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Sharing as Caring? Contact and residence disputes between parents

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Private child law — shared parenting — residence — contact — court-condoned time patterns

ABSTRACT

This article examines how five county courts promoted parental involvement in contact and residence disputes, both in terms of the formal orders made and the time patterns that were in place when the cases left court. This research is based on a sample of 174 parent versus parent cases in which a final order was made between February and August 2011. All five courts encouraged as much contact as possible in the circumstances of the case. The courts took a pragmatic approach to increasing contact time for non-resident parents which meant that the quality of care (good or bad), was rarely expressly discussed in the cases. A consistently cautious approach to transfers of sole residence was seen which contrasted with a lack of consensus on when shared residence orders should be made and for what purpose.

1 Introduction

This article¹ examines how county courts perceived and promoted parental involvement in contact and residence disputes.² Data were gathered³ on how county courts⁴ perceived and promoted parental involvement in contact and residence disputes, both in terms of the formal orders made and the nature of time patterns for contact or shared care that were in place when the particular cases left these courts. Policy debate is often conducted on the basis that more should be done to promote ‘shared parenting’ a concept that is rarely precisely defined.⁵ The recent introduction of a rebuttable legal presumption of parental involvement was largely a reaction to criticism that family courts were not doing enough to facilitate shared parenting.⁶ However, it is suggested that by focusing on increasing contact time for parents (especially fathers) rather than the benefits of care for children the courts in our sample were inclined to understate the significance of caring and particularly the pre-separation primary carer’s role.

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² The research was conducted prior to the replacement of Contact and Residence orders in the Children Act 1989, s 8 with the single Child Arrangements Order as introduced by the Children and Families Act 2014, s 12.

³ The data relates to cases from 2011 but was collected between November 2012 and May 2013.

⁴ In 2011 children cases were dealt with at Family Proceedings Courts, county courts or in the Family Division of the High Court. The bulk of adjudicated parenting cases occurred at county court level: see MoJ, *Judicial and Court Statistics 2011* (2012) p 25, available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf.

From 22 April 2014, following structural changes made by the Crime and Court Act 2013 all family cases are now heard in the Family Court, a single jurisdictional level.

⁵ Assertions that shared parenting has been unequivocally proven to be the best solution for children are not backed up by a more careful reading of the research: see OxFLAP briefing paper, p 6, available at:

<http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children%20OXLAP%20FPB%207.pdf>.

⁶ Children Act 1989, s 1(2A) was inserted by Children and Families Act 2014, s 11. On the motivations behind the legislation, see F Kaganas, ‘A presumption that “involvement” of both parents is best: deciphering law’s messages’ (2013) CFLQ 270.

Anonymised data were collected from 197 files taken from five different county courts in England and Wales.⁷ Each case was given a letter to signify the court and a number.⁸ The files were selected on the basis that a final order under section 8 of the Children Act 1989 had been made between February and August in 2011.⁹ The research was confined to document analysis.¹⁰ The focus on 2011 gave a useful snapshot of the situation at county court level before recent restrictions to legal aid and the new presumption of parental involvement.¹¹ The focus here is on the 174 cases that were disputes between two parents.¹²

This article starts with an overview of the outcomes in all 174 cases, noting the gendered patterns in both applications and combinations of final orders. The second section, which looks at sole residence orders, highlights the courts' comparatively cautious approach to moving children from one parent's home to the other. The number of cases where the status quo was confirmed could be seen as an implicit recognition of the importance of good, continuing care but caring, specifically the quality of care (good or bad), was only expressly discussed in the cases where the child's residence was changed due to parental inability to provide adequate care. In these cases, caring became visible because it could no longer be taken for granted.

The third section focuses specifically on the most involved types of shared parenting: the shared residence order (SRO) and, looking at the cases in terms of practical arrangements rather than formal orders, the cases where children's time was to be shared so equally that No Primary Care-Giver could be identified (No PCG cases). Given the typical levels of conflict and complexity in litigated cases, it is not surprising that such cases were rare within the sample. A high level of co-operation between parents is required in order to maintain an ongoing arrangement of near equal care. In these cases, the children's experiences of care were often secondary to the goals of reducing conflict and resolving adult disputes about status. It seemed unlikely that parents who often struggled with a combination of problems, and were locked into long-running disputes, would change their behaviour in such a dramatic way that such court-condoned arrangements would benefit their children.

The final section looks at the other types of practical timeshare arrangements made in contact disputes, broken down into the categories of overnight, daytime and limited contact, and a fourth group of cases which left the court without any expectation of contact. There was a comparatively uncritical tendency actively to promote as much contact as possible as long as this did not put the child in physical or emotional danger. Contact became a goal in itself, rather than a means of promoting the child's best interests. The nature and quality of care was rarely discussed.

2 Overview of outcomes

There was a gendered pattern to both applications and outcomes within the sample. The most common outcome in the 174 cases was for the child to live with the mother (with or without a residence order),¹³ and the father to be granted a contact order. 96% of all applications for a contact

⁷ These codenames were: Ambledune (a semi-rural Welsh area); Borgate (a town on the south coast and its surrounding countryside); Cladford (a northern mill town); Dunam (a comparatively affluent part of London); and Essebourne (an ethnically mixed and poorer part of the capital).

⁸ For example, B49 was one of the cases from Borgate.

⁹ The longest-running case had begun in 2001, but the largest group were cases that had lasted between six months and two years.

¹⁰ Files commonly contained the application, the respondent's answer form (unless not submitted), all interim and final orders, as well as assorted correspondence and costs forms for legal aid cases. All but the shortest cases also contained Cafcass Safeguarding letters and welfare reports where these had been requested. Protracted or contested cases could also contain the parties' statements, the results of drug/alcohol testing, documents from Local Authority Children's Services or from the police and full transcripts of hearings, particularly in litigant in person cases.

¹¹ Legal Aid, Sentencing and Punishment of Offenders Act 2012; Children Act 1989, s 1(2A).

¹² There were also 23 cases that featured a non-parent and are discussed elsewhere, and some other case files which were incomplete and therefore could not be included: see M Harding & A Newnham, *How do County Courts Share Care of Children between Parents?* (University of Warwick, 2015) available at: www.nuffieldfoundation.org/share-care; M Harding & A Newnham, 'Section 8 Orders on the Public-Private Law Divide' (2016) 38(3) *Journal of Social Welfare and Family Law* (forthcoming).

¹³ This was the outcome in 124 cases (74%).

order were made by fathers,¹⁴ and in 94% of the 75 cases that ended with a standalone contact order the father was the contact parent.

In the sample, men and women applied for different orders, for different reasons and in different circumstances. There may have been a pre-court filtering effect whereby parents were discouraged from making what was seen as unrealistic applications by solicitors, friends or what they read in the media. Our research looked only at what happened to applications that reached court. More fathers made applications to court than mothers: 121 as compared to 53. More fathers applied for contact: 68 as compared to three. Most women applicants sought sole residence orders to protect the status quo, whereas most men seeking sole residence orders were seeking a change to the children's living arrangements. This suggests that the stereotype of mothers as primary carers and fathers as contact seekers is determined by factors outside the court process. We acknowledge that perceptions that the courts are biased towards mothers may have had a particular effect on numbers of applications for residence by fathers. However, as discussed later in our paper, residence orders for children to live with their fathers were made by the courts in a number of cases, both to change residence and to confirm fathers as status quo primary care-givers.

Eighty-eight per cent of applications for contact by fathers were successful and, as examined in detail below, the courts actively promoted as much contact as possible in most cases. The fact that most contact orders were made for fathers and that more sole residence orders were made for mothers than fathers was not due to any discernible gender bias on the part of the courts or Cafcass. There were simply more fathers looking for contact than mothers and more mothers in the role of primary carer before application to court than fathers. The family courts are not the place to correct existing cultural understandings of parenthood or the socio-economic conditions that shape parenting practices in intact families or in separated families. Section 1(1) of the Children Act 1989 expressly prohibits such an exercise by defining the child's welfare as the paramount consideration.¹⁵

The sample of 174 parent cases contained high numbers of cases with either allegations of domestic violence (49%) or serious child welfare concerns (45%);¹⁶ in almost a third of cases both these complicating factors were present (29%).¹⁷ These figures indicate the difficult nature of these cases, and reinforce the point made in previous studies that the estimated 10% of parents whose disputes reach the family justice system are far from typical of the general population of separated parents.¹⁸ In many cases, the determining factors related to child safety, for example, cases in which parents had been sectioned under the Mental Health Act, were using Class A drugs, or had been convicted of attempted murder.

In C40, for example, the serious child welfare concerns would have made the issue of gender irrelevant even if the court had wished to take it into consideration. The father's suspicion that the mother had started supplementing her methadone prescription with street heroin was confirmed through hair strand tests. When the mother eventually demonstrated that she was clean, their six-year-old daughter was thriving with her father and Cafcass recommended against the mother's sole residence application; it was in the child's best interests to maintain the status quo.

¹⁴ Sixty-eight out of 71.

¹⁵ The term 'paramount' has been defined in *J v C* [1970] AC 668 as meaning 'first and only'. This principle has not been replaced by the presumption of parental involvement contained in Children Act 1989, s 1(2A).

¹⁶ This definition did not include minor shortcomings, e.g. not eradicating head lice, or allowing children access to violent computer games.

¹⁷ These figures are consistent with research by Hunt and McLeod which found 'serious welfare issues' in 54% of their cases, and included domestic violence in that definition: J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p 9.

¹⁸ C Smart, V May, A Wade & C Furniss, *Residence and contact disputes in court, volume 1* (Lord Chancellor's Department, Research series, no 6/2003, 2003) and L Trinder, J Conolly, J Kellett & C Notley, *A Profile of Applicant and Respondents in Contact Cases in Essex* (DCA research series, 2005).

3 Sole Residence

In total, 64 sole residence orders were made; 24 for fathers and 40 for mothers. These cases showed a cautious approach in favour of continuing status quo care where it was adequate. This is wholly consistent with section 1(3)(c) and warnings from appeal courts against damaging children's sense of security or weakening developmentally important bonds.¹⁹ There were more than six times as many cases where the children had been living with their mothers at least a year before the case, than cases where the children had been living with their fathers.²⁰

The cases in this section are discussed under two headings: confirming and changing residence. The topic of caring for children was given far less direct attention in the former category than the latter. Effort in caring for children can thus be compared to housework in that 'it is only visible when it is not done'.²¹

3.1 Confirming Residence

The decisions made by our courts meant that most children lived with the same primary care-giver parent both before and after the proceedings, with or without a residence order being made (117 cases). Children lived with their fathers in only 17 of the 117 status quo sole residence cases, and with their mothers in the remaining 100 cases.²² This is not surprising since in many of the cases, residence was not raised as an issue. As examined in the next section, applications to change sole residence were only granted if there were pressing concerns. As status quo often prevailed, it is, if anything, surprising that the gender difference in relation to numbers of sole residence orders made was not greater.

In our sample, the undesirability of changing the status quo carer was identified in welfare reports both in cases where the children lived with their mother and in cases where the children lived with their father. This factor is likely to have influenced outcomes where there were no child safety concerns. This supports the consistent findings of other empirical studies that the courts' reluctance to subject children to change is a more important factor than gender.²³

The courts' reluctance to upset the status quo could be seen as an implicit acknowledgement of the importance of care. However, recommendations against moves were generally justified in the case files in terms of the harm associated with upsetting routines or uprooting children rather than an express examination of the quality of care being provided. Where child-welfare related accusations were made against both non-resident and resident parents the court would respond, e. g. by asking Cafcass or Children's Services to investigate, but unless there was evidence of a serious problem such allegations were not taken further. Understandably, courts appeared unwilling to impede progress towards a compromise by going beyond the initial assumption that both parents were equally capable of caring for their children into forensic enquiries into who did what, and when. While parenting was not questioned unless there was evidence of very serious problems, particularly good quality of care provided was rarely acknowledged. The social and legal construction of mothering in terms of natural, instinctive self-sacrifice means the daily efforts involved in raising children largely go unremarked.

¹⁹ *Re B (Residence Order: Status Quo)* [1998] 1 FLR 368; *D v M (Minor: Custody Appeal)* [1983] Fam 33.

²⁰ There were 120 cases where the mothers had the children living with them, and 19 cases where the fathers were the status quo resident parents. In the remaining cases there were five No PCG arrangements that had been implemented for at least a year, and 30 cases where the parties were still living together in the family home during the year preceding the application

²¹ C Smart 'The Legal and Moral Ordering of Child Custody' (1991) *Journal of Law and Society* 485, at p 496.

²² Mothers were the status quo primary care-giver before and after proceedings in 85% of the cases where children did not move, and 57% of all the 174 cases.

²³ E Giovannini, *Outcomes of Family Justice Children's Proceedings - a Review of the Evidence*, Research Summary 6/11 (Ministry of Justice 2011), at p 1; J Eekelaar & E Clive, *Custody after Divorce* (OUP 1977), at p 5; S Maclean, *Legal Aid Case Profiling Study* (Legal Aid Board 1998) p 48; C Smart et al, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003), at p 18.

A second issue is the extent to which parents' positions as primary care-givers were formally recognised with an order. No residence order was made in 69 of 100 cases where the children lived with their mothers both before and after the court cases, and in five of the 17 cases where the children lived with their father. The lack of an order can be justified under section 1(5) of the Children Act 1989 where there is no real dispute about residence.²⁴ Many of these cases were contact disputes in which the issue of residence was not directly raised.²⁵ In some cases, it seemed sole residence applications ostensibly made to confirm or change living arrangements were probably made for tactical reasons related to contact arrangements.

However, the wording of some applications showed that sole residence orders were sought to confirm and protect the resident parent's role. Moreover, 18 mothers and six fathers were seeking sole residence either to prevent the long term removal of their children from their care, or to have children returned after a recent abduction.²⁶ For example, the mother in C31 wrote on her application form that she wanted a sole residence order to make sure the children would be swiftly returned to her. She explained that when the father had previously kept the four children after holiday contact, police officers had said that without a residence order there was not much they could do. The case had a history of domestic violence, including an incident where the father grabbed the mother's face and knelt on her head, saying he wished she was dead. She said she was not opposed to contact in principle, but stressed it must follow a schedule. What she, and other parents in similar situations who put similar reasons on their application forms, wanted from the family court was a protective framework that recognised their status as primary carers and could ensure a swift response from police and other agencies should things go wrong. Indeed, the Court of Appeal has recognised that providing peace of mind for a mother, and thus increased stability for the children, can be an important reason to make a residence order.²⁷ In such cases an order confirming the status quo carer gives their children stability that is rightly valued by the courts under section 1(3) of the Children Act 1989.

In other cases, sole residence appeared to become secondary to agreeing on contact. For example, 10 cases ended without a sole residence order where the non-resident parent had applied unsuccessfully for residence. The court's focus in these cases was on facilitating contact rather than on the resident carers' and the children's need for security. In cases like the one discussed below, this meant that the question of residence was entirely eclipsed by contact even though the original concerns raised in the residence application appeared to be left unresolved.

In E40, the mother's application for residence and prohibited steps orders alleged that the father was very controlling, and that he had repeatedly threatened to abduct the children. A prohibited steps order was initially made but later discharged, contact was gradually increased, and the parties agreed to go to mediation to avoid future contact disputes. In this context, the mother was given permission to withdraw her application for sole residence. It could be that both parents had, by this stage, decided to focus on reaching a compromise about contact, but it must be acknowledged that any such strategic decisions by primary care-givers are taken in an environment where there is a very strong emphasis on the benefits of contact and it may seem futile to try to steer discussions in a different direction.

In the sample as a whole, much energy was devoted to considering how to restart and extend contact, and this stood in sharp contrast to the paucity of evidence that fears around harassment and abduction had been investigated and solutions deliberated. Such issues were more often dealt with by gradually increasing contact in monitored stages.²⁸ Where no further problems arose the initial allegations

²⁴ For a more detailed examination of why cases left court without an order see M Harding & A Newnham, *How do County Courts Share Care of Children Between Parents?* (University of Warwick, 2015), [4.2.2] available at www.nuffieldfoundation.org/share-care.

²⁵ 55 involved contact applications.

²⁶ There were in total 27 mothers and 20 fathers seeking sole residence orders.

²⁷ *Re G (Children) (Residence Order: No Order Principle)* [2005] EWCA Civ 1283, [2006] 1 FLR 771.

²⁸ For a detailed examination of how courts deal with such allegations see M Harding & A Newnham, *How do County Courts Share Care of Children Between Parents?* (University of Warwick, 2015) available at www.nuffieldfoundation.org/share-care and A Barnett, 'Contact at all costs? Domestic violence and children's welfare' (2014) CFLQ 439.

seemed to be considered as no longer relevant. In such cases, where no concerns are raised with the mothers' caring, it is taken for granted, and possibly, they are therefore not perceived as needing the 'encouragement' of a residence order.²⁹ We echo concerns previously expressed by Smart et al that attention devoted to the question of contact (most often sought by fathers) should not be at the expense of enquiries into allegations about child abduction and domestic abuse (predominantly voiced by mothers).³⁰

3.2 Changing Residence

Since mothers were the established primary care-givers in most of the cases it is unsurprising that most fathers who wanted a sole residence order in the sample were seeking a change to the child's living arrangements (78%).³¹ The judicial approach to such requests was cautious and a sole residence order was used to move the child from one parent to the other in only 13 cases.³² All but one of these moves were from the mother's to the father's household.

While nine cases had some background of domestic violence, this was never the pressing problem. Instead, 12 of the 13 cases featured serious child welfare concerns. The mothers' (and in one case the father's) parenting was inadequate, commonly due to addiction, mental illness and/or an inability to protect the children from dangerous third parties. There was substantial Local Authority Children's Services involvement in 10 of these 13 cases.³³ In six of these applications the fathers had expressly stated that social workers had told them to seek a section 8 order.

D11 was a good example of the court's search for the 'least damaging'³⁴ solution. The toddler had lived with the father since his mother was admitted to a psychiatric hospital. The father now applied for a sole residence order, but the mother was getting better and objected. Initially, a schedule of increasing contact with the mother was set up, and shared residence was under consideration. The toddler was found wandering in the road; police officers found his father at home, incapacitated through drink. The father admitted his alcoholism, and the child moved to live permanently with his mother, who was engaging well with Children's Services.

The topic of care became visible in this group, possibly because the facts of these cases went against the prevailing, gendered cultural pattern of parenting, but more likely because mothers' caring practices could not be taken for granted. The issue of care had to be confronted and investigated. The court's reliance on social workers' assessments of parents' caring skills made this a highly visible, important topic.

In this group of cases, fathers were valued as substitute care givers and also often praised for the positive impact their good quality care was having on the children. In cases like D17, where the mother struggled with addiction and E12, where the children were terrified of the mother's new violent partner, paternal grandparents were also recognised for their important provision of care.³⁵

In conclusion, our cases confirmed that '[t]he more satisfactory the status quo, the stronger the argument for not interfering'.³⁶ This stance can be seen as incorporating an implicit recognition of the value of care. However, in terms of discursive space, good care is only noticed by its absence. Feminist writers have linked law's traditional lack of interest in care to its categorisation as women's

²⁹ S Lawler, 'Children need but mothers only want: the power of "needs talk" in the constitution of childhood' in J Seymour and P Bagguley (eds) *Relating Intimacies: Power and Resistance* (Macmillan Press Ltd, 1999), at p 67; J Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge, 1993), at p 111.

³⁰ C Smart and others, *Residence and Contact Disputes in Court: Volume 1* (University of Leeds 2003), at p 21.

³¹ 25 out of 32 fathers.

³² As will be discussed in the next section, SROs were sometimes used to effect a move. A few children moved to or from an equal or near equal shared time arrangement, while one case saw the child move from mum to live with his maternal grandmother.

³³ Involvement which went beyond writing the welfare report or responding to specific queries from Cafcass.

³⁴ *Re M (Child's Upbringing)* [1996] 2 FLR 441.

³⁵ See: M Harding & A Newnham, 'Section 8 Orders on the Public-Private Law Divide' (2016) 38(3) *Journal of Social Welfare and Family Law* (forthcoming).

³⁶ *S v W* (1981) Fam Law 81 per Ormrod LJ. This point is also the rationale behind the Children Act 1989, s 1(3)(c).

work;³⁷ while mothering has been put on a pedestal, it is also taken for granted, assumed without further discussion, invisible.³⁸ It is understandable that professionals tend not to write about mothers in terms of primary care-givers, experts on their children's needs or simply more experienced in childcare; that can feel like an insult to fathers who undeniably love their children just as much. Yet, this silencing of care draws attention away from what is arguably the most important factor for a child's welfare: being cared for.

4 The Shared Residence and No Primary Care-Giver Cases

This section of the article considers the most demanding and integrated types of shared parenting. We looked at this in two different ways: first, by identifying all cases where a shared residence order (SRO) was contemplated and, secondly, by a closer examination of all cases which left court with an expectation of an equal or near-equal split of the children's time. We called this latter group no primary care-giver cases (No PCG), some but not all of which were SRO cases and so feature in both sub-sets: seven of the 19 SRO cases were No PCG cases.³⁹ Both SROs generally and No PCG arrangements specifically were often driven by a laudable but unrealistic desire to reduce conflict. There is a danger that in such a pursuit, the realities of caring practices become subordinated to parental perceptions of rights and status. The logistical and emotional complexities of the cases meant that these kinds of arrangements within the litigating population were, and ought to remain, comparatively rare.

4.1 Shared Residence Orders

SRO applications and orders were relatively rare within our sample. There were 35 cases (20%) where a SRO was sought at some point during the case. Only 12 applicants had initially asked for a SRO; six of those were granted the order.⁴⁰ In the remaining 23 cases, SROs were suggested during proceedings; in 13 of these it was the final order. In total, SROs were the final order in 19 cases (11%). As noted above, only seven of these were No PCG cases; the remaining 12 had uneven time distributions.

In the reported cases, judicial opinion has been divided on whether SROs should be made to reduce conflict by inter alia emphasising both parents' equal status,⁴¹ or whether a lack of cooperation and mutual trust can mean that the SRO, 'instead of bringing greater benefits for children ... can simply serve as a further battlefield'.⁴² In our cases, opinion was similarly divided. In applications for shared residence, both fathers and their legal representatives stressed the psychological benefits to children of highlighting both parents' equal status, while mothers asserted that, in their case, the lack of cooperation meant that a SRO would not benefit their children. In welfare reports, SROs were sometimes suggested to reduce conflict (as will be discussed below) but in other instances rejected due to the level of parental conflict. For example, Cafcass made robust recommendations against SROs in D27, due the parents' unwillingness to address their severe conflict's impact on the child, and in E48, where the father had used his perceived rights under a previous SRO, 'to manipulate the situation at [his seven-year-old daughter's] expense'.⁴³

³⁷ Further explanations can be found in the difficulty of assessing or measuring care in a way that is intelligible to law, and in the impossibility of enforcing good care through court-ordered compulsion: J Herring, *Caring and the Law* (Hart Publishing, 2013), at p 2.

³⁸ *Ibid*, at p 7.

³⁹ All 9 cases that ended as No PCG were among the 35 cases where SROs had been considered at some point during the case.

⁴⁰ This gives a success rate of 50%, but the number is too small to give a picture of the wider use of SROs in the jurisdiction.

⁴¹ See e.g. *Re A (A Child)* [2015] EWCA Civ 910, [2015] All ER (D) 104 (Aug) where the dispute over the father's role in twins' lives had been running for 12 years, and the SRO was part of a package designed to reduce animosity; or *Re J and K* [2014] EWHC 330, [2015] 1 FLR 86 where there had been a decade of litigation and the fathers' alternate weekends and half of school holidays were now labelled shared residence in a consent order.

⁴² *T v T* [2010] EWCA Civ 1366, [2011] 1 FCR 267 per Black LJ at [27].

⁴³ Quote from the Cafcass-authored welfare report in E48.

Conflict reduction seemed to be the driving motivation in most of the cases where SROs were made as final orders. Prior to the final hearing in C37 the Deputy District Judge had highlighted, in both parties' statements, passages that acknowledged that their 13-year-old daughter felt caught in the cross-fire and unable to say what she wanted for fear of starting another row.⁴⁴ It seems likely she planned to read these out during the hearing to persuade the parties of the need to protect her from their conflict. The same tactic has been employed in the reported cases.⁴⁵

The cases also betrayed a lack of clarity, sometimes seen in reported cases,⁴⁶ about what SROs actually are. There is no bright-line rule dividing the concept of 'shared residence' from a reality of generous staying contact⁴⁷ and in our sample, these two labels were sometimes interchangeably or even simultaneously, on the face of the same order.⁴⁸ In 12 of the 19 cases in which a shared residence order was made, the children's time was divided so unequally that one parent had clear primary responsibility for day-to-day care; in eight cases that was the father, and in four the mother. These two subgroups provide good examples of the divorcing of formal status from the practicalities of sharing residence that has been evident since *D v D* in 2001.⁴⁹

In eight cases, the SROs were part of a process transferring the primary care-giver role to the father, away from mothers who were either unable to provide proper care, or whose children harboured strong feelings against them. This use of the SRO's symbolic messages to ease one parent's sense of loss of a day-to-day carer role and thus avoid an escalation of conflict is rarely discussed. It is, however, not new. There are reported examples as in the mid-1990s.⁵⁰ In *Re R* in 1995, for example, a mother who only spent three-quarters of weekends and some holidays with her children was given shared residence.⁵¹ As in the cases of changing sole residence, caring became visible in these cases due to the mothers' inability to provide adequate care.

For example, in D32, there were frequent public exchanges of verbal abuse, attempts by both parents to draw the four children into the conflict, and cross-allegations of substance abuse and mental illness. Local Authority Children's Services worried about the extent to which the mother's own troubled childhood prevented her from prioritising the children's needs. The final SRO, under which the mother's contact time eventually dwindled, seemed to have been an attempt 'soften the blow' of the mother's loss of her primary carer role. There is a tension between ensuring that the children are well cared for, and seeking to diminish conflict.

The risk of exposure to conflict caused by parental inflexibility or intransigence also featured in the four SRO cases where the children's main homes were with their mothers. SROs were seen by fathers as a way of preventing mothers from using their perceived superior status as resident parents to frustrate contact or dictate conditions rather than include fathers in decisions. This is consistent with the use of SROs in *D v D*, where the order was made because the mother had used the sole residence order as a 'weapon' in the 'war' with the father.⁵² B12, for example, began as the father's application for a variation of the existing contact order. The SRO was suggested by his counsel for the final hearing, inter alia because it would emphasise the father's equal role in the children's lives and thus encourage the mother to adopt a more cooperative attitude.

In D1, the SRO was expressly recommended by Children's Services to try to reduce conflict levels. A core assessment observed: '[the mother] has experienced significant domestic violence during

⁴⁴ Cafcass recommended a referral to Child and Adolescent Mental Health Services, an indication that the daughter was struggling to cope.

⁴⁵ *Re R* [2009] EWCA Civ 358, [2009] 2 FLR 819.

⁴⁶ P Harris & R George, 'PR and shared residence orders: parliamentary intentions and judicial interpretations' (2010) CFLQ 151.

⁴⁷ *Re K* [2008] EWCA Civ 526, [2008] 2 FLR 380.

⁴⁸ In A5, for instance, the judge's handwritten notes called this a dispute about joint residence or extended staying contact.

⁴⁹ *D v D* [2001] FLR 495.

⁵⁰ *Re N*, unreported, Court of Appeal, 2nd September 1994.

⁵¹ *Re R* [1995] 2 FLR 612.

⁵² *D v D* [2001] 1 FLR 495, per Connor J at p 497.

childhood and appears to have modelled this behaviour as a means of conflict resolution'. This, again, is consistent with the use of an SRO in *D v D* to help the parents 'go away and make contact work'.⁵³

Unfortunately, the D1 file showed that the case was due to return to court again in 2012; the SRO had not had the desired effect. Indeed, there is no empirical data that supports this use of SROs.⁵⁴ On the contrary, research shows that where conflict levels are high at the outset, they tend to remain so, regardless of the type of post-separation arrangement.⁵⁵

The focus on conflict reduction through adult status was a recurring theme in the group of cases that ended with a SRO.⁵⁶ The SRO, initially designed to regulate only the day-to-day practicalities of children's living arrangements,⁵⁷ was in some cases used in a way that has no proven benefits to children.⁵⁸

4.2 No Primary Care-Giver Cases

We now turn to the nine cases where the parents could be said to be more or less equally involved in their children's care under the arrangement approved by court. We made this categorisation independently of the formal order made, but seven of these cases did end with a SRO.⁵⁹ Other studies have found similarly low numbers⁶⁰ which is unsurprising given the complex problems that often characterised litigated cases. Parents who can maintain the level of practical cooperation needed to make this type of arrangement work, are unlikely to need to resort to court orders. In four of these nine cases a status quo of near equal care had been established before the case came to court but the parents continued to have difficulties in making it work and fought over the minutiae of arrangements.

Our definition of 'shared care' was deliberately narrow, in order to focus on the most demanding, furthest point on the spectrum of parental involvement. In order for a case to fall into our category of No Primary Care Giver cases (No PCG), both parents had to have at least 40% of the overnights as calculated across the year (to include holidays) and also some contact in term-time, midweek. Midweek involvement suggests that this parent is engaged in a 'broader range of activities in caring for their children',⁶¹ something which may have prompted both Australian legislators and Swedish judges to promote mid-week contact.⁶² Such an arrangement places greater financial, practical and emotional demands on parents than other arrangements, including the intact family.⁶³ The arrangements set out in the No PCG cases illustrated this point. Two cases involved week-about changes.⁶⁴ In the other seven cases, there were two or three hand-overs each week. File documents gave an insight into the level of organisation required: spreadsheets and four-page final orders. Some

⁵³ Ibid, per Dame Elizabeth Butler-Sloss at p 503.

⁵⁴ L Trinder, 'Climate change? The multiple trajectories of shared care law, policy and social practices' (2014) CFLQ 30, at p 49; S Gilmore, 'Court Decision-making in Shared Residence Order Cases: A Critical Examination' (2006) CFLQ 478.

⁵⁵ J McIntosh et al, *Post-separation parenting arrangements: Patterns and developmental outcomes: Studies of two risk groups* (Australian Institute of Family Studies, 2010).

⁵⁶ This was so whether the children lived mostly with their mother, with their father, or equally in both parents' homes.

⁵⁷ *Re H* [1995] 2 FLR 883 per Ward LJ at p 889.

⁵⁸ It is not argued here that equal sharing arrangements cannot bring benefits to children, but that the available evidence does not back up the idea that making symbolic changes of this type improves parental attitudes in a way that will positively impact on their children.

⁵⁹ One case ended with a combination of sole residence and contact, and one with just a contact order for one parent.

⁶⁰ Hunt and Macleod found that only two 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).

⁶¹ B Smyth, 'Parent-Child Contact Schedules after Divorce' (2004) *Family Matters* 32, at p 38.

⁶² Family Law Act 1975 (Aus), s 65DAA(3)(ii) specifically directs judges to consider making an order for 'substantial and significant time' with the contact parent, which has to include 'days that do not fall on weekends or holidays'. It has long been usual practice for Swedish contact orders to include some everyday time: L Sandström & I Wetter, *Barnet och Lagen: Lagtexter med Kommentarer Rörande Barn* (Kommentus Förlag, 1999), at p 95.

⁶³ C Smart & B Neale, *Family Fragments?* (Polity Press, 1999); Statistiska Centralbyrån, *Olika familjer lever på olika sätt – om barns boende och försörjning efter en separation* (Statistiska Centralbyrån, 2014), at pp25-26.

⁶⁴ 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).

parents planned for as many contingencies as possible: the transition to the school holidays arrangements when a term ended mid-week, the washing of sports kit, or what do if it snowed so much that public transport was disrupted. We did reflect on the desirability of micromanaging children's care in this way and its likelihood of success.

The concerns we express in relation to the use of symbolic SROs primarily as a conflict reduction strategy, apply equally to the small number of cases in which the decision to move to near equal time seemed motivated by achieving an equality of arms between the two adults. In four of these nine cases the shared time arrangements set up seemed to be made for reasons that subordinated the child's lived-in reality to adult interests.⁶⁵ This leads us to caution against the danger of giving effect to particular types of care arrangements as an adult right.

Research has shown that it is hard work for children, both practically and emotionally, to travel between two different households with different rules, expectations and caring practices.⁶⁶ It is perhaps telling that none of the No PCG cases involved teenagers. Teenagers instead told Cafcass that they preferred a different arrangement or were old enough to make their own. Swedish data shows a similar fall in alternating residence for teenagers.⁶⁷ This is not to say that No PCG arrangements cannot also be problematic for younger children. In two of our cases the children were under-five, and research has also raised concerns about the use of equal sharing schedules for young children.⁶⁸

Where shared care is imposed by court order there is a greater cost to the child because so many aspects have to be regulated rather than left to the parents. This rigid 'top-down' conceptualisation of childcare is at odds with the lessons drawn from research findings. Qualitative studies suggest that the reality of post-separation is (and should be) more complex than one unidirectional, standard caring relationship between parents and children: the latter play a vital part in creating their own unique 'caringscapes' for post-separation family life, where step- and grand-parents as well as full, half and step-siblings are also involved.⁶⁹ These flowing, multidirectional processes are likely to be stifled by overly rigid arrangements.

Young people interviewed for qualitative studies have stressed the importance of having their views taken into account, and the kind of flexibility that could allow them to 'pop over' to the other parent's home to visit, to collect possessions, or perhaps assuage a sense of guilt over one's absence.⁷⁰ Similarly, Anja Marschall's Danish research stressed the importance to children (and parents) of short, informal 'hook-ups' during the other parent's scheduled time.⁷¹

However, comparatively little is known about how the various practical tasks involved in caring for children are actually divided in shared parenting arrangements.⁷² Caring within a binuclear family framework is more demanding. Therefore, it was disappointing that practical care became a topic of

⁶⁵ The details of these cases are discussed at M Harding & A Newnham, *How do County Courts Share Care of Children Between Parents?* (University of Warwick, 2015) [5.1.1], available at www.nuffieldfoundation.org/share-care.

⁶⁶ A Marschall, 'Who cares for whom? Revisiting the concept of care in the everyday life of post-divorce families' (2014) *Childhood* 517, at p 521.

⁶⁷ Statistiska Centralbyrån, *Olika familjer lever på olika sätt – om barns boende och försörjning efter en separation* (Statistiska Centralbyrån, 2014), at p 109.

⁶⁸ In two cases the children were aged between nine and twelve, in three cases between five and eight, and in two cases the children were of mixed ages. On the risks associated with No PCG for very young children see J McIntosh, B Smyth & M Kelaher, 'Overnight care patterns following parental separation: Associations with emotion regulation in infants and young children' (2013) *Journal of Family Studies* 224.

⁶⁹ G M Haugen, 'Children's Perspectives on Everyday Experiences of Shared Residence: Time, Emotions and Agency Dilemmas' (2010) *Children & Society* 112; H Davies, 'Shared Parenting or Shared Care? Learning from Children's Experiences of a Post-Divorce Shared Care Arrangement' (2015) *Children & Society* 1.

⁷⁰ C Smart, 'Equal shares: rights for fathers or recognition for children?' (2004) *Critical Social Policy*, 484, at p 489; G M Haugen, 'Children's Perspectives on Everyday Experiences of Shared Residence: Time, Emotions and Agency Dilemmas' (2010) *Children & Society* 112, at p 114.

⁷¹ A Marschall, 'Who cares for whom? Revisiting the concept of care in the everyday life of post-divorce families' (2014) *Childhood* 517, at p 520.

⁷² H Davies, 'Shared Parenting or Shared Care? Learning from Children's Experiences of a Post-Divorce Shared Care Arrangement' (2015) *Children & Society* 1, at p 3.

debate only in parents' statements giving conflicting versions of who had previously been the child's primary carer. There was no discussion about the quality of care under the new arrangement.

In A3 the consent order provided for two change-overs per week. This fitted in well with both parties' work, and with their extended families. There was no express consideration in the file of how it impacted on their son, who was not yet two years old. It has been argued by some child psychologists that babies and toddlers should not be alternating residence, since they have a different sense of time, and need stability to establish developmentally vital parent-child bonds.⁷³ In A3, routines would have to be coordinated, yet there were high levels of bitterness.

The note of caution sounded by Baroness Hale in *Holmes-Moorhouse* is relevant. She described as 'striking', the fact that the court had made a SRO for the children's time to be divided equally without any prior effort to investigate who had been, and who would be, caring for the children.⁷⁴ She stressed the need to listen to the children's views and issued a reminder that in SRO cases 'it is all too easy for the parents' wishes and feelings to predominate'.⁷⁵

In the No PCG cases, disputes about the allocation of the children's time were also disputes about the parents' perceptions of their respective roles. Mothers' complaints seemed based on the breach of an implicit gender contract under which they had been primary carers. In C46, the father had accused the mother of trying to marginalise or exclude him. She tried to resist a 50/50 care arrangement by alleging that he had never really been fully involved before. The parties agreed that he was the one who did fun things, while she organised their daughters' lives. This role division was shaped by the parties' personalities, yet underpinned by the parents' understandings of 'proper' gender roles.

In A5, the father wanted a slight increase in his time so that there would be 50/50 sharing. He stressed that he wanted to play an equally important role in his daughter's life. He accused the mother of needing to maintain a controlling influence over their four-year-old daughter. She responded that the child needed one, secure base (with her). She told Cafcass that three nights in a week 'out of the house' was quite enough for the child, clearly not subscribing to the new narrative that children should have two homes of equal importance. Cafcass recommended the change on the grounds that it was so slight that the four-year-old probably would not notice. It seemed that the change was being made because an adult wanted it and because the child would cope, rather than (as is required by the legislation) any positive benefit for the child.

In some of these cases, care became a highly contested concept for the parents, while the court was unlikely to enquire further once it was determined that the children were coping. This had a number of consequences. In five of these nine cases, fathers' applications and statements mentioned a desire for an equal role in their children's lives. This was often explicitly linked to a 50/50 time split, as well as to a desire to remain closely involved in practical day-to-day care.⁷⁶ They stated that their children's mothers would otherwise frustrate contact and make cooperation difficult. Their former partners were accused of wanting to remain primary carers for selfish reasons. In response, mothers cited their children's need for stability. With the loss of time they felt the loss of a caring role that had been central to their identity. However, the courts' (understandable) reluctance to get into forensic enquiries into past care meant there was no discursive space to air these grievances. There was also no attention given to the question of how the children could best be cared for.

These nine cases demonstrate that No PCG arrangements can be associated with substantial risks and disadvantages for children. While generous contact with both parents is beneficial where it allows the

⁷³ A Broberg & G Bohlin 'Växelvis Boende för Små Barn: Utvecklingspsykologiska Aspekter' in Socialstyrelsen, *Växelvis Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2004) 55. See also J McIntosh, B Smyth & M Kelaher, 'Overnight care patterns following parental separation: Associations with emotion regulation in infants and young children' (2013) *Journal of Family Studies* 224.

⁷⁴ *Holmes-Moorhouse v LB Richmond upon Thames* [2009] UKHL 7 per Baroness Hale at [33] and [36].

⁷⁵ *Ibid.*, at [36].

⁷⁶ Some fathers seemed to fear the perceived relegation to a secondary role and a loss of normal, natural involvement that has been criticised e.g. in E Kruk, 'The disengaged non-custodial father: implications for social work practice with the divorced family' (1994) *Social Work* 15.

children to create and maintain meaningful relationship with both parents, pushing the time split to 50/50 solely to equalise adult status without proper consideration about whether this extension of time is beneficial to the child prioritises adult equality over the child's best interests.

5 Contact

The value of parental involvement cannot be measured solely in terms of time; the quality of relationships matters.⁷⁷ However, time is not irrelevant. There are important differences between contact that feels 'stilted, shallow, artificial and brief' and more free-flowing relaxed time to 'be in the moment'.⁷⁸ The way contact is structured can greatly shape subjective experiences of that time. The extent to which the contact allows for the contact parent's involvement in the child's day-to-day care is something which could help maintain close involvement and close, natural relationships. According to Families Need Fathers, 'a high quality relationship' requires contact to include 'standard daily activities, such as homework and cooking, as well as weekend and holiday time'.⁷⁹ We mapped the various contact arrangements that were set up as the cases left the courts in order to consider some of these issues in context, dividing the case outcomes into categories: the nine no identifiable primary care-giver (No PCG) cases that have been discussed above; 78 overnight contact cases; 34 cases with regular daytime contact; 32 cases with more limited or restricted contact; and 17 cases that ended without any contact.⁸⁰

Neither domestic violence nor child welfare concerns were viewed as bars against any type of contact. Instead, the courts' focus was on finding a compromise solution where the physical risks to the safety of the child could be managed. Professionals went to great lengths to support and encourage contact, which was gradually reintroduced through a series of interim orders. This process was not always smooth, and courts were then prepared to try comparatively resource-intensive ways to encourage and restart contact. In many cases, the long-term outcome was regular contact and two parents who could communicate about the child. There were, however, other cases where it seemed a great deal of court time had been spent and expenditure incurred for meagre results.⁸¹ At a time when the family justice system was already under pressure, this seemed a disproportionate use of resources.

5.1 Overnight Contact

Our research, whilst confined to court files, confirms staying contact as the norm within our sample; many files showed parents' contact being gradually increased until the goal of regular staying contact (discussed below) was reached. There was overnight staying contact in 78 cases. If the No PCG category is added to this total, that means half of our parent versus parent cases ended with regular overnight contact. This is in line with the findings of other research.⁸²

Welfare concerns were seen as an obstacle to be overcome rather than a reason against progressing to overnight contact. Allegations of child welfare concerns and/or serious allegations of domestic violence⁸³ featured in 44 of these 78 cases, i. e. just over half of this group (56%). Looking at this

⁷⁷ See e.g. J Fortin, J Hunt & L Scanlan, *Taking a Longer View of Contact* (Sussex Law School, 2012); L Trinder, 'Shared Residence: A Review of Recent Research Evidence' (2010) CFLQ 475.

⁷⁸ B Smyth, 'Time to Rethink Time? The experience of time with children after divorce' (2005) *Family Matters* 1.

⁷⁹ Families Need Fathers webpage: 'Shared Parenting Research' available at: <https://fnf.org.uk/publications/shared-parenting-research#faqnoanchor>.

⁸⁰ In four cases there was insufficient information in the court files; they were classified as 'unclear'.

⁸¹ The strongest example is D8, which is discussed below in relation to daytime contact.

⁸² 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, while the professionals they interviewed described overnight contact as the norm: J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice, 2008), at p 121, p 16.

⁸³ I.e. allegations that would have met the evidential requirements outlined by The Civil Legal Act (Procedure) Regulations 2012 (2012/3098), r33 or which were held to warrant further investigation by the court, e.g. through a fact-finding hearing.

question another way, overnight contact was by far the most common outcome in cases with either or both of these complicating factors.⁸⁴

In a third of overnight contact cases,⁸⁵ contact occurred both at weekends and during the school week. This should give both parents close involvement in their children's every-day lives and in caring for them rather than just having fun together.⁸⁶ It should provide better opportunities for the kind of warm, authoritative parenting which combines emotional involvement with moderate discipline and guidance, which has been linked in Amato's and Gilbreth's meta-analysis of research to better outcomes for children with separated parents.⁸⁷ On the other hand, it can also increase children's exposure to parents' conflicts and/or prove disruptive if clothes, toys, or school books do not end up in the right place at the right time.⁸⁸ That may be one reason why, in fact, two-thirds of the staying contact nights even in this sub-group were scheduled to take place at weekends.

The largest sub-category of staying contact was weekend-only contact.⁸⁹ Alternate weekend contact (often combined with half of school holidays) was the most common detailed schedule among all staying contact schedules.⁹⁰ In the Hunt and MacLeod sample, 43% of overnight contact cases followed the every other weekend pattern, which interviewees also described as 'the norm'.⁹¹ Similarly, Smart et al observed this pattern being used as a standard formula in courts.⁹² However, we found no evidence that the courts were imposing the pattern against the wishes of parents; it seemed more likely that contact patterns were shaped by practical limitations and parenting roles as established before separation.

Research shows that parenting in intact families is still organised along a traditional, gendered pattern,⁹³ and qualitative studies suggest that in post-separation binuclear families, it is often mothers who carry on bearing overall responsibility for childcare, health, education, etc.⁹⁴ As Barlow asks: 'Even when both parents work full-time, who would you guess schools typically call first when a child is ill?'⁹⁵ Weekend contact can insulate children from stress, but also perpetuate this pattern.

There were examples of disputes fought against the backdrop of traditional, gendered understandings of parenting. In B9, the father accused the mother of acting unilaterally, and making shared parenting difficult. She responded by remarking that he had been happy to leave everything to her when they were together, so why was he butting in now? However, she also protested about the continuation of this gendered familial organisation. She, like a number of other women, were opposed to their former partners taking all the more relaxed, fun, weekend time leaving them with the daily grind of school routine; the final order granted him staying contact on two weekends out of three.

Overnight contact was the most commonly reached arrangement, a goal often reached through gradual increases of contact. Even in the cases where welfare concerns had led to a change of primary care-

⁸⁴ There were 102 cases that featured serious child welfare concerns and/or domestic violence allegations that would have met the LASPO criteria or were held by the court to warrant further investigation. 44 of those cases (43%) were in the regular overnight contact category.

⁸⁵ Twenty-seven cases.

⁸⁶ B Smyth, 'Parent-Child Contact Schedules after Divorce' (2004) *Family Matters* 32, at p 38.

⁸⁷ P Amato & J Gilbreth, 'Non-resident fathers and children's wellbeing: A meta-analysis' (1999) *Journal of Marriage and the Family* 557; M Whiteside & B Becker, 'Parental factors and the young child's post-divorce adjustment: A meta-analysis with implications for parenting arrangements' (2000) *Journal of Family Psychology* 5.

⁸⁸ Socialstyrelsen, *Växervis Boende: att bo hos både mamma och pappa fast de inte bor tillsammans* (Socialstyrelsen, 2004), at pp41-43.

⁸⁹ 42 cases in total, 10 with weekly and 32 with fortnightly staying contact. In the final nine overnight cases, contact took place less frequently than fortnightly.

⁹⁰ It was used in 16 cases. There were also a number of cases with slight variations on this theme.

⁹¹ J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice, 2008), at p 21.

⁹² C Smart and others, *Residence and Contact Disputes in Court: Volume I* (University of Leeds, 2003) at p 28.

⁹³ It was noted in the British Social Attitudes Survey in 2012 that '[A]ctual behaviour at home has not caught up with changing attitudes': A Park, C Bryson, E Clery, J Curtice and M Phillips (eds) *British Social Attitudes: The 30th Report* (NatCen Social Research, 2013), at p viii.

⁹⁴ C Smart & B Neale, *Family Fragments?* (Polity Press, 1999).

⁹⁵ A Barlow, 'Solidarity, autonomy and equality: mixed messages for the family?' (2015) *CFLQ* 223, at p 232.

giver from the mother to the father, considerable efforts were made to establish overnight contact in a way that was safe for the children. In D11, for example, where the little boy had been moved from the mother to the father (due to her mental health issues) and then back to his mother again (due to the father's alcohol abuse), overnight contact with the father initially took place at the paternal grandparents' home and was supervised by them before the father could be trusted to have the child staying at his own home. Overnight contact facilitated non-resident parents' desire to stay involved in their children's lives in a way that worked best for them, and their family situation. It was clear that fathers were not expected to settle for a few hours on a weekend, but were generally granted the kind of contact they had asked for. However, there was no indication that our courts regarded equal sharing as the ultimate goal. There were a small number of cases, examined above, where 50/50 time splits were ordered by the court as a compromise solution in problematic high conflict cases. However, in other cases the move to 50/50 sharing was resisted for child-centred reasons leading to an end result of regular overnight contact. Such a policy promotes a more child-focussed understanding of 'shared parenting' than a rigid rule that a shared residence order for equal time should be the ultimate goal. Without significant societal changes it would be both difficult and undesirable to go further.

5.2 Daytime-Only Contact

In 34 cases (20% of the 174 parent versus parent cases), the final arrangement was for the contact parent to have direct contact solely during the day (also referred to in many studies as visiting contact). This was our second biggest category.⁹⁶ Daytime-only contact may deprive children of important familial contexts, but these shorter occasions can also lead to a better focus on the child.⁹⁷ There were a number of reasons against overnight contact that were found in many of these 34 case files. Child welfare or domestic violence concerns were rarely a determining factor; in fact, fewer welfare concerns were raised for the daytime contact group than for the overnight group.⁹⁸ One commonplace difficulty was a lack of suitable accommodation. In D26, for example, the parties were still in the process of separating and the final order was made 'Upon the mother agreeing that at such time as the father has suitable accommodation the children will have staying contact with their father on alternate weekends'. In a few cases, the children were still very young; in others, direct contact had been re-established relatively recently. Finally, there were older children who voiced strong objections to staying contact; in some cases, Cafcass could see that these were based on reasonable grounds, while in others, professionals' efforts to convince young people of the long-term benefits of contact were fruitless.

The strongest example of this was D8, which began with the father's application to reinstate fortnightly staying contact with him in Borgate when their daughter was 11 and their son 9, and ended four-and-a-half years later with one afternoon's contact per fortnight with the son in Dunam.⁹⁹ The parents were both inflexible: the mother said the children's wishes should be respected and the father accused her of parental alienation. The children complained of having to 'play happy families' and being subordinated to the needs of the young children in the father's Borgate family. Approximately half-way through the case, one judge decided on a firm, hands-on approach designed to let the children enjoy contact without feeling disloyal to their mother. The children remained uncooperative, as evidenced by the interim contact order that stipulated, with a penal notice attached, that the mother must ensure that the children are polite during contact and do not wear their headphones. There were 19 hearings,¹⁰⁰ involvement by Cafcass, the National Youth Advocacy Service (NYAS), a solicitor to represent the daughter, and an experienced Family Psychotherapist. At a time when the family justice

⁹⁶ A similar percentage of non-overnight contact has been found in Australia: B Smyth, 'Parent-Child Contact Schedules after Divorce' (2004) *Family Matters* 32, at p 37.

⁹⁷ 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), at p 78.

⁹⁸ Child welfare concerns were raised by a parent or a professional in 26% of the daytime-only contact cases and 41% of all the overnight contact cases).

⁹⁹ Children Act 1989, s 9(6) stipulates that contact orders should only be made after the age of 16 if 'the circumstances of the case are exceptional', in this case, no further orders were made for the daughter once she reached that birthday.

¹⁰⁰ Some shorter directions hearings but also several longer, contested hearings.

system was already under pressure, this seemed a disproportionate use of resources to secure very modest contact with the father (with the additional ‘cost’ of years of stress for all involved). While this case represented an extreme point on the spectrum of encouraging/coercing contact, it was part of a bigger trend, and reinforced our impression of a strong underpinning assumption that any level of contact is better than no contact. Attention should be paid to Baroness Hale’s observation that ‘[m]aking contact happen and, even more importantly, making contact work is one of the most difficult and contentious challenges in the whole of family law’.¹⁰¹

As with overnight contact, most contact took place at weekends,¹⁰² while in E32 midweek contact was chosen because Wednesday was the father’s day off. It seems likely that parents, understandably, fitted contact around their work, and this was one reason why daytime contact, like overnights, also tended to take place mainly at weekends.

What emerged was a picture of daytime-only contact as ‘second best’ where there were reasons against progression to ‘standard’ overnight contact. However, it was also clear that attempts were made to make daytime contact meaningful for both fathers and children. There were examples of fathers who walked their children to school in the mornings, took them swimming or got involved with extra-curricular activities such as Scouts. Cases like D8 also provided an illustration of the courts’ underpinning assumption that strenuous efforts should be made to promote contact as long as the contact parent is engaged with the legal process.

5.3 Limited Contact

This category contained three types of cases: those where contact would be irregular (e. g. a few times a year) (10 cases); contact that would remain supervised or monitored for the foreseeable future (14 cases); and indirect contact (eight cases). Some of these cases seem to demonstrate an implicit trust held by the courts in the inherent value of contact even in difficult circumstances, with little emphasis on the child’s experience of such contact as long as they are not at physical or emotional risk.

In the irregular contact cases, the arrangement of contact was left entirely up to the parties.¹⁰³ The most common reason was that direct contact was on-going but that the families were in a transitional period (e. g. working out their separation or attempting a reconciliation); some parents were on sufficiently good terms to prefer to make *ad hoc* arrangements, and a few teenagers were also left to decide for themselves when they wanted contact.

In 14 cases the final order was for contact to be supervised or monitored by Local Authority Children’s Services. As observed by Perry and Rainey, ‘the term “supervised contact” can be used to cover a variety of contact arrangements’.¹⁰⁴ In its strict definition, supervised contact should be observed and evaluated by specialists, while supported contact usually takes place at a neutral venue with third parties present, but without a close eye being kept on parent-child interaction. A third type is where the order stipulates that a relative or other adult should be present during contact. We found, as did Perry and Rainey, a ‘[I]ack of specificity in the information available from the court files’,¹⁰⁵ which meant that we used the supervised label to cover all these three types of contact.

As other studies have observed and our cases confirmed, supervised contact is often used as an interim stage, but rarely a final arrangement.¹⁰⁶ In this group of cases, grandparents and other relatives

¹⁰¹ *Re G (Children)* [2006] UKHL 43 per Baroness Hale [41].

¹⁰² There were 20 cases where contact was every or every other weekend, six cases where there was contact both during the week and weekends, and three cases where contact was midweek. The final five cases in this category left the courts with arrangements for irregular or infrequent contact.

¹⁰³ It seemed likely that some contact was envisaged, rather than the court making a standard aspirational statement about future contact in the final order.

¹⁰⁴ A Perry and B Rainey, ‘Supervised, Supported and Indirect Contact Orders: Research Findings’ (2007) *International Journal of Law, Policy and the Family* 21, at p 26.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, at p 36; J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice, 2008) at p 27; C Smart and others, *Residence and Contact Disputes in Court: Volume 2* (University of Leeds, 2003) at p 90.

were often called upon to supervise contact. In B56, for example, the order was for contact with the non-resident mother at a contact centre, with a view to it eventually returning to the maternal grandparents' home.

In three of the 14 cases, the Local Authority was not only responsible for supervising contact, but also for determining its nature and frequency.¹⁰⁷ There were serious welfare concerns in all three cases; Children's Services involvement had begun before the private law case and was set to continue for some time after it, perhaps into public law proceedings. In C14, for example, the six-year-old girl had already been moved from the mother to the father because of neglect, when bruises were found on the child, which were unlikely to have been accidental, and which the father was unable to explain. Children's Services informed the Cladford District Judge that they were launching a pre-proceedings review and 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 case was by no means resolved and blurred the line between public and private child law.¹⁰⁸

In eight cases the final court order provided for indirect contact only. Again, other studies have found similarly low numbers.¹⁰⁹ There were two main reasons for this outcome: safeguarding concerns and children's objections. Serious child welfare and domestic violence concerns (shared by parents and welfare professionals) were very common in this category (five out of eight cases, or 62%). In some of these, cases, children had voiced entrenched resistance to direct contact. In C17, for example, the father was given permission to withdraw his application for direct contact, with it being recorded in the order preamble that he respected his teenage son's wishes and feelings. The reasoning appears to have been that coercing a young person into contact could be counterproductive; this seemed sensible given the very limited success in D8.¹¹⁰ This reasoning has also recently been approved in the Court of Appeal.¹¹¹

The limited contact that was ordered in all 32 cases in this group was a way for the court to maintain some involvement for problematic parents, who struggled with combinations of poor mental health, addiction, relationships with violent partners, and had often themselves had troubled childhoods. It was the best that could be offered these parents at the time. Parents' attitude to their own problems and willingness to engage with the court and other agencies was often the most important factor. For example, D20 ended in indirect contact, largely because the father lied about his drug use and blamed the mother for past domestic violence since she had 'stressed him out'.

Limited forms of contact were also ordered with a view to keeping the relationship alive in the long term. It was very common for orders to state specifically that contact would progress if circumstances improved, e.g. if a parent could demonstrate their sobriety. As in other studies, indirect contact, in particular, was used as the last resort to 'keep the door open' and maintain parent-child ties in case things improved.¹¹² In that sense, these 32 cases were consistent with what Stephen Gilmore has described as the courts' desire to give non-resident parents as much contact as is possible, with as few restrictions as possible.¹¹³

¹⁰⁷ This is not to say that Children's Services did not take an interest in how contact was progressing in other cases, but their role was not explicitly identified in the orders.

¹⁰⁸ See e.g. M Harding & A Newnham, 'Section 8 Orders on the Public-Private Law Divide' (2016) 38(3) *Journal of Social Welfare and Family Law* (forthcoming); A Bainham, 'Private and Public Children Law: an under-explored relationship' (2013) CFLQ 138.

¹⁰⁹ 7% in Hunt's & Macleod's study and only 4% of Perry's and Rainey's cases: J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008), at p 28; A Perry and B Rainey, 'Supervised, Supported and Indirect Contact Orders: Research Findings' (2007) *International Journal of Law, Policy and the Family* 21, at p 37.

¹¹⁰ Discussed above under the Daytime-Only Contact heading.

¹¹¹ *Re J-M (Contact Proceedings: Balance of Harm)* [2014] EWCA Civ 434, [2015] 1 FLR 838.

¹¹² A Perry and B Rainey, 'Supervised, Supported and Indirect Contact Orders: Research Findings' (2007) *International Journal of Law, Policy and the Family* 21, p 37; J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice. 2008), at p 75

¹¹³ S Gilmore, 'Disputing Contact: Challenging Some Assumptions' (2008) CFLQ 285, at p 297.

Although limited contact is helpful in a number of ways, it can only meet 'a much more limited number' of a child's needs.¹¹⁴ Where it has to continue for the foreseeable future, it is unlikely to provide the kind of close involvement that is known to have a positive impact on children's adjustment and well-being.¹¹⁵ It can be seen as an artificial relationship 'going nowhere',¹¹⁶ and if it puts the child or primary carer under stress for comparatively meagre benefits, this raises questions about what exactly this contact is for. The implicit trust in any contact being better than no contact can only move the focus further away from seeing the child's needs in the present, concrete daily need for care.¹¹⁷

5.4 No Contact Outcome

Seventeen cases (<10%) left our five courts without any expectation that there would be contact.¹¹⁸ There were only five cases that ended with an actual order for there to be no contact, an active court prohibition. In the rest of the cases, there were simply no functioning directive provisions. Unsurprisingly, these were complex cases. Only two cases had some, albeit irregular, direct contact at the time of the application. There were child welfare concerns and/or domestic violence allegations supported by evidence that could have met the new criteria for obtaining legal aid¹¹⁹ in 15 of the 17 cases (94%). Frequently, the potential contact parent had failed to appear at court, either for the final hearing or at all.¹²⁰

Four cases had started out as primary care-givers' applications for residence and/or prohibited steps orders to prevent the removal of the children from their care. The potential contact parents made no efforts to attend or even contact the court. There was nothing more that could be done, and the court cannot be said to have failed to encourage contact.

Eight cases were applications to restart regular contact, which were either withdrawn or dismissed. Some of these applicants had disengaged, perhaps to avoid further financial and emotional costs once it had become apparent they could not get the contact they had sought. Some applicants had issues with addiction and/or refused to link their past behaviour to their children's vehement objections.

The cases in this group often left court on the understanding that circumstances could change. Where the obstacle to contact was the non-resident parents' lack of engagement with professionals who could otherwise have found ways to make contact safe, parents were invited to re-engage with such agencies and then re-apply for contact. Where children were against contact, considerable efforts were made to help them re-think or overcome fears. In B19, for example, both NYAS and a child psychotherapist had been involved to help establish contact, but the ten- and twelve-year old children were adamant that they did not want to see their mother. The final order was made in the hope that giving the children some space to heal and reflect was more likely to change their attitude towards contact than further legal proceedings.

¹¹⁴ The benefits include the experience of the continued interest of the absent parent, information about him/her, the keeping open of the possibility of the development of the relationship, and there may be some opportunity, through letters or phone calls, for reparation. C Sturge and D Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) *Family Law* 615.

¹¹⁵ P Amato & J Gilbreth, 'Non-resident fathers and children's wellbeing: A meta-analysis' (1999) *Journal of Marriage and the Family* 557; M Whiteside & B Becker, 'Parental factors and the young child's post-divorce adjustment: A meta-analysis with implications for parenting arrangements' (2000) *Journal of Family Psychology* 5.

¹¹⁶ This kind of reasoning appeared to have led the judge in *Re S (a child)* to decide against supervised contact which would have to be supervised indefinitely, but it should be noted that such a view was criticised by the Court of Appeal: *Re S (A Child)* [2015] EWCA Civ 689, [2015] All ER (D) 117 (Jul) per King LJ [23].

¹¹⁷ On the dangers of this, see: C Piper 'Investing in a child's future: Too risky?' (2010) CFLQ 1.

¹¹⁸ In the Hunt and Macleod study the corresponding figure was 15%: J Hunt & A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice, 2008), at p 55.

¹¹⁹ I.e. allegations that would have met the evidential requirements outlined by The Civil Legal Act (Procedure) Regulations 2012 (2012/3098), r33 or which were held to warrant further investigation by the court, e.g. through a fact-finding hearing.

¹²⁰ Seven of 17 cases.

The low number of 'no-contact' orders is in line with other research,¹²¹ and with 'the very well-known principle' from the reported cases 'that a refusal of contact with a parent should be a last resort'.¹²²

In *Re H* the wider welfare enquiry set out in the Children Act 1989, section 1(3) was narrowed down to the question: 'are there any cogent reasons why these ... children should be denied the opportunity of access to their natural father?'¹²³ In all the five files that ended with an order for there to be no contact, such cogent reasons were evident. There was evidence of past domestic violence in four of those cases, and in the fifth threats had been made to kill the children. All five featured serious child welfare concerns, and in four either Cafcass or Children's Services had made recommendations against direct contact. In B57, for example, the 11-year-old son remembered being taken into police protection at the age of five because the father was arrested while drunk. He had also witnessed his father being violent towards both his mother and his new partner. The father, however, blamed the breakdown in contact solely on the mother's implacable hostility. Indirect contact had been ruled out due to the father's tendency to be drunk and abusive on the phone.

The result in these cases was in no way inconsistent with the family courts' oft-repeated stance that parent-child contact is 'almost always in the interests of the child' and should 'be terminated only in exceptional circumstances'.¹²⁴ Cases like B17, where the father was nearing the end of a sentence he was serving for the attempted murder of the mother but still denied the crime, provided such exceptional circumstances. These five cases would not have been decided differently under the new parental involvement presumption.¹²⁵ They were a sobering reminder of the risks of seeing contact either as a parental right or as inherently valuable in its own right.

6 Conclusion

Without the imprimatur of a legislative presumption, our courts had a clear focus on encouraging parental involvement. In our study, many of the constraints on meaningful levels of contact were practical, linked for example to wider housing and employment patterns in England and Wales. Future reforms to improve gender equality in parenting need to focus on removing such structural obstacles, and on facilitating closer paternal involvement in day to day care before separation, rather than on promoting the abstract ideal of shared care at policy level and in the family courts.

Regular overnight contact was the most common outcome, the 'normal',¹²⁶ even though many cases were complex. This development is to be welcomed in most cases as it allows for more natural time spent together and closer involvement in caring routines. It encourages fathers to take on a meaningful role in the child's life, views them seriously as carers and creates a meaningful space for children to enjoy each parent's company. However, this does not mean that more contact is always better: our reservations against a wider use of equal or near equal sharing patterns primarily to equalise adult perceptions of status is expressed in the article's third section above. Any promotion of equally shared parenting must be grounded in the benefits of such an arrangement to the child.

Shared residence orders were rare within the sample, but we were concerned about the small number of cases in which they were used to award equal status to parents to improve parental cooperation when there is no empirical support for this approach, particularly given the difficulties that plagued these families. The 'practical test' set out by Ward LJ is to be preferred: 'ask the children, where do you live?'¹²⁷ Equal time also appeared sometimes to be linked to an understandable desire to have an

¹²¹ In Perry's and Rainey's study, '[l]ess than one per cent of the [343 contact or residence] cases resulted in a final order for no contact: A Perry and B Rainey, 'Supervised, Supported and Indirect Contact Orders: Research Findings' (2007) *International Journal of Law, Policy and the Family* 21, at p 36.

¹²² G Douglas 'Casenote: *Re W (Direct Contact)* [2012] EWCA Civ 999' (2012) *Family Law* 1305.

¹²³ *Re H (Minors) (Access)* [1992] 1 FLR 148 per Balcombe LJ at p 152.

¹²⁴ *Re R (A Child)* [2014] EWCA Civ 1664, [2015] 2 FLR 1331 per Christopher Clarke LJ at [16].

¹²⁵ Children Act 1989 ss 1(2A) and 1(2B) as inserted by the Children and Families Act 2014, s 11.

¹²⁶ The nine No PCG cases and 78 regular staying contact: 87 out of 174 cases.

¹²⁷ '[T]he residence order reflects just that: the place of the children's residence. It is not intended to deal with issues of parental status.' *Re H (Children)* [2009] EWCA Civ 902 per Ward LJ [11].

equal input into the children's lives, or an equal say in important matters.¹²⁸ In some of these cases, near equal shared care did not seem to be the best, or even the least damaging solution for the children, given the complex circumstances and the high levels of long-running conflict that are common in the cases that reach the courts. These subsets of the SRO and No PCG cases led us to reflect on how easily 'shared care' disputes could become about equal adult status rather than child's lived in experience of care.

There were a number of common, often interconnecting factors in the cases where contact did not progress to overnight contact. Serious child welfare concerns were investigated by Cafcass or Children's Services. Domestic violence (by a parent, a new partner, or members of a household) was a factor, particularly where a parent denied past conduct or refused to acknowledge future risks for children. Children's strongly held objections could also be a reason against contact. Parental commitment was tested (perhaps rather crudely) through directions in interim contact orders (e. g. for a parent to telephone the child regularly or submit to drug testing). This approach served as a pragmatic proxy for far more resource-consuming and intrusive enquiries into caring abilities. It helped ensure that contact was safe, even if not always rewarding for the child. However, the result was that there was rarely direct discussion about care, despite this being crucial to child well-being. The aim was to provide contact that was safe, rather than contact that was rewarding.

This enthusiastic and somewhat uncritical approach stood in sharp contrast to the courts' justifiably cautious approach to transfers of sole residence. Cogent reasons were required before a move was effected. In the cases where such reasons existed, care became visible because it was no longer provided (typically by mothers). In cases where sole residence orders were sought to confirm the status quo, there were highly effective combinations of residence, prohibited steps and non-molestation orders that confirmed the resident parent's status, giving them the confidence to implement contact. However, there were also some cases where we felt the resident parents' concerns had been overshadowed by the process of facilitating and increasing contact.

¹²⁸ Parental responsibility provides such equal rights, as Ward LJ explained in *Re G* [2008] EWCA Civ 1468, [2009] 1 FLR 894 at [17].