



Scotland's Commissioner
for Children & Young People

PE1529/E

David Stewart, MSP
Convener
Public Petitions Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

6th November, 2014

Dear Convener

PE1529

I welcome the opportunity to comment on this petition, which I believe highlights a number of key children's rights issues.

Children's Rights Perspective

As Scotland's Commissioner for Children and Young People, my role is to promote and safeguard rights for children and young people across Scotland. In doing so, I must have regard to the UN Convention on the Rights of the Child.¹

There are a number of key children's rights that can be applied to disputed contact. Article 3 of the Convention states that the court should always ensure that any decision being made about a child is based on what is in their best interests. Article 12 of the Convention states that in all decisions taken that affect them, children should have the opportunity to express a view (with due regard given to their age and maturity) and for that view to be taken into account. It is important to note, however, that even if a child expresses a view, the court does not have to follow their wishes, as it is what is in their best interests that is the overriding priority. Article 9 of the Convention states that children have a right not to be separated from their parents against their will (except where this is necessary in order to protect their best interests). Article 18 of the Convention makes it clear that both parents have common responsibilities for the upbringing and development of a child, whilst Article 19 states that children should be protected from all forms of physical and mental violence.

Most parents who separate manage to organise a mutually convenient contact arrangement, which works well for both them and for their children. I would agree with the petitioner's view, however, that in attempting to resolve contact difficulties

¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

through the courts, some parents use the process as a means of continuing their relationship dispute, at the expense of the best interests of their child/children.

I would disagree with the petitioner's view, however, that this issue could be resolved simply by increasing the enforceability of Section 11 orders².

There is a range of reasons why parents do not comply with Section 11 orders. To take a more punitive approach, without fully exploring the reasons behind this non-compliance, risks over-looking genuine concerns for children and young people's well-being.

The current system has the potential to negatively impact upon all children and young people. Frequent court dates and repeated changes to contact arrangements can mean that a child is in a state of flux for many years. However, some groups will face particular challenges. I have outlined these below.

Children Who Have Experienced Domestic Abuse

The dynamics of a relationship where there has been domestic abuse are complex. Non-compliance with a court order can sometimes mask a much more sinister picture. It is crucial, therefore, that Sheriffs and Bar Reporters are trained to recognise the different forms of control an abuser can exercise, including using contact proceedings as a means of exerting emotional and/or financial control over an ex-partner.

Perpetrators of Domestic Abuse can be skilled in presenting themselves as plausible witnesses. Where Domestic Abuse has taken place, it may (mistakenly) appear to the court that the resident parent has highlighted the abuse in order to secure a favourable outcome, rather than from any ongoing concern about the child's safety.

Whilst allegations of physical domestic abuse by a parent may be (but cannot always be) demonstrated to the court through health records/Police reports, emotional abuse is much more difficult to evidence. Cedar, an organisation working with mothers and children recovering from domestic abuse, has also highlighted the lasting impact that witnessing Domestic Abuse can have on children and young people.³

It is therefore crucial that those with decision-making powers have the ability to make an informed decision about the nature of a child's parents' relationship and the implications this might have on a child's well-being before making a substantive decision about contact.

² Children (Scotland) Act 1995, section 11.

³ <http://www.cedarnetwork.org.uk/about/supporting-recovery/impact-of-domestic-abuse-on-children/>

My office recently carried out two pieces of research into the issues facing children in contact disputes where there has been a history of domestic abuse. These can be accessed via our website here: <http://www.sccyp.org.uk/publications/domestic-abuse>.

Very Young Children

Anecdotal evidence to my office would suggest that another key group of parents at risk of non-compliance are the parents of very young children. Whilst these children may not be able to clearly express a view verbally, they may demonstrate their reluctance to attend contact in other ways (e.g. bed-wetting, becoming withdrawn, screaming/physically refusing to enter a contact centre). These behaviours are distressing to both the child and their resident parent.

It is crucial, therefore, that these non-verbal clues are picked up on by professionals and factored into any decisions being made about contact.

One of the key difficulties is that the resident parent has to perform a dual role. They are attempting to act as the child's advocate, whilst fulfilling their legal obligations under the Section 11 order (the terms of which may run counter to the child's wishes).

Children with Disabilities

My office has heard from parents that children and young people with disabilities face further difficulties in contact proceedings. For example, their views may be given lesser weight to those of non-disabled siblings. It is feasible, therefore, that in a family with two siblings of similar ages, both of whom have expressed a clear desire not to have further contact with a non-resident parent, that the child with a learning disability may be ordered to have contact, whilst the other child is not. This seems to me to be fundamentally unfair and contrary to that child's rights, assuming there are no other factors to be taken into consideration.

Children Who Do Not Already Have a Relationship with the Non-Resident Parent

A number of cases raised with my office have concerned parents who have attempted to secure contact with their child following a period of prolonged absence.

Perhaps unsurprisingly, resident parents can be reluctant for young children to have contact, particularly when the child is effectively being left with a stranger. Careful consideration needs to be made as to whether contact should take place and if so, how this can be done in a way that minimises distress to the child.

The Weight of Children's Views

An anomaly exists at present around the weight that a child's views are given by the court, depending on whether they agree with the Sheriff and Bar Reporter's own assessments. Where a child is happy to comply with an order, then it is normally assumed that this is their own view. There is no question that the child may have been influenced in any way. However, where the child expresses a clear wish not to have contact, then it is often suggested that the child has been influenced by the resident parent or "coached" in some way. This stacks the odds firmly against children who do not wish to have further contact with a parent.

I would encourage the Committee to consider ways in which the views of all children and young people in disputed cases could be sought in a way that is consistent with their rights. I do not believe that the current F9 form is accessible enough. Nor does it allow the child adequate opportunity to comment. Other methods, however, do appear to be more effective. The Scottish Child Law Centre's 'Helping Hands' resource, for example, is a good example of a child friendly approach. This allows children/young people to share their views on contact by completing a child-friendly form with the support of a third party, such as a teacher (thereby avoiding any question of parental influence).

Where a child has expressed a clear preference against contact, and the court subsequently orders contact, there is often no clear feedback route explaining the reasons for this decision, leading to a child feeling their views have been ignored.

Current Penalties

The petitioner has suggested in his evidence that there should be some form of "family liaison body"⁴ with legal powers to ensure that Section 11 orders are complied with. I do not believe that this would be in children's best interests. Instead I would prefer to see the introduction of specialised family law courts, with in-depth training for Sheriffs and Bar Reporters to enable them to build up a full and accurate picture of a family's situation.

Whilst I am aware of and sympathetic to the difficulties experienced by some non-resident parents in enforcing an order, and acknowledge that there are cases where a parent simply refuses to co-operate with the wishes of the court, I would also point out that penalties for non-compliance with a Section 11 order under the Children (Scotland) Act 1995 already exist. These are rarely used and there are sound reasons for this. It would rarely be in a child's best interests to separate them from their main care-giver, in order for a custodial sentence to be imposed.

⁴ Education & Culture Committee, Official Report, 30/9/14

Similarly, imposing financial penalties (e.g. re-claiming legal fees) on the resident parent is likely to impact negatively on the family unit as a whole, rather than just on the resident parent.

Conclusion

Whilst I recognise that there are many difficulties with the current system of resolving disputed contact, I do not support a more punitive approach towards the non-compliance with Section 11 orders.

Instead, I would prefer to see a more in-depth examination of the reasons behind parents' non-compliance, with a view to ensuring that where disputed child contact cases exist, children and their best interests are kept firmly at the centre of the decision-making process.

Yours sincerely

Tam Baillie
Scotland's Commissioner for Children & Young People