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Challenging undue influence? Rethinking children's participation in contested child contact

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Abstract

Despite the widespread ratification of the United Nations Convention on the Rights of the Child, children continue to struggle to have their participation rights recognised and supported. This is evident within family law, where despite sometimes progressive and strong legislation, children's views are often not heard nor given due weight, when parent-child contact is contested within the courts. This paper explores barriers to children's participation rights being realised. It uses Scotland as the example, due to its strong legal safeguards and mechanisms that aim to support participation rights. The paper draws on recent empirical research with legal professionals, combined with an analysis of reported case law and relevant literature, to explore the barriers 'on the ground' for children's participation rights. Through our analysis, we offer new ways to conceptualise the notion of influence in children's participation rights in family actions. We offer the conceptual devices of 'the influenced child' and 'the influential child' to elucidate how children's participation rights are restricted. [**Word count:** 161]

Keywords

children; family law; contact; views; children's participation; children's rights

Introduction

Children's participation rights are increasingly on the agendas of legislators, policy makers and practitioners (Birnbaum and Saini 2012, Gal and Duramy 2015). This has been catalysed by the widespread ratification of the United Nations Convention on the Rights of the Child (UNCRC), which is the most ratified of all of the human rights treaties, with the USA as the only Member State which has not done so. Despite this promotion of children's participation rights, the literature is replete with concerns about poor implementation: children's participation rights may exist 'on paper' but risk not being realised in practice (for overview, see McMellon and Tisdall 2020).

Such a narrative can be found about children's participation in family law proceedings, when parents separate or divorce. Across numerous jurisdictions, there has been considerable legal and practice activity to recognise children's participation rights in contested contact cases (e.g. Parkes 2015, Harvie-Clark 2019). Despite this, all too often research evidence finds that children's views are not heard at all (e.g. Bala *et al.* 2015, European Union Agency for Fundamental Rights 2015). If children do have the opportunity to express their views, research often shows that practice is inadequate or their views are not given due weight in decisions (e.g. Taylor *et al.* 2012, Birnbaum *et al.* 2016, Holt 2018). The literature details extensive, widespread and persistent barriers to implementing children's participation rights

This article uses Scotland as an example. Despite strong legal safeguards in the Children (Scotland) Act 1995 ('the 1995 Act') and mechanisms to support children's participation, neither have ensured that children's participation rights are realised. The article addresses why there is divergence between children's participation rights on paper and their rights in practice. Recent socio-legal research is drawn upon, which involved a review of reported case law and relevant literature, interviews with legal professionals (including

members of the judiciary) and international experts, and a children's expert group established to guide the research (for the full research report, see Morrison *et al.* 2020a). The article explores, in particular, the growing concern amongst legal professionals about children being 'unduly influenced' (see Barnes Macfarlane 2020, Fidler and Bala 2020), which can undermine children's participation rights significantly.

Below, the article introduces children's participation rights as outlined in the UNCRC and interpreted by the UN Committee on the Rights of the Child in the General Comment on Article 12 (2009). The article sketches the Scottish legal context, and goes on to summarise the recent study's methodology. Findings are then presented under three headings: protecting children from being too influential; ascertaining the 'real views' of children; and the implications of influence for children's views. The article uses the conceptual devices of 'the influenced child' and 'the influential child' to illuminate how children's participation rights are restricted in practice. In our conclusion we offer ways that law and policy might be reformed so *all* of children's rights, including their participation rights, are implemented in contested contact cases. Such reflections are timely, as Scotland is poised for family law reform at the time of writing, which will be discussed in the conclusion.

Participation Rights 'On Paper': the UNCRC and Scottish Law

The UNCRC contains a range of rights that are categorised as participation rights. These 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). Recognised as a General Principle of the UNCRC (UN Committee on the Rights of the Child 2003), Article 12 is much referred to in the participation literature. Its precise wording is:

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.

Such participation rights must be considered alongside all of children's human rights, including those of provision and protection (or, to use human rights terms, civil, political, economic, social and cultural rights). Thus human rights provide a strong framing for children involved in contested family law cases, when the state is intervening to make decisions that regulate parental responsibilities and rights.

The UN Committee on the Rights of the Child has further interpreted Article 12 in its General Comment No. 12 (2009). The General Comment has important ramifications for family law proceedings and for this article. For example, the General Comment provides an expansive understanding of capacity. Rather than a child having to prove their capacity, the child should be presumed to have capacity to form a view (para. 20). There is no age limit on a child's right to express a view (para. 21), which is emphasised as well in General Comment No. 7 on early childhood. In giving due weight to a child's views, maturity should be considered as well as biological age (para. 30). A child need not have comprehensive knowledge to be considered capable (para. 21). General Comment No. 12 has a number of 'protective' elements, emphasising that a child must have the choice not to give a view (para. 134), that 'freely' means that a child has the rights to express their own views and not others' views (para. 22) and the child must not be manipulated or subjected to undue influence or pressure (para. 22). Procedurally, the child should be protected so that States Parties consider 'the potential negative consequences of any inconsiderate practice of this rights' and ensure the 'full protection of the child' (para. 21). A child should not be 'interviewed more often than

necessary, in particular when harmful events are explored' (para. 24). The child should also be supported in their views. For example, information is a precondition to a child's 'clarified decisions', both in terms of: the matters, options and possible decision to be taken and their consequences; and the conditions under which the child will be asked to express their views (para. 25). The General Comment thus clarifies the breadth, support and protection needed for children's Article 12 rights, alongside all human rights of children.

The General Comment also lists steps for implementing the child's rights to be heard. These are: preparation for the child; ensuring the hearing is enabling and encouraging; ensuring the child's views are given due weight, with a case by case analysis and requiring good practice to assess the child's capacity; providing feedback to the child; and having a system of complaints, remedies and redress for the child (paras. 40-48). Wherever possible, children should be heard directly in proceedings (para. 35). Article 12 therefore requires consideration of the whole process and how children's participation rights are realised throughout.

The UNCRC has several other Articles particularly relevant to disputed contact decisions. Article 7(1) includes a child's right 'as far as possible to know and be cared for by his or her parents.'¹ Article 9(1) states that a child should not be separated from their parents against their will, except when proper procedures are followed and this is judged necessary for the child's best interests². Article 9(3) underlines that, even if a child were separated from

¹ Article 7(1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

² Article 9(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best

one or more parents, the child has the right to ‘maintain personal relations and direct contact with both parents on a regular basis’ unless this is contrary to the best interests of the child. Article 18 further requires that States Parties must do their best to recognise parents’ responsibilities for their child’s upbringing and development, with the child’s best interests as their ‘basic concern’.³ Article 19 requires States Parties to have legal measures in place to protect the child from all forms of physical or mental violence, injury or abuse, neglect or maltreatment or exploitation, including sexual abuse, while in the care of parents.⁴ Thus, the UNCRC has a range of additional measures that take account of children’s relationships with their parents, while emphasising the child’s best interests and their protection rights.⁵

interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

(2) In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

³ Article 18(1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁴ Article 19(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

⁵ To note that the European Convention on Human Rights (ECHR) also contains Articles that relate to parenting and state intervention, particularly Articles 6 and 8. The ECHR is largely incorporated into UK domestic law through the Human Rights Act 1998. Further, all Scottish law must be

When family law was substantially revised in Scotland, through the 1995 Act, the UNCRC and children's participation rights were much considered. The UK Government ratified the UNCRC in 1991 and was thus obligated to implement the articles. The 1995 Act was heralded as the primary legislation to do so, in reforming family as well as adoption and child care law (Tisdall 1997). In terms of family law, the 1995 Act begins with the responsibilities parents have to their children (s. 1) and sets out parents' rights as a consequence (s. 2). Within these sections, a parent has the right and responsibility to maintain personal relations and direct contact with their child on a regular basis (s. 1(1)(c) and s. 2(1)(c)). Section 1(1) is qualified, with the responsibilities extending only so far as is practicable and in the interests of the child. For the first time in Scottish legislation, Section 6 places a duty on parents, when making *any major decision* related to a parental responsibility or right, to have regard to their child's views as far as is practicable, taking account of the child's age and maturity. This would presumably apply to contested contact decisions.

Most contact is decided outwith courts (Scottish Government 2019b). But if contact were contested and reached the courts, then courts must give due regard to the child's views. Under s. 11 of the 1995 Act, when a court is making a decision about parental responsibilities and rights, a court 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))⁶

compatible with the 'Convention Rights' as listed in the Human Rights Act 1998 (see Scotland Act 1998).

⁶ Decided by the Inner House of the Court of Session, *Shields v Shields* (2002 SC 246) provided authoritative interpretation of s. 11(7)(b). *Shields v Shields* established that sheriffs must exercise

If a child were aged 12 or above, they should be presumed to be of sufficient age and maturity to form a view (s. 11(10) as well as s. 6(1)). Numerous mechanisms are contained in court rules and secondary legislation, to operationalise these rights. These include:

- If children are served with papers once the case enters the court process, they receive a Form F9 requesting their views. The form goes back to the sheriff.⁷ F9 forms are required to be sent to children unless considered ‘inappropriate’ to do so.⁸
- The court may appoint a child welfare 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. The 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.

their discretion as to whether and, if so how, an opportunity should be given to a child to express their views in the particular circumstances. Courts should consider whether there was a ‘material change of circumstances’ between an early decision and the order being made. Further, ‘practicability’ is the first test under section 11(7), with 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’ (para. 11). In *S v S* (2012 Fam LR 32), courts were directed to avoiding risks of further distress and perhaps lasting harm, to a child, when considering what was physically practicable (para. 36).

⁷ A sheriff would hear most family law cases at first instance but some cases are heard in the Court of Session at first instance.

⁸ This was recently and extensively clarified by rule 33.7A(2) of the Ordinary Cause Rules, inserted by Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Court Rules 1993 Amendment)(Views of Child) 2019.

- 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, if the case were in the Sheriff Court, the lawyer may appear on the child's behalf at the Child Welfare Hearing to represent the child and assist in having the child's views communicated to the court views. The Child Welfare Hearing provides an early hearing to resolve any disputed issues in family actions, particularly in relation to children.⁹

Other provisions frame the court's decision. When deciding whether or not to make an order, the child's welfare is the *paramount* consideration of the court (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)). The court must consider whether relevant persons will co-operate with one another in regards to matters affecting the child (s. 11(7D-7E)). Thus, while the contested case is framed as a parental dispute (Morrison *et al.* 2020b), the court treats children's welfare as the most important consideration in its decision.

The combination of strong primary legislation and a specified range of mechanisms provides a strong basis for children's participation rights to be realised in Scottish law, particularly under s. 11 orders. Despite this apparent strength, evidence has accumulated that children are very often not experiencing this in practice (Tisdall 2016, Mackay 2018, Scottish Government 2019a). This article presents such evidence, combining it with recent empirical research undertaken on compliance with the UNCRC, which is described below.

⁹ This summary is largely taken from Tisdall (2018).

Methodology

The project 'Children's Participation in Family Actions – Probing Compliance with Children's Human Rights' was undertaken between 2018 and 2020. It had two research aims:

- To interrogate the current challenges and barriers to realising and implementing children's participation rights in family actions and the implications these have 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, and Canada) who have positively evidenced developments.

A children's expert group was formed to guide the research. Four children were recruited, who had experience of participating in family actions. The group met with the research team at the beginning of the project to discuss and influence the project's priorities. The project had three phases: a review of reported case law; interviews with legal and advocacy professionals in Scotland; and an investigation of other jurisdictions' approaches to children's participation in family law through a rapid evidence review and interviews with international experts. This article draws on the first two phases, which are further detailed below.

For Phase 1, two searches of reported case law were undertaken through the Westlaw database. These form the core of the cases analysed. First, reported case law was identified by searching for references to s. 11(7)(b) of the 1995 Act: in other words, case law that is annotated as addressing children's participation rights in s. 11 orders. The database search identified 31 cases up until 1 May 2019. The results give insight into courts' interpretations of this provision but only when children's participation is identified as a legal issue. Thus, second, another search and analysis was undertaken of reported case law, over 12 months, of

s. 11 cases more generally. Specifically, this was from 1st June 2017 to the 1 June 2018 and resulted in nine cases. This second method provides the opportunity to analyse more generally how children's views are presented and used in written decisions.

A review of reported case law has its disadvantages because of how cases are selected for reporting. Cases are selected because they are perceived as making a significant legal point. They are not necessarily typical of all cases. Reported case law is more likely to be appeal cases, whereas children's participation in family law proceedings is more likely to occur in sheriff courts at first instance. Thus appeal cases may be commenting on how lower courts recognise children's participation rights but the appeal courts themselves rarely interact with children directly. Reported case law from sheriff courts, therefore, was given a separate analysis, as well as considering all the identified reported case law together.

For Phase 2, legal and advocacy professionals were identified who had 'on the ground' experience of children's participation in family actions. Semi-structured interviews were undertaken with the following groups: the judiciary (n=6), lawyers (n=8), and advocacy specialists (n=3). Purposive sampling identified participants with expertise in this area. Care was given during sampling to ensure there was a spread of representation: for example, specialist and non-specialist judges were included, and urban and rural/island practice. The interviews focussed on the perceived challenges and barriers to children's participation and any solutions there may be to these. Interview schedules were informed by priorities identified by the children's expert group and by findings from the case law review. Particular attention was given to how the notions of 'competence', 'manipulation' and 'distress' are understood and addressed in practice. The interviews explored what impacts current legal processes have on children's human rights. Interviews were audio-recorded and transcribed and data were analysed thematically (see Braun and Clarke 2006 for thematic analysis process).

The research sought to address ethical considerations. Ethical approval was gained from both the Universities of Stirling and Edinburgh. A range of ethical considerations were considered such as participants' informed consent for interviews, anonymity and data management, with particular concern when involving the child experts. Attention was given to ensuring that the children were appropriately supported before, during, and after their contributions by ensuring a support service was in place. Children agreed to have their views and quotations used when reporting of the research, anonymously. Confidentiality for the children was offered, with the exception of any concerns about significant harm. A named person in the support service was the contact should any concerns have been raised about a child or someone else being at risk of significant harm.

Findings

In relation to children's participation in contested child contact, concerns about 'undue influence' surface in three ways within the reported case law and legal participants' interviews. First, if children become too involved in the legal dispute about contact, courts and legal professionals were concerned that children would feel overly responsible and be made vulnerable to parents seeking to influence their views. Second, questions were raised whether the views expressed by children were their own or, instead, children's views were unduly influenced by one or more of their parents. Third, if children's views were perceived as not being their own, their views required further interpretation by the court. These three concerns about 'undue influence' are discussed below.

Protecting Children from being 'Too Influential'

Children in the expert group had advised the research team to investigate children's direct participation within legal proceedings. The children were frustrated at feeling 'kept out' of the legal process. These feelings were strengthened by their lack of influence over what views

and how their views were communicated to the court, once obtained by the child welfare reporter. In following up these issues, the majority of legal participants spoke with a degree of ambivalence towards children's participation in general and with negativity towards attempts to expand children's participation in contested contact.

Concerns were often framed around a desire to protect children from feeling responsible. This is illustrated in the following extract from an interview with a Sheriff:

Children can be put under immense pressure, so it's a fine balancing act to be able to inform the child and let them know that decisions are being made in their lives that will affect them, but also not to put so much pressure on them that they feel stressed by that [and that] they feel a responsibility for the decision making. (Sheriff C)

Many participants were preoccupied with attempting to 'balance' between supporting children's participation whilst ensuring children were protected from feeling overly responsible.

The following extract conveys a typical view of most legal participants about children's direct participation. Here, a solicitor reflects on her concerns about a child having their own independent legal representation and the tension between protection and participation should a child directly participate in court proceedings:

I really don't think it's appropriate for a child to have legal representation and being involved in ongoing family actions involving them, because I think it puts far too much pressure on them. It puts them in a very difficult position.[...] My concern would be, if a child is instructing a solicitor, what implications does that have for the child long-term? (Solicitor C)

The extract shows concerns about the immediate and future consequences that direct participation may have for a child's wellbeing.¹⁰ This view is very similar to the decision in *B v B* (2011 SLT (Sh Ct) 225), where the court refused to allow a child to have his own legal representation, even though the child did not agree with the view presented by the curator ad litem and wished to have his own solicitor. Along with concerns about time delay and disrupting the proceedings, permitting the boy to enter the process would only 'add to the pressures to which he has already being subjected' and 'In short, this is a boy who may well feel under pressure to take "a particular line"' (para. 18). The court was concerned that the child's more direct participation could lead to the child being more pressured and more vulnerable to parental influence. Adults' worries for the 'influential child' can constrain children's participation rights so as to protect them. While this may be seen as a *protective* act, it overlooks the harm done by disenfranchising children.

Children's direct participation was identified as a rare occurrence by interview participants (for a similar finding, see Mackay 2013, 2018). Some legal participants were sceptical that attempts for children to participate directly ever originated from children but rather were instigated by parents seeking to advance their own cases. Legal participants questioned how a child would know about the parental dispute or how to instruct a solicitor. Thus, this concern that children were being unduly influenced to participate, by one or both of their parents, led to doubts whether children should directly participate in proceedings. Yet, the UN Committee on the Rights of the Child, as outlined above, has recommended direct participation of children within legal proceedings, wherever possible.

¹⁰ See *S v S* (2012 Fam LR 32).

Reported case law and interviews with legal participants show that concerns for children – to protect them from feeling too responsible or making them vulnerable to parental influence – are barriers to implementing their participation rights in contested contact proceedings.

Ascertaining the ‘Real Views’ of Children

Further concerns about influence arise when adults do not think the views expressed by children are those of the child but rather the views of someone else, usually a parent who is a party to the disputed contact. Such concerns can be tracked throughout the reported case law, with courts critiquing children being pressured by parents, parents’ presence during interviews, or parents’ material bribes (e.g. *Ellis v Ellis* 2003 Fam LR 77 and *C v M* 2012 GWD 9-170). This is further underlined by stated counter-assertions, where a child answered questions ‘without any sign of being coached and with no detectable bias in favour of either parent’ (*G v G* 2015 SCLR 1: para. 28) or a child described as ‘knowing her own mind’ (*H v H* 2010 SLT 395: para. 31). Across the interviews, legal participants wrestled with whether it was possible for the court to ascertain the ‘real views’ of children¹¹. In the interviews, legal participants expressed scepticism that children’s views were ever completely without influence. For example, a solicitor stated:

Any mechanism that we use to get the child’s views is going to be coloured by the environment in which they find themselves, to varying degrees. So, it’s very difficult to ask a child who has to go back to live with their parent to say anything others than that she wants to live with her parent. Of course, their parent is going to ask what she said to the

¹¹ The Form F9 was subject to scathing criticism, in *X v Y* (2018 SLT (Sh Ct) 215), as dissatisfied parties frequently complained that a child’s view was adversely influenced by one party and that the form could upset the child.

[child welfare reporter] [...]. Those sort of subtle by sometimes very overt influences make it very difficult to gather truly objective information from a child. (Solicitor D)

Here, the solicitor suggests that the ideal is ‘truly objective information’ from a child. This presumes that there could be objective information, if only the child were not unduly influenced. Another perspective questions the assumption that ‘truly objective information’ exists (for discussion, see Mantle *et al.* 2007, Holt 2018). Evidence from research with children shows that children’s views are a mix of what they want for themselves, for others, and are influenced by their own particular circumstances (Callaghan *et al.* 2017, Morrison *et al.* 2020b). Any person, adult or child, in contested contact will be influenced by others. However, legal participants perceived children’s lack of objective views as a problem and, because it was a problem, children’s views might either not be sought or not weighed heavily in the decision.

Resident parents were most frequently cast as the influencing parents and non-resident parents as those who made allegations of parental influence or manipulation. However, this framing could undermine children’s participation rights. If a child expressed views against contact, their views risked being constructed as influenced and potentially less weight attached to them. This may reflect adults’ discomfort with children’s assertion of rights and expression of views that are against or rejecting of parents. Such views can be especially unsettling as they run counter to both paternalistic expectations of children and of parent-child relations (for discussion, see Fives 2017).

Adults’ perceptions about the appropriateness of children’s knowledge was critical to adults’ identification of ‘undue influence’. A child’s knowledge of the dispute and of the legal proceedings was negatively viewed in *E v W* (2014 GWD 26-514), when the Sheriff concluded:

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. (para. 11)

Similarly, the interviews found legal participants questioned the authenticity of children's views if the child were too informed. This is exemplified by Solicitor C:

A child may say things that are clearly not their own words, then perhaps they have been coached or they've heard other people talking about the other parent and it's seeped into their consciousness ...

Sheriffs reflected positively on cases they had presided over where children were reported as being unaware that their parents were contesting contact in court. Connections here can be made with notions of childhood innocence: children should be protected from knowledge about certain aspects of their families, particularly from parenting disputes about their welfare and parent-child relations. There is danger that this sets up an argument that the enactment of children's participation rights is contrary to children's best interests. It runs counter to the General Comment on Article 12 (2009) where children's knowledge is viewed *positively*. The General Comments states information is a precondition to a child's 'clarified decisions', both in terms of: the matters, options and possible decisions to be taken and their consequences; and the conditions under which the child will be asked to express their views (para. 25). Notions that children should be protected from the details of contact dispute contradicts the knowledge that children do have about their families (e.g. see Smart *et al.* 2001, Kay-Flowers 2019) – even if adults believe and wish that children do not – and risks undermining children's rights and their welfare more generally.

In short, the courts and legal professionals were concerned that children's views were inevitably influenced by one or more of their parents. This was perceived negatively, with the accompanying response to limit children's participation and especially children's direct participation in proceedings.

The Implications of Influence for Children's Views

Narratives of the influenced child question the reliability of children's views and have repercussions for the court's treatment of these views. This extract from an interview with a Sheriff outlines the court's need to interpret the views in light of 'manipulation':

Manipulation of children by one parent or another is a very common feature ... I don't think we can avoid that. [...] What we then do with the views of the child and how we interpret these views is a different matter. (Sheriff A)

Again adults' undue influence over children and their views is presented as the norm. Further, the court may struggle to give effect to children's participation rights in such situations. Not only may less weight be given to the influenced child's views but also their views may be subjected to a further step of adult interpretation. The *substance* of the child's stated views may thus be overshadowed by an adult preoccupation with how to *interpret* these views. Dialogue or communication does not routinely take place between the child and the court once the child's views have been obtained (Mackay 2013, 2018). Therefore, the influenced child does not know how their views are interpreted or considered by the court, issues that were identified as priorities by the children's expert group (see also Morrison *et al.*, 2020a, Scottish Government 2019a, Yello! 2020).

This interpretation could go further, so that children's views become treated by the court as evidence rather than expressions of feelings and opinions. The children's expert group alerted us to this issue. As one young expert said, giving their views to a child welfare reporter was like 'being interrogated, not listened to'. When this issue was explored with Sheriffs, their replies did suggest children's views could be treated as potential evidence: what led to or caused children to hold a particular view was considered to be important. When there were allegations of influence, children's views and what underpins them were subject to further scrutiny. Three of the six Sheriffs interviewed identified judicial interviewing as a

means for them to assess whether a child was influenced. Such scrutiny and treatment of children's views seem less about facilitating children's participation rights and more about the court using children's views as evidence.

Thus, should a child have the opportunity to express their views within disputed contact proceedings, their views may not be given due weight as required by Article 12 of the UNCRC. Rather, their views may be treated like evidence, tested by the court so as to ascertain whether children have been unduly influenced by one or more parents. If the children were unduly influenced, this may result not only in their views being given less weight by the courts but actively work against the children's expressed views. Children's views become a fact of the case showing non-cooperation or manipulation by one or more parents.

Conclusion

Concerns about undue influence were ubiquitous throughout the research. It was an issue raised by the children's expert group, traced through the reported case law and was a powerful and palpable issue for all the participants' interviews. Allegations of influence were serious threats to children's participation rights and their rights more generally. The conceptual devices of 'the influenced child' and the 'the influential child' help understand the research findings, to illuminate how adults' concerns about undue influence permeate the ways in which children's participation rights are considered and indeed rebutted by adults working in family law.

The construction of the influenced child is steeped in concern for children's perceived vulnerability to both adult pressure and adult manipulation. The influenced child is positioned as both subject to, and as an object of, adult influence. The influenced child is at risk of intense legal scrutiny, which may be experienced by a child as coercive or undermining. The construct of the influenced child draws heavily on powerful rhetoric about children and

childhood, underpinned by ideas of children's innocence, their vulnerability and their (in)competence (see Archard 2004, Hill and Tisdall 1997, James *et al.* 1998, Wyness 2012). Such constructions of childhood call into question children's participation rights and ultimately undermine these rights (see Moran-Ellis and Tisdall 2019 for overview). Adult responses are to restrict and even to circumvent children's participation rights. Such paternalistic responses are put forward as protective measures, to limit opportunities for adult pressure and manipulation on vulnerable children and to limit any allied distress.¹²

The courts and their legal personnel are also concerned about the influential child, who asks to be represented legally, wants to meet the judge or asserts strong views that may go against what adults think children's views should be. The court and legal personnel make discretionary decisions about how children's participation rights are facilitated and the weight that is given to children's views. Adults may struggle to accept the influential child's articulation of views that challenge power in parent-child relations. The influential child is perceived as too knowledgeable: their words are not their own, so their views may be discounted or taken themselves as expressions of adult manipulation and subject to further scrutiny. The influential child needs to be protected from themselves. Their attempts to participate in contested contact run counter to their immediate and future wellbeing. The influential child is subject to opposing expectations: it is inappropriate for them to be aware of the full circumstances of the parental dispute, so therefore they cannot have adequate insight into their best interests. The influential child is questioned for being inappropriately ready to share their inappropriately well-informed views. Their participation rights therefore may not be met within contested contact proceedings because of the discretionary decisions that are made by courts and legal personnel.

¹² See Holt 2018 for similar findings in Ireland.

The concerns about ‘influence’ should be re-thought and re-constructed. Neither Article 12 nor s. 11 of the 1995 Act provides children with choice over their contact arrangements: both are weak participation rights that require decision-makers to give ‘due weight’ or ‘due regard’, respectively, to children’s views (see Daly 2017 for critique of Article 12). Children’s participation rights here are not about providing the court with ‘objective’ information but rather with children’s subjective views. Reifying ‘the influenced child or ‘the influential child’ misses the continuum of influence experienced by all family members, living in relationships and dealing with these difficult disputes in their everyday lives as well as in courts. As detailed by Morrison and colleagues (2020b), children also influence their parents. Disputed contact can arise from children directly or indirectly expressing dissatisfaction or distress by contact arrangements made by others. Influence is more complicated than a binary between being influenced or not being influenced.

Children repeatedly inform researchers and policy-makers that the ‘Super Listener’ is the most helpful way for them to develop and express their views: a support worker that they can build trust with over time.¹³ Such a support worker could have the skills to work across the diversity of children, so as to facilitate communication of those who might otherwise be too easily excluded, such as young children and disabled children.¹⁴ With trust and support,

¹³ See <https://blogs.ed.ac.uk/jjcc/2020/01/young-people-want-adults-to-be-super-listeners/> for further information.

¹⁴ Reported case law and research has limited information on the extent to which disabled children are excluded or included, beyond cases discussed in Barnes (2008). As reviewed more extensively in Morrison and colleagues (2020a), reported case law now regularly states that a child is too young to be of ‘sufficient age and maturity’ to have a view, when children’s views are not elicited. Yet no clear trends could be ascertained in reported case, in relation to age, for those children who did participate. Very young children (e.g. aged 4) have had their views considered, whereas older children have not (see also Mackay 2013). With increasing attention to the skills needed to

children find they can better navigate the often difficult emotional and practical complexities of contested contact. Through a support worker and other means, children can have the information they need about how the legal system works and the legal options available to them. Rather than leaving the participation mode to the court's discretion (as has been repeatedly underlined by reported case law e.g. *S v A* (2015 GWD 13-222)), children should have choices about how they would like to participate, should they wish to do so. These are some of the demands being made by children, young people and children's rights organisations currently, as the Scottish Parliament is considering changes to family law legislation (Scottish Government 2019a, Scottish Government Justice Committee 2020, Yello! 2019), and these demands are congruent with UNCRC requirements.

More radical alternatives go beyond the current proposed legal changes, to a more fundamental look at the court system. The dispute is constructed as a parental one, with the child the object of concern. This legal construction of the dispute creates the conditions for influence and for allegations of influence to be so powerful. The child's views are treated almost as evidence for parties to contest and for courts to judge. If the system perceived children differently, as central to the decision-making, its logics could in turn be different. A better system would not be adversarial because it would need to support and understand the interconnecting relationships for children and their families. Instead the system would be orientated to and therefore be inclusive of children. Children would be supported to participate in decision-making, not for decisions to be made about them. The child would have choices about if and how to participate, direct connections to information, and feedback on the decisions. As children would be key actors in decision-making, all legal professionals

facilitate 'vulnerable' people's communication in legal proceedings more generally (see, for example, Cooper and Mattison 2017 for a critical discussion), attention is needed to ensure non-discrimination in children's participation.

would see it as their roles to be inclusive of and to facilitate children's participation. Legal professionals would have the skills and confidence to do so even in cases of highly contested child contact. Systems would be established so children could complain and seek redress if they felt their rights had been breached. Such reform requires a seismic shift in how the law views children and treats their participation rights. However, these kinds of changes are needed to address not only the General Comment's entitlements for children's participation rights but also its 'protective' elements for participation that protect children's best interests.

At the heart of the concerns about undue influence are the very familiar tensions between protecting a child's best interests and recognising a child's participation rights (Marshall 1997, Collins 2017, McMellon and Tisdall 2020). The Scottish system is currently so concerned about potential harm or distress to children if they participate in contested child contact cases, that they seek to distance and 'keep children out' of both the courts and the parental dispute. But rather than protect the child, this approach can make children more vulnerable. Children themselves report their disempowerment when they are not informed, when their views are not respectfully considered, and when they do not know what decision has been made or why. This is not only disempowering but at often times distressing, with some children finding no avenues to change their arrangements. In such ways, children are more harmed rather than less by the system. In congruence with the UNCRC, the obligation for family law is to find ways forward that combine – and not only balance – a child's best interests and their participation rights.

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