11

Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences

E. Kay M. Tisdall and F. Morrison[1]

Children's participation generally—and children's participation in court proceedings when their parents divorce or separate specifically—has gained considerable policy and practice prominence. This has been fuelled by the United Nations Convention on the Rights of the Child (UNCRC), with its requirements for children's views to be given due weight in all matters affecting the child (Article 12). Research developed immensely in the 1990s, gathering children's own views of their participation when their parents divorce or separate. This provided a grounded basis for changes in policy and practice[2] and numerous countries altered their law to facilitate children's views being considered in family law decisions.[3]

With all this activity have come new questions and new dilemmas. A very real concern is 'slippage', where leading legislation such as that of New Zealand is being negated by certain senior court decisions.[4] The pressure of fathers' rights groups—fathers who are unhappy with the contact they have with their children, following separation or divorce—has been successful in creating political attention. The policy and research gaze has narrowed to look intently at contested contact, including situations where domestic abuse has occurred or is alleged.[5] In a European context, the litigation of fathers has led to the European Court of Human Rights laying out how a parent's right to respect for his or her private and family life (Article 8) will need to

[1] Kay Tisdall is Professor of Childhood Policy and Co-Director of the Centre for Research on Families and Relationships, University of Edinburgh. She established the MSc in Childhood Studies in 2001, at the University, as one of the first interdisciplinary degrees underpinned by children's rights.

Fiona Morrison is a PhD student at the Centre for Research on Families and Relationships, University of Edinburgh.

[2] E.g. J. Cashmore and P. Parkinson, *The Voice of a Child in Family Law Disputes* (Oxford, 2008); G. Douglas, M. Murch, C. Miles, and L. Scanlan, *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991* (2006, <http://www.dca.gov.uk/family/familyprocrules_research.pdf> (3.11.09)); C. Smart, B. Neale, and A. Wade, *The Changing Experience of Childhood: Families and Divorce* (Cambridge, 2001); A. Smith, N. Taylor, and M. Gollop (eds), *Children's Voices: Research, Policy and Practice* (Auckland, 2000).

[3] See Henaghan, chapter 4, this volume.

[4] E.g. see chapter 4 this volume.

[5] Scottish Government, *National Domestic Abuse Delivery Plan for Children and Young People* (Edinburgh, 2008); J. Hunt and A. Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (2008, <http://www.justice.gov.uk/publications/docs/outcomes-contact-orders-briefing-note.pdf> (27.7.10)); Mruk Research Ltd, *2007 Child Contact Survey* (2008, <http://www.scotland.gov.uk/Resource/Doc/215624/0057695.pdf> (27.7.10)).

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be balanced by the child's best interests and the child's own right under Article 8.[6] Debates continue about how best to facilitate children's participation in court proceedings: e.g. by legal representation of the child; by continuing the professional approach of expert reporting; and/or by the judge meeting with the child and speaking to the child personally.[7]

Scotland has followed these broad trends. In 1995, the Children (Scotland) Act was passed; it was the most radical, across UK children's legislation, in specifying the requirement for children's participation. The 1995 Act remains the foundation of current Scottish family law, with certain amendments in regards to contested contact. In 1999, the then Scottish Executive commissioned the first study on the relevant provisions.[8] The study analysed all related legislation and guidance, reported case law up until 2001, and undertook a feasibility study on investigating children's experiences of their participation. Key findings included:

- the individual focus of the family law proceedings, that caused problems for siblings and other horizontal relationships for children;
- the lack of information for children and their heavy reliance on parents' initiatives to become involved;
- adults' concern about children's welfare, and their young age, which could preclude children's involvement;
- problems with procedures, such as (lack of) intimation to children, children feeling that their views were not adequately taken into account by reporting professionals, and negative feelings about delayed proceedings;
- the appreciation of children who had been independently represented by a lawyer, even when the court decisions were not always what the children had wanted.

This chapter explores whether progress has been made, since the study was undertaken. After summarizing the relevant legal provisions, an updated review of reported case law is undertaken. The chapter then presents provisional findings from research with children about their participation in the contested area of child contact where there is a history of domestic abuse. The analysis concentrates particularly on the processes of participation and the 'weight' given to children's views, with accompanying consideration of how children and childhood are constructed within these. Children's participation in family law court proceedings is a particularly challenging requirement, for several reasons: courts are involving themselves in the private lives of families; parents have traditionally been seen as the parties involved, and not children; including children means involving them in adult disputes; and children

[6] E.g. *Glaser v United Kingdom* (2001) 33 EHRR 1.

[7] A. Parkes, 'The Right of the Child to be Heard in Family Law Proceedings' (2009) 4(Nov) *International Family Law Journal* 238; M. Potter, 'The Voice of the Child: Children's "Rights" in Family Proceedings' (2008) 3(Sept) *International Family Law Journal* 140; L. Trinder, C. Jenks, and A. Firth, 'Talking Children into being in Absentia?' (2010) 22(2) *Child and Family Law Quarterly* 234; N. Wilson, 'The Ears of the Child in Family Proceedings' (2007) 38(Sept) *Family Law* 808.

[8] Full reports are contained in K. Marshall, E.K.M. Tisdall, A. Cleland, with A. Plumtree, *Voice of the Child under the Children (Scotland) Act 1995*, Volume 1: mapping paper (Edinburgh, 2002); E.K.M. Tisdall, R. Baker, K. Marshall, A. Cleland, with A. Plumtree and J. Williams, *'Voice of the Child' under the Children (Scotland) Act 1995*, Volume 2: Feasibility Study (Edinburgh, 2002).

are frequently young. Children's participation is thus testing traditional attitudes towards childhood, children, and family law.

11.1 Children's participation in Scottish family law

Scotland is arguably still the most 'positive' in primary and secondary legislation about the possibility of children's participation, as compared to elsewhere in the UK.

First, the Children (Scotland) Act 1995 has a wide (if largely unknown) requirement on all those with parental responsibilities to consider a child's views when making 'any major decision' in exercising parental responsibilities or rights.[9] This is subject to the child's age and maturity. While the duty presumes that any child of age 12 and above will have sufficient age and maturity to have views considered, the duty nevertheless applies to all children. Similarly, a person who has 'care or control' of the child (but not parental responsibilities or rights) must consider a child's views when making 'any major decision' in relation to safeguarding the child's health, development, and welfare and/or surgical, medical or dental treatment or procedures.[10] These responsibilities are notable, as most parental separations, and subsequent decisions on residence, contact etc, do not reach court.

Second, should a case reach court, a child can participate in a number of ways. In family law proceedings, a court must consider a child's views when making an order in regard to parental responsibilities or rights.[11] To be more specific, the court, when considering whether or not to make an order:

> . . . 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.[12]

Again, the presumption of age 12 is repeated: a child aged 12 or above will be presumed to have sufficient age and maturity to form a view.[13] A child can sue or defend proceedings in relation to any exercise of parental responsibilities and rights. A child under the age of 16 has the legal capacity to instruct a lawyer in any civil matter where the child has a general understanding of what it means to do so.[14]

Mechanisms have been established for children's involvement within court proceedings for s.11 orders on parental responsibilities and rights:

- If children were served with papers once the case enters the court process (called 'intimation'), they would receive a Form F9 requesting their views. The form goes back to the sheriff.[15]
- The court may appoint a court reporter or curator ad litem to report on the child's views.
- The sheriff may express the wish to hear directly from the child and ask for the child to be brought to the court.

[9] s.6. [10] s.6.

[11] s.11. Note the child's welfare remains the paramount consideration of the court.

[12] s.11(7)(b). [13] s.11(10). [14] Age of Legal Capacity (Scotland) Act 1991, s.2(4A).

[15] A sheriff is a professional judge in the second tier courts. A sheriff would hear most family law cases in the first instance—thus sheriff is typically used in this chapter—but some cases are heard in the Court of Session in the first instance or can be heard on appeal.

- A child may take independent legal advice. If this is done, the child's views may be expressed in several ways. First, the lawyer may help the child to fill in Form F9. Second, the lawyer may write to the court on the child's behalf or, third, the lawyer may seek to have the child involved as a party to the action.
- Alternatively, the lawyer may appear on the child's behalf at the Child Welfare Hearing to express the child's views. The Child Welfare Hearing was introduced following the 1995 Act to provide an early hearing to resolve any disputed issues in family actions, particularly in relation to children.

When a child has expressed a view, the sheriff or someone appointed by the sheriff must record the view. The sheriff may then decide whether it should be kept confidential.[16] As Raitt concludes, a Scottish sheriff has a wider set of participation modes and considerable discretion in selecting between or combining them, compared to English procedures.[17]

Family law proceedings under the 1995 Act remain substantially the same, with two amendments[18] of note: courts must consider whether it is appropriate to make an order when two or more relevant people would have to co-operate (to deal with contentious contact);[19] and courts must have regard to the need to protect the child from any abuse or risk of abuse, the effects of any such abuse, and the ability of a person to care for or meet the needs of the child.[20] These amendments are a reaction to the political furore and practical difficulties around contested contact.

11.2 Changing case law

An initial review up until March 2001 found that children's views were 'hidden' behind the reported case law.[21] Scottish case law rarely focused on the requirement to listen to children's views under the 1995 Act. Children's views may have been considered in many situations or, alternatively, their rights to be heard may have been breached. Either way, children's views were very seldom revealed in reported case law.

By 2010, this had substantially changed, clearly influenced by the Court of Session's pivotal decision in *Shields v Shields*.[22] In this case, a residence and specific issue order was requested, so that the child could relocate with his mother to Australia. The boy was seven-and-a-half years old at the time. The case was appealed and the Sheriff Principal commented negatively on the lack of attention to ensuring the child had an opportunity to state his views. The child had not been served with papers, and hence the Form F9, and no justification for this had been recorded beyond the boy's age. The Sheriff Principal still refused the appeal, on the basis that he would 'have to be satisfied that no Sheriff acting reasonably in the circumstances... could have refrained from seeking the views of an 8-year old child'.[23] The Court of Session disagreed.

[16] The Sheriff Ordinary Cause Rules 1993 (as amended) and the Child Care and Maintenance Rules 1997 (as amended) provide for children's views to be treated as confidential by the sheriff. The Court of Session has no similar rules (although does for adoption etc).

[17] F. Raitt, 'Hearing Children in Family Law Proceedings: Can Judges Make a Difference?' (2007) 19(2) *Child and Family Law Quarterly* 204.

[18] Made through the Family Law (Scotland) Act 2006. [19] s.11(7D).

[20] s.11(7A-C). [21] N. 8 above. [22] 2002 SC 246. [23] Para 4.

The child had an absolute right to discretion and reference could not be made to a hypothetical situation. Further, courts could not necessarily rest on an early decision but had to consider whether there was a material change in circumstances up until an order was made. The Court of Session agreed that the lapse of time (18 months) between intimation being dispensed with, and the decision being taken, was in this case such a material change.[24]

The Court of Session's subsequent observations have been vastly influential on the courts. Practicability is the 'only proper and relevant test' for giving the child an opportunity to make known his or her views, so the question becomes *how* rather than *whether* a child's views should be garnered: '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.'[25] 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's decision.[26]

Suitably taking account of children's views is now a recognized ground of appeal and, in some cases, has been the *sole* ground.[27] The processes of participation and how the reports say the views were weighed can now be commented upon.

11.2.1 Processes of participation

Observations in *Shields v Shields* cast doubt on the usefulness of Form F9 as a way for a child to express his or her views.[28] Reported case law shows a reliance on professional reports, written by court appointees and/or by psychological/psychiatric clinicians. These reports are pivotal in three ways: to establish the child's *capacity* to state views, the *content* of these views, and the *weight* these views should be given.[29] As Barnes writes, if a child's views might be called into question by reason of disability or learning difficulty, it would be wise to have a health professional's expert opinion that a child's views should be considered.[30] Reliance on such reports can fulfil the court's obligations for participation, if timely and well-prepared.

Most children's views are recorded and discussed when they are directly about the order requested: i.e. residence or contact. Case law suggests that a child's views will be considered more seriously when the topic is more 'focused' (e.g. *Shields v Shields*) than more generalized (on parental responsibilities, *C v McM*). The justification in the latter was that the child was less able to understand the generality of parental responsibilities. At least the case allowed for the wider considerations of a child to be discussed, such as school, friends, and physical activities. These considerations were also taken into account in certain other cases.[31] This shows some move to recognizing

[24] Although a gap of 16 months was not considered material in *C v McM* 2005 Fam LR 36.

[25] Para 11.

[26] This goes some way towards the UN Committee on the Rights of the Child's General Comment (2009): 'State parties should presume that a child has the capacity to form his or her own views and recognize that she or he has the right to express them; it is not up to the child to prove his or her capacity' (para 20).

[27] See also *C v McM.*

[28] Supported by early research by D. Christie, R. Mays, and L. Tyler, *The Child Welfare Hearings in Operation: Feasibility Study* (Edinburgh Scottish Executive Home Department, 2000).

[29] E.g. *Treasure v McGrath* 2006 Fam LR 100; *H v H* 2000 Fam LR 73.

[30] L. Barnes, 'A child is, after all, a child: ascertaining the ability of children to express views in family proceedings' (2008) 18 *Scots Law Times* 121.

[31] E.g. *Ellis v Ellis* Fam LR 77 mentions Jacob's wish 'to walk to the defender's house to play with his toys even if the defender is away' (para 15).

that the only issues at stake are not children 'choosing' between their parents but other aspects of children's lives affected by decisions on parental responsibilities and rights.[32]

In the earlier survey of reported cases, a slew of cases showed considerable concern about confidentiality.[33] On the one hand, courts recognized that children might be reluctant to state their views, if they were not kept confidential from one or both parents. To have their views revealed might jeopardize the children's welfare. The sheriff court could require children's views to be kept confidentially. On the other hand, if the views led to a certain decision, problems might arise about due process, especially in light of Human Rights Act 1998/European Convention on Human Rights' requirements. Notably, later reported case law has not continued with these debates, perhaps because sheriffs have managed to 'finesse the conflicts thrown up by confidentiality'.[34]

O'Malley v O'Malley[35] underlines judicial discretion on the mode of participation. In *X v Y*,[36] a party asserted that the children had lied to the clinical psychologist and the sheriff was asked subsequently to see the children himself. The sheriff refused, deeming himself 'not the appropriate person',[37] although he did see the children for a more generalized conversation as they had arrived at the court expecting to see him. Parties, then, cannot insist on the children's mode of participation; the sheriff decides.

The (possible) exception occurs when a child is separately represented. In early decisions, *Henderson v Henderson*[38] noted the reluctance of that sheriff to have children separately represented but the children remained parties to the case. More recently, in *D v H*[39] a 15-year-old sought a contact order for his sibling but a warrant for citation was refused as incompetent. Describing the *D v H* decision as 'premature', in *E v E*,[40] a 14-year-old took a plea of competency, arguing that she had a legitimate interest in contact with her siblings. The decision did not, however, make a clear statement that it would be competent for a contact order to be made in favour of a child.[41] But a possibility was opened for children's *own* horizontal relationships to be given a hearing, when they were affected by parental separation or divorce.

11.2.2 Due weight to children's views

The role of age was considered in the initial Scottish government feasibility study. There were concerns that the age of 12 would act as a threshold rather than a rebuttable presumption, particularly with less experienced legal professionals. Even the more experienced legal professionals expressed some concern with going below the age of eight for children's participation.

The citation of *Shields v Shields*, and its low threshold of practicability, has helped reduce this notional age threshold to under the age of three, but only this far: in *Stewart v Stewart*, including someone below this age was seen as 'wholly impractical'.[42] The court's view may well have been influenced by the overall disparaging of the appellant's 16 grounds of appeal as 'sterile and frivolous, and have

[32] See also Raitt for interviews with Scottish judges: n. 17, above.

[33] E.g. *Dosoo v Dosoo* 1999 SLT (ShCt) 86; *McGrath v McGrath* 1999 SLT (ShCt) 90.

[34] N. 17, above, 204. [35] 2004 Fam LR 44. [36] 2007 Fam LR 153. [37] 154.

[38] 1997 Fam LR 120. [39] 2004 SLT (ShCt) 73. [40] 2004 Fam LR 115.

[41] A. Cleland, 'Children's Voices in Legal Proceedings' in A. Cleland and E. Sutherland (eds), *Children's Rights in Scotland*, 3rd ed (Edinburgh, 2009) 9–58.

[42] 2007 CSIH 20, 13.

nothing to deal with the best interests of the child'.[43] This bundling is unfortunate because *Shields v Shields*' emphasis on method could allow in developing methods of working with very young children.[44] It follows Trinder and colleagues' concern that professionals use children's views as strategic resources, especially when they confirm their own perspectives and decisions, rather than as independent factors given due consideration.[45] Nonetheless, overall in reported case law, age is less likely to be used as a threshold and more likely as a factor to consider—it is regularly stated as part of the facts and often found in the justification—in deciding how to weigh a child's views. Age is highly influential when the child is near or over the age of 12,[46] due to the 1995 Act's presumption,[47] but courts now seem content to include the views of children who are much younger.[48]

Alongside age, other descriptors are used in decisions to justify the weight given to children's views. While the academic and legal literature discusses justifications around (rational) competency,[49] this was not a discourse used in reported cases. Instead, children's views were divided between those described as consistent, definite, and clear and views described as ambivalent or anxious. This contrast is illuminated by different descriptions of siblings, in a single case. For example, three siblings were described in *K v K*:[50]

- M expressed a strong view, and this has been consistent throughout...
- K is much more ambivalent and indeed from other information given to me it appears very likely that she may not be very happy in seeing her mother.
- X is really too young to have a definite view but he appears to be a happy child and one who should be resilient enough to deal with any problems that arise.

A similar contrast is made between two siblings in *H v H*:[51]

- LH was described as a mature and confident young woman, who knew her own mind... Her consistent view is that... It is articulated clearly in her letter...
- The position in respect of AH is much more difficult. Both psychologists were very concerned about him.... the distress and anxiety he has suffered... state of vulnerability...

[43] 31.

[44] P. Alderson, *Young Children's Rights: Exploring Beliefs, Principles and Practice*, 2nd ed (London, 2008); A. Clark and P. Moss, *The Mosaic Approach* (London, 2001).

[45] L. Trinder, C. Jenks, and A. Firth, 'Talking Children into being in Absentia?' (2010) 22(2) *Child and Family Law Quarterly* 234.

[46] And, according to Barnes (n. 30, above), age 12 remains a significant age for instructing a lawyer, as found in *Henderson v Henderson* (n. 38, above) and *C v McM* (n. 24, above).

[47] E.g. *G v G* 2002 Fam LR 120, 2-05.

[48] As an exception, the judge easily accepted the counsel's view that children aged seven and five were too young to be interviewed—with no justification of this (*McG v McG* 2007 Fam LR 62). This was an extremely contentious case, where 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.

[49] J. Hemrica and F. Heyting, 'Tacit notions of childhood: an analysis of discourse about child participation in decision-making regarding arrangements in case of parental divorce' (2004) 11(4) *Childhood* 449.

[50] 2004 Fam LR 25, 27.

[51] 2010 SLT 395.

When views are described as consistent, clear, and definite, the court weighs them more heavily; if views were described as ambivalent or anxious, the views have substantially less weight.

A child's confidence or evident maturity might be commented upon, with no further linking justification to the weight given to the child's views.[52] Professional reports were frequent resources to support these evaluations of stability and clarity—or not—of children's views. Such descriptors underline that children can be moral agents, as autonomous rights-holders, capable of coming to rational views.

To be influential, however, on the court's decision about *weight*, reports must be 'balanced'. In *J v J*,[53] Professor Triseliotis' expertise was (at least on the surface) not questioned but his procedure was. He saw only the mother and the two children, and not the father. He saw the children in the mother's home only. In this way, he was described as not having sufficient comprehensive knowledge or ensuring that the children's views were sufficiently uninfluenced by context. This suggests that a child's views are more influential when they are contained within a report that assists the court with its *own* decision, which must be framed by welfare as the paramount consideration, the range of relevant evidence, and provide expert guidance on what weight should be given to the child's views.[54]

There is a particular emphasis on autonomy. Barnes writes of the undermining of children's views, when (legal) professionals think that the children have been manipulated (particularly by one of the parents).[55] The word 'manipulation'[56] is not found in the reported case law reviewed here but similar concerns can be seen in worries about being pressured by parental presence or material bribes[57] or the counter-assertions that a child's views were 'genuine'[58] and that the child 'knows her own mind'.[59] In *M v M*,[60] G's views were discounted, not because he was manipulated by a parent, but because he would want to please whoever asked him; thus how the questions were asked and in what context would heavily influence his decisions. A child's views could be deemed unascertainable because of loyalty to parents, or not wanting the child to feel responsible for a disloyal decision.[61] The possible manipulation of parents is not directly stated, although heavily implied by the decision in *Bailey v Bailey*.[62] But the court was more willing to state family influence directly when it involved the perceived influence of an older sibling's refusal of contact on her younger sibling.[63] Here, a contact order was made for the younger child despite her views against contact. In short, the weight of a child's views is fundamentally weakened if the views were (unduly?) influenced.

All the reported case law is adamant that the paramount consideration is a child's welfare, as required by the 1995 Act. The traditional weighing up is exemplified by *J v J*, where the children's current views are noted but are seen as contrary to their longer-term interests. These two children may not want to have contact with their father now, and seeing their father may cause upset and short-term distress. But having

[52] E.g. *M v M* 2000 Fam LR 84.

[53] 2004 Fam LR 20.

[54] See also child psychologist report in n. 31 above.

[55] N. 30 above.

[56] The term 'coached' is used within *McG v McG* (64) but notably for children's comments to parents and not specifically for reports etc to the court.

[57] N. 31 above.

[58] *S v S* 2004 Fam LR 127, 132; *G v G* 2002 Fam LR 120, 22-05.

[59] E.g. *H v H* 2010 SLT 395, 31.

[60] 2008 Fam LR 90, 53.

[61] *G v G* 2003 Fam LR 118; AH in *H v H* 2010 SLT 395, 37–8.

[62] 2001 Fam LR 133.

[63] *White v White* 2001 SC 689.

contact is seen as in their long-term interest with the presumption that the upset and distress will dissipate.[64] These differences highlight particular views of childhood, well rehearsed in childhood studies literature:[65] the traditional focus on children as 'human becomings' as future adults and, more recently, as social investments for future society, in contrast to respecting children's childhoods now and their current state as 'human beings'. This is somewhat mitigated by the (now) common concerns for children's well-being should they move schools, friendships, need to travel between parents etc.[66] These raise more concurrent ideas of children's present well-being and not just their futures.

When the stated *views* of children are not considered sufficient for giving much weight, whatever a child's age, then recourse is made to *observed behaviour* of children. Of frequent note is whether the child seems loved, happy, and/or settled. Reactions at school are given high prominence. Such observations are not discussed as non-verbal expressions of children's views, but rather as indications of their welfare.

Moss and colleagues write about different perceptions of children and childhood, of the 'rich' child full of resources and capabilities in contrast to the 'poor' child, vulnerable and dependent.[67] When considering children's views, the 'rich' child is frequently presented in reported case law. Indeed, children are described as 'resilient' in *Ellis v Ellis*: 'I appreciate that children are resilient and can cope with change…' Note, however, that the statement then goes on to discount this, and to assert that children benefit from being settled: '…but I am not convinced that for the children to reside wholly with the pursuer would be so detrimental to their welfare that I should sacrifice the advantages they have gained from continuity and stability….'[68] Children, therefore, are not *that* resilient. In looking over the reported cases, the 'poor' child discourses are not associated with discussion of children's views, with one exception. The vulnerability of AH, in contrast to his sibling, is of 'great concern' to professionals and the court,[69] and leads to an occlusion of his views.

11.3 Lived experiences of family law proceedings

There has been much debate around the issue of child contact in the specific circumstances of domestic abuse. Research shows why contact in this context can be problematic. A wealth of studies has documented the negative impacts that domestic abuse has on children and that the presence of domestic abuse is a strong indicator for the direct abuse of children.[70] It is often assumed that abuse ends if women leave abusive partners. However abuse can continue and indeed intensify following

[64] The 2006 amendment in s.11(7)(D), on contentious contact, may diminish the precedence of *J v J*'s approach.

[65] A. James, C. Jenks, and A. Prout, *Theorizing Childhood* (Cambridge, 1998).

[66] E.g. *M v M* 2000 (n. 52 above), *M v M* 2008 (n. 60 above), *X v Y* (n. 36 above).

[67] P. Moss, J. Dillon, and K. Statham, 'The "Child in Need" and "the Rich Child": Discourses, Constructions and Practices' (2000) 20(2) *Critical Social Policy* 233.

[68] 95. See also *X v Y*: 'I accept that children can be quite resilient but unless there is a good reason for subjecting them to another major change in their lives then I believe that this should be avoided' (156).

[69] *H v H* 2010 (n. 61 above).

[70] See C. Humphreys, C. Houghton, and J. Ellis, *Literature Review Better Outcomes for Children and Young People Experiencing Domestic Abuse* (Edinburgh, 2006) for an overview of the effects of domestic abuse on children.

separation[71] and child contact is reported as a particular 'flash point' for such abuse to continue.[72] The research reported here[73] aims to explore children's own perspectives in these circumstances, an area that has been largely under-researched and missing from policy debates. As well as examining children's views of parental separation and the contact that does or does not take place, the research examines children's experiences of participating in family law proceedings.

The research involved separate in-depth interviews with children and their mothers (who were resident parents). Core to the research design were ethical considerations about informed consent, building respectful relationships with children and mothers, and their safety. A total of 15 mothers and 18 children participated in the study. The children's ages spanned from seven to 15 years. Participants were recruited to the study via domestic abuse support services like Women's Aid and local authority provided services. All of the families involved in the study had experienced domestic abuse (where fathers had been the perpetrator) and the parents had separated.

Drawing from the experience of an 11-year-old girl called Clare[74] who participated in the study, this part of the chapter examines Clare's views of her participation in family law proceedings. The purpose of this discussion is not to examine Clare or her mother's experience of domestic abuse. Nor does it intend to assess or make comment on whether contact with her father is in Clare's best interests. Rather this part of the chapter focuses on Clare's experience of participating in family law proceedings in a context of domestic abuse and contentious contact.

In many respects Clare's overall experiences were similar to those of other children who participated in the study. Contact had been a very fraught issue and disputes about it had been protracted. However in other respects Clare was not a typical case. She was very articulate and had been able to engage confidently with many of the family law processes that have been established to facilitate children's participation. She conveyed her feelings and wishes about contact on a number of occasions and through a variety of means. However, despite having a high degree of participation in the proceedings, Clare was extremely angry and frustrated about the decisions that were reached about contact with her father. Her anger emanated from a feeling that she had not been listened to or been able to influence the sheriff's decision about contact. Clare's experience has been selected for this chapter because of her feelings about participation. They led us to wonder: if children like Clare who are able to engage confidently with a ranges of mechanisms established for children's participation are left feeling unheard, what position may family law proceedings render children who are not able to participate so fully or confidently?

11.3.1 Clare's experience

Clare's parents first separated when she was four years old. Since then there have been disputes about the contact between Clare and her non-resident father. Thus, for

[71] R.E. Fleury, C.M. Sullivan, and D. Bybee, 'When Ending the Relationship Does Not End the Violence' (2000) 6 *Violence Against Women* 1363.

[72] C. Humphreys and R.K. Thiara, 'Neither Justice nor Protection: Women's Experiences of Post-separation Violence' (2003) 25(4) *Journal of Social Welfare and Family Law* 195.

[73] The research was undertaken as part of an Economic and Social Research Council PhD studentship at the Centre for Research on Families and Relationship at the University of Edinburgh and in collaboration with Scottish Women's Aid. Scottish Women's Aid is the membership organization for Women's Aid groups across Scotland.

[74] Not her real name.

almost three-quarters of Clare's life, there have been intermittent legal disputes about the contact that she has with her father. Several attempts to prevent contact have been made by Clare's resident mother. These stem from her concerns about Clare's father's ability to parent. When Clare was younger, her mother was concerned about Clare's physical safety when she was in the care of her father. Her mother described a series of occasions when, left alone with her father, Clare's physical safety had been compromised. On a few of these occasions she had sustained minor injuries: a cut to her hand that has left a scar and bruising to her head. Latterly concerns centered on Clare's strong feelings against contact. Both Clare and her mother in their separate interviews described how Clare became distressed before and after contact visits. This had at times manifested itself as physical symptoms, for example having an upset stomach or suffering from a headache.

11.3.2 Experiences of participation

During her interview, Clare recalled two main legal events where disputes about contact had been taken to court: once when she was around six years old and again more recently when she was ten years old. Clare exhausted many of the avenues open to her to convey her views and wishes about contact with her father to the court. During the first set of proceedings Clare had spoken directly to a court reporter who had been appointed by the court to investigate the circumstances of the contact dispute. In the most recent set of proceedings, Clare spoke again with a court reporter, completed a Form F9 with the support of an advocacy worker, and attempted to become legally represented. Whilst Clare's high level of participation shows that efforts were made by the court for Clare to have opportunities to express her views, her overall *experience* of participation was far from positive. Clare forcefully expressed through many ways that she does not want to have contact with her father. While the most recent contact order has significantly reduced the amount of contact taking place, Clare remains adamant that she does not want to see her father at all.

11.3.3 Due weight to children's views

For Clare, having the opportunity to express her view about contact has not been adequate, as she wanted to *influence* the court's decision so that it reflected her wishes. When explaining the ways in which court proceedings could be improved, Clare (and many of the other children in the study) placed great emphasis on the importance of listening to the child:

Clare: Listen to what the child says because after all it's the child's best interests and stuff.

As the quotation illustrates, Clare was familiar with the legal term 'best interests' and during the interviews she understood that this was the principle that underpinned the court's decision about contact. However for Clare her views were consistent with what was in her best interests.

Clare felt that the court's appreciation of her views was undermined because she could not give sufficient reason for her strong feelings about contact. Despite being articulate and confident, Clare struggled to provide reasons why she did not want to have contact with her father:

Clare: Cos that's the annoying part because apparently I don't have a good enough reason, because sometimes you don't need a reason sometimes you just have a feeling and you have to go by your instinct.

Clare's 'instincts' against contact were strong and she felt that these should be taken seriously. There appeared to be a disjuncture between what Clare and the court perceived to be valid reasons for contact to stop.

In Clare's case it was not clear to her what specific factors influenced the sheriff's decision about contact. Nor was it clear the weight accorded to Clare's views against contact, when conveyed in a Form F9 and when she met with the court reporter. Ultimately the sheriff ordered that she continue to have contact with her father (albeit a reduced amount of contact). Clare interpreted this decision as evidence that her views were not considered important, which left her feeling insignificant and powerless:

Clare: Unfair. Very unfair, cos in the court case that my mum went through I was nearly ignored. I mean it just makes you feel so small and yeah.

This focuses attention on a key challenge for children's participation in family law—the position that children are left in when the courts' decisions differ from the views expressed by the children. Courts are not legally required in Scotland to explain to children the reasons why courts have reached a particular decision. The sheriff's rationale for deciding to continue contact was not explained to Clare by the sheriff or anyone acting on the sheriff's behalf. Clare had no assurances that her views against contact had been heard and taken account of. Aside from raising questions about the respect that this affords children whose lives these decisions are concerned with (regardless of whether or not they have participated in proceedings), this lack of transparency can also create a vacuum where the child is left without any real understanding as to why a decision has been reached.

This vacuum can be filled by the child's own ideas and interpretations or by the perspectives of others. As well as interpreting the decision as evidence that her views were not considered important, Clare also believed courts placed more importance on issues that were not necessarily concerned with her individual circumstances or views. She described courts as having a strong commitment to ensuring that children and fathers have contact after parental separation. This meant that her views against contact were expressed in an environment that favoured contact, which made it difficult for her views to be heard and given weight:

Clare: ... nobody heard what I said, apart from my mum.... Because they didn't want to. Because in that court it is every children should see their fathers.... Um not actually listen to what the child thinks and stuff. Which I think should definitely change....

Clare believed that her views clashed with a dominant view that was held by the court about the relationships that children should have with their fathers, and as a consequence her views were overlooked.

As well as her perception that courts are pro-contact regardless of the child's views, Clare also identified her age as a barrier to influence the court's decision. She referred to this throughout the interview, highlighting that she looked forward to future birthdays because she believed that more weight would be given to her views or she would be sufficiently old to decide for herself whether she wanted to see her father:

Clare: ... I am really looking forward to my twelfth birthday cos that means I will be listened to much more, which will be very nice.

Clare: I am looking forward to when I am 12 cos that means they have to take me more seriously and I think I will definitely have stopped seeing my dad by the time I am sixteen.

It was not clear why Clare thought that reaching 12 would be the point where her views would be acted on by the court. The review of reported cases reveals that the child's age is not treated as a threshold; rather it is treated as one factor to take account of, amongst many others. However Clare's views highlight that children's age and the extent of their participation remain salient and connected issues for her. Clare perceived getting older as critical to her gaining influence within decision-making.

11.3.4 Participating in an adversarial process

There have been debates about whether participation in family law can over-burden children. It has been argued that it can leave children with an unenviable responsibility for choosing between parents.[75] This can be further complicated when considering the effects that domestic abuse can have on children's relationships with their mothers or fathers. For instance children may feel responsible for protecting their mother, fearful of their father, or not want to be disloyal to either.[76] Smart and colleagues' research with children on their participation in family law adds another dimension to these debates.[77] They report that in general children do not want to choose which parent they live with but do want to be involved in decisions about how they live. Particularly relevant to this chapter are the findings that children who had been abused want a greater say in decisions about residence and contact.

While children may want to be involved in decisions about issues like contact, it does not mean that children's participation is easy or without cost. The danger remains that, when participating in family law processes, children can become caught up in adversarial proceedings and indeed in conflict. During her interview Clare used words like 'battle', 'defence-weapon', and 'war' when referring to her experiences. These connotations of conflict are apparent throughout her discussion about the legal proceedings that have taken place.

When discussing the barriers that she experienced in expressing her views, Clare continued this theme of conflict with her description of the people who were involved in court proceedings. Clare described herself and her mother as being on one side and her father on another. Her idea of opposing sides extended beyond her and her parents. Clare perceived the court and all adults associated with it (even her mother's lawyer) to be allies of her father and therefore on his side. As a result Clare did not see the court as 'for' her or her mother; rather she saw the court as acting 'against' her and her mother:

Clare: . . . Cos practically everybody in the court is against me and my mum and cos they are always saying right horrible things to her and praising my dad—it's strange. And stuff. So practically everybody in there is against us like even my mum's own lawyer so yeah. And stuff.

[75] R. Chisholm, 'Children's Participation in Family Court Litigation', in J. Dewar and S. Parker (eds), *Family Law: Processes, Practices, Pressures* (Oregon, 2003) 37.

[76] A. Mullender, G Hague, U. Imam, L. Kelly, E. Malos, and L. Regan, *Children's Perspectives on Domestic Violence* (London, 2002).

[77] C. Smart, B. Neale, and A. Wade, *The Changing Experience of Childhood: Families and Divorce* (Cambridge, 2001).

The notion that everyone associated with the court is against Clare and her mother angered and frustrated Clare. Her narrative reveals a sense of powerlessness:

Fiona: What or who are you most angry at? (referring to an emotion card selected by Clare)

Clare: Everything to do with him (court reporter). Everybody to do with the court case that wasn't on my side. Angry that it's as if I'm a tiny dot and they are humongous they are all this big circle.

Clare's construction of the court in this way highlights a very real challenge for family law and for parents: are there ways that children can participate in decisions about contact and be protected (as far as possible) from levels of conflict or antagonism that may exist?

11.3.5 Mechanisms for participation

During both sets of court proceedings Clare met with a court reporter on several occasions. He observed contact handovers, contact visits, and met with her at home and at school to gather her views about contact. The length of time the court reporter spent with Clare was considerable. However, her relationship with him has been fraught: as discussed earlier she constructed the court reporter as not being on her side but being on her father's side. Clare initially said that she felt able to give her views to the court reporter; however during her interview she highlighted a number of issues that had latterly made it difficult for her to express her views.

The first issue relates to how children's views are taken or more specifically the questions that are asked to elicit these views. The relationships children have with non-resident parents are complex. This can be magnified when there is a history of abuse. During the interview Clare described the court reporter as asking 'horrible' but 'normal' questions. She recalled him asking her questions about whether she loved her father or whether he loved her. The court reporter's questions appeared to stem from seeking a justification for why Clare did not want contact with her father:

Fiona: So what did he say when he (court reporter) came to meet you?

Clare: Um horrible stuff. Basically the normal questions—like why do you want to stop seeing your dad? Don't you love him? Doesn't he love you?

The implication of these questions is that children who love their fathers want contact and those who do not love their fathers do not want contact. As already discussed, children may have conflicted feelings about these relationships. Questions about love can be loaded and add to feelings of conflict that children may already have.

The second issue relates to the confidentiality of children's views. The implications of not treating children's views as confidential were evident in Clare's case. During one contact visit, the court reporter made an attempt to gather Clare's views about contact. Asked in front of her father and his new partner, Clare found it difficult to express her feelings about contact:

Clare: Um well he said are you happy? . . . And I couldn't really exactly say anything evil cos I mean come on my dad was sitting there. It was like one child against three adults. Guess who is going to win. . . .

Following the most recent contact decision, during a contact visit Clare's father recounted the views that she had given in her Form F9. This was an upsetting

experience for Clare. She described feeling trapped and that her father had confronted her with these. It is not clear whether she had expected that her views on the F9 would be treated confidentially but the incident was upsetting, particularly as her father had misquoted her:

Clare: . . . um he said and when you wrote your court statement you wrote that I was mentally cruel to mum. And I said I don't remember writing 'cruel' and he said yes you did. And I actually put he 'also mentally hurt' my mother so I am so pissed off with him about that.

Clare's experiences bring to life some of the complexities around children's views and confidentiality. When asked her views about contact in front of her father, she was unable to express how she felt. Clare was however able to express her views in writing to the court, an activity she completed with the support of an advocacy worker. That these views were subsequently shared with her father during the court proceedings had negative consequences for Clare.

11.4 Concluding thoughts

On the surface of reported case law, there has been a substantial change in the overt recognition of children's views: most children will meet the low threshold of 'practicability' for their views to be considered; their views and the weight of those views are used more explicitly to justify court decisions. Not allowing children to have a chance to express views can be an appeal ground in itself. The case law demonstrates more sophisticated ideas about children's participation, at least on some issues, such as the need to consider change over time as children develop and to value children's present as well their future. All this can be seen as a considerable achievement, for those who normatively have argued for children's rights to participation in family law proceedings and elsewhere.

Children's views seem to have a clear influence in deciding certain cases. Family law proceedings can be seen, to a certain extent, as shifting paradigms:

> The welfare paradigm, which sees children as lacking the capacity and maturity to understand and assert their own needs, has been challenged by new paradigms, including children's rights, and children as social actors and young citizens. Within these new paradigms, children are not longer conceived as dependent, vulnerable, at-risk victims of divorce and passive objects of law, but are seen as subjects with agency.[78]

This progressive picture can be queried: practically, in reflecting on the empirical research; and conceptually, in questioning the reliance on autonomy, 'voice', and rationality.

Reported case law is but a small sample of cases and from the judges' perspectives. Children may not routinely have positive experiences of participation; even if procedures were followed as suggested in reported case law, children may still have different perspectives. Certainly, the empirical research reported here is less promising. Clare's account questions the *quality* of children's experiences: the procedures may be there, courts may even be ensuring they take place, but children may still not feel satisfied that their views are duly considered. Given the reliance on professional

[78] R. Hunter, 'Close Encounters of a Judicial Kind: "Hearing" Children's "Voices" in Family Law Proceedings' (2007) 19(3) *Child and Family Law Quarterly* 283, 283.

reports more generally, it is particularly important that practice is exemplary in gathering children's views.[79]

Here, the considerable discussion in England and Wales, engendered by the idea that judges should see children themselves, could be useful. One of the reasons articulated is a child's sense of inclusion:

> . . . when considering the question of positive benefit to the child, the judge should not confine himself to the question of whether or not it will assist the judge to come to his decision, but should consider the potential benefit of affording to the child the chance to feel that he or she has participated in the process of deciding his or her own fate and has had his or her own 'shout' whatever the outcome.[80]

There is a risk that a focus on inclusion can fall back into listening to children's views as a kind of therapy, a panacea that has no real influence on decision-making. But Potter's wording is careful and instead identifies the potential benefit of inclusion as additional. Listening to children, according to Raitt, is 'a simple but potent mark of respect'.[81] This is an area worthy of further research, from child participants' perspectives. Potter also suggests that the judge should explain the decision to the child.[82] This would meet the gap for Clare, who was not told directly what the court decisions were, nor the reasons behind them.

There are also conceptual queries, which illuminate why certain tensions and dilemmas remain in children's participation in family law proceedings. With some irony, just as Scottish case law seems to be accepting the 'new' paradigm of children's citizenship and agency, academic childhood studies is just gaining its own maturity to question some of its underlying assumptions. While discursively powerful, the focus on children as social actors and as agents fails to incorporate post-modern ideas about identity and subjectivity. These can be seen as socially constructed, through relations of power and knowledge.[83] With such ideas, no one is truly an 'autonomous agent' and all views are contingent, interpreted, and contextually dependent. As Mantle and colleagues (2006) note:

> A naive positivism underlies any assumption that a child's wishes and feelings are simply 'out there waiting to be collected'. Interpretation is unavoidable and meanings are likely to be contested.[84]

Hunter argues that 'the quest for access to children's "true" or authentic wishes and feelings is misplaced'.[85] These arguments stand in sharp contrast to the reported case law's weight to (supposedly) consistent, firm, genuine, and uninfluenced views of children.

There has been an association, within childhood studies and/or child advocacy, of recognizing children as social actors and trying to put forward 'children's voices'.

[79] See criticisms of professional practice in England: A. James and S. McNamee, 'Turn Down the Volume? Not Hearing Children in Family Proceedings' (2004) 16(2) *Child Family Law Quarterly* 189.

[80] M. Potter, 'The Voice of the Child: Children's 'Rights' in Family Proceedings' (2008) 3(Sept) *International Family Law Journal* 140, 148.

[81] N. 17, above, 208.

[82] N. 80, above, 150.

[83] M. Foucault, *Discipline and Punish* (London, 1997); G. Deleuze, *Difference and Repetition* (London, 1994, translated by P. Patton).

[84] G. Mantle, T. Moules, K. Johnson, with J. Leslie, S. Parsons, and R. Shaffer, 'Whose Wishes and Feelings? Children's Autonomy and Parental Influence in Family Court Enquiries' (2006) 37 *British Journal of Social Work* 785, 791–2.

[85] N. 78, above, 283.

This is typically done in research and participation activities, by direct verbal or written quotations from children and young people. But the selection of quotes, their framing and analysis are generally carried out by adults. Adults are determining what counts as a 'voice', representing that 'voice' textually, and interpreting what that 'voice' might be saying. The metaphor of 'voice' may unwittingly reproduce the very understandings of subjectivity that continue to marginalize children: the voice as the property of a rational, articulate, knowledgeable individual, capable of speaking for herself.[86] Focusing on voice privileges the comprehensible verbal utterances of individuals over other forms of communication, which risks excluding children and young people who communicate little or not at all through speech,[87] or who remain silent or laugh in response to questions.[88] All these trends can be seen in the reported case law. Behaviour is treated as evidence of best interests, in reported case law, but not as a communication form.[89] Further, most children are not directly 'voicing' their views in reported case law, because there are at least two layers of interpretation: first the reporting in the professional reports and second by the reported case. Thus, children's 'voices' are not unadulterated 'pure' representations of their views, but rather selected, framed, and presented for particular purposes and audiences.

Rather than agency and autonomy, the social sciences have gained an ever-increasing interest in relations and relationality.[90] A sharp distinction between emotions and rationality is not sustainable:

> Even to the present day, emotions are seen to be the very antithesis of the detached scientific mind and its quest for 'objectivity', 'truth' and 'wisdom'.... Such a view neglects the fact that rational methods of scientific inquiry, even at their most positivistic, involve the incorporation of values and emotions.[91]

Certain views have not been 'allowed in' by courts in family law proceedings because they are relational ('influenced') or emotional. Clare thinks, for example, that her feelings and 'instincts' were not taken seriously, as she could not articulate reasons for them. Views have been incorporated into family law under a rights approach that values autonomous, rational, articulate individuals. But these may be unhelpful standards, creating a mask that—should children deviate from it—will lead to their views being dismissed.

Scotland can be considered a success story, in its legislation and the evolution of its reported case law. But this must be qualified by certain trends that may undermine

[86] P. Alldred, 'Ethnography and Discourse Analysis: Dilemmas in Representing the Voices of Children' in J. Ribbens and R. Edwards (eds), *Feminist Dilemmas in Qualitative Research: Public Knowledge and Private Lives* (London, 1998).

These insights are attributed to Michael Gallagher.

[87] S. Komulainen, 'The Ambiguity of the Child's "Voice" in Social Research' (2007) 14(1) *Childhood* 11.

[88] K. Nairn, J. Munro, and A.B. Smith, 'A Counter Narrative of a Failed Interview' (2005) 5(2) *Qualitative Research* 221.

[89] N. Wilson, 'The ears of the child in family proceedings' (2007) 38(Sept) *Family Law* 808.

[90] A.R. Hochschild, 'Emotion Work, Feeling Rules and Social Structure' (1979) 85(3) *American Journal of Sociology* 551; L. McKie and S. Cunningham Burley (eds), *Families and Society: Boundaries and Relationships* (Bristol, 2005); C. Smart, 'Family Secrets: law and understandings of openness in everyday relationships' (2009) 38 *Journal of Social Policy* 551.

[91] S.J. Williams and G. Bendelow, 'Introduction: emotions in social life' in G. Bendelow and S.J. Williams (eds), *Emotions in social life* (London, 1998) xvi. This quotation, and more generally arguments about connecting emotion to reason, were brought to our attention by Louise Hill.

or sideline some or many children's views: a fixation on 'voice' and a façade of fixed, rational, autonomous views. Clare's case study certainly begs for more empirical research of children's own experiences, as well as other players within the court system, to check whether supposed progress is actually improving the experiences and outcomes for children. Children's participation is a marker of respect, a sign of inclusion, but it also should be part of ensuring the improved well-being of children.