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children & young people

Promoting Sibling Contact for Looked After Children

Clan Childlaw offers a unique advocacy and legal service for children and young people. We deliver free legal advice and representation in Edinburgh, the Lothians and Glasgow to those who would otherwise have found it very difficult or impossible to access the legal help that they require. We help Children & Young People up to the age of 18, or 21 if they have been Looked After Children.

We aim to improve life chances for children and young people in Scotland by making sure that every young person in Scotland has access to the legal advice they need, and by securing the recognition and enforcement of their rights in Scots Law.

We undertake three main strands of work in order to achieve this:

#### Representation

We deliver free legal advice and representation in Edinburgh, the Lothians and Glasgow to those who would otherwise have found it difficult or impossible to access the legal help that they require. We help children and young people up to the age of 18, or 21 if they have been Looked After Children.

#### Training

We provide training to individuals and organisations on many areas of child law. We use our direct experience of the law in action to deliver interactive training that is worked around practitioners' practice needs.

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## **Introduction**

This paper is primarily directed at those making assessments, making recommendations in reports and taking decisions on sibling contact for looked after children. It aims to set out the legal framework for and tools to enable the promotion of sibling contact. Although its main focus is on children with care experience, some of the matters raised are of wider application, to include children who are not looked after but who find themselves separated from their siblings as a result of family breakdown.

## **Benefits of Sibling Contact**

*“Siblings provide our longest lasting relationships, often extending throughout lifetime. Children growing up apart from their brothers and sisters, lacking contact or knowledge about their siblings may be deprived of family support in adult life. Much more should be done to foster sibling relationships for children who are separated from their families.”<sup>1</sup>*

The importance of sibling contact is already recognised in the relevant guidance already in existence: “Both in the early stages of placement, when holding onto familiar contacts is reassuring, and for children who spend prolonged periods looked after away from home by a local authority, **contact with siblings living elsewhere ... needs similar attention as contact with parents.**”<sup>2</sup>

*“...[W]hen contact between siblings was satisfying, it had the potential to foster positive identity development, feelings of connectedness and emotional support and reciprocation. These are developmental mediators which can broadly be understood as attachment related constructs. There is overwhelming support within the literature for the value and importance of such developmental experiences in the lives of children and young people and they have the potential to impact positively on the developmental trajectories of children and young people in care. ...*

*“Considering that children and young people in care have disproportionately higher rates of emotional attention and conduct-related problems, this inquiry provides strong support to child protection agencies to give priority to the function and value of sibling relationships. ...*

*“It is evident then that sibling contact that is positive and supportive is a significant contributor to a child’s emotional and mental health and development. Therefore sibling contact should be included as part of planning for health and recovery from harm.”<sup>3</sup>*

## **Difficulties faced by looked after children seeking contact with siblings**

When setting out the duties of a local authority to a child looked after by them, section 17(1)(c) of the Children (Scotland) Act 1995 directs the local authority to “take such steps to promote ... personal relations and direct contact between the child and any person with parental responsibilities ...”. As a result, social workers often prioritise contact with those with

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<sup>1</sup> Kosonen, M 1996, “Maintaining Sibling Relationships – Neglected Dimension in Child Care Practice”, *British Journal of Social Work*, 26:809-22

<sup>2</sup> Guidance on Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007, page 42

<sup>3</sup> Report on the inquiry into what children say about contact with their siblings and the impact sibling contact has on wellbeing: “She’s my sister and she will always mean something to me...”, 2011, Government of South Australia, pages 64-65

parental responsibilities over sibling contact. The issue of sibling contact can be overlooked in assessment, care planning and preparation of reports.

Looked after children may find themselves at the centre of a court action relating to parental responsibilities or parental rights. In that case, the court may make a contact order, which regulates “relations and direct contact between a child under [sixteen] and a person with whom the child is not, or will not be, living.”<sup>4</sup> It can be difficult for children to become parties to such actions, in order for them to pursue the issue of sibling contact.<sup>5</sup> Difficulties can be experienced by children in obtaining legal aid to seek a court order for sibling contact.<sup>6</sup>

When a looked after child is the subject of a compulsory supervision order (CSO) or an interim compulsory supervision order (ICSO), a children’s hearing or court, when making, varying or continuing a CSO or ICSO, must consider whether to include in the order a direction regulating contact between the child and a specified person or class of person.<sup>7</sup>

However, if the issue of sibling contact has been overlooked in the preparation of social background reports for the children’s hearings proceedings, then the hearing or court is less likely to consider including a direction in relation to sibling contact. In addition, one sibling is not automatically notified of hearings for another sibling, so is often unaware of the date of the other sibling’s hearing. It can then be difficult to raise the issue of sibling contact with the hearing. In certain circumstances, it may be possible to have one sibling deemed a relevant person in respect of another sibling. However, the test for deeming is a high one, requiring significant involvement in the other sibling’s upbringing, and it may well be that it would be undesirable, in any event, for a sibling to have all the rights of a relevant person which would include receiving all of the papers in relation to the other sibling.

Case Study: 15 year old girl was one of 7 siblings under the age of 16 years who were residing amongst 5 different foster carers. The children were placed on an interim compulsory supervision order (ICSO) by the children’s hearing, with a condition that the siblings saw each other once a week. By the time the ICSO was being considered by the court (concurrent to grounds of referral being considered), the local authority had not organised the sibling contact, although the condition relating to parental contact imposed by the hearing had been implemented. At court, the local authority tried to have the frequency of sibling contact reduced to once a fortnight rather than once a week, on the basis that they would try to organise it once a week but this could not be guaranteed. The girl sought to maintain the direction regulating sibling contact on her ICSO at once every week and was ultimately successful in persuading the sheriff of this.

<sup>4</sup> Section 11(2) Children (Scotland) Act 1995

<sup>5</sup> D v H 2004 SLT (Sh Ct) 73 The court in E v E 2004 Fam L.R. 115, however, allowed a child to pursue sibling contact. That approach was endorsed by Prof K McK Norrie, “Why title to seek orders such as contact orders is not confined to those entitled to apply for an order conferring parental rights” Journal of the Law Society of Scotland, October 2004 <http://www.journalonline.co.uk/Magazine/49-10/1001018.aspx#.UKZNImcRIwQ>

<sup>6</sup> <http://www.clanchildlaw.org/app/uploads/2014/11/Legal-Assistance-for-Children-and-Young-People.pdf>

<sup>7</sup> Section 29A Children’s Hearings (Scotland) Act 2011

## **Human Rights: Family Life**

In terms of the Human Rights Act of 1998, public authorities (including local authorities, courts and children’s hearings) have a duty to act compatibly with certain rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).

Those rights include the right to respect for “**family life**” specified in Article 8 of ECHR. The existence of “family life” depends on “the real existence in practice of **close personal ties**”<sup>8</sup>. It has been observed that there are four key relationships which amount to family life:

*“First there is the relationship between husband and wife. Secondly, there is the relationship between parent and child. Thirdly, there is the **relationship between siblings**. And, fourthly, there are relationships within the wider family: for example, the relationships between grandparent and grandchild, between nephew and uncle and between cousins. Each of these relationships can in principle give rise to family life within the meaning of Article 8.”<sup>9</sup>*

Any interference by a public authority in family life must be lawful and “a proportionate response to a legitimate aim.”<sup>10</sup>

It follows that local authorities, courts and children’s hearings need to consider whether there are close personal ties between siblings in care. If those ties are present, then “family life” between those siblings, in terms of Article 8, exists and any interference by a public authority must be lawful and proportionate. To be **lawful**, the interference must be conforming to or permitted by law (which could be a statute, a regulation or common law). To be **proportionate**: (1) the objective of the interference must be sufficiently important to justify limiting the fundamental right; (2) the interference must be rational, fair and not arbitrary; (3) the interference must be kept to a minimum, so far as is reasonably possible; and (4) the interference must involve the striking of a fair balance between the rights of the individual and the interests of society. If the interference is unlawful or disproportionate, the Article 8 rights of each sibling will be violated.

It is important to be aware also of the terms of the United Nations Convention on the Rights of the Child (UNCRC). Although the UNCRC is not incorporated directly in the United Kingdom, it is relevant in interpreting domestic legislation and ECHR. Article 16 of the UNCRC is in the following terms:

*“1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.*

*2. The child has the right to the protection of the law against such interference or attacks.”*

<sup>8</sup> European Court of Human Rights in *Lebbink v Netherlands* (2005) 40 E.H.R.R. 18

<sup>9</sup> English Court of Appeal in *Singh v Entry Clearance Officer* [2005] Q.B. 608, per Munby J, at para 58

<sup>10</sup> Supreme Court in *Principal Reporter v K* [2010] UKSC 56

All of the duties imposed on local authorities, courts and children's hearings and referred to below, must be read in the context of the obligation on public authorities to act compatibly with the rights under ECHR, including the Article 8 right to respect for family life.

## **Local Authority**

### **Duty to Looked After Children**

The local authority has a duty to **safeguard and promote the welfare** of a child looked after by them.<sup>11</sup> In terms of the Children and Young People (Scotland) Act 2014 [when it comes into effect], the local authority must exercise that duty in a way which is designed to safeguard, support and promote their wellbeing, under reference to the SHANARRI indicators: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included.<sup>12</sup>

### **Assessment & Care Planning**

The local authority is under a duty to **assess the child's need for contact with family members** where the local authority are considering placing a child away from the birth parents, with kinship carers, foster carers or in a residential unit.<sup>13</sup>

"The assessment of the child should include full consideration of the value of continuing contact with parents and others, and the purpose and frequency of the contact should be outlined in the child's plan."<sup>14</sup> "Contact should include not only parental but also sibling contact."<sup>15</sup>

*"Any decisions regarding looked after children taken in the context of assessment, care planning and review procedures should consider the potential impact of these decisions on the child's relationship with their siblings in the short, medium and long term. Even short-term decisions can have implications for sibling relationships that persist over a lifetime."<sup>16</sup>*

The United Nations has issued **Guidelines for the Alternative Care of Children** to enhance the implementation of the United Nations Convention on the Rights of the Child regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so. One of the fundamental policy orientations of the Guidelines is set out in Guideline 17:

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<sup>11</sup> Section 17(1) Children (Scotland) Act 1995

<sup>12</sup> Sections 95 & 96, Children & Young People (Scotland) Act 2014

<sup>13</sup> Regulation 4(3) & (4) Looked After Children (Scotland) Regulations 2009

<sup>14</sup> Guidance on Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007, page 40

<sup>15</sup> Guidance on Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007, page 41

<sup>16</sup> Kosonen, M 1999, "Core and Kin siblings. Foster children's changing families", *We are Family: Sibling Relationships in Placement and Beyond*, ed. A Mullender, British Association for Adoption and Fostering, London, page 46

“Siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child. In any case, **every effort should be made to enable siblings to maintain contact with each other, unless this is against their wishes or interests.**”

Guidance has now been developed to assist with implementation of the Guidelines.

*“As a general rule, **siblings should not be separated from each other** in care placements unless there are compelling reasons for doing so. These reasons must always be in the best interests of any of the children concerned. While this may seem an obvious policy directive, the number of documented cases where siblings are separated without regard to their best interests made it necessary to stipulate it as a general principle of the Guidelines.*

*“Where siblings are separated, [national policy] should facilitate contact so that meaningful links can be maintained.”<sup>17</sup>*

### **Views of the Child in Decision Making**

When making decisions about a looked after child, the **local authority** has a duty to ascertain the **views** of the child, his parents (or anyone else with parental rights) and any other person whose views the local authority consider to be relevant to the matter to be decided.<sup>18</sup> For sibling contact, “any other person” would include the sibling. The local authority must have regard to those views, so far as practicable.<sup>19</sup> If the looked after child concerned wishes to express his views, the local authority must take account of his age and maturity, in assessing the weight to be accorded to those views.

In **family actions**, the **court** “taking account of the child’s age and maturity, shall so far as practicable (i) give him an opportunity to indicate whether he wishes to express his views; (ii) if he does so wish, give him an opportunity to express them; and (iii) have regard to such views as he may express.”<sup>20</sup> A child aged 12 or over shall be presumed to be of sufficient age and maturity to form a view.<sup>21</sup>

Broadly similar provisions are made in respect of **children’s hearings proceedings**.<sup>22</sup>

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<sup>17</sup> Moving Forward: Implementing the ‘Guidelines for the Alternative Care of Children’, CELCIS 2012, pages 38 & 95

<sup>18</sup> Section 17(3) Children (Scotland) Act 1995

<sup>19</sup> Section 17(4) Children (Scotland) Act 1995

<sup>20</sup> Section 11(7)(b) Children (Scotland) Act 1995

<sup>21</sup> Section 11(10) Children (Scotland) Act 1995

<sup>22</sup> Section 27 Children’s Hearings (Scotland) Act 2011

## **Who are Siblings?**

“Sibling” is not defined in the relevant legislation. When a local authority is considering placing a child in kinship care, foster care or a residential establishment, and “**any other child in the same family** is looked after or about to be looked after, the local authority must, in making their assessment take into account the need to ensure, where practical and appropriate, that those children are placed with the same carer or in the same residential establishment or in homes as near together as is appropriate or practicable.”<sup>23</sup> “Any other child in the same family” is as close as the legislation comes to defining “sibling”. According to the relevant Guidance:

*“This highlights the need for awareness of the child’s view of “siblings”. Many families have complex structures with full, half and step siblings and research has shown that children’s perception of brothers and sisters and who is in their family is rooted as much in their living experience as biological connectedness. In initial planning for children, especially when they face a separation from their parents, the emphasis should be on maintaining as much as possible of familiar and comforting relationships. Longer term planning needs to be based on a fuller assessment of the nature and quality of different sibling relationships.”<sup>24</sup>*

One example from research shows the following:

*“While laws and policies may have restrictive definitions of siblings that typically require a biological parent in common, child- and family-centred practice recognises close, non-biological relationships as a source of support to the child. In these cases, the child may be one of the best sources of information regarding who is considered a sibling.”<sup>25</sup>*

It follows that, anyone making an assessment, recommendation or decision about sibling contact should have regard to the views of the child as to who their siblings are, and consider whether there are “close personal ties” such as to give rise to the existence of “family life” between the siblings.

The following may be a useful working definition: **“Sibling” includes full sibling, half sibling, step sibling by virtue of marriage or civil partnership, sibling by virtue of adoption, and any other person the child regards as their sibling and with whom they have an established family life.** For example, a sibling might include a foster child, living in the same family.

<sup>23</sup> Regulation 4(5) Looked After Children (Scotland) Regulations 2009

<sup>24</sup> Guidance on Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007, page 43

<sup>25</sup> Children’s Bureau 2013 “Sibling Issues in Foster Care and Adoption”, Child Welfare Information Gateway <https://www.childwelfare.gov/pubs/siblingissues/index.cfm>

## **Prioritising Sibling Contact**

*“...[M]any of the young people interviewed rated their relationships with their siblings as being equally important, if not greater, than their relationships with their biological parents. However, it appears that child protection and alternative care systems prioritise parental contact over sibling contact.”<sup>26</sup>*

Case Study: 11 year old boy was referred to children’s hearing. Grounds of referral were sent to the Sheriff Court by a children’s hearing for Proof. During these proceedings it became apparent to the boy’s solicitor that he was eager to have contact with his youngest sibling with whom he had lost contact. They spoke to the Social Work Department on their client’s behalf. The Social Work department agreed to look into this and were able to make arrangements satisfactory to the boy.

Anyone making an assessment, recommendation or decision about sibling contact, should include consideration of the following:

1. The expressed opinions and views of children about their sibling relationships and their satisfaction with contact.
2. Identification of sibling relationships as characterised by the child (see above).
3. Ability and willingness of carers to facilitate agreed sibling contact.
4. The facilitation of face-to-face sibling contact where possible.
5. Frequent contact in a relaxed, natural setting, involving activities and avoiding office-based contact.

It should be remembered that there will be some situations in which an assessment will lead to a conclusion that sibling contact will not safeguard and promote the welfare of a child looked after by them. “In a small number of situations, the relationship between siblings may be inappropriate or dangerous.”<sup>27</sup> Where that is the case, any assessment and report should set out the concerns identified in relation to sibling contact.

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<sup>26</sup> Report on the inquiry into what children say about contact with their siblings and the impact sibling contact has on wellbeing: “She’s my sister and she will always mean something to me...”, 2011, Government of South Australia, page 60

<sup>27</sup> Guidance on Looked After Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007, page 43