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### **Manipulation and domestic abuse in contested contact**

Threats to children's participation rights

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Manipulation and Domestic Abuse in Contested Contact – Threats to Children’s Participation Rights

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## Abstract

The United Nations Convention on the Rights of the Child has catalysed numerous jurisdictions to introduce new legal provisions to support children's participation rights when child contact is contested. Despite this, children's participation is frequently limited in practice, especially in contexts where children are perceived as vulnerable to a parent's manipulation, even if there are allegations of domestic abuse. While 'resist and refusal dynamics' have yet to become mainstream terms in Scottish family law, 'manipulation' has become a common concern in cases of contested contact. Drawing on a Scottish empirical study on contested child contact in circumstances of domestic abuse, we interrogate the implications that the concept of manipulation has for children's participation rights. The study involved separate in-depth interviews with 18 children and their 16 mothers. Findings point to concerns about upholding children's participation rights, particularly in cases where children were depicted as "influenced" or "manipulated". Through our analysis, we disentangle the problems professionals have when concerns about child manipulation and domestic abuse intersect. We argue that, when combined, allegations of manipulation and domestic abuse present a significant and serious risk to children's participation rights. We find the legal construction of the child's views as separate to the parental dispute to have unintended and serious consequences for children's participation rights. We offer ways in which law and practice may evolve to ensure children's participation rights in these contexts are both implemented and upheld.

*Keywords:* Child rights; participation; manipulation; alienation; domestic abuse; child contact; visitation; family law

### Manipulation and Domestic Abuse in Contested Contact: Threats to Children's Participation Rights

Children's right to participate in decisions that affect their lives is established in the UN Convention on the Rights of the Child (UNCRC). These rights are further assured in primary legislation for Scottish family law, the Children (Scotland) Act 1995, as well as in the accompanying procedures and mechanisms. Despite this progressive platform, there is growing recognition in civic advocacy, professional commentary and research (e.g. Tisdall, 2016, Morrison, Tisdall, Reid, & Jones, 2013; Mackay, 2013) that children's participation rights are not adequately assured in practice. At the time of writing, a large-scale consultation has been undertaken on family law by the Scottish Government<sup>1</sup> which documents the current failings when allegations of domestic abuse and parental manipulation intersect with contested child contact (the Scottish term for "access" or "visitation" with a parent who does not have primary care of a child). In this article, we draw from these recent discussions in Scottish family law and an empirical study on contested child contact in circumstances of domestic abuse, to interrogate the implications of the concept "manipulation" for children's participation rights. Our findings raise ongoing questions about children's right to participate generally, and particularly if children are seen to be influenced unduly or manipulated by one or both of their parents. We argue that, when combined, allegations of manipulation and domestic abuse present a significant and serious risk to children's participation rights.

#### **Literature Review and Policy Background**

Historically, domestic abuse was viewed first as a private concern for adults, and later as a legal and interpersonal issue contained within the adult relationship. However, a growing body of research demonstrates that children are also affected by domestic abuse (Callaghan,

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<sup>1</sup> <https://www2.gov.scot/Topics/Justice/law/17867>

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Alexander, Sixsmith, & Fellin, 2018; Stanley, 2011). The effects on children extend beyond ‘witnessing domestic abuse’. Children have intimate knowledge of domestic abuse, even if they have not directly witnessed it, and they may be the targets of or ‘used’ as part of the abuse, and their lives are impacted by it (Callaghan, Fellin, Mavrou, Alexander, & Sixsmith, 2017; Callaghan et al., 2018; Mullender et al., 2003). Awareness of the effect on children of being exposed to domestic abuse has been increasingly accepted in both Scottish law and policy. The Children’s Hearings (Scotland) Act 2011 introduced a child having ‘a close connection with a person who has carried out domestic abuse’ as specific grounds for referral to the children’s hearings system (Scotland’s child welfare and juvenile justice system). The Domestic Abuse (Scotland) 2018 Act sought to expand the definition and criminalization of domestic abuse. While not directly addressing children as victims in their own right, if a child witnesses, is targeted by, or used as a tool of coercive, controlling or other abusive behaviour, this is designated as a potential aggravating factor in sentencing for the offence. Thus, we see that both child protection and criminal law recognise the pervasive and ongoing nature and impacts of domestic abuse, on children as well as adult survivors. However, we have yet to see this recognition in family law *practice* in contested contact cases in Scotland (e.g. Mackay, 2013; Morrison, 2015)

### **Children’s Participation Rights in Contested Child Contact in Scotland**

The UK ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1991 and thus is obligated to ensure children’s rights are recognised. The UNCRC has had considerable influence on family law in Scotland. The Children (Scotland) Act 1995 was designed to put children’s rights at the centre, with parental responsibilities to meet them. In contested child contact cases under S.11 of the 1995 Act, the welfare of the child is the paramount consideration of the court. Further, when considering making an order under S. 11 of the 1995 Act, a court:

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... taking account of the child's age and maturity, shall so far as practicable:

- i) give him the opportunity to indicate whether he wishes to express his views;
- ii) if he does so wish, give him an opportunity to express them; and
- iii) have regard to such views as he may express. (S. 11(7)(b)).

A child aged 12 or above is presumed to be of sufficient age and maturity to form a view (S. 11(10)). A number of mechanisms are used to give effect to this legislation, ranging from the court appointing a court reporter or curator ad litem to report on the child's views, to the sheriff (judge) asking to speak to the child directly, or a child could give evidence as a witness or take independent legal advice. Most court reporters and curators ad litem are practicing solicitors; some are social workers and a minority are teachers. Considerable attention was given when developing these provisions and mechanisms, to ensure children's participation rights under the UNCRC were met (Tisdall, 1997).

While participation rights are detailed, the court's paramount consideration when considering whether or not to make an order, and what order to make is the child's welfare. (S. 11(7)(a)). The court must have regard to protecting the child from any 'abuse', the risk and/or effect of any abuse on the child (S. 11 (7A-7C)); these amendments were introduced by the Family Law (Scotland) Act 2006 that sought to ensure courts considered the effects on children of domestic abuse. The court must also consider whether relevant persons (those with parental responsibilities or a parent of the child without parental responsibilities or rights) will co-operate with each other in regard to matters affecting the child (s. 11 (7D-7E)). These amendments sought to address children's welfare in highly contested child contact cases, particularly those in which there were allegations or concerns of domestic abuse and/or difficulties with parents co-operating with each other.

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Since Section 11 was implemented, case law has increasingly mentioned S.11(7)(b) requirements— even if simply to note that a child is not of sufficient age or maturity to state a view (Tisdall, 2016). While there is some evidence of judges meeting directly with children (e.g. Masson, 2017), reported case law suggests that courts either do not hear children's views at all or instruct court reporters and curators ad litem to gather children's views amongst other issues, to present to the court. Whilst this may sound like these professionals are present to represent the 'voice of the child', they are not *advocates* for children, but at best transmitters of their views put in the context of their own expert conclusions (Office of Children's Commissioner, 2011). Courts are often concerned that involving children, or over-involving them, in court proceedings may be detrimental to a child's welfare (Tisdall, 2016; see *B v G* 2012 UKSC 21, *H v H* 2016 SAC (Civ) 12).

In this debate the court is positioned as an *adult domain*. Concerns include the risk that that a child might be pressured or 'unduly influenced' by one or both of their parents, in contested cases (e.g. *B v B* 2011 SLT (Sh Ct) 225; *C v M* 2012 GWD 9-170; *E v W* 2014 GWD 26-514; *X v Y* 2018 SC DUM 54). When a child's views are considered to have been manipulated or unduly influenced, courts tend not to weigh their accounts heavily, and may even see offering an opportunity to the child to speak out about their experiences and preferences as running counter to the child's best interests. The judiciary, and other professionals, can find it difficult to deal with these contested cases, particularly when domestic abuse allegations are unproven in criminal proceedings (Morrison et al., 2013; *X v Y* (2018) SC DUM 54).

Scottish family law is not alone in having increasing concerns that children may be manipulated by one or more of their parents in contested contact cases. Internationally there is a growing literature around 'parental alienation' (Gardner, 1985), 'alienation' (Kelly and Johnston, 2001) and 'children who resist contact' (Fidler, Saini, & Bala, 2013). This

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literature focuses on children's purported vulnerability and their openness to being influenced and manipulated by their parents in the adversarial context of contact disputes. Such research, particularly the work on alienation, challenges legal provisions for children's participation rights in contact decisions, suggesting that this creates a climate ripe for children's manipulation by parents (Weir, 2011).

Debate about the alienation evidence base has been vigorous. There is not one accepted definition for parental alienation (see Doughty, Maxwell, & Slater, 2018). The 'elasticity' of the concept makes attempts to measure prevalence and impact both complex. Much of the evidence originates from the USA and Canada; given the different legal systems and cultural contexts, it is not clear how this may translate to a Scottish context.

The study of Trinder et al., (2013) on the enforcement of contact orders is one of the few UK based empirical studies carried out in this area. It is of note, that the study tends to use the language 'implacably hostile' rather than alienation, reflecting the terminology of the English legal context. The study raises significant questions about the scale of the problem of implacably hostile parents (alienating) and the implications for reform in this area. In a sample of 215 English cases where applications had been made for contact enforcement, only 9 (4%) involved implacably hostile / alienating parents. More common were the 116 cases (55%) classified as 'conflicted' (meaning that parents were unable to work together to implement the court order), 66 cases (31%) classified as 'risk' cases (meaning one or both parents raised significant adult and/or child safeguarding issues, most commonly domestic violence, child physical abuse and neglect, alcohol and drug abuse or mental health issues) and 21 cases (10%) classified as 'refusing' (where older children refused contact).



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It is also of note that much of the literature on alienation and resistance dynamics is based on adult accounts – parents', professionals' and professionals' accounts of their own therapeutic case work. Whilst legal and psychotherapy scholars may argue that such case-based work does enable a proxy representation of children's accounts, it is not a substitute for direct research with children. Children's own views and perspectives are absent in these studies, which tend to adopt a developmental and mental health narrative, focusing on children's lack of capacity, rather than their abilities and agency. Such a narrative is not always consistent with a children's rights paradigm. Although the concept of resistance and refusal to parental contact offers a less pathologizing account of these dynamics that offers some space for a consideration of children's agency, it has not addressed directly the issue of how children can be represented in research about them.

A different perspective on manipulation is adults' (legal professionals and parents) use of children's views as a strategic resource during the legal process to advance their own disputes and arguments (Sawyer, 2000; Trinder, Jenks, & Firth, 2010). Linked to this is Tisdall and Morrison's (2012) analysis of the weight courts give to some children's views but not others. They find children's views that are perceived by the court as 'autonomous, rational and articulate individuals' to be more readily accepted than those perceived to be 'influenced' or emotional. Thus, a range of empirical research shows that manipulation is a danger to children's views and their participation rights for a variety of reasons.

Cashmore and Parkinson's (2008) Australian study is instructive on the divergence between adults' and children's views on manipulation. They found manipulation to be a more of a concern for parents than it was for children. In contrast, children were more preoccupied with issues of loyalty and fairness and concerned about the risk of jeopardising their relationships with parents. Cashmore and Parkinson found that children involved in contested cases that involved allegations of abuse or violence wanted greater influence on the

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court decisions than other children. The reasons given by children in this study for wanting this greater say echo arguments typically made in support of children's rights - namely that participation acknowledges that the decisions being made are about children's lives and that listening to children's views will lead to better decisions. This supports Eekelaar's (1994) view that listening to children, and working out what is important *to them*, are key to acting in children's best interests. Together, this adds to the concern about children's participation rights being set aside when there are adult concerns about their welfare or supposed vulnerability (e.g. Eriksson, 2008; Eriksson & Näsman, 2012; Henaghan, 2012; Parkes, 2015).

Issues of manipulation and domestic abuse are often framed as 'knotty issues' for children's participation in family actions. International evidence casts doubt on whether mechanisms for children's participation are suitable when there are allegations of domestic abuse and manipulation (see Birnbaum, Bala, & Boyd, 2016 on Voice of the Child Reports and Fernando, 2012 on Judicial Interviewing). However, research shows the majority of contested contact cases in the United Kingdom that are resolved by the court involve cases characterised by welfare concerns, including allegations of domestic abuse and manipulation (CAFCASS and Women's Aid, 2017). If these are the majority of the cases, the evidence calls into question the adequacy of jurisdictions' legal provisions to implement and uphold children's participation rights when there are legal proceedings about contested contact.

Concern about malicious allegations about domestic abuse and parental alienation feature heavily in responses to the Scottish Government's (2019) consultation on family law. This is particularly the case when children refuse contact or express views against contact with one of their parents. In these circumstances of contested contact, malicious allegations of alienation can be made by the resisted parent when in reality domestic abuse has taken place (p. 103). The reverse is also possible - malicious allegations of domestic abuse are

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made to confuse and complicate cases where alienation could well be at play in children's contact refusal (p119). We argue that both sets of circumstances have consequences for children's participation rights, and both circumstances can undermine the views of children when they do express them. In the responses to the Government's consultation, and the literature more broadly, children's participation rights are not subject to the same intense scrutiny when a child with experience of domestic abuse expresses views *for* contact with a parent responsible for abuse. The entanglement between domestic abuse and alienation prompts questions about how such allegations are raised in litigation, how they are assessed, substantiated and judged. Further, the entanglement reveals a risk to children's participation rights in these contexts.

Whilst the terms 'alienation' and 'parental alienation' are beginning to gain traction in Scottish policy discourse, the term 'resist, refuse dynamics' has not yet been part of the Scottish child and family law lexicon. In its 2018 public consultation on family law reform, the Government made efforts to resist the terminology of alienation, instead asking what action could be taken to prevent children being put under pressure by one parent to reject another:

'This can be referred to as "parental alienation" but that term can give rise to disputes and disagreements. Therefore, it may, perhaps, be better not to use that particular term but instead to refer to the types of activity involved. In this consultation, we are seeking views on what action, if any, we should take to try and stop children being put under pressure by one parent to reject the other parent.'

(Scottish Government, 2018: 65)

Despite these efforts to shun the language of alienation, the term 'alienation' was used by many respondents to the consultation, highlighting the term's currency and potency. Alienation was cited in some consultation responses as a reason not to implement or to at

least *temper* children's participation rights. Given children's participation is a right under the UNCRC, this raises questions as to whether their rights can be dismissed so easily:

'Some considered this [alienation] as a reason for not seeking (or giving weight to) a child's views, while others felt the child's views should be sought/considered on a case-by-case basis. For some, they felt that seeking (or giving weight to) the child's views in such circumstances could be counter-productive.'

(Scottish Government, 2019: 13)

### **Overview of the Empirical Study**

The overall aim of the research was to examine children's experiences of contact with their non-resident fathers when there are domestic abuse concerns. While contact in circumstances of domestic abuse is increasingly on the policy and research agenda, children's own perspectives on this is an under-researched area. The study aimed to address the following questions: What influences children's views about contact with non-resident fathers? What perspectives do children have on participating in parental disputes about contact? How do children experience contact in a context of domestic abuse? In what ways are children exposed to domestic abuse before and following separation?

The empirical research was carried out by Morrison. She adopted a qualitative approach, as the topic was concerned with sensitive and complex issues, and with events that unfolded and changed over time (Ritchie, 2006). Separate in-depth interviews were carried out with children and their resident mothers. The study used a purposive sampling strategy (Silverman, 2017), with families recruited from domestic abuse support services in both the voluntary and statutory sectors.

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A total of 18 children and 16 mothers participated. The age of child participants ranged from eight to 14 years old: eight identified as boys and ten identified as girls. Two families had Asian backgrounds, while the rest were White Scottish.

Interviews with children were divided into participative research activities, with the view to making interviews more engaging (e.g. Tisdall, Davis, & Gallagher, 2009) and diluting the intensity of the interview. Activities provided a physical entity to focus on rather than the dialogue and interaction between the child and researcher (Barter and Renold, 2000). The first substantive research activity used a 'storyboard', a pictorial vignette to explore three key areas: parental separation; participation in decisions about contact; and experiences of contact. The second research activity 'My Story' encouraged children to map their own experiences of contact onto paper.

Interviews with mothers tended to be directed by the mother being interviewed. At the start of the interview, mothers were asked about the legal processes that had taken place pertaining to contact and anything else they thought was important to their child's contact. Although a topic guide was developed that explored these areas, mothers tended to provide full accounts without much prompting, with the topic guide tending to be referred to more as a 'checklist' during the interview.

It was typical for mothers to report that their ex-partners had no or only minor criminal convictions (e.g. breach of the peace) for the abuse that the mothers and their children described in interviews. This was mostly explained by mothers' reluctance to involve the police. Mothers were concerned about the repercussions of police involvement, fearful that abuse may continue or increase. Before separation, mothers expected to continue to live with the perpetrators, feared that police involvement would jeopardize those relationships or lead to further abuse. They also described concern that police involvement would lead to unwanted child protection intervention in their families, and feelings of guilt

about the consequences that a conviction may have for their partner and their family. On the occasions where police had become involved, mothers frequently did not support investigations or the bringing of charges. This all has significant implications for both the raising and evidencing of domestic abuse in later legal proceedings about contact.

Interviews were audio recorded and later transcribed, with a largely inductive analytic strategy adopted for analysis. Interview transcripts were coded and analysed thematically (Braun and Clark, 2006). Analysis was led by one researcher (Morrison). Reflexivity was achieved through the researcher's reflexive recordings during fieldwork and discussing analysis in supervisory research meetings to explore patterns and alternative interpretations.<sup>2</sup>

Given the potential vulnerability of participants and the sensitivity of the topic, the research paid particular attention to ethical issues throughout, including addressing informed consent, dealing with risk and child protection, privacy and confidentiality, and distress and damage. Pseudonyms are used in all research reporting, including this article, with considerable attention to protecting participants' anonymity. Ethical approval for the research was sought from and given by the Research and Ethics Committee of the School of Social & Political Science, University of Edinburgh.

### **Key Findings**

We now turn to findings from the empirical research with children and mothers on contested child contact in circumstances of domestic abuse. Here, we use the metaphor of 'borders' to explore how the law attempts to separate the child and their views from the parental dispute. We interrogate the implications of this bordering for children's participation rights in a context of domestic abuse and for the concept of manipulation.

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<sup>2</sup> See Morrison (2014) for a fuller discussion about the methodology and analytical strategy adopted in this study.

**Constructing borders between the child and the parental dispute.** In disputes about contact, the law and related legal mechanisms attempt to establish and enforce borders between the child and the parental dispute. Well-defined borders arguably seek to safeguard the child. They create a space for the child in what the law constructs as an adult dispute. Potentially these borders offer a means to ensure the child's views are not subsumed into the parental dispute. However, constructing contested contact as a *parental dispute* obfuscates the influence that children in this study had in the dispute. It is also inconsistent with the priority given to children affected by domestic abuse on children in both child protection and criminal law. Children described themselves and were described by their mothers as the reason for, and in some cases the agitators for, going to court to resolve the dispute. Examples are given by two mothers from the study:

*And he [Luke] went away and locked himself in the toilet in the supermarket [on the way to a contact visit]. I had to get an assistant to get him out. So, he was kind of, showing it in that way.*

(Emma, Luke's mother)

*At the point where I decided that that contact, and there had been three incidents of violence I reported at contact with him [the father] bringing back the kids. So, and the kids had witnessed this. So, that was really how contact stopped.*

(Sophie, Ruby and Paul's mother)

In seeking to restrict or suspend contact, mothers consistently reported being motivated by the concerns and views of their children. Mothers were influenced by their children's refusal to attend contact or statements of their children about distress during contact, and maternal concern about children's welfare during contact. The term parental dispute acts to conceal the influence children have in a mother raising a dispute about contact. While borders between the child and the parental dispute may originate from a

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desire to protect children, these have unintended and serious consequences for children's participation rights. Rather than protecting children from manipulation, the law's attempt to separate the child's views from the dispute leaves children's views *vulnerable* to adult manipulation. Children's lack of legal status in the dispute renders the implementation of their participation rights conditional upon adults' actions. The reporting and representation of children's views to the court are most likely to be mediated either by a court official, or by parents claiming to advance children's views as part of their own litigation.

Borders between the child and the parental dispute are visible through courts' reluctance to involve children directly in court processes. In Scotland, despite provisions in law for children's independent legal representation, children are rarely parties to disputes on contact (Tisdall, 2016, 2018). There is limited infrastructure to enable children's access to independent legal representation or advice without practical and in some cases financial support<sup>3</sup> from parents. None of the children in the study were party to the dispute. One child attempted to gain her own legal representation and become party to the dispute: however, this was refused by the court. Laura, the child's mother, describes the result:

*Laura: I got it in the neck for Claire having a lawyer of her own... Claire's lawyer wasn't allowed in the court.*

*Interviewer: Why was that?*

*Laura: I don't know. And the Sheriff didn't respond to Claire's request to see her and speak to her about it. She was ignored. Claire [had written a letter that] said 'I want*

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<sup>3</sup> Since 2011, a solicitor assessing a child who applies for civil legal assistance must take account of the financial circumstances of anyone who owes a duty of support to that child. There is an exemption – if it would be unjust or inequitable to do so, in the particular circumstances of the case.



*to speak to you about contact, I am going to the top, you are the person who makes the ultimate decisions' and she just wasn't interested she just didn't even respond.*

Claire is described as being ignored by the Sheriff, and her request received no response. Later in the interview, Laura described being berated by the Sheriff, who suggested seeking independent legal representation for Claire was evidence of her efforts to manipulate her child. This suggests therefore that a child's attempt to exert her participation rights might not only be refused but may also cast doubt on the supporting parent. This also reveals that children's dependence upon adults to claim and implement participation rights and highlights the precarity of these rights. This is further exemplified by Leo, whose participation rights were not upheld:

*It's hard. It's hard because the last time [it went to court] we never even got a say.*

*They just told us we were going.*

(Leo)

Both Laura and Leo provide powerful examples of how courts gatekeep children's participation rights. Leo, in particular, reflects on his feelings of powerlessness produced by his lack of 'a say'. By creating borders that preclude children's involvement in their parental disputes, courts can disenfranchise the children and we would argue make them more vulnerable, rather than uphold their human rights.

**Exposing porous borders – the child's views and the parental dispute.** In law, the child's views are constructed as separate but connected to the parental dispute. The child's views are 'brought in' to the adult dispute and considered as part of the weighing of the child's welfare. However, the borders between the child's views and the parental dispute are porous. Children, like adults, live in families and are connected by relationships. Like adults, children's views are shaped and entwined by their experiences and considerations of especially complex familial relationships in the context of domestic abuse. In this study,

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children did their own relational weighing when considering contact. They considered the interests of parents, siblings and wider families. Children's views were influenced by their predictions of how these people might respond or react to their views. This complex weighing is illustrated well in the following statement from a child in an interview:

*I said I only wanted to two hours [of contact] or something. Because of the stuff that was happening at the time [...] In case he did something to Harry [twin brother]. Because he [the father] hit Harry when we went to see him.*

(Toby)

This weighing undertaken by children raises questions about the conceptual robustness of manipulation. Children's views are not a 'pure' representation of what they want for themselves. Instead like the views of adults, children's stated preferences are a product of what they want for themselves, for others and are influenced by others and children's particular circumstances (see also Callaghan et al, 2017). We would argue this is not necessarily evidence of manipulation, but rather underlines the complexity of views and relationships, as well as the magnitude of the issues that their views are being sought about.

Circumstances of domestic abuse bring a further layer of complexity, where children are not only relationally entwined with parents; they are also intimately entwined in the domestic abuse that occurred, and may be continuing. In circumstances of domestic abuse, children's views may be influenced and preoccupied by issues of violence and coercion, as exemplified by the following extract:

*Lisa: I just think with all the bad stuff he has done, I don't want to see him at all.*

*Interviewer: What bad stuff?*

*Lisa: Well he's got drunk; he's bent my finger back and stuff. He's smashed one of those windows. He's spat in my mum's face and stuff.*

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For many children in this study, issues of violence and abuse were at the forefront of their concerns about contact. Leaving aside the earlier discussion about the problems with providing evidence of domestic abuse, a legal construction of children's views as separate to the parental dispute underestimates the complexity of children's views and overlooks how omnipresent domestic abuse may be in children's lives. When children articulate views about these 'adult concerns,' there is a risk they are perceived as 'overly involved' and their participation rights undermined. While the law attempts to protect children from the parental dispute by keeping them out of the legal process, children's accounts reveals this may not be possible and nor is it desirable.

**Overcoming the borders - implementing children's participation rights in complex circumstances.** Children's views on domestic abuse in contested contact are challenging for several reasons. First, current legal mechanisms intended to facilitate children's participation rights are not sensitive or calibrated to issues of abuse. Second, domestic abuse is an issue that adults may find difficult to *hear* about from children. These problems are in the context of domestic abuse being traditionally viewed as an adult concern, one that belongs across the border in the parental dispute. Further, as discussed above, there may not be official evidence that domestic abuse has taken place. Children's views about contact in thus present a challenge to how adults consider children and childhood (Tisdall & Morrison, 2012).

Typically, in this study, children's views were gathered by a court reporter who children met with one or two times, frequently taking place without advance notice to children and without the children having information about the legal process or support for navigating it. This left children ill-prepared to express views on what were difficult and complex issues. For children to be able to exercise participation rights in this context, time and support were needed to be able to consider and articulate views:

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*Lucy: I was nervous. I never got to know him [the reporter] very well. It was only on one day. My teacher just told me that he was going to speak with me.*

*Interviewer: Is there anything that could have made it easier?*

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*Lucy: [...] it would be easier if I knew the person more. If I knew them and I knew that they weren't going to do anything. That they were going to help me, but they weren't going to tell anyone.*

*Interviewer: Who were you worried they were going to tell?*

*Lucy: They might tell my parents and they might not like my decision.*

The extract reveals a chasm between current mechanisms for implementing children's participation rights and the support children may need to exercise their participation rights. Given that children's views were gathered to inform decisions that have profound consequences - for children, their relationships and their parents - much greater attention and care is needed. Lucy's account underlines that in the contexts of parental separation and domestic abuse, the absence of assurances or information about how children's views will be treated, or who they will be shared with, creates a further barrier to children's participation. Across the study, it was clear that current legal mechanisms were ill-equipped to deal with the complex and sensitive issues that they are intended to seek children's views on. A further example is given by Claire, who did not want continued contact with her father. She described feeling pressured by the court reporter to have contact who was tasked with seeking her views:

*[Asking] questions like – 'Why do you want to stop seeing your dad? Don't you love him? Doesn't he love you?'*

(Claire)

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Here, we see the legitimacy of Claire's views against contact being probed. Claire's 'love' for and from her father is used in a particularly loaded way to challenge her views. Children in the study had a variety and changing views about contact with their mothers and fathers. Equally challenging to some mothers, and those who argue for children affected by domestic abuse to be recognised as victims, are children who want to live with or have contact with their non-resident father. All these range of views can be difficult for adults to 'hear' from children and this was evident from both child participants and their mothers. This raises questions about what adults are willing to 'hear from' children. It also raises serious concerns about how legal mechanisms that seek to implement children's participation rights risk acting to manipulate or coerce children when they express views against contact.

### **Study Limitations**

The focus of the study was children's contact with fathers who perpetrated domestic abuse. This reflects the gendered nature of domestic abuse (e.g. Hester, 2013; Walby & Towers, 2018) and of post-separation parenting arrangements (e.g. Marryat, Reid, & Wasoff, 2009). Non-resident fathers of the child participants were not included in this research. The decision to not include fathers was made so as not to undermine the safety of children and mothers, and in a bid to ensure the research was not dominated by the parental dispute about contact. While child contact and domestic abuse have gained attention in policy and research, children's views and experiences remain under-researched. This study aimed to begin to address this; however, further research is necessary to examine how findings from this study may apply to other populations e.g. court versus non-court-based samples, children of different ages and other demographic characteristics, exposure to different types of abuse and other post-separation parenting arrangements.

### Conclusion

Despite apparently progressive legislation in Scotland, the family law system and associated court procedures fail to sufficiently recognise the participation rights of numerous children in contested contact cases (Scottish Government 2018; Tisdall, 2016, 2018).

Internationally, it is recognised that children's participation is particularly at risk if they are considered 'manipulated' by one or more of their parents, where there are allegations of domestic abuse, or there are concerns about children's welfare being harmed by the court processes (e.g. Eriksson, 2011; Höjer & Röbbäck, 2009; Holt, 2011). If children are perceived to be in any combination of these situations, then they may not be involved in the court processes at all or their expressed views may be given little weight in the decision. These concerns are common to many jurisdictions, but have particular salience in Scotland at present, as the Scottish Government is legislating for full incorporation of the UNCRC, and its integration into all law and policy.

This article introduces the metaphor of 'borders' to help understand why in Scotland, despite its progressive legislation, children's participation in contact proceedings is so problematic. Courts seek to keep children out of the contestation and out of the courts, as potentially harmful to the children, constructing the case as an adult, parental dispute. While aiming to be protective, it does not sufficiently take into account children's participation rights. If children's views are asked for by the court, the most frequent way is through an expert instructed by the court. As children have no control over what is submitted to the court by this expert, children's views can be lost in translation rather than transmitted as the children would precisely wish (see Office of Children's Commissioner study in 2011).

Children's lack of legal status in the dispute renders the implementation of their participation rights conditional upon adults' actions and information. We have argued that this can mean children are *more* vulnerable to adults' manipulation rather than less. Children

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may be unaware of their rights, of how to raise concerns and lack information to support them. All this is problematic because the borders around the parental dispute are not maintained and are instead porous for many children. The imposition of borders obfuscates that children *are* typically involved in their families, which includes concerns about their parents, their ongoing relationships, their siblings and about violence and abuse historically, ongoing or prospectively. Borders mask that children's concerns are often the reason, or in some cases children are the agitators, for a parent disputing contact. Borders result in children's participation being conditional upon adults' willingness to allow their participation. Such constrained participation rights are not in keeping with the requirements of the UNCRC.

When children seek to implement their participation rights by becoming involved, the courts may refuse them. If a child articulates views about 'adult concerns', like domestic abuse, they risk being cast as 'overly involved' and their stated views used as evidence that they are being manipulated. The metaphor of the 'border' – as an attempt to contain the disputed contact as a parental dispute – illuminates how adult concerns about children's welfare and the reality of children as social actors in complex family relationships, combine together to exclude rather than include children's views in seemingly progressive family law procedures in regards to children's participation rights. Whilst this attempt to protect children from adult concerns and to shield them from adult manipulation is understandable, it risks excluding children from decision making in ways that are potentially harmful to children and their interests. The construction of children as inherently 'vulnerable' can result in the loss of valuable information to the courts when making decisions about children's best interests. As members of families in which domestic abuse has occurred, children often have information about family life and about their own experiences and needs that risk exclusion when they are dismissed as either 'manipulated' or too vulnerable to speak about their own lives. These

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constructs produce an epistemic injustice (Fricker, 2007) that ignores their own accounts of their lives. This is a harm in its own right, but it also potentially raises children's risks by excluding them from decisions about their own lives.

This has become more apparent in recent years, as research and advocacy have led to a gradual (and sometimes reluctant) recognition that children are affected by domestic abuse (see Stanley, 2011 for an overview). Domestic abuse is a significant concern in Scotland (Scottish Government, 2018b), and evidence from Scotland as well as elsewhere demonstrates that allegations and concerns of domestic abuse underlie many if not the majority of disputed cases that reach courts (CAFCASS and Women's Aid, 2017; Mackay, 2013).

With changes elsewhere in Scottish policy as described above, more allegations of domestic abuse are likely in contested contact cases in family law. Thus, the family law system and procedures need to treat concerns about domestic abuse not as the exceptions but the norm. They need to dismantle the borders between the adult and child disputes, to recognise that these borders are not protecting children and may be making them more vulnerable. There are immediate ways they could better protect both children's protection and participation rights in the current system. They could invest in a system of child advocacy, that ensures independent advice, ongoing support and trusting relationships, and information, that children repeatedly tell researchers they need (Commissioner for Children and Young People in Scotland and Scottish Women's Aid 2017; Morrison, 2014). As is planned (Scottish Government, 2018), there needs to be increased training and funding of court officials, and clearly articulated expectations to ensure children's views are transmitted and not translated. Understandings of how children experience family disputes, domestic abuse and come to develop their views need to be challenged and developed, taking on existing



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research that recognises children are part of families, influencing and being influenced by them.

Mechanisms must grapple with thorny issues like confidentiality, providing children with information about the legal processes and feedback about the role their views have had in legal decisions. Whilst not straightforward, these issues must be addressed if we are serious about upholding children's rights in these contexts. Indeed, research points to willingness from the judiciary to navigate issues like confidentiality (e.g. Raitt, 2007) and to communicate decisions to children (e.g. Barnes Macfarlane, 2018). The judiciary and all related court officials need to take on the responsibility of justice for children and not just for adults; children are potentially clients of the court system too, not solely dependents on their parents or objects of welfare concern. Changes need to be made to recognise children's participation rights.

A more radical approach would be to consider a system that dismantles the border further, to make disputes about child contact centered around the child, rather than parental responsibilities and rights. With that formation, children's views would not be subsumed merely as evidence to decide on a child's welfare. Children's participation rights would be recognised in themselves, as well as their intersections with children's welfare: the UN Committee on the Rights has itself wrestled with the articulations between a child's best interests and a child's participation rights (2009 and 2013), to ensure neither are subsumed. In a context where the European Convention on Human Rights needs to be considered, the European Court of Human Rights' respective balancing of parental responsibilities, rights and children's rights can be instructive (Daly, 2018 and European Union Agency for Fundamental Rights and Council of Europe, 2015).

To embrace this in a Scottish context would require more than minor changes to the current legislation and careful articulation with other systems – such as child protection and

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the children's hearing system – which seek to be 'child-centered'. It is arguably this kind of radical approach that Scotland, and other jurisdictions need to take, if they are truly going to realise all of children's human rights including their participation rights.

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