

HOW DO COUNTY COURTS SHARE THE CARE OF CHILDREN BETWEEN PARENTS?



FULL REPORT

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GLOSSARY

c100 Form	The application form used by parents and others who sought Section 8 orders. In the longest-running cases the old c1 form had been used.
Cafcass	The Children and Family Court Advisory and Support Service
Children's Services	The Local Authority social workers that were involved in many of our cases due to child protection related concerns.
Directions Hearing	A shorter hearing to monitor a case's progress and decide on the next steps. Typically 15 minutes.
Ex Parte	A hearing is held without notice to the respondent, often due to feared domestic violence or abduction. It is always followed by a hearing where both parties are present.
Fact-finding hearing	A hearing to investigate allegations of domestic violence. Parties set out their conflicting versions of past events in a Scott schedule.
Initial breakdown cases	Our term for cases that stemmed from the initial breakdown of the couple's relationship.
Kinship care	Where relatives or friends look after children who cannot live with their parents.
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012. Sets criteria for cases which can still qualify for legal aid.
No PCG Case	No Primary Care Giver case. Cases where we deemed both parents to be equally involved in the child's daily routine. See Section 5.1.1 .
Non-Molestation Order	An order that prohibits the respondent from, for example, threatening, following or contacting the applicant.
Schedule 2 / Safeguarding Letter	First letter provided by Cafcass to identify any issues such as domestic violence or children's services involvement with the family.
Section 7 Report	A report on questions related to the child's welfare prepared by Cafcass or the local authority children's services and used by the aid the court in its decision making
Section 8 order	Orders used to resolve disputes over where children should live, who they should see, and other aspects of their upbringing. In 2011 these were: Residence, Contact, Prohibited Steps Orders and Specific Issue Orders. The first two have now been replaced by the Child Arrangements Order.
The Welfare principle	The child's welfare is paramount, i.e. it should be the court's first and only consideration in a Section 8 case.

1 INTRODUCTION

In this chapter we explain the legal context in which the court decisions examined were made. We outline the rationale for the research and the aims of the study. We briefly explain the research methodology, further details of which is provided in Appendix 1.

1.1 The Legal Background

Disputes between the carers of children may be resolved by private agreement, through mediation or determined by a court order.

Most of these types of disputes take place between separating parents but in some of the cases examined, the dispute was between a parent and a non-parent carer (for example grandparents who cared for the child because the mother was ill).

Parents and other carers who want to take their dispute to court for adjudication have to apply for an order under **Section 8 of the Children Act 1989**. These orders are used to determine where a child should live (known in 2011 as a **Residence Order**) or with whom he/she should spend time (known in 2011 as a **Contact Order**).¹ The parent with whom the child lives is commonly known as the resident parent and the parent with whom the child spends time is often known as the non-resident or contact parent.

Two other types of orders, known as **Specific Issue Orders** and **Prohibited Steps Orders**, may be sought to determine discrete questions relating to the child's upbringing. These are used, for example, to decide where children should go to school, or whether one parent should be stopped from taking a child out of the country in a case where the other parent fears the child would never be returned.

The Children Act 1989 requires a court to consider a child's welfare as the paramount consideration when deciding whether or not to make the order sought.² Paramount means that the child's welfare should be the court's first and only consideration.³ This welfare principle requires the court to choose a solution that is in the best interests of the child. The court is required to consider a number of factors when determining what will be in the best interests of the child. This is sometimes referred to as the welfare checklist:⁴

- The child's wishes and feelings
- The child's physical, emotional and educational needs
- The likely effect on the child of any change in his circumstances
- The age, sex, background and any other characteristics of the child which the court considers relevant
- Any harm which the child has suffered or is at risk of suffering.
- How capable each of his parents or any other relevant carer is of meeting the child's needs.
- The range of powers available to the court in the proceedings in question.

¹ These orders have now been relabelled Child Arrangements Orders; they are still set out in Section 8 of the Children Act 1989 and are a straightforward replacement for Residence and Contact Orders.

² S1(1) Children Act 1989.

³ *J v C* [1970] AC 668, pp710-11.

⁴ S1(3) Children Act 1989.

Section 11 of the Children and Families Act 2014 has inserted a presumption into section 1 of the Children Act 1989. This requires the court to presume, unless the contrary is shown, that the involvement of a non-resident parent in the child's life will further the child's welfare. No such presumption was in place when the cases in our sample were decided in 2011.

The court has a great deal of flexibility and discretion in determining what solution would be best for the particular child in any particular case. This flexibility extends to the practical arrangements of post dispute child care and the type of Section 8 order chosen. Under section 10(1)(b) of the Children Act 1989 the court has power to make a particular Section 8 order even though no-one has applied for this particular order. A court can also decide not to make an order at all; Section 1(5) states that orders should not be made unnecessarily, for example if the parents have reached their own compromise agreement.

1.2 Rationale for the Study

Two developments in early 2012 provided the impetus for this study. The first development was a shift in emphasis on the importance of equality in parenting, in child law cases but primarily at family policy level.

Case law from the High Court and the Court of Appeal had moved away from a clear-cut position that Section 8 orders should be used solely to put in place practical solutions that furthered the best interests of the child.⁵ A line of cases developed where a particular type of Section 8 order, the shared residence order, was chosen to emphasise the equality of parental status and improve parental cooperation or prevent the marginalisation of one parent.⁶

At policy level there was increased pressure for some kind of express legal promotion of 'shared parenting' (a term which can be defined in a variety of ways) or even ideally for a presumption that children's time should be shared equally between their parents' homes. Although the Family Justice Review's Final Report rightly recommended against the introduction of any kind of shared parenting presumption, not wishing to draw any attention away from prioritising the child's welfare,⁷ the Government decided to change the law.⁸

A new legal presumption⁹ introduced by the Children and Families Act 2014 now requires the court to presume, unless the contrary is shown, that the involvement of a non-resident parent will further the child's welfare. The purpose of the new presumption was not to create a preference for equal sharing or any other time split between parents.¹⁰ Its aim was to increase public confidence in the family justice system, rather than to change the child focussed emphasis of the law.¹¹ This reform has, nevertheless, kept the contested idea of shared parenting in the public eye.

Residence and contact orders have now been replaced with **Child Arrangements Orders**. The Family Justice Review recommended this change in order to 'move away from loaded terms... which have themselves become a source of contention'.¹² The orders were renamed to avoid any misleading

⁵ This was what had been envisaged by the original draftsmen behind the Children Act 1989.

⁶ *A v A* [2004] EWHC 142 at [124]; *Re G* [2008] EWCA Civ 1468 at [5]; *Re W* [2009] EWCA Civ 370 at [11].

⁷ Family Justice Review, *Final Report*, (Ministry of Justice, Dept for Education and Welsh Govt, 2011) p138.

⁸ The Government Response to the Family Justice Review: A system with children and families at its heart, Cm8273 (TSO, 2012) 66.

⁹ S1(2A) Children Act 1989.

¹⁰ As was made clear in S1(2B) of the Children Act 1989, also inserted through S11 of the Children and Families Act 2014.

¹¹ Edward Timpson's evidence before the Justice Committee: Justice Committee, *Fourth Report: Pre-Legislative Scrutiny of the Children and Families Bill* (TSO, 2012) para 149.

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/739/73907.htm#a10> (last accessed 15 May 2015).

¹² Family Justice Review, *Final Report*, (Ministry of Justice, Dept for Education and Welsh Govt, 2011) p22.

impression that parents with a residence order had greater powers or status, leaving contact parents relegated to a second-class status, again promoting the idea of parental equality in parenting. There were, however, widespread concerns that the effects of these changes encouraged the courts to send messages to adults about the inherent value of equal parenting rather than focusing on a single goal of providing the best solution for the children in the particular case before the court.

The second development was a diminishing role for the court in adjudicating private child law disputes through the introduction of cuts to legal aid and new measures to promote private resolution of child law disputes.

The Family Justice Review set out a clear government policy that courts should be the last resort for parents.¹³ With the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid for families to go to court to resolve private child law disputes has been substantially withdrawn. While funding is available for help with the cost of mediation, subject to means testing, funding for court proceedings is now available only in exceptional circumstances.¹⁴ Where parents apply to court they are now required to attend a mediation information and assessment meeting.¹⁵ The new procedural rules of the Child Arrangements Programme (CAP) also promote out of court dispute resolution and where cases do go to court, swift resolution.¹⁶

As the rationale for these changes was to promote private agreements between parents, many of whom would be unable to afford representation to go to court for form adjudication, it seemed vital to examine the role that the court had previously played in private child law disputes.

1.3 Aims of the Study

The primary aim of this study was to better understand the detail of different types of child care arrangements set up during litigation at County Court level. Very little information had previously been published about the different types of child care patterns confirmed by the lower courts in parental disputes about where a child should live and what sort of contact should be facilitated with the other parent. We wanted to see to what extent the courts facilitated or promoted involvement by both parents in the child's life. We were particularly interested in how cases involving difficult issues of domestic violence or child safety concerns were resolved. **The study provides robust data on the typical levels of parental involvement in court condoned child care arrangements in the cases examined.**

The second aim of the study was to shed light on how the different types of court orders then in existence were used and understood by parents and the courts. Why did parents apply for a one type of legal order rather than another? In what circumstances did the courts substitute a different type of legal order for that requested by the parent applicants?

The third aim of the study was to better understand the role of the courts in adjudicating such disputes. What reasons did parent applicants give for resorting to court adjudication? Could these types of cases be resolved without court adjudication? What process did the court use in achieving resolution of these disputes?

Cutting across all of these questions was the issue of whether obtaining a 'fair' and even-handed solution for adults took precedence over the court's legal obligation to further the welfare of the child as the paramount and overriding consideration. Were the interests of children routinely interpreted as coinciding with adult wishes?

¹³ Family Justice Review, *Final Report*, (Ministry of Justice, Dept for Education and Welsh Govt, 2011) p20.

¹⁴ Where a parent provides cogent evidence that he/she has been a victim of domestic violence or in a very small number of cases where a fair hearing of the case would otherwise be impossible.

¹⁵ S10 Children and Families Act 2014.

¹⁶ Practice Direction 12(B) issued 22 April 2014.

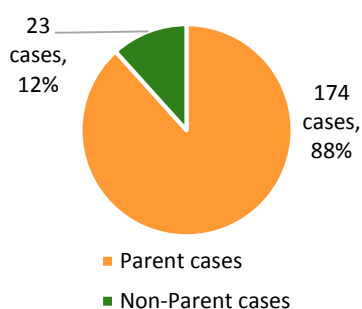
1.4 Methodology

The research is based on document analysis of a retrospective sample of 197 case files from the County Courts. We examined case files from five different County Courts in England and Wales which we code-named Ambledune, Borgate, Cladford, Dunam and Essebourne.¹⁷

The sample was limited to Section 8 application cases which were disposed of by final order in a six month period between February and August in 2011.

	Total	% of relevant S8 cases in that area during that time
Ambledune	10	100%
Borgate	52	27%
Cladford	54	61%
Dunam	31	82%
Essebourne	50	68%
Total	197	

At the time of selection there were 210 County Courts in the UK. It should be noted that our findings about the use of different Section 8 orders and the typical time patterns orders are not statistically representative of the general practice in 2011 but instead give us an idea of the different types of solutions being used in these five courts in 2011 in a range of circumstances.



We found that 12% of the cases examined were not disputes between two feuding parents but instead involved a non-parent such as grandparents or other relative carers. The issues in these cases were different. For analysis purposes, we divided our population of case files into two different types of dispute; those between two parents (parent cases) and those between a parent and a non-parent (non-parent cases). Chapters 2, 4 and 5 focus on the 174 parent cases. The role of the court in adjudicating all 197 cases is examined in Chapter 3. Chapter 6 looks more closely at the 23 non-parent cases.

1.5 Report Outline

Chapter 2 examines the reasons given by parents for applying to court and the different types of order sought in the **174 parent cases**. The levels of domestic violence and reported child protection issues meant that many cases were simply too problematic for private ordering. In a number of cases a legally binding order was required, not a mediated agreement. It concludes that **even within the litigating population, court is not the first option for parents. There was a clear need for court adjudication in many of these applications which could not have successfully been diverted to mediation.**

Chapter 3 examines the role taken by the County Court in adjudicating **all 197 disputes**. The courts' pragmatic problem-solving approaches used the available resources well, and allowed parents time and space to rebuild mutual trust and reach their own compromises where that was possible. It concludes that **court plays a necessary role in adjudicating disputes between parents and should remain a viable option for parents.**

¹⁷ The names are fictional and were selected from disused names in the Domesday Book. Demographic information about the areas is taken from 2011 Census and demographic info posted by the Local Council.

Chapter 4 examines the outcomes in the **174 parent cases**, looking at the success rate for applicants, where the child was living when the case left the court system and the numbers of different types of final orders made. **It concludes that the County courts showed no indication of gender bias in contested cases about where the child should live.** Contact applications by fathers were overwhelmingly successful. Near equal shared care arrangements were rarely sought, logistically difficult to manage and often precluded by families' work patterns and accommodation limitations.

Chapter 5 records all the different ways in which child care was shared between parents in the **174 parent cases** at the time that the case left the court system. The patterns are divided into six different categories: overnight contact cases, regular day time contact, supervised and monitored contact, irregular contact, indirect contact and 'no contact' cases. **The County Courts actively promoted as much contact as possible even in cases of proven domestic violence, often combined with welfare concerns or strong opposition from older children.**

Chapter 6 looks at the **23 non-parent cases** that involved at least one litigant who was not the child's parent. The chapter notes the high prevalence of child welfare related concerns in these disputes: typically, grandparents and other relatives were asked to step in when mothers were unwell or unable to care for their children and protect them from risks. This sizable minority of cases is very different from what is perceived to be the typical private child law dispute between feuding parents. In such cases private law orders may be being used as an alternative to care proceedings. These cases made different demands on the court in terms of time and resources that the paradigm feuding parent cases. **The advantages of using private law remedies are questioned and a call is made for further research** as these cases have been overlooked in Family Justice Review and recent reforms to the Family Justice System.

Chapter 7 provides a summary of our **key conclusions**.

2 WHY DO PARENTS COME TO COURT? - ANALYSING APPLICATIONS

2.1 Introduction

This chapter focuses on the 174 parent versus parent cases.¹

It examines **who** comes to court, **what orders** they seek, **when** in the relationship process applications are brought and **why**, by analysing the reasons given by parents for bringing these cases to court, including child welfare concerns and allegations of domestic violence. The chapter also looks at **family circumstances at the time the case came to court** in terms of: the level of contact taking place at the time of application; and the identity of the status quo carer. It concludes that **even within the litigating population, court is not the first option for parents. There was a clear need for court adjudication in many of these applications which could not have successfully been diverted to mediation.**

2.2 Who applied for what?

This section gives an introductory overview of all the parents' applications. At the time, there were four types of orders a parent could apply for under Section 8 of the Children Act 1989; as well as **Residence** and **Contact orders**, **Specific Issue orders** and **Prohibited Steps orders**, could be used for resolving disputes about one particular, major decision, or to stop a parent from using their parental responsibility in a risky way (for example taking the child on holiday to a war-torn country).

A residence application could be for sole or shared residence (where the child would alternate between both parents' homes) and contact applications could include an application by the other parent to limit or terminate contact.

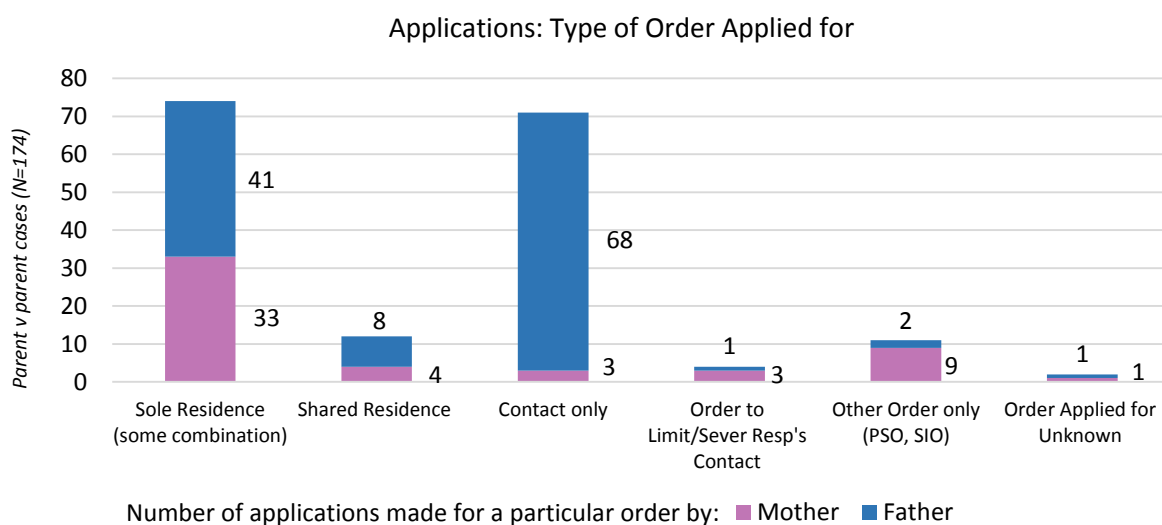
Type of Application	Mother	Father	Total
Sole Residence	27	29	56
Residence or Contact	3	9	12
Shared Residence	4	8	12
Res for Applicant & Contact for Respondent	2	3	5
Res for Applicant & Block Contact for Respondent	1	0	1
Contact only	3	68	71
Order to Sever Contact for Respondent	3	0	3
Order to Limit Contact for Respondent	0	1	1
Other Order only (PSO, SIO)	9	2	11
Order Applied for Unknown	1	1	2
	53	121	174

¹ Chapter **Error! Reference source not found.** examines the non-parent cases where grandparents, aunts and other relatives (in one case a good neighbour) were parties to the disputes.

70%² of parent cases began with an initial application by the father whereas only 30%³ of all initial applications to court were made by mothers.

Freestanding applications for an order to allow the child to have contact with the applicant were the most common types of application making up 41% of all applications.⁴ 96% of contact applications were made by fathers.⁵ Only four applications for standalone contact orders were made by primary care givers for the purpose of obtaining an order which would limit or end the respondent parent's contact.

Applications which sought a sole residence order made up 43% of the sample.⁶ These can be divided into two different types of application: In 62 cases the applicant specifically sought a sole residence order.⁷ In 12 cases the applicant made an either/or application seeking either sole residence or in the alternative, extended contact under a contact order. Applications for shared residence orders were rare, making up only 7%⁸ of the sample.



Similar numbers of applications were brought by fathers (32) and by mothers (30) when it came to seeking a sole residence order. More fathers (9) made an application for either residence or contact than mothers (3). Some of these either/or applications appeared to function to secure tactical bargaining positions, for example, a father denied contact might apply for a transfer of residence in order to re-establish contact.⁹

2.3 Reasons given by the applicants for coming to court

We coded the reasons for making the application given by the applicant parent on the official c100 court application form. This was not always straightforward. Parents did not clearly distinguish between their reasons for seeking court adjudication and their reasons for seeking a particular order. Some parents gave a number of different reasons for the application.

² 121 out of 174 cases.

³ 53 out of 174 cases.

⁴ 71 out of 174 cases.

⁵ 68 out of 71 cases.

⁶ 74 out of 174 cases.

⁷ In 56 cases the applicant sought a sole residence order only. In 6 cases the applicant sought a sole residence order for themselves and an order to limit or end the respondent's contact.

⁸ 12 out of 174 cases.

⁹ The father in C32 explicitly admitted to having done this after the mother repeatedly failed to turn up at court to discuss his initial contact application.

Reason given by applicant on c100 Form	Mother	Father	Total
To establish/re-establish contact	5	45	50
To enforce an existing contact order	0	2	2
To play a role in the child's life	0	9	9
To prevent children being taken from applicant	14	3	17
To prevent child being taken out of the country	3	9	12
To have an abducted child returned to their care	7	3	10
To allow the child to be taken out of the country	3	0	3
The primary carer of the children is incapable	0	7	7
To protect the children from the other parent	6	3	9
On Social Services recommendation	1	8	9
To get more time with the children	1	11	12
To limit the other parent's disruptive contact	5	2	7
To change an inconvenient care arrangement	3	5	8
To formalise the existing care arrangement	4	8	12
To prevent move by other parent	0	1	1
For Immigration purposes	0	2	2
To prevent misuse of Child Benefit	0	1	1
Reasons Unclear	1	2	3
	53	121	174

The reasons provided by parents on the forms can be grouped into several broad categories.

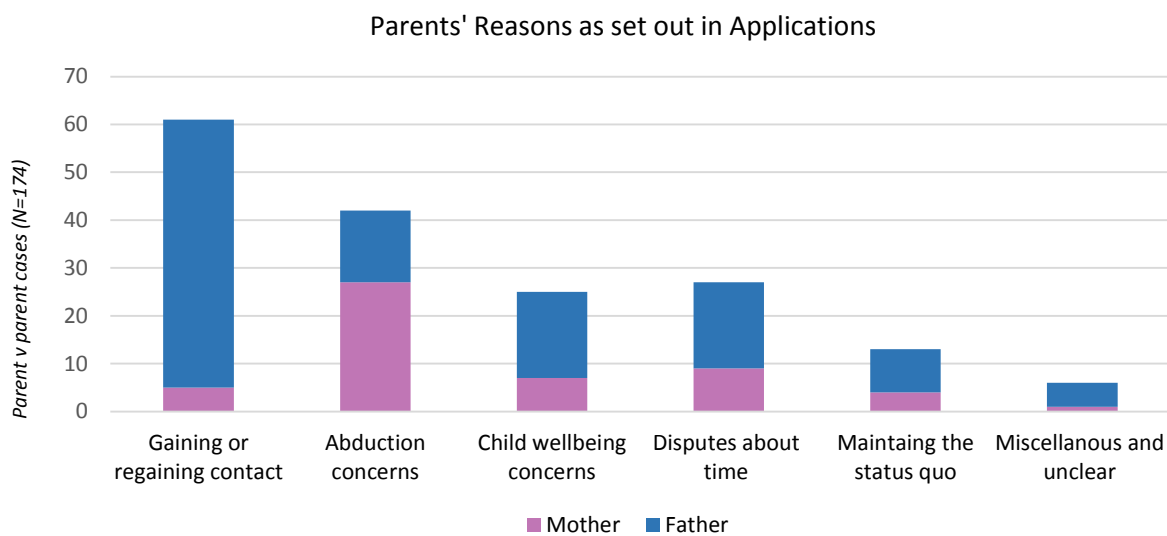
The most common reason given for going to court was **to establish or re-establish contact**, with 5 mothers and 45 fathers giving this reason. In addition, 9 fathers sought orders 'to play a role in the child's life'. Some typical examples include C21, where the father required a court order to restart contact which the mother had stopped because their 11-year-old daughter had come home from contact and talked about the father smoking cannabis, and E42, where the father had not seen his son for 6 months since the mother's marriage to a new partner.

A second broad grouping of applications was primarily related to the **risk of abduction or the need to take action because an abduction had already happened**. 17 applications were brought in order to prevent the children from being taken from the applicant parent's care. A further 12 applications were made to prevent the child being taken out of the country. In addition 10 applications gave the reason of seeking the return of the child. Many of these cases featured allegations of domestic violence. In C15, for example, the father had abducted the two children in a violent incident. The mother successfully applied *ex parte* for residence, a prohibited steps order and a non-molestation order. Finally, in this broad grouping, 3 applications were made by mothers to allow the child to be removed from the country, in order avoid their planned moves being seen as abduction.

In the study by Smart *et al* of contact and residence disputes, 44% of residence applications mentioned concerns about abduction. The authors expressed concern about '[t]he extent of the fear of child snatching' given the paucity of debate on this topic (as opposed to the well debated problems of

contact).¹⁰ It was clear from our sample that abduction was something that worried applicant parents, although we were unable to assess how real these risks actually were.

In a third broad grouping, 23 applications were made for the **purposes of ensuring the child's wellbeing**, with 9 applications stating the need to protect the child from the other parent, 9 on the basis of children's services recommendations and 7 because the applicant considered the primary carer incapable of looking after the child. The concerns in many of these applications were well founded. In E34, for example, the mother was an alcoholic and children's services had been working with the family for some time before the children moved to live with their dad. In D17, children's services encouraged the toddler's move from the mother to live with the father and paternal grandparents due to concerns about drugs and violence in the mother's household. The fact that 9 applicants expressly stated that they had gone to the County Court on the advice of their local authority raises interesting questions about the blurring of the boundary between public and private child law. These issues are examined in detail in Chapter 6 at page 123.



A further grouping included cases where the parents could not agree on the amount of contact the non-resident parent should have, although it was accepted that there would be contact with both parents. 12 applications were made expressly to **increase the applicant's time with the children**. In contrast, 7 applications were made to **limit the respondent's time** with the children. One applicant wanted to **change the details of an inconvenient arrangement**. In C26, a previous court order had been in place for 4 years. Under this shared residence order the children spent Wednesday evening to Saturday morning with their mother and Saturday morning to Wednesday with their father. The mother sought more flexibility in relation to weekends as her daughters were now older. She particularly wanted some full weekends to spend in her new caravan.

In a smaller group of cases, applications were made to maintain or strengthen the status quo arrangement. One applicant wanted the security of an order as the respondent was considering moving house with their children. 12 applications were made to **formalise existing arrangements** informally put in place between the parties.

Finally, two applications were made for immigration-related reasons, and one by an applicant who worried about the mother's misuse of child benefit. In three cases, the c100 form was missing from the file.

¹⁰ C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p21.

2.4 When do parents resort to court proceedings?

Even within the litigating population, court is not the first option for parents. At our five courts, applications were made to court for orders at three distinct points in the process of relationship breakdown.

The comparatively low proportion of our cases which were returning to court to change a previous order challenges the idea that our Family Courts are mainly clogged up with angry parents who return to court again and again primarily to revisit their own adult conflicts. Whilst such cases exist, and we saw a few,¹¹ they are a tiny minority.

1. Initial breakdown cases

17%¹² of applications to court were made at the point of relationship breakdown. For these families, no pattern of separated parenting had ever been established. Since the status quo of care within the intact family had broken down, parenting had been in a state of flux. The court was being asked to set up a new post-separation pattern rather than fix an old one that was not working. These cases are referred to throughout as the ‘initial breakdown cases’. It is worth bearing in mind that as only a 10% of parents go to court at all,¹³ these cases were likely to be the most difficult, bitter or complex disputes occurring at the point of separation.

2. Cases where informal arrangements had broken down.

In 56%¹⁴ of applications the parties had managed to set up stable arrangements to facilitate separated parenting without court intervention and these arrangements had lasted at least one year. The parties had lived apart for that long or had simply never lived together.¹⁵ They had tried to sort arrangements out themselves informally before seeking court intervention. In these cases the couple were either never happy with the arrangement or something had happened to rock the boat. Bryson’s study similarly found ‘that single parents on benefits tended to see the CSA¹⁶ as a “last resort” and therefore, if they thought there was any chance that private arrangements might work, they would try to set something up privately in the first instance’.¹⁷

3. Cases which had been to court for resolution before.

In addition, 23% of applications we saw were made following a previous court order.¹⁸ This means just under a quarter of the cases were returning to court after a previous court order had been made and had worked, often for a considerable period of time. In these 40 cases there was an established pattern of separated parenting which had been formalised by court order but now needed to be

¹¹ One such case was D8, which is discussed in Chapter 2.

¹² 30 cases.

¹³ A Blackwell & F Dawe, *Non-Resident Parental Contact* (ONS, 2003), p39.

¹⁴ 98 out of 174 cases.

¹⁵ Many applications were unclear on whether the parties had lived together at some point in the past, as this information was not routinely recorded. It was clear in these cases, however, that the parties had not cohabited during the last 12 months before the application.

¹⁶ The Child Support Agency. Since 1993, child maintenance is claimed through the CSA rather than the courts (subject to some exceptions). There have been a number of changes in organisational structure and terminology, but the CSA name is still used informally, and for claimants under the 1993 and 2003 statutory schemes.

¹⁷ Bryson and others, *Kids aren’t Free: The Child Maintenance Arrangements of Single Parents on Benefit in 2012* (Nuffield Foundation, 2013), p77.

¹⁸ 40 cases. There was one further case, C49, where the couple had previously been to court about contact but no Section 8 order had been made as the father had been imprisoned for murder just before the final hearing. It is possible that there were also previous orders in other cases but that we found no evidence of them in the files. This could happen where the applicant had moved to from one another area or where a fresh file had been opened and not linked to the previous proceedings.

changed either because one or both parents were not happy with it or because of a change in circumstances.

The decision to go back to court was often not unreasonable. In some cases circumstances changed: the arrival of a new partner who might present a risk to the children and one parent's ill-health were two of the most common reasons. **In many instances, a change in circumstances could not have been accommodated by private agreement as the parents would then have been in breach of a court order.** In B24, the mother changed her mind four times about whether the 9-year-old boy should change schools to come and live with her; the father ran out of patience and applied for a court order to give him residence and the mother contact at weekends and in the school holidays. In E4, where the existing contact order had been in place since 2002, the father wanted to extend contact to alternate weekend sleep-overs now that his son was no longer little.

There were also six cases in our sample where the situation at the time of the application was either unclear from the file or did not fit into any of these categories.

	Sole residence	Residence or contact	Shared residence	Contact only	Res for appl; contact for resp	Other	Appl. unknown	Total
Initial relationship breakdown	14	2	1	8	1	3	1	30
Previous court order in place	6	3	6	20	3	2	0	40
Previous informal arrangement	33	7	5	43	3	6	1	98
Other	0	0	0	3	0	0	0	3
Unclear	3	0	0	0	0	0	0	3
Total	56	12	12	74	7	11	2	174

2.4.1 Common Flashpoints

We have some data from the documents in the files about the flash points that caused parents to come to court after an established arrangement had been in force for some time. In many cases recourse to court was reasonable and necessary as court adjudication was required before the parties could move forward.

The most common flashpoint was that contact had been cut off. In some instances this coincided with a souring in the relationship between the parents. We identified quite a few cases where the respondents were in a new relationship, or had just had a baby with a new partner, and linked these events to the applicants' decision to fight the case at court.¹⁹

In C44, for example, the mother had stopped contact when the father moved in with his new girlfriend. She accused him of having loud, drunken parties while supposedly looking after their one-year-old; she had called them and heard music and voices over the telephone. In E12, the father kept the

¹⁹ The applicants would usually not confirm this, but instead offered child-welfare-related reasons for the application.

children with him after Christmas because he thought the mother’s new partner posed a risk to the children.

However, there were more cases where the flashpoint was directly linked to worries about one parent’s ability to look after the children. A few applicants alleged that the respondents had physically assaulted the children, but it was more common for the risk of neglect to be linked to respondents’ mental health, or their drug or alcohol use. In many of these cases the immediate encouragement to make the application had come from children’s services, in a few others from the children’s school or the police

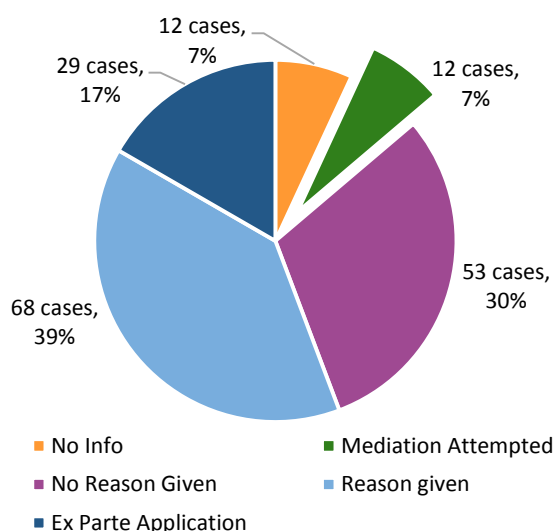
In A9, the parents’ older son was already living with his father when the local authority moved the younger son from his mother care to live with the father. There was a history of domestic violence, both children had been on the child protection register, and the prompt for the move had been the mother’s drug use and her resultant neglect of her son, coupled with the presence of her new partner who had prior convictions for sexual offences.

There were also some cases where the flashpoint was a dispute over money, either child support or how the couple’s property should be divided. In C28, the father’s application alleged threats by the mother to suspend contact until the financial matters of their divorce were resolved. In D15, the mother alleged that the father had quit his job in order to avoid paying child support, while in D23, the father’s earlier failure to pay child support contributed to the bad feelings between the parties.

There were changes in practical circumstances such as house moves, which meant the parties could not agree on how existing arrangements should be changed. There were also a few cases where the underlying problem, which caused frequent returns to court, was parents’ inability to cooperate or compromise. In D31, for example, the mother wanted contact to be organised and set in writing six months in advance, but the father argued that his work patterns made this impossible.

2.5 Use of Mediation

The c100 form required the applicants to explain whether or not they had considered or used mediation before their application to court. Mediation had taken place in just 7%²⁰ of parent cases. A reason why mediation was unsuitable was given in 39% of cases.²¹ In 17%²² of cases the application was heard *ex parte*, without the other parent being given notice of the first hearing. In a further 31%²³ of cases the applicant had merely indicated that mediation was not suitable, but had not told the court why. The remainder of the case files contained no information about whether or not mediation had occurred.



Base: Parent v parent cases (N=174)

²⁰ 12 out of 174 cases.

²¹ 68 out of 174 cases.

²² 29 out of 174 cases.

²³ 53 out of 174 cases.

Pre-Application Mediation	Number	Percent
No information about pre- application mediation	12	7%
Mediation has taken place	12	7%
Applicant considers mediation unsuitable but gives no reason why	53	30%
Reason given by applicant why mediation is unsuitable	68	39%
Ex Parte applications	29	17%
Total	174	100%

2.5.1 Cases in which pre-court mediation took place

In the 12 cases where mediation had been used, the level of partial success differed. In 1 case, A5, it was clear from the application form that mediation had been useful in bringing the parties closer together. The parents had reached a partial compromise, but had to go to court over details of the division of time and whether the arrangement should be labelled 'shared residence' or 'residence and contact'.

In 3 cases, mediation was interrupted by an event which raised child safety concerns, and meant that court adjudication was now required. In A7 mum had known problems with drugs and alcohol, and when dad tried to drop the children off after contact he was unable to find her or get in contact with her. In B65, mediation had been going well until the mediator realised that the paternal step-grandfather was a schedule one sex offender and contacted social services in order for them to assess the risk to the child. These cases show that mediation cannot be guaranteed to keep the parties out of court even where they both engage constructively with it. In C26 mediation was not going well and when one of the children fell ill and was admitted to hospital, communications between the parties broke down entirely.

There were 8 cases where the applicants expressly stated that they had tried mediation in relation to the dispute and it had not worked; most gave no further information on why it had failed. In C36, one of the few where reasons were provided, there was an outstanding dispute about paternity, which made it impossible to agree contact. These parents needed to go to court to establish the identity of the child's father was and a DNA test was ordered at the first hearing.

In C46 the mother applicant stated that she could no longer continue with mediation because she felt intimidated by the father and did not think that he was capable of putting the children's needs first and had unrealistic expectations. In this case the father was looking for a 50/50 division of the children's time to which the mother was opposed. In court, a wishes and feeling report was ordered to determine the children's views.

In C12, the parents had signed an agreement on contact following mediation. However the father said that the mother had reneged on the agreement when she found out that the father's other daughter was present during contact.

2.5.1.1 Cases in which mediation was deemed unsuitable by the applicant

A reason why mediation was considered an unsuitable method for resolving the dispute was given by the applicant in 68 cases. This section sets out some of these explanations as provided by the applicants. Although we were not in a position to assess the truth behind what the parents wrote, it seemed to us that many gave valid, sensible reasons. This raises the question whether the current system is set up to deal appropriately with parents for whom mediation is unsuitable.

	Number	Percent
Respondent parent refused mediation	27	40%
Child safety concerns	9	13%
Parents assessed as not suitable for mediation	6	9%
Background of Domestic Violence	7	10%
'There is no point'	5	7%
Mediation is impractical	3	4%
Parties needed court adjudication	3	4%
Parties needed a formal court order	8	12%
Total	68	100%

In 27 cases the c100 forms stated that **the respondent parent had refused to attend** mediation, or had failed to turn up for a booked initial appointment.

For example in D13, dad stated on his initial c100 application form that whenever he tried to discuss contact with his ex-partner she would just tell him to take her to court. In that case there was an existing contact order in place but dad now wanted more time and an order for 'shared residence'. In C44 the father had gone to the initial assessment for mediation but noted that it did not progress as the mother would not engage. Although he had made efforts to reinstate contact through negotiation and mediation the mother simply would not speak to him or return his messages.

In 9 cases mediation was deemed unsuitable due to **underlying child welfare or safety concerns**, most often evidenced by on-going children's services involvement.

For example, in B17 dad would soon be released from prison, and Borgate children's services insisted that any contact that would take place should be supervised. According to dad, the local authority had provided one supervised contact session but had advised that he needed to make a Section 8 application to take contact any further. In B45 the mother had expressed suicidal thoughts and threatened to harm the children. The father applicant explained that mediation was not possible due to the mother's mental health issues and the delay caused in attending a Mediation Assessment (MIAM) could cause the children significant harm.

In E12, the children lived with their mum. Dad sought a residence order to transfer residence of the children to him because he believed that the children had witnessed domestic violence between mum and her new partner. He alleged that the new partner had beaten the mother so severely that she had miscarried. Under the circumstances, the father felt that mediation was inappropriate. He had no problem with the mother's care as long as the new partner was not present. He felt the main issue in the case was the children's exposure to domestic violence.

In 6 cases, the c100 forms stated that the parties had already been **assessed as not suitable** for mediation. There were allegations of domestic violence in all but one of these cases. In B60 mediation was inappropriate due to a power imbalance between the parties. Mum had made allegations that dad had been verbally abusive and intimidating during the marriage. She did not feel comfortable in dad's presence during mediation.

In 7 cases, the applications expressly linked the decision not to try mediation to a history of **domestic violence**. In C2, for example, mum applied for a PSO on the grounds that dad was physically and verbally abusive, and had also threatened to abduct the child to the parents' mutual country of origin.

There were also 5 cases where the applicant stated on the c100 that there was no point trying mediation because **it simply would not work**. In these cases the parties had either tried mediation before in relation to other issues or communication between the parties had completely broken down.

In 3 cases, the problems were of a more **practical** nature. In C24 the applicant had been unable to locate mum or his children. The father in C49 was in prison, and in C42 the parties lived too far apart for mediation to be practical.

In 3 cases **the applicants wanted a type of determination** which could not be achieved through mediation. In B2 the applicant father wanted a court determination because he felt the mother had falsely accused him of harassing or threatening her.²⁴ In C20 the father said he wanted the children's wishes to be independently investigated and reported to the court. In C18 the mother wanted a court determination about the father's drinking during contact.

In 8 cases, mediation was not an option because **the parties specifically wanted a formal legal order**. In 3 of these cases the parties were in full agreement about further parenting arrangements. The applicants in D10 needed a formal court order to bolster their application to the UK Home Office for remaining in the UK. In D18 and E28 the applicants travelled internationally and wanted a formal residence order to prevent difficulties with border authorities, particularly in the USA. In E33 the mother applicant wanted a formal order to help with her housing application.

The applicant dad in D17 had been expressly advised by children's services that he needed a formal order. Again, this shows that mediation cannot be guaranteed to keep the parties out of court even where they both engage constructively with it.

Three of these cases showed that parents understood that mediated agreements could not be legally enforced. In B61 the father wanted a contact order to legally bind the mother so that contact arrangements could not be unilaterally changed. In B56 the applicant wanted to vary an existing court order and in D30 the applicant wanted the court to enforce the existing contact order and spell out to the mother what the limits of the legal order were.

2.5.1.2 Cases where Mediation was ruled out by the Circumstances

In a number of cases the application had been issued without any prior attempt at mediation, and the parties gave no explicit reasons on the c100 why they had not attempted mediation, but it was clear from the surrounding circumstances why mediation could not have been attempted.

There were 29 cases which began with an *ex parte* application, without the respondent having any notice of the first hearing. 26 of the *ex parte* applications featured allegations of domestic violence and many were combined with an application for a protective order or a prohibited steps order. In these cases, there were likely to be significant imbalances of power between the two parents, and mediation was not a viable option. In the remaining 3 cases the reason for the *ex parte* application was the risk that the respondent would take the child from the applicant's care or because abduction had just occurred and the applicant did not now know where the other parent and children were.

There were a further 22 cases where mediation was not used that featured allegations of domestic violence. This may have meant mediation was not suitable for these parents, particularly in the 10 of these 22 cases where there was enough evidence of domestic violence to meet the current LASPO funding criteria.

The father in C51 had unilaterally kept the 4-year-old after his last contact. The mother said she had been too frightened of him to demand the child back and had waited for him to allow her some contact. She was now seeking residence, which dad resisted. Cafcass safeguarding enquiries revealed

²⁴ There was no history of domestic violence between the parties and these allegations were not repeated.

26 domestic violence related police referrals against dad; these related to 4 different victims including the mother, the paternal grandmother, and dad’s new girlfriend. Cladford children’s services had also previously been involved when the couple were together due to dad’s alleged physical abuse of the little boy and his three older half-siblings. At the first directions hearing, contact with mum was set out and gradually increased over subsequent hearings. It was clear that, in addition to the power imbalance between the parties, there were questions that needed to be investigated and possibly adjudicated upon. In the first Section 7 Report, Cafcass were concerned about dad’s inability to admit and address his drinking and the past domestic violence, as well as his propensity to make groundless allegations of child neglect against mum. When hair strand testing on dad revealed continuing excessive alcohol use, Cafcass recommended a carefully managed return to mum; she had been struggling to cope as a parent, but was now doing better. The final order was for her to have residence with frequent staying contact for dad. The court’s involvement in this case meant that allegations and counter-allegations could be investigated, and the safest arrangement for the child could be arrived at. There would otherwise had been a real risk that dad would bully mum into a solution that only suited him, given the domestic abuse and his inability to recognise when his own behaviour impacted negatively on his son.

In Chapter 3, Section 3.5, we look at the courts’ use of mediation during the court process.

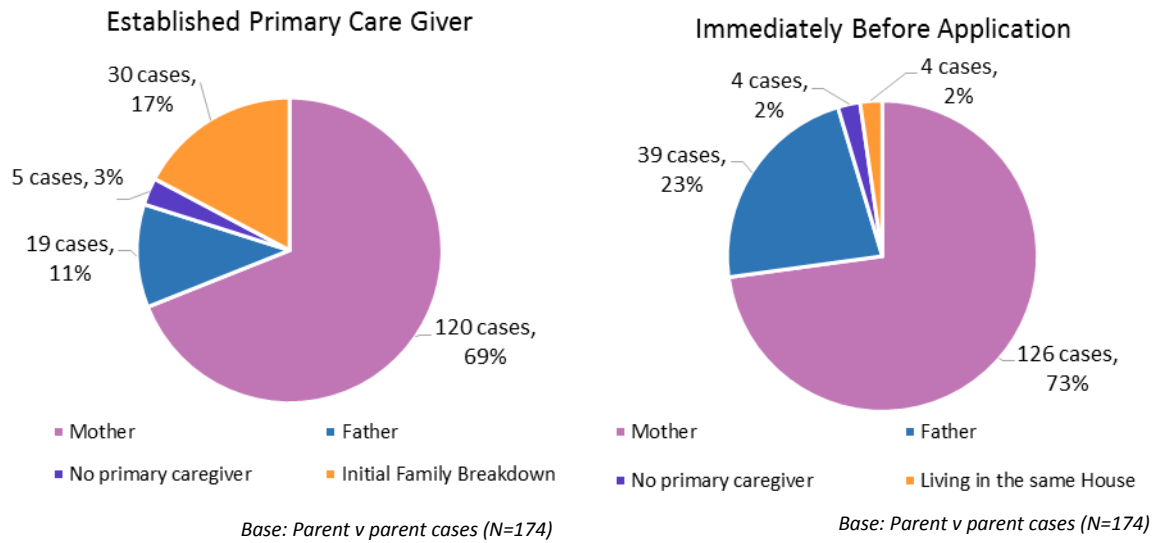
2.6 Reality of Care at the time of the Application

This part of the chapter examines the reality of care in these cases at the time of the application. We look at this in two ways. We recorded **arrangements that were established** in the sense that they had been in place for a year or more. We also recorded **a change in circumstances** immediately before the making of the application, for example where a parent had been suddenly taken ill, or had kept the child after contact in breach of what had been previously agreed.

2.6.1 Primary Care Givers

We had two measures of establishing which parent was the child’s primary care giver (PCG) at the time of the court applications. 1) We recorded who the child was with at the time application was made. 2) We recorded a parent as the established ‘status quo’ PCG if they had been the main carer of the child for over one year. The purpose of this dual measure was to distinguish cases where the child remained with their long term carer at the time of the application, the living situation at the time of the application reflecting a truly established status quo, from cases where there had been a sudden change in circumstances.

Status Quo PCG	Who was the child with at the time of the application?					
	Mother	Father	Both in same house	No PCG	Unclear	Total
Mother	104	16	0	0	0	120
Father	2	17	0	0	0	19
No primary caregiver	1	1	0	3	0	5
Initial family breakdown	19	5	4	0	2	30
Total	126	39	4	4	1	174



In 60% of cases,²⁵ the established PCG was the mother and the child was still living with her at the time of the application.

In 10% of cases²⁶ the father was the established PCG and the child remained with him.

In 10% of cases²⁷ there had been a recent transfer of care from one parent to another. In 16 cases the child had been living with the mother and was now with the father. In 2 cases the child had previously lived with the father and was now with the mother. In 10 of these transfer cases the transfer had occurred because the child had been placed with the other parent following social services or police involvement. In 8 cases the change was because one of the parents had retained the child following contact. Most of these cases also cited child safety concerns as the reason for retaining the child.

In 17%²⁸ of cases this was the initial family breakdown; the status quo had been everyone living together as an intact family. In these 30 cases most of the children were then living with their mothers at the time immediately before the application.

2.1.1.1 Was contact happening at the time of the application?

It was clear that in 51%²⁹ of cases the child was not having contact with one parent at the time of application. In 20 cases the child had no contact with the mother, in 69 cases there was no contact with the father.

There is truth to the claim that the one of the main reasons for court applications is because contact has been terminated by resident parents (who are mostly mothers). However, this does not automatically mean that these mothers are acting out of spite; in many case files there were clear and convincing reasons why contact had been stopped and court adjudication was required before contact could be recommenced.

In some cases there were circumstances beyond the parties' control; in four cases the contact parent was in prison, for example.³⁰ In a few cases one parent had left the family home, contact had then

²⁵ 104 out of 174 cases.

²⁶ 17 out of 174 cases.

²⁷ 18 out of 174 cases.

²⁸ 30 out of 174 cases.

²⁹ 89 out of 174 cases.

³⁰ B52, C3, C22 and C49.

dwindled to nothing or stopped abruptly. In other cases, such as E10, the parties had split up when the baby was little and contact had always been irregular.

In other cases contact had ceased due to a temporary crisis. In C15 the father had forcibly removed the children from the family home and would not let the mother see them. She feared that he would try to gain passports for them to take them back to the parties' country of origin, as he felt that was the only way to guarantee a sound religious upbringing. In D20 contact had stopped because the parties were at an impasse as to how contact should continue. The mother cited past domestic violence and drug abuse as obstacles to contact and insisted on using a contact centre, but the father said he could not afford to pay for that. In C18, the mother stopped contact because she suspected that the father was drinking while he was looking after their 8-year-old daughter. In D3, the relationship had broken down three weeks previously, and the father had not seen their 4-year-old daughter since, because the mother had left the family home taking the children with her without leaving any contact details. The mother claimed she had fled from domestic violence and she was subsequently granted an ex parte occupation order.

In other cases, relations between the parties had been deteriorating for some time. In B9 there had been minor conflicts around contact, the children's education and financial matters. After a disagreement ended in an incident of physical violence the mother had terminated contact, stating that she was also worried that the father might abduct the children. In C38, contact had been agreed at court two years previously, but there had been frequent arguments over the father's tendency to return the child late. The mother eventually decided to obey the court order to the letter, and then terminated contact when the father, once again, informed the mother in the middle of contact that the child was going to be returned a day late. The father applied for shared residence, and told the judge at the first hearing this was to make sure he was 'on a par' with mum.

In some cases, contact had become so risky that children's services were intervening. In B36, Borgate children's services told the father to apply for a residence order, because the only other alternative would be care proceedings. The mother not only had substance abuse problems but had also taken up with a dangerous new partner. When contact with their toddler was eventually restarted, it was to be supervised by the father.

2.7 DV allegations and Child safety concerns at the time of application

2.7.1 Allegations of Domestic Violence

When recording the instances of allegations of domestic violence we used the Government's broad definition, which includes allegations of any controlling, coercive or threatening behaviour including physical violence, sexual violence, and emotional abuse.³¹ We focused on allegations made by one parent against the other, given that those parents would be required to enter into a post-dispute parenting arrangement after the court case has finished.³²

Allegations of domestic violence were made in nearly half of the parent cases.³³ The type and level of violence varied substantially, from attempted murder in B17 and D28, to common assault in B13 where the mother had thrown a coffee mug at the father's head and claimed to have acted in self-defence. In C28, the father had on one occasion been verbally aggressive and had also grabbed the mother by the right forearm. She later agreed that although she had been very frightened at the time

³¹ The current ACPO definition. www.acpo.presscentre.com/Press-Releases/ACPO-comment-on-the-definition-of-domestic-abuse-1a4.aspx accessed 28 October 2014.

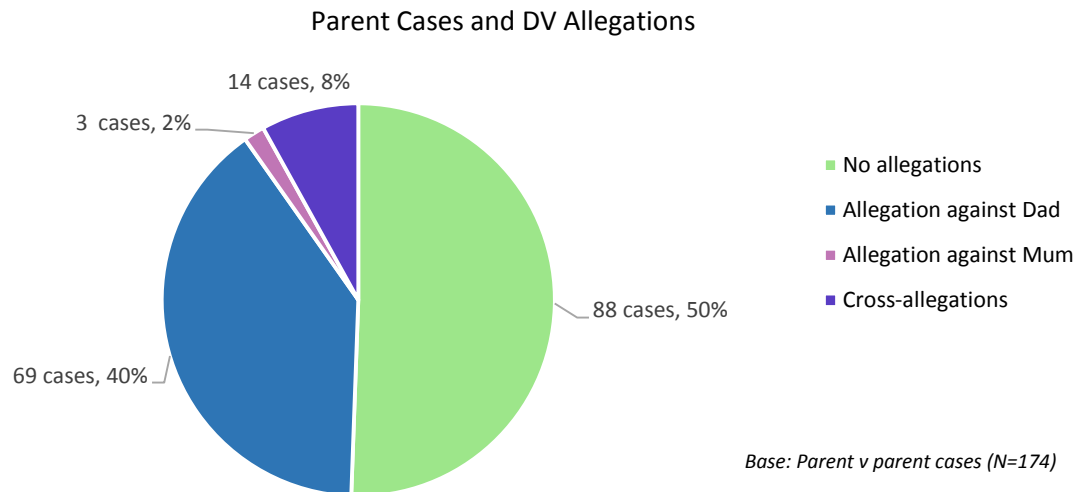
³² Where other issues in relation to a violent home life were raised, such as violence between mum and her new partner, these have been recorded as serious child welfare concerns; it is well known that children are harmed by witnessing violence.

³³ 86 out of 174 cases.

and very worried afterwards, the incident had been once-off behaviour that was out of character and linked to the stress of the divorce.

In 69 cases the alleged perpetrator was the father, in 3 cases it was the mother, and in 14 cases both parents accused each other of having been violent or abusive.

In 18 of the cases that featured accusations of domestic violence the applicants sought non-molestation orders as well as Section 8 orders. 26 of the Section 8 applications in such cases were made *ex parte*, without the respondents being told of the first hearing.



2.7.1.1 Factual Evidence

As we only had access to file documents and did not conduct interviews, it was impossible for us to ascertain whether or not the allegations of domestic violence were true. **We could only measure the supporting evidence provided and whether the court attempted any investigation or made findings of fact.**

Of the 86 cases in which allegations of domestic violence were made the new LASPO evidential requirements³⁴ were satisfied in 45 cases. This mirrors findings by Mackay who in a study of Scottish court cases found that only 42% of persons alleging domestic abuse would have the evidence of the kind required under LASPO.³⁵ The requirements were most commonly satisfied by protective orders made either in previous proceedings or as an *ex parte* order made at the first hearing.

In C6, for example, the father had a previous conviction for domestic violence during the relationship. At a contact hand-over, he had assaulted the mother in front of their 18-month old baby. She applied for residence, prohibited steps and non-molestation orders on the advice of children’s services and the non-molestation order was granted at the first hearing.

In C22, the mother’s application for residence, prohibited steps and non-molestation orders cited an alleged failed attempt by the father to ‘snatch’ the child in the street. He was currently serving a prison sentence for robbery but was about to be released on licence. A letter from children’s services confirmed that the family were known to them because of domestic violence.

³⁴ As required under Regulation 33 Legal Aid Sentencing and Punishment of Offenders Act 2012 and outlined in the Legal Aid Sentencing and Punishment of Offenders Act 2012 –Evidence Requirements for Private Law Matters.

³⁵ K Mackay, ‘A plea from Scotland: preserving access to courts in private law child contact disputes’ [2013] *Child and Family Law Quarterly*, 294, p297.

Type of Evidence	N°	%
Conviction	8	17.8%
Police Caution	3	6.7%
Ongoing Criminal Proceedings	3	6.7%
Existing protective order	16	35.6%
Successful application for NMO or OO alongside the S8 application	6	13.3%
Previous undertakings	1	2.2%
MARAC assessed as high risk	1	2.2%
Social Services Letter	5	11.1%
Domestic Violence support letter	2	4.4%
Total	45	100%

In B59, the father had taken the baby home from hospital and had raised him ever since; the mother had a long history of mental illness. He had been forced to move after she had turned up at his flat and had been so abusive that police and social services had to come and help remove her. There was a non-molestation order in place to protect father and son.

In D26 both parties were granted non-molestation orders to prevent further verbal or physical abuse. The father said that the mother had scratched and punched him; she accused him of breaking her nose.

In the remaining 41 cases the evidence of domestic violence present at the first hearing did not satisfy the current LASPO funding criteria. This means that had these 41 cases been heard today, legal aid would probably not have been available, unless the applicants could provide additional evidence. In some of these cases the level of violence alleged was extreme and evidence of the violence was not present at the time of application but was generated as the case unfolded.

Some of our sample cases raised some interesting questions about the LASPO criteria as appropriate measures of domestic violence.

For example, in D29, the mother said she would oppose contact until the father took some steps to address his violent and controlling behaviour and stop sending her threatening text messages. There was not enough evidence at the outset to satisfy the LASPO criteria, but there were 17 incidents recorded by the police, who later assessed this as a high risk case when the father wrote R.I.P. outside the mother's house.

In C49 there was clear evidence of violence but it was not of the type to satisfy the LASPO criteria. The father sought indirect contact with, and information about, his 4-year-old. He was serving a prison sentence for the violent murder of a prostitute who had propositioned him; it had been motivated by his generally poor views of women. Whilst he was clearly dangerous and difficult to deal with, these facts did not fit into LASPO criteria (nor did the evidence of incidents during the relationship that were available at the time).

In Chapter 3, Section 3.3 and Chapter 5, Section 5.7 we examine how the sample courts investigated allegations of domestic violence and the measures taken to ensure that any contact that took place was sufficiently safe for the children.

2.1.2 Applications with Serious Child Welfare Concerns

In 79 of the 174 parent cases, (45%), an allegation was made that at least one parent was unable to care for the child or presented some kind of risk of harm. We classed these cases as having serious child welfare concerns. This definition did not include minor shortcomings and the sorts of mistakes that all parents can make, for example persistently being late for school or allowing children access to violent computer games. There were some cases where one parent alleged a welfare problem, but it quickly became clear from the file that this was not the case. Our figure is consistent with research by Hunt and McLeod which found 'serious welfare issues' in 54% of their cases, but also included domestic violence in that definition.³⁶

In our sample, alcohol and drug use were cited as problematic in a total of 30 cases, in 13 of those in combination with other risk factors. Mental health issues featured in 14 cases. There were 16 cases where the problem was not the primary care giver parent *per se*, but his or (usually) her inability to prioritise the children and safeguard them against third parties. Sexual abuse was a comparatively rare allegation in our sample made in only 2 cases. In contrast, there were 15 cases where professionals were concerned about physical abuse, often because of unexplained injuries. In 5 cases one parent was so violent that they presented a risk of harm to the child. In 3 cases the conflict between the parents was so protracted and severe that the children were suffering, or at risk of suffering, emotional harm. The files showed that in at least 15 of these cases there was a combination of two or more of these risk issues.

In B7, the 2-year-old had a series of bruises and other injuries that the parents sometimes claimed were accidental and sometimes blamed on each other. Mum had stopped contact with dad. He was seeking residence. According to children's services, both parents were lost in accusatory and blaming behaviour; they suspected that the little girl was being coached to blame all injuries on someone and would develop divided loyalties and confusion. She was made subject to child protection plan under the categories of actual emotional harm and risk of physical abuse

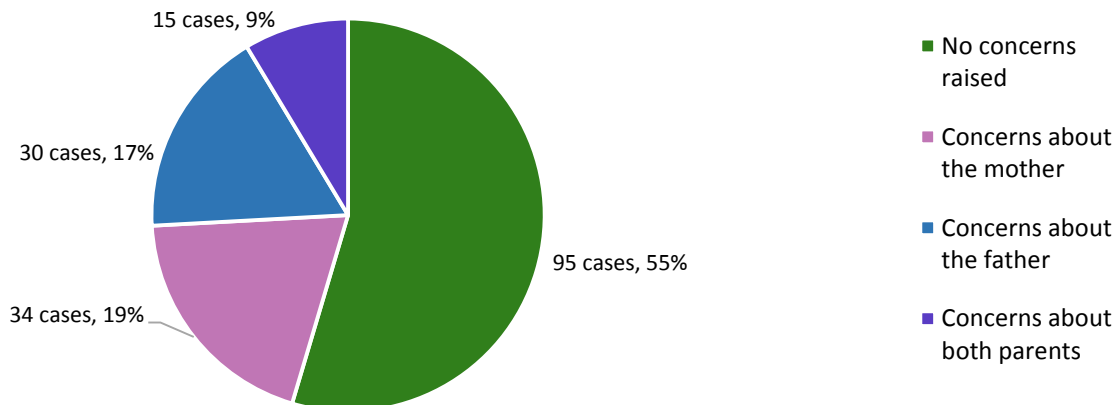
There were 34 allegations of a significant risk posed by the mother's care. In 30 cases the father was accused of being a risk to the child and in 15 cases there were allegations made against both parents.

In D11, the mother had quite serious mental health issues, and the father sought a residence order claiming that she was unable to keep their 18-month-old son safe (she had let him play with a knife and a lighter, for example). Children's services became involved, and the mother was getting some help with her depression and general circumstances. Contact was re-started before the hearing on residence. During one contact visit, the little boy was found, at 7 am, wandering alone on a busy street, while the father was at home, drunk. Children's services were now unwilling to let the father have overnight contact; a move was no longer an option, particularly as the mother was now coping a lot better.

As we were only looking at the documentation available in the files, we are unable to make a decision on how true these allegations were. As with domestic violence, we could only record what measures the court took to investigate the allegations and safeguard the children. This issue is examined further in Chapter 3, Section 3.2.

³⁶ Domestic violence (34%); child abuse or neglect (23%); drug abuse (20%); alcohol abuse (21%); mental illness (13%); parenting capacity affected by learning disability (1%) or fear of abduction (15%), including removal from the UK. (8%). J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p9.

Child Welfare Related Allegations made by Parents



Base: Parent v parent cases (N=174)

2.7.1.2 Local Authority Involvement and Child Protection Proceedings

Local Authority children’s services departments were involved in 43 (54%) of all cases in which child welfare concerns were raised. In many of these cases children’s services was conducting a child protection assessment at the same time as the private law proceedings.

We found details in many files that suggested that the Section 8 applications had been made on the advice of the local authority. In C11, children’s services had been involved with the intact family, largely due to mum’s abuse of drugs and alcohol, and advised dad to seek residence once the relationship had broken down. Ambledune social workers also had prior involvement with the family in A9, and had recommended that the child be moved to the father’s care because of the mother’s difficulties in controlling her sons’ behaviour and her drug use.

In C6, children’s services had received a referral from the police after the father had physically assaulted the mother. This attack, which was the latest in a serious of violent incidents, occurred during a contact hand-over. The mother was advised by social workers not to allow unsupervised contact as it was not safe for their toddler; she applied for residence, prohibited steps and non-molestation orders.

The precise nature of child protection investigations in these files was not always clear. We were dependant on what had been sent to the court and deposited in the file; the information was gathered from the applications themselves, the Section 7 reports, letters from the local authorities and enclosed local authority assessments of the children.

In D17 the father applied for residence with the support of Dunam children’s services. The file suggested that the mother had underlying drug and mental health issues; the child had been living with the father for nine months and the mother did not oppose the application. The order noted that she was having regular staying contact under an agreement made with Dunam children’s services. A residence order for the father was made after one hearing. Cafcass were unhappy about the lack of detail provided by the local authority as to why this change of residence had been recommended and implemented in the first place.

This suggests that in some cases the decision to use particular private orders in these circumstances are carried out away from the court, and the transparency of these decision could become problematic. There were a number of applications for residence made by fathers in circumstances similar to those in D17, and they are discussed below at page 30.

2.8 Analysis: What did the parents want a court order to do?

We put forward an assessment of what the applicants wanted to achieve in applying to court by analysing the evidence of the reality of care at the time of the application and the reasons given by the parents in their applications

The discussions of mothers' and fathers' applications are separated, as we found a meaningful difference in purpose between applications by mothers and fathers, particularly when it came to requests for sole residence and contact. We found, like Smart *et al* and Hunt and Macleod, that the outcome parents actually wanted was not always clearly discernible from applications.³⁷

2.8.1 Mothers Applications for Sole Residence

There were 30 applications by mothers that were clearly about seeking sole residence.³⁸ **Typically, these applications were made to consolidate the mother's place as primary carer of the children in circumstances where there was felt to be some threat to this *status quo*.** Many of these mothers also made allegations about domestic abuse and sought protective orders.

In C48 mum explained on her c100 application form that she was worried about dad's drinking and his state of mind. She felt that he might try to abduct the children, who were 12 and 4. The marriage had been marred by his alcoholism, frequent verbal abuse, and occasional physical violence. At the point of marriage breakdown, dad made death threats and suicide threats. Mum had been advised by the police to seek a non-molestation order. The Cafcass safeguarding letter before the first hearing highlighted that the older child in particular had witnessed much of this violence, and that the case therefore had a child welfare dimension.

In most of these cases the mother was the established primary care giver and seeking to protect that position. In 18 of the cases where the mother sought sole residence she was the established care giver, 7 applications stemmed from the initial family breakdown, there were shared care arrangements in 3 cases, and in 2 cases the father was the primary care giver.

The most common reasons given for applications for residence by mothers were fears that the father **would abduct the children from their care or from the jurisdiction.** In 5 of these cases the children had been retained by their fathers after contact. Many of these cases had a background of domestic abuse.

In C31, the parties were divorcing. The mother said that the whole marriage had been punctuated by violence. She described an incident a few years previously where the father had grabbed her face, knelt on her head and said he wished that she were dead, as the first time she had genuinely feared for her life. She said he was aggressive and controlling, but acknowledged that she had suffered from post-natal depression and had started many of the arguments. She now applied for residence and prohibited steps orders because the father had kept the children so long after the Christmas contact that they missed the start of school. At the time, she had been told by police officers that that without a residence order there was not much they could do. The father responded that the mother was a violent and unstable person, who had mental health problems. He claimed that she had banged her own head against the wall to implicate him. The family were not known to the police or Cladford children's services. Mum said she was not opposed to contact in principle, but it must be regular. It

³⁷ For example, some parents applied for all available Section 8 orders, seemingly unclear as to which ones they needed or the differences between them. C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p10; J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p34, p130.

³⁸ 27 applications for sole residence, 2 for residence and defined contact for dad and 1 for residence and blocking dad's contact.

seemed that what she wanted from the order was a protective framework that recognised her status as primary carer and could give her access to police and other agencies should things go wrong.

In 22 cases the father was accused of domestic violence.³⁹ In 13 of these cases the LASPO evidential criteria were satisfied. Furthermore, 3 of the residence applications where allegations of domestic violence were made included an application to define the father's contact made for the purpose of severing or reducing the father's contact with the child. Protecting themselves and their children from domestic violence was a common feature of residence applications by mothers. **In 18 cases the mothers sought additional orders such as non-molestation orders, occupation orders and prohibited steps orders.**

In C3, the mother claimed in her application that the domestic violence had continued since the separation and that their three young children had witnessed this. The father had twice been sent to prison because of his assaults on the mother; there were 30 records of police call-outs to the parties' address between 2003 and 2011. The father also had a drug problem that was probably the cause of many of his 43 previous convictions for 80 offences of violence, theft, burglary, and public order offences. The initial Cafcass safeguarding letter stressed the importance of contact being safe for the children, given the circumstances.

Child welfare concerns were raised in 18 cases, with significant Local Authority involvement⁴⁰ in 8 cases. There was particularly heavy Local Authority involvement in 3 cases. In A9, the focus was on the applicant mother's drug use and her new partner's prior convictions for sexual offences. In B44 and E24, the two cases in which the mother applicant sought a transfer of primary residence, children's services were engaged in a balancing exercise of the risks associated with both parents.

In E24 the mother applied for a residence order because she wanted her 3-year-old son back. He had lived with her from birth, but the father had taken him just over a year ago after mum had an argument with a previous partner that had ended in an incident of violence. Contact had ceased completely for 4 months but was now happening irregularly. The relationship was characterised by several splits and reconciliations, and by incidents of domestic violence which children's services said had been predominantly perpetrated by the father although he said that the mother was mentally unstable and had always attacked him. Although there were no specific details in the fairly basic file, it seemed clear that the mother had some significant problems. Her older child had gone to live with the child's father, drug tests were ordered by Esseborne County Court, and when the parties reconciled towards the end of the case they signed a safeguarding agreement with children's services, which stipulated *inter alia* that there was to be no substance abuse and that the child must be protected from witnessing domestic violence.

In C39, where a shared care arrangement was in place, the father had physically assaulted the 12-year-old daughter and thrown her out of the house, and mother felt the children should come and live with her instead. They did, but by the time she applied to formalise the arrangement, children's services had concluded that this had been a one-off incident, and supported the children's wishes to go back to live with dad.

2.8.2 Mothers' Applications for Shared Residence

There were only 4 applications by mothers for shared residence orders. In two cases, a pre-existing shared residence order was in force. In the other two cases the father was the established primary

³⁹ Includes 3 cases where accusations were made about both parents.

⁴⁰ That is to say involvement which went beyond writing the Section 7 Report or responding to specific queries from Cafcass. These were generally cases where the local authority was carrying out a child protection assessment or were supporting or opposing an application.

care giver. There were no child welfare concerns raised in these cases, and only one case featured allegations of domestic violence. These cases were all quite different.

In E5 there was a shared residence order from 2008, and the mother applied to extend her alternate weekends by one more night, and for permission to take the children back to her home country in the school holidays. In C26 the parties had been sharing residence for 4.5 years, and a slightly changed SRO was also sought by the mother, to give her more time with the children. In E33 the parents were on good terms and it seemed the primary reason for the mother's shared residence application was to help with her application for social housing.

In contrast, in E48 the mother sought to change the arrangements under an existing shared residence order. In this case the mother made allegations of domestic violence, applied for a non-molestation order and said that she had been coerced into consenting to the existing shared residence order. The children spent the majority of their time with mum spending alternative weekends with dad. She claimed that the father's main reason for insisting on the existing shared residence order was in order to keep his social housing and that he used his status under the shared residence order to assert his power and bully her. This allegation was backed up by the Cafcass Section 7 report.

2.8.3 Mothers' Applications for Contact

Applications by mothers to have contact with their children were rare and we only found 3 in our sample. They were a small, potentially atypical group of cases. In all 3 cases the mothers were seeking to re-establish contact after a considerable break and there were very serious concerns about the mothers' parenting ability. In B55 and B59 the mothers' mental health problems meant that the focus was on making contact calm and reliable. In B58 the ten-year-old boy said that when she was drunk, his mother could be threatening and physically abusive.

There were 3 additional cases where the mothers had sought either residence or contact, but where the residence applications seemed to have been made for tactical purposes. The father was the *status quo* carer in all 3 cases, and contact had broken down. In B19 the two children (aged 10 and 12) refused to see their mother. In C35 the mother conceded at the first directions hearing that she did not really want residence as the children had been moved around enough already. In A2, the third case, the mother withdrew her application for residence mid-way through the case when a Family Assistance Order was made to help with the implementation of contact.

2.8.4 Mothers' Applications to Limit or Terminate the Father's Contact

A total of 12 applications were made by mothers with residence for the purpose of limiting or blocking the father's contact.⁴¹ These applicants sought residence orders, no-contact orders or other orders such as prohibited steps orders to achieve this outcome. These applications generally represented serious concerns for child safety rather than malicious attempts to block contact.

In D5, the father had allegedly threatened never to return the children during their last visit, and the mother sought a contact order to block contact. In B57, the mother's application to block contact was a response to the teenage son's refusal to have any more contact with his alcoholic father. Some mothers who sought a formal residence order as a way of stopping contact had been prompted to do so by outside agencies: in B33, mum acted on the instructions of the police child protection unit; in B16 the father's many attempts to draw the children into making false allegations against the mother and other people had been assessed by children's services as amounting to a serious risk of emotional harm.

⁴¹ Only 2 such applications were made by fathers.

2.8.5 Fathers Applications for Sole Residence

Fathers' applications for residence were mainly to change, rather than protect, the status quo or to reflect a recent change in care.

There were 32 applications for sole residence by fathers and 2 applications for either residence or contact which we judged as genuine attempts to have the children come and live with their fathers rather than tactical applications made solely for the purpose of restarting contact.

In B45, the father applied for contact or residence but was actually seeking to formalise an arrangement where his son had been living with his father and his new wife for 18 months. The mother, who had a diagnosis of mixed personality disorder, had expressed suicidal thoughts and also talked about killing the 8-year-old boy. The mother did not resist the order, and never attended court.

Dad was the pre-application status quo primary caregiver in only 7 of the 32 applications by fathers for residence; in 16 the mother was the PCG, 8 arose in initial relationship breakdown cases, and 1 was a situation of near equal shared care. However in 20 applications, the child was in the care of the father at the time of the application.

Fathers' applications for sole residence broadly fell into three categories. In the first, and largest, category were cases where the father sought to become the primary care giver or have his status confirmed because the mother could not cope. In 16 cases a change of residence was sought, from mum to dad, because of child welfare and safety concerns that had manifested in recent crises. In 4 further cases where dad was the established primary care giver for over 1 year the child had initially been placed with him due to mum's inability to cope due to drugs or mental health issues.

What stood out from these cases was how many of the fathers' residence applications featured quite serious fears about the children's safety, which were usually shared by social workers or healthcare professionals. If we look at the reasons given by the fathers in the 32 applications for sole residence, 8 mentioned local authority involvement, 7 claimed that Mum was incapable and 3 were made to protect the child from the mother. In C37, for example, dad alleged that the 13-year-old daughter would frequently wander the streets rather than go home and face her drunk mother, who would sometimes assault her.

In D14, the 5-year-old girl had been living with her mother. She had moved to dad because of a very frightening assault that occurred when her mother was drunk. The police records showed that the mother shook the little girl, punched her three times, bit her on the face and pulled her from the back seat of a car to the front seat by her hair. The father collected his daughter from hospital and applied for sole residence on the instructions of Dunam children's services, who would have otherwise have instigated care proceedings. Mum had a history of binge drinking and cocaine and heroin use; the baby was born with opiate withdrawal symptoms. The child had been fostered for a few months after she was born,⁴² but returned to her mother after a parenting capacity assessment. The mother was out on bail, but all professionals were agreed that the long term solution was for the daughter to remain living with her father, despite the fact that he had previously been a drug user and there was a record of domestic violence during the relationship.

D14 was a case where the local authority were balancing the risks associated with both parents.

When the daughter in B20 was one, children's services had become involved after the stillbirth of a younger sibling had triggered or exacerbated mum's heavy drinking. There had been two Section 8 proceedings since. The father was now applying for sole residence, and the Section 7 Report, written by a Borgate social worker, confirmed his view that shared residence was not working. It noted that 'Whilst it had been hoped that a joint residency [sic] would provide a satisfactory outcome for [the

⁴² On a voluntary basis under Section 20 of the Children Act 1989.

girl] and both parents, the situation appears to have left [her] experiencing instability' and relationships within the family had not improved. Mum was an alcoholic, with a chaotic home. When interviewed, the 10-year-old daughter said: 'it feels like I'm looking after her, it feels like I'm the grown up and she's the child'. There were frequent fights between the mother and her friends; the daughter witnessed these and was sometimes a target for the violence. The Section 7 Report also criticised mother's lack of insight into how her drinking and fighting with friends affected her child. At this point in proceedings, the father applied to relocate to another country with the daughter, his new wife and her children.

In B36, C14 and D14 the fathers wrote in their applications that they had been expressly told that if they did not apply for residence, children's services would have to consider care proceedings; the children could not be left with their mothers. In fact, the files showed that the local authority had been involved in placing the child with the fathers in 8 of the cases where the fathers sought residence orders. In A7, the mother was a drug-user who one day failed to turn up to collect the children from school; children's services were happy for them to go and live with their father.

In most of these cases, mothers struggled with addiction and/or mental illness. In E41, for example, the move from mother to father was the outcome of a Section 47 child protection investigation; the 8-year-old daughter had become a carer for her mother due to the latter's mental health problems.

In B36, the father applied for a residence order. The 3-year-old girl had been handed to him after a family group conference convened. The toddler had been under a child protection plan since birth, due to her mum's substance abuse problems, and her involvement with partners who presented a risk. Mum had a conviction for being drunk in charge of a child when the daughter was a very young baby, and was facing an impending prosecution for robbery. Children's services confirmed in writing that urgent public law action would have to be taken if the child was returned to her mum. The mother did not respond to the allegations in writing, but the available documents from professionals, and the judge's notes from the one hearing in the case where the mother appeared in person, suggested that she accepted that her daughter would have to live with the father, and that contact had to be supervised.

The second smaller category included fathers who came to court to establish themselves as primary carers straight out of relationship breakdown.⁴³ These were genuine disagreements between private individuals about who should be the primary care giver.

The third category included 3 cases where the father had been the *status quo* PCG for some time by agreement between the parties and sought an order to protect this status and 1 case where shared residence had been agreed by the parties but the father applied for sole residence because mum had reneged on the arrangement.

Allegations of domestic violence were much less prominent in fathers' applications for residence than in those of mothers. Of the 32 applications by fathers for sole residence, 8 raised allegations of domestic violence perpetrated by the mother.⁴⁴ Only 2 were supported by evidence satisfying the LASPO criteria.⁴⁵

Fewer fathers applied for additional protective orders than mothers. Non-molestation and occupation orders were sought in 2 out of 32 applications, and there were 9 applications for prohibited steps orders in addition to the residence orders. Only 3 initial applications were made *ex parte*.

⁴³ In contrast, only 2 fathers' applications for contact were for the purpose of setting up the initial post-relationship breakdown pattern.

⁴⁴ In 5 of these cases allegations were made against both parents

⁴⁵ The Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1. In one of these cases, C45, there was also LASPO-compliant evidence about the domestic violence perpetrated by the father.

2.8.6 Fathers' Applications for Shared Residence

There were 8 applications by dads specifically for shared residence orders. In 7 of these cases the mothers were the *status quo* PCGs, while the last application resulted from the initial separation.

There was a common theme in submissions made by fathers of wanting equal status and seeking to avoid marginalisation. 6 of the applications were also motivated by the need to play a larger role in the child's life or have more time with them. In B31 the father stated specifically that a shared residence order would not have merely symbolic importance but would also have a real psychological importance. In A5, the father complained that the mother was being controlling; he wanted an equal division of time to signal equality. In D13 there had been conflict over contact for almost all of the four-year-old's life. The father sought shared residence, and also explained that he wanted a formal order that he could later enforce, rather than a mediated agreement that the mother could choose to ignore.

2.8.7 Fathers' Applications for Contact

The majority of the 68 applications for contact orders made by fathers were to initiate or restart contact.⁴⁶ In 44 of these cases no contact at all was happening at the time of the application. In 20 of the cases some level of contact continued.⁴⁷

In A4, for example, the father applied to reinstate contact that the mother had terminated due to his drug use, drinking and destructive behaviour. In B13, a high conflict case where there had only been sporadic contact, the father sought to regularise the contact.

In 10 cases there had been no contact at all for at least a year. In 21 cases there was an established pattern of contact which had been recently stopped by the mother. 12 fathers sought contact orders specifically to change the level of contact with 8 of these applications seeking an increase in time.

In C47 dad wanted more contact, because he alleged that mum was marginalising him and undermining his relationship with his daughter. He sought more holiday time, a mid-week sleep-over, slightly longer alternate weekends and certain special occasions. Mum responded that current contact was enough, given that she was also liaising with dad's ex-wife over contact with half-siblings living in that household. Mum claimed that dad was the sort of person who would always keep asking for more. The child said she liked the *status quo*, which was maintained, save for some minor changes around special days such as Father's Day.

6 fathers sought contact orders to protect their level of contact which had been established under an informal arrangement. Only 2 applications for contact by the father were for the purpose of setting up the initial post-relationship breakdown pattern.

There were also 7 applications for contact and/or residence that the circumstances showed to be largely tactical applications made to protect or increase these fathers' contact.

In E26, the father applied for both residence and contact, but gave as the reason for the case on his c100 application form that he wanted regular, court-ordered contact that could not be disrupted by the mother. The parties had two sons, a 3-year-old and an 11-month-old baby. The relationship had ended before the second child was born; the father had initially had informal very frequent contact, but it had stopped the previous Christmas for reasons that were not disclosed in the file. Once contact was up and running, the father sought, and was given, permission to withdraw his application for residence.

⁴⁶ 68%: 14 to establish and 32 to re-establish contact.

⁴⁷ In the remainder it was unclear.

2.8.8 Fathers' Applications to Limit or Terminate Contact

Two fathers sought orders to limit contact with mum. In B20 the father felt that the child was unsafe with the mother who drank during contact. In, B56, dad applied to vary or discharge the contact order. He claimed that while contact had worked well with social worker support, now that it was being supervised by the maternal great grandparents, the 3-year-old girl always came back exhausted, badly behaved and sometimes withdrawn.

2.8.9 Conclusions on Mothers' and Fathers' Applications to Court

The most common reason why mothers wanted a court order was to **bolster their position as the established primary care giver to prevent the child being taken from their care**. 17 court applications (32%) were seeking an order to protect the established status quo.⁴⁸ These mothers often alleged that the fathers were violent and/or controlling.

The next most common reason for court application by mothers was **to block or limit contact with the father** with 12 cases (23%) falling into this category.⁴⁹ The reasons given included child protection issues, concerns that contact was too disruptive or that the child would be abducted. Here, too, it was common for the files to contain allegations or past records of domestic violence.

Very few mothers sought an order **to facilitate their contact with their own children**. Only 5 applications were made for the purpose of establishing or re-establishing contact.⁵⁰ Two further applications were made by mothers who wanted to increase their time with the children.⁵¹

This analysis confirms the findings of previous studies that in general, mothers are the established PCGs who seek a court order to protect an established *status quo* or to protect themselves and the children from domestic violence. Smart *et al*, for example, found that mothers were twice as likely to apply for residence, and that in the majority of these cases the children were living with their mothers.⁵² In Hunt's and Macleod's sample of contact cases, 91% of the children lived primarily with their mothers.⁵³

In contrast, applications by fathers to court were generally seeking **a change to the situation at the time of the application**.

Most applications to court by fathers reflected their position as the contact parent and were for contact orders. 12% of applications⁵⁴ were for an order to set up contact. 30% were to re-establish contact after a break.⁵⁵ 9% of applications were to protect the existing level of contact from being cut off.⁵⁶ 9% of applications sought more contact time with the children⁵⁷ with 5 further applications seeking to change the details of contact.

There were 17 (14%) applications for a **transfer of residence** from mum to dad. There were a further 6 applications to protect the father's position as established care giver. These cases shared a particular set of circumstances: mothers who were no longer able to safely care for their children due to addiction, poor health or a generally chaotic or unsafe home life; close and current children's services

⁴⁸ 17 out of 53 cases.

⁴⁹ 10 out of 53 cases.

⁵⁰ 3 contact applications and 2 residence/ contact applications.

⁵¹ 1 residence/contact and 1 shared residence.

⁵² C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p11.

⁵³ J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p3.

⁵⁴ 15 out of 121 cases.

⁵⁵ 37 out of 121 cases.

⁵⁶ 11 out of 121 cases.

⁵⁷ 15 out of 121 cases.

involvement; fathers who were forced by circumstances to take over the primary care giver role; and a sense that the boundary between public and private child law was being blurred.

2.9 Conclusions: Is court adjudication needed?

We explained above in section 2.5 that few parents had attempted mediation prior to making their applications, and that in many cases it was clear from the c100 form or the circumstances why mediation was not a good idea. In this section, we consider whether mediation could have been an alternative to court for a greater number of the 174 cases that reached our five courts in 2011.

In a substantial number of cases the reason given for not going to mediation was because the applicant had no idea where the other parent was, because the other parent had severe mental health or addiction problems or because of heavy social services involvement. In some of these, and many other cases, there were allegations of domestic abuse. This meant that the situation could not be resolved by negotiation or mediation between the parties. **These cases were too problematic for private ordering.** It was not a simple case of a disagreement between two competent, reasonable and evenly-matched parents. There were many issues that needed to be investigated and support that needed to be provided for more vulnerable litigants. This was necessary to establish what was actually in the child's best interest in these complex circumstances.

There were a number of cases which simply could not be resolved by mediation alone as a **formal court order was required**. All the non-parent cases (discussed in Chapter **Error! Reference source not found.**), also fall into this category, where the grandparent, aunt or other non-parent carer needed a residence order to gain parental responsibility to care for the child and deal with schools, doctors, and other third parties.⁵⁸ In many of the cases in this second group it would also not have been possible for one parent to participate fully in mediation had a formal order not been necessary. Parents struggled with many issues, primarily alcoholism, addiction and mental illness. The parents in B33, for example, had previously informally agreed that the children should live with mum and have contact with dad. The mother went to court for an order to suspend that contact because the Police Child Protection Team had told her to; the father had been admitted to a mental health unit after threatening suicide and threatening to kill the children.

Formal orders were also sought in cases where there was no real dispute over child care for immigration purposes and to ensure social housing. In D24 the father had overstayed his visa, but reapplied on the basis of his successful contact application and was given discretionary leave to remain in the country. In E41, Esseborne children's services wanted the child to live permanently with the father due to mum's mental health problems; he needed a residence order to obtain adequate housing.

Some of the cases highlighted the need for a **further formal order** once the case had been to court once. For example in D8 a contact order had been made in 2003, but the parents had later changed the arrangements, by agreement, after the mother moved from Borgate to Dunam. This meant that when contact broke down in 2007, Dunam county court could only enforce the 2003 order, which suited neither party. This escalated the dispute in an already high-conflict case.⁵⁹

In conclusion, we found that a substantial proportion of our 174 cases did in fact need to apply to court and could not have satisfactorily resolved their disputes through mediation.

⁵⁸ For example, the father of the child in E31 had left the family when the child was very young. The mother had been diagnosed with terminal cancer and wanted to ensure that her sister could look after her teenage son when she became too unwell to do so.

⁵⁹ See section 3.4.2, which starts on p50 and describes D8 towards the end.

3 REACHING A SOLUTION: THE COURT PROCESS

This chapter examines the methods used by the courts in reaching a solution **in all 197 cases**. In 2011, the Children Act 1989 provided the menu of available orders, while the revised Private Law Programme¹ governed how these applications should be processed by the courts.

The County courts in our five areas resolved cases primarily through the use of multiple informal review hearings. **Formal fact-findings and contested final hearings were rare even in cases where allegations of domestic violence were made or where serious child safety concerns were raised.** The picture is one of pragmatic case management with a preference for the use of Section 7 reports and achieving conciliation between the parties rather than resorting to contested formal evidentiary hearings. The use of multiple short review hearings was essential to the promotion of contact, helping progress the cases to a workable outcome ‘little by little’.

This chapter also examines the measures taken by the courts to safeguard the welfare of the children involved in the cases and the courts’ approach to investigating allegations of domestic violence. Finally, the efforts made by the courts to discover the wishes and feelings of children are outlined.

3.1 The Private Law Programme in our Sample Courts

The philosophy of the Children Act 1989 is non-interventionist. There is no legal requirement for parents to go to court for an order to settle matters if they can come to their own arrangements. Even where court proceedings are commenced, the Children Act itself requires the court to refrain from making any order at all unless it deems that an order is necessary in the best interests of the child.² The Private Law Programme³ which governed private child law disputes in 2011 reflected the philosophy of the Children Act 1989. It required judges to find the appropriate balance between facilitating adult conciliation and managing the risks for children.

The Private Law Programme promoted early intervention by professionals at pre-application or application stage to resolve disputes using alternative dispute resolution wherever possible. Mediation was considered to be particularly helpful for disputes over residence and contact where there were no child welfare issues.⁴ As our sample had a fixed end point,⁵ not all of our cases started within the revised Private Law Programme.⁶ However, we observed from the files that in most courts the parties’ first hearing had taken place on a Cafcass day where they had a chance to meet with a Cafcass officer to try to resolve their issues in advance of the first hearing. Further directions hearings were often also scheduled on a Cafcass day.

The Private Law Programme recognised that domestic violence, drug and alcohol misuse and mental illness had an impact on private child law cases and that consent orders should be scrutinised where

¹ (The President of the Family Division, 2004) [2005] *Fam Law* 196.

² Section 1(5) Children Act 1989.

³ (The President of the Family Division, 2004) [2005] *Fam Law* 196.

⁴ Family Law Protocol (The Law Society 2005); The Children Act Advisory Committee, *The Handbook of Best Practice in Children Act Cases* (Lord Chancellor’s Department, 1997) Ch 4, [38].

⁵ We selected cases, which ended between February and August 2011.

⁶ The longest-running case in our sample, E36, had begun in 2000.

such risk factors existed to ensure that children were safe.⁷ The revised Private Law Programme promoted parental resolution of issues with the assistance of a Cafcass officer within a risk identification framework managed by the judges.

The text of the Private Law Outline envisaged two types of court hearing – an initial directions appointment to promote conciliation which could be followed by a formal hearing. The Family Court retained broad discretion to conduct a case in the most appropriate way possible and could decide whether or not to hold a full hearing.⁸

Only 27 of cases in our entire sample proceeded to a full formal contested final hearing. Instead, it was normal for multiple directions appointments to be used to reach agreement. This process allowed decisions as to the frequency and details of contact to be made on the basis of submissions by the parties without evidence being formally heard.⁹ This use of directions hearings is common practice and has the obvious advantage of enabling parties to reach their own agreements without one being judicially imposed upon them.¹⁰ In our sample, even contested applications were routinely settled without resort to trial.

Our findings reflect those of Bailey-Harris who found that family courts had developed systems for managing cases through a series of first appointments and review hearings. The judges provided target dates by which the parties were expected to have made substantive progress, ideally agreeing a final outcome which could be approved by the court in a consent order.¹¹ Mitchell cautions that the practice carries a danger that cases may drift in the hope that problems will resolve themselves without a need for issues to be properly addressed by formal hearing.¹²

In our sample, the number of hearings ranged from 0¹³ – 26. Most of these hearings were short 15 minute reviews. In Cladford, a number of directions appointments were made over the telephone by conference call between the judge and the parties’ representatives. The courts were attempting to save time and minimise costs for the parties.

Number of Hearings	Cases	% of Cases	Cumulative %
Disposed of in 1 hearing or less	22	11.2%	11.2%
2-3 hearings	46	23.4%	34.5%
4-5 hearings	43	21.8%	56.3%
6-10 hearings	62	31.5%	87.8%
11-15 hearings	16	8.1%	95.9%
16-20 hearings	7	3.6%	99.5%
Over 20 hearings	1	0.5%	100.0%
Total	197		

⁷ Practice direction: Revised Private Law Programme [2010] 2 FLR 717, [1.3].

⁸ *Re C (A Child) (Contact: Conduct of Hearing)* [2006] All ER (D) 214 (Jan).

⁹ Applicants have no legal right to a full hearing: *Re C* [2006] All ER (D) 214 (Jan) & *Re D (Children) (Contact: Conduct of Hearing)* [2006] All ER (D) 85 (Feb, CA).

¹⁰ J Mitchell, *Children Act Private Law Proceedings: A Handbook* (2nd Edition, Jordan 2006) [16.21].

¹¹ R Bailey Harris ‘Settlement Culture and the Use of the “No order” Principle under the Children Act 1989’ [1999] CFLQ 53.

¹² J Mitchell, *Children Act Private Law Proceedings: A Handbook* (2nd Edition, Jordan 2006) [16.23] - [16.25]. See also G Davis & J Pearce, ‘A View from the Trenches – Practice and Procedure in Section 8 Applications’ [1999] *Fam Law* 457.

¹³ Case D18, which was disposed of simply by reading the parties’ letters.

57% of the final orders in our sample were marked as consent orders.¹⁴ Whether or not the parties gave truly free consent to these court orders marked ‘by consent’ is difficult to ascertain. Consent can sometimes seem to be more apparent than real, especially when the consent order is made suddenly after long-standing and significant conflict between the parents.¹⁵ This is particularly so in cases where one party was unrepresented or where there was heavy Local Authority involvement. Our concerns about consent in this context are further discussed in Chapter 6, at page 124.

The high number of consent orders does not necessarily mean that parents could have come to a resolution without the need for court involvement. The different roles played by the court were essential to achieving resolution.¹⁶

In some cases where the parties were in full agreement from the beginning, a formal order from the court was necessary to give the situation a recognisable stamp of approval. For example, in E28, the mother lived in Germany and the father lived in the UK. The couple wanted a residence order to allow the child to attend school in England without any administrative difficulties.

There were also a number of cases where adults who were not the children’s legal parents, but were caring for them, needed formal recognition of the situation through a court order. In E20, for example, a 7-year-old child had been living with her paternal aunt for nearly six years. She wanted a residence order and parental responsibility so that she could eventually apply for British citizenship for the child. These cases are examined in more detail in Chapter 6, at 6.3.

In other cases, it was necessary for the court to adjudicate a dispute over a factual matter before the parties could reach an agreement. Without these decisions, negotiations between the parties could not have moved forward.

In C40, dad’s suspicions that mum was using heroin were confirmed by tests, despite her repeated denials. She then engaged with a drug treatment programme and following a series of regular drug tests and supervised contact, a shared residence order was made by consent one year later.

The court did not always determine factual disputes. In some cases the court deemed the parties’ dispute over an incident of past behaviour to be irrelevant to the issue of contact or residence and used undertakings to alleviate concerns about similar behaviour in the future. For example, in C18 the mum’s concerns about dad’s drinking were assuaged by his undertaking not to consume alcohol on any day that he had contact. The final order for contact was made by consent.

There remains a risk in cases where a factual dispute is not resolved, but is instead deemed to be irrelevant, that agreements will break down in the future if parties continue to revisit the issue.

In B27 the parties had a previous shared residence order from 2008, under which the two daughters aged 10 and 13 lived predominantly with their mum in Borgate, spending alternate weekends and half of the holidays with their dad in the North of England. The preamble to the 2008 order stated that the parties had agreed that a fact-finding in relation to mum’s domestic violence allegations was not necessary. The Borgate social worker who wrote the Section 7 report noted that this was regrettable; in the absence of the fact finding mum was continually dragging up these same allegations. The parties eventually agreed that the children would move to live with their dad for a six-month trial period, and the father withdrew his application for residence.

¹⁴ 106 parent cases were marked ‘by consent’ as well as 7 non-parent cases 113/197 (64%). The percentage is similar to Cassidy and Davey who found 52%: D Cassidy & S Davey, ‘Family Justice Children’s Proceedings: Review of Public and Private Law Case Files in England & Wales’, Research Summary 5/11 (Ministry of Justice, 2011).

¹⁵ C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p28; J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p175.

¹⁶ J Eekelaar & M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart Publishing 2013) p98.

Interim orders were used to manage contact, and sometimes issues of residence, while the dispute was being resolved. These interim orders were regularly reviewed and progress monitored.

The way in which interim orders were used differed from court to court. Some judges seemed to have a policy of immediately making an interim residence order to stabilise the situation before obtaining more information,¹⁷ with which to make the final decision. Other judges avoided the use of formal orders at interim stage as far as possible, merely noting any compromises the parties had struck in the preamble to interim orders made to obtain further evidence.¹⁸

This second approach, designed to get the parties to stick to their own agreements without giving them the force of a court order, was particularly prevalent in Cladford. Parties in Cladford who could not stick to their interim agreements were sent to a different judge for a final hearing where a formal order was finally made. This seemed to be a deliberate approach to encourage settlement with the imposition of a formal court order viewed as a last resort.

In other cases, details of contact were left out of the court order and instead merely recorded in the preamble to the order. This held the parties to a bare minimum agreement that contact would happen but rendered other aspects of their agreement unenforceable. For example in B11, the interim contact order stated that the father would have contact on alternate Saturdays from 10am to 6pm. The preamble to the order recorded that, in addition, both parties had agreed to work towards more contact including 1 overnight for the father per month. In B25 the formal order laid down a timetable for day time contact at the weekends. The preamble recorded that the parties agreed that overnight contact would take place every other weekend subject to the father confirming his ability to provide appropriate accommodation.

3.2 Safeguarding Children

Cases with Welfare Concerns	Parent		Non-Parent		All Cases	
	No	%	No	%	No	%
Concerns raised by						
Mother	13	16.5%	1	5.9%	14	14.6%
Father	10	12.7%	0	0.0%	10	10.4%
Grandparent	0	0.0%	1	5.9%	1	1.0%
Cafcass	14	17.7%	2	11.8%	16	16.7%
Local Authority Social Services	22	27.8%	9	52.9%	31	32.3%
More than one source of concerns	19	24.1%	3	17.6%	22	22.9%
Unclear	1	1.3%	1	5.9%	2	2.1%
Total	79	100.0%	17	100.0%	96	100.0%

The Private Law Programme required basic safety checks and inquiries to be carried out by Cafcass before the first hearing.¹⁹ Cafcass were required to submit a Schedule 2 letter setting out their initial conclusions on risk assessment in advance of the first hearing. At the first hearing, the court would engage in risk management and consider to what extent the parties could safely resolve their issues without further investigation into the child's situation.

¹⁷ Typically a Section 7 Report, sometimes also drug/alcohol testing or evidence of alleged domestic violence.

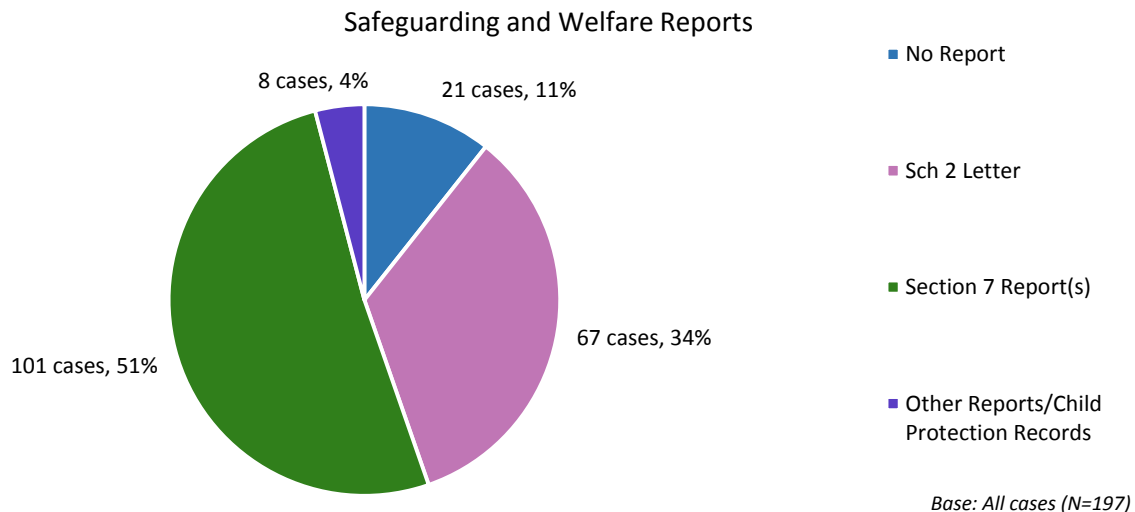
¹⁸ This occurred, for example, in D27.

¹⁹ Practice direction: Revised Private Law Programme [2010] 2 FLR 717 [2.2]

We defined a serious child welfare concern as a case ‘where there was a concern raised that one of the parents should not be able to have contact or residence due to the risk they posed to the child.’ Under this definition, a serious child welfare concern was raised in 79 parent versus parent cases (45%) and 17 non-parent cases (74%). Most of the allegations were raised by parents and/or by the Local Authority, or were uncovered by Cafcass during the progress of the case.

3.2.1 Types of investigation.

In our sample, there was evidence that some kind of safeguarding inquiry had taken place in 89% of all cases.²⁰ In a large number of cases Section 7 reports were ordered by the court.



Court fact-findings in relation to child safety concerns were not present in the sample. There were only two files, which suggested that something of that kind had been considered.

In B65, the paternal grandfather was a convicted sex offender and a central question in the dispute was whether he was around when the 7-year-old girl was having contact with her dad. The issue was listed for a fact-finding hearing but was subsequently vacated. The father agreed not to let the child come into contact with the paternal grandfather and the order preamble recorded that the mother needed ‘to accept that the current evidence before the court in relation to her two allegations does not meet the required tests to enable the court to make appropriate findings and as a result the allegations could not be pursued now or in the future.’

It was clear from the file, however, that this did not mean the risk was ignored; careful arrangements were put in place to ensure the child’s safety.

In E38, dad reported mum to social services for hitting the children. She counter-alleged that he had been physically violent. Cafcass were concerned about the long term effects of the animosity between the parents. The court held a fact-finding to determine the issues. It held that while the mother had smacked the children and verbally chastised them on occasion, this was out of character. The court found that four allegations of domestic violence perpetrated by dad were proved.

Fact-findings which establish whether or not an alleged incident actually happened are not very useful in helping the judge come up with an appropriate way forward. Section 7 reports allow a more holistic approach to the situation. For example, in a number of cases where Section 7 reports were used it was suggested that particular allegations were fabricated or embellished or inconclusive but the level

²⁰ Only 20 out of 197 cases had no safeguarding report whatsoever.

of animosity between the parties was identified as the real issue of concern. In cases such as B16 and D27, one or both parents were actively drawing their children into the conflict by getting them to repeat false accusations; professionals were recognising this as causing emotional harm. In a few cases, investigations were inconclusive. In B7, for example, social workers could not be sure whether the child’s injuries were accidental or had been caused by either parent or by an older half-sibling. It was clear, however, that the parents’ intense focus on their own conflict was causing the child harm.

In 34% of cases²¹ the court relied on the Schedule 2 letter provided by Cafcass. The level of detail in these letters, and the speed with which they were prepared, varied greatly from area to area. In Essebourne these letters were very basic: Cafcass looked at the c100 application form and carried out some police and Local Authority checks on the family. In Cladford the Schedule 2 letters were very detailed but did not generally appear until the 2nd or 3rd directions hearing.

We found only 3 cases in which welfare concerns were raised but no official safeguarding inquiry had taken place. In all 3 cases the judges had informally consulted with children’s services.²²

3.2.2 Section 7 reports

The court had access to a Section 7 report in 51 %²³ of our cases.²⁴ According to the guidance applicable at the time, Section 7 reports were recommended where there was a live issue to be resolved such as whether a child’s residence should change.²⁵ The need for a report had to be balanced against the delay which might be caused in preparing the report.²⁶ We found that in our courts Section 7 reports were used either to make more information about the child’s well-being or an adult’s capacity to parent available to the court, or alternatively specifically to ascertain the child’s wishes and feelings.²⁷

	Parent	Non-Parent	Total
Cafcass	59	6	20
Local Authority	18	7	67
Independent Social Worker	1	0	65
Multiple S7 with different authors	9	1	5
	87	14	197

The Section 7 reports were generally provided by Cafcass. Local authorities were asked to prepare Section 7 reports in cases where they were identified as being involved with the family at the safeguarding enquiry stage and Cafcass felt that the local authority were best placed to make

²¹ 67 out of 197 cases.

²² In B43 the judge had spoken to children’s services on the phone. In C1 the local authority gave a letter of support with the application. In E29, the parties in dispute had agreed that the 9-year-old girl would live with her grandmother under a SRO before any safeguarding report could be carried out.

²³ 101 out of 197 cases.

²⁴ This is a lower figure than Hunt & Macleod who found that welfare reports had been prepared in 64% of cases. This may be because they looked exclusively at contact cases where it is less likely that the parties are not in dispute, but that an order is needed for some other purpose: J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p167.

²⁵ The Children Act Advisory Committee, *The Handbook of Best Practice in Children Act Cases* (Lord Chancellor’s Department, 1997) Appendix A, VI.

²⁶ *Parental Separation Children’s Needs and Parent’s Responsibilities* (Department of Constitutional affairs, 2004) Cm 6273 [73]. J Hunt, H Bretherton & V Bream, ‘Families in Conflict – Perspectives of Children and Parents on the Family Court Welfare Service’ [2001] *Fam Law* 900; J Tross, ‘Cafcass Present and Future’ [2004] *Fam Law* 731.

²⁷ In the latter cases, the court often specifically requested a specific Wishes and Feelings Report.

recommendations.²⁸ 10 cases contained Section 7 reports from both Cafcass and either the local authority or an independent social worker.

There were often long delays in obtaining Section 7 reports. It was common for deadlines for reports to be extended; in several areas it was clear that this sometimes tried District Judges' patience. The delays were often due to long backlogs and staff shortages. Furthermore, where parents were rehoused and moved from one local authority area to another there were long hold-ups in obtaining reports as the correct authority had to be identified. This was particularly the case in Dunam, a densely populated urban area.

In 7 cases a Section 7 report was requested but never delivered. In most of these cases the dispute was resolved before the Section 7 report could be completed. In E26, for example, contact was restarted at a contact centre, and the parties then reached a compromise agreement for unsupervised contact before the report deadline. In B48 mum withdrew her application. In C19 the parties reconciled.

In 4 cases the courts ordered a different type of report instead of a Section 7 report: including one Section 16A Risk Assessment, a Special Guardianship Report and Section 37 assessments. In 4 further cases the court relied on more informal information from children's services about parallel child protection investigations.

In E23 dad had kept the 3-year-old boy after contact, and was applying for residence after encouragement from Esseborne children's services. The authority was ordered to prepare a Section 37 report. This stated that mum had been known to the local authority since the child's birth due to her long-term substance misuse and mental health issues. The main problem was her highly problematic involvement with drunken and volatile friends. Her son had witnessed or actually suffered violence on several different occasions; and children's services deemed that she would not be able to keep the toddler safe. In contrast, the father lived with the paternal grandparents and could provide a safe, encouraging environment. A residence order for the father was recommended, and was made by consent at the next hearing. Contact was to continue to be supervised by the maternal grandmother.

3.2.3 Parallel Child Protection Investigations

In 33 of the 79 parent cases with welfare concerns there was significant involvement by the local authority which went beyond providing a Section 7 report on the basis of past involvement. The corresponding figure for the non-parent cases was 12 out of 17 cases.²⁹ In many of these cases there were on-going parallel child protection assessments during the Section 8 disputes.

There were 15 parent versus parent cases in which care proceedings seemed to have been the only alternative to a court order in Section 8 proceedings. In some of these cases children's services had removed a child from one parent and placed them with the other, usually due to concerns about addiction, poor mental health or unsuitable partners, as discussed in Chapter 2.³⁰ In other cases, children's services refused to allow unsupervised contact with one parent.

These include B17, where Borgate social workers were alerted when the father told probation officers that he was getting back together with the mother as soon as he had completed his sentence for attempting to murder her. Thankfully, the mother was both unaware of and completely against his

²⁸ In accordance with the Joint Protocol Statement ADCS and Cafcass (2010). Available at: <http://www.adcs.org.uk/download/position-statements/feb-10/ADCS-Cafcass-Protocol-FINAL-2010.pdf> accessed 22 December 2014.

²⁹ Grandparents and other relatives had often become involved because of the concerns around the children's welfare.

³⁰ See section 2.8.5.

plans for reconciliation. Children's services continued to support her opposition to the father's application for direct unsupervised contact, making it clear that they would otherwise have to intervene.

In some of these 15 cases, children's services continued to monitor the situation even after the final order.

In C14, Cafcass, when preparing the initial Schedule 2 letter, identified this as a family with current social worker involvement. Some the 4-year-old girl's older half-siblings had been placed with relatives due to neglect. Cladford children's services had initially encouraged the father to apply for a residence order, but before the case's first hearing the child arrived at nursery with significant bruising, which the father could not explain. Children's services told the County Court that further involvement with the family was necessary. They brokered an agreement with mum and dad which covered residence, supervised contact with mum and separately with half-siblings, and also contained conditions relating to the child's basic care, the parent's cooperation with children's services, and timely reporting of any injuries or health issues. It was clear that when the final order was made by the County Court, local authority involvement under the public child law framework would continue.

In 8 non-parent cases the only real alternative would have been for the local authority to consider care proceedings. These were applications by relatives to take over as primary carer when parents were unable to cope or were dangerous. The 5 applications by parents for return of their children from the care of a non-relative contained records of previous litigation that had been a real alternative to public law proceedings. For example, in B43 the grandmother had been granted a residence order four years previously, after her grandson had been made subject to a child protection plan. The mother, who was now sober, wanted her son back. Children's services were supporting her application, and in cases such as this one the county courts relied quite heavily on the local authorities' documentation and recommendations.³¹ These cases are discussed in more detail in Chapter 6, at page 111.

3.3 Dealing with allegations of Domestic Violence

As explained in Chapter 2, at page 22, we used the Government's broad definition of domestic violence. We focused on allegations made by one party to the case against the other,³² classifying other domestic abuse as a serious child welfare concern where children were exposed to it. This means that this section of this chapter focuses only on how allegations of domestic violence were investigated and resolved in the 174 parent versus parent cases.³³

Under the 2009 practice direction³⁴ the court must make several decisions³⁵ where accusations of domestic violence are made. The direction requires the court to consider to what extent the alleged domestic violence, if proved, is relevant to the dispute over residence or contact. The direction also requires the court to consider the safety of the child in light of the alleged domestic violence and to take action to safeguard the child from the risks posed.

³¹ An exception was D17, where Cafcass criticised the local authority for not providing enough information about the mother's long-term problems and their reasons for recommending a change of residence to the father.

³² Ensuring compatibility with the Government definition and recognising the fact that domestic violence makes it particularly difficult for the parties to cooperate over shared parenting once the court has made its final order.

³³ We found one non-parent case, C30, where we wondered whether the maternal grandparents' residence application was the grandfather's way of continuing his coercive control over the mother, his grandchild and his whole family. The point is discussed in Chapter 6 at page 115 onwards.

³⁴ Practice direction: Residence and Contact Orders: Domestic Violence and Harm [2009] 2 FLR 1400.

³⁵ *Ibid* [3]. Under the practice direction, 'domestic violence; is defined as physical violence, threatening or intimidating behaviour of other abuse which may have caused harm to the other party or to the child or give risk to the risk of harm.

Judges were advised to consider a Section 7 report unless satisfied that this would not be needed to safeguard the child's interests.³⁶ While the nature and extent of domestic violence is being investigated, the court should consider interim arrangements that minimise the risk to the child and the parties, e.g. supervised, supported or indirect contact.³⁷ Where domestic violence has occurred the court must consider the risk of harm to the child and only make an order for contact if it is satisfied that the physical and emotional safety of the child and the parent which whom the child is living can be secured before, during and after contact.³⁸

Allegations of domestic violence were made in 49% of the parent versus parent cases (86 cases). In 69 the allegations were that the father was violent towards the mother. Allegations were made against the mother in 3 cases and in 14 cases both parties were accused of being violent.

The cases in which allegation of domestic violence were made were mapped against the new LASPO evidential requirements.³⁹ As discussed in Chapter 2 these were satisfied in 45 cases.⁴⁰ In many of these cases the court took the same approach to reaching a solution as it did in cases where such allegations were not present, introducing contact by interim order and monitoring its progress.

In D4 dad applied for contact and PR as a response to mum's applications for non-molestation and prohibited steps orders. They had two boys aged 11 and 5. He insisted that she was making unfounded allegations as part of her strategy of blocking contact. There was a history of police call-outs and consequent children's services involvement due to the domestic violence. Alternate weekend staying contact was agreed at court soon after dad had submitted his application. Cafcass, writing the safeguarding letter for the subsequent directions hearing, expressed concern that mum had agreed to restart contact out of fear. The letter also pointed out that this interim unsupervised contact was incompatible with Dunam children's services' strategy for safeguarding the children. However, the interim contact continued without incident, Cafcass attended a directions hearing and did not oppose continuing unsupervised contact, and the final order was for alternate weekends and half of holidays.

The five courts took steps towards investigating the truth of the allegations of domestic violence in only 21 of the 86 cases in which allegations of domestic violence were made, i.e. just under a quarter. This is not to say that the court dismissed the allegations of domestic violence in all the other cases as irrelevant. In many cases, it was possible to take a view based on the evidence given to the court in the applications (one way or the other). The father in B17, for example, had been convicted of the attempted murder of the mother, after he had tried to cut her throat.

11 of these 21 court investigations were undertaken in cases in which current evidentiary requirements of LASPO would not be satisfied.⁴¹

In B54, the parties had separated shortly after the child's birth; she was now a toddler. There had been no contact since the relationship breakdown. Dad had applied for contact and was worried about mum leaving Borgate without a forwarding address. She was opposed to all contact. She alleged that he had been violent during the relationship and threatening and abusive since. Dad made cross-allegations of violent and volatile behaviour. Due to the long gap in contact and the allegations made, the Cafcass Schedule 2 letter recommended against direct interim contact, and suggested a

³⁶ *Ibid* [16].

³⁷ *Ibid* [20].

³⁸ *Ibid* [26].

³⁹ As required under The Legal Aid Sentencing and Punishment of Offenders Act 2012, Regulation 33 of The Civil Legal Aid (Procedure) Regulations 2012 No 3098 and outlined in the Legal Aid Sentencing and Punishment of Offenders Act 2012 –Evidence Requirements for Private Law Matters. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/345515/legal-aid-evidence-for-private-family-law-matters.pdf last accessed 22nd December 2014.

⁴⁰ See Section 2.7.1.

⁴¹ This included 5 fact findings, 3 scheduled fact-findings that did not take place and 1 S16A risk assessment.

fact-finding followed by a Section 7 report as the best way forward. A fact-finding was listed; dad withdrew and then applied to reinstate his application for contact, and the fact-finding was eventually held. The District Judge found for the mother on all points: while she had not been violent, dad had subjected her to physical assault during the relationship and verbal and text message abuse since. Mum, who had lost her job and could not afford her Borgate flat, successfully applied to return to her home country to live near her extended family. The father's application for contact was dismissed.

In a number of cases the court did not investigate allegations because it considered the alleged DV to be irrelevant to the issue of contact or residence. For example, in B24, it was documented that the court had considered a fact-finding but decided that it was not necessary because regardless of the outcome, the alleged domestic violence would not affect contact.⁴²

In B61, dad was unhappy with only having three hours of contact per week, and applied for an order. In response, mum said he was volatile, had shouted and physically assaulted her, but there was no evidence of domestic violence that would meet the LASPO requirements. Dad accepted that he had shouted, but not that he had pushed, shoved or hit her. A fact-finding was scheduled and contact with the 4-year-old boy was initially supervised. It was then successfully argued for the father that a fact-finding hearing was unnecessary. He denied the allegations but argued that if they were true they would not impact on the court's decision as all of them related to behaviour that was not directed at the child and occurred during the period immediately following the breakup. Contact was gradually increased to alternate weekends staying contact.

3.3.1.1 Investigating DV

Very few of the 21 cases in which allegations of domestic violence were investigated ended in a formal ruling on whether the alleged incidents of domestic violence had in fact happened.

In 3 cases the truth of the allegations was resolved between the parties; in 2 the accusations of domestic violence were retracted, in 1 case the violence was admitted.

In many of the cases the court's focus was on establishing whether there was a risk to the child rather than establishing the truth of the allegations. This re-focussing of the investigation did not mean that complaints were not believed. In A9, for example, there were allegations of domestic violence, but there was no fact-finding because the contentious and crucial question at this point was agreed to be the mother's drug use. In A4, the situation was much the same, although it was the father's drug use that was the problem. In two cases, C6 and D20, Section 16A risk assessments were ordered.⁴³

In C6, mum wanted to terminate contact but was worried that dad would then abduct their 18-month old son. She sought residence, prohibited steps, non-molestation and occupation orders. The father's response was that he wanted to see the child and did not understand why that would be a problem. He had been convicted of battery when he head-butted mum, received a 12-month probation order which included anger management classes; he later made threats to kill her with an imitation firearm. Cladford children's services, involved because of the domestic violence, had carried out a core assessment, were happy with mum's care but concerned about unsupervised contact. After the first directions hearing, there was some initial contact supervised by dad's cousin; at a later directions hearing the judge noted that 'dad needs to do his bit in probation'. Cafcass were ordered to do a S16A risk assessment. It concluded that because dad refused to admit to his past violence, and could not

⁴² Mum, who was a bodybuilder, had attacked dad on more than one occasion; she had been charged with actual bodily harm but the charges were eventually dropped. She claimed that the fight was all a misunderstanding and that the two of them were equally involved in each incident. It was agreed that the child would remain living with his dad, and that contact would take place at the maternal grandmother's house.

⁴³ In D20 dad had been charged with common assault and criminal damage, as well as with harassing mum by telephone, emails and texts. Here, as in C6, the fathers had a tendency to downplay their own responsibility and lacked insight into how their behaviour affected their children.

see how this continued to impact on contact with his toddler, supervision by dad's cousin should continue. The final order was made for supervised contact.

Formal fact-finding hearings were scheduled in 16 cases but actually held in only 8 cases. There were a number of reasons why scheduled fact-findings were abandoned. Either the alleged DV was deemed irrelevant to the issue of contact, or the parties (and their representatives) had resolved the issue during the preparation for the formal hearing, and the court deemed the risk to be effectively managed.

In B15 the scheduled fact-finding hearing was abandoned on the day it was listed. The interim order recorded: 'Upon deciding that the allegations sought by both parties would not assist the court in making final orders on the Children Act matters...' The case had a background of constant arguing, with the mother throwing things at the father (according to the children), but the real issue now was mum's mental health and ability to cope with the children.

Similarly, in other cases, courts took an alternative approach to investigating whether past violence would continue to impact on future contact.

In E1, where the father sought shared residence, Scott schedules (lists of each allegation) were prepared, but no fact-finding held. Instead, the parties agreed at a directions hearing that a fact-finding was not necessary but that they would abide by the findings of the Section 7 Wishes and Feelings report. The two children, aged 8 and 14, made it clear that they wanted to live with their mum and did not even want staying contact with their dad. They accused him of often sulking and ignoring them. They said they were only comfortable with seeing him for a few hours at the time, and this was the final order made. This strategy may have been chosen to avoid increasing animosity between the parties, rather than because anyone doubted the veracity of what the mother had been alleging. Dad had also previously accepted a caution for common assault after he grabbed the 8-year-old daughter's arm.

3.1.1.1 Where Fact-Findings were held

Fact-findings were held in 8 cases. In 4 of these, the allegations of domestic violence were proved or partially proved. In 3 cases the allegations listed in the Scott schedules were disproved. In the final case, C9, the allegations could not be proved one way or the other; a problematic outcome that cannot have helped resolve the dispute. This last case illustrates one of the disadvantages of fact-findings; ultimately it may prove impossible for the judge to make any clear findings and that will not help to resolve the case.

In the cases in which domestic violence allegations were proved by fact finding the effect on long-term contact was one of managing risk. In E3 the conclusion from the fact-finding was that although some of the mother's allegations were true, she had a tendency to exaggerate and retaliate, and the problems were not serious enough to rule out contact. In contrast, in D7 there were findings of physical violence, and contact was subsequently supervised and held in a public place. In B54, which is discussed above, all the mother's allegations were upheld.

E38 was a more concerning case, in terms of awareness of, and responses to, domestic violence. Mum said dad had repeatedly hit her, resulting in hospital visits for cuts and bruises, but that he or members of his family had always assured professionals that her injuries were accidental. Mum had left dad while pregnant with their third child and gone to relatives in Esseborne. Dad made an unfounded and probably malicious referral to Esseborne children's services. At the fact-finding hearing, the judge found all the four main allegations of violence proved. However, the judge also held that this was not a case of systemic violence. Moreover, the judge held that there was no evidence that dad had never behaved violently against the children. The risk was constructed as relevant solely to the mother. It could, the court held, be eliminated by having one of dad's relatives present at hand-overs.

Such findings ignore the impact on the children of witnessing violence, and of being in the house in the aftermath (as was the case here). Cafcass and the judge had noted the risk of dad denigrating mum during unsupervised contact, yet nothing was done to address this risk. Instead, it was recorded in the final order that both parties had agreed to attend a mediation assessment meeting. The final contact order was for alternate weekends and half of school holidays.

Fact findings which disproved allegations of domestic violence or otherwise declared the allegations to be irrelevant functioned as a way to progress the case.

In E35 the mother had repeatedly refused to comply with contact orders, had made allegations of domestic violence which had no supporting evidence, and eventually disappeared with the child. At the fact-finding, the mother's allegations of domestic violence were found to be unconvincing and fabricated. Furthermore, the mother's concerns regarding the father's ability to care for the child were all held to be misplaced anxieties with no valid reasons. The fact-finding appeared to be a way to move the case on. The case progressed to staying contact in the final order, but returned two months later for enforcement.

In dealing with domestic violence, the courts tread a delicate line between arbitrating between adults and making a child-centred decision. This is an area where a dispute between adults about their behaviour towards each other may need to be resolved before the case can progress, and risks to children can be properly assessed, but where the adversarial nature of the fact-finding hearing is very different to the overall approach of the court process which is one of incremental 'wait and see' problem solving.

In conclusion, the court's approach in dealing with allegations of domestic violence is one of risk management. **The relationship between the parties or the violent nature of the abusive parent is considered irrelevant to the issue of contact if the risk of violence to the child or the other party can be effectively managed.** Courts absolve themselves from undertaking adversarial fact-findings by side-lining the allegations as irrelevant to the issue of contact. This refocussing of the issue allows the risk to be managed by engaging in more problem-solving and child-focussed investigative processes such as a Section 7 report or S16A Risk Assessment rather than adversarial fact findings.

3.4 Children's Wishes

Both the Private Law Programme and the welfare principle itself require the judge to consider the wishes and feelings of the children in light of their age and understanding.⁴⁴

3.4.1 When were children's wishes heard?

The court was made aware of children's wishes and feelings in 39% of cases.⁴⁵ In 84% of these cases⁴⁶ this occurred through the Section 7 report. In a limited number of cases the views of older children were put more directly to the court. In 6 cases the written opinions of the children were put directly to the court in the form of letters. Rule 16.4 guardians were appointed in three cases. Separate representation was rare. In one case, D8, NYAS had initially acted as both children's Guardian, but the teenager asked to be represented by a solicitor instead. She was angry that, rather than relaying her wishes to the court, NYAS had made recommendations that went completely against what she wanted.⁴⁷ We found only one case where the judge had spoken directly to the child.⁴⁸

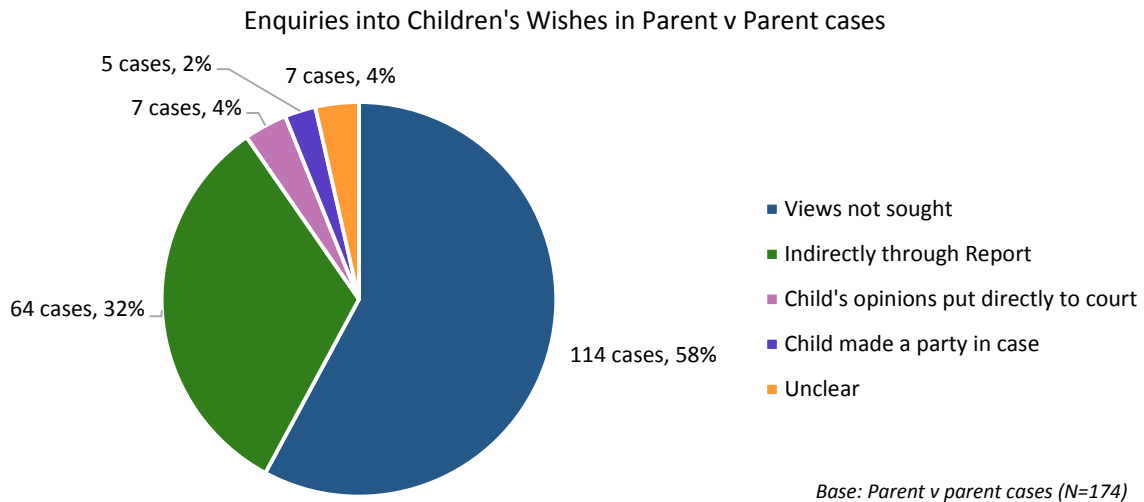
⁴⁴ S1(3)(a) The Children Act 1989; Practice direction: Revised Private Law Programme [2010] 2 FLR 717 [5.5].

⁴⁵ 76 cases: 67 parent cases and 9 non-parent cases.

⁴⁶ 64 cases: 58 parent cases and 6 non-parent cases.

⁴⁷ See section 3.4.2, which starts on p50 and describes D8 towards the end.

⁴⁸ C10. This was because of the non-availability of Cafcass staff, and a wish to avoid further delay.



While babies and very young children were understandably not interviewed, there were only two cases where teenagers' opinions were not sought, and in both cases there were good reasons for this.⁴⁹

Children's views were not generally sought in cases where the parents were in agreement from the beginning; Section 7 reports were also not used in these cases.

In many cases the central issue was whether one parent could be trusted to care for the child, because of concerns about mental health, addiction or domestic violence. In such cases, children's views were not always sought, particularly when the children were young, perhaps because this could never influence the outcome, but could raise false hopes.

3.4.2 The weight given to children's wishes

It was not possible to collect data on the extent to which children's wishes influenced the final orders. As the Section 1(3) welfare 'checklist' is deliberately non-exhaustive and non-hierarchical, the courts have discretion when weighing and considering factors.

Children's wishes were often given weight in Cafcass Section 7 reports where they accorded with adult assessments of what was in the children's best interests. In A2, for example, Cafcass recommended in favour of more contact partly because the 8-year-old girl wanted it.

This is not to say that when children's wishes did not accord with the prevailing pro-contact rhetoric they were routinely ignored. In B9 and C47 the fathers had asked for extensions of contact, but since the children explicitly said they were happy with things the way they were, existing arrangements were not varied.

However, it was clear, particularly from Section 7 reports, that considerable efforts were made in a number of other cases to persuade children to have contact, or to increase the amount of contact they were having. D8, discussed below, was a prime example of how children's refusals to comply with orders could result in lengthy cases.

⁴⁹ In E33, mum sought shared residence partly as it 'may also aid me with my housing situation' and dad supported her application. There would be no real change to time allocation. The child in B39 had severe autism. The application was also dismissed, with the recommendation that as the boy would soon turn 18, it would be better to take this case to the Court of Protection.

Older children's wishes were particularly likely to be reflected in the outcome. In some long-running disputes; once older siblings turned 16 they were no longer named in orders but left to decide for themselves whether to continue contact or where to live.⁵⁰

In E15 a father sought direct contact with a sixteen-year-old. He had been sending letters and cards, but had received no response. A Children's Guardian was appointed, and reported that the daughter had no wish to rebuild a relationship with her father, whom she criticised for never being genuinely interested in getting to know her and understanding her disability. Instead, she suspected him of having immigration-related ulterior motives, and stressed that she was now old enough to know her own mind. At the next directions hearing, the court noted the firm views of the child and determined that her wishes and feelings were so strong as to, as likely as not, be preferred over any other issue which the applicant father would be able to identify. Consequently, the court determined that it was in the interest of the child and the parties that the application should be determined summarily. The father's application was dismissed.

Children could also be allowed to make their own decisions when slightly younger. In C39, a dispute between two equally capable parents, the teenage children were allowed to decide where they wanted to live; and these wishes were shaped by school, friends etc. rather than a preference for either parent.

In B31, a case with a documented history of domestic violence, the mother welcomed the court's involvement; she felt that the children's wishes and feelings were crucial but that her former partner needed to hear them from a neutral person. Contact was eventually set at a level that suited the children. The mother also suggested that the two older children, now in their early teens, ought to be able to decide their own contact arrangements with their father. A provision to this effect was included in the contact order, which only set specific hours for their younger sibling's contact.

Children's opinions were not always taken at face value and professionals investigated whether or not they had been influenced by resident parents.

In cases such as B40, where children objected to contact, or to any increase in contact, professionals raised questions as to whether the children were being coached or influenced by resident parents. Cafcass concluded that the dispute was intractable and the mother was influencing the child against contact. The parties had been separated for some time, but the father now had a new partner and was asking for a divorce. Efforts were made to encourage the child into contact. Nevertheless, in the face of the daughter's strong opposition to anything more than monthly contact, the father withdrew his application.

Children's views were not simply disregarded where was evidence that they had been influenced by one of the parents; a more sophisticated assessment was evident from many reports.

In B51 Cafcass recommended that the children's objections to contact should be respected. Their opposition was based on historic allegations of sexual abuse against paternal relatives. Although these had never been proven to a criminal standard, forcing the children to have contact could harm them. They would feel either that they were not being believed, or that their safety was not important. Instead, indirect contact was ordered to keep a line of communication open.

In C35 the contact dispute took place against the backdrop of the former family home being repossessed, and dad (the resident parent) felt mum was being highly uncooperative about that matter. The two older children were strongly opposed to seeing their mum and seemed to have taken their dad's side. However, there was no real evidence that he tried to influence their views in any way. A Cafcass Section 7 Report stated: 'I believe it would be naive to think that the children have not

⁵⁰ This happened, for example, in D9 and D32.

been influenced to some degree by the views of their father and his partner, however I do not think this unusual or deliberate'. Contact was eventually set at different levels for the older and younger children, as a reflection of their preferences.

In D8, the experienced family therapist who eventually became involved with the case felt the two children had also internalised their mother's negative feelings towards their father. This was a long-running case of entrenched conflict. Agreed contact terminated abruptly; the mother's consistent stance was that the children, aged 9 and 11 at the breakdown of contact, did not want to see their father and that she neither could nor would make them go any more. The children told Cafcass that they resented having to 'play happy families' every other weekend. Their father had remarried, had a toddler, and a new baby was due very soon. Activities at the father's home were centred on his new pre-school age child, with no adjustments for them; there was, for example, a seven o'clock bedtime for all. Special clothes were provided for them which were the subject of considerable complaint, and they were forced to play with the 'annoying' little brother. Their stepmother had once lost her temper and thrown a teaspoon across the table, it accidentally hit her stepson. It seemed that they felt second-class or second-best. The listed concerns were not considered, by Cafcass or by the judges involved, to be serious enough to be reasons against contact. The children did, in meetings with child welfare professionals, agree to see their father again. Contact was eventually restarted. In several orders, the mother was threatened with contempt; first if the children did not attend, later if they wore their headphones during contact, were rude, or refused to speak to their father. The children's views were at this stage largely ignored as the mother was considered to be influencing them, while contact was felt to be in the children's long-term best interests. The daughter, now a teenager, strongly criticised NYAS on this ground: where she had thought they would speak for her, they had instead argued for direct contact against her clear wishes.⁵¹ She agreed to one meeting with the father, but no regular contact. Her younger brother appeared to enjoy regular fortnightly after-school visits with the father, where they did things the son chose, but he remained firmly opposed to going back to Borgate. It seemed at the end that little had been achieved, particularly given the number of professionals involved and the amount of court time devoted to the case: there were 19 hearings over four and a half years.

D8 was a sobering reminder that, as it has been said in the Court of Appeal, we must be realistic enough to acknowledge that in high-conflict cases where the relationships between the participants are seriously damaged 'the very extensive powers that courts have do not extend to waving a magic wand to mend them'.⁵²

3.5 Mediation

It was not routinely recorded in the court files whether the parties were encouraged or ordered to attend mediation after attending the first hearing. We only found detailed information on this use of mediation in 13 cases. It is difficult to draw any firm conclusions from such a comparatively small number. Moreover, negotiations between the parties could be happening in other ways, apart from mediation, e.g. in discussions with Cafcass, through letters between solicitors, or when the parties would communicate directly with each other.

In a few cases diversion to mediation had worked well. The final arrangement in D1 had been agreed in mediation. In D15, the parties were ordered at the first directions hearing to attend mediation, they came back to the next directions hearing with an agreement on contact. The parents in E5 sat down with Cafcass before the first directions hearing and managed to narrow the issues in dispute so much that they could continue that process through mediation.

⁵¹ She was subsequently given separate representation.

⁵² *Re B* [2013] EWCA Civ 81 *per* Hughes LJ at [8].

In C28, dad applied for a residence order because of frequent problems with the shared care arrangement. He claimed that mum would lie about their son being ill, pick the child up when it wasn't her turn, and try to link contact to their divorce and financial matters. Mum responded that dad was very unreliable when it came to collecting the child. There had been some angry arguments in public. The parties agreed to try mediation at the first directions hearing. A very detailed agreement was drawn up in mediation and incorporated into a consent order for shared residence. This dealt with term-time and holiday time shares, but also set out how the parents should communicate and deal with various contingencies such as bad weather, the birth of the father's new child,. It stipulated, for example, that '[the child] will see both mum and dad on his birthday each year with the exact arrangements agreed between the parties with 4 weeks' notice'.

In a few cases, parties agreed to mediate, or at least to be assessed for mediation, as part of the final judgment in the case. Working compromises for contact had been reached in E38 and E40, but it was felt the parties needed to learn how to resolve future issues. In D23, dad's application accused mum of wanting to erase him from their 5-year-old son's life, and telling him that his stepfather was his dad. In the final order, where contact was set out, the parties were ordered to attend a mediation assessment, presumably with a view to helping them agree on future extensions of contact.

Mediation could occur even where one party had initially been opposed to it. In both C47 and D12, for example, the applicant fathers ruled out mediation in their c100 forms because of the mothers' refusal to discuss contact, but in both cases there was evidence that that the parties did go to mediation between hearings.

In D13, dad stated on his initial c100 application that whenever he tried to discuss contact with his ex-partner she would just tell him to take her to court. There was a contact order in force made three years previously, and in the past he had applied to court to have it enforced. He was now seeking shared residence, which he felt would signal both parties' equal involvement and importance in their daughter's life. She spent alternate weekends two to three nights every week with him while the mother worked night shifts. The Cafcass reporter noted in the Section 7 report that the 6-year-old had been the subject of contested court proceedings since she was in her infancy and felt the dispute had less to do with practical arrangements than with the parents' perceptions about who was gaining the upper hand. At the first hearing, a contact activity direction as made for the parties to attend PIP and a mediation assessment. They were assessed as possibly suitable for mediation, and agreed to try it. In a subsequent statement dad said he would not try further mediation, since the mother would only use it to stall matters, and would not be interested in reaching an agreement. Since she was legally aided and he was not, he was unwilling to waste £120 per session in this way. The case ended with a shared residence order, made by consent, which confirmed the informally-varied arrangements that had existed at the time of the application: alternate weekends, half of school holidays and those weeknights when the mother was working night shifts as a health care professional.

However, in some cases the files showed that mediation had been tried during the case, but had not worked. D13 is discussed above. In E50 no reason was provided, but in E11 the notes in the file suggested that this had been due to dad's failure to engage with mediation. In E14, the parties had attended the initial mediation information meetings, but had been assessed as unsuitable for mediation. In D13, too, as noted above, mediation was not successful.

3.6 Legal Aid Funding and Litigants in person

In 2011, before the enactment of LASPO, legal aid was available for private family law court applications. We gathered some very basic data on the numbers of litigants in person and parties in receipt of legal aid involved in our case sample.

One of the parties was a litigant in person for at least one hearing in 105 cases. (53%) One of the parties was in receipt of legal aid in 140 cases (71%). The issues of obtaining legal aid and becoming

a litigant in person were often interconnected. Parties often became litigants in person for short periods due to interruptions in receipt of legal aid.

We encountered a small number of cases which took place between two parents who were both litigants in person. Consistent with the finding of Trinder *et al*,⁵³ these cases took up a disproportionate amount of court time and resources. Transcripts of court proceedings had to be produced and the parties were often unfamiliar with court processes causing problems in communication and in the preparation of bundles.⁵⁴ They are illustrative of some of the problems that may be encountered in an era where legal aid is not generally available for private child law cases. Transcripts had to be produced, terminology and process requirements had to be explained to parents, and instructions were not always understood.

In B62, the litigant in person father who did not have the benefit of any legal advice tried to use the court hearings to challenge the accuracy of all aspects of documents prepared by the mother’s solicitors. When he was refused the time to do this, he grew frustrated with the court process, became disruptive and ultimately was barred from making future applications to court.

In B12 the judge had two litigants in person who wrote letters and cards to the court on a monthly and sometimes weekly basis. Mum was frustrated that dad had applied to change contact less than a year after the previous contact order was made; he wanted to ensure that travelling from mum’s new house in London to Borgate would not eat into his contact time. Both parties refused to attend court at different points in the process even though they had been given notices and had dates moved to suit them. The mother also refused to attend court-ordered mediation. In the end, after 9 unproductive directions appointments, the judge made an order for both parties to attend court for the final order.

In B44, where mum was ineligible for legal aid and dad was having problems with legal aid funding the case was relisted several times until legal aid could be obtained. The court found that proceeding with two litigants in persons as would violate dad’s bail conditions in relation to a violent assault on mum.

D8 was an entrenched battle.⁵⁵ During one directions hearing in this dispute, the parents, who were both litigants in person, had been asked to produce position statements with their proposals on how to progress contact in the immediate future. Instead, the parents produced witness statements that covered past events, and cross-examined each other on what happened four years previously. The judge eventually steered the parties back to agreeing interim daytime contact.

3.7 How long did cases take?

The cases can be divided into short cases, average cases and long cases.

The length of the case is measured from the initial c100, or for the oldest cases c1, application form found in the case file to the point when that case exited the court system.

Time taken	No	% of total
Completed within 6 months	69	35%
6 months to 2 years to complete	99	50%
Over 2 years	29	15%

22 of **the short cases** were disposed of in a single hearing. These cases were often uncontested but a court order was required. For example, in B45 it was agreed by both parents that the child should go and live with his father and stepmother due to the mother’s poor mental health. A court order was needed to give both carers Parental Responsibility.

⁵³ L Trinder and others, *Litigants in person in private family law cases* (Ministry of Justice Analytical Series, 2014).

⁵⁴ E.g. C26 and C43.

⁵⁵ See section 3.4.2, which starts on p50 and describes D8 towards the end.

In other cases, the parties were largely in agreement but the court needed several hearings in order to allow time for Cafcass or children's services to provide relevant information to the court. For example, in C14, the father had applied for residence on the recommendation of social services. The court had received a report from social services by the second hearing and a final residence order was made.

The largest category of **medium or average time cases** was comprised of cases which took between 6 months to 2 years.⁵⁶ All of these had at least 3 hearings and most had between 6 and 10. In these cases the court progressed contact using a series of interim orders and time was required for the arrangements to be reviewed before progressing to the next stage. It can, therefore, in no way be concluded that these cases took longer because time was being wasted.

The **long cases** were characterised by serious child safety concerns, domestic violence, and multiple applications and cross applications to court as circumstances changed.⁵⁷ In many cases, time was needed to prepare reports that adequately investigated safety concerns, or considered safe ways to foster better parent-child relationships.

In two extraordinarily protracted disputes the cases were in the system for the majority of the children's childhood. In both cases both parents regularly breached court orders and the matters were only finally resolved when the children became old enough to voice a strong opinion to the court and thus end the disputes by making up their own mind.

E47 was a long running contact dispute. The daughter was 3 at the time of the initial application; when the final order was made 10 years later, she was 12.

The longest case was E36 which started in 2000 as a contact dispute and was still ongoing 13 years later. The parties returned to court at regular intervals either to enforce an interim contact order or due to breach of a non-molestation order. This was a highly unusual intractable dispute in which the primary care giver of the children had changed 3 times. There were 26 different orders relating to contact or residence within the 13 year period.

Cases took time to resolve because of delays caused in obtaining information but also because of the deliberate 'wait and see' approach of the courts. Where an unexpected delay arose, the courts generally used the time well.

Unexpected delay was commonly caused by difficulties in obtaining legal aid funding or because Cafcass or children's services were overstretched and requested more time to complete reports. In C42, Cafcass wrote to the court and requested an extension 'due to ongoing staffing difficulties and the high demand' and in C32 wrote noting that 'due to unforeseen circumstances regarding allocation we are unable to file a report by this time'. These kinds of delays were not confined to Cladford County Court but occurred in all our five courts.

In D1, Cafcass wrote a letter to explain that a Section 7 report would be late 'owing to local staffing constraints' and a backlog. Sometimes listed directions hearings had to be adjourned because the parties had not had enough time to see the completed Section 7 report: in E41 it was released the day before the hearing, in E43 the father had only received the report on the day and rejected most of its findings.

In busier courts, such as Dunam, it could take some time before adjourned hearings could be re-listed, due to time and space pressures.

⁵⁶ 99 cases.

⁵⁷ Similarly, Smart *et al* found that protracted cases 'were typified by more extensive problems' and that 'the families involved appeared to live quite chaotic lives': C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p50.

However, in many instances the courts had deliberately left the case in the list for future review to see how situations would develop.

In B55 the mother had left the country for two years, and returned to apply for a contact order. The father, with whom the infant-school aged child lived, was reluctant and understandably worried that the mother would simply disappear again. Contact had to be gradually increased over two and a half years from a couple of hours once a fortnight to one day per weekend. Whilst there were some interruptions caused by the father's concerns and delays in obtaining a Section 7 report, this is not to say that this case could have been resolved better in less time.

In C8 the parties were given time for what the Cladford district judge termed 'gentle extensions of contact' and also to try their own agreed arrangement for three months before it was set down in the final consent order. The case, from start to finish, took just over a year (14 months).

In other cases, unexpected delays in obtaining information were used to build up the level of contact.

In E38, the police disclosures were delayed and this meant the fact-finding hearing had to be adjourned for three months. However, as the parties had agreed to start supervised contact; the parent-child relationships were developing during this hiatus.

As in many other cases, supervised contact was a way to avoid 'wasting' time waiting for information to come in from other agencies.

3.8 Funding for Experts

A stated objective in private as well as public child law has been to reduce reliance on experts (other than social workers and Cafcass) to reduce costs and delay, ensuring shorter periods of uncertainty for children.⁵⁸

In our sample there was certainly no evidence of an over-reliance on experts. In some instances GPs and other medical personnel wrote letters outlining parents' conditions, but full reports from instructed experts were rare. There were a few cases where paternity was contested; the availability of testing meant that this question could be resolved relatively quickly and the dispute moved on to other issues.

We saw many cases where drug tests were ordered and carried out, often on parents' public funding certificates. In most of these cases the tests were crucial in the assessment of parenting capabilities and in terms of rebuilding trust between the parties. Where tests came back negative resident parents were reassured. Positive tests could determine a decision on residence but did not mean a termination of contact (it was more likely that supervision would have to remain in place).

It seemed to us to be a good use of resources where court time would otherwise have been spent by parents arguing over the truth of allegations. We wonder whether the fact that a court had the power to order drug tests may also have discouraged false allegations, or denials of actual drug use.

In C40 both parents were former addicts. The relationship broke down, and the case began, when dad suspected that mum had started using heroin again. A clear answer on this was obviously needed to determine with whom the child should live, given that mum had previously been the five-year-old's primary carer. The drug tests provided that clear answer, the mother eventually accepted that she had a problem, sought treatment, and gained regular contact.

⁵⁸ <https://www.gov.uk/government/policies/making-the-family-justice-system-more-effective>

3.9 Conclusion

Court plays a necessary role in adjudicating private child law disputes and should remain available as a viable option for parents. Although many of the cases ended in consent orders, this does not mean that court assistance was not needed. The court used drug testing and supervised contact to investigate and resolve objections to contact. Children's wishes were objectively obtained and used to encourage parents to come to an agreement

In 2011, when our cases were decided, legal aid was still available to many of the parents and grandparents. Under LASPO, litigants will only be entitled to legal aid if they satisfy the criteria for domestic violence or exceptional circumstances. It has already been questioned elsewhere whether this restriction of funding will in fact save court time, or money.⁵⁹ File documents often showed how the parties' legal representative, where they had them, were keen to help the court progress cases towards settlement. In the cases where both parties were litigants in person, judges could struggle to keep the case process on schedule and the parties' focus on future plans rather than past disputes.

Many of the parents led chaotic lives, which made them prone to missing directions hearings or documentation deadlines. Granting them a legal aid solicitor not only ensured that their rights, and their children's rights to private life, were adequately protected, but would also have made cases run more smoothly. We also noted that many of the parents were trying to recover from episodes of serious mental ill health while fighting court cases to keep their children living with them or get them back. It is a cause for grave concern that the LASPO provisions for legal aid in exceptional circumstances seem to be interpreted in a very narrow way.⁶⁰

The courts in our sample favoured a 'wait and see' approach that focused on pragmatic problem-solving and sought to avoid hearings of an adversarial nature that could exacerbate conflicts between parents. We found that this approach worked well for the majority of cases and was a good use of court resources. It seemed to be time well spent rather than time wasted.

In many of the cases that reached court an incremental approach was required. The parties had not come to court as their first resort and it took time for trust to be re-established and practical arrangements for post-dispute contact put into place. The process of regular review allowed the parties time to resolve factual disputes such as issues of drug use while moving forward. Similar findings about constructive use of delay and careful incremental approaches have been made by Smart *et al* and by Hunt and MacLeod.⁶¹

The courts balanced the need for protect children with the desire for conciliation through the use of safeguarding reports in cases where child safety or domestic violence related concerns were reported.

⁵⁹ G Cookson, 'Analysing the economic justification for the reforms to social welfare and family law legal aid' [2013] *Journal of Social Welfare and Family Law* 21.

⁶⁰ Ministry of Justice statistics showed that in the period April to June 2014 only 7 of 125 applications for exceptional funding were granted. In the year 2013-2014 just over half of all applications for exceptional funding were made in family cases. 9 out of 821 applications were granted in that year, with a further 2 having received a positive preliminary view.

See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358092/legal-aid-statistics-apr-jun-2014.pdf and

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366575/legal-aid-statistics-2013-14.pdf

⁶¹ C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p97; J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p177.

Although ordering a Section 7 report often resulted in unexpected delay, the court used this time well to progress contact and develop relationships between parent and child.⁶²

Progress was not always smooth; circumstances could change in unforeseen ways during cases, and judicial involvement was needed to make adjustments in order to steer scheduled arrangements back on course. Best laid plans did not work out where parties were taken ill, changed jobs or moved, for example. We felt that this use of judicial time for short hearings was efficient.

A4 began as a high conflict case with a history of police call-outs to remove an inebriated and aggressive father from the mother's flat. She initially opposed any contact with their toddler, and refused mediation. The case took just under two years. There were 12 short directions hearings, which were used to investigate dad's drug and alcohol abuse, given him opportunities to address his problems, and gently increase contact from a few hours in a contact centre to over-nights in the paternal grandparents' house. At the end of the case, relationships of mutual trust had been established between all the adults involved, and there was no more police attendance at mum's address.

The Private Law Outline in place at the time our cases were decided has now been replaced by the Child Arrangements Programme (CAP).⁶³ The main aspects of CAP are the promotion of out of court dispute resolution and the insistence that when cases do go to court, they should be resolved swiftly. We think this change could prove counterproductive.

Under CAP, cases should no longer be frequently adjourned for review and directions hearings.⁶⁴ The new CAP outline, with one FHDRA, a DRA and a (possibly) a final hearing⁶⁵ may in fact in many cases push issues to a head rather than allowing the gradual finding of solutions through a 'softly softly' approach, which also left the parties in a better position to negotiate their own future solutions once their case had left the county court.

⁶² In a few cases there were very serious risks which meant there could be no direct contact until these had been investigated.

⁶³ Practice Direction 12B issued 22 April 2014.

⁶⁴ Practice Direction 12B, Paragraph 15.3.

⁶⁵ Practice Direction 12B, paragraph 19.3.

4 ANALYSIS OF OUTCOMES

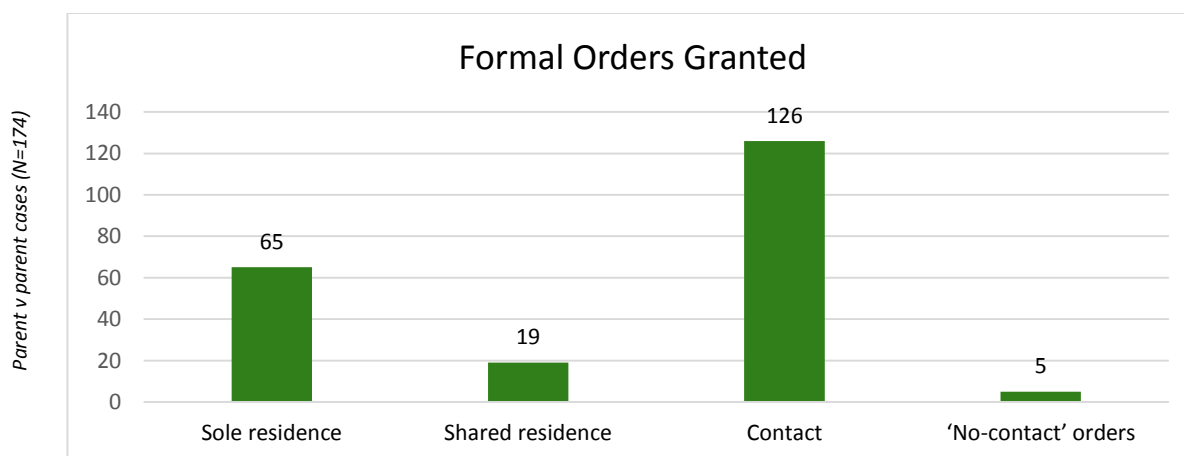
4.1 Introduction

This chapter examines the outcomes **in the 174 parent cases**. The numbers of residence, shared residence, contact and no-contact orders made by the courts are outlined. The chapter also looks at the success rate for applicants, where the child was living when the case left the court system and investigates whether allegations of child welfare and domestic violence make a difference to the success rate of applications.

It concludes that the County courts showed no indication of gender bias in contested cases about where the child should live. Furthermore, contact applications by fathers were overwhelmingly successful. Near equal shared care arrangements were rarely sought, logistically difficult to manage and often precluded by practicalities. We also found some uncertainty about what exactly a shared residence order was for, and how it should be used.

4.2 What were the formal outcomes?

This section gives an overview of the formal outcomes reached in the 174 cases. The numbers of the different types of orders made for mothers and fathers are discussed.



Within our sample of 174 parent cases, the courts made 215 separate final orders in relation to where a child should live and with whom he or she should have contact. More orders were granted than the number of cases, since many cases resulted in more than one order, e.g. a residence order for dad and a contact order for mum.¹

In total, a higher number of residence orders were made for mothers than for fathers. However the success rate for mother and father applicants who applied for a residence order, was more equal.² As both parents are named on a shared residence order we deemed this order to be made for the benefit of both mum and dad.

¹ There were also other Section 8 orders (Prohibited Steps Orders and Specific Issue Orders) in some cases, and some parents had also been granted Non-Molestation or Occupation Orders under the Family Law Act 1996. We have not focused on any of those orders in this Chapter.

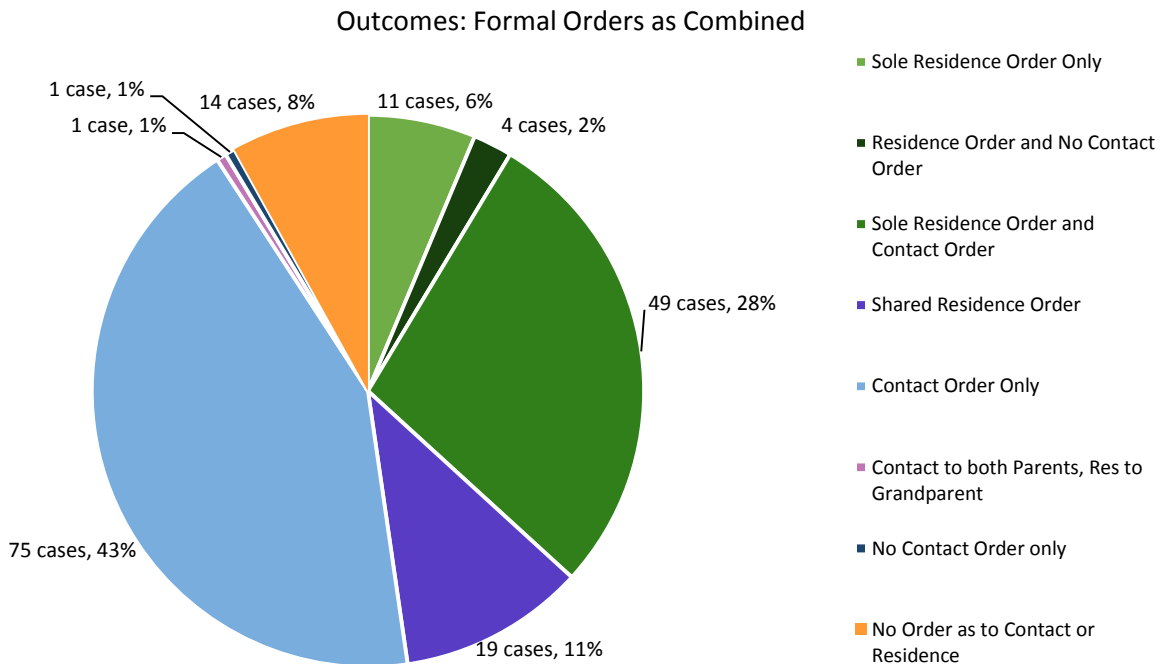
² See section 4.6

More contact orders were made for fathers than for mothers. Contact was the most common type of order overall, while orders that there would be no contact were very rare. There were only 5 cases where such express orders were made.³ This low number is consistent with other studies. In the study by Smart *et al*, for example, there were only 4 ‘no contact’ orders out of 430 cases.⁴

Types of orders made	Named holder of formal order			
	Mother	Father	Grand-parent	Total
Sole residence	40	24	1	65
Shared residence		19	0	19
Contact	27	99	0	126
‘No-contact’ orders	5	0	0	5
Total number of orders				215

4.2.1 How were the orders combined?

The most common outcome in the 174 cases examined was a single, standalone order allowing a non-resident parent to have contact. There were 75 such orders made. A sole residence order was made in 65 cases. Most of these residence orders were made in conjunction with contact orders for the non-resident parents to have contact with their children.⁵ Shared residence orders were comparatively rare, made in only 19 cases.



Base: Parent v parent cases (N=174)

³ In all five cases it was fathers whose contact was blocked.

⁴ C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p27.

⁵ 50 out of 65 cases: 77%.

The table below gives a more detailed breakdown of the outcomes in the 174 cases. The most common outcome was for the child to live with the mother and the father to be granted a contact order.

Combination of Orders	Mum	Dad	Gran	No-one	Total
Sole Residence Order Only	8	3			11
Residence Order and No-Contact Order to block Other Parent	4				4
Sole Residence Order and Contact Order for the Other Parent	28 ^a	21 ^a			49 ^a
Shared Residence Order	19 ^b	19 ^b			19 ^b
Stand-Alone Contact Order	5	70			75
Residence Order For Grandparent and Contact Orders for both Parents			1 ^a		1 ^a
Stand-Alone No-Contact Order Only		1			1
No Order as to Contact or Residence				14	14
	64	114	1	14	174 ^b

^a This chart shows the named residence order holder. The other parent is the holder of the contact order.
^b although each parent shares the residence order, there are only 19 SRO orders in total

In 11 cases the courts made a sole residence order for the resident parent⁶ but did not make any kind of formal contact order. There did not seem to be any particular reason for this practice although the non-resident parents in these cases were all very disengaged from the court process.⁷ In two of these cases it was clear from the files that existing informal contact would be continuing. In D18, for example, dad lived abroad and would continue to have contact in the summer holidays. In a further 5, future contact was still a possibility. Borgate children's services were prepared to supervise contact with mum in B45, but she had yet to take up that offer. In 2 cases, the non-resident parents simply did not attend the first and only hearing where the residence order was made.⁸

The parents without residence had initially engaged with the court in only 2 of these 11 cases. In B54, dad seemed to give up on his application when the fact-finding hearing went against him, and withdrew his application. In C52 dad was violent and his drinking was a problem, but it was unfortunately not clear from the file why no contact order was made. Supervised or indirect contact orders were made in similar circumstances in other cases.

4.2.2 No order made as to residence or contact.

There were 14 cases in which no order relating to residence or contact was in place when the case left the court system. This does not mean, however, that questions of residence and contact were never addressed or resolved by the courts. These 14 cases can be divided into four categories: cases where outcomes were determined by external circumstances; cases where the applicant parents simply disengaged from the court process, single issue cases resolved through prohibited steps or specific issue order and cases which started in court but where the parties went on to negotiate private solutions (in one case through the involvement of social services).

⁶ 8 mothers and 3 fathers.

⁷ A contact orders ought to be made once a residence order has been made as, otherwise, the parent with residence can, under Section 14 of the Children Act 1989, demand that the child is returned to them at any point.

⁸ One of these, A10, was an application made in the very early stages of relationship breakdown, and it seemed likely that the parties would agree contact once the baby had been returned to her mother.

In four cases external circumstances intervened to dictate the solution of the case. The applicant father in B17 was deported, while the father in C3 was sent to prison. In B63 the couple reconciled. Finally, in B39, the severely autistic child would soon turn 18, and the case was referred to the Court of Protection.

Two cases ended without a formal order because the applicants disengaged from the process.

In B53 contact had been agreed informally, but was irregular, possibly because the father had some issues with drugs. He applied for, and was granted, an interim order for weekly daytime contact, but Cafcass reported that this had not worked out well for the 9-year-old, who was now fed up with erratic, infrequent and boring contact. An interim order for indirect contact was made, but dad did not write to his son, lost touch with his solicitor, and failed to turn up at court. The interim order was discharged and the father's application was dismissed.

The question of the courts' limited responses in the face of this kind of litigant disengagement is discussed further in Chapter 5 in 5.5.2.

Three of these cases were about a single issue that could be decided using a prohibited steps or a specific issue order. The dispute in C25 was over the mother's proposed family holiday to the Middle East; she was granted a specific issue order once she had given an undertaking that she would return to Cladford. In C2 dad had threatened to take the child to his country of origin, mum was granted a PSO to stop this from happening, and there was no further discussion of contact since dad neither engaged with Cafcass nor attended court. In the third case, E15, a PSO was put in place to stop dad from removing the child from care of mum 'save for the purposes of contact agreed in writing'. The files in all three cases indicated that there was some kind of ongoing contact between the non-resident parent and the child. The ability to take these particular disputes to court halted the escalation of the conflicts and averted a potential breakdown of contact. Smart *et al* found a number of similar short cases where court worked very well in clarifying matters and reassuring the parties.⁹

In four cases the court considered issues of residence or contact but did not make final orders on these questions because the parties requested space to reach their own, private agreements. This links to the point made in Chapter 3 about the need for time to resolve disputes.

Here, the district judges' gradual 'wait and see' approach to monitoring contact gave the parents space and opportunity to reach their own agreements. In both E26 and B38 there had been temporary crises around contact, but once these settled down the parties agreed to negotiate instead; since neither application was dismissed, court was left open as an option should negotiation not work out.

In B27, there had been a very detailed shared residence order in place for over two years. At the end of summer holiday contact, dad said the two girls had been effectively abandoned with him, but mum applied to court for their return. She was granted a specific issue order. This led to a re-opening of the issues of residence and contact. A Section 7 report was prepared by children's services because there had been some prior involvement with the family in relation to historic domestic violence allegations. The author investigated some of mum's allegations regarding emotional and sexual abuse by dad, but found no evidence to support these. Instead, she raised concerns about gaps in the mother's home-schooling of the daughters. Moreover, the older daughter had complained about mum's attempts to frustrate contact, and both girls said they wanted to live with dad, or at least see more of him. The mother refused to accept this. Dad accused her of trying to alienate the children against him. However, a few months later mum agreed to the two girls, now aged 10 and 13, spending six months with dad on a trial basis. At that stage, the parents wrote to ask the court to discontinue proceedings, make no order and give them space to focus on co-parenting by agreement.

⁹ C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p40.

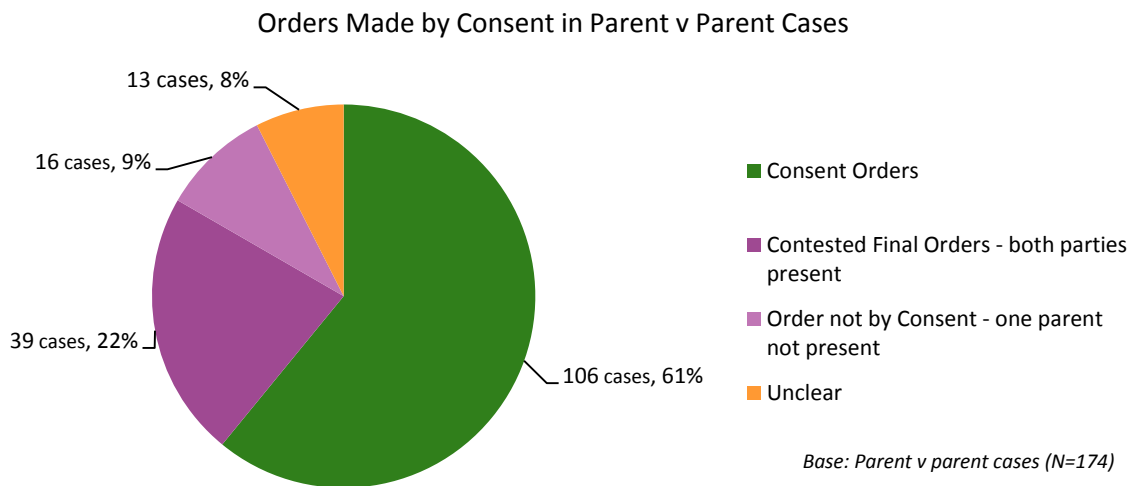
This case can be seen as an example of a success in terms of referral to private ordering. Court assessment of the alleged risk to the children was essential in moving the case towards this resolution.

The situation in B16 was different. This case, too, moved from court to negotiations, but these negotiations included Borgate children’s services as well as the parents. Dad, who had alternate weekend contact, had embroiled the children in so many applications to court, and made so many groundless accusations against the mother (made to the court, police and children’s services) that social workers assessed his actions as emotional harm. Once mum had been granted an order to suspend dad’s contact, the plan was for things to be resolved, and contact restarted, through a child protection conference. A ‘no-order’ order was made in relation to dad’s contact application, leaving it up to the parties to continue contact along the pattern order in the interim. Mum’s application for residence was never formally dismissed or withdrawn, it just ceased.

On the surface B16 can be seen as a successful referral to private ordering but it raises questions. The County Court appeared to have handed over responsibility for the dispute’s resolution to the local authority rather than to the parents themselves. These cases illustrate a court order as to residence or contact may not always be the appropriate solution even where court adjudication is necessary to ensure that contact runs smoothly. Other actors may intervene to resolve the issues in the case.

4.1 How many consent orders were made?

Of the 174 parent applications, resolution was reached by consent order in 106 cases (61%). In 13 cases it was not clear from the file if the final order had been reached by consent. In 55 cases it was clear that the parents did not agree the final order (32%) but not all of these cases went to a contested final hearing. In 16 of these 55 cases, the respondent parent simply didn’t attend the final directions appointment and the order was made in their absence.



In C36, mediation to get contact restarted had failed, and there seemed to be a link to dad’s delay in paying child support and the paternity of an older child who both parties eventually agreed was not dad’s son. The mother then failed to turn up for six court hearings; a warrant was issued, she was brought to Cladford County Court by a court bailiff and represented by the duty solicitor. At this hearing an order was made for twice-weekly visiting contact with the 6-year-old. There was clearly a high level of antagonism between the parties. This is likely to have influenced mum’s decision not to appear at court for the final hearing; her solicitors told the District Judge that they were without instructions and that the mother’s phone had been disconnected. In those circumstances, a consent order was not an option.

In 14 cases the matter was disposed of in a directions hearing but it was clear that the parents did not agree. 25 cases went to a fully contested final hearing, 14% of the entire sample. In a small number of these cases the final hearing was bitterly contested. In B9 for example where the parents could not agree where the child would live, the final order specified that the parties should discuss arrangements by text message only.

In B62, Cafcass were concerned that the father's tendency to draw the child into the dispute over residence was causing him emotional harm. The father, a litigant in person throughout, wrote numerous letters to the court and complained that he did not have enough time to challenge the accuracy of the documents prepared by the mother's solicitors. A residence order was made for the child to live with his mother. An order was also made to prevent the father from making applications for two years without the court's leave.¹⁰

D27 was a long-running dispute, with a current shared care arrangement. It had a background of fears of abduction and historic domestic violence allegations against dad; mum also claimed someone else was the child's father (a DNA test eventually proved this to be wrong). Mum alleged that dad had been excluded from the child's school more than once due to his aggressive behaviour. Cafcass were concerned about the child's exposure to the adult conflict and doubted whether the parents were willing and able to put aside their differences to focus on the child. There were 17 hearings over 2 years, and the final listing was for the two-day contested hearing where a residence order was made for the mother, with an almost equal sharing of time with the father.¹¹

As was mentioned in Chapter 3, it is impossible to ascertain from the file documents whether or not the apparent consent to the final order was free and full consent. Other researchers have questioned the reality of consent in cases in their samples where consent orders were suddenly made after a long-term, deep conflict.¹² We also wonder whether, in some cases, vulnerable parties were subjected to undue pressure to settle, particularly in cases where one parent was struggling with multiple issues such as drug dependency and depression and/or children's services were (not unreasonably) insisting that the only alternative to the Section 8 order would be care proceedings. These types of cases are discussed in Chapter 2. They are also discussed in Chapter 6, in relation to the non-parent cases where mothers may have been allowing relatives to take over caring for their children because they felt there was no real alternative.¹³ It would be too simplistic to see the proportion of cases that have settled by consent as cases which would have been better off in private ordering.

4.3 How successful were applicants?

This section examines the numbers of applicants who were successful in obtaining the court order they initially applied for. **It is difficult to measure a true 'success rate' for applicants.** The long-term resolution of the issue in dispute might require a different order than the one that was initially applied for, particularly where family circumstances changed during the case. Some parents made tactical applications for residence orders where they were really looking to reintroduce contact. There were also other cases where the idea of measuring success in terms of obtaining the order sought do not really give a full picture of what was going on. For example, three parents who initially applied for something else were eventually granted sole residence orders. In E48, mum had applied to vary the shared residence order, but Cafcass felt dad was using that formal order to harass and bully her, and

¹⁰ An order made under Section 91(14) of the Children Act 1989. The Court of Appeal, laying down guidelines for the use of this order limited it to 'a useful weapon of last resort in cases of repeated and unreasonable applications'; *Re P (A Minor) (Residence Order: Child's Welfare)* [1999] 3 WLR 1164.

¹¹ Unfortunately, the judgment setting out why the sole residence order had been chosen despite an almost equal sharing of the child's time was not included in the court file.

¹² C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p28; J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p175.

¹³ See section 2.8.5, section 0 and section 6.5.1.

recommended sole residence. In E38 mum's initial application was for non-molestation and prohibited steps orders but the court felt that a residence order was also appropriate. In C21, mum decided midway through the contact case to move to another town. The 11-year-old daughter chose to stay in Cladford with her dad, and that arrangement was put into a consent order for residence with dad.

That said, this section will look at whether applicants obtained the order they applied for as a measure of 'formal success' and also consider the factors that might lead to an application being successful.

There were 53 Mum applicants and 121 Dad applicants in total. In all cases the respondent was the other parent.¹⁴

Type of Application	Mum	Dad	Total
Sole Residence	27	29	56
Residence or Contact	3	9	12
Shared Residence	4	8	12
Res for Applicant & Contact for Respondent	2	3	5
Res for Applicant & Block Contact for Respondent	1	0	1
Contact only (+)	3	68	71
Order to Sever Contact for Respondent	3	0	3
Order to Limit Contact for Respondent	0	1	1
Other Order only (PSO, SIO)	9	2	11
Order Applied for Unknown	1	1	2
	53	121	174

The court made some sort of order for the applicant in 151 out of 174 cases; an overall 'success rate' of 82%. This would seem to belie the protestations that is sometimes made that 'there is no point in going to court'.¹⁵

35 of the 62 applications for sole residence ended in a residence order for the applicant (56%).

Only 1 of the 12 either/or applications for either residence or contact ended in a residence order. 9 ended in a contact orders and 2 other application were withdrawn. As discussed in Chapter 2,¹⁶ we judged that in most of these applications, the applicants were seeking and would have been satisfied with, regular direct contact.

There were 12 applications for shared residence; 6 resulted in that order being made. This is a 50% success rate. Since we had such a small number of cases that featured the issue of a shared residence order,¹⁷ the reasons why such applications succeeded or failed are considered together.

61 of the 71 applications for contact ended in a contact order for the applicant (85%).

¹⁴ There were only 2 cases with notice parties: in C32 the maternal grandparents, who were eventually awarded residence, and in A2 the new stepdad and the maternal grandmother. The cases where one party was someone other than a parent are examined in Chapter **Error! Reference source not found.**

¹⁵ We recognise, of course, that applicants did not always get legal recognition of the exact practical arrangement they sought. Enforcement of orders is a further problem.

¹⁶ See e.g. section 2.8.7.

¹⁷ Even including cases where such requests were made during the progression of the case.

3 of the 'no-contact' orders were made on the court's own motion where investigations revealed a high risk of domestic violence. Only 2 of the 4 parents who wanted a standalone contact order solely to sever or reduce the other parent's contact were successful in that endeavour.¹⁸ In these cases it was accepted by the non-resident father that the continuation of contact was impossible. In B33 the father was in and out of a psychiatric hospital. In B57, the father wrote to the court to say that he no longer wished to pursue contact after the Section 7 report revealed that his children found contact distressing. The father had a long term alcohol abuse problem and was often intoxicated during contact. In B16 changes in circumstances as the case progressed meant that a final 'no-contact' order was not necessary. The mother in B16 sought an order to suspend contact on the advice of children's services. It was always envisaged that this suspension would be temporary until social workers could work with dad to minimise the risk for the children. After considerable support by social services direct contact recommenced.

23 contact orders were made for applicants who had initially applied for something else. In 9¹⁹ cases, the application had been for either residence or contact, 8²⁰ parents had applied for sole residence and 2²¹ had sought shared residence. 2 applications had been for prohibited steps orders, while in 2 files the initial applications were missing from the files.

Not all the final orders made were made for the applicants. 25 residence orders were made for respondents (19 for mothers, 6 for fathers) and 42 contact orders were made for respondents (20 for mothers and 22 for fathers).

4.3.1 What was the success rate for Father Applicants?

Of the 68 applications made by fathers for a contact order to allow them to have contact with their children, 60 ended in contact orders: a success rate of 88%. This is consistent with other researchers' findings that fathers are generally successful in obtaining a contact order.²² The level and quality of their contact is discussed in the Chapter 5.

Of the 8 applications for contact that did not end in a contact order, 2 applicants obtained more time than they had initially sought with one case ending in a shared residence order and 1 in a residence order. Six applications for contact were truly unsuccessful, with 1 case ending in a 'no-contact' order, 1 the application being withdrawn and 4 applications dismissed.

Of the 9 applications for either residence or contact only 1 ended in residence, 7 ended in contact orders and the last application was withdrawn. Only 1 of the 7 either/or cases that ended in contact went to a full contested hearing:

In E50, the parties' marriage had recently ended in considerably acrimony when mum discovered that dad's affair with their former nanny was not, in fact, over. Dad accused mum of being implacably hostile and was dissatisfied with only seeing his two sons, aged 8 and 12, for a few hours twice a week. He sought residence or contact and said he wanted equal time. He made some accusations that mum physically and emotionally abused the children, but these had no factual foundation; he was at one point encouraged by a judge to try to move beyond his egocentric view of events. The older son said he never wanted to see dad's new partner (his old nanny) again and wanted to live at mum's house. At the contested hearing in front of a Circuit Judge a sole residence order was made for the mother, with weekly staying contact and half of holidays for the father. Although the father may have been

¹⁸ They may also have been seeking, and may have been granted, another additional order.

¹⁹ 7 fathers and 2 mothers.

²⁰ 5 fathers and 3 mothers.

²¹ 2 fathers.

²² Smart *et al* estimated that at least 80% of fathers' applications ended either with an order for contact or with apparent agreement between the parents: C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p32.

disappointed not to have been granted residence, it was what the children wanted, and there was generous contact.

As discussed in Chapter 2,²³ we judged that only 2 of the 9 either/or applications were really seeking residence; the others were tactical attempts to secure contact time. In all the remaining 6 of the either/or applications that ended in a contact order, contact had either stopped or been severely restricted. In two of the cases, the fathers expressly complained of being unfairly 'squeezed out' of their children's lives by the stepfathers; other fathers had not seen their children for weeks. These 6 cases ended with compromises and consent orders where contact was regular and defined, and the dads withdrew their residence applications.

In E21 the parties had lived apart for a few months since mum asked dad to leave the matrimonial home. He had not seen the child since and claimed that mum kept threatening to call the police if he tried to visit. He applied for residence or contact but stated on the c100 application form that what he wanted was regular contact in a contact centre which could progress to staying contact. At the first (and only) hearing, he withdrew his application for residence, and an order was made for contact with for two hours every Saturday at the maternal grandparents' home 'and at such times and in such manner as the parties may from time to time agree'.

Of the 32 applications for a sole residence order by fathers, 16 ended in a sole residence order: a success rate of 50%. 8 ended in shared residence, 5 in contact and 3 ended with no order. Where fathers applied for residence they were highly invested and the court kept them involved even in difficult or high conflict cases. The case below illustrates this point.

The parties in B62 were divorcing due to the mother's adultery. Mum had moved out of the marital home in Fernham²⁴ and intended to return with the children to her parents' house in Borgate. Only one of the children was under 16. Dad applied *ex parte* to the Fernham County Court to prevent mum from moving with to Borgate, a six hour drive away from the former marital home. Mum said she had to move as dad was refusing to sell the former matrimonial home. The relocation was allowed after the 11-year-old told the Fernham duty Cafcass officer he would like to move with mum and his older siblings. The case was transferred to Borgate and the court focused on defining dad's contact. However, during the year that the case remained in the court system, dad changed his mind twice and made a number of cross applications for residence, claiming the boy wanted to return to Fernham. It seemed to Cafcass that dad was using mum's continuing affair with a married man to influence their son against her. He also made a number of complaints against Fernham and Borgate Cafcass officers, the mother's solicitors and Borgate court officials. The case went to a full hearing, where it was decided that it would be too disruptive to move the boy half-way across the country again, particularly as he had now settled into senior school in Borgate. Cafcass stressed that the conflict was causing the boy emotional harm. A residence order was made for mum, with staying and holiday contact to dad, and with it a S91(14) order to prevent dad from making further applications without permission from the court. The father's appeal was heard by a High Court judge, who dismissed it, and he was denied permission to apply to the Court of Appeal. This was clearly a very high conflict case, where the child was suffering emotional harm, because dad kept involving him in the parents' conflict. Yet, it was never questioned that regular staying contact should continue.

Failures to obtain a formal order were not necessarily failures to resolve the case in a way that satisfied the applicant. The father in B42, for example, had sought a residence order. He later withdrew this application, by consent and upon the parties agreeing that the child would stay living with her father and that contact would be as per an agreed contact order. This was presumably the factual outcome the applicant had originally sought.

²³ See e.g. section 2.8.7.

²⁴ A fictional name used to preserve the parties' anonymity.

4.3.1.1 Why did Fathers' Applications Fail?

We cannot draw any general concrete conclusions on why some fathers' applications failed and others did not. Unsuccessful case files suggested a variety of different and interconnecting reasons why the father applicant did not get the order he sought. The children's strong opposition to contact and litigant disengagement were common themes. It was impossible to assess how influential any particular factor was in any particular case as did not interview the litigants or professionals involved. For example, in E50, discussed above,²⁵ the father sought residence, or shared residence orders, but failed to obtain these at the final, full hearing. He seemed unwilling to see anything from anyone else's point of view and the 11-year-old child's desire to live with his mum was probably very influential.

In C52 mum had left Cladford very suddenly to return to her hometown of Gramborne²⁶ with the 5-year-old child's three older half-sisters. As she had not yet ruled out a reconciliation, she agreed that the boy could stay with his dad to avoid unnecessary change. The parties' relationship had been marred by domestic violence and very heavy drinking. Mum's letters to the Court suggested that dad, who was an ex-soldier with several tours in war zones, may have had PTSD. She claimed that living with him and the paternal grandmother in Cladford had 'dragged her down' to their lifestyle of alcohol abuse, violence and petty criminality. Returning to Gramborne had helped her refocus. Contact with the father of her older children was, and always had been, trouble-free. Dad applied to have the informal residence agreement put into a residence order. Mum resisted this; dad was repeatedly telephoning her when drunk to be verbally abusive, plead for a reconciliation or put the little boy on the phone to tell her she was 'a shit mum'. The Section 7 Report highlighted dad's drinking, his vacillation between abuse and a desire to get back together, and the 20+ domestic violence call-outs from when the couple were together. It recommended a fact-finding to ascertain the truth of the mother's allegations, before any decision was made as to residence. Nevertheless, at the last hearing a residence order was made for mum, but no order for dad. It was not possible to tell from the file why that was. This was a full contested hearing, and although dad was by now a litigant in person and had failed to submit statements as requested, it seemed incompatible with the prevailing pro-contact climate in Cladford that a request by the father for contact would have been simply dismissed.

In this case, like many others, it was clear that high conflict, parents' problems and parents' inability to comply with court instructions all played a part in the result. There is more detailed examination of the cases that ended with no contact at all in Chapter 5, section 5.5.2.

4.3.2 What was the success rate for Mother Applicants?

There were 30 applications by mothers for sole residence; 19 ended in a sole residence order. This success rate of 63% was slightly higher than the fathers';²⁷ something which is consistent with other studies.²⁸

4 of the remaining 11 applications ended in shared residence orders, 3 in contact orders, 2 in prohibited steps orders which gave the mothers the security they wanted and 2 in no order.

There were also 3 applications for either residence or contact, 2 ended in a contact order and 1 was withdrawn. As with the majority of the fathers' either/or applications, we judged the main purpose of these applications to have been the resumption of contact. It seemed to us that these mums and many

²⁵ See section 4.3.1.

²⁶ A fictional name used to preserve the parties' anonymity.

²⁷ However, as we explain in the section on the role of the status quo, the latter was likely to be a more important reason for this slightly higher success rate for mothers.

²⁸ Where mothers applied for residence, 47% gained either sole or shared residence; the corresponding figure for fathers was a slightly lower 43%. C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p16.

of the dads in the same position were signalling to the respondents that unless contact improved their children would be better off changing residence.

In A2, mum applied for contact and residence after problems with the existing arrangements for her 8-year-old daughter. It had been agreed that the child would live with dad and have contact with mum. Dad said he was worried that mum's new husband presented a risk. This was a high conflict case where the parents' new partners and extended families had also become involved in the dispute. At the second directions hearing, the Section 7 report found the child was settled with dad and her new stepmother but hated the ongoing conflict cause by the hostility of the parents to each other. Mum withdrew her application for residence, her undertaking for the stepdad not to be present during contact was discharged, a Family Assistance order was made, and there was frequent staying contact.

Three mothers applied for contact; only one was successful. These were, however, a very small and troubled group of applicants. In B58, as an example, there had been previous children's services involvement with both this child and the mother's older children. The ten-year-old boy said that when she was drunk, the mother could be threatening and physically abusive. In 1 case, a mother who asked for a change to the details of the shared residence order was granted a sole residence order. The outcomes in shared residence cases are examined in more detail below.

4.3.2.1 Why did Mothers' Applications Fail?

There was no common denominator in cases where mothers' applications failed. As with the father applicants, there were a variety of potential reasons why the application was not successful. In some cases mothers did get the factual outcome they had wanted, but not the formal order requested. In a very small number of cases mothers had been less than truthful, exaggerating risks to the children. A few of the mothers who struggled with addiction or ill health did not respond promptly to the court's requests for documents or failed to turn up for hearings.

We did, however, find one grouping of cases with common themes that gave us cause for concern. These cases featured allegations of domestic violence, but the court's attention was commonly focused on facilitating contact rather than meeting mothers' demands for orders that would give them confidence and security. A few examples are given below.

In E40 mum's application for residence and prohibited steps orders alleged that dad was very controlling, and that he had repeatedly threatened to remove the children. A PSO was initially made but later discharged, a contact order was made for dad, the parties agreed to go to mediation and in that context mum was given permission to withdraw her application.

The background of domestic abuse led us to question whether a referral to private ordering had been appropriate in this case.

In C9 mum applied for residence, prohibited steps, occupation and non-molestation orders. She had moved to a refuge and claimed her arranged marriage had been marred by domestic violence from the start. A fact-finding hearing proved inconclusive: allegations were neither proven to be true nor false. The judge remarked that neither party were wholly credible and that the alleged facts were, in any event, not serious enough to rule out contact. Initial supervised progressed well. The final order was a consent contact order for one overnight every other weekend and telephone contact. The mother's initial application was never formally withdrawn or dismissed.

The lack of a residence order may be justified as there was no dispute over where the children should live, but this outcome also meant there was no formal legal protection for mum's primary care giver role.

In D5 mum, who had a residence order from previous proceedings, alleged that dad had threatened to kill the children, her and then himself. She applied to terminate dad's contact because he was, at

that point, refusing to return the children. In addition, she sought prohibited steps and non-molestation orders. She also cited a history of domestic violence. During the case, Cafcass wrote to Dunam Court to express their concern that contact had been restarted at the first hearing and the case adjourned indefinitely without any safeguarding checks or involvement from Cafcass. This case ended with recitals/undertakings by both parents not to use violence or threaten violence and a contact order for dad was made. A contact direction ordered the parties to attend PIP and mediation.

It may well be that as feelings calmed down the parents were able to reach a compromise on contact, but we did not feel that the worries expressed by the Cafcass officer were misplaced.

In E3 the mother had applied for prohibited steps and non-molestation orders. A full fact-finding hearing was held, and the allegations of domestic violence were proved. However, they were not considered 'very serious violence' of the kind that might require contact to be supervised. The final consent order for contact was drawn up by the father's solicitors and did not contain a residence order for mum, and although the PSO had been made at the first *ex parte* hearing it was unclear how long this would continue.

There were some cases where, although there was room for improvement in the case management of domestic violence allegations, the court had nonetheless made a positive impact.

The case in E8 began when dad unilaterally removed his 4-year-old son from the maternal grandparents' home because mum was not there. Mum applied for PSO and non-molestation orders; these were initially made, and later replaced by cross undertakings. It was clear that there was a lot of bitterness between the parties, but that dad was also seeking reconciliation; his frustration resulted in excessive communication that mum saw as harassment. During the case, there was tension about holidays, passports and the implementation of contact. The child had been saying horrible things about his mum and stepdad at school; teachers talked to dad about not interrogating the son or trying to get the son 'on his side'. Cafcass concluded that the boy was under severe pressure trying to please both parents. Although the father strongly resisted this, contact was changed in the final order from weekly to fortnightly. This had been one of the mother's strongest requests, and it may be that the legal process and involvement of welfare professionals allowed her to hold her own position against the father's desire for more time with the boy.

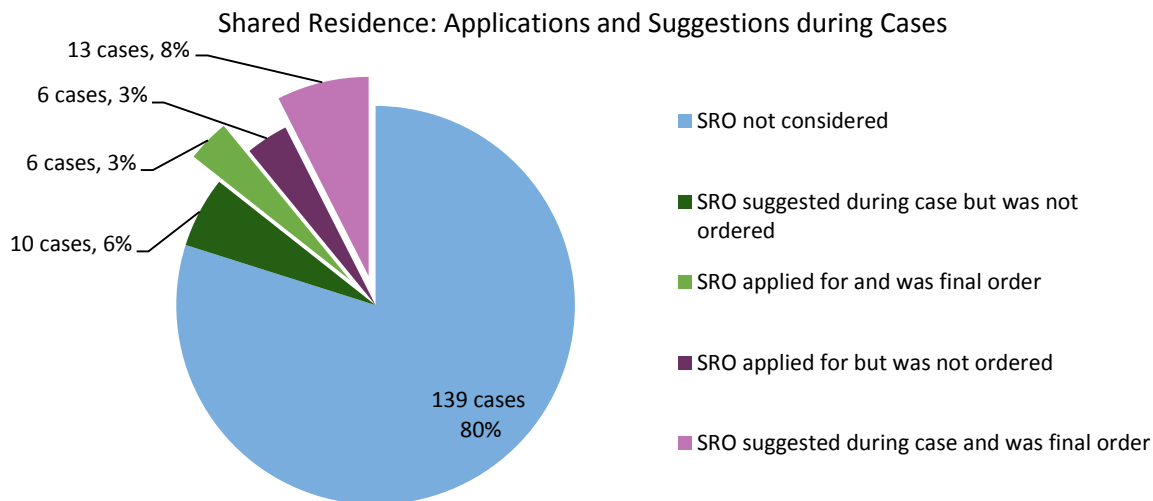
4.3.3 Shared residence Orders

A total of 19 shared residence orders were made. The success rate of applications for shared residence was 50% (6/12). In the other 13 cases the issue of a shared residence order was raised during proceedings.²⁹ In total, the issue of whether a shared residence should be made was raised in 35 parent cases.

In most cases the idea of a shared residence order was raised as an attempt to improve relations between the parties and encourage settlement.

Sometimes the order was suggested by the parents themselves. In C20 and in C37, for example, the fathers had applied for sole residence orders, mentioning *inter alia* the animosity between the parties. The mothers in both cases responded by suggesting shared residence. In B10 the father cross applied for shared residence after the mother had sought sole residence. The father in B28 complained in his shared residence application that the current contact arrangement was being sabotaged by the mother. The file in B12 showed that the parties had agreed on a very detailed shared residence schedule in mediation, but did not disclose who had initially suggested this type order.

²⁹ 12 arose out of applications for sole residence. Only one case (B12) began with a parent's application for contact.



A shared residence order was expressly suggested as a way forward by a professional in two cases. Unfortunately, in C40, no reason was given for this choice of label by the Cafcass author of the Section 7 Report. In D1, however, the social worker who wrote the Section 7 report for Dunam children's services explicitly recommended shared residence as a way to improve co-parenting. The parties, it was said, were both capable parents, but needed to radically change the way they interacted with each other to reduce the level of conflict and the risk of harm to the child. The father agreed. His skeleton argument for the final hearing set out that a shared residence order was wanted 'to send a clear message that [the son] has two parents of equal importance who both have a valuable contribution to make to his life'.³⁰ The file showed that the case was due to return to court again in 2012, so it appears that shared residence did not work the way it was intended.

In E24 the parties asked for a shared residence order towards the very end of the case. They were attempting reconciliation, but there had been several failed reconciliations before, and children's services were involved due to drug use and domestic violence. Esseborne social workers wrote to inform the County Court that the parties wanted the shared residence order to avoid disputes and minimise conflict should the relationship break down again. We wondered whether the SRO had been suggested by children's services to increase stability and security for the child.

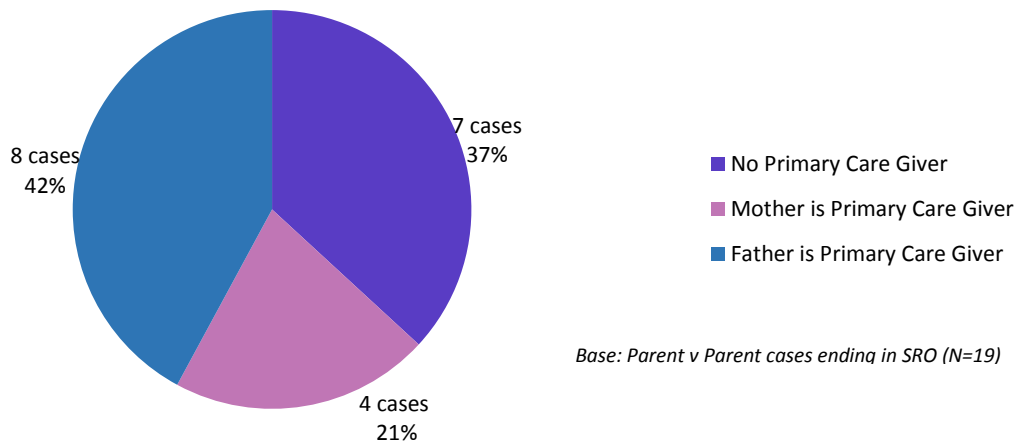
4.3.3.1 Reality of care under the Shared residence order

The reality of the child care arrangements under all the formal orders is discussed in greater detail in Chapter 5. Here we examine whether the notion of a shared residence order was linked to 50/50 sharing. **We found confusion among litigants and legal professionals as to what exactly a shared residence order was for; a point that has also been raised by academics.**³¹ We were interested in the extent to which these orders described the situation 'on the ground', and whether they were being used for secondary, perhaps symbolic purposes.

³⁰ Similar arguments had been made, successfully, in the reported cases, e.g. *D v D* [2001] 1 FLR 495, *Re F* [2003] EWCA Civ 592, and *A v A* [2004] EWHC 142.

³¹ P Harris & R George, 'PR and shared residence orders: parliamentary intentions and judicial interpretations' [2010] CFLQ 151.

Reality of Care in Parent cases with Final Shared Residence Orders



There was an equal or very near equal sharing of the children's time in 7 of the 19 cases with shared residence orders.³² In the remaining 12 cases, the children's time was allocated unevenly, and it was possible to identify one parent with primary responsibility for the children's day-to-day care. In 4 cases, the primary care giver was the mother and in 8 cases it was the father.

In all the 8 cases where the reality under the shared residence order was that the fathers were the primary care givers there was regular overnight contact to the mothers. In the majority of these cases there were current or past child welfare related allegations against the mothers.

In E49, for example, it seemed that the children's poor school attendance as an indicator of neglect had prompted children's services to ask the father to seek residence. The arrangement had initially been labelled interim contact to the mother, but was changed at the last hearing to shared residence.

In C40 the parties were recovering heroin addicts whose relationship broke down when dad (correctly) suspected that mum was using street heroin again. He took over the primary care giver role and retained it even when the mother got herself clean; the shared residence order may have been made to recognise her continuing close involvement in raising their daughter.

In other cases it was the parents' conflict itself that was putting the children at risk.

In D9 both parents were *prima facie* competent, but their three sons had been drawn into the parents' on-going divorce to such an extent that they were potentially at risk of emotional harm. In the context of marital breakdown and a dispute over the matrimonial home, the mother had made allegations of historic sexual offences against her husband; he was initially arrested, but the case was dropped. This gradually caused the three boys to adopt their father's anger that their mother had betrayed and destroyed the family. Contact with her dwindled, particularly for the teenage children, until the final shared residence order was for the youngest child only to spend alternate weekends with his mother.

In 4 of these 8 cases, **the solution achieved by the court was a *de facto* transfer from primary care with mum to primary care with dad.** In 1 case the order was an initial solution for post relationship breakdown parenting following the breakdown of the parties' marriage. In the remaining 3 cases the children had been living in the care of their fathers for some time.³³

In the last four cases mothers were the primary care givers with regular overnight contact to the fathers. **Here, the reason for the label of shared residence appeared to be high levels of animosity;**

³² Patterns are discussed in detail in Chapter 5, section 5.1.1, where our definitions of a Primary Care Giver and No-PCG cases are also set out.

³³ In two cases on an informal basis and in the third under an existing shared residence order.

shared residence orders were made with the aspiration that this could improve matters.³⁴ Despite the animosity, all three final orders were marked as having been made by consent.

In B12 the dispute between the parents was long-running, rooted in other issues, and moved from one matter to another, with the resident mother providing many excuses why she could not attend directions hearings. A highly detailed and precise shared residence order was used, although the time-share was almost the same as that under the previous contact order: alternate weekends and half of holidays.

In C38 dad said at the first hearing he wanted shared residence to be seen as ‘on a par’ with mum. In C20, an acrimonious relationship breakdown, there was a complicated three-week schedule for the father to have approximately a third of the children’s time, which seemed to be built around his shifts in an emergency service. In D1, Dunam children’s services found that neither parent posed a risk to their toddler son, apart from their inability to stop exposing him to their conflict. As discussed at the start of this section, shared residence was recommended to help the parents learn to work together.

It can therefore be seen that, as is clear from the reported cases,³⁵ a ‘shared residence order’ did not have to mean a near equal sharing of the practical responsibilities of caring for children. There were a number of cases where labels of shared residence or extensive contact were used interchangeably or even simultaneously. In A5, for instance, the judge’s handwritten notes interchangeably called this a dispute about joint residence or extended staying contact.

4.4 The role of the status quo

	Habitual PCG (status quo carer)	PCG immediately before the application	PGC Post Final order	Named residence order holder
Mum	120	126	124	40
Dad	19	39	38	24
No PCG/Shared care	5	3	9	19
Intact Family/ in same house	30	4	0	0
Grandmother	0	0	1	1
Unclear	0	2	2	0
Total	174	174	174	84

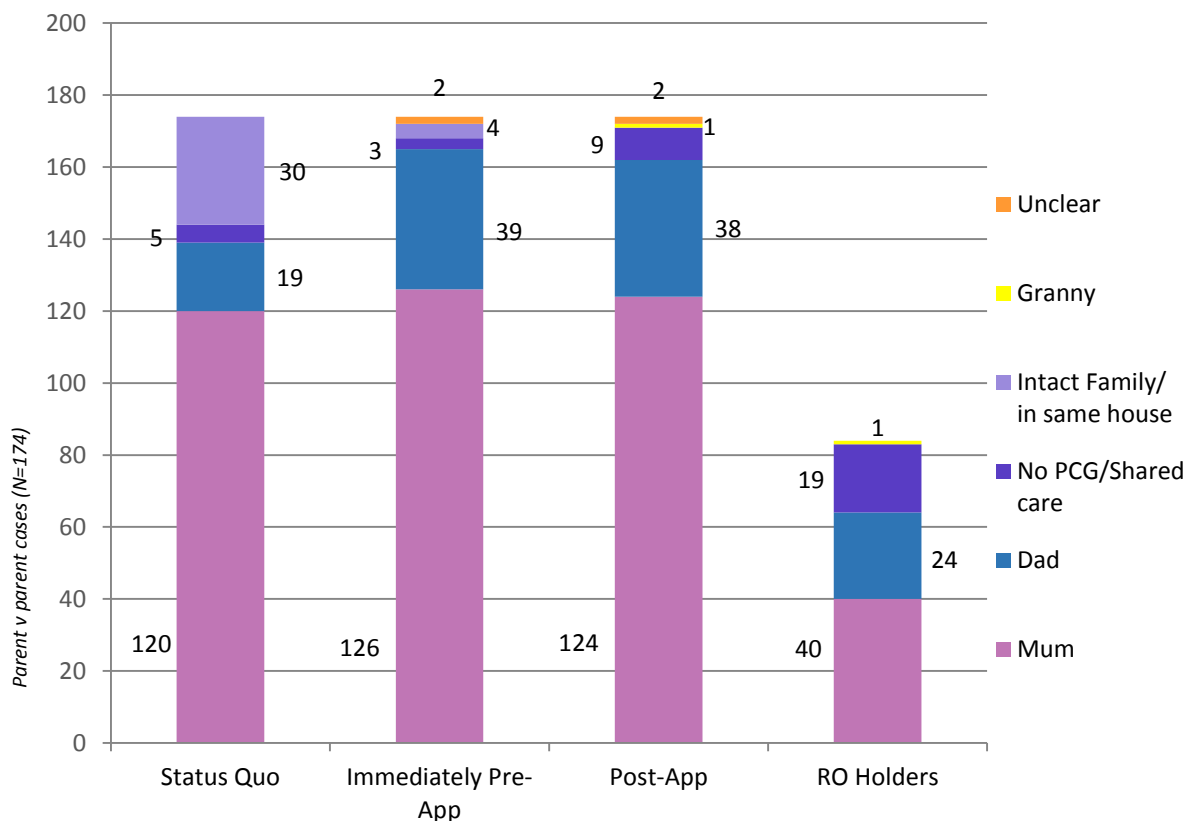
In Chapter 2, we looked at who the children were living with both immediately before the application, and on a longer term established basis. We wanted to separate the cases where a parent had been the child’s primary carer for a long time from the cases where there had been a sudden change in circumstances. In this section we examine the relationship between established patterns of care and the final order made. The cases files very rarely provided transcripts of judgments or even judges’ handwritten notes on their decision-making processes. It was not possible for us to pinpoint exactly when a wish not to disrupt the status quo had been the decisive factor in a judicial decision.

The importance of the need to avoid disruption to the child was sometimes made in Section 7 reports. In C52, for example, the Section 7 report noted that there had been more than 20 domestic violence call-outs to the couple’s old address as well as mum’s concerns about dad’s drinking and his highly

³⁴ An aspiration also expressed in the leading reported cases at the time: *D v D* [2001] 1 FLR 495; *Re F* [2003] EWCA Civ 592; *A v A* [2004] EWHC 142.

³⁵ *Re K* [2008] EWCA Civ 526

conflicted attitude, but was not confident that any of these factors could justify a change of residence, at least not without a fact-finding hearing to ensure that the mother was not exaggerating things. Similarly, in E49 and C40 report the Section 7 authors recommended against another move because the children were settled in their current arrangements.



4.4.1 Children who stay put

4.4.1.1 Children who stay put with their mother

In 100 cases the children’s habitual care giver at the time of the application was the mother, and their habitual PCG after the final order was also the mother. In these cases, the established status quo was maintained. These were the largest group of cases, making up 57% of the parent versus parent cases.

In D2, the mother applied *ex parte* for non-molestation and prohibited steps orders, alleging that dad was violent and that when he did intermittently have contact he always threatened not to return their daughter, who was nearly 4 years old. The orders were granted. At the second hearing, the father denied her allegations and sought contact. A defined contact order was made; hand-overs and other communication was handled by both sets of grandmothers. Contact progressed to regular staying contact. Half way through the short case, dad sought residence on the grounds that his daughter looked unkempt and had been bitten by the mother’s dog, but that application was dismissed without further investigation. The final order was for alternate weekend staying contact.

In 3 of these cases the children were temporarily with their fathers at the time of the application. In all these, there was a contact arrangement that was meant to be temporary, but the fathers wanted to keep the children. In D19, for example, the 12-year-old son had gone to stay with dad while mum travelled overseas, dad applied for residence, but the boy told Cafcass he wanted to live with mum and just see more of dad.

In 28 of these 100 cases the reality of care after court resolution was supported by a formal sole residence order for the mother.

In C2, dad applied for contact with his 2-year-old son. Mum responded by seeking residence. At the second hearing the residence and contact orders were made by consent. Three months later, mum stopped contact. She alleged that dad had been telling the son that mummy was fat and ugly, and didn't really want him living with her. The father denied this. At the next hearing, the order recorded that the father did not accept these allegations, but did nevertheless give an undertaking not to 'bad-mouth' the mother in front of the child. At the subsequent hearing, the court noted that things were going well and that 'mum would agree to gentle extensions' of contact. The final order was for twice-weekly visiting contact.

In 3 of these cases the formal order was for shared residence, although this order preserved the status quo that in reality the PCG was mum, with whom the children spent most of their time. All three cases had a long history of conflict between the parties, and problems with the implementation of contact.³⁶

In 69 cases where children lived with their mothers both before and after the court case no formal residence order was made.

4.4.1.2 Children who stayed with their fathers

In 17 cases the children's habitual caregiver at the time of the case was the father and the children stayed with the father after the case as well. In 1 of these cases the child was temporarily with mum at the time of the application.

In B20 the father applied for a residence order. The mother's alcoholism, which she had struggled with since 2005, made direct contact too difficult for their 11-year-old daughter. The mother responded by accusing the father of hypocrisy, claiming that he drank just as much as she did. Hair strand testing and welfare enquiries confirmed that while both parents were drinking more than the recommended daily amount, only mum was an alcoholic whose drunkenness distressed the child. Interim supervised contact was set up, but cancelled on the advice of Borgate children's services when mum turned up drunk. The final order gave dad permission to relocate overseas, and set up indirect contact via Skype as well as supervised holiday contact subject to the condition that mum must be sober.

In 3 of these cases the formal order was for shared residence even though dad was the PCG. In E33, for example, there was an existing informal and seemingly amicable arrangement that the child should spend the majority of time with dad. Mum wanted this to be labelled shared residence as this 'may also aid me with my housing situation'.³⁷

In 9 cases a sole residence order was made for dad and in 5 cases the child remained with dad but no residence order was made. In C35, for example, the mother applied for either residence or contact. Interim contact was set up through negotiations between the solicitors before the first hearing and continued with gradual increases until it became the final contact order. The question of a residence order was never raised.

4.4.1.3 Children who remained in a No PCG arrangement.

In 4 cases the children remained in arrangements of near equal care where neither parent could be identified as a PCG.³⁸ In 1 the child was with his dad at the time of the application. In 2 of these cases a formal shared residence order was eventually made. In 1 case the formal order was a sole residence order for mum with staying contact for dad. In the last case, C26, no formal residence order was made;

³⁶ As set out above in Section 4.3.3

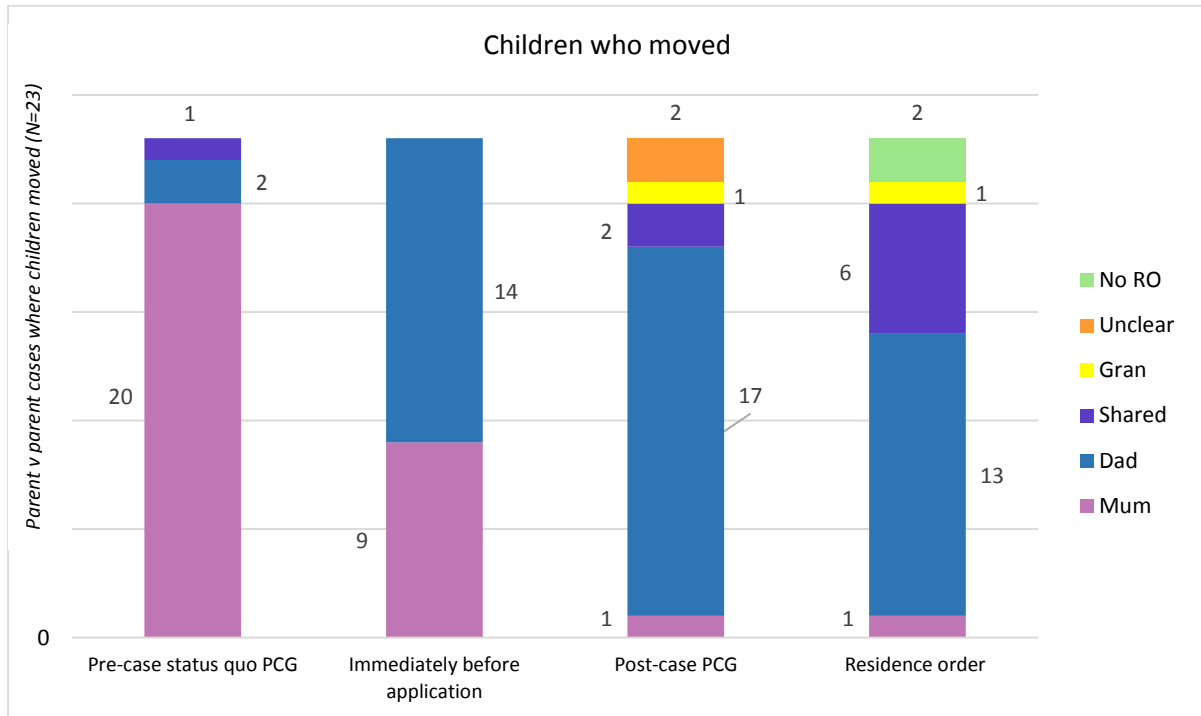
³⁷ See Section 4.3.3.1.

³⁸ Our definition of primary care giver is set out in detail in Chapter 5 section 5.1.1.

oddy the case began with the parties having a shared residence order but it ended with a contact order made for dad, despite there being only a marginal change to the allocation of the children’s time between the parents.

4.4.2 Children who moved from one parent to another

There were 23 cases where the children moved from the care of one parent to another. In 16 cases the primary care giver role was transferred from the mother to the father. There was only one case where a child was moved from living full time with a father to full time with a mother. In 1 case the child moved from living with his mum to living with his maternal grandmother; mum’s inability to cope with parenting had been discovered as a result of dad’s application for contact.³⁹



There were also 2 cases where the mother was the habitual PCG before the application, the situation after the case ended was unclear because the parties had been referred to mediation. The most likely outcome in both families seemed to be that the mothers would keep their PCG role, with the dads increasing their contact time.⁴⁰

In 1 case the child was moved from the living full time with mum to a shared care arrangement and in the last case the child was move from living full time with dad to a shared care arrangement.

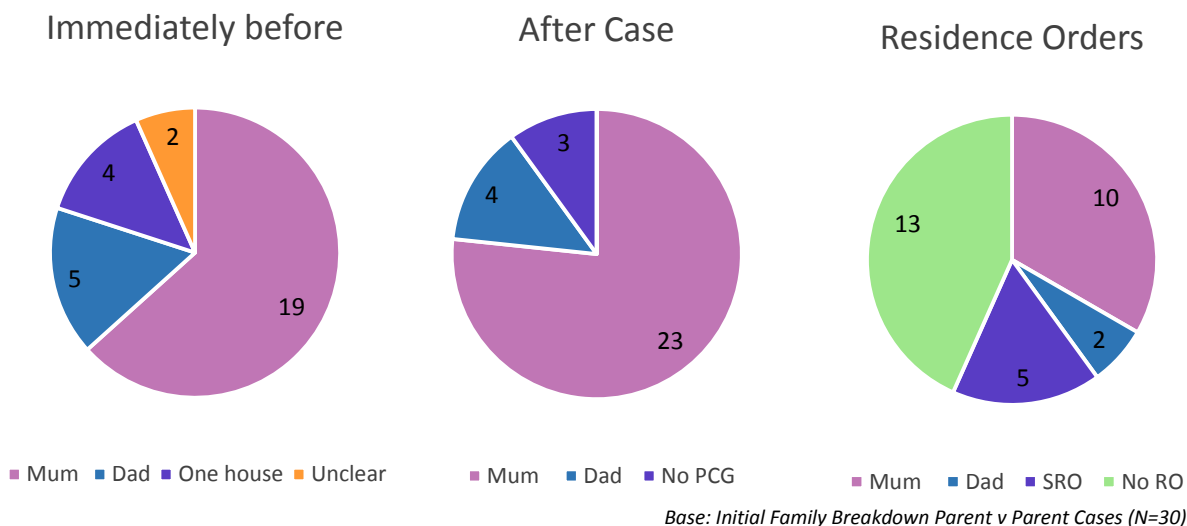
In D11 the child was left in the care of the father for a temporary period while the mother received residential treatment at a psychiatric hospital for depression with psychotic symptoms. A year later the father applied for a residence order. The mother, now recovered, was keen to care for the child full time with help from social services. The local authority S7 report suggested that the father was having difficulty coping and needed support in dealing with an alcohol abuse problem. During the time that the case was in the court system the child ended up living with the mother by agreement and this was supported by social services.

³⁹ In C32 there was a younger half-sister born during the case who also ended up with the maternal grandmother. Mum had a drug problem and a very chaotic life. Dad, who made the original application, had frequent contact with his son.

⁴⁰ In both B27 and C38 the parties’ communications suggested that negotiations would focus on the dad’s contact.

4.4.3 The Initial Family Breakdown Cases

There were 30 families where the application was made at the stage of initial relationship breakdown. In 4 of those cases, the parties were still living together in the former family home at the time the application was made. Where the parties were living in different house in 19 cases the children lived with mums and in 5 cases the children lived with dad.⁴¹



In 17 of these cases applications were made for residence orders so it was clear that the issue of residence was in dispute.

In 23 of these cases the final outcomes was for the children to live with their mother. In 4 cases the children lived full time with their father, and in 3 cases there was near equal division of care. Sole residence orders were made in 17 cases: 10 for mothers, 2 for fathers. In 5 cases shared residence orders were made.⁴²

4.4.4 Analysis

The formal orders generally reflected the reality of care in terms of the identity of the primary care giver. There were a small number of exceptions in the shared residence category. There were also a large number of cases where the reality was sole residence but no formal order as to residence was made. This is in keeping with Section 1(5) of the Children Act 1989 which cautions courts against making unnecessary orders.

In the initial breakdown cases most of the children went from living in an intact family to living with their mothers (77% of the cases). Cases with no primary care giver were rare (10%).

It was also rare for the courts to effectuate a change in the children's residence. Where this did happen the vast majority of the transfers were from the mother's care to the father's care. Many of the cases featured serious child welfare concerns, which persuaded the court that it was necessary to change the status quo and subject the child to stressful changes. These cases are discussed in more detail below.⁴³

⁴¹ In the remaining 2 cases it was unclear from the file what exactly the situation was just before the court case.

⁴² In those 5 cases, there was no identifiable PCG in 3, in 1 case the PCG was the mother and in 1 the father.

⁴³ See section 4.5.2.1.

In E12 dad applied for residence because the two children, aged 6 and 4, had witnessed frequent and serious domestic violence between mum and her new partner. Dad said mum refused to end the relationship even though the children were terrified. As dad moved into more adequate accommodation, Cafcass reported that he had the support of his own parents and was managing well in meeting the children's practical and emotional needs. Mum ended her new relationship, and sought the return of the children, but she accepted the Cafcass recommendation against another move, since the children had already experienced enough disruption. The final order was a residence order for dad with one mid-week overnight and a long day-time contact on Sundays for mum.

In all the 19 parent cases where a shared residence order was made, the care patterns predating the applications had a high level of involvement by both parties and some contact with both parents continued throughout the legal disputes. In general, the adults were in agreement that both parents should have substantial involvement but were arguing over details.

In 4 cases shared residence orders were used to change the post-separation PCG. The mothers in these cases commonly struggled with problems such as addiction and poor mental health, and the levels of conflict were generally high. In D32, for example, the children had originally lived with the mother when the parents separated, but after frequent fights, the teenage daughters went to live with their father, and their two younger siblings eventually chose to follow them. Concerns were expressed by children's services about how much the mother's own troubled history prevented her from parenting effectively. In C37 dad alleged that mum's heavy drinking made her a neglectful and aggressive parent. Cafcass found the teenage daughter to be very quiet, exhausted and frightened to express any opinion lest this should spark another row; it was the exposure to conflict that was causing her the most harm.

In our sample of cases where there was no status quo for post dispute parenting and the parents' relationship was at the stage of the initial breakdown, most children ended up in the full time care of their mothers.

4.5 Allegations of child welfare and domestic violence

Our sample contained high numbers of cases where allegations of domestic violence were made (86/174), or concerns about a parent's ability to care for the child were raised (79/174). There were 50 cases where both issues were raised and considered. With such high numbers of cases within the sample it is difficult to see any clear difference to outcome in such cases as compared to the cases without such allegations, particularly as other factors such as the nature of order applied for might determine the case.

4.5.1 Domestic Violence

4.5.1.1 DV and Sole Residence Orders

Residence orders were made for the child to live with a parent in spite of clear evidence that this parent had engaged in domestic violence.

A sole residence order was made for fathers in 5 cases where they had been accused of domestic violence and this had been proven. In all these cases, social services were involved and the aim of both the social workers and the County Court seems to have been to find the 'least damaging'⁴⁴ solution. In two of the cases it was feared that the mothers would not adequately protect the children from dangerous third parties, in two cases the mothers had serious mental health issues. In one case, the children had come home and found their mother in bed with another man; they were now

⁴⁴ *Re M (Child's Upbringing)* [1996] 2 FLR 441.

staunchly opposed to any kind of direct contact. In addition there was problematic drug or alcohol use in relation to three of the mothers.

In two cases, mothers were granted sole residence orders although they were jointly accused of domestic violence. In both C45 and D26, there were a number of police call-outs and referrals to the domestic violence unit, which identified both parents as perpetrators and victims. In D26, the deciding factor was practical: dad was effectively homeless, and it was agreed that the three children would live with mum, but that staying contact would start as soon as dad had somewhere better to live. In C45, the deciding factor was probably professionals' shared concern⁴⁵ that dad was very controlling, and was using the Section 8 proceedings as one part of his strategy; he had also made malicious referrals to children's services based on groundless allegations against mum. The mothers in these cases may not have been perfect, but living with their fathers would have presented greater risks to the children.

4.5.1.2 DV and Shared Residence Orders

There were 4 cases where the fathers were accused of domestic violence and the LASPO evidential criteria were satisfied, yet a shared residence order was made. This raises questions: even if the allegations were not true there was clearly still such a high level of bitterness between the parties that an SRO could be seen as 'a recipe for disaster'.⁴⁶

Yet, in all four cases, we thought that the shared residence order had been chosen as an attempt at conflict reduction. These were entrenched disputes, some of which had been going on for a very long time. In all cases the fathers were really the children's main carers.

Both parents in B49 accused the other of drinking too much and being violent; dad also said mum was mentally ill. The allegations against mum were not backed up by her GP, and tests found dad's drinking to be 'just at the upper limit'. The focus was then on the parents' intractability and the way they exposed their children to their conflict. Drugs test were ordered and the parents were sent to PIP in an effort to resolve the conflict and a shared residence order was the final solution in the case.

It was clear from all the cases where shared residence was considered (but not always the final order) that allegations of domestic violence or child welfare related problems were not treated as an automatic bar to the making of a shared residence order, but were quite an important factor in the decision of whether or not to make such an order.

In D9 the mother made allegations about the physical abuse from the father at the time of the break-up of the marriage as well as historic more serious criminal offences. A fact-finding hearing was scheduled, but not held, since findings would, in any event, 'be unlikely to assist in determining the matter at the welfare stage or in the preparation of a Cafcass report.'⁴⁷ A shared residence order was made at the contested final hearing. It had been suggested by one of the children as morally the best solution.

In D32 the mother had accused the father of past physical abuse. There was clearly ongoing verbal abuse from both parents, with threats and insults frequently being exchanged in public. However, the more important issue in the case was the parties' inability to prioritise what was best for the children. The shared residence order made at the contested final hearing may have been an attempt to reduce the level of conflict. Family counselling was also recommended.

In 3 cases the option of a shared residence order was rejected because of the fathers' aggressive, violent or controlling behaviour. C45 has been mentioned above. In C51 more than twenty domestic

⁴⁵ Children's services and dad's probation officer.

⁴⁶ *Re R* [2012] EWCA Civ 1326 *per* Hughes LJ [9].

⁴⁷ This was noted in the preamble to the interim order made on the date of the scheduled fact-finding hearing.

violence related referrals had been made to the police by the mother, the paternal grandmother and other women. Cafcass were particularly concerned that, when interviewed, the father lied to minimise the impact of both his violence and his drinking. They made a very robust recommendation in favour of sole residence to the mother (despite her also having a troubled background with ongoing concerns).

In E48 the applicant mother complained that she had felt pressured into shared residence during previous proceedings in the FPC. She suspected that the father wanted a shared residence order (rather than contact) for symbolic and housing purposes and accused him of harassing her. During the case there was an incident where the father attempted to forcibly collect the child from school, was arrested for dangerous driving, and was subsequently banned from attending the school because other pupils had been put at risk. He also lost his solicitors who had strongly advised him not to take such action. The subsequent Cafcass report stated: 'Although a harmonious situation between parents is not a prerequisite for a Shared Residence Order, I believe that in this case, the father has on occasion used his 'rights' to manipulate the situation at [the child's] expense'.

Past domestic violence was also documented in E1 and B31. In those cases, it was a factor militating against shared residence, but the main reasons given were the children's views. In E1, the parties agreed not to hold a fact-finding hearing, but instead to respect the findings of a Wishes and Feelings Report.⁴⁸ It may be that this approach avoids time-consuming examinations of the past. It may also be an attempt to avoid escalating conflict and bitterness by expressly labelling the applicants as 'bad' parents.

4.5.1.3 DV and Contact Orders

Proven allegations of domestic violence did not generally prevent the court granting a contact order. Instead, contact was commonly reintroduced by interim orders for supervised contact which was then reviewed to see if contact could progress to direct contact. In a few cases supervised contact was also the final order – these are examined in more detail in Chapter 5.⁴⁹

In some cases professionals went to great lengths to support and encourage contact. This did not always work, particularly where the children were frightened of the parents.

In B60 there were historic allegations of domestic violence. The father sought to reinstate contact with his two sons aged 8 and 2. He had not seen them for over 18 months. The mother said her sons were frightened of their dad, and that she had stopped contact because she feared the father would take the boys out of the country. At the first hearing it was agreed that fortnightly contact would be arranged by the parties at Borgate Contact Centre. Due to issues around funding, and the Centre's waiting list, this did not happen for six months. The father, who was by now a litigant in person, failed to turn up for a review hearing, and his application was dismissed. He appealed, it was reinstated, and the directions as to contact at the Centre were repeated. The first session was not successful. The children had refused to enter the room, and the 8-year-old had been upset and tearful. The centre recommended one-to-one professional support and a tailored contact setting. The case was listed for a hearing to consider this. However, the father withdrew his application and did not turn up for the hearing.

In this case, the court had been prepared to try other, comparatively resource intensive, ways to encourage and restart contact. In other cases, the court's persistent approach led to progression to overnight contact.

⁴⁸ The Report stated that the children were clearly against shared residence; they described their dad as distant, aggressive and prone to ignoring them.

⁴⁹ See section 5.4.1.

In B22 the previous arrangement for contact at the paternal grandmother's house had broken down. When dad applied, mum said she was not opposed to contact in principle, but wanted it to be safe. He accused her of parental alienation, but this was refuted by Cafcass. Dad had been arrested for attacking mum when they were together, and was currently harassing her by driving past her place of work and as she walked their 10-year-old son to school. There had been a dispute over parentage linked to dad's failure to pay child support. The initial Safeguarding letter recommended against direct contact on these grounds. The court ordered contact at Borgate Contact Centre. During this, dad asked the child so many questions about mum that the boy asked the centre staff to supervise contact. Nevertheless, dad continued to raise inappropriate topics, including past allegations of violence. Cafcass noted that dad has problems with maintaining close relationships with all his 4 children, and showed no remorse either about his conduct during contact or about past violence. Supervised contact for six months was recommended for him to demonstrate his commitment. Dad would also undergo liver function tests to assess his drinking and complete a PIP. At the end of these six months, the son was reported to be enjoying contact, and the father had complied with all requirements. It was noted in the Section 7 Report that the boy was now happier about his dad, who could provide a much-needed male role-model. The final order was for one overnight contact visit per fortnight and some additional time in school holidays.

In this case, safeguarding issues were investigated, and the child's wishes and feelings taken into account, but the main goal was clearly to increase the amount of contact in so far as was possible.

There were allegations of domestic violence which either met the LASPO criteria or merited a fact-finding by the court in 4 out of the 5 cases that ended in a no-contact order (80%).⁵⁰ This was not the sole reason for such an order being made. There were, in addition, other factors, including serious child welfare concerns and the non-resident parents' attitudes towards, and engagement with, the court process.

Our cases showed that domestic violence was never viewed as a bar against any kind of order, but as one factor among many to be considered. Where the applicants were looking for contact, it was very rarely, and only in the most serious cases, a reason for there to be no contact and even in these cases domestic violence was merely one factor out of many which weighed against contact.

4.5.2 Child Welfare Concerns

4.5.2.1 Child Welfare and Sole Residence Orders

As highlighted in Chapter 2, there was a clear correlation between the presence of very serious child welfare concerns and applications by fathers for residence orders.⁵¹ 26 out of 32 applications by fathers for residence orders featured alleged child welfare concerns. There was what we classified as significant Local Authority involvement in 15 of these cases.⁵² This included 10 cases in which the fathers sought residence orders on the advice of the Local Authority who had placed the child with them and 4 cases where the fathers sought residence at their own initiative but the Local Authority approved of the proposal. A final residence order was made for the father with a contact order for the mother in all but 2 of these 15 cases.⁵³

In some of the cases with serious welfare concerns both parents were highly chaotic and it was only support from **grandparents that allowed the situation to be resolved by private order**. In C32, where children's services were closely involved, mum lived with her own parents for a while when the new

⁵⁰ All these cases also featured child welfare concerns, and litigant disengagement was a feature of many.

⁵¹ See section 2.8.5, p31.

⁵² The definition of this category is discussed in Chapter 2, section 2.1.

⁵³ In C45 dad's allegation were found to be fraudulent and part of an attempt to control the mother. A final residence order was made for mum. In B63 dad's application was withdrawn with no order as to contact or residence (the parties were considering a reconciliation but the children were currently living with their mother).

baby was born, but she later moved out and left her two children living with their maternal grandparents. In C24 the 3-year-old daughter flourished when she left the mother's care and went to live with her dad and her paternal grandparents.

4.5.2.2 Child Welfare and Shared Residence Orders

There were a few cases where the solution of shared residence was considered and rejected due to child welfare concerns. In D11, the father, with whom the child had been living, was discovered to be unable to care for her due to his excessive drinking. The child was put into police protection, and given to mum, to whom sole residence was subsequently transferred.

In two cases shared residence was tried out at interim order stage, but the mothers' ability to provide a calm, stable home environment was in doubt. In B15 dad complained he had felt pressured into a trial equal sharing arrangement because mum had been so persistent. She was later committed to a psychiatric hospital for treatment under Section 3 of the Mental Health Act 1983. On release she had day-time contact and a sole residence order was made for dad. In B24 shared care had been trialled, but had made the son very unhappy as he was exposed to domestic violence and witnessed his father being hurt and intimidated by mum and his older half-brother. The boy, who was now 9, wanted to live with his dad, and preferred to see his mum with another adult there to supervise.

There were a further 6 cases where shared residence had been rejected because the conflict between the parties was so severe that it put the children at risk of emotional harm. For example, in both B36 and D27 both parents were highly antagonistic, and what was needed was a substantial reduction of contact between them, both at hand-overs and in terms of communication about the children. This meant shared residence was not suitable. These cases can be contrasted with some of the cases, examined above, where a SRO was recommended expressly to improve poor co-operation.⁵⁴

4.5.2.3 Child Welfare and Contact

Not all the serious welfare cases where the local authority were heavily involved were ones in which mum could not cope and dad stepped in as primary carer. Some involved a risk to the children from the non-resident parent. In B33 where dad had threatened to kill himself and the children, risks were so great that contact was not possible. In the other cases, there was a pragmatic focus on maintaining contact to give the children relationships with both parents. This was true whether the contact parent was the father or the mother.

In D14, residence was transferred from the mother to the father after the mother assaulted and injured the 5-year-old when she was drunk. The father said children's services had told him to seek residence or they would apply for a care order. Both parents had a history of drug use, their relationship had been marred by domestic abuse, mum was now drinking heavily and had mental health problems. It seemed this family were battling with a variety of issues. Initially interim contact was supervised by the paternal grandfather who also collected and delivered the child so that the parents would not have to meet. Dad was granted a PSO to stop mum from taking the child at any time. At the next hearing, it was ordered that contact now needed to be supervised; this appeared to be linked to concerns about mum's mental health and a scheduled child protection conference. Mum had attempted suicide and during her compulsory detention in hospital she had made a number of allegations against the maternal grandfather. He refused to cooperate with a risk assessment and children's services no longer considered it appropriate for him to be involved in contact. He initially offered to fund supervised contact, but withdrew that offer. Dad was happy for indirect or supervised contact to go ahead, but told the court he 'couldn't cope' with supervising it. Dunam children's services were contacted about supervised contact, but responded that local authority contact facilities were only available for children in care. Their role in private cases was not to arrange or fund contact,

⁵⁴ See section 4.3.3, p69.

but rather enabling the child's parents to establish contact. A Section 37 report was prepared, which noted mum's ongoing addiction and mental health issues and the stress she was under as a witness for the prosecution of an attempted murder. The father was criticised for not doing enough to support contact, and the recommendation was for him to be provided with a male support worker who could help him to promote the child's emotional wellbeing and encourage positive memories about her mother. In the final hearing, which took place approximately a year after the initial application, it was noted that dad had now supervised contact with mum. The order was for dad to make child available for continuing supervised contact with mum on dates and times as may be agreed between the parties.

There were other cases like D14 with similarly complex circumstances where the requirement to supervise contact seemed to be placing additional stress on parents and relatives. They are examined in greater depth in Chapters 5 and 6.⁵⁵

4.6 Analysis: Does gender matter?

The largest group of cases were fathers' contact applications (68) yet we found only 3 applications by mothers for contact. **This indicated that in cases where residence was not in dispute, children were more likely to live with their mothers.** In the 30 cases that started with the initial family breakdown, mothers were more likely to be identified as the child's primary care giver both before and after the court case. It is likely that social expectations of parenting had shaped gendered roles long before the parties came to court.

The numbers of applications made by mothers and fathers for residence were broadly similar.⁵⁶ There was a slightly higher success rate for mothers. The reason for this was not gender *per se*, but there was a gendered dimension to the reality of care prior to the applications. The reasons given by mums and dads for seeking residence orders were different. Applications by mothers and fathers for residence occurred in different factual circumstances. Mothers' applications for residence were generally to preserve the status quo whereas a much greater number of the fathers' applications were seeking a transfer of residence.

Residence orders were more likely to be made to maintain status quo than to effect a change. As more children lived with their mothers prior to court proceedings the residence orders reflected this reality. Several residence orders performed the same function where the status quo parent was the father. A number of studies have found that the most important factor in a residence dispute is who is looking after the children at the time, rather than gender or anything else.⁵⁷

In E49, children's services had prior involvement with the family due to the children's very poor school attendance. The parent's marriage broke down when he discovered her affair; she left the matrimonial home and the child and her older siblings were living there with dad under an informal arrangement for some time before the father sought a residence order. The mother agreed on this as an interim order as she was under stress; she had also been ordered to undergo testing for drug and alcohol use. There were several delays with funding and with the Section 7 Report. The latter eventually concluded that a residence order should be made for dad so as to avoid upsetting a status quo that was working well for the children. The final order was for shared residence but the youngest child spent school weeks with dad and weekends with mum.

⁵⁵ See section 5.4.1 and section 0.

⁵⁶ 29 mothers and 32 fathers applied for sole residence, in a few cases this was in conjunction with an application for an order to block or limit the respondent's contact.

⁵⁷ E Giovannini, *Outcomes of Family Justice Children's Proceedings - a Review of the Evidence*, Research Summary 6/11 (Ministry of Justice 2011) p1; J Eekelaar & E Clive, *Custody after Divorce* (OUP 1977) p5; S Maclean, *Legal Aid Case Profiling Study*, 1998, Legal Aid Board, p48; C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p18.

However in spite of the importance of status quo to the court, a high number of the applications by fathers were successful in achieving a transfer of residence in circumstances where the mother could not cope. This suggests that the court values fathers as primary care givers where they choose to take on the role. In E49 and C40 the fathers had taken on the primary care giver role at times of crisis and mothers' subsequent challenges to this failed due to the courts' reluctance to change the child's circumstances yet again. In other cases, such as D14, it was noted that children who had previously struggled were thriving in their fathers' care.

In aggregate, 40 residence orders were made for mothers as opposed to 24 for fathers. This difference is attributable to the larger number of residence orders made for respondent mothers (19) as opposed to the number made for respondent fathers (6). This difference reflects the fact that there were a much greater number of mother respondents than father respondents in our sample rather than any gender bias by the courts.

The true identity of the primary care givers following a residence order was slightly more equally split between mothers and fathers than the labels of the residence orders made would suggest. This is because in 13 cases the reality of care did not follow the formal order. In D27, for example, the label of shared residence was deemed unsuitable although the situation was one of near equal care and a sole residence order was made for the mother.⁵⁸ As noted in section 4.3.3.1, we did find evidence of a symbolic use of shared residence orders, particularly in some cases with child welfare concerns and/or high animosity between the parents. This use of shared residence for symbolic purposes could be said to have favoured mothers as a group more than fathers, because in 8 cases the shared symbolic status masked an unequal distribution of time where the fathers bore the main responsibility for raising the children. Nevertheless, as is discussed in Chapter 5, the general pattern for the majority of cases was mothers fulfilling primary care giver roles and fathers having frequent, regular contact.

As there were so few applications for contact made by mothers, it was not possible to meaningfully examine the success rates of such applications on the basis of gender. However, applications by fathers for contact were overwhelming successful. There were some cases where the court went to extreme lengths to re-establish contact in spite of objections by the children or a history of prior domestic violence. This pro-contact attitude was, as D14 shows, equally evident in the small number of cases where mothers sought contact. Very few applications to block contact were successful. This shows a strong stance from the courts in favour of granting contact even in very difficult cases.

⁵⁸ This was a very high conflict case with cross allegations of domestic violence and child neglect, where Cafcass had identified the way the parents were drawing the child into their conflict as causing emotional harm. There was a contested hearing. It was recorded in the final order that the reasons for choosing a sole residence order had been set out in the judgment and that a transcript would be made available. Unfortunately, that transcript was not in the file.

5 COURT CONDONED TIMESHARE PATTERNS

This chapter records the different ways child care was set up to be shared between parents in the **174 parent cases** when the case left the court system. The court files could not tell us whether arrangements lasted or were felt to work well. Nonetheless, they did give us valuable information about the five courts' expectations of parental involvement in post-order child care: what kind of agreements would the court convert into consent orders and what solutions did judges impose where parents failed to agree?

Some timeshare patterns were described in the wording of the orders, others were merely detailed in the files but not copied onto the final orders. Therefore, we refer to 'arrangements' or 'patterns' throughout this chapter.

Our original intention had been to compare time patterns before and after the parents had gone to court. Unfortunately, lack of information on the former in the files meant there was not enough data to make a meaningful comparison in terms of specific sleep-overs, days or hours of contact. In addition, the c100 application forms would rarely tell us precisely how many days or hours of contact that parent was seeking.

Parental involvement should not be measured solely in terms of time; it is the quality of relationships that exerts a critical influence on children's wellbeing, not the amount of time *per se*.¹ However, work by Smyth has also explored subjective experiences of time, distinguishing between 'stilted, shallow, artificial and brief' and more free-flowing time, the kind of relaxed time to 'be in the moment' that helps build closer relationships.² Although contact parents can seem obsessed with time and schedules, what they are actually seeking is time of the second kind, which is relaxed enough to just 'be' together.³ The quantity of time is not the be all and end all, but neither is it wholly irrelevant.

We classified any final arrangements for care in that we found in the 174 parent files into six broad categories: overnight contact cases (including near-equal shared care); regular daytime contact; supervised and monitored contact; irregular contact; indirect contact; and no contact. Each of these categories is examined in more detail in a separate section. In four cases there was insufficient information in the court files. These cases are classified as 'unclear'.

There is also some consideration in this chapter of child welfare concerns⁴ and allegations of domestic violence, and of how cases with these complicating factors are spread across the time pattern groups. In this chapter, we also focus on a narrower group of domestic violence cases: those where the LASPO criteria for evidence would have been met, or where the court judged the allegations serious enough to warrant further investigation.⁵

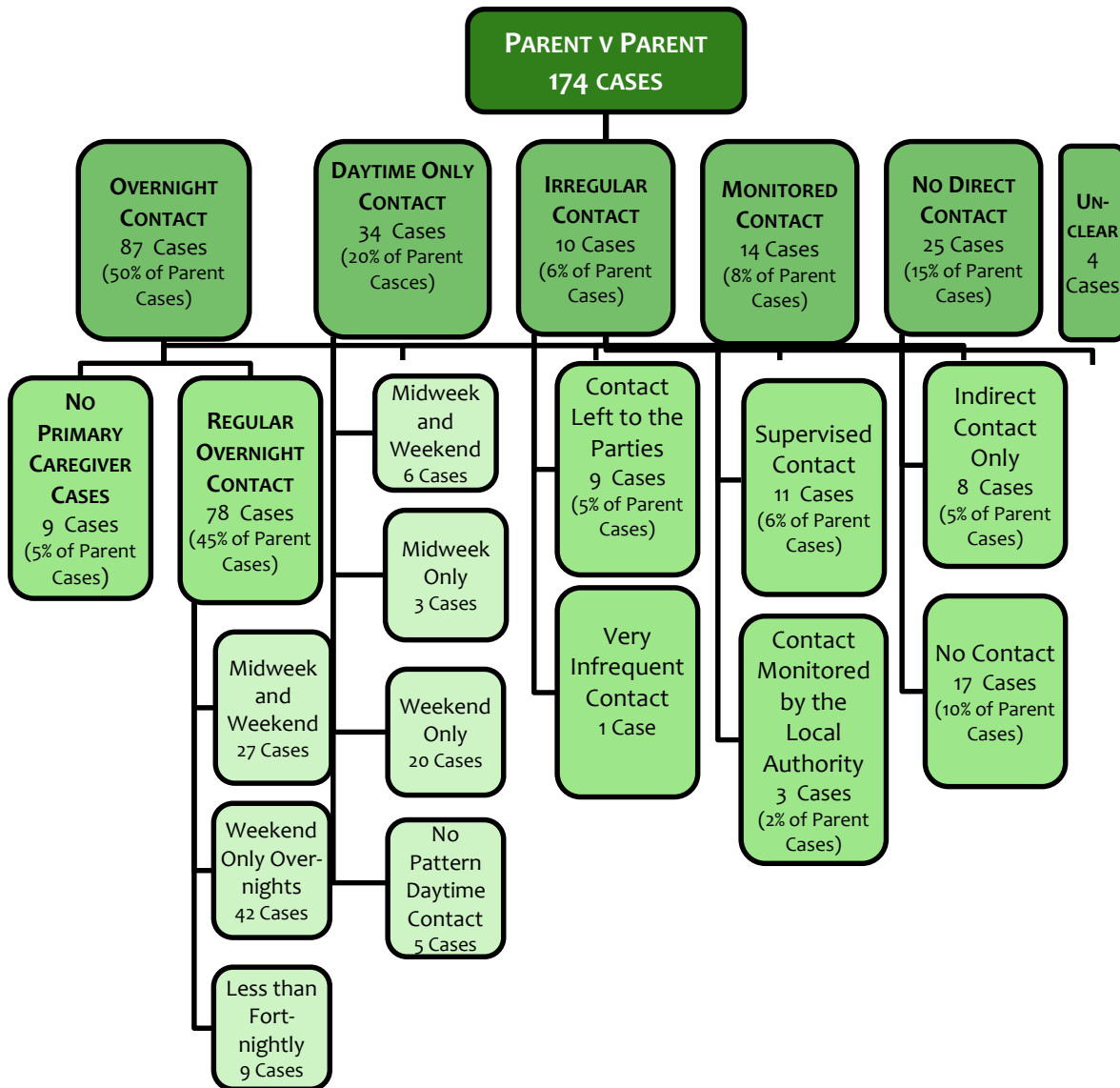
¹ See e.g. J Fortin, J Hunt & L Scanlan, *Taking a Longer View of Contact* (2012, Sussex Law School); L Trinder, 'Shared Residence: A Review of Recent Research Evidence' [2010] CFLQ 475.

² B Smyth, 'Time to Rethink Time? The experience of time with children after divorce' (2005) 71 *Family Matters*, 1.

³ *Ibid*, p8.

⁴ As explained in section 2.1.2, we filtered out child welfare concerns that were the sort of shortcomings that most parents are guilty of at some point.

⁵ This risks being under-inclusive, but does rule out the cases where it was judged that even if the unproven allegations of domestic violence were true, they would not affect future contact arrangements.



The **overnight contact** category was the largest with 87 cases (half of all the cases). The range in quality and quantity of overnight contact set out in the documents varied greatly within this category. The grouping includes cases where the time spent with each parent was so equal that no primary care giver could be identified.⁶ It also includes cases where the contact parent was going to have overnight contact every other weekend and a few cases where the parties lived in different countries and overnight contact was to occur in school holidays only. The different patterns for overnight care are examined below.

In cases where overnight contact was ordered or arranged, it was common for there to be different arrangements in place for school holidays and term-time. These special holiday patterns are discussed

⁶ In order to fall in this category, both parents had to have at least 40% of the overnights as calculated across the year (to include holidays) and they must also have some contact in term-time, midweek. This definition is discussed in the next section.

where common patterns can be identified, but there is no comprehensive cataloguing of holiday contact patterns.

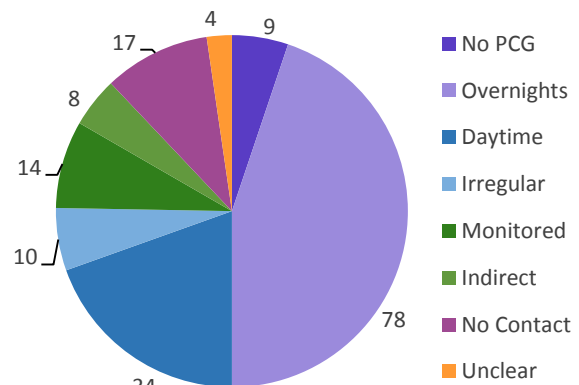
Face to face **daytime contact only** was arranged in 34 cases. In 10 of these cases the contact was irregular in nature and/or left entirely up to the parties but it was agreed that no overnight contact would take place. The 24 cases in which a pattern of daytime only contact was outlined are examined below.

In ten cases the arrangement was to have **irregular** contact. Whether this would be overnight, daytime only or indeed indirect was entirely left up to the parties to arrange for themselves.

The next group was made up of 14 cases where the plan was for **contact to be monitored** by third parties even in the final order. This grouping included the use of contact centres, as well as relatives, and some cases of children’s services monitoring due to on-going concerns about the non-resident parent. Clear time patterns were not always outlined in these cases as arrangements depended on the availability and wishes of the appointed supervisor. The issues arising with this category of cases are examined in that section.

Eight cases ended with arrangements for **indirect contact** only. The final group of 17 cases finished without the court ordering or expecting any contact to take place. We look at the reasons why **no contact** was condoned by the court.

Type of Pattern	N°	%
No PCG	9	5%
Overnights	78	45%
Daytime Only	34	20%
Irregular	10	6%
Monitored	14	8%
Indirect	8	5%
No Contact	17	10%
Unclear	4	2%
	174	100%



Base: Parent v parent cases (N=174)

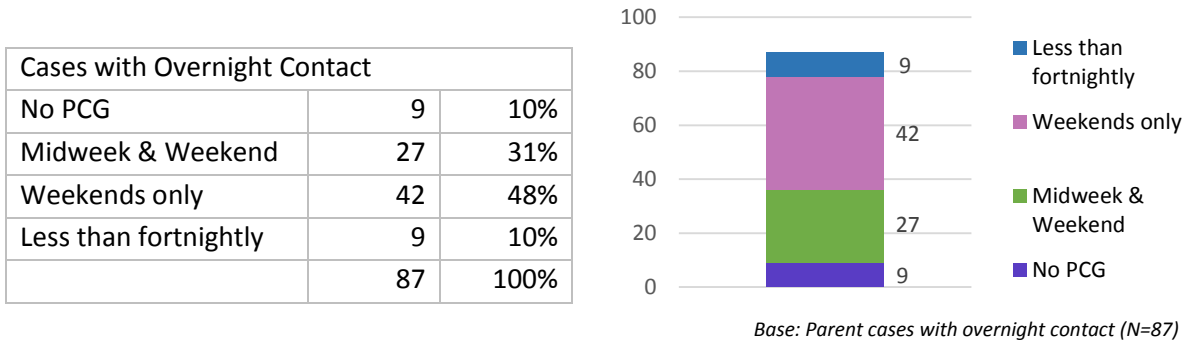
5.1 Overnight Contact

The regular overnight and no primary care giver subcategories added up together make 50% of the entire parent versus parent sample. This is in line with the findings of other research.⁷ In Hunt’s and MacLeod’s study of contact disputes in the courts, staying contact was ordered in 49% of cases where the outcome was known, and their interviews with professionals confirmed that it was very much the norm they worked towards, often because it was seen as better, more relaxed or more natural time.⁸

⁷ D Lader, ‘Non-resident Parental Contact 2007/8’, Omnibus Survey Report No. 38 (ONS, 2008); V Peacey & J Hunt *Problematic contact after separation and divorce: A national survey of parents* (Gingerbread 2008) p18.

⁸ J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p121.

Some interviewees in Hunt and MacLeod’s study also linked this push towards overnight contact as the norm to a ‘sea change’ in attitudes towards a greater involvement by fathers.⁹ Our research, whilst confined to court files, does confirm this. In our case files, there were clear records of parents’ contact being gradually increased towards regular staying contact, which seemed to be the goal in these cases.



This large group of 87 cases was broken down into several sub-categories and the different types of time patterns are examined in turn.

5.1.1 No Primary Care Giver

The arrangements in 9 cases were classified as having **No Primary Care Giver** (No PCG). This classification was made by looking at the number of nights spent with each parent.¹⁰ In order to fall in this category, both parents had to have at least 40% of the overnights as calculated across the year (to include holidays) and they must also have some contact in term-time, midweek. We appreciate that this is not a perfect measure; it is aimed to capture arrangements in which both parents have a near equal substantial involvement in the child’s daily life.¹¹

Midweek involvement suggests that this parent is engaged in a ‘broader range of activities in caring for their children – including bedtime and morning routines – than probably is the case over just weekends’.¹² When Australian legislation was amended to encourage shared parenting judges were specifically directed to think about ordering mid-week contact.¹³

We were particularly interested in how court-ordered near equal care arrangements were designed to work given recent, albeit unsuccessful, campaigning for a legal starting point of 50:50 sharing.¹⁴ It has been argued that such a starting point would place both parents on an equal footing and ensure that children maintained a meaningful relationship with both parents.

It takes high levels of co-operation to make near equal care work. Therefore, you cannot expect high numbers of near-equal care arrangements within a sample taken from the litigating population. As these cases are ones in which the parties required court resolution, co-operation and trust levels

⁹ *Ibid.*

¹⁰ The choice of formal order was not relevant to this categorisation but in 7 of these cases the formal order was indeed ‘shared residence’.

¹¹ Other studies have defined shared parenting according to percentages of nights spent with each parent during a calendar year. Definitions of shared parenting in terms of each parent having at least either 35% or 30% of the children’s time are common. Examining the percentage splits of overnights in our sample showed that in only 16 of our cases did each parent have at least 35% of the overnights as measured over the year (if this examination was limited to term-time only, that number shrunk to 15.) This is 18% of all cases with regular overnight contact, and 9% of our 174 parent versus parent cases. If a cut-off of 30% was used, the corresponding figure for across the year would be 21 cases - with a further 7 cases where the non-resident parent had 29% of all overnights.

¹² B Smyth, ‘Parent-Child Contact Schedules after Divorce’, (2004) 69 *Family Matters*, p38.

¹³ An order for ‘substantial and significant time’ with the contact parent had to include ‘days that do not fall on weekends or holidays’: The Family Law Act 1975 S65DAA(3)(ii).

¹⁴ Although the presumption introduced as Section 1(2A) of the Children Act 1989 by the Children and Families Act 2014 Section 11 is not about the allocation of time, this was what many campaigners had wanted.

between the parties were low. In our sample, arrangements for near equal shared care remained rare occurrences, making up only 5% of the sample. This reflects the findings in previous empirical studies on court files carried out in England.¹⁵

The practical realities of shared care ‘may be quite different from being attracted to it as an ideal of fairness for parents and children’.¹⁶ Shared care is known to be logistically complex.¹⁷ The practical arrangements set out in the No PCG cases illustrate the difficulties of arranging and maintaining a near equal care arrangement. Two cases involved **week-about changes**.¹⁸ In the other seven cases in this category, **change-overs were more frequent** (two or three hand-overs each week).

No particular age group of children dominated this category. However, no case involved teenagers. Instead, teenagers were more likely to tell Cafcass they felt they were now old enough to set their own schedules. This happened, for example, in D9 and B31.

It was common for the court approved arrangements in the No PCG cases to be very detailed. Files could contain colour-coded spreadsheets or four-page agreements. Such arrangements tried to prepare for all contingencies including, for example, provisions for transitioning from term-time to holiday contact and plans for child-minders’ holidays, adverse weather conditions and significant family events. This gave a unique insight into the level of organisation necessary to make these arrangements work.

In C26, where the children had alternated between both parents’ homes for 4½ years, the very detailed order contained provisions about the hand-over of school uniforms to ensure they would be washed. Invitations to relatives’ birthdays or weddings on the other parent’s weekend frequently caused conflict when negotiations broke down. There seemed to be a personality clash between a very organised father who preferred set routines and a more spur-of-the moment mother who found it impossible to only communicate by sealed letters.

These cases gave us cause for concern over the stresses that court-ordered near equal care can place on children, particularly where there are frequent and fraught changeovers.

In B10 the pre-application pattern had involved change-overs every night (with one weeknight alternating each week to ensure a 50/50 distribution). The mother had applied to abandon this, after the school had echoed her concerns. The court seemed to agree, since an interim hearing on the issue of a change of pattern was listed for only six weeks after the initial application. Cafcass reported that the boy was in a constant state of confusion; his main concern seems to have been that the teddy he needed to sleep would be discovered by his class-mates. Hand-overs were done at school, and teddy had to be smuggled in and out every day. At this interim hearing, the weekly change-overs were introduced. It was found that the child coped much better with these. Thus, week-about was the final order, despite the mother’s concern that the child needed her to be the primary carer.

We were concerned to see one case with proven or investigated domestic violence in the category of near equal care given that close cooperation, low levels of conflict and mutual respect are known to be necessary to make this kind of arrangement work well for children.¹⁹

¹⁵ Hunt and Macleod found that only 2 out of 308 children were categorised as living in a shared care arrangement. J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p8.

¹⁶ C Caruana, A Ferro, & B Smyth, ‘Fifty-Fifty Care’ in B Smyth (ed) *Parent–Child Contact and Post-Separation Parenting Arrangements*, (Australian Institute of Family Studies, 2004), p28.

¹⁷ *Ibid.*

¹⁸ Meaning that the child spent one week with one parent and the second with the other. B Smyth *Parent–Child Contact and Post-Separation Parenting Arrangements*, (Australian Institute of Family Studies, 2004).

¹⁹ L Trinder, ‘Shared Residence: A Review of Recent Research Evidence’ [2010] CFLQ 475.

In B49 the mother claimed that the father was emotionally and sometimes physically abusive, and that she had left with the children to escape the violence. She sought a residence order, as did the father. They both accused each other of drinking too much and having mental health problems, but Cafcass found no evidence to support these allegations (although tests revealed the father's drinking to be at the upper limit of what is acceptable). Cafcass also reported that while the police had placed a special marker on the mother's address, there was no objective evidence of violence or injuries to support her allegations. The court decided that a fact-finding hearing was not necessary. Cafcass thought the dispute over residence was bound up in the wider conflict around the divorce, particularly in terms of who should live where. The Section 7 report focussed on shielding the children, aged 5 and 6½, from the conflict. The parents were ordered to attend PIP and not to denigrate each other in front of the children. The shared residence order, made by consent, lasted just under a year before the father made a new application to court for a change in arrangements that would make him the primary care giver. The tone of the documents he submitted did not suggest that the SRO had any measurable positive effect on the parents' relationship. Unfortunately, the case was then transferred to the Family Proceedings Court and we could not follow its progress.

Serious child welfare concerns were expressed in 4 near equal care cases, including B49. Research has shown that near equal shared care places extraordinary demands on parents in terms of financial, material and emotional resources. It was clear that some of the parents in this category struggled with multiple issues and were likely also to struggle with the demands of cooperative co-parenting. Some examples are provided below. As we only had the paper evidence in the files, it was difficult to assess whether we felt that near-equal care sharing was a 'good' solution in these cases.

In C40 the mother was using street heroin, and attacked dad at one hand-over. She then started treatment; while she was not using drugs, prospects seemed good.

In A3 dad was worried about violence and drinking in mum's home (she lived with her parents and siblings). He also complained that her smoking made the toddler's asthma so bad that he had to be taken to hospital. It was a high-conflict case where both sets of grandparents had been drawn into the dispute and there was no good-will between the parties. The solution of near equal care suited the adults, as it allowed them to combine shift work and parenting. However, it was disappointing that the file contained no discussion on whether the agreed schedule was actually good for the small child (nor was a Section 7 report ordered). The file showed that dad had come back to court with a new application a year later to apply for the child to spend the majority of his time with him.

It seemed to us very optimistic to act on the basis that the parents in B49 would be able to follow the Cafcass officer's recommendations to separate their conflict about the divorce and their joint assets from their role as parents. Their children were still small, only 5 and 6½. The adults would need to completely change their attitudes and behaviour, stop fighting and start co-operating so that the children could enjoy their time with both without fear or guilt. Research suggests such comprehensive change is unlikely to occur, and that these kinds of compromise shared care agreements are prone to breaking down.²⁰

It was equally difficult to feel easy about the future in D27. In D27 both parents accused the other of physically abusing the 7-year-old boy but his school worried that the way he was drawn into the parents' intractable dispute and made to make false allegations was tantamount to emotional abuse. Several core assessments had been carried out by children's services but the allegations had not been substantiated. There were frequent rows and the case also had a background of domestic violence. These were, according to the notes made by one Cafcass officer, not parents who were able to put their hostility aside to make shared care work for their son. Instead, they let their parental needs take precedence over the child's, and used him as a pawn in their conflict. This dispute had already

²⁰ L Trinder, 'Shared Residence: A Review of Recent Research Evidence' [2010] CFLQ 475.

returned to court once after a previous final order, and seemed likely to return to court again repeatedly until the child became old enough to make his own decisions.

In 7 of the 9 near equal care cases, the orders were marked ‘by consent’. In some, such as A3, it was a solution that suited the parents but not necessarily the children. However, some consent orders seemed to be uneasy compromises, where any issue that could potentially cause new conflicts had to be identified in advance. It made us wonder whether the focus had been on finding pragmatic workable arrangements or on finding a solution that the applicant felt was sufficiently fair.

5.1.2 Regular Overnight Contact

In 78 cases a pattern of overnight contact existed where one parent had considerably more time with the child (particularly in the school week) and could be clearly identified as the primary care giver. Allegations of domestic violence supported by evidence which would have met the LASPO criteria or required court investigation were made in 25 of the 78 cases. Child welfare related concerns were voiced in 32 cases; in half of those 32, children’s services were involved in the case in some way.²¹

Overall, allegations of child welfare concerns or proven/investigated allegations of domestic violence featured in 44 of the 78 cases, i.e. just over half of this group (56%). This is consistent with Hunt’s and MacLeod’s assertion that if it is true that parents with residence ‘play the welfare card in order to resist contact’ then ‘their strike rate is rather low.’²² This showed that our courts clearly did not treat such problems as an insurmountable obstacle in relation to progression to the goal of staying contact whenever possible.

The overnight category was broken down into three sub-categories. In a third of the 78 cases (27), the contact parent was going to have **contact both at weekends and during the school week**. In all but 3 of these cases all such contact was to be overnight.²³

In all these 27 cases, quite involved co-parenting was required to liaise over details (like the washing of sports kit and who would help with what homework). This pattern of engagement with the child both at the weekends and during the week gives the contact parent a role in the child’s day to day routine, moving away from previous ‘McDad’²⁴ patterns where contact was seen perhaps as a fun distraction. A potential problem is that this kind of involved parenting can increase the child’s exposure to the adult conflict.

In A2 contact had been broken down, but was soon restarted. The 8-year-old girl lived with dad, and he claimed that mum’s new partner was dangerous. Dad’s inflexibility had often caused arguments, and mum had a tendency to exaggerate every potential problem and escalate conflicts. There had been an altercation involving dad and the maternal grandfather during a handover not long before mum’s application for contact and/or residence. The final order was for contact to mum every other Friday from school until Sunday, every Tuesday night to Wednesday morning, and every other Friday afternoon. School holidays were to be shared equally. The final disputed point was whether mum should return the daughter at 1.30pm or 3.30pm on a Sunday, and they had yet to agree precisely how the child’s birthday should be spent. The Cafcass report noted that the girl was now resigned to being questioned extensively about issues that the adults should deal with.

²¹ In 3 cases children’s services were supporting the applications; in 1 case they were opposing it. In 5 cases the local authority wrote the Section 7 report, and in a further 6 cases there were also concurrent local authority assessments taking place. In 1 case the local authority was monitoring the final order.

²² J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p16.

²³ In A4 and C38 there were weekend sleep-overs and midweek face to face contact; in E12 the sleep-over was on Wednesdays, with a Sunday visit from 10am to 7pm

²⁴ ‘McDad Day Demo coming Friday 17 Jun 2005’ (The Mens’ Hour 12 May 2005) <http://men.typepad.com/f4j/mcdad_day_demo_17_jun_2005/> accessed 23 December 2014.

Even in this category of 27 cases, sleep-overs predominantly took place at weekends. Two-thirds of sleepovers in orders were scheduled for Friday, Saturday or Sunday nights (with hand-over at school on Monday morning).²⁵ There was no evidence in files of fathers seeking, but being denied, midweek overnights. This finding is in line with findings in other jurisdictions. In Smyth's analysis of AIFS data, alternate weekend contact was the most common pattern of overnight contact, but schedules had also often been varied into more complex patterns, leading the researchers to suggest that this may be indicate a 'subtle shift ... towards higher levels of involvement by non-resident fathers'.²⁶

Weekend only staying contact without regular mid-week contact was a more common pattern: 42 cases fell into this sub-category. In a quarter of this group (10 cases) there were sleep-overs every weekend. In the remaining 32 cases staying contact occurred on alternate weekends.²⁷

In D1 the first interim order was for contact to be restarted at a contact centre; the mother claimed to be fearful due to the father's past violent behaviour when drinking. Contact began at the maternal grandmother's house, and relatively quickly progressed to staying contact. It broke down when the mother accused the father of inappropriately touching their toddler son, while the father made several referrals to Dunam children's services which resulted in no further action. It seemed a high conflict case, where the mother initially resisted shared residence on the grounds that the father would use it to control her, but where the shared residence order was made by consent. The remaining dispute, which was eventually resolved through solicitor negotiation, was whether the father should have the child for two nights every weekend, or whether mother could keep him for one weekend in four, presumably to gain some of what Smyth has termed free-flowing, in the moment time.²⁸ The compromise was for the child to be returned at 7pm on one Saturday per month.

The prevalence of weekend overnights, as well as the alternate weekend schedule, reflects the findings in other studies. In the Hunt and MacLeod sample of overnight contact cases, just under half (43%) followed the every other weekend pattern, which was also described as 'the norm' by the professionals they interviewed.²⁹

In some cases, the parties lived comparatively far apart; in a few others parents' work commitment prohibited mid-week overnights, but in most cases there was no information about why this schedule had been selected. It has been suggested that mid-week overnights ought to lead to a greater engagement in the activities that constitute the child's day-to-day life.³⁰ On the other hand it can also prove disruptive to the child when homework or favourite toys end up at the wrong house at the wrong time.³¹ It may be that such concerns influenced the requests made to the courts.³²

In most of the regular overnight contact cases, the contact was going to follow a weekly or fortnightly pattern. However, in 9 cases, contact was going to be **less frequent than fortnightly**. In 4 cases there was to be overnight contact once a month. In 5 cases, contact would take place in school holidays because of the geographical distances between the parties. Contact was planned for at least a couple

²⁵ There were a total of 169 overnights per four weeks in this category: 112 were on weekends and the remaining 57 mid-week.

²⁶ B Smyth, 'Parent-Child Contact Schedules after Divorce', (2004) 69 *Family Matters*, pp41-42.

²⁷ In 3 cases there was a weekend visit in the intervening week.

²⁸ B Smyth, 'Time to Rethink Time? The experience of time with children after divorce' (2005) 71 *Family Matters* 1.

²⁹ J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p21. In Lader's sample of parents within the general population just over half of reported schedules were for weekend-only staying contact: 45% for alternate and 15% for every Friday and/or Saturday night: D Lader, 'Non-resident Parental Contact 2007/8', Omnibus Survey Report No. 38 (ONS, 2008).

³⁰ B Smyth, 'Parent-Child Contact Schedules after Divorce', (2004) 69 *Family Matters*, p38.

³¹ Socialstyrelsen, *Växelvis Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (2nd edn, Socialstyrelsen 2004), pp41-43.

³² As we did not interview the parents in these cases we did not gather data on this question.

of occasions each year, and in 3 of these cases the orders showed that the non-resident parent had half or more of the school holidays, and would see the children every six weeks.

5.1.3 Modifying patterns for the School Holidays

An important issue for separated parents is how the time in children’s school holidays should be divided. The duration of school holidays can vary between types of schools, but we worked on a figure of 14 weeks, which was also used by a number of parents in our cases. In the 87 cases that planned for the children to sleep at both parents’ houses after the final order, detailed provisions for holiday contact were set out in 50 cases.³³ In 34 cases, the holiday arrangement provided for an equal sharing of Christmas, Easter and summer school holidays as well as the three half-term weeks.

School Holiday Arrangements in the Overnight Category		
Equal	34	39%
Non Equal	16	18%
Not Set	37	43%
	87	100%

Alternate weekends and half of school holidays seemed to be a very common pattern.³⁴ It was the most common combination in our sample. This confirmed the observation by Smart *et al* that this was used as a standard formula by courts.³⁵ However, we found no evidence in the files that the courts were imposing the pattern against the wishes of parents.

3.1.1 Conclusion on Overnight contact arrangements

Overnight contact was the most commonly reached arrangement in the court cases examined. Where previous contact had broken down or contact had never been established, the courts followed a process of building up to overnight contact. Contact applicants would generally get what they asked for, unless they were reasons against that fitted within the S1(3) welfare checklist.³⁶

Does this mean that the courts are moving to a norm of ‘shared parenting’? It depends on what is meant by the term. ‘Shared parenting’ is an imprecise term which can be used to denote 50/50, frequent contact, or an ideological standpoint: a shared attitude towards conflict-free co-parenting. In our courts, shared parenting was understood and promoted not in a rigid, time-focussed way, but as helping and encouraging non-resident parents to stay closely involved in their children’s lives.

There was no indication that courts regarded equal sharing as the ultimate goal, or pushed for it. This was probably wise; our cases showed how demanding 50/50 can be for all involved, and how important it is that the adults are willing and able to make it work for the children.

However, there seemed to be a push towards greater involvement for fathers – a few hours on a weekend afternoon is no longer seen to be enough.

In E11 there had been no contact for six months. It was reinstated in interim orders. A detailed timetable was drawn up where contact was initially for two hours at the mother’s house, was then gradually extended by an hour every two weeks, and moved away from the mother’s property, until it reached a full day. The next interim order was for staying contact. It seemed clear that a relationship of trust had to be re-established between the parties. In one interim order preamble the father promised, among other things, to let the mother see the 2-year-old’s bedroom in his house prior to overnight contact. The final consent order had been agreed before the hearing. It provided for one overnight weekend contact per month at times agreed by the parties for the next three months.

³³ In many of the other cases the children were still little and had not started school.

³⁴ It was used in 16 cases. There were also a number of cases with slight variations on this theme.

³⁵ C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003) p28.

³⁶ Risks of harm, neglect, or children’s strong opposition, particularly.

Thereafter, contact was to be on alternate weekends from Saturday to Sunday with specific times to be agreed by the parties.

Child welfare concerns were not a barrier to overnight contact, nor were they usually ignored. In some cases the courts managed to resolve the concerns through the use of undertakings.

In C18, for example, there was one child, an 8-year-old girl. Mum was worried about dad's drinking. He gave an undertaking not to consume alcohol during contact, and stated at a directions hearing that the parties had met and discussed contact, and that he now acknowledged that his drinking had been a problem in the past. The final order for fortnightly overnights was made by consent.

In other cases, welfare concerns had led to a change of primary care giver. Here, too, considerable efforts were made to establish overnight contact with the former carer in a way that was safe for the child.

In E34, dad said on the c100 that he had entered into an agreement with children's services for him to seek PR, residence and an order to regulate mum's contact. There were two girls, aged 9 and 5, who had been living with their dad for six months due to mum's alcoholism. The final order gave the mother overnight contact every second weekend and every Wednesday night; she also signed a formal undertaking to stay sober during contact. Children's services had given dad responsibility for keeping an eye on this.

5.2 Daytime Only, Direct Contact Category

In 20% of cases the final arrangement was for the contact parent to have direct contact during the daytime only (also referred to in many studies as visiting contact). This may deprive children of important familial contexts in their contact with the non-resident parent, but it can nonetheless be rewarding as far as it fosters focussed time with children.³⁷

Hunt & MacLeod found that the children in cases that ended in visiting contact were 'typically very young',³⁸ and that welfare concerns were raised in half of their cases.³⁹ In our group of 34 cases, there were serious welfare concerns in 9 cases (26%). 9 cases had a background of proven or investigated domestic violence allegations. There was an overlap between these two categories, so that 13 cases in total featured either child welfare concerns, domestic violence, or both. These were reasons against overnights, but other reasons also included children's objections and logistical issues around housing.

In D26, the parties' marriage had always been rocky with three break-ups and reconciliations. There were three children aged 14, 7 and 2, but during the case it was established that the husband was not the father of the youngest child. The parties were divorcing, but as they were unable to agree on arrangements for the children they were all still living together with the maternal grandmother in one flat. The parents both accused each other of domestic violence, which had been witnessed by their children. Dad also alleged that mum had once threatened to kill the children; she denied this. An interim order set out the sleeping arrangements and there were also cross non molestation orders. Mum had applied for an occupation order, and this was made, by consent, two months into the proceedings. Dad moved out. The final order set up contact on every Sunday from 10am to 6pm, with handovers at the tube station supervised by their teenage son. It was made 'Upon the mother

³⁷ C Caruana & B Smyth, 'Day-time Only Contact' In B Smyth (ed) *Parent-Child Contact and Post-Separation Parenting Arrangements*, (Australian Institute of Family Studies 2004), p78.

³⁸ J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p90.

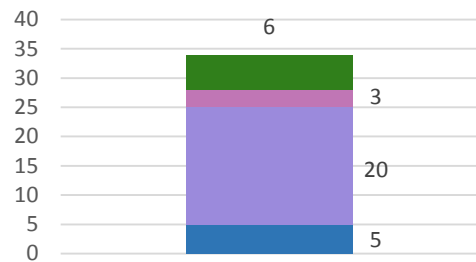
³⁹ *Ibid*, p91.

agreeing that at such time as the father has suitable accommodation the children will have staying contact with their father on alternate weekends’.

In this category, too, weekend contact was more common. As was discussed in relation to overnights, we could not tell from the files why that was, but possibly parents’ work commitments and children’s schooling made mid-week contact more difficult. The result, again, may be less involvement by the contact parent in the child’s day-to-day life and in caring for the child in a practical sense; but more relaxed time at weekends could also mean qualitatively better contact.

The daytime only contact category was broken down into several sub-categories: regular contact with a long visit every weekend and some during the week; mid-week contact only; weekend only contact; and irregular and/or infrequent contact.

Daytime only Contact Categories		
Mid-week and Weekend	6	18%
Mid-week only	3	9%
Weekend only (each or alternate)	20	59%
Less than once a fortnight	5	15%
	34	100%



Base: Parent cases with daytime only contact (N=34)

5.2.1 Regular contact with a long daytime visit every weekend and some contact during the week

In 6 cases the arrangement went some way to integrate the contact parent into the child’s day-to-day routine even though there were reasons why overnight contact was not possible. The contact pattern generally included a longer weekend visit of at least six hours, and one or two shorter contact times during the week, often after school.⁴⁰

In 3 of these cases the children were pre-school age and this may explain the reluctance to introduce overnight contact.⁴¹ In the other cases, the children were of mixed ages. In B31, for example, they were 9, 13 and 15; in C36 they were 9 and 6½.

In a number of these cases specific reasons were given for the lack of overnight contact relating to practicalities, children’s objections and/or welfare concerns. In D3 and B15 the non-resident parents did not have suitable accommodation (in B15 there were also mental health concerns). In B14, the mother said she was concerned about the father’s large, dangerous dogs, and resisted overnight contact on that ground. In B31 it was the two teenage children who were opposed to staying contact, due to the father’s controlling behaviour; their 9-year-old brother said he was not prepared to go for sleepovers on his own.

5.2.2 Mid-week contact only

In 3 cases, contact was limited to short mid-week periods after school. Again, the reasons related to practicalities, welfare concerns and children’s objections. In E32 the weekday was the non-resident father’s only guaranteed day off work. In E40 the relationship had only recently broken down, there

⁴⁰ In C36 there was only a short two hour weekend contact, but the non-resident father also walked the 6-year-old child to school on two weekday mornings.

⁴¹ Small children need routines and can be anxious about sleeping in a strange bed or leaving their main carer for long periods; new parents are often particularly worried about others’ ability to care for their child the right way.

were allegations of violence against the father, and the mother was worried about him abducting the children. This may have been why she was reluctant to allow longer periods of contact. In D8, a protracted dispute discussed in Chapter 3,⁴² there was only one visiting contact after school per fortnight as the son (now aged 13) remained unwilling to travel from Dunam to spend weekends with the father's new, second family in Borgate.

5.2.3 Weekend only face to face contact

Cases were put in this category if there was contact only at weekends (which could include a visit after school on a Friday night) and if contact was happening at least once a fortnight. This was the largest sub-category in this category, with 20 cases. This shows that old patterns of weekend contact have not been completely abandoned. Again, the reasons for weekend only contact in these cases centred on practicalities, welfare concerns and children's objections to overnight contact.

In D15, E18 and E37 it was spelled out that the problem was the non-resident parent's lack of suitable accommodation. In A9 and C35 there seemed to be some doubts about the non-resident mothers' commitment and ability to provide a safe environment.

In A9 the family, with two sons now aged 7 and 12, had been known to Amblestone children's services for some time due to concerns about poor school attendance neglect and drug use. The older boy had gone to live with his father after children's services found his mother unable to cope with his challenging behaviour. The case was about contact with the younger boy. The Cafcass Section 7 Report recommended against overnights or any contact in the mother's home due to her new boyfriend, who was a Schedule One offender. The parties were encouraged to reach a compromise, and the final consent order provided for contact each Saturday between 11.30 and 5.30.

In C32, C44 and E10 contact had to be re-established with comparatively young children after a long gap; the final orders were for daytime only contact but overnights were never ruled out. In all these three cases the applicants may reasonably have decided not to push for too much, too soon. Similarly, Hunt and MacLeod identified some contact parents who seemed to have decided (or had perhaps been advised) not to 'rock the boat' but to be satisfied for the moment with visiting contact and hope that in due course it would progress naturally, while other applicants appeared to have faced such an uphill struggle to gain face-to-face contact that they had decided not to try to push further for overnight stays.⁴³

C44 was a case of a successful slow and patient re-establishment of contact. Initial contact at a Contact Centre did not run smoothly; the mother would persistently arrive late, and it was clear that the child had been told negative things about the father. However, the father was commended by the centre for not causing a fuss but focusing on playing with the pre-school aged child for whatever time was left. Unsupervised contact was then ordered at the next Directions hearing, with the mother including the proviso that the father's new partner was not to be present. In the final order, this proviso was lifted, and contact appeared to continue relatively smoothly.

Attempts to build up contact were less successful in B25 and E43. In E43 the Cafcass Section 7 report noted the children's reluctance to attend contact, and recommended that the applicant father needed to make a lot of effort to rebuild relationships, understand teenagers, be proactive, and accept responsibility for the emotional harm he has caused the children by disappearing from their lives for several years.

⁴² See section 3.4.2, which starts on p50 and describes D8 towards the end.

⁴³ J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p99.

5.2.4 Daytime Contact with No Fixed Pattern

In 5 cases the arrangement was for irregular or infrequent contact. It was clear from the files that this was an expectation rather than, as is sometimes the case, an aspiration. In 2 cases, E1 and E9, the final order provided a basic structure for a number of days of contact a week leaving the parties to agree precise days, and it seems the parties were on good enough terms to be able to do so. No specific reasons for this flexibility were given in the files. In D10 the father needed a formal contact order to support his application to stay in the UK, but since contact was already going well informally, there was no need to list the precise times in the order.

In contrast, the mother in E45 suspected that the father's application had more to do with his immigration status than with a genuine wish to have a relationship with his daughter. Although considerable efforts were put in by professionals into developing contact it was eventually reduced to one afternoon a month because the daughter, too, had come to doubt the father's motives.

Similarly, in B40, a case of on-going conflict, contact had to be set at a level that the twelve-year-old daughter was comfortable with. It was reduced from fortnightly to monthly. There was considerable bitterness surrounding the parents' divorce and some suggestion from Cafcass that the child might be choosing sides.

5.2.5 Conclusion on Daytime Only Contact

This category was our second biggest category of cases, with 20% of parent versus parent cases ending in an arrangement for daytime contact only. This is consistent with deliberate effort on the part of the courts to facilitate the most contact that is possible in the circumstances.

A similar percentage of non-overnight contact has been found in Australia;⁴⁴ the factors that featured most prominently were children at the lower and upper ranges of the age spectrum, structural issues such as accommodation and relationship issues such as perceived obstruction or disinterest by a parent.⁴⁵ In our group of cases children's objections, logistics, welfare concerns, and a fear of pushing newly-established contact too far, too soon, were all recurring reasons against overnights.

Yet, we still saw a push towards involved parenting at a day-to-day level within the daytime only contact cases.

Furthermore, the fact that clear reasons against staying contact were almost always given highlights that regular overnights are now the new 'normal'; in many cases it was expressly identified as a logical future progression once certain conditions were satisfied.

A common barrier to overnight contact is lack of accommodation by the non – resident parent. It was clear from the files that this had been a factor in B15, D3, D15, E18 and E37 (discussed above) but it may have been relevant also in further cases. There was a higher proportion of day time only face to face contact in Esseborne;⁴⁶ this court was located in a comparatively poor, urban area, where affordable accommodation was difficult to obtain.

Welfare concerns formed another barrier to overnight contact. Unlike Hunt and Macleod,⁴⁷ the children in our day-time only group were not markedly younger, nor were there more likely to be

⁴⁴ Daytime contact occurred in 17% of the cases in Smyth's AIFS sample, and it was relatively frequent. Where the regular patterns were recorded, a quarter (24%) saw their parent more often than once a week, 37% saw them weekly, and a third (33%) saw that parent at least once a fortnight, only 6% had a pattern with longer intervals. B Smyth, 'Parent-Child Contact Schedules after Divorce', *Family Matters*, No 69, 2004, p37.

⁴⁵ C Caruana & B Smyth, 'Day-time Only Contact' In B Smyth (ed) *Parent-Child Contact and Post-Separation Parenting Arrangements*, (Australian Institute of Family Studies 2004), p84.

⁴⁶ 38% of all daytime only cases were in Esseborne, but that court only had 26% of all the parent versus parent cases.

⁴⁷ J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p91.

welfare concerns in this category of cases than in overnight contact cases. In fact, fewer welfare concerns were raised here than for the overnight groups.⁴⁸ However, where welfare concerns were relevant, they were often related to the contact parent's unsuitable home environment (drinking, violence, unsuitable friends/partners, etc.). In B15 for example, mum had recurring mental health issues and was also homeless.

5.3 Irregular Contact Cases

There were 10 cases where the parties were left to arrange contact. In some cases it was envisaged that this would happen weekly or even daily, in other cases it seemed contact would only be on a few occasions each year. There was no common pattern to contact, and no dominant reason for the lack of specificity. The reasons for this arrangement were largely practical rather than linked to child welfare or domestic violence concerns.

In B63 the parties were moving towards reconciliation, and dad was having contact every day. The parents in B27 and B38 were trying to negotiate a solution outside of court. In all these three cases it seemed clear that there would be frequent, regular contact.

In B13, B46 and B64 the contact fathers had moved abroad and were not requesting further detailed orders. In B64 a holiday to visit dad in Southern Europe had been agreed, and in B46 contact was currently indirect via phone and Skype. In B13, which was a very high conflict case until the father decided to return to his home country, there was specific no mention of any current or future contact: the order merely provided for 'such contact as the parties agree'.

In C19 and C21 the parties were left to negotiate the precise details of contact, which was happening every week on an informal basis. In D22 it was left up to the teenage son when and how he would initiate direct contact with his dad (indirect contact was occurring on an informal basis). In C11 the final order provided for the mother to have reasonable contact provided she was not under the influence of drink or drugs (presumably this was to be assessed by the father).

These were cases with a high degree of uncertainty. In at least 6 cases it seemed reasonably clear that direct contact was on-going but that the families were in a transitional period. In 1 contact was happening, but on a more intermittent basis due to the geographical distances. In 2 cases there was a possibility that indirect contact could lead to something more. In the last case, it was difficult to tell whether the court had actually expected contact to happen, or had merely included a standard clause order, perhaps to highlight the importance of contact or leave a door open.

5.4 Supervised and Monitored Contact

There were 14 cases in this category (8% of parent cases). Cases were placed in this group if the final arrangement was for contact to be supervised by a third party or monitored by the local authority. It is not surprising that ongoing child safety concerns were common in this group: these were problematic cases. This category does not include all cases where interim contact had taken place at contact centres. As other studies have observed and our cases confirmed, supervised contact is often used as an interim stage, but it is rarely a final arrangement.⁴⁹ In Hunt's and Macleod's study, for example, there were only 11 cases ending in supervised contact (4%).⁵⁰

As we set out in Chapter 3, it was quite common for supervised or monitored contact to be used as an interim measure when the court was gathering information about child safety concerns or restarting

⁴⁸ Child welfare concerns were raised by a parent or a professional in 26% of the day-time only contact cases and 41% of the overnight contact cases).

⁴⁹ C Smart and others, *Residence and Contact Disputes in Court: Volume 2* (University of Leeds 2003) p90.

⁵⁰ In 2 cases this was to be at a contact centre, in 2 resident mothers were going to supervise contact, and in the remaining 7 that responsibility had been accepted by grandparents: J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p27.

contact after a long period. Contact would then usually move on to unsupervised contact if courts, welfare professionals or primary carer parents were reassured. Supervised contact was also used to ensure that contact would begin even if there were delays waiting for information which would determine the long-term prognosis for contact.

5.4.1 Supervised Contact

In 11 cases the final order was for contact that had to be supervised (6% of parent cases). In 6 of these cases the non-resident parents were mothers; in 5 they were fathers. In all these cases it was evident that the court was satisfied that serious and reasonable concerns would continue for the foreseeable future.

In B36, D14, E23 and E39 the young children had all been moved to live with their fathers due to children's services' concerns about the mothers' parenting, poor mental health and/or alcohol and drug abuse. The use of supervised contact was a deliberate way of keeping these mothers involved while ensuring child safety. In two cases the fathers were present during contact, in the other two contact took place in the maternal grandmothers' homes and was monitored by them. This was a good example of the pivotal role often played by grandparents.

In B56 there was contact with the non-resident mother at a contact centre, with the hope that it would eventually return to being supervised in the maternal great grandparents' home.

This is consistent with courts' desire to give non-resident parents (irrespective of gender) as much contact as is possible, with as few restrictions as possible.

The reality of many of these cases was, however, that the benefits of a good, natural parent-child relationship had to be balanced against the need to keep the child safe and secure.

In B20 the 12-year-old girl and her father were relocating abroad. The final order provided for supervised daytime contact in the three main school holidays, subject to the proviso that the mother must not be drinking. Unsupervised contact could be considered if the mother could prove through hair-strand testing that she had been sober for three months.

This can be seen as another example of courts wishing to encourage contact parents, by metaphorically leaving doors open for more contact (even in instances where there seemed to be little realistic prospect of actual change).

The cases involving supervised contact with fathers featured both welfare concerns and proven allegations of domestic violence.

In C54, the mother's original application was for residence, a PSO and a non-molestation order which dad subsequently breached more than once. There had been 5 DV referrals, which had not resulted in further action. Although dad never formally sought contact, that issue soon became the main focus of the case. Correspondence from Cafcass showed that dad's alcohol problem was both long-standing and serious. His involvement with the criminal law included an Alcohol Treatment Requirement; he had recently been arrested in front of the two girls (aged 3 and 4), which they had found very upsetting. At the end of the case dad was living in the paternal grandparents' garage. His probation officer described his progress as the 'one step forward two steps back' that is typical in the early stages of treating chronic alcoholism. The father was encouraged by Cafcass to withdraw his application, on the understanding that alternate weekend contact would continue, as supervised by his own parents. The reality of the arrangement seemed to be that the children went to stay with their grandparents and sometimes saw their father too, if he was up to it. It was impossible to progress contact further at this stage. Nevertheless, the final order recorded that the father would consider submitting an application at later stage once he had made measurable progress, and that the mother would be happy to agree to more contact if professionals confirmed that he had stopped drinking.

In C6, C42, C48,⁵¹ and E44, the mothers' fears around contact were based on a history of domestic violence. In C6 the Section 16A risk assessment concluded that contact would have to remain supervised by relatives. This was due to the father's failure to admit the violent offence he was convicted of (the mother was the victim) or even accept that his violence had any impact on the child. This case was a good example of when the contact parent's attitude to his/her behaviour is the real problem. It seemed to us that Cafcass were generally far more likely not to recommend an increase of contact where parents, such as the father in C6, refused to behave responsibly by acknowledging their faults.

5.4.2 Contact as Directed by Children's Services

Children's services were involved in many of these cases, providing the court with information, and in 3 cases it was expressly recorded in the order that children's services would monitor contact, decide when it could take place as well as under what conditions. This is not to say that children's services did not take an interest in how contact was progressing in other cases too, but their role was not explicitly identified in the orders. These 3 cases show that there is, in practice, a real blurring of the line between public and private child law.⁵²

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In B16, which is discussed in Chapter 3, the formal order was made on the understanding that further negotiation between the parents would occur within a Child Protection Conference.

The three children in A7 had been categorised as children in need when the mother abandoned them at school. They went to live with their dad. Mum was a drug user, who had a caution for common assault. Children's services were also concerned about an 'inappropriate person' who was staying in the mother's home. The order may have been drafted the way it was because of the mother's failure, up to that point, to attend the County Court or the concurrent child protection conferences. It may well have been that her future contact with the children depended on better engagement with children's services.

In Chapter 3 we raised the point of limited County Court insight into children's services involvement with the families, *inter alia* in relation to B16. The final case in this small group had similar facts.

In C14 the 6-year-old girl had lived with mum. Residence was granted to the father once his concerns about neglect were backed up by Cladford children's services, who also insisted that he should be present during all contact between mum, the daughter and her two older half-brothers. Towards the end of the case, nursery workers found bruises on the child, which her father could not explain. This prompted children's services into a pre-proceedings review. They informed the Cladford District Judge that although they had no immediate intention of launching care proceedings, they wanted a period of intensive assessment and work with the family. Until this had been done they reserved their position on the residence order. The order for residence to the father was made, with the mother to have reasonable contact as monitored by children's services.

The long term future of these cases was far from settled at the end of these private law cases, and it was clear that children's services involvement would continue. In C14 public law proceedings seemed quite likely. We were not sure that these cases were actually resolved by the County Court, since

⁵¹ The mother in C48 also had concerns about the father's heavy drinking.

⁵² See e.g. A Bainham, 'Private and Public Children Law: an under-explored relationship', [2013] CFLQ 138.

⁵³ See e.g. A Bainham, 'Private and Public Children Law: an under-explored relationship', [2013] CFLQ 138.

these families' problems were too severe. The question of whether these families' problems would be better addressed through public law proceedings will be returned to in Chapter 7.

5.4.3 Conclusion on Monitored Contact

In 8 of the cases fathers were PCGs, in 6 they were non-resident parents. In this respect, the monitored contact cases differed from the overall group of parent versus parent cases. The children were also slightly younger than the whole sample (and thus slightly more vulnerable).

It is not surprising that there were recorded child welfare concerns in 11 of these 14 cases. These were raised by children's services or Cafcass as well as the parents in all except one case, where parental concerns were based on the involvement of children's services in the past. In 2 other cases there were allegations of domestic violence that were proven to a LASPO standard and were clearly taken seriously by the Court. In C42, there was also a history of domestic violence and prior involvement with children's services in the past when mum had been severely depressed. The main reasons that contact continued at a contact centre because dad needed to demonstrate his commitment through regular attendance having previously missed more than half of the scheduled contact centre sessions.

It was clear that in all these cases there were good reasons why contact would have to be monitored. They raised issues about the value of this contact for the children, both in the short term if the setting was artificial and the parent was distracted or unreliable, and in the long term if this contact could not realistically develop.

Furthermore, these cases raised questions about the burdens placed on those resident parents and relatives who had to supervise contact. Grandparents could be put in a situation of divided loyalty where they had to be gatekeepers, and had to consider stopping their own child's contact with their grandchildren. The resident parents, and the children involved, had also usually gone through a turbulent time during and before the court case. There were cases where we wondered whether the supervised contact with the troubled non-resident parent would add yet another stress factor but would bring very little corresponding benefit. Finally, we were concerned about the blurring between private and public law remedies, given the serious problems these families were experiencing and the involvement of children's services.

There was also one other case on the question of supervision which we found troubling, although we did not categorise it as monitored contact as no formal order was made to that effect.

In E1, the final order was based on an implicit assumption that a 14-year-old son would be present while his 8-year-old sister had contact with their father. She had said that she was sometimes scared of her dad but felt safer with her big brother around. He, however, had told Cafcass that he wanted to make his own arrangements, and did not want to be tied down by a formal order. The children were both named in the order which set out twice weekly visiting contact, once after school and one whole day at the weekend. The arrangement seemed unfair on both children.

These cases raise a further, strong, argument that private law cases cannot all be rushed through according to a strict time table, but must be allowed to take the time needed to investigate the circumstances. It can also be argued that cases such as these should, where appropriate, be re-directed to a public law route, since these private law cases ended without a real resolution of the actual problems around contact.

5.5 No Direct Contact Cases

These 25 cases were divided into two sub-categories: where there was a formal or informal arrangement for there to be indirect contact via letters, cards, telephone calls or Skype; and those

where the court made no provision for contact to happen or issued an express ‘no-contact’ order on a best interests basis.

5.5.1 Indirect Contact Cases

In 8 cases the final court order provided for indirect contact only (5% of parent versus parent cases). Hunt and MacLeod found a similar level of indirect contact cases in their sample: (7%).⁵⁴

There were proven or investigated allegations of domestic violence in 4 of these cases, and concerns around child welfare in 3. In 5 of the 8 cases either or both of these issues were present (63%).⁵⁵

In all the cases with concerns, the fears were shared by professionals and there was clearly no simple solution. For example, in A6, the father was considered by his consulting psychologist to be potentially dangerous and paranoid. The order stated that the mother would read all communications from the father and only pass on those that were suitable.

In D20 contact could not progress beyond the indirect stage because of the applicant father’s failure to engage with Cafcass or demonstrate at least some willingness to address his past domestic violence or current recreational drug use. His initial application explained that he rejected the mother’s offer to use a contact centre since he could not afford to pay for that, and in any event presented no danger to their 3-year-old daughter. Safeguarding enquiries revealed that he had convictions for drug and violent offences and that children’s services had assessed the child due to unrelated concerns about her stepdad, who had a conviction for rape. Cafcass advised a S16A risk assessment. This identified three areas of risk: domestic violence, dad’s drug use and the fact that the child could not remember him and thought her stepdad was her dad. A Family Assistance order was subsequently made; mum worked well with Cafcass and helped gradually explain to the little girl that she had a birth daddy and a looking-after daddy. Dad, however, was often late, or failed to explain his non-attendance, and also failed to comply with a number of requests made by Cafcass. He blamed mum for the domestic violence because she had ‘stressed him out’. At this mid-way point, Cafcass invited the court to consider terminating the family assistance order, but it was continued. Dad now admitted that he had lied about his cannabis and cocaine use, but also saw no need to reduce it until he was actually having unsupervised contact. In the final report, Cafcass echoed mum’s fears regarding dad’s commitment and advised against direct contact. The little girl had already experienced one major transition when mum left stepdad and was about to face another as mum’s new baby was due very soon. Dad’s response was to post a number of derogatory things about mum on his Facebook page, which he was subsequently ordered to remove. The final order was an adjournment of the father’s application, which also set up indirect contact. Dad was to send the child simple letters, postcards and age-appropriate books on a fortnightly basis, together with small gifts at Christmas and birthdays. He was invited to reinstate his application once he had made some progress on the drugs and domestic violence concerns identified by Cafcass.

It seemed to us that contact parents’ attitude to their problems had a greater effect on outcomes than their actual problems; this kind of intransigence meant professionals and judges could not enlist the parents into problem-solving compromises. However, as in D20, parents were always told that if they could provide evidence of change, future applications would be viewed more favourably.

Furthermore, in a number of these cases, children voiced strong objections. In C17, the father was given permission to withdraw his application for direct contact, with it being recorded in the order

⁵⁴ J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p28.

⁵⁵ If all cases with domestic violence allegations are included, that figure rises to 88% (7 of 8 cases). Similarly, in Hunt’s and Macleod’s sample the indirect contact cases were highly problematic with domestic violence and/or child welfare concerns raised in 81% of cases: J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p77.

pre-ambles that he respected his teenage son's wishes and feelings. In B52 the children said contact would only remind them of the father's previous very violent behaviour. In the only case not to feature domestic violence or child welfare worries, E47, the child expressed a strong desire to terminate direct contact.

In E47, there was an order from 2002 for contact in a contact centre, with a plan to progress to unsupervised visiting contact. In 2009, the father reapplied on the grounds that contact had broken down in 2006. Interim orders were made for indirect telephone contact and then direct contact. The daughter, now nearly 12 years old, resisted an extension to overnight contact, and Cafcass recommendation against it. The father refused to accept this, blaming the mother and telling the daughter that it was up to the court to decide, not her. He had also allegedly discussed the case with his pupils in an Esseborne school where he was teaching; the daughter found out about it through the grapevine. She wrote a letter to the judge pleading to stop direct contact. The final order suspended the previous contact orders, set up fortnightly indirect contact and provided for the mother to refer the girl to counselling. The Cafcass worker was to have one more meeting with the daughter to explain the decision and encourage her to resume contact any time she wished to do so.

The reasoning in these instances appears to have been that little could be achieved by coercing a young person into contact,⁵⁶ but that indirect contact might leave the door open for contact at a later stage. The latter point was also explicitly stressed in the final orders in B52 and E47.

In B52 the children, now aged 7 and 9, had witnessed a violent incident that took place when the parents were separated. Dad had turned up at their house, fought with mum's new partner, attempted to take the children, waved a sword at mum and held it against her throat. He had served a 12-month prison sentence but still refused to acknowledge that the children had good reasons to be frightened of him. This case was unusual in that reports were ordered from both a child psychologist and an adult psychologist. These identified as the main concern the fact that dad did not take genuine responsibility for incident; this had been a one-off episode which was not likely to be repeated. Supervised contact was mooted as a way forward, but the children were against it unless dad said sorry and meant it. Cafcass recommended against direct contact. The final order gave permission for dad to withdraw his application. The preamble noted that the applicant still wished to see his children and was prepared to wait until such a time as they were ready to see him; that the respondent agreed to facilitate such contact as the children requested, and that there was to be fortnightly indirect contact, with mum encouraging the children to respond.

Cafcass officers interviewed by Hunt and MacLeod described indirect contact as the best alternative to direct contact, because it could maintain parent-child ties in case things improved.⁵⁷ Our cases confirmed that approach; on the courts' view this was the best that could be achieved in the circumstances. In this sense, these orders were consistent with the courts' general pro-contact stance.

5.5.2 No Contact Cases

As is discussed in Chapter 4, it is rare for litigated cases to end with a final order which expressly precludes contact with the non-resident parent. In this chapter, we focus on the expected outcomes rather than orders made. We therefore have a group of 17 cases (10%) where it was not envisaged by the court that there would be any form of contact once the proceedings had concluded. In the Hunt and MacLeod study the corresponding figure was 15%.⁵⁸

⁵⁶ Indeed, the one example of such coercion that we saw, D8, had very limited success.

⁵⁷ J Hunt & A MacLeod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p75.

⁵⁸ Hunt and MacLeod, too, found that no contact was rarely the outcome because a formal order had been made to that effect, but more often because cases were dismissed, formally withdrawn or effectively abandoned: J Hunt

This group of 17 cases included the 5 cases that ended in 'no-contact' orders⁵⁹ as well as other cases where the case left the court without any expectation that contact would take place. There were 5 cases that ended with a sole residence order for the other parent and in 7 cases neither contact nor residence orders were made.

There was proven or investigated domestic violence in 11 of the 17 cases. In 13 cases resident parents and/or professionals raised serious child welfare-related concerns. 15 cases (94%) featured at least one of these complicating factors; 10 cases (59%) featured both. In many cases the children also had strong objections to contact.

E15 was the only case in this group with neither allegations of DV nor safeguarding issues.⁶⁰ It was a father's application for contact with a 15-year-old daughter and is discussed in more detail in Chapter 3.⁶¹ In the final order dismissing the father's application for contact the court noted the firm views of the child and determined that her wishes and feelings were so strong as to be preferred over any other issue which the applicant father was able to identify.

However, the most common reason for the no-contact outcome (which featured in 9 cases) was actually that the court had heard little or nothing from the non-resident parents. There had been safeguarding fears regarding parenting ability expressed in all cases, and 6 had a background of domestic violence.

C2, C3 and D29 were mothers' applications for prohibited steps orders to prevent the removal of the children from their care. The fathers neither attended nor made any attempts to contact the court. The background of domestic violence may have persuaded district judges against including a provision for any contact that could be agreed by the parties.

In D16 such a standard clause was included in the final order, despite the fact that dad had threatened to abduct and kill the children, and mum described the violence during the relationship as extreme. Worryingly, she also told Cafcass that she had kept going back to her ex-partner, although he was violent and controlling, because she loved him and kept hoping that he would love her. There appeared to be a risk that she could be coerced into contact that was not safe for the children. However, there was no immediate prospect of contact restarting, particularly as the father did not engage with the court case in any way.

Similarly, in C15 the father (who had previously taken the children from the mother's care) did not attend court for the single with notice hearing when the mother's residence, PSO and non-molestation orders were confirmed.

In D7 the father's behaviour had become erratic during the divorce and contact cases, which ran concurrently. Mum reported that dad was no longer focusing on their baby daughter during contact, but behaving oddly. He eventually terminated all communication with his solicitors, the court and the mother, and was no longer turning up for scheduled contact. In these circumstances, the judge most likely assessed further welfare inquiries to be necessary to make certain that contact would be in the toddler's best interests.

The two-year-old boy in B45 had been living with dad for a most of his life, at the instigation of children's services. His mum suffered poor mental health; there had been threats to kill both herself

& A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p55.

⁵⁹ These are discussed in section 4.2.

⁶⁰ In B60 there were allegations of domestic violence, but no evidence to fit the LASPO standard. In that case the father withdrew his application.

⁶¹ See section 3.4 on children's wishes.

and her son. She did not attend court and was generally not engaged with the process. At the first and only hearing, a joint residence order was made for the father and step-mother.

In B33 there was some indication in the file that dad, who had serious mental health problems and accepted that this constituted a risk, would like to seek indirect contact. However, he did not attend the final hearing and was unrepresented. It was not unlikely that contact would one day restart, but nothing was set out in the final order.

In B53 direct contact had not gone well, because the 8-year-old daughter was upset at being away from her mum. The father was twice offered indirect contact but failed to take it up. By the final hearing, his solicitors had not heard from him for a month, and he did not attend court. His application was dismissed.

In the remaining 8 cases, there were clear reasons in the files for the outcome of no contact; in half of the cases the applications were withdrawn and the others were dismissed.

In B60 the father withdrew when supervised contact ended with the children in tears; he declined an offer of further one-to-one supported contact. In B57 dad also withdrew his application, but he remained convinced that the teenage sons' opposition to contact was due to the mother's implacable hostility rather than his own drinking. In B59 there was some prospect of future contact. Mum, who had a long history of mental illness, accepted that it was in the best interest of her 4-year-old boy to have contact regulated by dad. She withdrew her application on the understanding that if dad was satisfied that she was well enough, he would supervise contact.

In B19, both NYAS and a child psychotherapist had been involved to help establish contact, but the 10- and 12-year old children were adamant that they did not want to see their mum: we 'just want to get on with our lives'. Mum accused dad of manipulating the children against her. She refused to take any responsibility for the breakdown in her relationship with the children although they said that she used to start fights with them and dad and that they had come home unexpectedly one day to find her in bad with another man. Borgate children's services concluded that the children needed to feel that they were taken seriously and would benefit from some time to work through their feelings. Mum was given permission to withdraw her application. She had previously written letters to the children which were ripped up unopened and put in the bin, but the final order suggested that she may want to send cards for Christmas and birthdays.

In four cases, parents' applications were dismissed. One of these was E15, discussed above. In B58, interim arrangements had been made for telephone contact between an alcoholic mother and her 10-year-old son. She did not comply, and acknowledged that the child did not want to see her. She was given permission to withdraw her application. However, it was noted in the order that dad remained open to the idea of direct and indirect contact if requested by mum and if she demonstrated a commitment to the arrangement.

Domestic violence was a feature in many of these cases, and in some the deciding factor. In the most extreme example, B17, the father had been convicted of attempting to murder the mother, the children were strongly opposed to contact as they were frightened of him, and the father was in any event due to be deported by the UK Border Agency. In this case, the judges involved appeared, not unreasonably, to have decided against contact.

B54 was slightly unusual. A number of findings of fact of pre- and post-separation assaults and harassment were made against the father. There were also allegations that he was working in the sleazier sector of the adult entertainment industry. The child was too young to have any memory of her dad. The mother, who was unemployed and facing eviction, obtained permission to relocate back to her home country where her extended family could help with childcare. In this context, the contact application was dismissed. It was clear that dad was very disappointed with this outcome, particularly

as he did not acknowledge any responsibility in relation to the facts that had been found against him. At the same time, his unreasonable attitude may have been a main reason for the court's decision.

Furthermore, children's views were important in a many of these 17 cases. In E15, B19 and B57 the children, who were older, were vehemently opposed to contact. These were judged not to be unsubstantiated views influenced by implacably hostile parents. Thus, their wishes were respected. In B60 the initial supervised contact session went so badly that the father decided against carrying on with the case.

In other cases the non-resident parents led chaotic lives, had erratic parenting styles or battled with multiple problems which meant contact could not benefit the children. In B33 the mother applied to effectively terminate contact because she had been strongly advised to do so by the local Police Child Protection Unit. In B59 children's services had wanted the father to bring the baby home from hospital, and the 4-year-old boy had lived with him since. The mother had a history of mental illness and involvement with social services; there was also an incident at Borgate children's services about the mother's younger child who was in foster care. After this, the mother withdrew her application.

5.5.3 Conclusions on no direct contact cases

There were serious child welfare concerns raised in 16 of these 25 cases, and proven or investigated allegations of domestic violence in 15. In total, 20 of the 25 cases (80%) featured either or both of these complicating factors.

In conclusion, cases that ended without the court expecting there to be any direct contact were rare. This small group of cases were around twice as likely to feature proven or investigated domestic violence as the total sample of parent versus parent cases.⁶²

These were generally cases with real risks that could not be reduced through the courts' problem-solving approach, particularly as many of these parents were unable or unwilling to cooperate with that process. Whilst past domestic abuse, addiction or mental illness were common complicating factors in these cases, the real obstacle to direct contact was often the parent's attitude.⁶³ In such cases it would be dangerous to encourage these non-resident parents to think they have a right to contact which is not dependent on change.

That said, serious consideration was always given to the possibility of direct contact, often involving experts to recommend ways forward and work with the children. However, courts' options were limited where the non-resident parents were unwell, inflexible, or did not even come to court to ask for contact. In a few cases, the welfare of older children demanded that their objections were taken seriously and respected. Indirect contact was used in these cases, to 'keep the door open'. It was difficult to tell from files where professionals held a realistic hope that contact would resume at some point in the future.

What was clear, was that these cases were consistent with a general judicial approach in favour of contact.

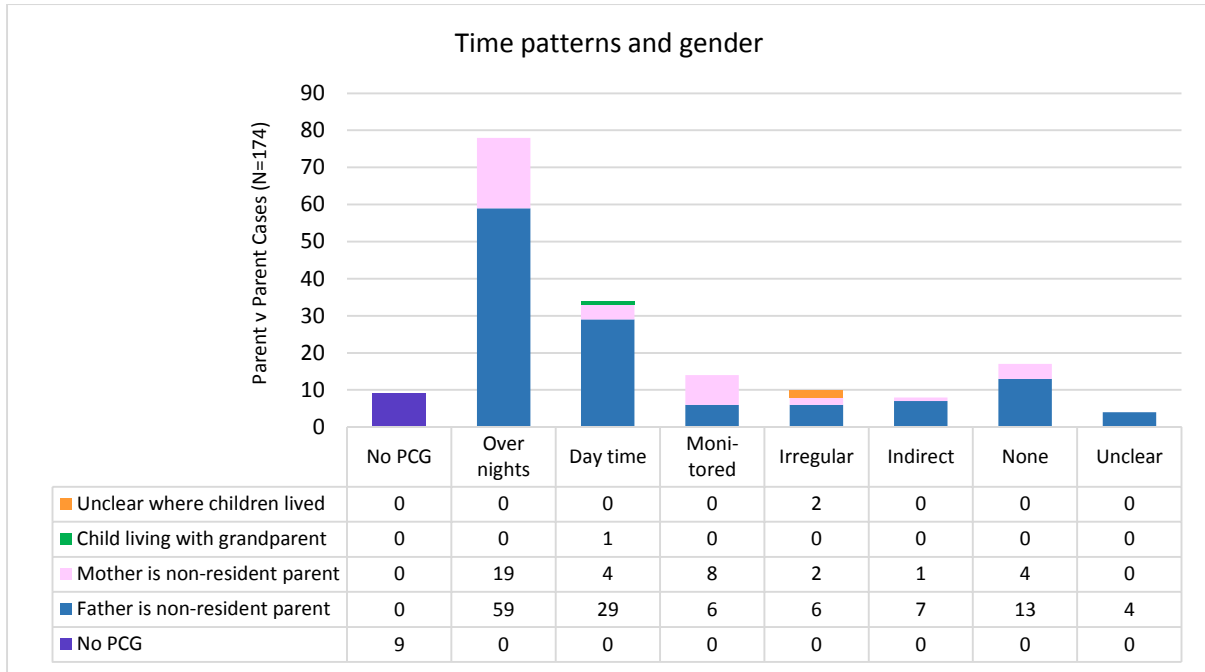
5.6 Time Patterns and Gender

In Chapter 4 we examine gender in relation to the formal orders that parents sought and were granted.⁶⁴ Here, we look briefly at gender and court condoned time patterns.

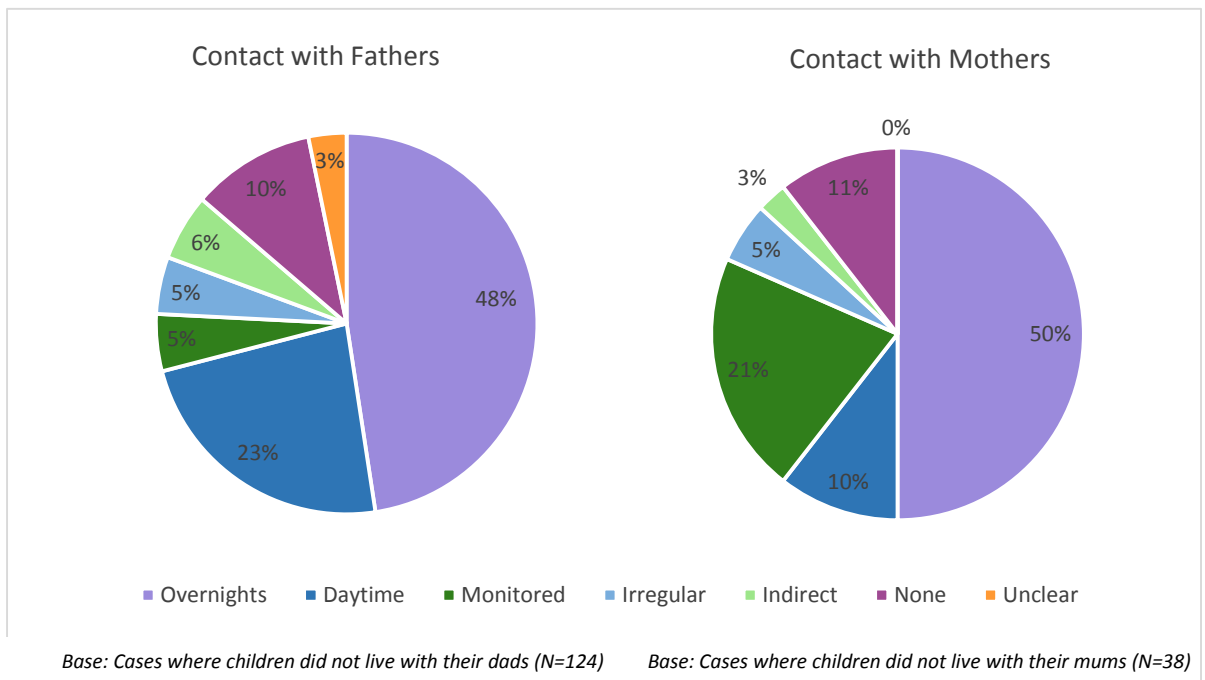
⁶² At 60% and 32% respectively.

⁶³ Examples identified in the discussion include B17, B19, B52, B54, B57, D20 and to some extent E15 and E47.

⁶⁴ See section 4.6.



It was difficult to compare the treatment of the two groups of non-resident fathers and non-resident mothers since the latter group was so much smaller: there were 39 mothers who were non-resident parents, and 125 fathers.⁶⁵



The small group of mothers who were contact parents was also very different from all mothers involved in our cases; most had lost residence because they could not properly look after their children. Local authority children’s services were, for example, involved in some capacity in 62%⁶⁶ of

⁶⁵ These numbers include C32, where the child lived with the grandparents and both parents had contact. There were 9 additional cases with no primary care giver, and 2 cases where the final outcome was unclear.

⁶⁶ 24 of 39 cases.

the cases where the mothers ended as non-resident parents. The corresponding figure for cases with non-resident fathers was 14%.⁶⁷

This could well to explain why 21% of contact mothers, but only 5% of fathers ended up with a monitored contact order.⁶⁸ In our sample a higher percentage of fathers ended up with daytime only contact than mothers (23% rather than 10%), but the most common outcome for both mothers and fathers was regular overnight contact.

As set it out in Chapter 4,⁶⁹ we found no evidence that outcomes were influenced by a bias in favour of either gender. We noted that children were more likely to have mothers as primary care givers both before and after the litigation, regardless of whether this was an initial family breakdown, a previous informal arrangement or a return to court. We considered it likely that social expectations of parenting had shaped gendered roles long before the parties came to court.

However, our data suggests that both parents' and legal professionals' ideas of male post-separation parenting have moved away from the old model of a few hours on a Sunday afternoon towards more involved fathering. We had some cases where dads' applications mentioned the need to play an equal and important role that should not need to change much after the separation.

We did not interview parents, but some of our case files contained mothers' complaints that the unspoken gendered contract entered into at the start of their relationships, under which they had the primary care giver role, was now being broken by the fathers. In B9, dad accused mum of acting unilaterally, and making shared parenting difficult. She responded by remarking that the father had been happy to leave everything to her when they were together, so why was he butting in now? He was given overnight contact on two weekends out of three. The case was a good illustration of the difficulties families face in the transition from a gendered, traditional nuclear family to shared parenting.

In C46 the parents were broadly in agreement that there should be some form of shared care. However, mum did not want it to be labelled shared residence; she accused the father of never really having been involved before. She, like the mothers in B10 and C45, argued that their children needed the security of one primary carer. The problem in C46 was to some extent a personality clash; the parties agreed that dad was the one who did fun things, while mum organised their daughters' lives. It was clear, however, that this role division was underpinned by the parents' understandings of 'proper' gender roles.

In contrast, some mothers, like the applicant in E8, were unhappy about this gendered allocation of child-rearing. She sought to decrease the father's weekend contact on the grounds that it was unfair that she had to do all the more difficult, routine and functional parts of parenting without having the pleasure of spending free-flowing, quality time with their 5-year-old son.

Discussion about past or current allocations of the actual tasks of caring for children were generally absent from the documents in the files. This was probably partly because, as in C46, this was often a contested issue, with both parents claiming that they had been the primary carer during the relationship while their ex-partner was in some way unreliable or unstable. In the interests of moving cases forward, investigation of the veracity of such assertions was usually avoided.

The fact that courts so rarely changed the status quo suggests that prior involvement in caring for the child was still an important factor, but some parents may have felt disappointed that these points were never aired.

⁶⁷ 18 of 125 cases.

⁶⁸ 8 out of 39 contact mothers and 6 out of 125 contact fathers.

⁶⁹ See section 4.6.

There was only one case, E41, where one parent (in this case mum) claimed to have cared for the child, but her inexperience and ignorance betrayed her. Responding to mum’s statement, dad pointed out that although she claimed to have been the primary carer, down to the making of packed lunches, their daughter had in fact been getting free school dinners. Here, as in C40, where the mother was a heroin-user, it was the fathers who provided consistency and stability and cared for the child’s basic needs; both these cases also ended with the little girls living with their dads.

It was in these cases, which went against the prevailing cultural pattern of gendered parenting, that caring became visible, and became an issue. That, however, is not so much a comment on the courts, but on the implicit assumptions around parenting that are still present in society.

5.7 Time Patterns, Domestic Violence and Child Welfare Concerns

This section gives a brief overview of child welfare concerns⁷⁰ and allegations of domestic violence which would have met the LASPO criteria for evidence or were serious enough to have prompted investigation (beyond a brief dismissal of unfounded accusations). There is more detailed discussion of both these concerns in the sections on each time pattern category.

The table below sets out the percentages of cases in the time pattern categories that proven or investigated domestic violence allegations and/or serious child welfare concerns.

	Proven/ Investigated DV as % of category	Child Welfare concern as % of category	Proven/Inv DV and/or CW concern as % of category
No PCG	11%	44%	44%
Overnights	32%	41%	56%
Daytime	26%	26%	38%
Irregular	20%	50%	60%
Monitored	29%	79%	93%
Indirect	50%	38%	63%
None	65%	76%	88%
Unclear	0%	50%	50%
	32%	45%	59%

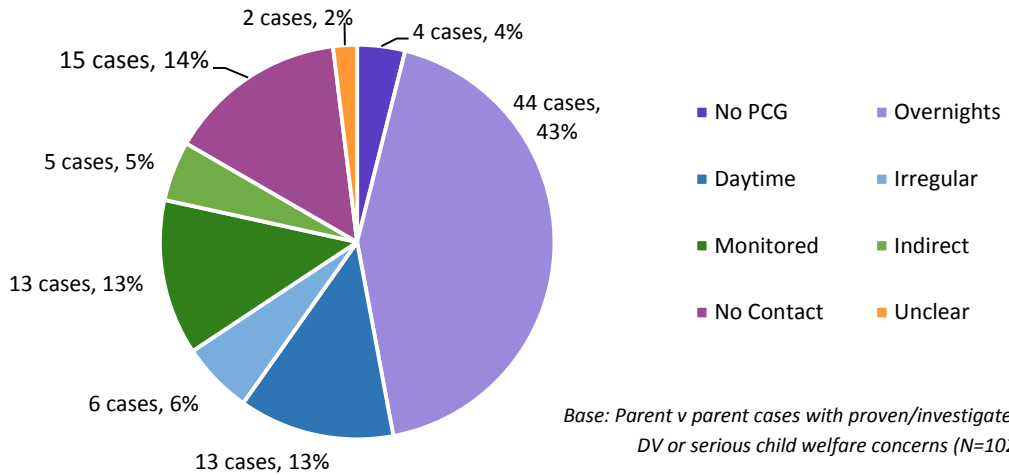
There were allegations of domestic violence serious enough to meet LASPO criteria or prompt the courts into further investigations in 32% of the parent versus parent cases overall. This was the same percentage as for overnight contact. In many of those cases, courts decided to minimise risks by supervising hand-overs or scheduling them at school.

Cases that ended with indirect or no contact were, unsurprisingly, much more likely to have LASPO-level evidence of domestic violence or court investigation. This suggests that indirect contact, for example, was used as a way of managing documented risks.

⁷⁰ We explain how we defined this in Chapter 2, in section 2.1.2.

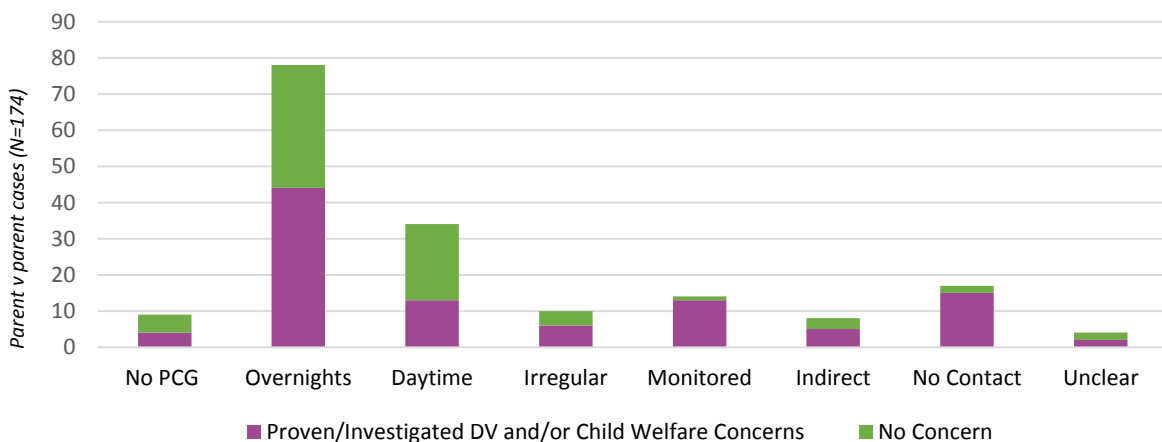
The pie chart shows that while cases with serious DV or child welfare concerns were overrepresented in the categories without direct unsupervised contact, the most likely outcome was still regular overnight contact.

Contact Arrangements in Cases with Domestic Violence or Child Welfare Concerns



There was no clear pattern in relation to child welfare concerns; such allegations were raised in nearly half of the no primary care giver cases, and in over a third of the overnight cases. We concluded that welfare concerns were considered on a case by cases basis; what mattered to the court was the particular problem in each case, and the practicalities of managing that risk. In B14, for example, the father built a secure enclosure for his large, aggressive dogs, and promised to contain them there when his little girl came to visit. In contrast, parents with serious mental health problems, as in B33 and B45, were often unable to modify their behaviour; although they were not in any sense to blame, contact had to be limited for their children’s safety. Unsurprisingly, welfare concerns were particularly likely to be a factor in the cases that ended in monitored contact. There were also child welfare related concerns in three-quarters of the cases that ended in no contact; many of these parents battled problems such as poor mental health or addiction, and that probably contributed to their disengagement from the court process.⁷¹

Contact Arrangements: Proven/Investigated DV and/or Child Welfare Concerns



⁷¹ In a few cases, that disengagement was instead linked to the applicant’s disappointment with the legal process; the latter was also sometimes linked to a lack of insight into their own role in the breakdown of contact.

Our overall impression from the files was of a pragmatic, problem-solving attitude to risk associated with domestic violence, addiction, ill health and other child welfare concerns. This, however, depended on the non-resident parents' cooperation with that process. Courts also often limited contact where Cafcass or children's services recommended this, or had concluded that older children's wishes needed to be respected. In our cases, there was a complex interaction between all these factors, which determined how much contact would be deemed safe.

5.8 Conclusion

It was clear that overnight contact has become the norm: **half the parent versus parent cases ended with regular stay-overs**. This may not seem encouraging, but it is. The courts deal with an atypically problematic group of separated parents in terms of domestic violence, entrenched conflicts, and also a number of welfare-related things like addiction, ill health and chaotic parenting.

Other studies have found support for the existence of a pro-contact assumption by the court in the fact that in their samples even problematic cases with allegations of domestic violence and/or adults with multiple problems ended in direct contact.⁷² **We found that, regardless of the circumstances before them, the courts adopted a problem solving approach to increase contact as much as they could.** We wondered whether increases in contact sometimes became the court's goal in itself, rather than the question of what type of contact was in the children's best interests. There is an important distinction to be made between simply 'making contact happen' and 'making contact work'.⁷³

Near equal sharing of practical care remained rare (9 cases or 5% of the parent versus parent cases). This was not unexpected and should definitely not be seen as the courts failing to promote shared parenting. The fact that the parents in our sample had gone to court meant they were likely to have higher levels of conflict and more child-welfare related problems than the general group of separating parents. We did not see cases where applicants had asked for 50/50 but this was dismissed outright without child welfare related reasons being provided. **In fact, we had doubts in some of these 9 cases whether near equal sharing was workable and child-focused, given the extraordinary level of detail in some orders, and those parents' past history of frequent disagreements.**

78 cases (45%) ended in regular staying contact; these children had one primary home but stayed with the other parent. **Our courts were strongly in favour of overnight contact.** The case files showed that this was the goal that was worked towards in most cases, unless there were quite serious welfare issues or a non-resident parent had not asked for it. This trend is to be welcomed, since overnight contact can give more relaxed, rewarding time for parents and children.

Most overnight contact occurred at weekends. There was no explicit information about why this was in the files, but it seemed likely weekend contact proved less disruptive to parents' work commitments and children's schooling. Weekend contact may feel more like 'quality time', but may also mean the non-resident parent has less involvement in the child's day-to-day life, and in the practical tasks of caring for the child.

The data presented in the previous section showed that **welfare concerns were not a *prima facie* barrier to overnight contact.** Courts would adopt a problem solving approach to find constructive solutions. These often involved a gradual increase of contact, or attempts to minimise conflict at hand-overs. This could take time. However, our case sample also clearly shows that there are many

⁷² J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p189; S Maclean, *Report of the Case Profiling Study: Legal Aid and the Family Justice System* (Legal Aid Board 1998), p49. See also D Cassidy & S Davey, 'Children's Proceedings – Review of Public and Private Law Case Files in England & Wales', Research Summary 5/11 (Ministry of Justice, 2011), p9 and E Giovannini, 'Outcomes of Family Justice Children's Proceedings - a Review of the Evidence', Research Summary 6/11 (Ministry of Justice 2011) p9.

⁷³ As pointed out by Baroness Hale in *Re G (Children)* [2006] UKHL 43 at [41].

court cases where there are strong reasons against staying contact. It is important that these reasons are given due consideration.

Daytime only contact was the outcome in 34 cases (20% of the parent cases). There was a sense here applicants parents wanted, and courts facilitated, contact that allowed that parent involvement in the child's day-to-day reality; a departure from the old stereotype of a divorced dad who saw his children for a few hours on a weekend. There was often a sense that these cases would be progressed to overnight contact if it were not for particular obstacles. In some cases staying contact was explicitly left open as a future possibility, subject to certain preconditions such as obtaining accommodation or staying sober.

In some cases it seemed applicants were happy with daytime contact, which was working well. The other cases in this category featured combinations of practical problems, children's opposition and child welfare related concerns. As with overnights, domestic violence and child welfare concerns were not a bar to face-to-face contact, provided the risks could be managed satisfactorily. Courts were often practical, and constructive.

In a small number of cases, the courts gave resident parents, grandparents and others the responsibility of supervising and monitoring contact with some of the least reliable, or potentially frightening parents (14 cases, 8% of the parent versus parent cases). In three of these cases, final orders for Local Authority monitoring showed not only that the problems that had led to these cases being brought to court were far from resolved, but also that the lines between public and private child law were being blurred.

We concluded that the courts promoted as much direct contact as possible. In 83% of cases ended with direct contact albeit in some cases irregular or monitored. The corresponding figure in the research by Hunt and MacLeod was 79%, and in the Legal Aid Profiling Study 78.8%, leading the authors of both reports to conclude that there is 'a *de facto* presumption of contact'.⁷⁴

In 25 cases (15% of the parent versus parent cases), there was not expected to be any direct contact when the case left court. As with the monitored cases, this group featured combinations of children's vehement objections, child welfare related fears, and domestic violence. This was the category where the actual value of contact, for the child, was most likely to be questioned (rather than implicitly taken for granted). **However, even in these cases it was seen as doing the child a disservice to completely cut off contact.** Thus, 8 cases ended with an order for indirect contact (5% of the parent cases). Where cases ended without any kind of contact, the most common reason was the non-resident parent's disengagement from the legal process. In many of the cases that ended without direct contact, the order preambles expressly mentioned direct contact as a future possibility or encouraged parents to reapply once they had addressed their own circumstances.

The files from our five courts, in summary, showed a commitment to as much as contact as was possible under the current circumstances.

⁷⁴ S Maclean, *Report of the Case Profiling Study: Legal Aid and the Family Justice System* (Legal Aid Board 1998), p49.

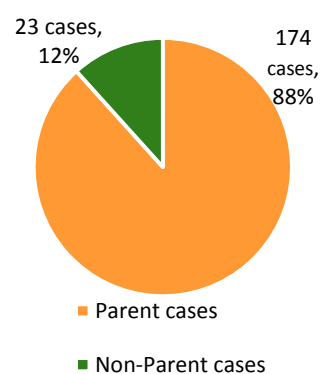
6 THE NON-PARENT CASES

6.1 Overview

This chapter examines the **23 non-parent cases**.

Non-parent cases made up nearly 12% of our overall sample.¹ In most of these 23 cases, one disputing party was a parent and the other a non-parent, although two cases involved no parents whatsoever.² The central issue in nearly all of these cases was whether the children should be cared for by a non-parent, generally a kinship carer.

	Non-parent cases	Total	% of sample cases from area
Ambledune	1	10	10%
Borgate	5	52	10%
Cladford	10	54	19%
Dunam	1	31	3%
Essebourne	6	50	12%
Total	23	197	



Base: All Cases in Study (N=197)

20 of these cases illustrate the use of private law residence orders as an alternative to public law remedies. We examine some of the issues raised by this practice, particularly in relation to the level of ongoing support provided to kinship carers. **We are concerned that this use of residence orders has not been taken into account in recent reforms to legal aid or the requirement for applicants to try private ordering before resorting to court orders.**

We also found 3 applications by grandparents for contact with their grandchildren, which are examined separately before we consider the larger group of residence disputes.

6.2 Grandparent applications for Contact

In 3 cases grandparents made applications to have contact with their grandchildren. Although this is a very small sample it does give some insight into the lengths to which the court will go to facilitate such contact.

In C13, the children lived with their mother and the parents were in a separate, ongoing dispute over contact. After three years of irregular contact and constant tension the paternal grandparents wanted something formalised. A contact order was made granting them one weekday tea-time contact session per week. The case was disposed of in two hearings.

¹ 23 out of 197 cases.

² In B1 the paternal grandmother was applying for contact with a four-year-old girl, who was living with her maternal grandmother. C16 was an application for residence made by relatives of two children who had been orphaned in 2003 in a different country and had lived with the applicants since 2006.

It is not possible to gauge whether this order was successfully implemented, given the background of animosity. However, it provided recognition that the court saw this relationship as important to the children and worthy of legal protection.

B1 was an application for contact by a paternal grandmother where the 4-year-old girl was being cared for by the maternal grandparents. The paternal grandmother's application was amalgamated with the father's pre-existing case. The final order was for both the grandmother and the father to have contact with the child once a week in her house. Here, as in many of the parent versus parent cases, a grandparent's home provided a safe setting for contact.

These cases show that grandparents' relationships with their grandchildren are vulnerable to changes in the parents' relationships and wider circumstances. They show that it is important that the courts can make contact orders that recognise and try to protect the significant role grandparents often play in their grandchildren's lives (a point illustrated by the non-parent cases discussed below where grandparents roles' changed from helping out to taking over the children's care). However, the third case in the contact category showed that contact with grandparents may not always be in children's best interests; the priority may instead be children's security with their primary carer.

In C10, the 9-year-old girl lived with her mother, her father had left the country some years ago to escape criminal prosecution, and the paternal grandparent applicants had not seen their grandchild in two years. Considerable efforts were made to introduce and develop contact. There were 15 hearings, and contact did progress from indirect to direct contact. However, there were two diametrically opposed accounts of contact. Had the girl been coached by an implacably hostile mum to be rude and constantly demand money? Or were the grandparents seeking to undermine the mother and confuse the child by constantly talking about the father and his new family in another country, showing photographs of half-siblings and nagging the little girl to go and visit them? An anonymous, malicious referral to children's services was made during the case, falsely alleging that mum was a drug addict neglecting her daughter. There was clearly residual bitterness between the paternal grandparents and the mother over the breakdown of the marriage and the criminal charges that meant the father could not return to the UK. In these circumstances considerable emphasis was placed by Cafcass on protecting the child from conflict; it was also said in the last Cafcass Section 7 report that forcing the child into further direct contact in the hope of building a relationship was likely to prove counterproductive. In the end, due to delays with the Wishes and Feelings report, the child actually attended court and spoke to the judge in the presence of a Cafcass officer, expressing her clear objections to contact. These views were determinative and indirect contact of letters cards and gifts six times a year was ordered.

These three cases suggested that, unlike the parent versus parent cases, the court's aim was not ordering as much contact as would be possible under the circumstances but rather on whether the potential benefits of contact outweighed the risks associated with exposing children to adults' conflicts. In conclusion, these cases indicated the importance of a full application of the Section 1(3) welfare checklist to contact cases.

6.3 Use of residence orders to facilitate kinship care

We have divided this group of 20 residence disputes into two categories for further analysis:

15 court applications for residence were initiated by a non-parent applicant against a background of concerns about the mothers' ability to look after their children. 5 applications were made by mothers³ for return of their child to their care.

³ In one, B8, the application was made jointly with the father.

Fathers were not heavily involved in this group of cases;⁴ this was usually one of the reasons why the non-parents had to step in and take over.⁵

The ages of the children in these 20 non-parent residence cases ranged from 4 months to 15 years. In a third of the cases the child or children were under 4. In 16 cases there was only one child involved; there were 2 siblings in three cases, and only 1 case with three children.

	Frequency	Percent	Cumulative Percent
All 4 or under	7	35%	35%
Aged 5 to 8	3	15%	50%
Aged 9-12	5	25%	75%
Aged 13+	2	10%	85%
Mixed group	3	15%	100%
Total	20		

6.3.1 Applications for Residence by Non-Parents

There were 15 applications for a residence order made by non-parents.⁶ Just over half of these applications were made by grandparents. It was more common in our sample for maternal relatives to apply than paternal relatives (11 and 2 applications respectively).

Applicants	
Maternal Grandparents together	3
Maternal Grandmother	4
Maternal Aunt and Uncle	2
Maternal Aunt	1
Maternal Sister and Aunt	1
Paternal grandparents together	1
Paternal Aunt	1
Cousins	1
Non-relative	1
Total	15

Applications were made because the parents in these cases were unable to care for the children: the mothers had significant problems and the fathers were disengaged or dangerous. In most cases the non-parent had been caring for the child for some time. Some of the parents had an ongoing low level of contact at the time of application.

A court order was sought either because the non-parent carer feared interference by the dysfunctional parents, needed PR to deal with third parties, or because the order had been suggested to them by social services.

⁴ Fathers were named as joint respondents with the mothers in 7 applications by non-parents. This may have been a mere formality as Family Proceedings Rules 1991, r4.7 requires every person whom the applicant considers to have parental responsibility for a child to be named as a respondent

⁵ There was also a group of fathers who were seeking residence order in order to take over primary care following the inability of the mother to continue as primary carer; they are discussed in e.g. in section 2.8.5, p26 and Section 3.2.3, p38.

⁶ A number of applicants also sought a Parental Responsibility Order seemingly unaware that such orders were only available to parents or step-parents (B41, C16, C29, and E20). In C29 the application was for residence or in the alternative a PRO or a special guardianship order. In C30 the maternal grandparents applied for residence or in the alternative, contact.

6.3.1.1 Problematic Mothers

In 12 cases where non-parents sought residence, serious concerns were raised about the ability of the mothers to look after the children full time. In all except one of these cases, the concerns were echoed in investigations by Cafcass and children's services.

The mothers generally suffered serious long term problems which had affected their ability to care for their children. Mental health issues were particularly common, featuring in 6 of these files. In A1 the mother had severe postnatal depression and was self-harming and volatile. The mother in E29 was under the care of the community mental health team. In C29, C53 and E16 the mothers had spent extended periods of time in a mental hospital. In C1, mum had learning difficulties, and was also suspected to be suffering from depression.

In other cases, the mothers had been involved in the care of the children but a recent turn of events meant that their care could no longer continue. Perhaps the saddest case was E31 where the residence order was set up to allow an aunt to take over care for a 15-year-old boy whose mother had terminal cancer. In B41, the grandmother and mother had raised the baby together, because of the mum's learning difficulties, but now the mother had met a man on the internet. The worry (shared by the grandmother and Borgate children's services) was that mum would move with the child and would then be unable to cope on her own.

C30 was the only case in which the welfare concerns expressed by the grandparents were not supported. Allegations were made by maternal grandparents about the mother's parenting ability but investigations by Cafcass found no evidence of poor care. In this case, the live issue was instead the high level of animosity between the parties, and the negative impact this may have on the child.⁷

6.3.1.2 The Unusual Voluntary Transfer of Care Cases

There were three cases that did not quite fit with the others. Two had a slightly different set of circumstances to the majority of disputes in this group and the last was highly unusual.

In E20 a paternal aunt applied for a residence order in respect of her 7-year-old niece. The parents were divorced. When the niece was six months old, she had been abandoned by her mother and left with a family friend. The aunt, who was a British citizen, had flown back to their war-torn country of origin to collect the baby and had raised her since. She now wanted parental responsibility so that she could eventually apply for citizenship for the girl. The aunt's application had the father's support. He had recently been released from prison in a third state and had been sent back to his war-torn home country, homeless and unemployed. The aunt, and her solicitors, had unsuccessfully tried to contact the mother. Cafcass recommended that the residence order should be made, as there were no safeguarding concerns. The court dispensed with the requirements to notify the mother, given the circumstances, and made the order.

There was another similar case where the children in had had been abandoned in their country of origin and brought back to the UK by the relatives who were now seeking residence orders.

In C16 the two girls, now aged 12 and 7, had been living with their parents' first cousin and her husband in Cladford for five years. They had been born in Pakistan and both their parents had died when the younger daughter was still a baby. It was not quite clear how they had ended up in the UK with the applicants. The Cafcass safeguarding inquiry found no concerns, and the order was made at the second hearing.

In both these cases, the court was dealing with a status quo under which the children seemed to be thriving, and where there seemed to be no real, practical alternative. In the third case, the

⁷ The case is discussed in section 0 in relation to the unusual use of a shared residence order.

arrangement was much more recent, and had initially caused healthcare professionals to raise questions.

According to the c100 application, the maternal aunt and uncle in C5 were applying for a residence order because 'we cannot have a child of our own and therefore our sister in law has agreed to give her child to us'. They had taken the now 4-month-old girl home from the hospital. The midwife had alerted the local authority to the arrangement, but children's services declined to do the Section 7 Report on the grounds that their involvement with the family had been minimal. The Cafcass officer who prepared the report had talked to all four adults and observed the child, and was happy to recommend the order.

These were unusual examples of kinship care, which nevertheless showed how important a child's extended family can be, and how private orders can be used well where there is no real dispute and no child welfare concerns.

6.3.1.3 Non-parent is the child's primary carer

In 14 of these 15 cases, the non-parent was already caring for the child full time at the time of the application. In 5 cases the child had spent all or most of his or her life with the non-parent by the time of the application.

In A1 the 3 year old child had lived with the maternal grandmother for the first 14 months of his life; his mum had severe post-natal depression and her life was chaotic. He had then gone to live with his mum and her new partner for a little while, but when his younger half-sibling was born, his mum had returned him to the grandmother and he had stayed with her since. Mum had intermittent contact, which was reported to be distressing for the little boy but important in order to maintain a relationship with his half-brother.

In 6 other cases the non-parent carer had been heavily involved for a considerable period of time.

In E16, the 12-year-old had been living with his uncle and aunt for nearly 4 years. It was originally meant to be a temporary arrangement while the mother went in to hospital for treatment, but had become permanent due to her bipolar disorder. All parties were happy for the arrangement to continue; mum was having contact every week on an informal basis. The boy said he knew his mum was too ill to look after him and enjoyed living with his cousin; children's services praised the applicants for providing a safe and secure environment. Social workers had prompted the application because the mother had a new partner, who presented a high risk to the boy and should not be allowed to have contact with him. It seemed that everyone involved saw this order as lasting until the boy was old enough to leave home.

These were families that had struggled with difficulties for months or even years and relatives had already stepped in to ensure that the children were being adequately cared for.⁸

6.3.1.4 Local Authority involvement in residence applications by non-parents

These cases were very far from the ordinary understanding of private disputes. There was a high level of local authority involvement in 8 of these 15 cases, where children's services were actively supporting the applications. In 4 cases, the child had been placed with the non-parent after intervention by police or on the recommendation of the Local Authority. The mothers in these cases had all been struggling for a long time, some since their babies' births.

⁸ C30 was the only case where the mother had actually been the child's primary carer prior to the litigation; but she had lived next door to the maternal grandparents and acknowledged that they had played a significant part in the child's daily care.

In E25 mum had six children. The case was about the third eldest, her 13-year-old son. His two older sisters were living with their maternal grandmother, while his three younger siblings and half-siblings were also living with mum. They were subject to a child protection plan; mum's last two partners had been violent in the home, she often left the children on their own, and social workers suspected that she was depressed and therefore unable to cope. The boy's aggressive behaviour had caused problems at school. Children's services had suggested the move to gran's house, and the boy's school reports improved. The case was kept under review for six months after the interim move, and then a final residence order was made with reasonable contact to mum.

In a further 4 cases the Local Authority was aware that the child was living with a non-parent, was supportive of this, recommended or even insisted on residence orders to give the children security.

In C29 the child had been left with the neighbour, who was also a long-time family friend who used to help the struggling mother. This happened on Christmas Day, a few days after the mother had been sectioned following a serious breakdown. It appeared to be because the father, to whom the child had been given, recognised that he was unable to care for the little girl. He had turned up with her mid-morning, already very drunk. When the neighbour sought advice from the Local Authority they characterised the arrangement as 'private fostering' and claimed that there was no option except for the neighbour to get a solicitor and explore her legal options. Subsequently, serious allegations were made about the father sexually assaulting the older half-sisters or possibly this little girl. The local authority then funded the neighbour's application for a special guardianship or a residence order.⁹

In the other 6 cases all safeguarding issues were dealt with by Cafcass. In E29 there was no current children's services involvement although there had been in the past. The girl and her siblings had been the subject of child protection plans under the category of emotional abuse. Mum had long-standing mental health problems; her form partner had been verbally and physically abusive. There were no concerns about the grandparents. In C53 Cafcass spoke to the 12-year-old who expressed her strong wish to stay with her paternal grandparents. In C30 Cafcass found the grandparents' concerns to be unfounded. The three unusual transfer of care cases have been mentioned separately above.

6.3.2 Outcomes in the 15 residence applications made by non-parents

	Applicants	Holders of Final Residence Orders
Maternal Grandparents together	3	2
Maternal Grandmother	4	3
Maternal Aunt and Uncle	2	2
Maternal Aunt	1	1
Maternal Sister and Aunt	1	0
Paternal grandparents together	1	1
Paternal Aunt	1	1
Parents' Cousins	1	1
Non-relative	1	1
Mother & Grandparent(s) together (SRO)	0	2
Mother (suspended order)	0	1
	15	15

⁹ This is discussed further in Section 6.4.4.

6.3.2.1 Non-parents generally confirmed as primary care givers

The non-parent was confirmed as the primary care giver in all but two of these cases. The court made sole residence orders in 13 cases and shared residence orders in the other two.

Grandparents were the group most likely to apply for (and gain) residence orders. There were greater numbers of maternal relatives.

The fact that non-parents won most of their cases does not suggest any kind of bias on the part of the courts, Cafcass or the Local Authority social workers involved. Instead, it was clear from the files that most of the mothers (and fathers) in these cases were unavailable or unable to provide stable, secure homes for their children. The outcomes in these cases raised a few other, interesting points explored below.

6.3.2.2 Final orders may not be permanent after all

In D25 residence orders were initially granted to allow two children to be cared for by their sister and maternal aunt, following the recommendation of children's services. Their mum was an alcoholic who had served prison sentences for violent assault. The children had been placed in police protection several times and were on the child protection register. The mum's sister and her oldest daughter were now seeking residence for one child each, stating on their c100 forms that they wished to legalise this arrangement. The orders were made. Although no contact orders were made, contact with mum was facilitated informally, mainly through telephone calls. After 14 months, the alcoholic mother had completed treatment and applied for the residence orders to be lifted and the children to be returned to her care. The sister and aunt did not object to this. However, there was a Catch-22 situation: the mother wanted her children back, but had no suitable accommodation, yet without dependants she could not be provided with social housing. The solution was an excellent example of the county courts' practical problem-solving approach. Dunam County Court made a suspended residence order: the children would remain living with the mother's sister and her maternal aunt respectively until such a time as the mother secured somewhere suitable to live. This case illustrates the temporary nature of the kinship care arrangements made by private orders.

6.3.2.3 A curious use of shared residence orders

There were two non-parent cases where the final order was for shared residence, and one further case, B41, where shared residence was considered but rejected as the mother did not demonstrate the necessary ability to ensure the child's well-being.

The mother was confirmed as the primary care giver in C30. This was a case which caused us concern. The comparatively young mother had originally lived next door to her parents; when she moved out of the area the maternal grandparents sought a residence order claiming to have been the child's primary carers and alleging that she was disinterested and neglectful. Mum responded that she had wanted to escape an environment marred by the grandfather's violent and controlling behaviour; allegations substantiated by a number of domestic abuse police call-outs. None of the grandparents' welfare allegations were substantiated. It was also clear from the file that they disapproved of the mother's choice of husband and would not help her bring him into the country; as a result he was stuck abroad and she could not afford to visit him. After some time away, the mother returned to the Cladford area, after a failed reunion with her husband, to live with her sister. At this point, a shared residence order was made for the child to reside mostly with the mother and with the maternal grandparents every other weekend, with two mid-week tea time contact occasions. This arrangement was reached through negotiations between the grandparents' solicitors, the mother and her McKenzie friend. The final order shared residence order stipulated that the child was to live in the Cladford area and was to be educated at one particular, named school.

This order and the somewhat one-sided negotiating process may have continued patterns of controlling and abusive behaviour towards the mother.

In E29, the second case where a shared residence order was made, the 9-year-old girl had initially been the subject of a child protection plan, due to maternal neglect. Her grandmother took over her care. Reports from the Local Authority were sought by the court but never received. The mother and the unrepresented grandmother came to an agreement, facilitated by the mother's solicitors. A shared residence order was made, by consent, under which the girl would spend every other weekend at her mum's house. In this case, the grandmother was clearly the primary care giver.

Both shared residence orders were the result of consent orders in cases where the Local Authority was not directly involved. These two cases fall far outside the paradigm understanding of shared parenting. The use of shared residence here raised similar points as in high conflict disputes between parents. In both cases, the shared residence order was a way out of a stale-mate and a means of avoiding a full contested hearing. In E29, where the grandmother was the *de facto* primary carer and the mother only had the child on alternate weekends, it seemed the order was used for symbolic purposes, and to comfort a parent who may otherwise feel she had been marginalised.¹⁰ In C30 there seemed to be a risk that the grandparents would use the shared residence to continue to control their daughter's life. It gave the grandparents every other weekend as well as 'contact' on two weekdays after school each week. Moreover, it purported to prohibit the mother from moving out of the Cladford area or changing the child's school.

6.3.2.4 Contact in the cases where non-parents sought residence

In contrast to the parent versus parent cases, facilitating contact between parent and child was not such a priority for the courts in these cases. This is unsurprising due to the high level of disengagement by these parents, and the range of issues they were battling. It could never be assumed that contact would be in these children's best interests. In a few cases contact was recommended not so much for the parent-child relationship as for the benefits of maintaining links with siblings and half-siblings.

In the 13 cases where the children remained with their non-parent carers, there were 6 cases where a contact order was made for one parent. There were generally not very detailed; in C1, C4 and E25 the orders were merely for 'reasonable contact'. While they reinforced the principle of contact, they left many of the details up to the non-parent carer. This brings flexibility, but also placed a lot of responsibility on the non-parents' shoulders.

In some cases there were contact orders for one parent, but not for the other.

In C29 a neighbour and long-term family friend was required to make the child available for one hour of contact with the troubled mother each Saturday and Sunday. However, no contact order was made for the father: he had not actively sought one, had problems with alcohol abuse, and was at investigated for sexual abuse of his daughter or her older half-sisters.

There were a few cases where the court took the approach that was prevalent in the parent versus parent: to order as much contact as was judged safe enough in the circumstances.

The mother and maternal grandmother in B41 had raised the child together because of the mother's learning disabilities. The final order stated simply that the grandmother acknowledged that contact with the mother did not need to be supervised and that daytime contact should be facilitated. However, it also ruled out overnight contact. In the same case a formal 'no contact order' was made to prevent the father having contact; he had been arrested for accessing child pornography in 2009 and due to his learning difficulties it was not clear that he recognised why this was so wrong.

¹⁰ See also discussion on Shared Residence Orders in Chapter 4, section 4.3.3.

As was observed in Chapter 5, indirect contact could be used to ‘keep the door open’, should a child who objected to contact later change her mind.¹¹

In C53 an order was made for indirect contact with the mother through letters. In this case the 12-year-old child had written a letter to the court asking to live with her paternal grandparents because of the mother’s constantly changing circumstances, and her erratic behaviour that often embarrassed the girl ‘like directing traffic’. The father had frequent and informal contact at his parents’ house, and it seemed the court had not felt the need to make an order to formalise this arrangement.

In two cases there was some informal, intermittent and possibly indirect contact with the mothers. The courts did not encourage any future increases in contact as it was already distressing and potentially harmful to the children. In A1 the local authority noted that contact was distressing to the young child as the mother was volatile and self-harming, but also recommended it should be kept up to maintain the little boy’s link to his younger half-brother. In E16 the mother, who had mental health problems, had recently moved in with a dangerous new partner; although no specific reasons were set out in the file it was clear that children’s services did not want this man to spend time with the 12-year-old boy. Although the son told Cafcass that he was in contact with his mum twice a week, this appears to have been indirect contact by telephone.

In 4 cases, no order was made to facilitate contact between the children and their parents. In three cases this was understandable as the parents were not going to be involved in the child’s future,¹² and in a fourth, C5, the lack of contact was a logical consequences of the parties’ private surrogacy-type arrangement.

In the two cases where the court placed the child with their parent, contact with the non-parent applicants was maintained by formal order. The obligations of the shared residence order in C30 were quite restrictive on the primary carer and are discussed above. In D25, where a suspended residence order was made, the court also made a suspended contact order for mum to facilitate contact between the children and their former cares at such times and dates as agreed by the parties.

6.3.3 Residence Applications by Parents for the Return of the Children

There were 5 applications by parents for residence, where the respondents were non-parents. One application was made jointly by a couple; the rest were made by mothers on their own.

In all these five cases, the parents sought the return of their children who had been cared for by a non-parent for between 2 and 9 years at the time of application.

Care giver	Nº
Maternal Aunt and Uncle	1
Maternal Grandmother	2
Paternal Grandmother	1
Paternal Step-Grandfather	1
Total	5

In 4 cases an existing residence order confirmed the non-parent as the primary carer.

In the fifth, C41, there did not seem to be a formal residence order in place but the paternal grandmother had cared for her grandson for at least 9 years and had successfully held herself out as his guardian.

Much like the cases in the previous section, all five mothers were dealing with complex problems ranging from drug and alcohol abuse to chaotic behaviour partially attributed to a history of violent relationships.

¹¹ See section 5.5.1.

¹² In E31 the residence order was designed to come into effect once the terminally ill mother became too sick to care for the child. In C16 the parents were dead, while in E20 the mother could not be found, the father was abroad, and the child settled with the non-parent.

In, E2 the mother had a history of alcohol abuse and the children were placed with the children's maternal aunt and her husband by Essebourne social services who advised them to secure the arrangement with a residence order. In B53 the child had been subject to a child protection plan and placed with maternal grandmother with mum's agreement. In B18 social services did not place the child with the non-parent but had assessed and approved the placement.

In the other two cases social services only seem to have become involved after the case came to court. In B8 ongoing local authority support was ensured by the use of family assistance orders. In C41 social services did an initial assessment before referring the matter to Cafcass as a private residence dispute citing no reason for their continued involvement.

6.3.4 Outcomes in Cases where Parents applied for Residence

In 3 of these 5 cases, the children were returned to their parents, in 2 cases they remained with their non-parent carers.

The approach of the courts was to reinitiate contact with the parent, often through supervised contact. Where appropriate, parents were expected to submit to drug and alcohol tests as well as attending parenting courses. Where the parents engaged well with the process, the child was returned to their care. Where the parent disengaged from the court process, the child remained with the non-parent carer but the court made an effort to keep some level of contact going.

This is an area which seems highly unsuited to private ordering. Returning the children to their parents was a long process which required regular monitoring by the court and social services or Cafcass.¹³

In B8, the 6 year old girl had lived with her maternal grandmother and her two teenage uncles for two years at the time of the application. Mum and dad had a history of drug and alcohol abuse, but they had since had two younger children who lived with them, and appeared to have settled down. They submitted to drug and alcohol testing and attended the court-mandated parenting courses. They acknowledged that they had had problems in the past and said they were now working hard to overcome them. Their level of contact was increased from holiday contact to more regular contact and finally full time care through a residence order. The process took three years with short directions hearing taking place every 2-3 months. The court also made a final family assistance order to ensure the continuation of local authority support.

Similarly in E2, both parents submitted to blood and liver function tests. Mum was given a short amount of day contact at the start of the case while the test were being processed. When results came back indicating that mum was still drinking, she scaled back her application from residence to increased contact. An order was made for overnight contact; this went well for six months, and the children said they wanted to go home. The court made an interim residence order to be monitored by the Local Authority, and five months later the final residence order was made with the support of the local authority. This had been a carefully monitored process

In B43, the matter was disposed of in one hearing. However, children's services, who encouraged the move to granny's house in 2008, had been monitoring progress for the last six months. All parties were in agreement that the mother had overcome her problems with substance abuse, and had left the violent relationship behind her; regular overnight contact had also proved that she was capable of looking after her 10-year-old son. A residence order in favour of mum was made by consent.

In the two cases where the children did not move, there had been less contact, and these mothers seemed less willing to engage with the court process.

¹³ Indeed, in B43 the reason given for not attempting mediation was that the local authority needed to assess the situation before the parties could be given free rein to reach an agreement.

In B18 the child remained with the paternal grandmother's new husband, her step-granddad. Care proceedings had been instigated when the baby was born, due to her mum's troubled past. Four years later, the grandmother had tragically died in an accident, but the step-granddad had continued to raise the child. Although a contact order was in place for twice-weekly supervised contact, mum had only attended 3 times in the previous 2 years. She was now living with a new baby and a new partner and sought residence or contact. In a clear example of a preference for maintaining the *status quo*, Borgate children's services recommended against changing the residence since the child was clearly thriving with her step-grandfather. The court began with an interim order for contact at an indoor play centre once a month while waiting for the Section 7 report. The step-grandfather and the child and waited patiently the play centre once a month for three months, but the mother never turned up, nor did she contact her solicitors. The court dismissed the mother's application.

This case, and some of the parent versus parent cases discussed in Chapter 5 as outcomes of no contact,¹⁴ showed that where an applicant completely disengages with the litigation there is little or nothing the court can do.

In C41 the 11-year-old child had been living with her paternal grandmother for 9 years. The court reintroduced contact with the mother slowly but the mother failed to attend many of the scheduled supervised contact sessions and those she did attend did not go well. The child was joined as a party to the proceedings and told Cafcass that she did not want to continue with direct contact. She had no real memories of her mother, but had lived with her grandmother all her life, and seemed understandably frightened of change and opposed to contact. An order for indirect contact was made.

The level of co-operation of the non-parent carers in these cases was commendable. Not only had they cared for these children for many years but they co-operated with court, Cafcass and/or social workers in reinitiating the children's relationships with their mothers and in some cases agreed to transfer primary care while remaining in the background for support. Only in B8, where the grandmother was struggling with her own teenage sons, did we see any criticism of the non-parent for engaging inadequately with children's services. Although these were a small number of cases, it seemed courts took very seriously parents' applications for the return of their children, but also liaised closely with children's services to ensure that a move would be safe. It seemed to help if the children and parents had remained in touch throughout. In the 3 cases in which the children were returned to their parents there had been regular staying contact with the parents before the application for the order.

6.4 Analysis: The use of Residence Orders in facilitating Kinship care

6.4.1 A common use of residence orders

Our study demonstrates that residence orders are regularly used as an alternative to public law remedies in situations where the parents are no longer able to provide care and grandparents or other relatives take over, often at the suggestion of social services. These orders were generally made in cases where mothers struggled with multiple and complex problems and fathers were relatively uninvolved.¹⁵ Our findings are supported by the work of Hunt and Waterhouse (2012)¹⁶ who found that 25% of kinship care cases were formalised by a residence order. In 2013 Selwyn *et al* found even higher numbers of residence order in their sample; 56% of kinship care arrangements were formalised

¹⁴ See section 5.5.2, p5.5.2105.

¹⁵ There were a similar group of cases where fathers took over from mothers who were struggling to cope with their children; these are discussed

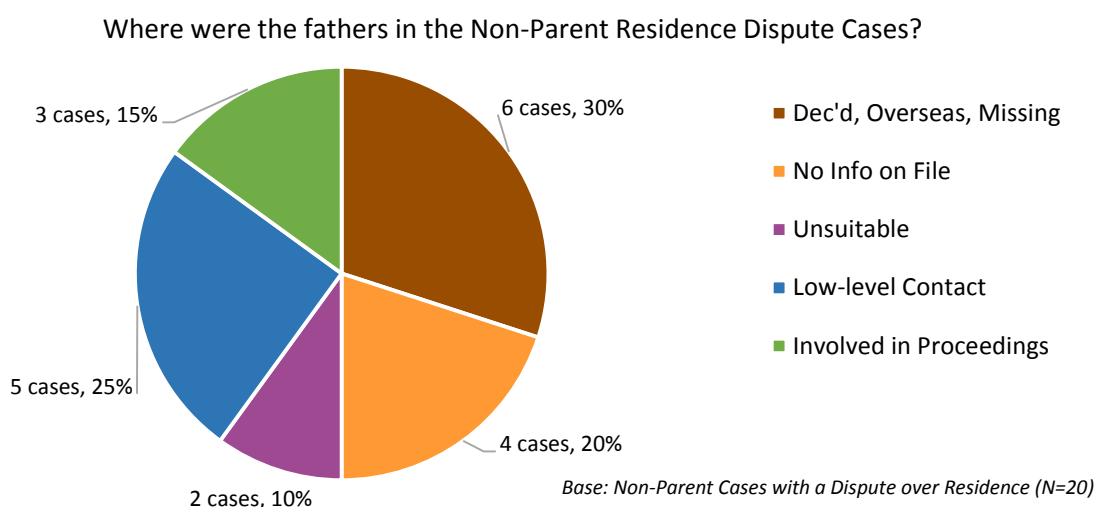
¹⁶ J Hunt & S Waterhouse, *Understanding Family and Friends Care: the relationship between need, support and legal status – Carers' experiences* (Family Rights Group/Oxford University Centre for Family Law and Policy 2012).

by a residence order.¹⁷ 4% of the children who exited ‘looked after’ status in 2011 did so because a Section 8 residence order was made.¹⁸

6.4.2 Fathers are not considered as appropriate substitute carers

There was a definite gendered aspect to this group of cases. The trigger for placement with non-parents was maternal inability to care for children. While four single mothers sought the return of children there were no such applications from single fathers. The fathers in these cases were never seriously considered as substitute primary carers.¹⁹ However, the files generally provided good reasons for this approach, which was taken by both children services and the County Courts.

Any allegation of a gender bias can be easily refuted by the high numbers of residence applications by fathers to take over as primary carer due to incapacity of the mother. A sizeable number of these applications from non-resident fathers had been expressly encouraged by children’s services and are discussed e.g. in section 2.8.5.



In 6 cases the fathers were unavailable; they were dead, living outside of the UK and unable to obtain a visa, or missing in the sense that all reasonable efforts to locate them had failed. E31, for example, concerned a teenage boy whose dad had moved to Spain in 1999 and had not been in contact since; unsurprisingly a letter sent to the Spanish address had been returned stamped ‘addressee unknown’.

Fathers in Non-Parent Residence Disputes	
Deceased, Overseas or Missing	6
No Information on File	4
Unsuitable	2
Low-level Contact	5
Involved in Proceedings	3
	20

In 4 of the cases there was no (or very little) information about the children’s fathers in the files. In E25, for example, there was sporadic telephone contact, but since the challenging 13-year-old boy had settled in well with his maternal grandmother and his behaviour at school had improved noticeably it was understandable that no efforts were made to consider a move to his dad’s house.

¹⁷ J Selwyn and others, *The Poor Relations? Children and Informal Kinship Carers Speak Out* (Buttle 2013).

¹⁸ Department of Education, *Children looked after by local authorities in England: year ending 31 March 2011* Statistical First Release SFR 21/2011, <https://www.gov.uk/government/statistics/children-looked-after-by-local-authorities-in-england-year-ending-31-march-2011> accessed 22nd December 2014.

¹⁹ In C1, C4 and C53 the fathers were having low level of contact which were not formalised by a contact order.

There were 2 cases where the fathers could clearly not be considered as primary carers. In C29 the alcoholic dad was also suspected of having sexually abused his daughter's older half-sisters. In B41 the father's learning difficulties meant he failed to see why it was so wrong to view child pornography on the internet.

In five of the cases there was some contact between the fathers and the children; but it was commonly informal and limited to the occasional daytime visits. In C4, for example, dad, who had a history of drug use, was already informally seeing his children at the paternal grandparents' house. An order was made for reasonable contact.

There were only 3 of these 20 non-parent residence disputes where the fathers were actively involved in the proceedings. Only in one case, B8, was the father seeking to have the child come and live with him (and the mother and the child's younger half siblings).²⁰

6.4.3 Less Priority given to promoting parent-child contact

These cases were more focussed on finding a safe and stable residence for the child, than on contact as a highly prioritised goal in its own right. In the cases where the children were placed with non-parents the level of contact with both mothers and fathers tended to be quite low. The parents in these cases were often struggling with multiple problems. Reliability could be an issue and there were also child safety concerns.

In a few cases, the main purpose of contact was to maintain links with half siblings. In others, contact was used as a tool in determining whether or not a parent could take over or resume the role of full-time carer. Where the children returned to the parents the emphasis of the cases was on smoothing the transition. The non-parent carers remained heavily involved, yet formal contact orders were rare. Where they were made, the details were generally left up to the parties.

6.4.4 Residence in preference to Special Guardianship

The use of a residence order grants the non-parent the parental responsibility (PR) which is necessary to care for and make decisions on behalf of the child.²¹ This grant of PR does not, however, affect the PR held by the mother and father. In contrast, a special guardianship order allows the holder to make decisions to the exclusion of other holders of parental responsibility, effectively overriding their input.²²

The issue of special guardianship was raised in only two cases in our sample. Neither application was successful. In B8, the court actually decided to return the child to her parents, who were at that stage cooperating well with all agencies, while the grandmother's house was described as chaotic.

In C29, the neighbour said she was worried that either parent could turn up randomly and demand changes; a special guardianship order would also entitle her to financial and other support from the local authority. The authority supported, and funded, the application for special guardianship. However, the mother's barrister successfully argued the court had not been shown sufficient reasons to prevent this mother from exercising her parental responsibility. This order, it was said, was more suited to public proceedings where full framework assessments have also been carried out. The court made a residence, but not a special guardianship order. Whilst this gave the neighbour some security, it also left her without any formal local authority support and worried that either parent could interfere or disrupt the child.

²⁰ The parents' application was successful. The other two cases were C5, a highly unusual informal surrogacy case where the married parents 'gave' the child to a childless relative and C53 where the father actively supported his own parents' application for residence.

²¹ Section 12(2) The Children Act 1989.

²² Section 14C(1)(b) The Children Act 1989).

Furthermore, we saw the unexpected use of the shared residence order as a compromise solution in two cases between grandparents and mothers, as discussed above.²³ We were concerned that compromise became an end in itself, but left the person tasked with actually being the child's primary carer in a less secure position.

6.5 Discussion: The Dividing Line between Public and Private Child Law

In many of these cases a Section 8 residence order appeared to be functioning as an alternative to public child law measures. After the child had been placed with them by police or the local authority the non-parents applied for residence orders to prevent care proceedings.

In other cases the non-parent carer went to the local authority for advice and was encouraged to apply for a residence order to secure the arrangement. In these situations, too, the cases were diverted from public law remedies.²⁴

This channelling of families away from a public law route into private law remedies minimises formal state intervention into the family, and arguably promotes the non-interventionist philosophy of the Children Act 1989. The children are removed from the care of an unsuitable parent, to be cared for by a relative with whom they have a pre-existing bond. This practice is no doubt more cost effective for local authorities than commencing the formal pre-proceedings process. It is quicker and less stressful for the family, and avoids the potential stigma of failure or inadequacy that might come with formal care proceedings. The residence order provides non-parent carers with some security, by giving them parental responsibility.

We acknowledge that private law orders are an appropriate part of kinship care where the parents and carers are in agreement and aware of the legal consequences of the order.

However, we are concerned that in some of these cases, the diversion to private law remedies is an inappropriate substitute for the support structures of voluntary accommodation or formal care proceedings. Other studies have shown that in practice the distinction between voluntary support provided by local authorities and compulsory intervention into the family is often blurred.²⁵ We argue that the use of residence orders to facilitate kinship care can blur the boundary between public and private child law remedies.

We acknowledge that local authorities have finite resources and have to make difficult decisions about how to support struggling families and when to formally intervene. Nevertheless, some aspects of the non-parent residence cases gave us particular cause for concern:

- Where residence orders are made 'by consent' is this really a voluntary decision by the parent and non-parent?
- Where the residence orders are contested by a parent, is the private law standard of 'the best interests of the child' legally appropriate?
- Do residence orders provide adequate stability?
- Does the practice of diversion into private orders leave the non-parent carers and the children with inadequate support?

²³ See section 6.3.2.3.

²⁴ As discussed in Chapters 2 and 4 there were also a number cases where fathers made residence applications against a similar background of problematic mothering and children's services involvement. These cases were not true disputes between two private individuals but situations in which the local authority took the lead in finding adequate care for the child outside the immediate family.

²⁵ J Masson, 'Emergency intervention to protect Children: using and avoiding legal controls' [2005] CFLQ 75, p80.

6.5.1 Where residence orders are made ‘by consent’ is this really a voluntary decision by the parent and non-parent?

Under Part III of the Children Act 1989, public authorities are empowered to provide voluntary assistance, including accommodation, to families where children have been classified as being ‘in need’.²⁶ Where children are placed in voluntary accommodation, the arrangement is supposed to be a partnership between the local authority and the parents.

Past research has found that, in reality, many parents were presented with a choice of agreeing to the arrangement or going to court. This practice has been described as testing the balance between compulsion and voluntariness.²⁷

We see similar tensions in our sample of non-parent cases. Although 15 of the applications were brought by a non-parent applicant it was not always clear if the initiative was really theirs or if they acted under pressure from their local authority.²⁸

In 14 of the cases the non-parents were legally represented and 9 were receiving legal aid. However, in 6 cases the non-parents acted as litigants in person without independent legal advice.

The mothers from whom the children were removed were very vulnerable. They had legal representation in only 4 cases. In 3 cases, although the mother could be located she did not attend court and did not seem to have received any legal advice. 6 of the mothers acted as litigants in person. In contrast, all the mothers who applied to have their children returned to them were legally represented.

Although 7 of the 20 non-parent cases ended in a consent order, the lack of legal representation raises questions about the true voluntariness of some of the consent orders, particularly where the alternative may have been for the local authority to initiate care proceedings.

For example, in C1 none of the parties had legal advice but a consent order was reached through a negotiation process monitored by the local authority. The young mum had learning difficulties and it was suggested she may be suffering from post-natal depression. The file showed efforts had been made by social workers to explain the implications of a residence order, but there was only one County Court hearing, at which the mother was not legally represented.

6.5.2 Where the residence orders are contested is the private law standard of ‘the best interests of the child’ legally appropriate?

Section 9 (2) of the Children Act 1989 prevents a local authority from applying for a residence or contact order directly. The purpose of this section is to prevent the local authority from bypassing the ‘significant harm’ threshold test²⁹ when seeking to remove a child from the care of a parent. A way of potentially circumventing parental consent is to find the other parent or a family member and encourage them to applying for a residence order. Bainham³⁰ has argued that use of private orders to avoid threshold violates the rights of both parents and children.

In 4 cases, the residence order which confirmed the non-parent as the primary care giver was not made by consent. In 3 of these 4 cases the mothers were not represented.

²⁶ The Children Act 1989, Section 17.

²⁷ Department of Health, *Children Act Now: Messages from Research* (TSO 2001) 49. The test is set out in Section 31 of the Children Act 1989.

²⁸ In relation to fathers’ applications see section 2.8.5. We return to these similar concerns in relation to some of the residence applications made by dads in Chapter 7.

²⁹ The Children Act 1989 Section 31(2).

³⁰ A Bainham, ‘Private and Public Child Law: an under explored relationship’ (2013) CFLQ 138.

In C29, the mother's barrister successfully resisted a Special Guardianship Order on the grounds that it was 'draconian'; she said it was inconceivable that the court would make a parent subject to an order to prevent the exercise of their parental responsibility without a full framework parenting assessment. A residence order was made in that case. This was the only time we saw records in the files of this kind of argument being made before the County Court.

While the making of a residence order to a non-parent does not limit the parents' PR, in reality most of these mothers would play very limited roles in their children's lives, would have few opportunities to exercise PR and could, as they struggled with multiple issues, drift out of their children's lives altogether. Although it was very clear in these cases that the mothers were not coping well and that the children were better off with the non-parents, the decision which had the effect of removing the child from the mother was made outside the procedural safeguards that apply to public law care proceedings. It was not clear from the files how much assistance these troubled mothers had been offered by their local authorities.

For example, in E16 the local authorities had encouraged the aunt and uncle to apply for a residence order. The mother was unrepresented and did not engage with proceedings. She had recently been released from a mental hospital. Although she indicated her consent to the court by letter the final order was made based on recommendations by the local authority and concerns that mum's new, dangerous partner should not be allowed to come into contact with the child.

These unrepresented dysfunctional mothers were highly unlikely to appeal the decisions. There is a danger that diversion from voluntary care using residence orders could be abused in order to place a child with a relative against parental wishes without reaching the public law threshold of significant harm.

6.5.3 Do residence orders provide adequate stability?

When providing long term voluntary accommodation to a child under S20, or accommodating a child who is the subject of a care order under S31, the local authority must give preference to relatives, friends or other persons with a previous connection to the child.³¹ Therefore, placing a child with a relative who then applies for a Section 8 residence order can be seen as a quicker route to the same outcome, given the presumption in favour of the extended family when considering voluntary accommodation.³² However, there is one crucial difference: when placing a child with a relative or friend using the public law route,³³ that person must also be approved as a local authority foster parent reaching the National Minimum Standards for Fostering Services.³⁴ The *Family and Friends Care: Statutory Guidance for Local Authorities*³⁵ notes that the parenting capacity of kinship carers should be rigorously assessed before they are approved as local authority foster carers.³⁶ Characterising the dispute as a private matter often meant that the new non-parent carer was not assessed under this framework. In the cases in our sample, local authority assessments of the non-parent carers did not commonly appear in the files. Some of the non-parent carers were battling their own issues or struggling with other challenging children.

In B8, where the 9-year-old girl moved from her grandmother's home to live with her parents and younger siblings this was partly because the parents were cooperating with all agencies, but also partly because the maternal grandmother was not. Her home was described as chaotic, she had not been

³¹ Section 22A The Children Act 1989.

³² *Re C (Family Placement)* [2009] EWCA Civ 72 [19]

³³ Section 22C(12) The Children Act 1989.

³⁴ S22C(12) A good description of the assessment process is found in Department of Education, *Family and Friends Care: Statutory Guidance for Local Authorities* (TSO 2010) [5.1]-[5.20].

³⁵ Department of Education *Family and Friends Care: Statutory Guidance for Local Authorities* (TSO 2010).

³⁶ *Ibid* [5.22]

liaising with the school about her granddaughter's special educational needs, and struggled with her teenage twins, both of whom had been diagnosed with ADHD. It was fortunate the child's mother was now clean, child-focused and very keen to have her daughter back.

There is a danger that diversion from formal voluntary care places the child with a kinship carer who may not be able to cope.

In D25, the mother's propensity for fighting when drunk had resulted in several prison sentences. Children's services had been involved for some time before the 10-year-old boy went to live with his aunt (the mum's sister) and his 4-year-old half-sister moved in with the mother's oldest daughter. While the little girl settled in well, the aunt seemed to be struggling with the boy's challenging behaviour, which for example meant he was on a reduced timetable at school. Two years later, when mum had successfully completed both her prison sentence and treatment for her alcohol addiction, the children returned to live with her. The Section 7 report, prepared by the local authority, noted that while the son could benefit from a fresh start in a new school, the daughter was likely to find another move stressful.

The children in these cases had often experienced several moves, and it was often difficult to feel confident that their latest move would be their last.

6.5.4 Does the practice of diversion into private orders leave non-parent carers and children with inadequate support?

Children who have been taken into care or are accommodated by the local authority on a voluntary basis³⁷ are 'looked after' children.³⁸ A local authority has a general duty to safeguard and promote their welfare,³⁹ and specific duties to accommodate and maintain them.⁴⁰ In practice, this means that local authority foster parents receive a non-means-tested allowance as well as dedicated financial and other support. Where children are 'looked after' all foster carers must be treated the same, regardless of whether they are related to the child.⁴¹

However, children who live with relatives under a residence order⁴² do not have 'looked after' status.⁴³ Local authorities are empowered to provide support and assistance,⁴⁴ but only on a discretionary basis; such support is not available in all local authority areas.⁴⁵ This means that for non-parent carers it is generally more beneficial⁴⁶ to be viewed as a local authority foster carer or to apply for a special guardianship order,⁴⁷ rather than opting for a private Section 8 order.

Local authorities' budgets are limited. It has been estimated that each child cared for by an informal kinship carer saves the taxpayer between £23,500 and £56,000 a year.⁴⁸ As Bainham has observed, the temptation for local authorities to use private orders to avoid public proceedings and the financial

³⁷ Under Section 20 of the Children Act 1989.

³⁸ As defined in the Children Act 1989 S22(1)

³⁹ Section 22(3) The Children Act 1989

⁴⁰ Section 22A & Section 22B respectively.

⁴¹ *X (on the application of R) v London Borough of Tower Hamlets* [2013] EWCA Civ 904.

⁴² Or now a Child Arrangements Order.

⁴³ In fact, the making of an order for the child to live with a relative ends 'looked after' status: *Re B* [2013] EWCA Civ 964; *GC v LD & Ors* [2010] 1 FLR 583.

⁴⁴ Department for Education, *Family and Friends Care: Statutory Guidance for Local Authorities* (TSO 2010) [3.15]; See also the Children Act 1989, Schedule 1, para 15.

⁴⁵ *R (M) v Birmingham City Council* [2008] EWHC 1863 (Admin).

⁴⁶ A residence order does allow the holder to claim Child Tax Credit.

⁴⁷ Section 14A of the Children Act 1989. It would which would entitle them to a means-tested special guardianship allowance under Regulation 11, Special Guardianship Regulations 2005

⁴⁸ J Selwyn and others, *The Poor Relations: Children and Informal Kinship Carers Speak Out* (Buttle 2013).

duties owed to 'looked after' children is high.⁴⁹ This has been recognised in legislation.⁵⁰ Yet, research has shown that poverty is a problem for many non-parent carers,⁵¹ and that the diversion into private law leads to lower levels of financial and other help for relatives.⁵²

There was nothing in our court files that showed that the non-parent applicants had had these things explained to them before they made their applications to the County Court. Similarly, many carers interviewed by Hunt and Waterhouse reported feeling pushed into private orders and complained that the consequences of the private status had not been set out.⁵³ Only one case in our sample showed any awareness of the consequences of a residence order on levels of support. The neighbour in C29 applied for a SGO mid-way through the case partly because the council would then be under a duty to provide financial and other support.⁵⁴

In C4 the paternal grandparents sought a residence order for three grandchildren aged 11, 8 and 4. The applicants had helped to raise them since both parents (who were now separated) had long-standing problems with drugs, and a tempestuous relationship. The children had been living full time with their grandparents for nine months. They had initially been dropped off by police officers who had been called out to mum's house and had been alarmed by the chaotic, dangerous home environment and particularly by the presence of mum's new boyfriend. It was clear that the children were thriving and wanted to stay. A Cladford children's services assessment was included in the County Court file. It stated twice that this was a private law matter and so outside the remit of the local authority. Thus, it was the grandparents' responsibility to negotiate and supervise contact with both parents although the mother's drug use and violent partner meant that children's services would almost certainly have had to step in had the grandparents not done so first. We were concerned that these grandparents, like many others, were asked to take on unsettled children and also supervise contact with chaotic, unreliable and often aggressive parents.

The continued involvement of children's services after a residence order had been made seemed to vary from area to area. In B8, for example, the court made several family assistance orders in order to keep the Local Authority involved. There were 6 parent cases in which the Local Authority continued to monitor contact after the final order but these were generally cases in which child protection investigations were ongoing.

We acknowledge that our files did not always contain a full record of the local authority's involvement with that family. However, the use of private orders as an alternative to public proceedings poses some troubling questions about whether the carers in these cases are made aware of the effects a 'private order' may have on the support that will be available to them in the future. Un-represented non-parent carers may be unaware of the consequences of a residence order which may leave them without recourse to the support to which they would otherwise be entitled.

⁴⁹ A Bainham, 'Private and Public Child Law: an under-explored relationship', [2013] CFLQ 138, p141.

⁵⁰ One reason for the introduction of Sections 22A to s22C into the Children Act by the Children and Young Persons Act 2008 was to prevent local authorities from making private arrangements with relatives or friends in order to avoid their duties to 'looked after' children.

⁵¹ J Selwyn and others, *The Poor Relations: Children and Informal Kinship Carers Speak Out* (Buttle 2013).

⁵² J Hunt & S Waterhouse, *Understanding family and friends care: the relationship between need, support and legal status – Carers' experiences* (Family Rights Group/Oxford University Centre for Family Law and Policy 2012); J Selwyn and others, *The Poor Relations: Children and Informal Kinship Carers Speak Out* (Buttle 2013).

⁵³ J Hunt & S Waterhouse, *Understanding family and friends care: the relationship between need, support and legal status – Carers' experiences* (Family Rights Group/Oxford University Centre for Family Law and Policy 2012).

⁵⁴ However, as explained in section 6.4.4, when the mother's barrister raised concerns about restricting her use of PR in this way without a full public child law framework assessment, no SGO was made.

7 CONCLUSIONS

In this chapter, we set out our main conclusions and discuss the potential impact of recent changes to the family justice system.

1. Court plays a necessary role in adjudicating private child law disputes and should remain available as a viable option for parents.

There is a clear need for court adjudication in private child law cases and the vast majority of the cases examined could not have been successfully diverted to mediation. Only a small minority of our case files featured implacably hostile parents and repeated returns to court to argue the same points of contention. Instead, there were real issues to be decided, and the courts' pragmatic problem-solving approach included a realistic recognition that it could take time to find the best solutions for these families and leave them in a place where they could deal with future problems.

The majority of applicants in our sample had attempted to resolve their dispute themselves before going to court. **The decision to apply for a court order was a necessary last resort where attempts had failed and the parties had reached an impasse.**

Going to court did not amplify or entrench the conflict between the parties. The vast majority of cases were resolved by consent order. In our five courts, only 25 of the 174 parent cases ended in a contested final hearing. Such hearings are resource-intensive and stressful but they were usually not needed since the parties had been allowed time to find a workable compromise.

County courts used a series of short directions hearings, interim orders and review hearings to gradually introduce contact and resolve positions that initially seemed entrenched. **We saw no evidence of an over-reliance on experts and court resources were managed well.**

Time taken in the courts process should not be viewed as unnecessary delay. Cases need time to build trust between the parties and reach a safe, workable child-centred conclusion.

Recent changes to the family justice system are designed to divert parents away from the court system into private ordering or mediated agreement. Cuts to legal aid under the Legal Aid and Sentencing of Offenders Act 2012 means that going to court with legal advice to resolve disputes between parents about child care is now out of the financial reach of most parents although funding is still available for mediated resolution. Where the parties are able to access the Child Arrangements Programme (CAP) is designed to minimise the amount of time that the cases will spend in the court system.

As the focus has shifted to the adults negotiating their own solutions, under an overarching presumption that involvement by both parents is in the child's best interest, **there is a danger that the child's voice, and consideration of the particular risk factors in an individual case, will be lost.** Within the court system in 2011 the wishes of the child were often marginalised as secondary to the goal of promoting as much contact as possible. They are likely to have even less weight in adult negotiations.

We have concerns that the wholesale diversion of these cases from court will mean that parents will agree to unsafe arrangements where risk factors are not appropriately managed or be unable to reach agreement about having contact with their children.

59% of the parent versus parent cases contained proven or investigated allegations of domestic violence and/or serious child welfare concerns, which were more often than not linked to addiction and mental illness. Serious child welfare concerns were raised in 17 of the 23 non-parent cases; 13 cases had local authority involvement. These figures all show that **the litigating population is very different from the general population of parents and carers. Their problems are more complex, and this must be recognised.**

In the particularly difficult cases that went through our five courts, parties could be reassured by supervised contact and a framework of protective orders. Children's safety could be ensured by court monitoring and child welfare reports conducted by Cafcass and Local Authority social workers.

Although legal aid is still available in exceptional circumstance and in cases of domestic violence it is unlikely that all parents in these situations will be able to access legal aid. As was outlined in Chapter 2, domestic violence allegations featured in half of our parent versus parent cases (86 of 174). In only 45 of these cases was there enough evidence to satisfy the new LASPO evidential requirements at initial application stage.¹ Many of the parents in our cases were trying to recover from episodes of serious mental ill health while fighting court cases about where the children should live. Yet mental ill health is unlikely to be seen as constituting an exceptional circumstance for the purposes of legal aid. It is a cause for concern that the provisions for exceptional circumstances seem to be interpreted in a very narrow way.²

Accurate legal advice was important. Many of the parents led chaotic lives, which made them prone to missing directions hearings or documentation deadlines. Granting them a legal aid solicitor not only ensured that their rights, and their children's rights, were adequately protected, but also made cases run more smoothly.

We question whether the new restrictions on funding will in fact save court time, or money.³ In general court time was used well and legal advice progressed the cases quickly. Litigant in person cases took longer and without legal professionals to manage expectations, positions were more likely to become entrenched.

Under the new Child Arrangements Programme (CAP),⁴ cases should no longer be frequently adjourned for review and directions hearings.⁵ We are not sure that the CAP focus on swift resolution is the best approach. While we saw a few instances where slow progress, for example in obtaining Section 7 reports, meant that cases were allowed to drift, in the main, district judges' patient and gradual approach led to good outcomes. Progress was not always smooth; circumstances could change in unforeseen ways during cases, and ongoing judicial involvement was needed to make adjustments in order to steer scheduled arrangements back on course. Best laid plans did not work out where parties were taken ill, changed jobs or moved, for example. We felt that this use of judicial time for short hearings was efficient.

¹ As required under Regulation 33 Legal Aid Sentencing and Punishment of Offenders Act 2012 and outlined in the Legal Aid Sentencing and Punishment of Offenders Act 2012 –Evidence Requirements for Private Law Matters.

² Ministry of Justice statistics showed that in the period April to June 2014 only 7 of 125 applications for exceptional funding were granted. In the year 2013-2014 just over half of all applications for exceptional funding were made in family cases. 9 out of 821 applications were granted in that year, with a further 2 having received a positive preliminary view.

See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358092/legal-aid-statistics-apr-jun-2014.pdf and

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366575/legal-aid-statistics-2013-14.pdf

³ G Cookson, 'Analysing the economic justification for the reforms to social welfare and family law legal aid' [2013] *Journal of Social Welfare and Family Law* 21.

⁴ Practice Direction 12B issued 22 April 2014.

⁵ Paragraph 15.3 Practice Direction 12B.

The changing of the formal labels of residence and contact orders under the Children and Families Act 2014 is unlikely to have any impact on levels of conflict between litigating parents. It seemed evident from many of our files that the Section 8 disputes were only one facet of larger conflicts existing between the parents (and in some cases, their extended families). There could, as in C43, be resentment over what had happened to the family home. In other cases feelings ran high over one party's infidelity, new partner or past conduct which was perceived to be reprehensible.⁶ Parents seemed to feel unable to compromise or back down, because their views of themselves as good parents had become dependent upon success at court; rather than the case being simply about the residence and contact labels.

2. The County Courts showed no indications of gender bias in contested cases about where the child should live.

Our research found that the success rate for mothers and fathers in applications for orders to have their children live with them was similar within our sample.

The overall number of residence order made for mothers was higher than those made for fathers. This was because many residence orders were made for mothers as respondents in the large number of cases where fathers sought contact; cases where there was no disagreement about where the children should live.

Mothers and fathers sought the residence orders for different reasons. There was a clear correlation between the presence of very serious child welfare concerns, local authority involvement and applications by fathers for residence. While transfers of sole residence were rare as the courts as the courts sought to preserve status quo where transfers were ordered they were disproportionately likely to be transfers from mum to dad and to feature welfare concerns and children's services involvement.

Near equal shared care arrangements were rarely sought, logistically difficult to manage and often precluded by most families' work patterns and accommodation limitations. Applications for shared residence were also rarely sought and rarely granted.

The terminology surrounded 'shared care' and 'shared residence' was very fluid. Parents had different understandings of what the terms meant. The reasons why applications for shared residence orders were made and why the courts granted shared residence orders varied widely.

In some cases where shared residence orders were made to improve relationships within dual-household families it was difficult to feel optimistic about the future, either in terms of the arrangements lasting or in terms of things actually getting better for the children.

While such orders are no longer be labelled 'residence' or 'contact' but rebranded as child arrangement orders the wording of the court orders will include the terms 'live with' or 'spend time or otherwise have contact with'. Therefore, it is unlikely that the confusion we observed between using orders to regulate practical arrangements and using orders to send symbolic messages to parents (or encourage joint decision-making) will disappear completely with this small change of terminology.

A further worry is that for some applicants, like the father in A5, the parents' equal importance in their children's lives can only be recognised through an equal division of time, as well as an order that the child lives with both parents.

⁶ The mother in D9 accused the father of rape during the marriage; the mother in E50 had discovered that the father's affair with their nanny had continued despite his protestations to the contrary.

3. The County Courts actively promoted as much contact as possible even in cases of proven domestic violence, welfare concerns or strong opposition from older children.

Without any legislative intervention, the normal process of the County Courts in 2011 was to increase the level of contact with the non-resident parent until both parents were happy with the child staying overnight. Where this was not possible, the focus was on ordering as much contact as was safe in the circumstances.

Half of all cases involving parents ended in regular overnight contact. Contact still predominantly took place at weekends, but was much more frequent and involved than the stereotypical, artificial 'McDad' who gets a few hours every other Sunday afternoon

'No contact' orders were extremely rare and a last resort in difficult cases where children's safety was at risk (5 out of 174 cases) and in those instances there were clear reasons why even indirect contact was not suitable (often the applicant's attitude was a contributory factor). This means that had the new parental involvement presumption been in force in 2011, it would clearly had been rebutted on the facts of these five cases.⁷

Cases were more likely to end without contact because a parent disengaged from the case than because an express no contact order was made.

It is our view that the new presumption that requires the court to presume unless the contrary is shown that the involvement of a non-resident parent will further the child's welfare will make little practical difference to the way in which the courts approach the issue of contact. It is clear from our sample that courts were already actively working towards regular overnight contact as the standard pattern for applicant parents and were prepared to work with reluctant children or chaotic parents to find workable arrangements. There would not seem to be any advantages that off-set the risks of this presumption being misunderstood by parents.

4. A sizable minority of private child care disputes involve non-parents such as grandparents or other relatives who were caring for the children.

12% of our sample involved disputes between a parent and a non-parent. This group of cases were very different from what is perceived to be the typical private child law dispute; they make different demands on the court in terms of time and resources. In such cases private law orders are being used as an alternative to care proceedings.

We have concerns that there is comparatively little debate about how this use of Section 8 orders to divert cases from public law remedies and such cases have been overlooked in Family Justice Review and recent legal reforms. The assumption that parties are capable of reaching their own agreements and that court scrutiny can and should be minimised does not hold true for these families.

Such cases have to be resolved by court order to allow a non-parent or relative carer to obtain parental responsibility to care for the children.

These cases have a lot in common with care proceedings: the stakes are high and the consequences for the children of getting it wrong can equally serious whether the child is left in a family or removed.⁸

We are not sure how parent applicants and respondents in these cases will have a fair hearing without access to legal aid. In many cases parents were battling addiction and/or suffering from

⁷ Under Section 1(6) of the Children Act 1989 the presumption of parental involvement in S1(2A) only applies 'if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm'. In these 5 cases (and many others) there was evidence to satisfy S1(6)(b).

⁸ See *Re J* [2013] UKSC 9 *per* Lady Hale at [1].

poor mental health. It seems likely that many of these types of cases will now put increased pressure on the public law system.

Our research identifies an evidence gap that needs further investigation. The handing over from public remedies to private law remedies is not always done in the most transparent fashion. It is important that the no-parent applicants in these cases, once they are established as primary carers, are not left to deal with unsettled children and their hostile or troubled parents without any help from children's services.

APPENDIX 1: METHODOLOGY

7.1 How the case files were selected

We looked at a selection of 197 case files from County Courts in five contrasting areas in England and Wales which we code-named Ambledune, Borgate, Cladford, Dunam and Essebourne.¹ The sample was limited to Section 8 application cases which were disposed of by final order in a six month period between February and August in 2011. At the time of selection there were 210 County Courts in England and Wales.

Our selection of case files was not designed to generate results which could be generalized and portrayed as typical practice of all County Courts in England and Wales in 2011. Such a statistically robust finding could not be achieved without using a much larger, statistically representative sample of case files; something which was not possible within the limits of the study given the availability of sample frame data and practicalities of reviewing individual files. By deliberately targeting five contrasting areas we aimed to ensure that we encountered as many of the different types of issues that affected the use of Section 8 orders as we could. The data collected represents what was going on in these five areas in 2011. Throughout the report we have compared our indicative conclusion to a range of previous empirical studies² in order to demonstrate where our findings are similar or different to previous studies with similar limits.

We restricted the sampling to County Court files rather than including files from Family Proceedings Courts. This decision was made for two reasons. First, official statistics suggested that the majority of application for contact and residence went directly to the County Court and this suggested that this was the primary route for families seeking court resolution.³ The second reason for limiting the study to County Courts was a paucity of information on FamilyMan about the disposals in Family Proceedings Courts during the time period in question. Not all the cases in our sample began and ended in the County court: one case started with a transfer in from the Family Proceedings Court, and another was transferred from the County Court to the Family Proceedings Court for final disposal.

Our sample included all four types of Section 8 application including applications for a contact order, residence order, specific issue order or prohibited steps order. These were recorded on FamilyMan as c43 cases. Many case files commenced with applications for multiple Section 8 orders.⁴

We deliberately included different types of Section 8 applications. This allowed us to examine the different reasons why an application for one type of order ended in a final order for a different type of order.⁵ For example, an application by a father for contact could sometimes end without any contact order being made for the father applicant but instead a residence order might be made for the child to live with the respondent mother.⁶ In other cases, an application for contact might end in an order for residence with the applicant. There are a number of reasons why an application for one type of order might end in a different type of order. For example, the respondent might make a cross

¹ The names are fictional and were selected from disused names in the Domesday Book. Two further places that featured in cases were renamed Fernham and Grambourne.

² Such as Smart et al (2003), Hunt and MacLeod (2008) Cassidy and Davey (2011).

³ MoJ *Judicial and Court Statistics 2011*, (28 June 2012).

⁴ See Chapter 2.

⁵ The tendency for applications for one type of Section 8 order to end in a different type of Section 8 order has been noted in other studies Smart et al (2003)P46; Cassidy and Davey (2011)

⁶ See Chapter 4, Section 4.2.1.

application, the situation might change between the application and final order, the initial application might not reflect the intentions of the parents or the court might make an order on its own motion.

Cases by Court		
	Total	% of relevant s8 disposals in that area
Ambledune	10	100%
Borgate	52	27%
Cladford	54	61%
Dunam	31	82%
Essebourne	50	68%
Total	197	

The selection of individual cases through FamilyMan was done on our behalf by HM Courts & Tribunals Service using the parameters we had set. The HM Courts & Tribunals service selected all the Section 8 applications which were disposed of by final order in a six month period between February and August in 2011 in each of the five areas. Where there were more than 50 cases in a particular court in the period of interest we examined a random sub-selection of 50 cases. Where the total sample of cases selected by HM Courts & Tribunals Services was under 50 we sought to examine all the files.

In total we examined 197 cases. This is a very small percentage of the number of final disposals made in 2011, although it is difficult say with precision what percentage it is. The national court statistics for 2011⁷ record that 183,718 children were involved in disposals of cases that year rather than recording the number of cases that reached final resolution or the number of children involved in each case. 293 children were involved in disposals of cases in our sample. 123 cases involved only 1 child whereas 74 cases involved more than one child.

Number of children involved in case	
One child	123
Two children	56
Three children	14
Four children	4
Total	197

Our sample was based on a fixed end point – final disposal in 2011 as recorded on FamilyMan. The primary research aim of the project was to examine the type of final order and the final timeshare pattern agreed between the parties as recorded on the official court orders disposing of the case. By choosing a fixed endpoint we expected to minimise the number of incomplete cases when we carried out the field work.⁸ We also hoped to minimise disruption to the courts we visited by requested files that would not be in current use at the time of the visit. However when we examined the case files we found that the final disposal date on FamilyMan was not always correct. A number of cases were excluded because they were disposed of prior to the period of interest in 2011. In the larger courts we substituted other cases from the same time period to make up numbers but this was not possible in the smaller areas.

A total of 38 cases had remained in the court system beyond the ‘final disposal’ as recorded on FamilyMan. The picture was one of deliberate case management. The cases remained on the lists for a review of the final arrangement after six months to see how it was working. Follow up cross applications were sometimes made to enforce the ‘final order’ within the period of review or because a minor dispute, often relating to holidays, had arisen within the review period that had not been encompassed in the final substantive order. We noted that three case files showed evidence that the dispute had returned to court with a fresh application and disputes were ongoing at the time of data collection.

⁷ Ministry of Justice *Judicial and Court Statistics 2011*, (28 June 2012)

⁸ A fixed end point has been used in previous studies including Eeklaar & Clive (1977) and Cassidy and Davey (2011). In contrast Smart *et al* (2003) and Hunt and Mc Leod (2008) selected cases based on the date of initial application and so a number of the cases had not reached final resolution at the time that field work was carried out.

7.2 About the five areas chosen

We aimed to encounter as many of different types of issues that affected the use of Section 8 order as possible by deliberately selecting five County Courts with contrasting volumes of Section 8 disposals which were based in areas with very different demographic characteristics.⁹

Ambledune is a town in Wales with a population of about 60,000. It had the lowest population density of all the areas examined. It is a predominately white area with slightly higher than average deprivation levels. A final disposal was made in only 10 files in this area within the time period so Section 8 orders were not as everyday an occurrence to the judges there as was the case in other areas.

Borgate is a town in Southern England with a population of about 300,000. It has a younger population than average. Borgate court also hears cases from the surrounding area, which is both more affluent and more rural.

Cladford is a mill town in the North of England with a population of about 50,000. There were 88 cases in Cladford during this period of which we examined 54. A large number of these cases were decided by the same judge and there was some evidence to suggest that Cladford was being preferred over other nearby courts for Section 8 orders, possibly because the district judge had a good reputation.

Dunam and Essebourne are areas in London. These courts had applicants from many parts of London and the complication of dealing with several different Local Authorities and Cafcass offices, particularly as the applicants tended to move areas mid-case as their circumstances changed. Dunam is located to the south. It is a predominately white area with a population of about 300,000. It had a relatively small turnover of cases during the period at only 38 and we managed to examine 31 of these. Essebourne is an area in East London with a high level of ethnic diversity. It is a deprived area with high levels of population churn. The Essebourne court had a high number of Section 8 cases with 74 in the 6 month period chosen, of which we examined 50.

7.3 What we found in the case files

We carried out our field work between November 2012 and June 2013. We travelled to the five areas and examined the case files in the relevant court buildings. We had great assistance from the very busy court staff in all the areas we visited. We are extremely grateful to them for facilitating our visits particularly as the later court visits coincided with disruptions caused by the changes to the legal aid system following the implementation of the Legal Aid and Sentencing of Offenders Act 2012 after 1st April 2013.

A small number of selected case files could not be located when we visited the courts. Where the initially selected case file was unusable, where possible, another file from the same time period was substituted. This substitution was not possible in the smaller courts such as Ambledune and Dunam.

We found most files to be relatively complete containing the original applications and answer forms, all relevant interim orders and directions and Section 7 reports. For example, the initial applications were missing from only two cases but the information was repeated in other documents. We deemed two case files (E19 and E7) too incomplete to use and excluded these from the sample.

Files typically contained following documents:

- 1) The initial application on a C1 or C100¹⁰ form.

⁹ Demographic information about the areas is taken from 2011 Census and contemporaneous demographic info posted by the Local Council.

¹⁰ There were a number of slightly different versions of this form in use in different courts.

This was sometimes accompanied by a completed C1A form if there were allegations of domestic violence.

- 2) Proof of service
- 3) An answer form (c7) from the respondent.
This was sometimes accompanied by cross applications for different Section 8 orders.
- 4) A Cafcass initial schedule 2 risk assessment letter.
- 5) Paper copies of all the interim orders and directions made by the court
- 6) Handwritten notes made by the judges.
- 7) Section 7 reports by Cafcass or Local Authority or notes about the outcome of child protection proceedings.
- 8) Assorted correspondence from solicitors, Cafcass, Local authorities and litigants in person.
- 9) Costs forms for legal aid cases.

Very short files contained only the c100, answer form and final order.

In addition some of the more protracted contested cases which went to a contested hearing also contained the following:

- 10) Full statements by the parties
- 11) Scott schedules of alleged domestic violence incidents.
- 12) Full case bundles
- 13) Expert reports
- 14) Full judgments
- 15) Transcriptions of hearings (in litigant in person cases).

7.4 Data collection

The data collection was carried out by two researchers, Maebh Harding and Annika Newnham, who travelled to the courts together.

A pre-designed data collection form was used to collect specific empirical information which allowed us to generate descriptive statistics about our small population. This data related to the nature of the process from application to final order, the time that the case spent in the court system and how it was used and identification of the actors involved in each case.

- Date of initial application
- Type of order applied for
- Identity of parties to the dispute – mum, dad or other.
- Type of final order made
- Date of each hearing and information about the type of order or direction made.
- Whether there had been previously completed Children Act proceedings
- Information about the children who were the subject of the dispute – numbers of children, ages¹¹ and gender.
- The nature of involvement by Cafcass, Local Authorities, independent social workers and other professionals and experts.
- Whether the parties had been to mediation either before or during the court proceedings.
- Whether either represented themselves as a litigant in person in a court hearing at any stage of the process.
- Whether either party was in receipt of legal aid.

¹¹ We recorded the month and year of the child's birth.

Richer, more qualitative data, was collected about the pre-identified themes of interest. Non identifying sections of text were retrieved from the cases as NVivo quotes where appropriate.

- What reasons did the applicant give in the initial application for applying to court for an order?
- What was the respondent's position? Did they object and if so why?
- Detailed information was collected from all documentation in the file about the child care pattern before and at the time of the c100 application. We recorded who the child lived with, where, and how often the child saw the other parent or carer, and for how long. We also recorded any changes to the pattern of care in the year preceding the court application.
- We systematically recorded the anonymised wording of interim orders, directions and final orders as given in the official issued court order.
- We recorded details about the child care patterns in each interim and final court order specifically when the child was supposed to be with each carer, when and for how long.
- Where child care professionals such as Cafcass, Local Authority social workers or other experts had given a report to the court we recorded details of the options suggested to the court, why they were made and the evidence relied upon.
- Allegations of domestic violence. We recorded information about allegations of domestic violence in cases where one parent was accused of domestic violence against the other parent. These allegations could be made by the applicants or respondents in applications or cross applications or raised as an issue in Schedule 2 safeguarding letters or Section 7 reports. A broad approach was taken to what constituted 'domestic violence'.¹² We recorded the nature of the alleged domestic violence, the steps the court took to investigate and any findings as to whether or not the violence had actually occurred.
- We recorded details where a concern was raised in the case file that either parent should not be permitted to have contact with the child or have the child live with them due to a risk to the child's safety. Again, these allegations could arise at different stages in the dispute. We recorded details of the nature of the allegation and any investigatory actions taken by the court.
- Where the case file contained information about the children's wishes we recorded how these wishes were identified (report, letter, interview etc) and what they were.

Finally, following completion of the data collection form we created a 'pen portrait' of each case; this consisted of a brief outline of what happened in the case, the final child care arrangement as approved by the court and the themes of interest. These pen portraits are referred to throughout the report to give some context as to how particular issues arose and were resolved.

7.5 The limits of data collection

Our method of data collection is an imperfect way of understanding what went on in these cases. We did not speak to the parents, judges or legal professionals involved but merely read the documentary data in the case files. This method raises two issues.

First we may have an incomplete picture of what happened. We worked solely from documentary evidence contained in the file. It is possible that much negotiation went on behind the scenes or by telephone of which we encountered no evidence.

Second, we had to be clear about the 'truth' of the data we were recording. For the empirical information about the nature of the process from application to final order, the time that the case spent in the court system and how it was used and identification of the actors involved in each case no subjective decision had to be made. The information was recorded as presented in the case file.

¹² The current ACPO definition. www.acpo.presscentre.com/Press-Releases/ACPO-comment-on-the-definition-of-domestic-abuse-1a4.aspx accessed 28 October 2014.

When collecting the richer data about the pre-identified themes of interest there was more room for subjectivity. Where possible we recorded facts as asserted without inserting our own interpretations of what actually happened. For some pieces of information we preferred one source of information. For example, when it came to recording the time patterns reached in the final court order, we recorded the details as written into the formal court orders. We recorded the reasons for application as given by the applicant in the initial c1 or c100.¹³

Other issues were often contested, such as the nature of the pre-application status quo care pattern. For example, both parents may claim to have been the primary care giver before their relationship came to an end. Where the court or the Section 7 report determined these issues we recorded this finding as our data. Where there was no ruling on conflicting information the data was recorded as unclear.

As both researchers were together during data collection we were able to discuss and cross check judgments about the data to ensure that we were consistent. A number of files from each area were examined by both researchers to ensure inter-reliability of data collection. We also kept a data collection log book about each decision made during data collection.

7.6 Analysing the Data

The analysis of the data combined quantitative and qualitative research techniques.

The empirical data was coded and SPSS was used to generate descriptive statistics about our small population. The more qualitative data was also coded creating variables to identify cases in which domestic violence issues or child safety concerns arose. SPSS allowed us to identify the outcomes for particular sub populations of case such as, for example, applications by fathers for contact and identify correlations between particular types of variables such as whether the issue of domestic violence made a clear difference to the outcome within the population.

Cases by Court			
	Parent	Non Parent	Total
Ambledune	9	1	10
Borgate	47	5	52
Cladford	44	10	54
Dunam	30	1	31
Essebourne	44	6	50
Total	174	23	197

Two separate datasets were created – one for disputes between parents and the other for non-parent cases. Parent cases were defined as a dispute between two parents; for example, an applicant father and a respondent mother. Non-parent cases were defined as a dispute between a parent and a non-parent (usually a kinship carer). We examined 174 ‘parent cases’ and 23 ‘non parent cases’.

The largest number of non-parent cases was from Cladford, but they could be found in all five courts. There was heavy local authority involvement in many of these non-parent cases and these cases demonstrate the use of Section 8 orders as a functional alternative to public care proceedings.

¹³ It was not possible either to ascertain to what extent the parents’ statements reflected what they had been advised to say by lawyers. However, a large number of the applications were filed out by the applicants before they engaged legal help.

7.7 Tracking the cases through the court process

We recorded the dates of the initial application, each hearing and the date of the final order and used SPSS to track the length of time and number of hearings each case took to achieve resolution and exit the court system. This analysis allowed us to demonstrate how an application for one order might lead to the court making a completely different order.

We made a distinction between cases that resulted in returns to court and those that took a long time to resolve with multiple review hearings. It was sometimes difficult to distinguish between what was a long running dispute and a series of related disputes. We treated review hearings as part of an ongoing dispute. It was often the case that in the six months leading up to a scheduled review hearing one of the parties would make an application for enforcement of an interim order or an additional application to deal with an issue that had come up in the period of review but had not been determined by the interim order, for example, disputes relating to the school holidays.

Where an entirely fresh application was made after the final review hearing we classified this as a related but separate dispute. For example, E36, included an application for a new residence order unrelated to initial proceedings. This was considered to be an entirely fresh application falling outside the scope of the study.

7.8 Child care pattern mapping and typing

The detailed court-condoned time patterns in the 174 parent versus parent cases were recorded using colour-coding in Excel spreadsheets. This enabled us to have an overview of what type of contact was happening when and to separate the cases into our categories described in Chapter 5.

The details of the arrangements in place as these cases left the courts were analysed in further detail to map the different ways in which child care is shared between parents in court adjudicated disputes. SPSS was used to identify correlations between the instances of variables such as child safety concerns and allegations of domestic violence with particular patterns of care.

7.9 Use of richer qualitative data

Thematic analysis of the pen portraits and richer qualitative data collected was used to add context to our observations about the different sub populations of cases and the correlations between particular variables.

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