

## Crime and Justice: Civil Justice

### Understanding Child Contact Cases in Scottish Sheriff Courts

Graeme Wilson and Karen Laing, Newcastle University

Parents or grandparents who cannot agree arrangements to see children with whom they do not live may turn to the courts to resolve their disputes. The Scottish court system puts children at the centre of decisions that affect them. A key mechanism for this is the Child Welfare Hearing (CWH), which parties must attend, in which sheriffs have extensive powers to intervene. Those who initiate contact actions (pursuers) are encouraged to respect children's views and agree solutions with the other party (the defender) that support children's welfare. From 2007 to 2009, a study for the Scottish Government examined the nature and impact of court actions in Scotland in respect of child contact.

### Main Findings

- Most pursuers with contact issues had some contact with their children at the start of an action. Pursuers, mostly male, typically reported communication difficulties between parents.
- Most pursuers sought increased contact or a better arrangement regarding contact with the children involved. A sixth of pursuers did not anticipate a successful outcome to court action.
- Most pursuers reported moderate or severe stress on a validated measure of general psychiatric morbidity as they undertook contact actions. This was most severe for those reporting poorest communication with the other party and for those primarily pursuing contact.
- Few pursuers had sought help or advice from services other than a solicitor.
- In contact cases, sheriffs seek to promote conciliatory approaches and compromise. They value CWHs as a forum for themselves and parties to interact and will discourage confrontation. Pursuers may describe court action as a fight or a process of bargaining.
- Only half of pursuers spoke during CWHs. Most who did felt their views were taken into account and saw this as positive. Pursuers report a strong positive impact where the sheriff had spoken directly to them to explain the judicial view, even if the pursuer disagreed.
- During the court case, amounts of contact generally increased and this increase was maintained. Following the case, pursuers' levels of stress were significantly reduced and the quality of communication they reported with the defender had often improved. Most pursuers were satisfied with their action. Those who maintained contact said the children were happier.
- Pursuers whose cases were resolved with a court order felt more confident of lasting change than those who had reached an agreement without an order. Many pursuers were prepared to return to court if contact problems re-emerged.
- Four months or more after the start of the case, 54 per cent of actions were still continuing. Pursuers in these cases were anxious or dissatisfied with an open-ended sequence of CWHs.
- Few pursuers had told children about the court action. Children's views are most commonly ascertained in contact actions through court-ordered reports; they are rarely represented by a lawyer or spoken to by a sheriff in person.

## Background and aims

Parents or grandparents who do not live with their children or grandchildren may turn to the courts to resolve disputes over contact arrangements. Reducing conflict and improving family relationships can improve outcomes for children whose parents separate or divorce, and are potential benefits of a court system that puts children first. However the expectations of litigants are not always met in court actions in respect of contact and there may still be barriers to children's involvement in those actions, and court-ordered contact arrangements may not prove sustainable. In 2006, researchers at Newcastle University were commissioned by the Scottish Government to conduct a study aimed at increasing understanding of the Scottish court procedure for dealing with child contact cases, examining how it is perceived by legal professionals and how it meets the expectations of those who initiate court action.

## Research methods

We adopted a mixed-methods approach which included: analysis of court data on cases involving a crave for contact; a postal survey, at two points in time, of pursuers undertaking contact and/or divorce actions; a survey of family lawyers; in-depth telephone interviews, in two waves, with a sample of pursuers in contact actions; observations of child welfare hearings (CWHs); and face-to-face interviews with sheriffs and sheriff clerks.

## Actions in respect of contact

70 per cent of pursuers with contact issues had had contact with their child or children at the start of an action, indicating that contact actions in Scotland are usually undertaken to alter contact that is taking place rather than to initiate or restore contact. Differences are apparent between those primarily pursuing divorce and those primarily pursuing contact in court actions. The latter are significantly more likely to report no contact with the child in the case, and parents pursuing contact primarily report significantly poorer communication with the other parent, as well as higher levels of stress, than do those pursuing divorce primarily.

Pursuers describe having been forced into taking action by the other party's refusal or inability to communicate. Non-resident pursuers, who are in the majority, describe significant feelings of distress or loss arising from their contact problems. They typically feel controlled by the defender. Qualitative evidence suggests that the concerns of male and female non-resident parents are similar, but distinct from those of resident parents.

Solicitors had been a first port of call for help for those pursuing contact actions, often following advice from their family. Few pursuers had sought help or advice from other services. According to solicitors, many clients in contact cases lack understanding of the scope and purpose of legal process or harbour unrealistic expectations. Solicitors also state that clients are likely to be suffering emotional distress or to be unaware of the need to substantiate allegations regarding child welfare.

Pursuers primarily sought increased contact or a better arrangement for the children through the court action. They expressed a wish to see justice done, or to achieve parity in the allocation of contact. They often described court action in terms of a fight, and some wanted to be able in the future to provide their children with evidence that they had been prepared to take legal action. Concerns regarding children's well-being or safety were described in the context of allegations and counter-allegations between parties, but those pursuers did not usually seek specific solutions to these issues through contact actions. Although most pursuers anticipated a successful outcome to their court action, 17 per cent did not. Some expressed concern about possible gender discrimination or differences in approach between sheriffs adversely affecting their case. More than half of our survey sample reported experiencing moderate or severe stress as they undertook the contact action. This was most severe for those who had the poorest communication with the other party.

## Child Welfare Hearings

Sheriffs and sheriff clerks endorsed CWHs as:

- a) providing informal forums for resolution;
- b) allowing sheriffs to address parents directly;
- c) allowing the voice of parents to be heard;
- d) enabling a process of incremental change through testing and reviewing options.

CWHs were observed to be relatively informal and reassuring for parties, although some aspects of the court environment could be daunting for them. Most pursuers (81%) felt prepared for attending a CWH, but 70 per cent were nervous during the hearings, and 37 per cent felt intimidated. Sheriffs addressed parties only minimally during CWHs. Pursuers who reported that the sheriff had spoken directly to them and explained their view said that this had had a strong positive impact, even if they had disagreed with that view.

Half of pursuers did not speak during their CWH. This may have been because they did not want to, because they felt they were not supposed to, or because their

solicitor had instructed them not to. Some felt aggrieved or ignored, or thought that the court had not gained a full picture of their case. In contrast, 57 per cent of pursuers who spoke during their hearing felt that their views had been taken into account. Pursuers who felt that they had been listened to in the CWH saw this as extremely positive. However, dialogue between sheriffs and parties during CWHs can create tensions in cases where parental contributions create disruption or diverge from the focus on children's interests, requiring sheriffs to impose their authority.

Pursuers expressed dissatisfaction with the apparent unpredictability and cost of a series of CWHs, and with the delay to resolution that this involved. They perceived a need to co-operate with repeated CWHs, but some fathers resented the apparent assumption in some hearings that their parenting needed to be monitored.

## Resolving disputes in court

Actions in respect of contact may be dismissed or sisted in a number of ways without reaching a proof hearing; very few such actions proceed to proof. Sheriffs promote non-adversarial approaches in court, emphasising shared outlooks and common goals. Pursuers often continue to take an antagonistic approach to their case while being aware of the court's preference for a co-operative approach. Where defenders have raised concerns about violence, abusive behaviour or mental health problems, adversarial approaches may be fuelled by pursuers' perceptions that they are not trusted by the court.

Sheriffs and solicitors describe their role in contact actions in terms of promoting conciliatory approaches and compromise between parties. Pursuers in contact cases may see their involvement with their solicitor in terms of a process of bargaining over contact. Avoiding contact cases proceeding to a proof hearing is consistent with a non-adversarial approach and the principle of minimum intervention, but delaying resolution sometimes creates practical problems.

Sheriffs can refer parties involved in contact cases to mediation. Few pursuers in our study had used it. However, of those who had, some had found it beneficial and others had not. Sheriffs strongly endorse the use of contact centres in dealing with contact cases, particularly where they have concerns about one party's parenting skills or capacity. Pursuers using these centres appreciated being able to see their children, but were anxious that unsupervised contact should soon take place. It should be emphasised that these may not represent the views of defenders in contact actions who are mostly female and mostly resident parents.

## After the action

The amount of contact reported by pursuers generally increased during the court case, and this increase was maintained at the time of our follow-up. Pursuers whose cases were resolved with a court order felt more confident of lasting change than those who had reached an agreement without an order being made. Fifty-four per cent of cases were still ongoing at follow-up. Many pursuers felt that the court case had taken too long, but some of them felt that this was inevitable or, in retrospect, unavoidable. Those whose actions had not concluded were anxious about how long this might take.

During the court action, pursuers often experienced severe stress, depression and other impacts, but these stresses were relieved significantly after the case had been concluded. Most pursuers were satisfied with the results of their court case. The quality of communication that pursuers perceived between themselves and the defender had often improved following the court case. Some pursuers had continued to express ill feeling towards defenders, suggesting that improvements in communication may be unstable. At the conclusion of a court case pursuers were usually optimistic that arrangements could be maintained, but they did not discount the possibility of returning to court in the future should contact break down or changes be needed. As a result of court action, some parents realised that their original plans for contact had been impractical. Pursuers who maintained contact following the court case reported that their children were happier as a result.

## Putting children at the centre

Few pursuers had told the children in the case about the court action or believed that the child had been told by someone else. Most parents did not consult their children, as they felt they were too young, or they did not want to burden them. Some parents were worried that they could be accused of pressuring the children if they discussed the court action with them.

The most commonly used methods for court staff to ascertain children's views are court-ordered reports and the F9 (even though it is not used in the majority of cases). Few children in contact actions are represented by a lawyer, or talk to a sheriff in person. Some pursuers were concerned that the time reporters allowed for visits to observe children's home environments was too short to enable them to establish their welfare fully.

Almost all pursuers believe that they are acting in the best interests of the child, and most believe that sheriffs also act in this way. In court, sheriffs intervene to maintain a

focus on children's general welfare. However, solicitors can base opposing arguments on divergent accounts of what could support that welfare.

## Conclusions

These findings suggest that the main business of the Scottish courts regarding child contact is not in dealing with whether and how ceased contact can be restored, but the development of existing arrangements. Greater acceptance or awareness among separated families of the need for contact arrangements to reflect the changing needs of children and families might reduce court numbers.

Pursuers had rarely approached other services or sought alternative ways to resolve their dispute ahead of their court action. They tended to have seen solicitors as their first or only option, with a view to going to court to undertake adversarial procedures. Potential contact pursuers might be likelier to view court action as a last rather than a first resort with greater understanding and availability of other options for dispute resolution.

Pursuers may have unrealistic expectations of court action or believe that their action is futile, while suffering considerable stress and having strong emotional investment in a particular outcome. Signposting clear information or impartial advice about the processes and ethos of Scottish courts in relation to child contact, particularly the length and number of CWHs that may be involved, might assist those considering court action to consider whether it will meet their expectations.

There is a strong culture of seeking settlement among sheriffs as well as among solicitors. Both have a clear focus on bringing about resolutions that support children's welfare and, where possible, have been reached through agreement of all parties.

Although sheriffs and sheriff clerks hailed the potential for interaction at CWHs, and many pursuers expect and appreciate the opportunity to talk directly with the sheriff at a CWH, only half do so. Outbursts from parties can create considerable tension in the court room. If the active participation of parties is not required or expected at a CWH, it may be worth reconsidering or redefining their role, considering for instance whether it should be assumed necessary for them to attend if they will play little or no part in proceedings.

Pursuers and solicitors rarely talk to children in contact actions about their views. There is scope for encouraging more parents to engage their children in discussions about court action in some cases, although they may need advice or support in this. The apparent under-use of many of the mechanisms available to the courts for consulting children could be addressed through debate around new or alternative means or procedures by which courts could access children's views in a contact action.

Pursuers were on the whole satisfied with their court actions, leaving many inclined to resort to courts again if they deem it necessary. We were not able to access the views of defenders (mostly women) and children, and research into the experiences of defenders and children would extend understanding of Scottish court procedure for contact actions.

This document, along with full research report of the project, and further information about social and policy research commissioned and published on behalf of the Scottish Government, can be viewed on the Internet at: <http://www.scotland.gov.uk/socialresearch>. If you have any further queries about social research, or would like further copies of this research findings summary document, please contact us at [socialresearch@scotland.gsi.gov.uk](mailto:socialresearch@scotland.gsi.gov.uk) or on 0131-244 7560.



Social Science in Government

ISBN: 978-0-7559-9817-3

