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Subjects with agency? Children's participation in family law proceedings

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Abstract

Galvanised by the UN Convention on the Rights of the Child, many jurisdictions now recognise children's rights to participate in decisions that affect them. While such legal rights have increased, research on family law proceedings shows how children's views can still be undermined, ignored or not even sought in decisions about them. This article uses the academic resources of childhood studies, to consider dominant and alternative narratives of children's participation within Scottish family law. Drawing upon reported case law and empirical research, the article concludes that children's participation gains protection by being institutionalised but children's participation is attenuated because it is not recognised as relational and contextual. As rationality, consistency and autonomy are privileged, the weight given to children's views is lessened by concerns about children being manipulated or distressed. Courts and their decisions may be child-focused, centring on children's welfare, but they are not child-inclusive, involving children in decision-making.

Keywords: family law; participation; views; children; manipulation; children's rights

Introduction

In 2007, Hunter wrote about changing paradigms in family law:

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 no longer conceived as dependent, vulnerable, at-risk victims of divorce and passive objects of law, but are seen as subjects with agency. (p. 283)

This description mirrors very familiar ideas for childhood studies, an academic area that has sought to counter 'traditional' conceptualisations of children as passive, dependent and lesser than adults with conceptualisations of children as active social actors in their own lives as well as their families and communities (e.g. James, Jenks and Prout, 1998; Wyness, 2011). This is more than an intellectual exercise – how we (largely adults) perceive children and childhood impacts on our informal and formal practices. As Hunter writes in her article, if children are seen as lacking capacity and dependent, they will not be included in family law decisions. If they are seen as subjects with agency, their participation will be both recognised and facilitated.

Yet, just when Hunter was describing changing paradigms in family law, so childhood studies was beginning to debate and question their characterisations of children's agency, claims for children's participation and assertions of children's autonomy. While recognising the practical power of such discourses, aligned with the political agenda of children's rights, these discourses fail to incorporate post-modern ideas about identity and subjectivity. These ideas recognise relations of power and knowledge, questioning whether anyone is an 'autonomous agent' and suggesting that all views are contingent, interpreted and contextually dependent (e.g. Gallacher and Gallagher, 2008). Perhaps even more salient are the practical disadvantages for children, of certain assertions about their agency, which leave some children even more vulnerable or marginalised (see below for discussion). With this questioning of agency, and how agency has been used within research and associated policy and practice, have come reassessments of children's participation and how best to support children's rights to participate.

Wyness (2016) takes up such critiques of agency, for children's participation more generally. He first identifies five dominant narratives in the literature:

- (1) as formalised, set within institutions;
- (2) event-based;
- (3) outcomes-oriented;
- (4) discursive, concentrating on words whether spoken or written; and
- (5) individualistic, concentrating on the individual child.

He then lists emerging, alternative narratives, three of which are relevant to this article. First, rather than formalised or event-based, participation is perceived as embedded in children's 'everyday lives', routine and on-going (e.g. see Percy-Smith, 2010). Second, participation can be understood as relational, enacted and created with others, rather than reifying the individual person with agency (e.g. Mannion, 2007; Punch and Tisdall, 2012). Third, participation can be perceived as emotional and embodied, rather than solely rational and intellectual (e.g. Jupp, 2008). Considering both the dominant and alternatives narratives, provides an illuminating critique of Scottish court practices in regards to children's participation.

This article continues a journey of analysing reported case law and empirical research, following the explicit efforts to strengthen children's rights to participate in Scottish family law proceedings through the Children (Scotland) Act 1995. Children gained unprecedented rights to have their views duly considered by a court, in disputed cases of parental responsibilities and rights, along with a slew of mechanisms to support them. We first analysed early attempts at implementation, through a research project completed in 2001 (see Marshall, Tisdall, Cleland and Plumtree, 2002; Tisdall, Bray, Marshall and Cleland, 2004). We then returned for a re-assessment of reported case law up until 2009 and the emerging findings from Morrison's PhD project on children affected by domestic abuse and contact with their fathers, in the chapter Tisdall and Morrison (2012). This article capitalises on: the now completed PhD research by Morrison (2014), which was an indepth study with 18 children and 16 mothers; the breadth of Mackay's PhD project (Mackay 2013a and b), who reviewed the court papers of 208 contact disputes, concerning 299 children, which were raised in two sheriff courts in 2007;¹ and the scoping study on child contact proceedings for children affected by domestic abuse (Morrison, Tisdall, Jones, and Reid, 2013). The article incorporates key policy and practice developments over recent years: constraints on legal aid and the associated rise of self-represented litigants; global interest in judicial interviewing (see Bala, Birnbaum and Cyr, 2015); and increased recognition of domestic abuse and its effects on children (Humphreys and Bradbury-Jones, 2015). In order to explain why children's participation is so often provisional or non-existent, Wyness' narratives provide a fresh framework to analyse how Scottish family law proceedings deal with children's participation – and identifies alternative ways of understanding participation that would better facilitate children's ethical and meaningful involvement.

¹ Further, Mackay sent questionnaires to the family law practitioners and then parents, who had been involved. Responses from parents were limited, with 28 responding, and a following eight parents and two children were interviewed. Additional interviews were done with family law practitioners, sheriffs and non-legal practitioners.

This article draws together an analysis of the current state of children's participation in Scottish family law with the debates within childhood studies. It first sketches the heritage of childhood studies and current discussions. It then briefly describes children's participation rights in Scottish family law. The article goes on to consider how Wyness' dominant narratives characterise much of Scottish family law. The article concludes by considering alternative narratives that illuminate how family law practices risk excluding children, by either not involving them or diminishing the weight given to their views.

Children's agency and participation

Academics in the 1980s and 1990s began to develop an alternative conceptual and research agenda for children and childhood, distinguishing itself from the dominance of developmental psychology and functionalism in sociology (Mayall, 2012). In 1990, Prout and James sought to lay down some of the key elements of this new agenda. These included:

- While childhood may have a material basis, how it is understood is socially constructed.
- Children should be seen as active in the construction and determination of their own lives, the lives of those around them, and of the societies in which they live.

Subsequently, a proliferation of micro-studies and writings has sought to evidence and argue that 'children are agents in their own lives' (for critique, see Holloway and Pimlott-Wilson, 2011; James, 2010).

For those interested in practical applications, the research interest in children's agency paralleled the recognition of children's participation rights by the UN Convention on the Rights of the Child (CRC). The CRC was ratified by the UN General Assembly in 1989 and is the most ratified human rights convention – only the USA has currently not ratified it, of all States Parties. The CRC has a grouping of children's participation rights, that include Article 13 (freedom of expression), Article 14 (freedom of thought, conscience and religion), Article 15 (freedom of association and peaceful assembly) and Article 17 (access to information). Considered a key overarching principle of the CRC (UN Committee on the Rights of the Child, 2003), Article 12 states:

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.

It is particularly Article 12 that has garnered both research and policy attention and was highly influential in changing Scottish family law, as well as other jurisdictions (see European Union Agency for Fundamental Rights (FRA), 2015).

Attention to children's agency and their participation counter-balances the previous decades where children were the objects and subjects of research and services, but not included as valued contributors or co-creators. But this literature risks reifying certain constructions of childhood – which in turn have practical implications for children as well as conceptual problems. One problem is the positioning of children as agents or having agency. Some children live in such highly constrained contexts that they have great difficulty expressing agency (Ansell, 2009). Whilst the assertion of children's agency has led to a greater inclusion of some children in research and potentially policy and practice, it paradoxically risks marginalising children (and others) who cannot achieve this agentic ideal of independence and autonomy (Holt, 2011; Ruddick, 2007; Tisdall, 2012). Rather than seeing agency as an essential identity, position or characteristic, childhood studies' literature is increasingly suggesting that agency is relational and contextual (see Oswell, 2013; Tisdall and Punch, 2012). Much of the research and associated literature on children 'as agents' is also problematic because of the normative value given to agency. Children's agency is celebrated, as positively recognising children's contributions as social actors. But then it becomes difficult to recognise, let alone include and consider, when children express agency in ways that go against the moral values and social order of the researcher and others. This can be tracked through the ambivalence in the literature on children who work (Hanson, Volonakis and Al-Rozzi, 2015), children involved in prostitution (Montgomery, 2007), and 'child soldiers' (Rosen, 2007). Coining the phrase 'ambiguous agency', Bordonaro and Payne (2012) write how children's expressions of agency are diminished, ignored or categorised as something else, when such expressions challenge adults' normative views.

Thus, through a combination of policy and research interest, children's agency and participation has gained increased prominence and some practical purchase in decisions that affect them. However, implementation remains problematic and increasingly childhood studies suggests that is partially because of the inadequate interrogation of these concepts and their use. Below, the legal basics of how children can participate in Scottish family law proceedings are outlined, before using Wyness' dominant and alternative narratives to consider current practices.

Scottish family law: children's participation in s.11 orders

When courts are making decisions about parental responsibilities and rights, children's welfare is the paramount consideration (Children (Scotland) Act 1995 S.11(7)(a)). Children's views, though, have a role in such decisions. The court, when considering whether or not to make an order, must:

... 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 shall be presumed to be of sufficient age and maturity to form a view (S.11(10)). Thus the legislation sets out the welfare principle as paramount, alongside step-by-step requirements to ensure a child's view is given due regard within the court's decision.

Mechanisms seek to operationalise these provisions, including:

- If children are served with papers once the case enters the court process (called 'intimation'), they receive a Form F9 requesting their views. The form goes back to the sheriff.²
- 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.
- The child may give evidence as a witness, at a proof. A child can use 'special measures' to help the child give evidence, as a 'vulnerable witness' under S.11 of the Vulnerable Witnesses (Scotland) Act 2004.
- A child may take independent legal advice. If this were done, the child's views can be expressed in several ways. The lawyer may help the child to fill in Form F9; the lawyer may write to the court on the child's behalf; or 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 provides an early hearing to resolve any disputed issues in family actions, particularly in relation to children.³

² At the time of writing, sheriff is a professional judge in the second tier of courts. A sheriff would hear most family law cases in the first instance – but some cases are heard in the Court of Session in the first instance.

³ This list is largely taken from Tisdall and Morrison (2012), pages 158-159.

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 (Age of Legal Capacity (Scotland) Act 1991, S.2(4A)); however, restrictions in legal aid introduced in 2011⁴ curtail this possibility for most children, for S.11 proceedings.

Thus, Scotland had a framework around court decisions on parental responsibilities and rights, which requires a child's welfare to be the paramount consideration, accompanied by detailed mechanisms to incorporate children's views. As the court continuously underlines that welfare must be determined in light of each child's circumstances and the facts of the case (Morrison et al., 2013), there is potential for children's views to be part of such determinations. Given this framework, how well are courts ensuring that children's participation rights are being met?

Dominant narratives of children's participation in Scottish family law

A positive story can be told about Scottish family law proceedings. A pivotal case, *Shields v Shields* (2002 SC 246) led to considerably more judicial discussion of children's participation (for details and analysis of this particular case, see Barnes, 2008; Tisdall and Morrison, 2012). A review of reported case law prior to 2001 found rare examples where children's views were discussed (so children's participation may have been exemplary or not, but it was not part of written reasoning) (Marshall et al., 2002); the updated review in 2010 found a greater number of reported cases expressly referencing S.11(7)(b) and discussing children's views as part of the decision-making (Tisdall and Morrison, 2012). Children as young as age 3 have had their views duly considered (see *Stewart v Stewart* 2007 CSIH 20; Mackay, 2013a). This interest in children's participation, in reported case law and recent empirical studies, provides a basis to consider the dominant narratives of children's participation in Scottish family law and how these facilitate or block children's participation rights.

Dominant narratives 1 and 2: Institutionalised, formal and 'events-based'

Children's participation in Scottish family law can be characterised as institutionalised, formal and 'events-based'. These characteristics give a place and a protection for children's participation, within a largely adult-focused system (Neale, 2002; Tisdall et al., 2002).

The introduction of S.11(7)(b) through the 1995 Act was intended to institutionalise and formalise children's rights to participate, bolstered by subsequent secondary legislation and rules of court (Scottish Law Commission, 1992). Because of this legal basis, breaching children's rights to participate has been grounds for appeal, and successful appeals at that. One such appeal was *Shields*

⁴ Due to the Advice and Assistance (Scotland) Amendment Regulations 2010 and the Civil Legal Aid (Scotland) Amendment Regulations 2010.

v Shields, cited above. This was a relocation case, with the mother requesting a residence and specific issue order, in regards to her son who was seven and a half years old. The case was appealed to the Sheriff Principal, who noted negatively that attention had been lacking in ensuring the child had an opportunity to state his views. Papers had not been served on the child and hence the child had not received the Form F9; no justification for this had been recorded, beyond the child's age. The Sheriff Principal still refused the appeal, as 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' (4). The Inner House of Court of Session disagreed. The child had an absolute right to discretion and a hypothetical situation could not be referred to. Further, courts could not necessarily rest on an early decision but had to consider whether a material change in circumstances had happened, up until the order was made. The lapse of time between intimation being dispensed with, and the decision being taken, was such a material change.⁵ The Court of Session's subsequent observations help clarify the participation provisions of the 1995 Act. The first test is 'practicability', which is a low threshold: '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' (11). Thus, the issue becomes largely *how* rather than *whether* a child's views should be ascertained. Only after a child's views has been sought does the court decide on the weight to be given to the child's views, in making its decision. *Shields v Shields* thus should have bolstered children's views being elicited for disputed court proceedings, with the responsibility on adults to have the skills to do so.

However, recent reported cases and empirical evidence suggests some counter-trends. Increasingly, children's opportunities are being subsumed by concerns that courts are not good places for children to participate directly. Courts are considered *too* institutionalised and *too* formal for children – and thus courts decide that it is *against* a child's welfare to be involved.

From the start, children may not be given the opportunity to state their views to the court because of (adult) concerns about their welfare. In Mackay's research (2013a and b), only 17% (52 of 299 children) were sent the Form F9 and only 25 returned them, with an additional 9 children sending a letter to the court instead. Mackay (2013b) explains that most solicitors acting for the parents asked the court to dispense with sending the form, citing the 'tender years of the child'. This reason was used even for children aged 12 years or over, despite the legal presumption in S.11(10). Intimation to the child was often dispensed with because of: the weaknesses of the Form F9 (as it was not

⁵ Although note that a gap of 16 months was not considered material in *C v M* 2005 Fam LR 36 and in *S v A* 2015 WL 1839055 any material change of circumstance could be addressed by a party using a minute to vary (para 19).

particularly child-friendly, it was unclear on its confidentiality, and it could be influenced by others) and practitioners incorrectly thinking that intimation would include the Initial Writ (which can include negative allegations). Writing about English procedures, Mantle and colleagues (2006) found that early decisions on children's involvement were difficult to revise and thus difficult to alter. Such decisions, analysed Mantle and colleagues, were based on age-based views of competence. In the Scottish situation, the decisions seem based on age-based views of children's welfare.

Until recently, children's direct involvement in court proceedings has not been encouraged by the courts nor prevalent in practice. *O'Malley v O'Malley* (2004 Fam LR 44) asserted judicial discretion on the mode of children's participation, while in *X v Y* (2007 Fam LR 153) the sheriff refused a party's request to see the children himself, as he was 'not the appropriate person' (154).⁶ In Mackay's research, only 3 children out of 299 children spoke to the sheriff directly. There is thus not a substantial tradition of direct engagement between judges and children, whether to familiarise children with how court decisions are made, to let them know who is making the court decision, or to provide children with the opportunity to express their views. Some recent reported cases may show a changing trend, at least amongst some in the judiciary. The judge shows a proactive approach, in *G v G* (2014 WL 2194580), taking the opportunity of interviewing the child (28). His judgement provides a detailed description on the interview method, its quality and what the child said. However, in developing the argument for the decision, there is no reference to the child's views being influential on the decision. In another appeal case, *S v A* (2015 WL 1839055), the sheriff's attempt to interview child A is commended, even though the child was not 'keen to engage in discussion' with the sheriff (8). Given the increased enthusiasm for judicial interviews in England and elsewhere (Bala, Birnbaum, and Cyr, 2015; Cobb, 2015), practice may be rapidly changing amongst some of the judiciary but is only seen in certain reported case law to date.

The case *Hall v Hall* (2014 WL 4063101) suggests having a self-represented litigant may weigh against children's direct participation. The sheriff in *Hall v Hall* is very negative about how the appellant conducted his case, generally. Further, the sheriff is critical that the appellant had brought one of his children, Z, to court even though Z was not party to the proceedings:

Indeed, on an earlier occasion a different sheriff entered the court room for a continued child welfare hearing only to find Z sitting in court. The sheriff correctly decided that Z be removed from the court and arrangements were made for him to be looked after during the hearing. This is a very clear example of the appellant's lack of judgement in

⁶ To be more specific, the Sheriff wrote that he was not the appropriate person to determine if the children had lied to the consultant psychologist. The Sheriff did have a general conversation with the children as they had arrived at court expecting to see him.

considering the welfare of one of his children, rather than asserting at whatever cost his deeply held principles about the appropriate legal basis for his children's care arrangements. (13(2))

In *Hall v Hall*, the children were seen as overly involved, in the proceedings, by their father (see below). Much has been written about the potential pressures of increased self-representation in England. These include greater judicial management (whether to protect or constrain the self-represented litigant) and extended proceedings due to party litigants' lack of legal awareness and negotiation (see Bevan, 2013; Hunt, 2011). Children can also be negatively impacted by such pressures, whether or not they are themselves party to the proceedings. This has led English family law discussions to encourage greater protections of vulnerable witnesses, including proactive consideration by the court (Vulnerable Witnesses and Children Working Group, 2015). In Scotland, the response seems primarily to exclude children's direct participation in courts.

While some early cases successfully tested children's ability to gain legal representation (*Henderson v Henderson* 1997 Fam LR 120), there also have been decisions where courts resisted children being separately represented. For example, in *B v B* (2011 SLT (Sh Ct) 225) a court refused to allow a child to have her own legal representation, even though the child did not agree with the view presented by the curator ad litem and wished to have her own solicitor. Changes in legal aid mean that children are even less likely to have a solicitor's support for participation. Previously a child would be assessed financially in the same way as an adult, on the basis of the child's own disposable income and capital. Since changes in 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 aliment to that child. There is an exemption – if it would be unjust or inequitable to do so, in the particular circumstances of the case. Statistics are limited, but what is known is that there has been a drop in civil advice and assistance intimations from children under age 16, since these legal aid changes.⁷ Children are even less likely than before to have their own legal representation.

As court practices are creating more and more barriers for children to be involved in the formal events of courts, children face a double layer of interpretation of their views (see also Trinder, Jenks and Firth, 2010). If children are given the opportunity to express their views, this is usually done through a report ordered by the court. In Mackay's study, for example, only 42% (125 of 299) of children had their views taken into account by one or more of the mechanisms listed above; the

⁷ Statistics are available from a freedom of information request to the Scottish Legal Aid Board (see <http://www.clanchildlaw.org/app/uploads/2014/11/Legal-Assistance-for-Children-and-Young-People.pdf>). This found a drop in civil advice and assistance intimations, from 1852 for children under age 16 in April 2009/March 2010 to 898 in April 2011/March 2012.

most commonly used was reports (68 children by court reports and a further 15 children by a curator ad litem). A court reporter will be instructed on what to report upon by the court, which can include a request to ascertain children's views; a curator ad litem is appointed to protect the child's interests. Neither role has a responsibility to advocate for the child or to support the child in stating her views, directly to the court.

The role, support and procedures for court reporters and curators ad litem have been thoroughly and officially criticised, from the Scottish Government report finding variable practice (Whitecross, 2011) to the Scottish Civil Courts Review (Scottish Courts and Tribunals, 2009).⁸ Direct research with children also suggests concern. Morrison (2014) reports questionable practice, such as children being asked by court reporters directly and in front of a parent 'don't you love him?' to court reporters intervening to force children to have contact with a parent. Morrison, as well as other research (Fortin, 2007; Mantle et al., 2007), finds that trust is essential for children and young people to express their views, and that building trust takes particular skills from adults – and time. The constrained funding for such reports, and the ensuing practices, can find children having a single meeting with a reporter and not feeling that they can adequately express their views. Thus this process risks being 'event-based' itself, a snapshot of children's stated views at any one time rather than views developed over time, in context, and supported by information.

In Morrison's research, some children were concerned that their direct views had not been expressed to the sheriff, by the professionals. This raises a distinction made in English research, about whether such professionals should directly present children's views – a form of *transmission* – or should they *interpret* or *translate* children's views, in light of their overall role to protect the child's interests (Office of Children's Commissioner, 2011). But courts may well not be making this distinction, accepting reports as the transmitted views of the children rather than recognising them as interpretations or translations. For example, in *L v L* (2013 WL 3994808), the sheriff observes that the judge is 'entitled to treat the recorded views as the views of the child unless the judge (exceptionally) accepts evidence that contradicts them' (22). A high reliance can be given to such reports, which may not fully or partially relay children's views. Further, even a transmission of children's views is a form of interpretation (unless the full audio and visual version of children's views is provided), as it involves selection and contextual framing. Reports will always be one layer of interpreting children's views, following by the second layer when courts in turn interpret the reports.

⁸ With new guidance imminently to be published, to improve practice.

A 2012 Supreme Court decision⁹ may have further curtailed children's opportunities to express their views. In *B v G* (2012 UKSC 21), the court was scathing about the unnecessarily lengthy contact proceedings, with accompanying costs, which were 'inimical to the best interests of the child' (21). Already this has led to new procedural rules and encouragement of active judicial case management. But rather than recognising children's views may change over time, as in *Shields v Shields*, courts' attention has been drawn to the distress of repeatedly involving children and how this is against the children's best interests. For example, the Sheriff Principal in *Hall v Hall* refers to *B v G* and then later writes: '... it is clear from the history of the proceedings that the views of the children have been sought on many occasions, arguably too often' (13(6)) and that repeated questions by the appellant has put 'each of his children under enormous pressure' (13(6), referring to the sheriff's words). More generally, the Sheriff Principal observes that this case is typical of ones where 'children are left to suffer the consequences, not least because their opinions on what they want are asked often and in circumstances where they could never be expected to cope' (8). Thus, involvement in the proceedings themselves is seen as potentially harmful to children, in creating pressure and/or distress. This is not to negate that proceedings may well cause additional pressure on and distress for children. However, *Hall v Hall* does not ask whether there had been a 'material change in circumstances' for the child, due to the substantial period of time, following *Shields v Shields*. Instead, the concern is about the potential pressure and distress to the child, following the Supreme Court decision on *B v G*.

Morrison (2014) and other researchers on domestic abuse criticise the 'events-based' understanding of domestic abuse, which does not match many women's or children's accounts about domestic abuse as on-going (see Coy, Scott, Tweedale and Perks, 2015). It does not capture the cumulative effects of domestic abuse on a child's wellbeing and ongoing fear, even if the violence has apparently ended. Morrison (2014) found children needing to manage communication between parents, when one or both were seeking to avoid communicating in the context of domestic abuse. She found children had different and changing views about contact with their fathers: some were positive, some conditional, and others negative. In-depth knowledge of the particular context, experiences and feelings of the children and mother were necessary to understand the stated views of the children towards contact with their fathers. Yet court mechanisms did not seem able to gain this fuller understanding (Morrison et al., 2013). Current discussions (Scottish Government, 2015) of alternative definitions of domestic abuse – particularly coercive control – may better capture

⁹ See also *S v S* (2012 Fam LR 32).

children and their mothers' experiences of domestic abuse and assist courts in making decisions when such coercive control is present.

Institutionalising and formalising children's participation in Scottish legislation and court procedures have provided some protection and support to children's rights to participate. But concerns about children's welfare can trump children's participation rights, as seen by concerns about children's 'tender years' and receiving inappropriate information during intimation, to concerns about their involvement if proceedings are too long or if self-represented litigants are acting inappropriately. Restrictions in legal aid has limited children's information about and access more directly to proceedings, making children's participation even more reliant on court reports and curators ad litem. Because of constraints on funding and time, these reports themselves risk being event-based, seeking a potentially uninformed and unsupported 'snapshot' view of children over one or two meetings. This does not tap into children's everyday experiences and participation, including in the contexts of domestic abuse; it does not facilitate their participation being embedded or routine in the processes nor decisions.

Dominant narratives 3 to 5: Outcomes-oriented, discursive and individualistic

In Scottish family law, children's participation can also be characterised as being largely outcomes-oriented, discursive and individualistic. Case law (e.g. *M v M* 2012 SLT 428) repeatedly underlines that the court's paramount consideration is the child's welfare, when deciding whether or not to make a S.11 order and if so what order to make. This is the outcome that must be sought. Children's participation is instrumental to the court's decision on children's welfare: children's views are given weight if they are perceived to help the court in that decision (e.g. *R v R* 2012 WL 5894486).

Courts value reports that assist them in making their welfare decision, considering the particular facts and circumstances of the case. For example, reported case law shows how courts value reports that are 'balanced'. In *J v J* (2004 Fam LR 20), the court criticised the expert report for *not* being balanced. The expert was instructed only by the mother, he had only interviewed her and only met with the children in the mother's home. Thus the report was seen as having insufficient knowledge and not considering all the factors a court must take into account. Children's views are more likely to be influential on the courts if contained within reports that treat welfare as the paramount consideration, consider the range of relevant evidence, and provide expert guidance on what weight should be given to children's views (see *Ellis v Ellis* 2003 Fam LR 77 and *CAM v HM* 2012 WL 3062491).

Eaton (2015) points out that, in English law, wishes and feelings need not be verbalised nor written down.¹⁰ In Scottish procedures, the mechanisms privilege a view being expressed discursively, in words, whether written down or verbal. Thus children could write down their views, in the Form F9; they could meet with the judge and state their views directly; most often their views are said to a court reporter or curator ad litem, who then write about these views in their reports. If children express views in different ways – e.g. through behaviour – then this is more likely to be categorised as information about their best interests. It thus may have considerable weight but it will not be considered as their views.

This focus on the ‘voice’ of the child has its merits: other forms of expression have particular risks of discretionary interpretation, such as how to interpret behaviour or an art drawing (Einarsdóttir, Dockett and Perry, 2009). However, reifying the ‘voice’ of the child creates a misplaced ‘quest for access to children’s “true” or authentic wishes and feelings’ (Hunter, 2007, p. 283). The quest becomes one for a definitive, discursive statement of the child’s views, which is then recorded and given due weight in decision-making. Scottish courts place more weight on children’s views if the stated views are characterised as consistent, definite and clear (e.g. *R v R* 2012). If the views are described as ambivalent or the child as anxious, then the court gives the views less weight in making its decisions (see Tisdall and Morrison, 2012, also *P v M* 2012 GWD 26-549). Courts seem to want views that are fixed and unemotional.

But courts are making decisions on issues that are highly likely to be distressing to children and their families. Research in the UK and elsewhere shows that parental separation and subsequent changes are distressing to many children, as well as for many parents (Bailey, Thoburn and Timms, 2011; Fortin, Hunt and Scanlan, 2012). Research shows that most children (but not all) do not want to ‘choose’ between their parents (see Parkinson and Cashmore, 2008). Research does find that most children want to contribute their views and for their views to be considered in decision making (Birnbaum and Saini, 2012). Yet Fortin and colleagues’ retrospective study with young adults found that many had not been involved in decisions:

Although some separating parents involve their children in discussion over their future upbringing, respondents’ accounts suggest that surprisingly large numbers seemed unaware of their children’s new found independence, and assumed that they would fall in with whatever arrangements were put in place for their future upbringing. (p. 4)

Further, Fortin and colleagues found that young people who were involved in making decisions about contact subsequently are more likely to have positive experiences of contact. The English and

¹⁰ See also Cobb, 2015.

Welsh Voice of the Child Dispute Resolution Advisory Group makes a strong claim that distress should not be a reason to exclude children from processes:

Arguments that it might be distressing to the child do not normally constitute good reason to disenfranchise the child ... Furthermore, high conflict disputes can be particularly stressful for children and being able to express their concerns and worries can be reassuring and supportive. (2015: 133)

The advisory group are working on child dispute resolution, outwith courts, but their view is provocative to consider for court procedures as well (see also Vulnerable Witnesses and Children Working Group, 2015). The question moves away from excluding children because they are distressed, to how to include them positively.

Courts find it difficult to deal with views that are not considered autonomous. As Barnes (2008) writes, if children's views are characterised as 'manipulated' by parents or others, the views are given little weight. Such concerns can be tracked through reported case law, with court decisions mentioning children being pressured by parents being present during interviews or giving material bribes (e.g. *Ellis v Ellis* and *C v M* 2012 GWD 9-170) or counter-assertions, where a child answers questions 'without any sign of being coached and with no detectable bias in favour of either parent' (*G v G* 2014 WL 2194580, 28) or that a child 'knew her own mind' (*H v H* 2010 SLT 395, 31; see also *V v Locality Reporter Manager, Stirling* 2013 Fam LR 69, 8). More overt concern may be increasing in reported case law, as more strongly worded phrasing can be found in *Hall v Hall* (see above) and *E v W* 2014 WL 4063090.¹¹ Here the sheriff writes:

I do not believe a 7 year old child would talk in the manner they claim. I am of the opinion they were, so to speak, putting their own concerns into his mouth ... That seems to me to be the ways adults, not young children speak. (11)

Thus, children's views were undermined because the sheriff perceived the child as speaking like adults. In *E v W*, the sheriff may well be right about parental coercion. But the particular phrasing resonates with how children's views are undermined, in other participation activities, where children are described as too 'professionalised' and too proficient in knowing the adult discourses (Faulkner, 2009). Thus as children become more informed and experienced in expressing their views, this risks their views being given less weight because they are not considered 'authentic'.

¹¹ This case was about contempt of court because the mother had not fulfilled the requirements of contact established by a previous order.

Concerns about ‘manipulation’ are given extra salience because of the substantial proportion of cases reaching court, which likely involve domestic abuse (Trinder, Connolly, Kellett, Notley and Swift, 2006).¹² This raises particular difficulties for the judiciary, as so much domestic abuse remains underreported to the police, so few allegations in family law cases have been tested by courts (Morrison et al., 2013). There is no single definition of ‘domestic abuse’ in Scottish policy generally nor in the legislative provisions in particular. While courts must now take account of ‘abuse’ when taking the child’s welfare as the paramount consideration, courts have found the definition unclear and circuitous (s.11(7C), see *R v R* 2010 Fam LR 123). The legislative definition is criticised for potentially making disputes more contentious because of the ‘emotive connotations’ of using the term abuse (Morrison et al., 2013). Indeed, this amended section is rarely cited in reported case law, in comparison to the estimates of domestic abuse in contested cases.¹³

In summary, both empirical evidence and reviews of reported case law suggest difficulties for courts in dealing with children’s views, if children are considered to be emotional, inconsistent or manipulated. Courts can have particular difficulties in dealing with disputed parental responsibilities cases, when there are allegations or suspicions of domestic abuse. Children may well be pressured and manipulated in such cases but also, as so little domestic abuse is proven legally, may have their concerns under-recognised. Because the court’s paramount consideration is the child’s welfare, children’s views are largely helpful if they assist with that outcome. If the views are not considered rational, consistent and the children’s own, then the court considers them less helpful in its decision-making. Yet this misses that – particularly in the context of parental separation – children and others are likely to be distressed and emotional, changing their ideas, and embedded in relationships.

Conclusion

Threading through the above discussion are the balances courts and others are seeking to make, between children’s welfare and children’s views. Such balances are well rehearsed in literature and a dilemma for policy and practice in many jurisdictions (e.g. see Douglas, 2013; Trinder, Jenks and Firth, 2010). The primacy or paramountcy of children’s best interests or welfare has been a longstanding principle in many jurisdictions, when administrative or legal systems are making decisions about children and their families (see Freeman, 2012). The recognition that children’s views should be given due consideration in such decision-making is more recent, encouraged by Article 12 in the CRC, with steady growth in legislation, policy and practice (see Percy-Smith and

¹² In England, 41.9% of resident parents involved in in-court conciliation attributed ‘domestic violence’ or ‘emotional abuse’ as the reason for separation. More than half of the resident parents reported fear of violence made it difficult to resolve problems associated with contact.

¹³ Exceptions include *AS v AB* 2010 G.W.D. 32-663 and *JB v AG* 2013 GWD 3-96.

Thomas, 2010). Literature documents how adults' discretion to determine children's best interests or welfare can exclude children's views (see FRA, 2015). It also documents that, while Article 12 was arguably innovative in establishing children's rights to participation, it also involves decisions about children's capacity and maturity. Thus children's welfare and children's views involve discretionary decisions, exercised largely by adults.

With children's welfare as the *paramount* consideration of Scottish courts, in regards to S.11 orders on parental responsibilities and rights, the balance tips towards children's welfare away from children's views. Courts are not seen as a good place for children to participate, because of concerns about children's welfare. The initial processes around intimation and the Form F9 are seen as detrimental to most children's welfare – so children are seldom included at this early stage. Direct involvement in court proceedings has not been encouraged by the courts nor prevalent in practice. Age can be used easily as a reason to not involve children and often as a shorthand to protect them (the 'tender years'). Courts' concerns about children's distress, and children being distressed by courts, lead courts to order reports to obtain children's views. Such reports are most valued by courts when they support the courts' own decision-making – which circles back to children's welfare. Children's views then are helpful if they assist the court in determining children's welfare. This instrumental status contributes to courts valuing children's views if the views are perceived as rational, consistent, and their own – rather than emotional, changing or manipulated. Thus, following Hunter's quotation at the start of this article, Scottish legislation and procedures have the potential to be framed by the new paradigms of children's rights, children as social actors and young citizens. But the welfare paradigm still seems dominant, with welfare concerns used to exclude children's participation so they are not treated as 'subjects with agency'.

Recent writings in childhood studies are asserting that it is unhelpful to perceive agency as an essential identity, position or characteristic. Agency is more usefully perceived as relational and contextual. Contexts influence whether children express 'thin' or 'thick' agency:

... 'thin' agency refers to decisions and everyday actions that are carried out within highly restrictive contexts, characterized by few viable alternatives. 'Thick' agency is having the latitude to act within a broad range of options. It is possible for a person's agency to be 'thickened' or 'thinned' over time and space, and across their various relationships ... Structures, contexts, and relationships can act as 'thinners' or 'thickers' of individuals' agency by constraining or expanding their range of viable choices. (Klocker, 2007, p. 85)

Thus, many children affected by domestic abuse may have particularly 'thin' agency in disputed contact cases but this could be 'thickened' with sufficient support for their views to be developed,

heard and understood. Time constraints can thin children's agency, as concerns about undue delays and over-consulting can squeeze out children's participation opportunities. The limited time given for court reports in turn creates limited opportunities for children to gain the information and establish sufficient trust to express their views. The article above documents numerous ways that current family law practices thin children's agency.

Wyness' dominant narratives fit well onto Scottish family law proceedings. For cases that reach courts, participation becomes formalised in court procedures. 'Taking account' of a child's views is treated as an event, whether after one or two visits by the court reporter to the child or a child submitting views on a Form F9. The court wants to keep it as an event, rather than having on-going and potentially distressing rehearsing of a child's views. Participation is outcomes-oriented, in that it contributes to decisions about a child's welfare. There is a concentration on what a child says or what is written down. The focus is on the individual child, with particular attention to age so as to protect a child and determine the child's competency.

Wyness' alternative narratives suggest different understandings of children's participation in family law decisions. The focus on obtaining the child's views, writing them down and then treating them as 'set' may be convenient for the court but does not reflect how a child's views are contextual, relational and potentially changing. Recognising that participation is emotional, contextual and embedded requires a more subtle understandings of 'manipulation', recognising the significant proportion of cases reaching courts involving coercive control/ domestic abuse. It might take into account suggestions by Mantle and colleagues (2007) about how to help support children to express their views, including working with parents, having sufficient time to establish trust and rapport, checking out understandings across a number of contacts, and using a variety of expressive modes including drawing to be able to elicit different understandings. Much more use could be made of video recordings and video links, to capture fuller information of children's embodied and communicated views. Acceptance of such alternative narratives would encourage courts and personnel not to veer away from perceived or actual distress of a child (see Pinkney, 2014). Proceedings should be adapted to best support children, to minimise their distress. But adult fears of emotionality should not disenfranchise a child.

A distinction has emerged within the literature on dispute resolution, between approaches that are 'child-focused' and those that are 'child-inclusive' (Ewing, Hunter, Barlow and Smithson, 2015). A child-focused approach seeks to 'put the child at the centre', the focus of proceedings and decisions, and thus protects a child's welfare. This would seem to match the intentions and decision-making of Scottish family law proceedings. The child is the focus, with the paramount consideration being the

child's welfare. But the child-focused approach contrasts with a 'child-inclusive' approach, which facilitates a child's active involvement in the process alongside attention to a child's welfare. As being developed in other jurisdictions, this requires more radical change to adult processes and procedures. And to be child-inclusive is to bring in the realities of children's participation. Children can be constructed productively as social actors and as rights holders, but respecting that requires understanding that agency is relational and contextual, expressions of it requires trust and information, and may be emotional as well as rational and change over time. Adults need to change their narratives of participation, as well as improving how courts and family law more generally can sensitively involve children in decisions that affect them.

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