Chapter 12

Actions in relation to parental responsibilities and parental rights

INTRODUCTION

12.1 A mother automatically has parental responsibilities and parental rights in relation to her child.[1] The child's father will also automatically have parental responsibilities and parental rights if: (i) he was married to the child's mother at the date of conception or subsequently; or (ii) he has been registered as the father of the child.[2] Where the child was born as a result of assisted reproduction, the mother's partner will automatically have parental responsibilities and parental rights if: (i) she was the mother's spouse or civil partner; or (ii) she has been registered as the child's second female parent.[3] It is possible for other persons to acquire parental responsibilities and parental rights as a result of an application to the court under s 11 of the Children (Scotland) Act 1995. For example, unless he has obtained parental responsibilities and parental rights under an agreement with the child's mother,[4] the father of a child who does not automatically have parental responsibilities and parental rights can only obtain these by virtue of a s 11 order. On divorce or dissolution, the court has power to regulate the parental responsibilities and parental rights of the parties in relation to any children of the marriage or civil partnership. The purpose of this chapter is to discuss the procedures which are applicable and the principles which are applied in litigation relating to parental responsibilities and parental rights.

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1 Children (Scotland) Act 1995, s 3(1)(a), discussed at para **11.3**.

2 C(S)A 1995, s 3(1)(b), discussed at para **11.3**. The registration must be on or after 4 May 2006.

3 C(S)A 1995, s 3(1)(c) and (d).

4 C(S)A 1995, s 4, discussed at para **11.3**.

TITLE TO SUE

(1) Independent applications in relation to parental responsibilities and parental rights

12.2 The Court of Session and the sheriff court have the power to make any order in relation to parental responsibilities and parental rights as it thinks fit.[1] An application can be brought by the following persons:

(a) A person who does not have and never has had parental responsibilities and parental rights in relation to the child, but claims an interest.[2] In other words, any person claiming an interest can bring an application. An interest can be a genetic or emotional tie between the applicant and the child. Applicants include the father of a child,[3] the child's second female parent who does not automatically have parental responsibilities and parental rights, a step-parent[4] or the child's grandparents.[5] In addition, a person with an interest in the outcome of the specific application as it relates to the welfare of the child also has title to sue. For example, a Health Board could apply under this provision for the right to consent to medical treatment on behalf of a child whose parents were refusing to consent.

It is expressly enacted that a child has title to sue in respect of the fulfilment of parental responsibilities and parental rights *vis-à-vis* him or herself.[6] If a child wished to live elsewhere than at home, or the child was unhappy with parental decisions relating to the child's education, etc, or was concerned about how his or her property was being administered, the *child* could apply under s 11(1) of the Children (Scotland) Act 1995 for a ruling by the court. A local authority has no title to sue under s 11 for an order in relation to parental responsibilities and parental rights.[7] If the local authority wishes to have parental responsibilities and/or parental rights, it must apply for a permanence order under Part 2 of the Adoption and Children (Scotland) Act 2007.[8] If a social worker considered the child to be in need of a compulsory supervision order, the case should be referred to the Children's Reporter.[9]

(b) Any person who has parental responsibilities or parental rights in relation to a child.[10] If, for example, both parents have parental

responsibilities and parental rights but cannot agree on an issue, for example, the child's religion or education, etc, either parent could apply under s 11(2)(e) of the 1995 Act for a ruling by the court on the matter.

(c) Any person who has had parental responsibilities or parental rights in relation to the child.[11] If, for example, a parent has been deprived of his or her parental responsibilities and parental rights by a s 11(1)(a) order, for example, as a result of a serious addiction problem that has significantly affected the child, that parent could apply for parental responsibilities and parental rights when he or she has successfully addressed the addiction and wishes to resume responsibilities towards his or her children. But persons deprived of parental responsibilities and parental rights by the following orders have no title to raise an action under s 11(1)(a) and (b) and s 11(2):[12]

(i) when the parental responsibilities and rights have been extinguished as a result of an adoption order. This means that if a child has been adopted the natural mother or father cannot seek parental responsibilities and parental rights under s 11 of the 1995 Act. There is one exception, namely, with leave of the court, the parent can apply for a contact order in relation to the adopted child;[13]

(ii) when the parental responsibilities have been extinguished by virtue of a parental order under s 54 of the Human Fertilisation and Embryology Act 2008;[14] or

(iii) where the parental responsibilities and rights have vested in a local authority as a result of a permanence order. In this situation, the parent can apply to have the permanence order varied or revoked.[15]

In these three situations, decisions have been made for the long-term future of the child and the parents' interests will have been taken into account on making the relevant order. It would defeat the certainty inherent in adoption and permanence orders if the whole procedure could be undermined by applications under s 11 of the Children (Scotland) Act 1995 for parental responsibilities

and parental rights by parents who had recently been denuded of these responsibilities and rights as a consequence of such orders.

1 Children (Scotland) Act 1995, s 11(1)(a), (b) and s 11(2). The court can also make any order relating to the guardianship of the child and the administration of the child's property: C(S)A 1995, s 11(1)(c) and (d).
2 C(S)A 1995, s 11(3)(a)(i).
3 *A v S* 2014 4 WLUK 453.
4 This would include the parent's cohabitant. The fact that it is a same sex cohabitation is irrelevant to the preliminary issue of title to sue as opposed to the merits of the case. In *X v Y* 2002 GWD 12-344 the sheriff took the view that a parent's same sex cohabitant was not a member of the child's family and could not apply. This decision is wrong. Cf the decision in *W v M, M v W* (2002) Sh Ct, where same sex cohabitants obtained parental responsibilities and rights in relation to each other's children. In *Telfer v Kellock* 2004 SLT 1290, the Lord Ordinary (Lady Smith) held that a child was a member of the family of the child's mother's lesbian partner who had accepted the child as a child of the family. Siblings have also applied for parental responsibilities and rights in respect of other siblings, for example contact: it is thought that such actions are competent: *E v E* 2004 Fam LR 115: cf *D v H* 2004 Fam LR 41.
5 *D v Grampian Regional Council* 1994 SLT 1038 (IH); approved 1995 SLT 519, HL.
6 C(S)A 1995, s 11(5): we are assuming the child has legal capacity to sue (s 2(4A) Age of Legal Capacity (Scotland) Act 1991: see **Ch 10**.
7 C(S)A 1995, s 11(5). It can make representations to the court that it would be against a child's interests to award parental responsibilities and rights to the applicant: *McLean v Dorman* 2001 SLT (Sh Ct) 97.
8 On permanence orders, see paras **13.13** and **14.7**.
9 On compulsory supervision orders, see **Ch 15**.
10 C(S)A 1995, s 11(3)(a)(ii).
11 C(S)A 1995, s 11(3)(ab).The application must be for an order other than a contact order.
12 C(S)A 1995, ss 11(4)(a), (c) and s 11A.
13 C(S)A 1995, s 11 (3)(aa).
14 Discussed at para **13.15**.
15 C(S)A 1995, s 11A.

(2) Ancillary actions in relation to parental responsibilities and parental rights

12.3 We have been considering the question of title to sue when a person brings an application relating to parental responsibilities and parental rights independently of other proceedings. In addition, the courts have the power under the Children (Scotland) Act 1995 to make s 11 orders

in any action of divorce or dissolution, judicial separation or declarator of nullity of marriage or civil partnership.[1] Even if no application has been made, the court must consider whether to make a s 11 order in the light of such information as is before the court, relating to the arrangements or proposed arrangements for the upbringing of any child of the family.[2] In other words, a court requires to be satisfied that arrangements are in place for any child before the granting of a s 11 order. A child of the family is *either* a child of both parties to the action *or* any other child (other than a child placed with them as foster parents by a local authority) who has been treated by both of them as a child of the family.[3] A child is a person below the age of 16.[4]

The court can postpone granting decree in the principal action if it feels unable to make a s 11 order without further consideration and there are exceptional circumstances which make it desirable in the interests of the child to delay granting decree until the court is able to exercise its s 11 powers.[5] In these circumstances, the court[6] can, for example, appoint a child welfare reporter[7] or a curator *ad litem*[8] to undertake enquiries and provide a report to the court.[9] The report will often contain recommendations with regard to the residence of the child and while the decision is that of the court alone, in practice the recommendations will often be followed. It should be noted that there is an increasing move towards parties agreeing to take part in ADR (alternative dispute resolution) in an attempt to resolve family conflicts without the need for court intervention.[10] Family mediation is not compulsory but in any family action in which an order in relation to parental responsibilities and parental rights is in issue, the sheriff may, at any stage of the action, refer that issue to an accredited mediator.[11]

Where the court considers that a s 11 order should be made, it can make the order even if there was no application for such an order; moreover, the court can make a s 11 order even if it declines to make an order in respect of the principal action.[12] Thus, for example, if one spouse or civil partner brings an action of divorce or dissolution against the other, the court could order that their children should reside with one of the parties, even though the court refuses to grant the divorce or dissolution.

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1 Children (Scotland) Act 1995, s 12(1). Ancillary orders are also possible in actions for declarator of parentage: *Robb v Gillan* 2004 Fam LR 120; *Y v M* 2013 GWD 27-550.

2 C(S)A 1995, s 12(1).
3 C(S)A 1995, s 12(4)(a) and (b). But the court cannot order aliment for such a child unless the child was also accepted as a child of the family: FL(S)A 1985, ss 1(1)(d) and 2(2)(a).
4 C(S)A 1995, s 12(3).
5 C(S)A 1995, s 12(2).
6 See Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, Sch 1, Chapter 33, OCR 33.21 (child welfare reporters); OCR 33.21A (local authority).
7 The role of a child welfare reporter is to seek the views of the child and report these back to the court and to undertake enquiries and report to the court (OCR 33.21).
8 The role of a curator *ad litem* (in relation to s 11 actions) is represent and protect the interests of the child who lacks capacity. Note that curators *ad litem* are appointed in other legal actions, for example, to represent and protect the interests of an adult with incapacity (OCR 33.26).
9 See C(S)A 1995, s 101A (Register for child welfare reporters) and s 101B (Register of curators *ad litem* for the purposes of s 11D). Note that at the time of writing (July 2022), these sections are not yet in force.
10 ADR comprises: mediation; arbitration; negotiation and collaborative law. Discussion of ADR is outside the scope of this book. See Children (Scotland) Act 2020, s 24 in relation to the duty on the Scottish Government to arrange a pilot scheme for 'mandatory alternative dispute resolution meetings'. Although this section came into force in January 2021, at the time of writing (July 2022) the pilot scheme is not yet set up.
11 OCR 33.22 (see fn 6 above).
12 C(S)A 1995, s 11(3)(b).

THE NATURE OF S 11 ORDERS

12.4 Whether a s 11 order is sought in an independent action or as an ancillary action, the court has the power to make any order in relation to parental responsibilities and parental rights as it thinks fit.[1] Without prejudice to the generality of this power, the Children (Scotland) Act 1995, s 11(2) specifies the following orders.

(a) An order depriving a person of some or all of his or her parental responsibilities and parental rights. For example, if one person is convicted of sexual abuse of his or her children, the other party could apply under s 11(2)(a) for an order depriving the first party of his or her parental responsibilities and parental rights.

(b) An order: (i) imposing upon a person parental responsibilities; or (ii) giving a person parental rights. The person must be aged

16 or over unless that person is a parent of the child.[2] This is the provision under which a person who does not have parental responsibilities and parental rights can obtain them: for example, a father who does not automatically have parental responsibilities and parental rights,[3] a step-parent, or the child's grandparent.

(c) An order regulating the arrangements as to: (i) with whom a child under 16 is to live; or (ii) if with different persons alternately or periodically, with whom and during what periods a child under 16 is to live. This is known as 'a residence order'. This order can be used where, for example, the child's parents separate or divorce and the court wishes to regulate the residence of their child. This could be, for example, that the child lives with one parent for five days per week and with the other parent for two days. Because the court can make any order 'it thinks fit', residence need not be awarded to one or other parent but to a third party, for example the child's grandparent. It should be noted that a child can apply for a residence order.[4]

(d) An order regulating the maintenance of personal relations and direct contact between a child under 16 and a person with whom the child is not living. This is known as 'a contact order'. This order can be used where, for example, the child's parents separate or divorce and one parent obtains a residence order. The other parent can apply for a contact order to maintain his or her personal relationship with the child. It is also the way in which a father who does not automatically have parental responsibilities and parental rights or grandparents who have successfully applied for the parental right of contact can exercise that right. A child can also apply for a contact order.[5] A contact order can be varied on a change of circumstances. An appeal court will only intervene if the order was one which no reasonable judge could reach: its function is not to determine what is in the best interests of the child.[6]

(e) An order regulating any specific question which has arisen in respect of parental responsibilities and parental rights, guardianship or the administration of a child's property. This is known as 'a specific issue order'. The scope of such orders is potentially very wide. Consider the following examples:

(i) The parents cannot agree on the education[7] or religion of their child. An application could be made for a specific issue order to resolve the impasse.

(ii) A child is unhappy with the parents' choice of school, or the decision for the family to move house to another country. The child could apply for a specific issue order asking the court to resolve the matter.

(iii) One parent wishes to take the child to a different country for an extended or prolonged period resulting in the frustration of the other parent's right of contact with the child. Either parent can apply for a specific issue order to resolve the matter.[8]

(f) An interdict to stop any conduct which purports to be done in fulfilment of parental responsibilities or to be an exercise of parental rights relating to a child or the administration of the child's property. Again, the scope of this provision is potentially very wide. Consider the following examples:

(i) The parents of a 14-year-old girl with s 2(4) capacity[9] consent on her behalf to the termination of their daughter's pregnancy even though the girl refuses to consent. The girl or a nurse or a doctor could apply for an interdict prohibiting the operation going ahead until the court has made a specific issue order as to the legality of the operation.

(ii) The parents enter into the sale of a house owned by their 12-year-old child. The child could apply for an interdict preventing the sale going ahead until the court has determined whether the sale was in the child's interests.

(g) An order appointing a judicial factor to manage a child's property or remitting the matter to the Accountant of Court.

(h) An order appointing or removing a person as guardian of the child.[10]

In practice, the most common orders are residence orders, contact orders, specific issue orders and orders giving or depriving persons of parental responsibilities and parental rights. A s 11 order includes an interim order,[11] the variation of an order or the discharge of an order.[12] For the

purpose of s 11 of the 1995 Act, a child is a person below 18, except in the case of residence and contact orders when the child must be below 16.[13] If in the course of s 11 proceedings[14] the court considers that a ground for referral exists,[15] it may refer the case to the Children's Reporter who can arrange a children's hearing to consider whether or not the child is in need of a compulsory supervision order.[16]

It will be clear that often more than one person will have parental responsibilities and parental rights in respect of a child.[17] Where this is the case, each can exercise a parental right without the consent of the other(s).[18]

What then is the effect of a s 11 order on a person's parental responsibilities and parental rights? Consider the following example:

> A and B are married. Both have parental responsibilities and parental rights in respect of their child, C. A and B divorce. A obtains a residence order in respect of C. B is awarded a contact order in respect of C. How do these orders affect A and B's parental responsibilities and rights?

By s 11(11) of the 1995 Act, an order has the effect of depriving a person of parental responsibilities and parental rights[19] only in so far as the order expressly so provides and only to the extent that it is necessary to do so to give effect to the order. Thus, in the example, the residence order will not deprive B of *any* parental responsibilities and parental rights unless this is expressly stipulated in the order. Despite not being deprived of responsibilities and rights, B cannot act in any way which would be incompatible with the residence order.[20] So even though B has still the *prima facie* parental right of residence in relation to C, B cannot insist that the child live with B rather than with A during the periods stipulated in the residence order, namely, that C is to live with A. Similarly, A retains the full complement of parental responsibilities and rights but cannot prevent B from seeing C at the times stipulated in the contact order. If the court took the view that A and B would not act sensibly, it could in the residence order expressly deprive B of the s 2(1)(a) right 'to have the child living with him', and in the contact order expressly deprive A of the right to have contact with C during the period B is to have contact with C. The court is enjoined *not* to do so unless satisfied that it would be better for the child to make such orders than that no order to that effect be made at all.[21]

The importance of s 11(11) cannot be over-emphasised. The C(S)A 1995 takes the view that a child should have the benefit of the support and guidance of *both* parents. A s 11 order should have the minimal effect on the parents' existing parental responsibilities and parental rights. Indeed, if a child's parents agree on the steps to be taken in respect of the child's upbringing after they separate or divorce,[22] there should be no need for a s 11 order as the court *cannot* make a s 11 order unless satisfied that it is better for the child to make the order than that none should be made at all.

Even if a s 11 order is made and a person is expressly deprived of a parental responsibility or parental right, this must be the *minimum* necessary to give effect to the order. If in the example, B is deprived of the parental right to have C live with him or her,[23] B still retains the right to determine C's upbringing[24] or act as C's legal representative:[25] these rights continue to be exercised *along with* A, who also retains parental responsibilities and parental rights.

Where a residence order is made which requires a child to live with a person who does not have pre-existing parental responsibilities and parental rights in relation to the child, the effect of the order is to give that person the parental responsibilities in s 1(1)(a), (b) and (d) and the parental rights in s 2(1)(b) and (d) of the 1995 Act for as long as the order is in force.[26] So, in the example, if residence was awarded to C's grandmother, she would have the relevant responsibilities and rights as a result of the residence order.[27] Unless A or B was expressly deprived of parental responsibilities and parental rights in the residence order, they would continue to fulfil their responsibilities and exercise their rights *along with* C's grandmother, provided they did not act in any way that was incompatible with the order.[28]

The C(S)A 1995 adopts a minimalist approach to orders relating to parental responsibilities and parental rights. No s 11 order can be made unless the court is satisfied that it is better for the child to make an order than that none should be made at all.[29] This is particularly pertinent where a residence order or a contact order is sought when a relationship breaks down. In these circumstances, the parties are to be encouraged to reach agreement, if possible, without resort to court proceedings, and, if necessary, through mediation services, on how their children are to be brought up after the breakdown. Where there is such an agreement, there will be no change

to the parental responsibilities and parental rights held by each party. There will be no need for a residence or contact order; indeed, the court *cannot* make the orders.[30] But to achieve this objective the parents must put the interests of their children first and recognise the importance of the children's need to retain personal relationships with both parents after the breakdown of a marriage.

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1 Children (Scotland) Act 1995, s 11(1) and (2).

2 'Parent' means the genetic mother or father subject to Chapter 3 of the Adoption and Children (Scotland) Act 2007, the Human Fertilisation and Embryology Act 1990, ss 27–30 and Part 2 of the Human Fertilisation and Embryology Act 2008.

3 There is no reason in principle why the court cannot make such an order even if the applicant could not immediately discharge his parental responsibilities and rights: *T v A* 2001 SCLR 647.

4 C(S)A 1995, s 11(5).

5 Ibid.

6 *M v M* 2002 SC 103; *NJDB v JEG* [2010] CSIH 83; *S v S* [2012] CSIH 17 (Appeal rejected on the basis that 'the high threshold for appellate intervention has not been met and that the appeal must fail'); *A v S* [2014] 4 WLUK 453; *LRK v AG* [2019] SAC (Civ) 33.

7 *G v G* 2002 Fam L R 120.

8 *Shields v Shields* 2002 SLT 579; *Fourman v Fourman* 1998 Fam LR 98; *MCB v NMF* [2018] CSOH 28; *MK(AP) v TDD* [2019] SC LER 66.

9 That is, capacity to consent to medical treatment by virtue of the Age of Legal Capacity (Scotland) Act 1991, s 2(4), discussed at para **10.2**.

10 On guardianship, see para **11.3**. In *L v H* 1996 SC 86 the father of an illegitimate child applied for guardianship so that he would become a relevant person who would then have the right to attend a children's hearing in respect of the child. The application was refused on the basis that guardianship was for the benefit of the child – not for the benefit of the guardian. But see: *Principal Reporter v K* [2010] UKSC 56.

11 C(S)A 1995, s 11(13).

12 Ibid.

13 C(S)A 1995, ss 15(1), 11(2)(c) and (d).

14 Children's Hearings (Scotland) Act 2011, s 62. The child must normally be below 16.

15 On grounds for referral, see para **15.7**. The provision does not apply where the ground for referral is that the child has committed an offence: CH(S)A 2011, s 67(2)(j).

16 CH(S)A 2011, s 66. For full discussion, see **Ch 15.**

17 For full discussion, see para **11.3**.

18 C(S)A 1995, s 2(2). But a parent cannot take a child out of the United Kingdom without the consent of any other person with parental responsibilities and rights: C(S) A 1995, s 2(3) and (6).

19 However, the court can revoke a s 4 or s 4A agreement if necessary: C(S)A 1995, s 11(11). On s 4 and s 4A agreements, see para **11.3**.

20 C(S)A 1995, s 3(4).

21 C(S)A 1995, s 11(7)(a).
22 Discussed at para **12.5**.
23 C(S)A 1995, s 2(1)(a).
24 C(S)A 1995, s 2(1)(b).
25 C(S)A 1995, s 2(1)(d).
26 C(S)A 1995, s 11(12). These are known as 'relevant responsibilities and rights'.
27 Subject to any provision in the order that she was *not* to have any relevant responsibility or right.
28 C(S)A 1995, s 3(4).
29 C(S)A 1995, s 11(7)(a). There must be evidence that it would be better for the child that an order should be made: *Q v P* 2016 Fam LR 54; *MCB v NMF* [2018] CSOH 28; *G v G* [2014] CSOH 88; *H v H* [2015] 4 WKUK 46.
30 C(S)A 1995, s 11(7)(a).

THE WELFARE PRINCIPLE

12.5 In considering whether to make a s 11(1) order and, if so, the nature of the order, the court has to exercise discretion. In so doing s 11(7)(a) of the 1995 Act provides that 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'.

We have discussed the minimum intervention aspect of this provision in the preceding section. In this section we shall explore the welfare principle in some detail.

It is a fundamental tenet of the 1995 Act that decisions relating to parental responsibilities and parental rights should be child centred. Not only is the child's welfare the paramount consideration in s 11 proceedings but, by s 11(7)(b), the court is also enjoined so far as practicable, taking account of the child's age and maturity, to do the following:[1]

(i) give the child an opportunity to indicate whether the child wishes to express any views;

(ii) if the child so wishes, give the child an opportunity to express his or her views; and

(iii) have regard to such views as the child may express.

The court has a duty[2] 'so far as practicable' to give the child the opportunity to express his or her views and have regard to such views. This duty to consult continues throughout all the proceedings until a final order is made.[3] At the time of writing (July 2022) a child aged 12 or over is presumed to be of sufficient age and maturity to form a view,[4] but the views of a child below that age can be taken into account if the child *in fact* is of sufficient age and maturity.[5] In giving his or her views, the child does not have to be legally represented if he or she does not wish to be.[6] Thus, the views of the child at the centre of the proceedings must be fed into the court's decision-making process.[7] It is then for the court to have regard to the views expressed by the child. The court will accord weight to the child's views. For example, in *X v Y,*[8] the views expressed by a child were not accepted by the sheriff as being 'the child's genuine view, independently formed'.

Difficulties can arise if the child requests that his or her views be kept confidential. The parties are entitled to a fair hearing under Article 6 of the European Convention on Human Rights. This usually involves disclosure of the evidence that the court has taken into account in reaching its decision. However, from time to time, situations can arise where the views of the child require to be kept confidential and only the sheriff has sight of them. For example, where parents are disputing residence and contact arrangements for a child, the sheriff may appoint a child welfare reporter to take the views of the child. In situations where the child may be reluctant to express his or her views due to anxiety or fear of the consequences should the parents find out, it is possible to submit the child's views to the sheriff alone, without those views becoming a part of the court process. This is facilitated by lodging the document containing the child's views (or the part of the child's views that he or she does not want shared) with the court in compliance with Chapter 33.20 of the Ordinary Cause Rules.[9] The court will maintain the confidentiality of the child's views only where it considers that there is a real possibility of significant harm to the child. The interests of the child have to be balanced against the interests of the other parties, so non-disclosure should be the exception rather than the rule.[10] However, it is the *court's* view of what is in the child's best interests which will ultimately prevail. The views of the child will be considered along with all other factors before the court.

Although under s 11(7)(a) the welfare principle is the paramount consideration, s 11(7A) provides that in carrying out this duty the court must have regard to the matters listed in s 11(7B). These are:

(a) the need to protect the child from abuse or the threat of abuse which might affect the child;

(b) the effect such abuse or the risk of such abuse may have on the child;

(c) the ability of the abuser to care for or otherwise meet the needs of the child; and

(d) the effect of any abuse or the risk of any abuse on a person with parental responsibilities (or who would have such parental responsibilities by virtue of an order under s 11(1)) from carrying out these responsibilities.[11]

Abuse is very broadly defined. It includes violence, harassment, threatening conduct and any other conduct giving rise to physical or mental injury, fear, alarm or distress.[12] Importantly, it includes abuse directed at a person other than the child.[13] So in determining under s 11(7)(a) what is in the child's best interests, a court must take into account the fact that the child's parent has been abused even if the abuser has not abused the child. 'Domestic abuse' is also included.[14] It has been held that the abuse, or risk of abuse, does not have to be directed towards the child,[15] (or a third party), nor does it have to be intentional.[16] In other words, the test for the existence of abuse is objective. A person who behaves aggressively when drunk, or under the influence of drugs, engages in abuse even although his or her aggression is unintentional and not directed towards the family. 'Conduct' includes speech and being present at a particular place or area.[17]

These provisions focus on abuse or risk of abuse to the person who has care of the child as well as the direct abuse or possibility of abuse of the child. Because abuse of the carer may affect the quality of his or her care, it is a matter which indirectly affects the child's welfare which must always remain the paramount consideration in s 11 applications. An abuser's ability to care for the child is a relevant factor when he or she has directly abused the child or might carry out abuse on the child. But the fact that the abuser abused his or her spouse or partner when they lived together with their child may not be relevant to the abuser's ability to care for the

child. This is particularly important given the width of the definition of abuse which includes any language which could give rise to distress, or the mere presence of a person in a particular place. In *R v R,* [18] the court emphasised that evidence of abuse or the risk of abuse did not in itself give rise to a presumption against granting parental responsibilities and parental rights; and in *SM v AN*,[19] the three-year old child continued to live with the mother, with the father being granted direct contact, despite a finding that the father had been the victim of abusive behaviour by the mother. There was no suggestion here that the child was not well cared for by the mother. However, in *Ahmed v Ahmed*,[20] the court refused a contact order to a father whose abuse towards the mother had a detrimental effect on their son. Once again it is important to remember that, at the end of the day, it is the child's welfare, not whether a parent was an abusive spouse or partner, that is the paramount consideration and the child's views are always to be taken into account.[21]

Nevertheless, it is the welfare principle that must be used to determine the difficult questions that can be raised in s 11 proceedings. It would apply in deciding, in what would be exceptional circumstances, that a parent should be deprived of parental responsibilities and parental rights. The welfare of a child will also be the paramount consideration in determining whether to give parental responsibilities and parental rights to a father or a second female parent who does not automatically have them,[22] or a step-parent or a grandparent of the child. Acute problems can be envisaged in specific issue orders,[23] but again the welfare principle must provide the solutions. An exception is made to this in proceedings relating to a child's property to the extent that the court must endeavour not to affect adversely a person who has 'in good faith and for value, acquired any property of the child concerned, or any right or interest in such property'.[24] This could arise if the child's parents had leased heritable property owned by the child to a *bona fide* tenant when it was not in the child's best interests to do so.

Where the welfare principle was most commonly applied before the enactment of the 1995 legislation was in actions for custody and access. These cases are also illustrative of how it is used in applications for residence and contact orders. The pre-1995 Act decisions must be used with caution given that, under the 1995 Act: (1) the court should not make

any order unless it is better for the child to do so than that no order should be made at all;[25] and (2) the court *always* has a duty to consult the child.[26.]

Finally, as stated above, when making an order under s 11 of the C(S)A 1995, the court has a duty to give the child the opportunity to express his or her views and to have regard to those views. However, it has long been a concern that little or no attempt is made to explain to the child the meaning and the consequences for him or her of the court's decision – a decision that can significantly affect the child's family life, relationships and ongoing welfare. Section 11F of the C(S)A 1995 (not yet in force at the time of writing (July 2022)) imposes a duty on the court to 'ensure that the decision is explained to the child concerned in a way that the child can understand'.[27] This may be done by an explanation being given to the child by the court or by arranging for a child welfare reporter to speak to the child.[28] See *Patrick v Patrick,*[29] in which Sheriff Anwar wrote a letter to the parties' children to explain to them the decision taken by the court and the reasons for making the decision.

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1 Children (Scotland) Act 1995, s 11(7)(b)(i), (ii) and (iii).

2 See *LRK v AG* [2021] SAC (Civ) 1, where neither party sought the views of the child and the sheriff had not sought the views of the child because he was too young. The Sheriff Appeal Court criticised the sheriff on the basis that it is the duty of the court to ascertain the views of the child unless a matter of practicability made it impossible to do so. See also: *FBI v MH* [2021] SAC (Civ) 16 for a similar outcome.

3 See: *M v C* [2021] CSIH 14 in which the child was just under five years old. The Sheriff Appeal Court and the Inner House found that the sheriff had failed to apply the correct test in refusing to take the views of the child on the basis that inappropriate information would have to be shared with the child. Lord Malcolm stated, 'If children are of sufficient age and maturity to form and express a view, their voices must be heard unless there are weighty adverse welfare considerations of sufficient gravity to supersede the default position. Careful thought as to how a child's position is to be ascertained will often resolve concerns. The court would require to be in a position to justify the proposition that the welfare issues are such as to render the exercise impracticable'. See also: *Shields v Shields* 2002 SLT 579, where the child was seven years old when the case started and nine years old when the case was finally decided. It had not been considered practicable for the boy to give his views as a seven-year-old, but this did not bar him from giving his views as a nine-year-old. The court stressed that the only proper and relevant test was whether, in all the circumstances, it was practicable to consult the child.

4 Section 1(3)(a) of the Children (Scotland) Act 2020 will repeal (amongst other things) ss 11(7)–(7E) and s 7(10) of the Children (Scotland) Act 1995. The presumption of

age 12 and over (currently in s 7(10)) is to be repealed when s 11ZB comes into force. The presumption will be replaced by the principle that: 'The child is to be presumed to be capable of forming a view unless the contrary is shown.'

5 C(S)A 1995, s 11(10).

6 C(S)A 1995, s 11(9): the presumption in s 11(10) applies to a child's decision under s 11(9).

7 *Shields v Shields* 2002 SLT 579.

8 [2018] SC DUM 54, at para [130].

9 Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No 1956 (s 223) Sch 1. See also *Dosoo v Dosoo* 1999 SLT (Sh Ct) 86.

10 *Re D (minors)* [1995] 4 All ER 385; followed in *McGrath v McGrath* 1999 SLT (Sh Ct) 90; *Dosoo v Dosoo* 1999 SLT (Sh Ct) 86.

11 Sections 11(7A) to (7E) of the Children (Scotland) Act 1995 will be repealed and replaced with similar provisions in s 11ZA ('Paramountcy of the child's welfare, and the non-intervention presumption').

12 C(S)A 1995, s 11(7C)(a), to be repealed and replaced with s 11ZA(4)(a).

13 C(S)A 1995, s 11(7C)(b), to be repealed and replaced with s 11ZA(4)(b)

14 C(S)A 1995, s 11(7C)(c), to be repealed and replaced with s 11ZA(4)(c).

15 See Domestic Abuse (Scotland) Act 2018, s 5 which makes the offence of abusive behaviour towards a partner or an ex-partner aggravated if a child is used to direct the abusive behaviour to party B, or if a child sees, hears, or is present during an incident where A directs abusive behaviour towards B as part of a course of behaviour.

16 *R v R* 2010 GWD 23-442.

17 C(S)A 1995, s 11(7C), to be repealed and replaced with s 11ZA(4).

18 2010 Fam LR 123.

19 [2021] CSOH 60. See also *J v M* 2016 SC 835. See also: *W v G* 2012 GWD 34-692 (Father awarded a residence order even though there had been bouts of violence towards the mother during their volatile relationship and evidence of alcohol and drug abuse. In the course of his judgment the sheriff stated that: 'At the end of the day it comes down to a question of risk. Whilst no one can ever predict with certainty what the future holds for anyone, I am satisfied on the evidence that the pursuer will always put the welfare of [the child] at the top of his list of priorities. I am not satisfied that the defender will always do so': ibid at para 19).

20 2020 Fam LR 68.

21 C(S)A 1995, s 11(7)(b). See also ss 11(7D) and (7E) which oblige the court to consider whether it should make an order where the result of doing so is that two persons – usually the child's parents – will have to co-operate with each other. The inference is that if they can't co-operate the court should not make the order. However, consider where, if such an order were otherwise in the best interests of the child why should the court not make an order even though the parents may find it difficult to co-operate with each other?

22 See: *AY v MM* 2012 GWD 33-674.

23 See: *Q v P* 2016 Fam LR 54; *MCB v NMF* [2018] CSOH] 28; and *MK(AP) v TDD* [2019] SC LER 66.

24 C(S)A 1995, s 11(8).

25 Discussed at para **12.4**.
26 See above.
27 C(S)A 1995, s 11F(2).
28 C(S)A 1995, s 11F(4).
29 [2017] SC GLA 46.

The relevant factors in applying the welfare principle in residence orders

12.6 While the welfare of the child is the paramount consideration, all the factors of the case are considered to the extent that they point to the course of action which is best for the child. As Lord MacDermott explained in *J v C*,[1] the welfare principle connotes:

> 'a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare …'.[2]

Specific factors are relevant in so far as they pertain to the child's welfare. In determining what is best for the child, a judge will be influenced by a number of factors that will include information about family relationships, the child's sibling relationships, education, the medical needs of the child and the views of the child him or herself. In Scots law there is no 'welfare checklist' to guide a judge on the matters for consideration.[3] When a decision is made by a court, it is generally recognised that an appellate court will not interfere with the decision of the judge at first instance unless the court is satisfied either that the judge exercised his or her discretion upon a wrong principle, or that the decision is so plainly unreasonable that the judge must have exercised his or her discretion wrongly.[4]

It is worthwhile noting the historical development of the welfare principle, At the beginning of the twentieth century, it was the practice of the Court of Session in divorce actions to apply a presumption that the 'innocent' spouse whose conduct was not responsible for the breakdown of the marriage should be granted custody; this presumption was rebuttable on evidence that it would be against the child's welfare to award custody to the innocent spouse.[5] Such a presumption has no place in modern Scots law where the

welfare of the child is the paramount consideration in s 11 proceedings and the law of divorce and dissolution is, theoretically at least, based on the non-fault concept of irretrievable breakdown of the relationship.[6] Instead, a person's 'conduct' should only be relevant in so far as it suggests that it would not be in the child's best interests to live with that person. So, for example, the decision to allow a child to live with a parent who has a drug addiction may be considered in keeping with the child's best interests if the parent has support from a community psychiatric nurse service and the addiction is being supported and monitored. However, where the behaviour of a parent with a drug addiction includes, for example, selling drugs from the family home, this puts the child's safety at risk and this behaviour would be relevant in determining the effects on the child's welfare.

It is submitted that a similar approach should be taken when the person seeking residence or contact is LGBTQ+. In the past a parent's sexual orientation has been considered to be an important factor. In *Early v Early*,[7] a lesbian mother lost custody of her child who had lived happily with her for several years. The court held, *inter alia*, that the boy, who was approaching adolescence, required a suitable male role model and could better adjust to his mother's sexuality if he lived with his father and siblings.[8] However, in *Salguiero da Silva Mouta v Portugal*,[9] the European Court of Human Rights held that the decision of a Portuguese court to award custody of a child to his mother simply because she was heterosexual, and the father was homosexual, constituted a violation of the father's rights under Article 8 and unlawful discrimination under Article 14 of the European Convention on Human Rights. The approach evidenced in *Early*[10] can no longer be justified.

In weighing up the factors which determine what is best for the child, in the past the Scottish courts also gave considerable importance to ensuring that a child obtained a religious upbringing. The 'solace and guidance' of a religious faith was regarded as so important for the welfare of a child that on divorce it was difficult for an atheist spouse to obtain custody if the other spouse was prepared to provide a religious environment. In *M'Clements v M'Clements*,[11] for example, an adulterous mother was awarded custody rather than an atheist father because she would give the children a religious upbringing.[12] Where both parties were prepared to offer the child a religious upbringing, there was no bias in favour of any particular Christian

denomination and custody was determined by weighing up other factors in accordance with the welfare principle.[13] These cases were decided over 60 years ago. It is submitted that given our increasingly secular society, a religious upbringing is not such an important factor in applying the welfare principle.[14] On the other hand, a child's ethnicity and cultural background are considered relevant.[15]

It is also interesting to note that the Scottish courts have rejected (some decades ago) any presumption that a young child should *prima facie* live with his or her mother. In *Hannah v Hannah*,[16] the Lord Ordinary had proceeded on the basis that it was 'more in accordance with nature' that a child should be removed from the custody of her father and his cohabitant where she had been living for several years after the marriage had broken down and be returned to the mother. In reversing the judge's decision, in the Inner House of the Court of Session Lord Walker observed:

> 'What exactly the Lord Ordinary meant by nature, or what precisely nature has to do with it, I must confess I find difficulty in appreciating as a proper test in matters of this kind. It is not nature but the welfare of the child which is the material matter.'[17]

The evidence established that the child – who had lived with her father for six years – was happy and well adjusted; in these circumstances, the court held that it was in her best interests that custody be awarded to her father.

In *Brixey v Lynas*[18] the sheriff awarded custody to the father of an illegitimate child. The decision was upheld by the Sheriff Principal. Since her birth and throughout the proceedings, the child had been in the care of her mother and was well looked after. In reversing the decisions of the sheriff and Sheriff Principal, the Inner House of the Court of Session held that the child should remain with her mother. In the course of his judgment, Lord Morison took the view that the sheriff had given insufficient weight to:

> 'the practice of the courts in Scotland to recognise as an important factor which has to be fully taken into account in a dispute concerning custody between the mother and father of a very young child, that during his or her infancy the child's need for the mother is stronger than the need for a father'.[19]

At the same time Lord Morison recognised that 'this principle should not be regarded as creating any presumption in favour of the mother, nor, certainly, as a rule of law'.[20] On appeal, the House of Lords held that the contention that a young child should be in the care of his or her mother was neither a presumption nor a principle but rather the recognition of a widely held belief of ordinary people based on nature![21]

It is thought that although the judges overstated the importance of a *mother's* – as opposed to a *parent's* – role in the upbringing of a child, the result in *Brixey* is justified on the basis that the child was thriving in the *de facto* care of her mother. In *Re B (a child)*,[22] the Supreme Court approved the dictum of Lady Hale delivered in the earlier case of *Re G*:[23]

> 'All consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in an examination of what is in the child's best interests. This is the paramount consideration. It is only as a contributor to the child's welfare that parenthood assumes any significance. In common with all other factors bearing on what is in the best interests of the child, it must be examined for its potential to fulfil that aim.'

Acute difficulties arise in relation to relocation cases. This is where a parent who has a residence order wishes to relocate with the child. This may make it difficult, if not impossible, for the other parent to retain contact with the child. To permit relocation therefore goes against the shared parenting philosophy of the Children (Scotland) Act 1995. In England, however, the Court of Appeal in *Payne v Payne*[24] considered that the reasonable proposals of the resident parent seeking to relocate were factors of great weight giving rise in effect to a presumption in favour of a resident parent's wishes. This approach was rejected by the Inner House in *M v M*[25] and the principle that there is no presumption in Scots law in favour of either parent was affirmed in *S v S*[26] and again in *GL v JL.*[27] Instead, the welfare and best interests of the child or children concerned are paramount and fall to be judged without any preconceived leaning in favour of the rights and interests of others. The onus therefore rests on the party seeking relocation to establish to the satisfaction of the court that it would be in the best interests of the child to do so.[28]

It is submitted that one of the factors to be taken into account when determining with whom a child should live is where and with whom the child is currently living or has lived since the parental breakdown. The preservation of the status quo may help to give stability to the child in the face of family disruption and the court has a duty to apply the minimum intervention principle[29] when making a decision relating to the welfare of the child. In *MCB v NMF*,[30] the father wanted the court to grant him a residence order over his child on the basis that it was necessary only in the event of a move to Cyprus by his child's mother.

Other things being equal, it is considered to be in a child's best interests to preserve the status quo and allow the child to live with the parent or person who has looked after the child since the breakdown of the marriage or the relationship.[31] In *AY v MM,* [32] a residence order (along with a declarator of paternity) was granted to the father of a three-year-old child who had been the *de facto* carer of the child for around three years.

It must be stressed that preserving the status quo is only a *prima facie* presumption. If it is established that it is in the best interests of the child to be moved, the courts should not hesitate to do so. In *Hastie v Hastie*,[33] a nine-year-old child had been in the care of his father's mother, ie the child's grandmother, for four years. The grandmother, who was 63, attempted to indoctrinate the child against his mother. In these circumstances, Lord Davidson ordered that the child should live with his mother because this would restore a 'normal' parent child relationship which was in the child's best interests. Given the range of acceptable family set ups, the courts have moved away from what were seen as 'normal' family relationships and have acknowledged that families are no longer limited to the traditional set up of a married different sex couple and their genetic children. In the past, the child's best interests would be considered best served if the child was removed from the residential care of a lesbian or gay parent to live with the heterosexual parent.[34] Other factors, for example if a child was to be removed from a school where he or she was settled, may result in the child residing with a parent who has not hitherto had care and control of the child.[35]

The preservation of the status quo is generally accepted to be in the best interests of the child whether it favours the father or the mother.

That said, in practice, when a marriage, civil partnership or relationship breaks down, the child or children will generally remain in the care of their mother. In most cases, the couple agrees that the child or children should reside with the parent who has retained care since the breakdown. In the majority of cases, this will be the mother. A residence order simply reflects this arrangement.[36] This practice has been reflected in the principle of minimum intervention in s 11(7)(a) of the Children (Scotland) Act 1995 so few residence orders are awarded since it is not in the child's interests to make an order which simply reflects what the parties have already agreed.[37]

A final point. While the court has a duty to give the child the opportunity to express a view in residence disputes, it is for the court to determine with whom the child will reside. While the child may express a preference, the court will have regard to the child's views but the final decision will be taken with the welfare of the child as the paramount consideration.[38]

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1 [1970] AC 668 at 710–711, HL.

2 In *Campins v Campins* 1979 SLT (Notes) 41 at 42, Lord Cameron emphasised that nothing can override or be superior to the child's welfare.

3 This is a matter about which there is continuing discussion. See Children Act 1989, s 1(3). This is not an exhaustive list. See also, Elaine Sutherland, *The Welfare Test: Determining the Indeterminate*, 2018 Edin L R, Vol 22, pp 94-100.

4 See: *H v H* [2015] CSIH 10 in which an Extra Division of the Court of Session issues a reminder of the steps that should be taken by a party who is dissatisfied with the decision of the court at first instance in residence and contact actions. See also: *Early v Early* 1990 SLT 221*; J v J* 2004 Fam LR 20; *Y v M* 2013 GWD 27-550; *M v M* [2011] CSIH 65; *S v S* [2012] CSIH 17; *A v S* [2014] 4 WLUK 453.

5 *Hume v Hume* 1926 SC 1008.

6 On 6 April 2022, the law relating to so called 'no fault divorce' came into force in England and Wales. See Matrimonial Causes Act 1973, as amended by the Divorce, Dissolution and Separation Act 2020.
See **Ch 6**.

7 1989 SLT 114, approved 1990 SLT 221.

8 In *Hill v Hill* 1990 SCLR 238, a child was returned to his gay father in Canada on the ground that the father was not a danger to the child with whom he had had a good relationship. In *X v Y* 2002 Fam LR 58, a gay father was given contact with his son who had been born as a consequence of AID.

9 2001 Fam LR 2.

10 1989 SLT 114.

11 1958 SC 286.

12 Cf *MacKay v MacKay* 1957 SLT (Notes) 17, where the atheist father was awarded custody on condition that the child's grandmother gave the child religious instruction.

13 *McNaught v McNaught* 1955 SLT (Sh Ct) 9.
14 See *L v L* 2011 [2011] WLUK 876 in which the court held that a father was entitled to further and uninterrupted weekend contact to compensate for the mother collecting the child on a Sunday morning to take her to Catholic mass, then returning to the father afterwards.
15 *Osbourne v Matthan* (No 3) 1998 SC 682; *Perendes v Sim* 1998 SLT 1382.
16 1971 SLT (Notes) 42.
17 Ibid 42 at 43.
18 1994 SLT 847.
19 Ibid at 849.
20 Ibid.
21 *Brixey v Lynas* 1996 SLT 856. This view was endorsed by the House of Lords in *Re G (children)* [2006] UKHL 43 (order in favour of natural mother of children conceived by AID during a lesbian relationship). In the course of his speech, Lord Scott profoundly observed, 'Mothers are special'.
22 [2009] UKSC 5.
23 [2006] UKHL 43 at para 37.
24 [2001] Fam 473.
25 [2011] CSIH 65 [para 52] in which the Inner House stated: 'In particular, the welfare and best interests of the relevant child or children are paramount and must be judged without any preconceived leaning or presumption in favour of the rights and interests of either parent.'
26 2012 Fam LR 32.
27 [2017] CSOH 60. See also, *Donaldson v Donaldson* [2014] CSIH 88.
28 ibid at [para 9]. Lady Wise states that. '… it is neither instructive nor appropriate to try to formulate any list of applicable factor to be applied in considering a case of this sort … these cases are fact sensitive and scrutiny of the particular circumstances of the dispute and the child concerned is what matters'.
29 C(S)A 1995, s 11(7)(a).
30 [2018] CSOH 28.
31 See: *L v L* 2013 GWD 25-496. Also, in *Senna-Cheribbo v Wood* 1999 SC 328, a two-year-old girl who was being looked after by her paternal grandparents was allowed to remain there in spite of her grandmother's age and diminution in energy; her mother who sought a residence order was simply incapable of coping with a child on a permanent basis.
32 2012 GWD 33-674; [2012] 8 WLUK 64.
33 1985 SLT 146.
34 *Early v Early* 1989 SLT 114; *T, Petitioner* 1997 SLT 724 (IH); and *Salgueiro Da Silva Mouta v Portugal* (2001) Fam LR 2.
35 See: *CAM v HM* [2012] CSOG 127.
36 Statistical information on the number of cases where the child or children live with the mother after divorce, dissolution or separation is not regularly produced. In 2010 the Scottish Government carried out research: *Understanding Child Contact Cases in Scottish Sheriff Courts* (Karen Laing, Graham Wilson, Scottish Government Social Research, 2010). This found that fathers were more likely to be the non-resident parent

than mothers; and, in the vast majority of courts actions relating to child contact, the pursuer was a non-resident father.

37 See para **12.4**; *G v G* 1999 Fam LR 30.

38 C(S)A 1995, s 11(7)(a).

Relevant factors in applying the welfare principle in contact orders

12.7 Before the Children (Scotland) Act 1995 came into force, in actions for access, the Scottish courts insisted that the onus lay on the pursuer to prove that access was positively in the child's best interests.[1] As a result of the 1995 Act,[2] where a person already has parental responsibilities and parental rights, *prima facie* that person has both the duty and the right to maintain personal relations and direct contact with a child who is no longer living with him or her. This responsibility and right to contact remains, even where the child is subject to a residence order in favour of the other parent or another person, unless the person has been expressly deprived of the responsibility and right.[3] In other words, the whole thrust of the 1995 Act is that it is *prima facie* in a child's best interests to have contact with an absent parent as this fosters the child's relationships with both his or her parents. Conversely, the granting of a contact order to a parent with whom the child does not live will be refused if the court finds that contact will be detrimental the child's welfare.[4]

In *White v White*,[5] the Inner House of the Court of Session held that there was no onus of proof on the father to establish that contact was positively in the child's best interests. On the other hand, the application of Article 8 of the European Convention on Human Rights,[6] does not mean automatic enforcement of the right of contact to a parent in the absence of evidence that contact would be *against* the child's interests. Instead the welfare principle should prevail and the common conception that contact between a parent and his or her child is in the child's best interests should form part of the reasons given for the granting of the order.[7] A parent with parental responsibilities and parental rights who is seeking a contact order is not in an advantageous position over the parent with no parental responsibilities and parental rights. A court will apply the welfare principle in deciding if the granting of a contact order is in the best interests of the child.

In contact cases, the views of the children are of particular importance; but where a child says he or she does not wish to see the pursuer, the court should take pains to ensure that the refusal is genuine.[8]

Where a contact order is granted, the parents of the child or children must obtemper the terms of the order. Failure to do so can amount to a contempt of court. In *Blance v Blance,*[9] Lord Stewart stated: 'It is the duty of the person who has care of the child to tell the child, if necessarily firmly, to go with the person to whom access has been granted. In other words, the person having custody should do his or her best to ensure that the access granted is in fact enjoyed … The child should be persuaded, encouraged and instructed but not physically forced to go with the person to whom access has been granted.'[10]

Where a person knowingly or deliberately fails to obtemper a court order for contact, this amounts to a contempt of court for which the punishment can be imprisonment. However, the courts are reluctant to impose a custodial sentence on a parent with whom the child resides as this will, undoubtedly, have a detrimental effect on the welfare of the child.[11]

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1 *Porchetta v Porchetta* 1986 SLT 105; *Crowley v Armstrong* 1990 SCLR 361; *O v O* 1995 SLT 238; *Sanderson v McManus* 1997 SC (HL) 55.

2 Children (Scotland) Act 1995, ss 1(1)(c) and 2(1)(c).

3 C(S)A 1995, s 11(11); see para **12.4**.

4 *J v M* [2016] CSIH 52; 2016 SC 835 (court refused father's application for a contact order based on the effects on the child of the hostile relationship between the parents. See also: *Ahmed v Ahmed* [2019] 11 WLUK 535.

5 2001 SLT 485.

6 ECHR, Art 8(1): 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

7 However, in *A v S* [2014] 4 WLUK 453, the court emphasised that there was no presumption in favour of contact once the biological father and child relationship had been established. The Sheriff Principal stated that: 'the sheriff's process of reasoning was bereft of articulation of the child's best interests in the context of a potential award of contact in favour of the pursuer'.

8 See: *X v Y* [2018] SC DUM 54, in which the sheriff did not accept the child's view as being 'genuine' and 'independently formed'.

9 1978 SLT 74.

10 Ibid at p 75.

11 See: *M v S* 2011 SLT 918; *G v B* [2011] CSIH 56; *F v H* 2014 GWD 26-515; *SM v CM* [2017] CSIH 1; *TJ v SB* [2018] SAC (Civ) 15. See also: Shona Templeton *Why are contact orders so hard to enforce?* Fam LB 2018, 155.

CONCLUSION

12.8 In theory, any proceedings in relation to parental responsibilities and parental rights are determined by the welfare principle. But in relation to the residence of children whose parents' relationship breaks down, the outcomes today are not so very dissimilar to those of several decades ago. Professor Joe Thomson, in previous editions of this book, quoted from Maidment[1] who produced three findings from a British socio-legal study:

> 'Firstly, about 94 per cent of divorcing parents agree between themselves the arrangements for the care of their children after the divorce. Secondly, about 90 per cent of these arrangements provide for the mother being the main caretaker in that the children live with her. Thirdly, the court, which need not but usually is asked to confirm the private consensual arrangements, rarely disturbs parents' agreements and almost invariably preserves the residential status quo of the child …'.

Whatever the theoretical powers of the court, the judge will generally 'rubber stamp' the arrangements which have been negotiated by the parties where it is in the child's best interests to do so. Preserving the status quo is thought to be conducive to the child's welfare as it does not disturb the continuity of the child's relationship with the *de facto* caring parent.

Unless a parent has been deprived of his or her parental responsibilities and parental rights, the parent with whom the child does not reside can continue to exercise his or her rights and fulfil his or her responsibilities in relation to the upbringing of the child. The non-residential parent has the right to maintain contact[2] with the child. In most cases, the parents will have agreed with which parent the child or children will live and the terms of contact arrangements with the non-residential parent and the child or children.

There is growing evidence that children will make a better recovery from the traumatic effects of the breakdown of their parents' relationship when they can sustain an emotional tie with both parents. As a consequence of the principle that no s 11 order should be made unless it is better for the child to make the order than that none be made at all, and that when such orders are made, they should have the minimum effect on a parent's existing responsibilities and rights, the C(S)A 1995 has given Scots law

the framework to achieve this end. There is some evidence that many family law practitioners and parents have taken the opportunity to make this aspiration an everyday reality.

Nevertheless, there are still cases where residence and contact matters are bitterly disputed between parents resulting in protracted proceedings; these long proofs are not in the interests of the children involved. They are also extremely expensive and can exacerbate the poor relationship between the parties. In *NJDB v JEG*,[3] the Lord President (Hamilton) described such proceedings as a 'highly unsatisfactory' state of affairs and reminded professional advisers of their duty to their clients and the court to attempt to obtain an expeditious disposal by taking steps to identify and concentrate on, and only on, what is in the best interest of the children at the centre of the case. When the case proceeded to the Supreme Court[4] Lord Reed was highly critical of the length of time the dispute had lasted and the costs involved. He focused on the lack of judicial control over the process due to the extensive pleadings of both parties which then resulted in an extensive proof. In his view: 'The glacial pace of the proceedings was itself inimical to the best interests of the child… the proceedings have overshadowed the life of this young child, perpetuating and deepening the conflict between his parents which has caused him such distress.'[5]

As stated above, the ultimate sanction for failing to obtemper a court order for residence or contact is a finding of contempt of court and possible imprisonment. These are hardly conducive to the child's welfare. This reinforces the benefits to the child and to the parents of working to achieve an agreement on child related issues and at all costs avoid litigation.[6]

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1 Maidment *Child Custody and Divorce* (1984, Croom Helm), p 68. (Note: (i) that the quoted percentages date back to the mid-1980s; and (ii) the breakdown of relationships would now include dissolution of a civil partnership and separation of cohabitees.)

2 Children (Scotland) Act 1995, s 2(1)(c).

3 2010 CSIH 83.

4 [2012] UKSC 21, 2012 SC (UKSC) 293.

5 Ibid at para 21.

6 See para **12.7**.