



Scotland's Commissioner
for Children & Young People

Child Contact Proceedings for Children Affected by Domestic Abuse

*Briefing paper
for Scotland's Commissioner for Children and Young People*

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January 2013

www.sccyp.org.uk



Acknowledgements

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

Citation for this summary report: Morrison, F, and Tisdall, E. Kay M (2013). Child Contact Proceedings for Children Affected by Domestic Abuse. Briefing Paper. Edinburgh: Scotland's Commissioner for Children and Young People.

The full report will be available from Scotland's Commissioner for Children and Young People at www.sccyp.org.uk from February 2013: Morrison, F, and Tisdall, E. Kay M (2013). Child Contact Proceedings for Children Affected by Domestic Abuse.

Introduction

This briefing paper provides an overview of preliminary research work carried out for Scotland's Commissioner for Children and Young People. The Commissioner identified the issue of safe contact as particularly important to children and young people who have experienced domestic abuse.

The purpose of this research was to provide the Commissioner with information about current practices and procedures in Scottish child contact proceedings for children affected by domestic abuse, from a children's rights perspective. Three types of proceedings are considered:

- family actions;
- children's hearings proceedings; and
- adoption and permanence orders.

The research examines how the concepts of 'best interests' and 'the voice of the child' are used in these proceedings. It also investigates where guidance and training on this topic may already exist. It identifies current gaps in knowledge and practice and offers advice on how the Commissioner can work to address these. The full report contains a detailed narrative of the legislative framework, review of case law and training and guidance.

Three approaches were adopted to carry out this preliminary research work:

1. A review of relevant legislation and associated regulations and guidance
2. Analysis of Reported cases
3. Desk-top research to identify relevant professionals' training and guidance, complemented by consultation with 12 adult stakeholders.

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

Types of contact proceedings

Contact between a child and a parent is both a parental responsibility and a parental right, under the Children (Scotland) Act 1995 (sections 1 and 2). Legally, this parental responsibility and right can be modified primarily through three types of proceedings:

1. **Family actions** – where courts can make orders in relation to parental responsibilities and rights, often in situations of parental divorce or separation.
2. **Children's hearings proceedings**, including emergency orders – where children in need of care and protection, or who commit offences, can be subject to supervision requirements or emergency court orders, which in turn can impose conditions regulating contact.

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

Specific legal requirements exist to consider domestic abuse, as it affects the child, in family actions and soon as a ground for referral in children's hearing proceedings.

Scots Law and the UNCRC

In Scots law, there is a tradition of such proceedings taking the child's welfare as the paramount consideration. This is a higher standard than that required by the UN Convention on the Rights of the Child (UNCRC).¹ In the UNCRC, Article 3 sets out the 'best interests' principle:

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

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

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

Thus, Article 3 has a wide remit – all actions concerning children – but a lower threshold than 'paramountcy' – a child's best interests are 'a primary consideration'.

No sharp legal distinction has been made between the concept of a child's 'best interests' (used in the UNCRC) and a child's 'welfare' (used in Scots law).

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

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

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

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

Over recent years, disputed child contact has become a considerable focus of policy and research attention. It can be particularly fraught in situations of domestic abuse.

¹ The UK ratified the UNCRC in 1991. The UK is thus bound by the UNCRC in international law.

Definition of 'domestic abuse'

There is no one accepted definition of 'domestic abuse' across Scottish policy and legislation. This study used a working definition from the Scottish Government's *National Domestic Abuse Plan for Children and Young People* (2008)²:

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

² <http://www.scotland.gov.uk/Publications/2008/06/17115558/0> (accessed 25.6.12), page 9

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

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

What is the Scottish legislative framework for disputed contact?

In relation to contact proceedings, recent legislation has been passed that has the explicit intention of drawing greater attention to the (negative) impacts of domestic abuse on children and young people.

- When courts make decisions about parental responsibilities and rights, under section 11 of the Children (Scotland) Act 1995, courts must now take account of 'abuse' when determining the child's welfare.
- Under the Children's Hearings (Scotland) Act 2011, children will be able to be referred to the children's hearings, on the grounds of the child having – or likely to have – a close connection with a person who has carried out domestic abuse.

There is no definition of 'domestic abuse' in either legislation.

The child's welfare is generally the paramount consideration for courts and children's hearings.

The principle of having regard to children's views is being threaded ever more into the relevant legislation and associated rules. Mechanisms for

children to express their views include children in contact proceedings:

- Giving evidence
- Sending in written views
- Appearing in person to a judge or children's hearing
- Being represented, which may or may not be legal representation
- Having people appointed to report on the child's best interests, including the child's views: local authorities, court reporters, curators ad litem, safeguarders (in relation to children's hearings). This is usually discretionary, but a curator ad litem must be appointed in applications for adoption and permanence orders.

Provisions of the European Convention on Human Rights are relevant, applying to both parents and children in such proceedings. These include:

- Article 6: the right to a fair trial
- Article 8: respect for private and family life, home and correspondence.

What do we know from reported case law?

Courts have a key role in interpreting the law. There is less reported case law on children's hearings but guidance on a child's welfare in family law cases is relevant to children's hearings cases.

The courts consistently emphasise the need to judge each case on its facts. There is no legal presumption for contact, or against contact in situations of domestic abuse.

A weaker legal concept, a 'general principle', has been accepted in family actions, that "it is conducive to the welfare of children if their absent parents maintain personal relations and direct contact with them on a regular basis". This principle is qualified by practicability and the child's best interests are still paramount.

For adoption orders, the courts have supported the general principle that "in normal circumstances it is desirable that there should be a complete break from the child's natural family".

Few reported court cases consider 'abuse' in relation to a child, in family actions. Domestic abuse is one factor amongst others, to weigh up in deciding what is in the child's best interests. The lack of definition of 'domestic abuse' in these proceedings has been criticised in reported cases.

Key court decisions underline children's right to have their views regarded, as far as is practicable and using appropriate methods. However, the quality and effectiveness of the mechanisms have been questioned.

It is recognised that the roles of reporters, curators ad litem and safeguarders need to be clarified. Children's access to legal aid is problematic under current provisions.

What guidance and training do professionals have?

Limited guidance and training seems to be available to professionals specifically on children affected by domestic abuse and contact. The study found it difficult, however, to assess what is available for all professions. For many professions, training arrangements vary by locality. For some, training was on an ad hoc basis.

There are at least three exceptions.

- Advice is available to the judiciary, in dealing with children affected by domestic abuse in court proceedings.
- Reference to, and resources about, children affected by domestic abuse are contained within initial training for children's panel members.
- Guidance on domestic abuse is available to Reporters.

Some guidance uses 'domestic violence' and 'domestic abuse' interchangeably. Focusing on 'violence' rather than 'abuse' can obscure the range of behaviours that constitute domestic abuse.

What are the challenges?

The consultation with professional stakeholders raised some challenges.

Professionals identified **eight challenges** when considering children's views and in determining children's best interests:

1. Children's views differing from their best interests
2. Confidentiality of children's views
3. The effectiveness of mechanisms for children to express their views
4. Gaps in professionals' knowledge and understanding
5. The complexity of weighing children's best interests
6. Divergent views on whether evidencing domestic abuse is difficult or not

7. Weighing up the risks in having contact and not having contact, for children
8. Parents' views obscuring children's best interests

The professionals identified **four implications** of introducing the 'domestic abuse' ground for referral to the children's hearings.

1. It will make the issue of domestic abuse more visible.
2. It will create a more appropriate ground for referral than what is available currently.
3. It may increase litigation, particularly by alleged perpetrators of domestic abuse.
4. It will not necessarily create more referrals to the Children's Reporter.

Key points

This research highlights a number of key points about the current approach to child contact proceedings in Scotland:

- There is no single definition of 'domestic abuse' in Scottish policy nor the relevant children's legislation.
- Few reported court cases consider 'abuse' in relation to a child, in family actions.
- The child's welfare is generally the paramount consideration for courts and children's hearings, when making decisions.
- There is no legal presumption for contact between a child and a non-resident parent.
- There is no legal presumption against contact between a child and the (alleged) perpetrator of domestic abuse.
- Each case is unique: the particular facts and circumstances will determine the child's welfare.
- Generally, contact proceedings must have regard to a child's views, subject to the child's age and maturity and as far as is (reasonably) practicable.
- A range of mechanisms is available for children to have their views regarded in proceedings.
- Criticisms have been made of these mechanisms individually and of the number of professionals potentially involved.
- Parents' views can obscure children's views.
- Limited guidance and training seems to be available to professionals specifically on children affected by domestic abuse and contact.

What suggestions does the report make to the Commissioner?

There are several possible options on which the Commissioner may wish to focus future work:

Work towards a common and evidenced definition of domestic abuse

- In partnership with other agencies, to agree and promote a common definition of domestic abuse in regards to child contact. A common definition should extend beyond incidents of abuse or violence and include the cumulative effects that domestic abuse can have on children's lives. This common definition should appear in legislation, guidance and training.

Encourage sound information to inform practice and policy

- Commission further research, and encourage other funders to do so, on disputed contact, domestic abuse and the related proceedings. This includes evidence on: children's experiences; legal aid; professionals' concepts of, attitudes towards, and practices in relation to domestic abuse and disputed contact.
- Seek to influence the next Growing Up in Scotland (GUS) sweeps to fill in evidential gaps as well as commissioning further analysis of the existing GUS data.
- Facilitate a 'Think Tank' to undertake a fundamental review of how to involve children effectively in these proceedings, involving cross-national learning and learning across the proceedings.

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

- Undertake a more extensive audit to identify the full range of optional training available and to know what is available locally.
- Work in partnership with professional bodies to develop training and guidance suitable for each profession.
- Encourage learning from the Australian reforms for family actions, where there is now routine screening for domestic abuse and whole-scale training for professionals.
- There are other areas where training and guidance may be considered, namely: the implementation of the Children's Hearings (Scotland) Act 2011, with its new ground of referral on domestic abuse; implementation of the National Framework for Child Protection Learning and Development in Scotland and making sure related competencies on domestic abuse receive specific attention; the Judicial Studies Committee which is reviewing the curriculum provided to judges across Scotland.

Final comment

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

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

With all the policy and practice activity, the children's actual experiences of proceedings and decisions need to be kept central.



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