

Undue influence? Children's views in contested child contact cases

Fiona Morrison and Judith Warburton, Centre for Child Wellbeing and Protection, University of Stirling

Kay Tisdall (Childhood and Youth Studies Research Group, Moray House School of Education

Fiona Jones and Alison Reid, Clan Childlaw

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Today's presentation

- UNCRC context in relation to children's participation rights and particularly Article 12
- Children's participation rights in contested child contact in Scotland
- Research methods
- Findings re undue influence – and ways forward?

'Compliance' with children's participation rights

Article 12 of the United Nations Convention on the Rights of the Child states:

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.

12.2 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.

Article 8, 9 and 18 UNCRC and Article 6 and 8 of ECHR.

¹ United Nations Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard* [40] (2006) available at <http://www2.ohchr.org/english/bodies/crc/discussion2013.htm>.

² United Nations Committee on the Rights of the Child, General Comment No. 12: The Right of the Child to be Heard, CRC/C/GC/12, [16] (2009) available at <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

³ United Nations Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard*, supra note 8, at Preamble.

UN Committee's Comments on Article 12:

- Children must be **informed** in about their right to be heard, ways of doing so and other aspects of the proceedings.¹ Expressing views is a choice for children, not an obligation.²
- “Being given due weight in accordance with the age and maturity of the child” requires **views to be considered seriously**.²
- A child should be **presumed to have the capacity to form his or her own view**: “... it is not up to the child to first prove his or her capacity”.²
- There is **no age limit** on the right of the child to express his or her views.² A child **need not have comprehensive knowledge** to be considered capable.²
- ‘Freely’ means **a child must have the right to express his or her own views and not the views of others** (para 22) and the child must not be manipulated nor subjective to undue influence or pressure (para 22). A child should not be “interviewed more often than necessary, in particular when harmful events are explored” (para 24).
- The child to decide whether to be heard directly or through a representative or appropriate body. **Wherever possible child should be given opportunity to be heard directly in proceedings**.²
- Maturity is defined as “the capacity of a child to express his or her views on issues in a reasonable and independent manner”.²

Our Study

- To interrogate the current challenges and barriers to realising and implementing children's participation rights in family actions and the implications this has for compliance with children's human rights.
- To identify empirical evidence on potential solutions to these issues from Scotland and from other jurisdictions (England and Wales, Australia, Canada and the Netherlands – who have positively evidenced developments, from judicial interviewing to children's advocacy).



Children's Views

- <https://www.youtube.com/watch?v=3HmFN5XHNTs>

From our Expert Group

Findings from the Review of Reported Case Law

- *Shields v Shields* (2002 SC 246)

The sheriff was obliged to exercise a discretion as to whether, and, if so, how, an opportunity should be given to the child to express his views.

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 is made.

“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” (para 11).

- *S v S* (2012 Fam LR 32)

s. 11(7)(b) is “... also concerned with what is appropriate having regard to the age and maturity of a given child. It would ... be most unsatisfactory if considerations of physical practicability obliged this court to follow a course which risked causing further distress, and perhaps lasting harm, to a young child.” (para 36)

Findings from the Review of Reported Case Law

- “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.” (*E v W* (2014 GWD 26-514) para 11)
- “This is a very clear example of the appellant’s lack of judgement in 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.” (*Hall v Hall* (2014 GWD 26-521) para 13(2))
- Judge was “entitled to treat the recorded views as the views of the child unless the judge (exceptionally) accepts evidence that contradicts them” (*L v L* (2013 GWD 25-496) para 22).
- “The glacial pace of the proceedings was itself inimical to the best interests of the child.” (*B v G* (2012 UKSC 21) para 21).

Emerging themes from Evidence Review

- **Back to where we started** – children’s competence, distress and vulnerability to manipulation, ‘alienation’
- **Some adults are especially anxious about hearing from children** –retraumatising children, implications of ‘hearing evidence’ from children, knowledge, skills and experience and manipulation (e.g. Bell, 2014 and Birnbuam and Bala, 2017)
- **Children’s power in decision making** e.g. being informed about processes, options available for participation, access to the decision maker (judge), being able to check the accuracy of and control over how their views are presented (e.g. Birnbaum and Bala, 2017))
- **Questioning how ‘child friendly’ methods really are** e.g. in Australia ICL are not required to meet children, how much time is spent *with children* gathering their views – and who is best placed to do this?
- **Some (limited) evidence on extended approaches to support participation in complex cases** (e.g. child abuse, domestic abuse) (e.g. Fotheringham et al., 2013)

Concluding thoughts

- Clarity on the purpose of involving children and the parameters of their involvement
 - e.g. judicial interviews – to hear views / evidence; meet the person who is, or who you are making decisions about; to get ‘a sense’ of the child; to explain process and decisions; to help get ‘the child on board’
- Reduced participation – does not necessarily equate with protection
- Allegations of domestic abuse, alienation and other complex issues are the very cases that come to court - children’s participation is especially contested here – and it is in these cases that children report they want to have ‘more of a say’ e.g. Cashmore and Parkinson (2008)

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.

Voice of the Child Advisory Group (2015), para 133.

‘They said I spoke like an adult’

‘Think about what you are writing – you changed what I said’

‘Write down what kids say - don’t put it in your own [Court Reporter’s] words.’

(Young Expert Group)