

Section 11 Orders and the “Abuse” Provisions

A. INTRODUCTION

Domestic abuse is a “scourge” and “destructive of the stability and security that ought to characterise family life...with effects as deleterious on mental health as on physical wellbeing”.¹ Studies have highlighted that judicial decisions about child contact which fail to take safety into account can endanger women and children physically and emotionally.² In some cases where courts have allowed unsupervised contact with violent men, children have been killed.³ It must therefore be questionable if it is in the best interests of a child to order contact with the non-resident father where there has been a history of domestic abuse, for “the assumption that contact per se is measurably good for children does not stand up to close scrutiny”.⁴ Yet an (unofficial) presumption that contact is in the best interests of the child continues to inform legal judgments.⁵

Although only a minority of parental separations reach family courts in Scotland (around 10%) as a means of settling disputes over the residence of, and contact with, children, domestic abuse is one of, if not, the most common welfare issue raised in proceedings.⁶ Concern about how the Child Welfare Hearing system responds to children having contact with fathers who have been abusive towards their mothers is not new.⁷ In Scotland a range of specialist women's support services, for example Scottish Women's Aid, have long highlighted that it is problematic to presume that the relationship between a child

¹ K McK Norrie, *The Family Law (Scotland) Act 2006: Text and Commentary* (2006), 56.

² For example, A Mullender et al, *Children's perspectives on domestic violence* (2002).

³ H Saunders, “Twenty-Nine Child Homicides: Lessons still to be learnt on domestic violence and child protection” Bristol: Women's Aid Federation of England (2004).

⁴ J Pryor and B Rodgers *Children in Changing Families* (2001) 214.

⁵ See for example, *J v M* [2016] CSIH 52: “This approach is reflective of the general background of it almost always being conducive to the welfare of the child that parental contact is maintained”, para 11(2).

⁶ J Hunt and A Macleod, “Outcomes of applications to court for contact orders after paternal separation or divorce” Ministry of Justice (2008).

⁷ K McKay, “The Treatment of the Views of Children in Private Law Child Contact Disputes where there is a history of domestic abuse: A Report to Scotland's Commissioner for Children and Young People” SCCYP (2013); F Morrison and EK Tisdall, “Child Contact Proceedings for Children Affected by Domestic Abuse” SCCYP (2013).

and abusive father is unaffected by violence, whilst contact proceedings are frequently raised by the perpetrator as a means of seeking to continue to control women and children.⁸

This note focuses on the amendments introduced by the Family Law (Scotland) Act 2006 (the “2006 Act”) to the Children (Scotland) Act 1995 (the “1995 Act”) that require courts to “have regard to....” abuse, including domestic abuse.⁹ Specifically, it presents preliminary findings from empirical research undertaken in 2016-2017 to investigate solicitors’ experience of the legislation in practice.¹⁰ Although the legislation did not go so far as “to provide that findings of abuse or the risk of abuse give rise to any presumption against the granting of an order [for contact],”¹¹ nevertheless, concerns were expressed that the provisions would be used by mothers (typically the primary care giver) to prevent contact between father and child.¹² More recently, lawyers have been criticized for either being unaware of the provisions or of failing to advise their clients about the provisions, thereby not raising issues of domestic abuse more frequently in private contact proceedings. To what extent can these concerns be discerned from interviews with solicitors who are engaged with such cases?

B. RESEARCH ON CHILDREN, CONTACT AND DOMESTIC ABUSE

A range of studies document the emotional and psychological impact on children of living with violence and their relationships with their mothers and the abuser.¹³ Studies have documented the increasing trend towards a pro-contact approach based on the presumption that this serves the best interests of children.¹⁴ This approach was highlighted in 2006 amendments to the Australian Family Law Act 1975 that prioritised “meaningful involvement”. Research undertaken shortly afterwards revealed problems arising from

⁸ Research highlights a correlation between abuse of the mother with high incidence of abuse (physical and sexual) of children. See A Mullender et al, *Children’s perspectives on domestic violence* (2002).

⁹ Section 11(7A) of the 1995 Act.

¹⁰ This research was undertaken with support of a Royal Society of Edinburgh Arts and Humanities Grant.

¹¹ Unreported Sheriff Court case 2010.

¹² Scottish Parliament Justice Committee Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006, 17.

¹³ A Mooney, C Oliver, and M Smith, “Impact of Family Breakdown on Children’s Well-Being: Evidence Review” Institute of Education, University of London, (2009).

¹⁴ C Harrison, “Implacably hostile or appropriately protective?: Women managing child contact in the context of domestic violence” (2008) 12 *Violence Against Women* 381- 405.

“meaningful involvement”. In particular, the research found that mothers felt discouraged from voicing safety concerns for fear of being viewed by the court as seeking to disrupt or damage the other parent’s relationship with the child.¹⁵ In 2011 new amendments were introduced that stress that protecting the child must be given “greater weight” than a “meaningful involvement” with the non-resident parent.¹⁶

Research studies in England and Wales have consistently demonstrated the inadequacy of family court responses. A recent study concluded that the Children and Family Court Advisory and Support Service (CAFCASS) officers “commonly reframe allegations by downgrading or normalising or historicising concerns”.¹⁷ Similar concerns have been raised in Scotland by a range of women and children support groups.¹⁸ In a study on contact mechanisms, Wasoff argued that “the presumption in law in favour of contact by non-residential parents as being in a child’s best interests may be misplaced”.¹⁹

C. LAW AND POLICY ON CHILD CONTACT IN SCOTLAND

Under the 1995 Act, a court may make a range of orders including residence orders and contact orders in respect of children under section 11. Section 11 orders may be sought as part of a wider action, such as divorce, or as a separate course of action. Equally, the court may make section 11 orders even when they are not sought by one of the parties. Section 11(7)(a) states that when a court is considering whether to make a section 11 order, the court:

shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all.²⁰

¹⁵ L Moloney, B Smyth, R Weston, N Richardson, L Qu and M Gray “Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-Reform Explanatory Study” Australian Institute of Family Studies, Research Report No. 15 (2007).

¹⁶ Ibid.

¹⁷ L Trinder, A Firth and C Jenks, “So presumably things have moved on since then? The management of risk allegations in child contact dispute resolution: A report of findings” NSPCC (2010) 21.

¹⁸ K Mackay, “The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse: a report to Scotland’s Commissioner for Children and Young People” SCCYP (2013).

¹⁹ F Wasoff, “Dealing with Child Contact Issues: A Literature Review of Mechanisms in Different Jurisdictions” Scottish Executive, Social Research (2007) 2.

²⁰ The welfare provision here reflects Article 3 of the United Nations Convention on the Rights of the Child, which states that “in all actions concerning children... the best interests of the child shall be a primary consideration”.

The Child Welfare Hearing (“CWH”) system, introduced in November 1996, gives practical effect to the principles contained in the 1995 Act.²¹ CWHs are held if the granting of a section 11 order is opposed (or, if in any other circumstances the sheriff considers that a CWH should be held). This process, focused on the welfare and best interests of the child, is intended to enable the court to address the issues relating to that child separately from other issues in dispute, for example, the factors in the breakdown of the parents’ relationship or financial provisions on separation or divorce.

Section 11 was amended by section 24 of the 2006 Act. The main refinement was the insertion of subsections 11(7A-7E), which specifically directed the court to have regard to the need to protect the child from actual or possible abuse, including domestic abuse.²² Thus, in a CWH, the court must:

- treat the welfare of the child as the paramount consideration;
- address the statutory test;²³
- have regard to specified matters, including the need to protect the child from any abuse and the need for co-operation (subsections 11(7A-7E)); and
- before refusing an application for contact, carry out a “careful balancing exercise...with a view to identifying whether there are weighty factors which make such a serious step necessary and justified in the paramount interests of the child”.²⁴

D. POST-IMPLEMENTATION SCRUTINY BY THE JUSTICE COMMITTEE

In February and March 2016, the Justice Committee invited a range of witnesses to give evidence on the operation of the 2006 Act, including its amendments to the section 11 provisions of the 1995 Act. During the first session Professor Norrie pointed out that, as a matter of drafting, the provisions set out in section 24 of the 2006 Act (i.e. subsections 11(7A-7E) of the 1995 Act) are not a counter-balance to the welfare test: they are matters to be compulsorily taken into account in applying the welfare test.²⁵ Professor Norrie noted that:

²¹ It should be noted that CWHs are distinct from Children’s Hearings.

²² Subsections 11(7A-7E) of the 1995 Act, as amended by section 24 of the 2006 Act.

²³ *NJDB v JEG* 2012 SC (UKSC) 293 at paras 11 – 13 per Lord Reed and para 39 per Lord Hope.

²⁴ *J v M* [2016] CISH 52, para 11(2).

²⁵ Scottish Parliament Justice Committee Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006, 16.

There have been very few judicial discussions of the provision and there is certainly no evidence that court practice has changed in any noticeable way. Therefore, I can understand people who argue that the provision promised more than it delivered. My response to that is that, if we look carefully at the wording, we see that it did not actually promise much.²⁶

He went on to argue that because of the insertion of subsections 11(7A-7E), the original provisions of section 11 of the 1995 Act are “untidy” and appear to single out the risk of abuse as the *only* factor expressly required to be taken into account when courts apply the welfare test.²⁷ In written evidence, Professor Sutherland highlighted that in other jurisdictions the relevant legislation provides the court with an “extensive checklist of factors to assist in assessing the welfare of the child”.²⁸

However, Scottish Women’s Aid strongly believe that there is a “crisis around child contact and domestic abuse” reflected in unsafe decisions in contact cases. In their written evidence subsections 11(7A-7E) were described as

good law” that could be a powerful tool in protecting women and children at risk of domestic abuse. The problem is the failure of implementation that has resulted from institutional reluctance to change discriminatory attitudes and practices, an absence of an awareness of the dynamics and impact of domestic abuse, and a lack of adequate and positive judicial case management.²⁹

Families Need Fathers disagreed with this view and argued that the revised provisions had created a “perverse incentive” for conflict between parents in cases involving children.³⁰ The Justice Committee concluded that “there is a lack of evidence that the amendment “has made children safer”. Notably, it concluded that “there are conflicting views as to whether there is a significant problem of court orders ... putting children in risk of abuse”.³¹

E. RESEARCH FINDINGS

Against this background, the current empirical research was carried out, by way of twenty face-to-face and telephone interviews with experienced family lawyers, conducted between June 2016 and January 2017. The research was concerned with the understanding

²⁶ Ibid, 16.

²⁷ Ibid, 16.

²⁸ Ibid, 16.

²⁹ Ibid, 17.

³⁰ Ibid, 17.

³¹ Ibid, 21.

and knowledge of lawyers of the provisions set out in subsections 11(7A-7E); how they raised and explored possible issues of domestic abuse with clients; and how they presented such issues in the context of CWHs. A full discussion of the findings is beyond the scope of this short comment. However, two key issues will be considered and the findings in relation to both outlined. The first is the understanding and knowledge of the lawyer of the provisions and, related to this, their own awareness of domestic abuse. The second considers the perceived barriers to raising domestic abuse concerns in the context of CWHs.

Although the 2006 Act amendments appear to have been passed without widespread publicity amongst lawyers, all the lawyers interviewed indicated that they became aware of them shortly after the Bill was passed. The Family Law Association raised awareness of the changes introduced by the 2006 Act, including the new provisions set out in subsections 11(7A-7E). For experienced family law practitioners, there was a shared belief that the provisions, as noted by Professor Norrie, added nothing new to established practice. However, it was acknowledged that having it set out in the legislation was important for making sheriffs, notably those with limited experience of contact actions, aware of the need to consider abuse amongst other factors when making a section 11 order.

In practical terms those interviewed noted that when meeting a client that they would listen carefully, and based on what the client was saying raise, if appropriate, concerns about domestic abuse. Those interviewed were careful to note that they wanted to avoid “prompting” clients to mention domestic abuse, something that they are accused of doing. Equally, in response to the charge that lawyers are failing to discuss domestic abuse with clients, it was clear that family law practitioners are aware of the broader issues and forms of domestic abuse and they all, without exception, stressed that they would discuss issues of domestic abuse once it was raised by the client. However, one area that varies is reference to subsections 11(7A-7E) in court documents, typically in the written defences, submitted. This appears to vary with sheriffdom and the sheriff court in which actions are being held. Lawyers working in Glasgow and Edinburgh with specialist family sheriffs noted that they felt no need to set out direct reference to the provisions, whilst in other sheriff courts lawyers felt it necessary to directly mention the provisions. All noted that in the event that the child welfare process required an evidentiary hearing or to move to proof or proof before answer the written pleadings would be amended at that stage to set out a specific reference to subsections 11(7A-7E) if necessary. Of course, as noted by all participants, it depends on the individual case and the context. Therefore, what emerges is evidence that lawyers are aware

of and do discuss the provisions with their clients. However, the challenge lies in how to present such issues during CWHs.

As mentioned above lawyers working in the specialist family courts noted how well sheriffs pick up on concerns. However, this can be contrasted with the experiences of lawyers working in different sheriff courts. In particular, one key concern emerged which was how best to introduce concerns about domestic abuse during a CWH, when both parents are present. Although none of the lawyers interviewed would support a presumption *against* contact, a number expressed concerns about the barriers to challenge the preference for parent-child contact in cases where domestic abuse had occurred and which still deeply affected their female clients. Describing their experience in one sheriff court, one lawyer observed that “It is like the Wild, Wild West out there!” A majority of the lawyers interviewed argued that a significant barrier to raising concerns about domestic abuse is the attitudes and understanding of some sheriffs. Training was viewed as a first step to remedying these concerns, and to challenging understandings of domestic abuse (for example that it is “more than a black eye”). Until then, judicial attitudes appear to remain a barrier to implementing fully the intentions underlying subsections 11(7A-7E).

F. CONCLUSION

Rosemary Hunter argues that a strong parent-child contact presumption and a narrow definition of domestic abuse means that

...the “cultural shift” called for by the Family Justice Council [in England] remains incomplete with some judges and lawyers still adhering to the notion of contact at any cost...and, as a result, there remains a broad spectrum of views among the judicial and practitioner community on the relative importance of contact and safety.³²

However, as noted in *J v M* “if the court has material before it which evidences abuse, or the risk of abuse, then in reaching a conclusion as to the welfare and no order principles in section 11(7)(a) it must include in its deliberations the matters set out in section 11(7B)”.³³

The challenge, as suggested by the lawyers interviewed, is ensuring that such evidence can be presented and considered in private contact proceedings in Scotland as provided for under subsections 11(7A-7E) of the 1995 Act.

³² R Hunter, “Domestic violence: A UK Perspective” in J Eekelaar and R George (eds) *Routledge Handbook of Family Law*, (2014), 321.

³³ *J v M* [2016] CSIH 52 at para 11(2).

Richard W Whitecross
Edinburgh Napier University