrated by men against female partners or children, it is not unknown for it to be carried out by women. It may also occur between partners of the same sex.

The Bench Book then refers to the abuse definition, contained within section 11 of the 1995 Act.

At paragraph 9.4, judges are reminded that:

Domestic abuse can manifest itself in the court process in various ways. It may be the subject of a charge or charges in criminal proceedings; it may form the subject-matter, or at least the background, to family proceedings; and it may form

the subject matter, or the background, to proceedings before a children’s hearing which may then progress, by one means or another, into the sheriff court and beyond.

In relation to children, reference is made to protecting children who are victims of alleged abuse, under the children’s hearings system and by means of emergency court orders. For court orders relating to parental responsibilities, attention is drawn to the amended section 11. Under the heading ‘Children Indirectly Affected by Domestic Abuse – Residence and contact’, paragraph 9.11 states:

Difficult questions may arise in cases where one parent alleges that she has been abused by the other parent, and the judge has to determine residence or contact where it is not alleged that there has been any direct abuse against the child or children themselves. Consideration should be given to the effect on a child of witnessing abuse of one parent by the other parent. Also one parent may use contact to abuse the other parent further, and may try to involve the child in that abuse. Very often questions of residence or contact arise at an early stage before there has been any opportunity to explore in evidence the existence, or absence, of inter-parental abuse. It is virtually impossible to offer any general guidance in such cases, as so much will inevitably turn on the particular facts and circumstances.

5.8 Training and guidance on children’s rights

This section describes the training and guidance available to professionals on children’s rights, firstly by professional groups, and then concludes with certain inter-agency resources.

Safeguarders: The Scottish Safeguarders’ Association confirmed that no specific guidance or training exists for safeguarders on children’s rights. The Scottish Safeguarders’ Association disseminates new relevant publications amongst safeguarders and would highlight any new publications relating to children’s rights amongst their members.

Children’s Panel Members: The Children’s Panel Members’ training manual is underpinned by the legislation on the children’s hearing system. As such children’s rights are threaded through the entire training manual. Reference is made throughout about the child’s right to express a view, and for that view to be taken into consideration, as well as for the welfare of the child to be the paramount consideration when making decisions.

There is a specific section on the training manual on children’s rights. This provides background to the UNCRC and the ECHR. It also provides information about the agencies that offer advice to children about their rights.

The supplementary handouts for panel members have a large section on ‘Communicating with Children’.58 This draws from a seminar held by the National School

58 p. 36-46
for Panel Members in 2002. This is particularly relevant for enabling children to express their views at children’s hearings.

**Children’s Reporters:** The *Framework for Decision-Making by Reporters* makes reference to the ECHR and UNCRC in relation to respect for family life and the need to justify intervention when required to protect individual’s rights.59

The *Code of Principles and Good Practice*60 sets out what is meant as good practice for Reporters. This draws from the UNCRC, the ECHR and the Children (Scotland) Act 1995. The document refers to the importance of children’s participation as well as the child’s best interests guiding decisions.

The most relevant principles from the code are noted below:

<table>
<thead>
<tr>
<th><strong>Code of Principles and Good Practice (SCRA)</strong></th>
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<tbody>
<tr>
<td><strong>1.6.2 Care and Justice</strong></td>
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<tr>
<td><em>Each child has a right to care and justice</em></td>
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<tr>
<td>Respect for child’s rights (including participation, protection and privacy) promotes the child’s dignity and self-worth.</td>
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<tr>
<td><strong>1.6.3 Partnership</strong></td>
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<tr>
<td><em>Working in partnership promotes the welfare of the child</em></td>
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<tr>
<td>We will enable children and parents to contribute actively to processes and decisions through clear communication, fair procedures and listening to their views.</td>
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<tr>
<td><strong>1.6.5 Outcomes</strong></td>
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<tr>
<td><em>The least intervention possible will be used to ensure the best possible outcome for the child</em></td>
</tr>
<tr>
<td>All actions, processes and decisions should promote the long-term well-being and inherent worth of the child.</td>
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</tbody>
</table>

**Solicitors:** As with training on domestic abuse, training specifically on children’s rights did not appear to be readily available. Given the provisions in the Children (Scotland) Act 1995, it was thought that solicitors would be familiar with issues around children’s rights.

The importance of training for solicitors on domestic abuse and children’s rights was raised in another interview. Describing solicitors as having a ‘frontline’ role, Morag Wise QC (now Lady Wise) commented:

> So the training I would imagine that is being thought about looks at how to spot these issues, how to deal with the clients and so on and so forth. And I would have thought in the first instance solicitors would benefit more from that as they are at the front line.

Interestingly, the issues of routine screening for domestic abuse in a legal setting have been examined in Australia. Since family law reforms in 2006, significant attention has

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59 p. 4
been paid to how well family law deals with domestic abuse. An interesting example of this has been the development of interdisciplinary training ‘Avert Family Violence’ for those working in a family law context. This comprehensive training has been designed for a range of professions including judiciary, legal practitioners, court report writers and contact centre staff. The training includes: ‘Dimensions Dynamics & Impact of Family Violence’, ‘Risk Assessment’ as well as ‘Engaging With People Who Use Violence’.

**Advocates:** The consultation did not identify specific guidance available to advocates on the issue of children’s rights. In the review of the CPD advertised on the Faculty of Advocates website, one course was identified as particularly relevant. This was ‘Family Law Conference’, there was a specific session on the issue of disputed contact and talking with children. This appeared to be more about talking with children about divorce and separation rather than taking a child’s views.

**Judiciary:** Children’s rights has featured in a number of the one-day specialist training offered by the Judicial Institute for Scotland (previously the Judicial Studies Committee). Sheriff Welsh QC commented that there had been a number of courses on the best interests of the child and the voice of the child.

A recent example was ‘Talking to Vulnerable Witnesses’, a course with a particular focus on children coming to court. Another example was a course on Adoption and Permanence Orders. This provided judges with an opportunity to review international legal instruments like the **UNCRC**, how theory about the voice of the child has developed, and case law on the issue.

As well as referring to domestic abuse, the *Equal Treatment Bench Book* also makes reference to children and their rights. Chapter 8 is headed ‘Children’. The court’s powers to make special arrangements at common law and under statute for children giving evidence in civil proceedings are set out at paragraphs 8.27 and 8.28. Judges are reminded, for example, that they have the common law power “to order lawyers to remove gowns and wigs if that is thought to be helpful in putting a child witness at ease”.

Reference is made to the **Vulnerable Witnesses (Scotland) Act 2004** and the special measures available to child witnesses. Reference is also made to other Guidance, including the **Memorandum by Lord Justice General Hope on Child Witnesses, July 1990** which is appended to Chapter 8. The Memorandum states that:

> The general objective is to ensure, so far as is reasonably practicable, that the experience of giving evidence by children under the age of 16 causes as little anxiety and distress to the child as possible in the circumstances.

Paragraph 8.59 refers to the appointment of a curator *ad litem* to protect a child’s interests during court proceedings. After setting out, at paragraph 8.60, the relevant part of section 11(7) of the Children (Scotland) Act 1995, Paragraph 8.61 deals briefly with some of the issues arising when a child wishes to express a view, including the following comments about confidentiality:

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62 Details of this course can be found at [http://www.advocates.org.uk/profession/cpd/course_32082.html](http://www.advocates.org.uk/profession/cpd/course_32082.html) (accessed 26.6.12)
Where a judge receives a written communication from a child, that communication may, at the judge’s discretion, be kept confidential, and may be placed in an envelope not forming part of the process. Where a judge interviews a child it may be necessary to explain the difficulties of confidentiality, should the child not wish his or her views to be known to other parties.

5.9 Inter-agency guidance and resources

As well as the training and guidance identified for specific professions several inter-agency guidance and resources were also identified:

**Supporting Child Witnesses:** The Scottish Executive published *Guidance on the Questioning of Children in Court* in 2003. It provides “a brief summary of some basic points to assist all practitioners to conduct the examination of children in an effective, responsible and professional manner”.

A *Code of Practice to Facilitate the Provision of Therapeutic Support to Child Witnesses in Court Proceedings* was published by the Scottish Executive in 2005. It aims:

- to provide guidance on how therapeutic support can be provided to child witnesses in ways that avoid the risk of contaminating the evidence;
- to establish best practice guidelines which can be implemented consistently throughout Scotland.

Generally, these documents add to considerations of 'best interests' and 'children’s views', but do not specifically address domestic abuse. The Code of Practice highlights a particular tension that exists relating to children’s views: a child’s views can be seen to be undermined or influenced if they have received counselling or therapy about the issue they are giving their views or evidence on. It states that therapeutic support for children should not be delayed until after court proceedings out of concern that such a provision undermines the credibility of a child’s views or their evidence. However the Code requires that consideration should be given to the type of therapeutic support offered in order to avoid any risk of a child’s evidence being contaminated or allegations that they have been coached.

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65 p. 6
67 p. 15
**Children’s Hearings decision-making:** Blueprint for the Processing of Children’s Hearings Cases Interagency Code of Practice and National Standards 2001\(^{68}\)

The Blueprint sets out an inter-agency code of practice backed up by a number of integrated standards and targets designed to promote improvement. The aims of the code are as follows:

- establish an agreed basis for what individual agencies can expect of each other
- define standards which service users have a right to expect
- provide a basis for accountability through inclusion of measurable targets
- propose a workable system for monitoring, reporting and review. \(^{69}\)

Encouraging children’s participation is identified as a pre-requisite for delivering high quality services. \(^{70}\)

**Helping hands**\(^{71}\): In 2011, the Scottish Child Law Centre produced a new tool for children to express their views about contact called *Helping Hands*. This consists of a form to be completed by the child, along with guidance for adult helpers and for younger children.

**National Framework for Child Protection Learning and Development in Scotland 2012**\(^{72}\) One other aspect around training and guidance and in particular developing skills is the introduction of a *National Framework for Child Protection Learning and Development* by the Scottish Government. The framework aims to “ensure that all workers (paid and unpaid) have the knowledge and skills to contribute effectively to the multi-agency task of assessing, managing and minimising the risks faced by some of our most vulnerable children and young people”. \(^{73}\) The framework establishes competencies for the ‘wider’, ‘specific’ and ‘specialist’ workforces. For specific workforces competencies relevant to this research include: “understand the impact of domestic abuse on children”, “understand and be able to promote children’s rights” and “be able to contribute to the assessment of children affected by parental substance misuse, domestic abuse or mental health problems” or “by factors that affect parenting capacity”. \(^{74}\) For specialist workforces relevant competencies include: “understand the issues / implications of work with dangerous / violent families”, “be able to identify, investigate and / or assess abuse”. (See Chapter 6)

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\(^{69}\) p. 8

\(^{70}\) p. 7

\(^{71}\) [http://www.sclc.org.uk/publications-list.html](http://www.sclc.org.uk/publications-list.html) (accessed 26.6.12)


\(^{73}\) p. 5

\(^{74}\) p. 15
5.10 Stakeholders’ views on disputed child contact where there is domestic abuse

In the consultation, stakeholders were invited to reflect on the challenges in dealing with disputed child contact where there is domestic abuse and hearing the voice of the child in these cases. Many of these echo themes from chapter 4, on the reported case law. Despite these challenges, many of the stakeholders stressed the importance of listening to children’s views, as exemplified by Sheriff Frank Crowe: “The children’s views are fundamental and we are the guardians of that”.

5.10.1 Children’s views differing from their best interests

Professionals can find it difficult to reconcile circumstances where a child’s views differ from what they believe to be in the child’s best interests. This can be problematic in situations where a child wishes to have contact as well as situations where a child does not wish to have contact. Richard Peacock (Scottish Safeguarders’ Association) elaborates on this:

… the difficult thing is to consider what the child wants and what’s in the child’s best interests physically and emotionally. That is quite a challenge if you are faced with a child that is very able to express their view and your opinion is different to what that child wants.

Anni Donaldson (Glasgow School of Social Work at the University of Strathclyde and West Dunbartonshire Council) raised ‘traumatic bonding’ as a particular problem when taking a child’s views in the context of domestic abuse.

If she’s traumatically bonded to an abusive person it might be that what she wishes might not be a safe option. What a child wishes and what’s in their best interests are not necessarily the same thing in the context of an identified or suspected traumatic bond with an abusing parent.

When there is a discrepancy between what professionals consider to be in a child’s best interests and the child’s views, stakeholders thought professionals should explain to the child why they reached the decision that they have. Several stakeholders explored how it was difficult to manage such situations: for example,

At the moment there is a tension... panels should be child friendly but panel members may have to make decisions that they (children) don't like. But they (panel members) need to be able to explain that to them (children).’ (Joan Rose, Children’s Hearings Training Unit)

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Whilst it is incredibly important for the panel to listen to that and take it into account, sometimes it is necessary for a decision not to go along with that...and it's really difficult to explain that to children. I think it's really an area that could be doing with some input. You know how to make it clear that you are listening, you are taking into account their views and but you are not going to go along with it and why. And that doesn't mean that you haven't listened. (Unattributed)

5.10.2 Confidentiality of children’s views

Confidentiality was a topical issue, in contrast to the reported case law in chapter 4 that has very few recent reported cases. Stakeholders reported that children may be anxious about giving their views: they may wish to express a view but they may not want these views to be shared with one or both of their parents. Children may be worried about upsetting one parent or perhaps be concerned about the reaction a parent has to their views. Stakeholders interviewed were aware of and sensitive towards this issue, as exemplified by Morag Wise QC (now Lady Wise):

How does the child give their views in a confidential manner that still preserves the right of each party to a fair hearing which means knowing what everyone is saying about them?

Reflecting on a case where a child expressed the view that she did not want contact with her father, Sheriff Crowe describes how he navigated the tension between the child’s right to express views freely and the natural justice principle of the parent knowing the basis on which a court was dealing with an issue:

I opened up a letter and it said 'I don't want to see my dad.' Hopefully I was able to convey there were difficulties here (to the father) without undermining the confidential nature of that communication.

This description maps on to Raitt’s research findings, based on interviews she undertook with sheriffs across Scotland. She found that sheriffs had largely managed to “finesse the conflicts thrown up by confidentiality”.

5.10.3 The effectiveness of mechanisms for children to express their view

Criticisms were made about the effectiveness of the F9 form (Appendix 4a) as a means to obtain a child’s views. The criticisms ranged from its suitability for securing younger children’s views, to whether a parent might influence a child so that parent’s views were recorded on the form rather than the child’s views. Reflecting on this, Sheriff Crowe considered children’s legal representation as potentially more effective:

Maybe in the longer term but there are obviously costs involved, it may be better for children to have their own solicitor putting their views in an authoritative but bowdlerised way.

Morag Wise QC (now Lady Wise) raised the difficulty in deciding when a child should have their own legal representation. She spoke of the importance of informing children.

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about the court's progress especially when they express a view. Unless a child had their own legal representation, she questioned whether current mechanisms ensure children are suitably informed:

How do you decide when it's an appropriate case for a child to come in there and be separately represented and be part of the hearing? And if they are not part of the hearing how to keep them informed when they are old enough to express a view. I'm not sure we have got the balance on that right.

Whether children have their own legal representation was raised by Sheriff Welsh QC. He questioned whether it was appropriate when children were the subjects of the case. Reflecting on the current reforms in England and Wales, Sheriff Welsh QC commented that an inquisitorial rather than adversarial approach to contact disputes might be more effective in ascertaining children’s views.

5.11 Challenges in determining children’s best interests in contact where there is domestic abuse

Determining a child's best interests in contact, where there is domestic abuse, caused considerable discussion in the interviews.

Five challenges can be distilled from the interviews:

(i) Gaps in professionals’ knowledge and understanding: Anni Donaldson (Glasgow School of Social Work at the University of Strathclyde and West Dunbartonshire Council) stressed how important it was that professionals involved in making contact decisions had an understanding of the dynamics of domestic abuse and the impact domestic abuse has on children. She gave examples where she felt professionals had gaps in their knowledge and understanding. This included not appreciating that a child witnessing or hearing his or her mother being abused can be as harmful as a child being directly abused. She commented that a lack of understanding about these issues as well as “an absence of proper risk assessment” meant that inappropriate and often dangerous contact decisions are made.

(ii) The complexity of weighing a child’s best interests: Those interviewed described weighing a child’s best interests as complex and fraught. They discussed the tensions that exist in balancing parental rights and obligations to contact and the child’s welfare. For example, Margaret Main (SCRA) highlights that, in cases of domestic abuse, different aspects must be considered and weighed:

Sometimes it can be quite chronic – when is enough, enough for the child?

Those interviewed echoed the findings from chapter 4, on the reported case law, that each case must be assessed individually and on its own merits, to establish and weigh a child’s best interests as highlighted by Heather Smith (Principal Officer Childcare and Protection Training and Development, City of Edinburgh Council):

I don’t think there is a one size fits all. I don’t think assumptions should be made. There should be far more discussion and exploration needed
Stakeholders stressed that every case has unique circumstances and resisted adopting a formulaic approach to determining a child’s best interests when making contact decisions. They recommended that each case was treated individually, with Richard Peacock (Scottish Safeguards’ Association) raising the issue of safety:

Each case is different; we need to weigh up the individual circumstances of the child. The safety of the child: what the balance is, the benefit of having contact against the child’s safety.

(iii) Divergent views on whether evidencing domestic abuse is difficult or not: Some of those interviewed thought that it was difficult at times to determine whether domestic abuse had taken place. For example:

It is sometimes one person’s word against another. (Margaret Main, SCRA)

One person’s word against another – but having great long proofs is not always going to help that – you need to get a reporter in to give you an idea of the children in the situ. I think if there is any risk or potential risk of serious violence then no contact. (Sheriff Frank Crowe)

The idea that domestic abuse is difficult to evidence or prove was not shared by everyone interviewed. Morag Wise QC (now Lady Wise) commented that the standard of proof required in civil cases is less than those for criminal cases, meaning it was easier to argue that domestic abuse was a factor. The divergence of views is interesting and highlights the need for further empirical work in this area.

(iv) Risks in having contact and risks in having no contact: Those interviewed were mindful that, for children, there could be associated risks with having contact and not having contact. Both arrangements can have serious repercussions for a child’s life, as described by Sheriff Frank Crowe:

You can be ultra cautious and end up defaulting to the old method and end up where the child doesn’t see one parent or the other. And equally there is always the risk that something tragic could go wrong.

(v) Parents’ views obscuring children’s best interests: The focus needed to be on children’s best interests, and not the parents; parent’s views can dominate contact disputes. However, professionals saw it as their responsibility to ensure that the children’s best interests were prioritised and they are not swayed by the parents’ views:

If they [panel members] are looking at contact we always say in whose best interests? I think it is easy for panel members to be deflected by the parents, particularly when the child isn’t present. (Joan Rose, Children’s Hearings Training Unit)

… with the kids it’s their own [parents’] views that often colour and we have got to try and bring them down to earth. (Sheriff Frank Crowe)

Sometimes the parents don’t want to listen to the voice of the child. The parents think they know best. The voice of the child is quite clear but the parents don’t want to hear it. Sometimes it’s not a case of articulating the voice of the child but a case of opening the ears of the parent. (Sheriff T Welsh QC)
5.12 Implications of introducing domestic abuse to grounds for referral to the children’s hearings

As discussed in chapter 3, the Children’s Hearings (Scotland) Act 2011 introduces a new ground for referral to the children’s hearing if a child has or is likely to have a close connection with a person who has carried out domestic abuse. The consultation revealed a range of views and perspectives about what this might mean for contact in circumstances of domestic abuse. These are divided into four categories.

1. It will make the issue of domestic abuse more visible: Whilst stakeholders thought panel members already take domestic abuse seriously, there was a consensus that having domestic abuse as a specific ground for referral would raise the profile of domestic abuse at panels. This is exemplified by the following comments:

   Rather than it being almost a hidden subject it will be at the forefront. It will have to be discussed rather than skirted around. (Joan Rose, Children’s Hearings Training Unit)

   It will [help to] focus panel members and the Safeguarder. Domestic abuse quite often is denied by both parties and if it’s something that is found to be proven in the Sheriff court ... this denial question is out the equation ... there is no room for debate, it's a fact, it's proven in court. (Richard Peacock, Scottish Safeguarders’ Association)

2. It will create a more appropriate ground for referrals: Currently referrals made to a children’s hearing for domestic abuse are made under section 52(2)(c) of the Children (Scotland) Act 1995. This states that the child:

   (c) is likely —

   (i) to suffer unnecessarily; or

   (ii) be impaired seriously in his health or development,

   due to a lack of parental care;

   Categorising domestic abuse in this way can be seen as inappropriate. It neglects to focus on the perpetrator of domestic abuse. Instead it sometimes has a tendency to require panels to focus on the non-abusing parent who is a victim (in most cases the mother). Margaret Main (SCRA) comments that having specific grounds for domestic abuse could positively shift the attention from the non-abusing parent to the parent who is carrying out the domestic abuse:

   It will take pressure away from victims and very clearly put the focus on the person that is perpetrating. We have not wanted to focus on the victim but that is what the law has sometimes forced us to do.

3. It may increase litigation: There was a concern that adding domestic abuse as a specific ground could increase the scope for litigation. For example, a children’s hearing might make a particular condition in relation to contact with the (alleged) perpetrator of domestic abuse, and this person might use his or her rights to appeal the decision to the court.
4. **It will not necessarily create more referrals to the children’s hearings:** Stakeholders did not think the inclusion of the domestic abuse ground would necessarily lead to an increase in referrals to children’s hearings because of domestic abuse. Margaret Main (SCRA) commented that the Reporter would still make the decision whether a child required compulsory measures of supervision and the need to arrange a hearing:

I don’t think it will mean that there are more children being referred to the Reporter or children’s hearings because this category exists. We still have to make the decision … [that] not only does the problem fall into a category but also there is a need for a child or young person to be subject to legal intervention in their life. So in terms of decision-making it should not mean that more children are reported because of that.

5.13 **Other issues**

Three other issues were raised by particular stakeholders, which are salient to this study's topic.

1. **Contact centres:** A number of stakeholders highlighted contact centres as a useful resource in assisting children to have contact with a parent when there is domestic abuse. Where there are concerns about the safety of the child or of the non-abusing parent, contact centres can offer a venue for contact to take place and in some cases can supervise contact.

Those interviewed raised concerns that contact centre provision varies across Scotland and that current demand outstrips provision. Previous research \(^{77}\) reports that there can be confusion around the supervision levels that are offered at contact centres. This can result in contact arrangements being made that do not have adequate levels of supervision for risk posed by contact. Contact centres are often seen as a temporary or transitional measure. However they to do not address the reasons why contact has to be supervised in the first place. Contact centres need to be complemented with other services that address the reason why contact is supervised, if there is to be any realistic chance of developing an exit strategy from contact centres.

2. **Perpetrator programmes:** Perpetrator programmes were also identified as an important resource in supporting safe contact where there has been domestic abuse. Anni Donaldson (Glasgow School of Social Work at the University of Strathclyde and West Dunbartonshire Council) commented that “patchy provision” of court mandated or community based perpetrator programmes, where men address their violent and abusive behaviour, mean that it is difficult to introduce measures that can reduce the risks posed by contact with an abusive parent.

3. **Dealing with domestic abuse as a child protection issue.** Whether it was always useful to frame domestic abuse as a child protection issue was raised in the consultation. Reflecting on practice where a child is automatically referred to the Children’s Reporter

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\(^{77}\) Morrison, F. and Wasoff, F. 'Child contact centres and domestic abuse - victim safety and the challenge to neutrality', Violence Against Women 8(6):711-20
when police are called to an incident of domestic abuse, Janice McGhee (Social Work, University of Edinburgh) commented that the prevalence of domestic abuse means that a child protection response in all cases of domestic abuse is not possible nor is it always appropriate. Distinctions have to be made in relation to the severity of domestic abuse, the effects it has on the individual child, and the response and services that would best meet the child’s needs. She further commented that, as well as appropriate responses to individual cases of domestic abuse, attitudes need to be challenged on the acceptability of gendered violence in society that underpin domestic abuse.

5.14 Summary - consultation with key stakeholders
The consultation with stakeholders raised numerous issues, complementing and adding to the early chapters on legislation and reported case law. A brief summary of issues raised is summarised here.

A broad range of professionals can be involved in cases of disputed contact. As a preliminary research study, a small but targeted sample of individuals were selected for the consultation.

We sought to identify and analyse specific training and guidance on domestic abuse and children’s rights that was available to professions. For certain professions specific or discrete training on domestic abuse and children’s rights did not exist. For some this was because domestic abuse and children’s rights were issues threaded through entire syllabuses and not addressed as separate issues; for other professionals, on-going training and guidance on these issues did not exist. ‘Front-line’ professions do not have specific requirements to undertake training on domestic abuse. Solicitors who represent child and adult victims of domestic abuse have no requirement to undertake training on domestic abuse or the effects it has on children. Court reporters and safeguarders who make recommendations about contact and children’s best interests are not required to undertake training on domestic abuse or the effects it has on children. They are not required to undertake any training on assessing a child’s welfare of taking a child’s views despite these being core to their purpose. For certain professional groups – e.g. safeguarders, children’s panel members, social workers, solicitors and advocates – the topics of CPD training were highly discretionary, so that coverage was not guaranteed. Given the local variations in training and guidance, a degree of caution should be exercised when interpreting and drawing conclusions from results of the consultation.

Professionals identify eight challenges, three when taking a child’s views into account:

1. Children’s views differing from their best interests
2. Confidentiality of children’s views
3. The effectiveness of mechanisms for children to express their views.

And a further five challenges in determining a child’s best interests:

4. Gaps in professionals’ knowledge and understanding
5. The complexity of weighing a child’s best interests
6. Divergent views on whether evidencing domestic abuse is difficult or not
7. Weighing up the risks in having contact and not having contact, for the child
Stakeholders identified implications of introducing the ‘domestic abuse’ ground for referral to the children’s hearings. These implications can be divided into four categories:

- It will make the issue of domestic abuse more visible
- It will create a more appropriate ground for referral than what was available currently
- It may increase litigation, particularly by alleged perpetrators of domestic abuse
- It will not necessarily create more referrals to the children’s hearings.

Three further issues were raised by those interviewed, of note for this study:

1. Child contact centres could be useful to support safe contact but confusion remains about supervision levels and demand for provision outstrips supply.
2. There is ‘patchy provision’ of perpetrator programmes to assist men to address their violence and abuse. Therefore it is difficult to reduce the risks to a child.
3. Domestic abuse is not only a child protection issue but a broader cultural one, and needs to be addressed as such.

The next section brings together the key points raised in the review of legislation, the case law review and this consultation and offers directions for further action.
6 Key points and future action

Domestic abuse is not an insignificant issue. There are inherent difficulties in knowing how many children are affected by domestic abuse, due to reporting issues, but statistics suggest at least three out of ten children are living with domestic abuse. Chapter 5 underlines that child-parent contact, and its potential association with domestic abuse, is regularly an issue in disputed contact proceedings.

Disputes over child-parent contact have become the focus of increasing policy and practice attention. When domestic abuse has occurred or is alleged, these issues of disputed contact can become even more fraught. Recent changes in both family actions and now the children’s hearing system direct specific attention to domestic abuse.

This preliminary research study examined current practices in procedures in child contact proceedings where there is domestic abuse, from a children’s rights perspective. This chapter summarises key points under four main issues:

- Defining domestic abuse
- Best interests, children’s views and domestic abuse when contact is disputed
- Defining a child’s best interests when contact is disputed
- Children’s views within contact proceedings

It then considers potential future action that the Commissioner could choose to take forward.

6.1 Defining domestic abuse

There is no single definition of ‘domestic abuse’ in Scottish policy generally nor in the legislative provisions in particular.

Domestic abuse is not defined in the Children (Scotland) Act 1995 nor in the Children’s Hearings (Scotland) Act 2011.

The legislative definition of ‘abuse’ for family actions is criticised on several grounds. Reported case law has found the definition unclear and circuitous. The legislative definition is criticised for not adding to what courts would have considered before, while potentially making disputes more contentious because of the ‘emotive connotations’ of using the term ‘abuse’.

The new children’s hearing ground of referral is received more positively. It is an improvement on the previous ground used in situations of children affected by domestic abuse; the new ground shifts attention from the non-abusing parent to the person who is carrying out the domestic abuse. However, queries have been raised whether this ground will lead to more litigation by the (alleged) perpetrator of domestic abuse.

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The definition of domestic abuse is a contentious issue, replete with ideological and practical debates. Nonetheless, the lack of a consistent definition across policy, legislation and guidance leads to confusion. It distracts attention from addressing the domestic abuse’s impact on children and young people. If professions define domestic abuse differently, it is not clear what is meant when they refer to it. This may have repercussions if domestic abuse is understood to affect a child’s welfare – or how it is understood to affect it.

The consultation with stakeholders reveals some of the tensions that exist when defining domestic abuse and assessing the impact it has on children. Risk assessment tools can encourage domestic abuse to be framed as a series of violent incidents. This does not reflect women’s or children’s accounts that domestic abuse is on-going. It does not easily capture the cumulative effects that domestic abuse can have on a child’s wellbeing. It can overlook the high levels of fear that some victims experience even once violence has ended. It can also overlook the other behaviours that are used by perpetrators to exert power and control, particularly emotional and psychological abuse.

The terms ‘domestic violence’ and ‘domestic abuse’ are used interchangeably in training and guidance documents, perhaps adding to this confusion. Focussing on ‘violence’ rather than ‘abuse’ is criticised for being reductionist and obscuring the range of behaviours that constitute domestic abuse.

### 6.2 Best interests, children’s views and domestic abuse when contact is disputed

**Few reported cases refer to the court’s particular consideration of ‘abuse’ in relation to a child, in family actions under section 11 of the Children (Scotland) Act 1995.**

Unreported cases may have addressed these provisions.

Certainly, given that high levels of allegations of abuse or violence amongst family court samples, domestic abuse is likely to be part of the family context in many disputed family proceedings. It may well be that domestic abuse is not labelled as such in the proceedings and thus considered within a more general mix of children’s best interests.

**Across proceedings, there is no legal presumption against contact between a child and the (alleged) perpetrator of domestic abuse.**

Domestic abuse is one factor among others to weigh up in deciding what is in the child’s best interests. Such factors include:

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79 A recent English study reported that 41.9% of resident parents involved in in-court conciliation attributed ‘domestic violence’ or ‘emotional abuse’ as the reason for separation (p28). More than half of the resident parents reported fear of violence made it difficult to resolve problems associated with contact (p34). Trinder, L., Connolly, J., Kellett, J., Notley, C. and Swift, L. (2006) Making Contact Happen or Making Contact Work? The Process and Outcomes of In-Court Conciliation, London: Department for Constitutional Affairs.
• The likelihood of co-operation between parents and the impact that co-operation (or the lack of it) will have on the child
• The risks of further abuse to the child
• The impact that further abuse on the non-abusing parent may have (directly on the non-abusing parent and indirectly on the child)
• The importance of providing a child with a sense of finality and removing uncertainty, by terminating contact (particularly in adoption and permanence orders)
• The importance that continued contact can have in providing a child with a link to his or her heritage

Stakeholders differed in their concern about whether domestic abuse had been alleged or proven.

If alleged, some were concerned that this could lead to more disputes about evidencing this allegation.

Limited guidance and training seems to be available to professionals specifically on children affected by domestic abuse and contact.

There are at least three exceptions.

1. Advice is available to the judiciary, in dealing with children affected by domestic abuse in court proceedings.
2. Reference to, and resources about, children affected by domestic abuse are contained within initial training for children’s panel members.
3. Guidance on domestic abuse is available to Reporters to assist them during their initial investigation and final decisions about the need for a child to have compulsory measures of supervision.

The research study found it difficult, however, to assess for all professions what is available on domestic abuse and disputed contact and on children’s rights. For many professions, training arrangements vary by locality. Ad hoc seminars have been available.
6.3 Defining a child’s best interests when contact is disputed

The study addresses wider discussions of children’s best interests and how children’s views are considered in proceedings that decide on child-parent contact.

The child’s welfare is the paramount consideration across all three proceedings.

Some variations on its expression exist (e.g. whether it is throughout childhood or throughout life). There is one exception, where a children’s hearing can make a decision inconsistent with the paramountcy of a child’s welfare, in order to protect members of the public from serious harm. The Children's Hearings (Scotland) Act 2011 will require children’s hearings to treat the child’s welfare throughout childhood as a primary consideration, in such situations.

There is no legal presumption for contact, between a child and a parent, when determining a child’s welfare.

A ‘general principle’ has been expressed in family actions, that “it is conducive to the welfare of children if their absent parents maintain personal relations and direct contact with them on a regular basis”. 80

In contrast, for adoption orders, the courts have supported the general principle that “in normal circumstances it is desirable that there should be a complete break from the child’s natural family”. The courts have so far rejected a presumption in favour of post-adoption contact. Generally, direct contact will be ordered only in “exceptional cases”. 81

Each case is unique: the particular facts and circumstances will determine the child’s welfare.

Courts and children’s hearings thus carry out a balancing exercise, without regard to checklists and assumptions. On the one hand, this may appear arbitrary or unpredictable; on the other hand, a court can pay attention to the particular circumstances and weigh accordingly.

Nonetheless, reported case law reveals trends in what is considered and how such factors are weighed in deciding a child’s best interest. For example:

- contact has been seen as potentially assisting a child in his or her future identity. In this regard, courts have been ready to award indirect or ‘letterbox’ contact in permanency and adoption proceedings, between the birth parent and the child

- a birth parent’s wish for continuing child contact is not, of itself, a bar to granting a permanence order. Indeed, a birth parent’s acceptance of the placement is an essential pre-condition for an order for direct contact to be granted

- a child’s attachment to particular people (e.g. primary carer), his or her stability and security are frequently mentioned in determining the child’s best interests

- lengthy time delays in proceedings are not in a child’s best interests.

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80 Lord Rodgers in White v White

81 Although a recent decision, as yet unreported, of Sheriff Holligan may change this.
6.4 Children’s views within contact proceedings

Generally, contact proceedings must have regard to a child’s views, subject to the child’s age and maturity and as far as is (reasonably) practicable.

Legal wording varies, particularly in the detailing of the procedure and how practicability is phrased. For a child aged 12 or over, a permanence or adoption order cannot be made without the child’s consent, except if the court is satisfied that the child is incapable of consenting to the order. Otherwise proceedings tend to have a legal presumption that a child aged 12 and over is of sufficient age and maturity to form a view.

Reported case law shows that the presumption of age 12 has not acted as a barrier to younger children expressing their views.

Courts should apply the test of ‘practicability’, in family actions, in determining whether a child should have the opportunity to make known his or her views.

This should include consideration of what is appropriate given the child’s age and maturity – in order to avoid causing further distress and lasting harm. The test of ‘practicability’ emphasises how rather than whether the child’s views should be gathered. Practicability is the first stage – and arguably sets a low threshold – and only then does the court weigh the child’s views in the court decision. Suitably taking account children’s views is now a recognised ground of appeal and, in some cases, has been the sole ground.

The following factors are invoked by courts, to determine the weight to be given to children’s expressed views.

- The age and maturity of the child: the older and more mature the child, the greater the weight.
- The confidence, and to some extent consistency, with which the views are expressed.
- Any influence on the child’s views, whether deliberate influence by a parent or another, or influence as a result of the child’s own perception of the circumstances, e.g. the reaction of others to one outcome or another.

The paramount consideration is the child’s best interests: thus a child’s views will always be subordinate to the child’s best interests.

A range of mechanisms are available for children to have their views regarded.

These include children:

- Giving evidence
- Sending in written views
- Appearing in person to a judge or children’s hearings
- Being represented, which may or may not be legal representation
- Having people appointed to report on the child’s best interests, including the child’s views: local authorities, court reporters, curators ad litem, safeguarders (in relation to children’s hearings). This is usually discretionary, but a curator ad litem must be appointed in applications for permanence and adoption orders.
Certain of these mechanisms have been criticised individually, as has the plethora of potential professionals involved.

For example, questions have been raised about:

- The appropriateness of different methods, having regard to a child’s age and maturity
- The distinction between the different roles, and the need to clarify whether a child’s views are being communicated or the professional’s view of the child’s best interests
- The extent to which children’s views can be kept confidential
- Inconsistent approaches by the courts to allowing children to enter court processes
- Children being informed about what happens, particularly after court proceedings

**Parents’ views can obscure children’s views**

Professionals see it as their responsibility to ensure that the child’s best interests are prioritised and they are not swayed by the parents’ views.

### 6.5 Future action

One of the remits of this study was to identify where there may be gaps in knowledge and/or practice to identify areas where the Commissioner may wish to consider opportunities for further action. From the study’s findings, four possible areas are identified:

#### 6.5.1 Work towards a common and evidenced definition of domestic abuse

- The Commissioner could make a clear statement on the definition he uses, and the reasons for it.
- The Commissioner could work in partnership with other agencies, within the children’s sector and other fields, to develop a consistent and sound definition of domestic abuse.

Such a definition would assist consistency across policy, legislation and guidance, with the possibilities of variation or exceptions as required in the particular circumstances.

This definition should take on board the extensive research on domestic abuse generally, and how it affects children in particular. This would clarify and exclude certain terms that are unhelpful – like ‘domestic violence’.

In the short-term, the Commissioner could support professional groups working with children, in disputed contact proceedings, to consider and amend their definitions in training, guidance and other information.
6.5.2 Encourage sound information to inform practice and policy

- The Commissioner could commission further research, and encourage other funders to do so, on disputed contact, domestic abuse and the related proceedings.

For example, little empirical research exists on family actions in Scotland. Given recent and forthcoming changes in adoption and permanence proceedings, and in children’s hearings respectively, empirical evidence will be lacking here as well.

Considerable concern has been expressed about recent legal aid changes, which may even further decrease children’s ability to access legal aid.

Empirical research is required on how children experience proceedings, particularly on how their best interests are determined and their views are accessed and duly regarded.

Morrison will report on her qualitative study of children’s experiences of contact, in case of alleged domestic abuse. This study is necessarily small-scale and primarily covers family actions. More evidence is needed to ascertain children’s experiences of contact on an on-going basis and across proceedings. It should be remembered that, for most children, disputes about contact do not come to the attention of any of these three types of proceedings. Any commissioned research should consider addressing this substantial and under-researched group.

A feasibility study of how to undertake such research was funded by the then Scottish Executive and published in 2002. It would be possible to build on the findings there, on how to access such evidence robustly, efficiently and ethically.

The legal and policy focus has tended to be on parent-child contact. Other relationships can be very important to children: for example, siblings and grandparents. What issues in relation to proceedings and decisions are there, in relation to these other forms of contact?

Growing Up in Scotland, Scotland’s longitudinal cohort study, is being continued by the Scottish Government. Plans will be taken forward for subsequent data sweeps. Children are now being included as respondents as well as their parent(s) or carer(s). The Commissioner could seek to influence the next Growing Up in Scotland sweeps to assist in filling in the evidential gaps above. He could also commission, in partnership with the Scottish Government, further analysis of the existing Growing Up in Scotland data in regard to the above questions.

The study found a lack of reported case law, explicitly referring to the ‘abuse’ considerations in family actions. Yet, statistics suggest a very high rate of disputed contact attributed to ‘domestic violence’ or ‘emotional abuse’ (see chapter 6.2). The study suspects – but cannot confirm – that the issues of ‘domestic abuse’ are being hidden within contact proceedings under broader discussions of ‘welfare’. The reported

82 This PhD study is funded by the Economic and Social Research Council UK (ES/G028796/1) and Scottish Women’s Aid, and is located at CRFR.
cases sometimes used the term ‘volatile’ to describe behaviour, which ignores the power dynamics of ‘domestic abuse’. The implications of this should be considered further: for example, a more concentrated study of how professionals involved conceptualise, recognise and address domestic abuse.

Scotland, and other jurisdictions, have regularly found it difficult to involve children effectively and sensitively in disputed contact proceedings. While this study identifies some very concrete improvements that could be made in certain proceedings (e.g. taking forward the recommendations of the Scottish Civil Courts Review, see chapter 4.2), the continued difficulties suggest the benefits of a more fundamental review: based on children’s experiences, and a children’s rights perspective, what are the mechanisms that would support children to express their views and have them given due weight? How should these be balanced by attention to children’s welfare? The Commissioner could initiate this review, taking a ‘Think Tank’ approach. It would benefit from cross-national learning, from other systems, and learning across family actions, children’s hearings and adoption and permanence proceedings.

6.5.3 Influence training and guidance on the impact of domestic abuse on children, and particularly on disputed contact

- A more extensive audit would be required to identify the full range of optional training available, to know what is available locally and to judge the quality of what is provided.

No professional group would seem to have – nationally – both high quality training, consistently offered, and guidance on this topic, although some professional groups have more than others.

- Training and guidance for professional groups should be a priority. The Commissioner could work in partnership with professional bodies, to develop training and guidance suitable for each profession.

All these professions, working in disputed contact cases, should receive this training, as a core issue, rather than a discretionary one. The training and guidance should have common definitions of domestic abuse and ensure they incorporate recommended practice that has been evidenced.

- More could be learnt from the Australian reforms for family actions, where there is now routine screening for domestic abuse and whole-scale training for professionals.

- In terms of training and guidance, three further opportunities may be available to the Commissioner, currently.

  (1) The implementation of the Children’s Hearings (Scotland) Act 2011, with its new ground of referral on domestic abuse.

The Commissioner could work with Children’s Hearings Scotland, the Children’s Hearings Training Units, Children 1st and SCRA to support high quality training and guidance.

Recently published, this framework establishes core skill and competences for staff working directly and indirectly with children. A number of the competencies are relevant to domestic abuse and children’s rights.

The Commissioner could work with the Scottish Government and Child Protection Committees to ensure that the competences relating to domestic abuse and children’s rights receive specific attention when implementing the framework, subsequently influencing the training and guidance for ‘front line’ workers.

The Judicial Studies Committee (now the Judicial Institute for Scotland) is reviewing the curriculum provided to judges across Scotland.

6.6 Final Comment

In Scotland, there has been considerable policy attention to children affected by domestic abuse. This has led to specific recognition of its potential impact on children, in both family action and children’s hearing proceedings. There are examples of it being addressed in certain professions’ training and guidance materials. There has also been considerable policy attention to improving children’s ability to have their views regarded in proceedings that affect them. Changes have been made to legislation, case law has addressed these issues, and mechanisms have evolved.

This increased attention provides the opening for further action. This preliminary research study suggests that much needs to be done to ensure children’s rights are recognised in practice and met. This can be challenging for all, as disputed contact is often contentious, affects relationships within and outwith families, and discretion is inherent in making judgements about what is in a child’s best interests. Professionals, children and their parents thus need to be supported to ensure children’s rights are met in the ensuing processes and decisions.

With all the policy and practice activity, the children’s actual experiences of proceedings and decisions need to be kept central.
Appendix 1 – Methodology

Research questions

The study was framed around the following questions, initially asked by the Commissioner’s Office.

Legislative Context
1. What is the current legislative context for contact decisions in Scotland?
2. How is the issue of contact dealt with a) through the children’s hearings system and b) through the courts? Please identify any processes involved, paying particular attention to processes specifically designed to help children/young people who have experienced domestic abuse.
3. Please identify where the concept of 'best interests' appears in legislation and guidance relating to child contact proceedings.
4. Please identify where the concept of ‘voice of the child’ appears in legislation and guidance relating to child contact proceedings.
5. What is the likely impact of impending legislative changes on contact decisions (e.g. the introduction of the Domestic Abuse Ground in the children's hearings system)? We are not looking for detailed analysis at this stage, rather an indication of which legislative changes may be imminent, with a view to us establishing where we may be able to have an input (e.g. in creating new guidance).

Current Guidance/Training Materials
6. Which reports and/or background information might be requested by the Reporter/Sheriff to enable them to reach a decision on disputed contact?
7. What guidance or training (if any) on the subject of domestic abuse is available to Sheriffs/Reporters/Panel Members/Social Workers?
8. What guidance or training (if any) on the subject of children's rights is available to Sheriffs/Reporters/Panel Members/Social Workers? We are particularly interested in finding out about how Article 3 of the United Nations Convention on the Rights of the Child is applied in this context.
9. What guidance (if any) is available to Sheriffs and Panel Members to help children express a view in contact proceedings, as per Article 12 of the UNCRC?

Key Organisations
10. Which key organisations would we need to engage with, in order to influence policy and practice for a) Sheriffs, b) the Hearings system and c) Social Workers?
11. How might we best do this?
Three main methods sought to answer the research questions that had been set out.

**A. Review of relevant legislation and associated regulations and guidance**
*Addressing research questions 1, 2, 3, 4, 5, and 6*

This established the current legal framework for dealing with disputed contact. It set out the processes for making decisions. It identified where the concepts of 'best interests' and the 'voice of the child' appeared in legislation and highlighted how these concepts feature in any guidance relating to child contact proceedings for courts and children’s hearings. It built on the original analysis of the Children (Scotland) Act 1995 in this regard, published in 2002.84 The review identified which reports and background information may be requested by the court or children's hearing to enable them to reach a decision on disputed contact.

This part of the research examined the impending legislative changes made by the Children’s Hearings (Scotland) Act 2011.

**B. Case law review**
*Addressing research questions 1, 2, 3, and 4*

This examined the current legal context for child contact. It highlighted current decisions, issues and commentary about child contact decisions. It paid particular attention to how the concept of 'best interests' was applied and how children and young people’s views were regarded in decision-making processes.

**C. Desk top research and consultation with key professional stakeholders**
*Addressing research questions 5, 6, 7, 8, 9, 10 and 11.*

The consultation complemented the desk-based research, seeking to identify current guidance and training. It focused on the guidance and training on domestic abuse and children’s rights (with particular attention to the right of children to express a view and the requirement that these views are taken into consideration when making orders relating to contact).

The consultation was carried out with individuals from the following professions and organisations: child and family law solicitors and advocates, children’s hearings training, Judicial Studies Committee, Sheriffs, the Scottish Children’s Reporter Administration (SCRA), safeguarders, and those that train social workers. A total of 12 interviews were undertaken, by telephone or in person.

Appendix 2 provides details of the individuals who participated in the consultation.

Stakeholders were asked to identify any existing written guidance or training materials, future plans, and to reflect upon the research questions. (Appendix 3)

The study followed ethical procedures, with particular regard to informed consent within the consultation. Anonymity was not provided generally, although some opinions have not been attributed due to their sensitivity. The study followed the ethical requirements of the School of Social & Political Science, University of Edinburgh.

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# Appendix 2 – Stakeholders consulted

<table>
<thead>
<tr>
<th>Name</th>
<th>Role</th>
</tr>
</thead>
<tbody>
<tr>
<td>Margaret Cox</td>
<td>Service Manager, Children 1st</td>
</tr>
<tr>
<td>Sheriff Frank Crowe</td>
<td>Sheriff</td>
</tr>
<tr>
<td>Anni Donaldson</td>
<td>University of Strathclyde, Glasgow School of Social Work and West Dunbartonshire Violence Against Women Partnership</td>
</tr>
<tr>
<td>Margaret Main</td>
<td>Practice Reporter, SCRA</td>
</tr>
<tr>
<td>Lesley McFall</td>
<td>Solicitor and Secretary of Family Court Users' Group of Solicitors</td>
</tr>
<tr>
<td>Janice McGhee</td>
<td>Senior Lecturer in Social Work, Edinburgh University</td>
</tr>
<tr>
<td>Richard Peacock</td>
<td>Secretary of Scottish Safeguarders' Association</td>
</tr>
<tr>
<td>Joan Rose</td>
<td>Children's Hearings Training Officer, Queen Margaret University</td>
</tr>
<tr>
<td>Heather Smith</td>
<td>Principal Officer Childcare and Protection Training and Development, Edinburgh City Council</td>
</tr>
<tr>
<td>Morag Wise QC (now Lady Wise)</td>
<td>Chair of the Advocates Family Law Association</td>
</tr>
<tr>
<td>Sheriff Thomas Welsh QC</td>
<td>Director of Judicial Studies</td>
</tr>
<tr>
<td>Maureen Wylie</td>
<td>Violence Against Women Network Coordinator, Improvement Service and National Child Protection Committee Coordinator</td>
</tr>
</tbody>
</table>
Appendix 3 – Interview schedule

Introduction
- Who I am
- What the research is and why it has been commissioned
- What will happen with the information gathered
- Recording interview
- Confidentiality / Anonymity

Basic Information about Interviewee
Background information on professional work, time in particular post etc.

Current training and guidance
Can you tell me how your profession [Sheriffs/Reporters/Panel Members/Social Workers/Safeguarders] accesses continuing professional education / training?
- How is it delivered?
- Who are the providers?
- How frequently do people participate?
- Timing of the training (was it a one-off training? Is it something offered routinely - if so to whom?) and cost if any?

I would like to ask some specific questions about the training and guidance that is available in relation to domestic abuse and child contact.

Domestic abuse
What guidance (if any) on domestic abuse is available to Sheriffs/Reporters/Panel Members/Social Workers/Safeguarder?
- Can you tell me about the guidance? E.g. what does it cover? Is it accessible to everyone? Is it mandatory?
- Timing of the training (was it a one-off training? Is it something offered routinely - if so to whom?) and cost if any?
- Where can I get a copy of this?
- What additional guidance might be helpful for dealing with disputed contact cases where DA is a factor? (Are there specific issues it should address?)

What training (if any) on the subject of domestic abuse is available to Sheriffs/Reporters/Panel Members/Social Workers/Safeguarder?
- Can you tell me about the training? E.g. what does it cover? Is it accessible to everyone? Is it mandatory? Who provides it?
Timing of the training (was it a one-off training? Is it something offered routinely - if so to whom?) and cost if any?

Where can I get a copy of this?

What additional training would be helpful for dealing with disputed contact cases where DA is a factor? (Are there specific issues it should address?)

Children’s rights

What guidance on children’s rights is available to Sheriffs/Reporters/Panel Members/Social Workers/Safeguarders?

- Can you tell me about the guidance? E.g. what does it cover (Article 3 & 12)? Is it accessible to everyone? Is it mandatory?
- Where can I get a copy of this?

What additional guidance might be helpful for on Children's Rights? (What would it address?)

- What training on the subject of children’s rights is available to Sheriffs/Reporters/Panel Members/Social Workers/Safe?
- Can you tell me about the training? E.g. what does it cover (Article 3 & 12)? Is it accessible to everyone? Is it mandatory?
- Timing of the training (was it a one-off training? Is it something offered routinely - if so to whom?) and cost if any?
- Where can I get a copy of this?
- What additional training might be helpful for on Children’s Rights? (What would it address?)

Background information to make decisions

For Reporters / Sheriffs only

I would like to ask you about the information you might request to help you in reaching a decision about dispute contact where domestic abuse is a factor.

Can you tell me what types of reports and/or background information you might request?

- What information are you looking for?
- Are there particular specialists / professionals / organisations that you might consult?
- Are there other types of information / reports that might be useful when domestic abuse is a factor?
Future

As you know, the Children’s Hearing Scotland Act introduces new provisions for children affected by domestic abuse. It will mean that having ‘a close connection with a person who has carried out domestic abuse’ can result in referral to a children’s panel.

From your perspective how will this impact contact decisions where domestic abuse is a factor?

The Commissioner has identified safe contact as an issue that is particularly important to children and young people who have experienced domestic abuse. Which organisations / structures / networks would be important for him to work with so as to influence policy and practice in this area?

Additional questions

From your perspective:

Are there particular challenges when it comes to determining a child’s best interests in contact disputes where domestic abuse is a factor?

Are there particular processes that would be useful in determining a child’s best interests when there is domestic abuse? (e.g. risk assessment)

Are there particular challenges in taking a child’s views in disputes about contact where domestic abuse is a factor?

Are there particular processes that assist children who have experienced domestic abuse give their views? (e.g. confidentiality)

Round up

Is there anything else I should be asking you?

Thank you for your time and contribution

Next steps with the report
Appendix 4a – Court forms requesting children’s views in family actions - Form F9

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

Rule
33.7(1)(h)

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.

PART B

IF YOU WISH THE SHERIFF TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM

To the Sheriff Clerk, (7)
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?  
A teacher?  

A relative?  
Other?  

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: .................................
Appendix 4b – Court forms requesting children’s views in family actions - Form 49.8-N

Form 49.8-N


Court Ref. No.

PART 1

THIS PART MUST BE COMPLETED BY THE PURSUER’S SOLICITOR IN LANGUAGE THAT A CHILD IS CAPABLE OF UNDERSTANDING

To:  (name and address of child)

The court has been asked by your father [or mother, or (other relative or person as the case may be)] to decide (insert appropriate wording to explain section 11 or Article 12 order[s] sought).

If you want to tell the court your views, you should complete Part 2 of this form and return it to the court in the envelope provided by (insert date). This envelope does not need a stamp.

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

IF YOU DO NOT UNDERSTAND THIS FORM OR IF YOU WANT HELP TO COMPLETE IT you may get help from a SOLICITOR or you may contact the SCOTTISH CHILD LAW CENTRE ON the FREE ADVICE TELEPHONE LINE ON 0800...
PART 2

IF YOU WISH THE COURT TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM

To: Deputy Principal Clerk of Session

Court Ref. No.

From: (insert name of child)

1. Do you want the court to know what your views are about your future?

   YES ☐   NO ☐

   Please tick

2. Would you like someone else to tell the court what your views are about your future?

   YES ☐   NO ☐

   Please tick

   If YES, please write this person’s name and address below:

   Name:

   Address:

3. Would you like to write to the court to give your views about your future?

   YES ☐   NO ☐

   Please tick

   If YES, please write your views below. You may continue on a separate piece of paper.

Thank you for taking the time to respond. Please now return the form and any separate piece of paper in the envelope provided.
Appendix 5 – International child abduction cases

Special provisions apply when courts are considering a child’s views in cases involving international child abduction. In cases brought under the Hague Convention on the Civil Aspects of International Child Abduction, when considering whether to order the return of a child, Article 13 includes the following provisions:

Hague Convention on the Civil Aspects of International Child Abduction

Article 13 ... [T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

... (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an agreed degree of maturity at which it is appropriate to take account of its views.

In cases where a petition is made to the court to register and enforce a foreign court order in terms of the Child Abduction and Custody Act 1985, the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children (which now has very limited application) will be relevant. Article 10(1) allows for refusal of recognition and enforcement when, by reason of a change in circumstances, the effects of the original decision are manifestly no longer in accordance with the child’s welfare. In reaching a decision on refusal on those grounds, Article 15 of the Convention requires the court to ascertain the child’s views (unless this is impracticable), having regard, in particular, to the child’s age and understanding.

In the case law review, any child abduction cases are considered together with family actions but the different legislative framework that applies should be noted.
Scotland’s Commissioner for Children and Young People
85 Holyrood Road
Edinburgh
EH8 8AU
Tel: 0131 558 3733
Young People’s Freephone: 0800 019 1179
Fax: 0131 556 3733
Web: www.sccyp.org.uk
Twitter: @RightsSCCYP

www.sccyp.org.uk