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Outcomes of applications to court for contact orders after parental separation or divorce

Briefing Note

Joan Hunt and Alison Macleod

Oxford Centre for Family Law and Policy
Department of Social Policy and Social Work
University of Oxford

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Authors

Joan Hunt is Senior Research Fellow in the Oxford Centre for Family Law and Policy, which is part of Oxford University's Department of Social Policy and Social Work. She has conducted several empirical research studies on children and families subject to family court proceedings, undertaken a review of research on contact after parental separation and prepared two policy briefing papers on contact, the first providing an overview of the issues, the second examining innovative approaches used in other countries. She is currently working on a national survey of separated families, most of whom have not taken their disputes to court, and a review of research into parents' experiences of the family justice system.

Alison Macleod was a Research Associate in the Centre for Family Law and Policy for the duration of the study and prior to this was a senior researcher worked in the University of Bristol's Socio-Legal Centre for Family Studies. A solicitor by profession, she has participated in, or directed, many research projects on families involved in court disputes in both public and private law.

Disclaimer

The views expressed are those of the authors and are not necessarily shared by the Ministry of Justice.

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Genesis of the study

The study was commissioned as the result of a commitment given by the government to Parliament in the course of the passage of the Children and Adoption Act, 2006. The aim of this legislation, as far as the contact-related provisions were concerned, was to provide courts with a greater range of powers to facilitate and enforce contact¹. However much parliamentary time was devoted to debating proposed amendments which would introduce a statutory, rebuttable presumption of, under varying guises, minimum levels of contact, into the Children Act, 1989. At the heart of these attempts to change the law were concerns about non-resident parents who went to court for a contact order but ended up with little or no contact for insubstantial reasons.

The government strongly resisted all arguments for introducing a statutory presumption of contact, let alone any particular quantity of contact, on the grounds that a) the courts already started from the point that contact was to be promoted unless there were good reasons to the contrary and b) that a statutory presumption would undermine the fundamental basis of the Children Act, the paramountcy of the interests of the child. It was acknowledged, however, that there was little statistical data on the outcomes of court proceedings. As Baroness Ashton, for the government, put it,

I believe that the time has come for us to look very carefully at repudiating some of the anecdotal evidence and to consider carefully what has happened in the court. To understand more about the process we shall research what happens when the courts start with a desire for contact and see what the final orders are².

And later:

I recognise the concern at the heart of many of the issues, that is, those parents, often non-resident fathers, who do not get a fair deal. I repeat the commitment I gave...during the previous stage of the Bill: I intend to commission new research to establish a proper evidence base. I will go further, if the research recognises the problem that noble Lords have raised with me anecdotally, I will take action to address it. I am at one with noble Lords in recognising the critical importance of establishing the evidence base³.

This study was commissioned to give effect to that commitment.

¹ The Bill was the result of a lengthy process of consultation and consideration beginning with the work of the Children Act Sub-Committee on the Facilitation and Enforcement of Contact, followed by the Green Paper 'Parental Separation: Children's Needs and Parents' Responsibilities and the Government's Response 'Next Steps'. A draft bill was also issued for pre-legislative scrutiny and considered by a Joint Parliamentary Committee.

² Lords Hansard Text 14 Nov, HL col 861

³ Lords Hansard Text 29 Nov, HL col 200

The issues

When parents separate or divorce less than one in 10 seek the assistance of the family courts in making decisions about contact arrangements for their children. In making such a decision the court under the Children Act 1989 must give paramount consideration to the welfare of the child.

What are the outcomes when parents do go to court? How many non-resident parents end up with no contact? When they get contact, how much do they get? How does this compare with what they were seeking? If there is a discrepancy what explains this?

Key points

- Outcomes were typically agreed. It was rare for the court to have to make a final ruling.
- Most cases ended with face to face contact. Where they did not this was usually because the applicant withdrew from proceedings.
- Contact typically involved overnight stays, at least fortnightly, with some children having additional visiting contact. Visiting contact was usually weekly or more and was almost always unsupervised.
- Non-resident parents were largely successful in getting direct contact where there had been none and in getting the *type* of contact sought.
- Those who achieved staying contact usually got the *amount* they sought, those with visiting contact mainly did not. Applications to enforce previous orders were unusual and rarely wholly successful.
- Non-resident parents were almost twice as likely to succeed in getting the type of contact they wanted as resident parents who initially opposed staying, unsupervised contact or any contact.
- Four in five resident parents who opposed unsupervised contact raised serious welfare concerns.
- The initial position of the resident parent and whether they raised serious welfare issues were significantly related to outcome, as were the age of the child, whether there was any contact at the point the application was made and the interval since the child was last seen.
- There was no evidence that non resident parents as a group are systematically unreasonably treated by the family courts. On the contrary, the study shows that the courts start from the position that contact is generally in the interests of the child, they make great efforts to achieve this and in most instances they are successful. In a small minority of cases, however, it might be argued that the outcome was unfair to the non-resident parent

The study

The main element in the research was a detailed analysis of court files in 308 cases with a contact application in 2004. The applicants were almost all (289; 77%) non-resident parents, typically fathers (265). Where there was more than one child in the case full data was collected on only one, randomly selected. In 236 cases this was the first set of contact proceedings. The cases were drawn from five family proceedings courts and six county courts, distributed across all six court circuits, covering a mix of rural and urban areas, and courts which handled low, medium and high volumes of contact cases. The findings are therefore likely to reflect the national picture.

The file study was supplemented with an analysis of transcripts of 102 court hearings, covering 43 cases, in the county courts, plus interviews with solicitors (27), Cafcass officers (23) magistrates (8) legal advisors to the family proceedings courts (5) district judges (9) and circuit judges (4).

Findings

Outcomes⁴

The court rarely had to make a final ruling on contact. Most outcomes were reached by agreement or by one party withdrawing.

- A mere 32 cases (11% of 292) went to a contested final hearing of which at least 11 settled in the course of the hearing.
- Almost three quarters of cases (213 of 288) were known to have ended by agreement. This included 25 of the 44 cases in which the application was withdrawn, 15 of the 21 with an order of no order and 173 of the 203 where a contact order was made. Only 19 cases were dismissed.
- Applications which ended with no contact at all were most likely to be formally withdrawn (18 of 39) or effectively abandoned (17). Only four were dismissed after a contested hearing.

Non-resident parents typically began the proceedings having no contact and ended them with an order or agreement for direct contact.

- At the start of the proceedings only 28% of non-resident parents (83 of 294) had direct contact with their children.
- By the end of proceedings 79% of parents (225 of 286) had an order or agreement for face to face contact. In 7% there was to be indirect contact and in 14% no contact at all.

The most common outcome was staying contact, which rarely took place less than fortnightly and was sometimes supplemented with visiting contact.

⁴ Of the sample of 308 cases 10 had not completed by the end of the data collection period. Six had to be excluded because either the contact parent had died or the parents had reconciled. In six there was no data on the outcome; in one there was to be no direct contact but it was unclear whether there would be indirect and in 17 either the type of face to face contact was not known (15) or this was left to the child (2). In some of the remaining cases detail was lacking. The numbers on which percentages are calculated, therefore, will vary.

- 139 cases (49% of 286 in which the outcome was known, and 62% of 225 in which there was to be direct contact) ended in staying contact.
- In 89% of these (109 of 122 on which information was available), overnights were at least fortnightly, with 40 more frequent. Stays were typically for one (45% of 114) or two (43%) nights at a time with the average length of stay per fortnight being 51 hours fortnightly.
- 35% of children (48 of 139) also had visiting contact, adding an average of 8 more hours contact per fortnight.
- Overall, in 59% of cases (66 of 111) children were expected to have direct contact on four or more days a fortnight with 32% having six or more contacts and only 5% less than two .
- The average combined contact time was 55 hours per fortnight. Three-quarters (70) were to have between 25 and 72 hours and 17% (16) more than this (range 14 to 137 hours).

The next most common outcome was unsupervised visiting contact, usually at least weekly.

- 58 cases (20% of all known outcomes and 28% of those allowing direct contact) ended in unsupervised visiting contact.
- Frequencies varied from five times a week to four times a year, with an average of 2.2 a fortnight. 61% of children (31 of 51) had weekly (19) or more frequent contact (12); only three less than fortnightly.
- The average length of a visit was 5.4 hours, ranging from one to 10 hours. 48% of visits (21 of 44) were between six and 10 hours.
- The average contact time per fortnight was 10.3 hours, ranging from one exceptional case with contact for only one hour four times a year to just over 12 hours a week.
- Supervised contact was very unusual as a final outcome (11; 4% of 286) and only two cases involved the use of a contact centre. In most cases contact was expected to be at least weekly.

The relationship between the contact sought and obtained⁵.

Most non-resident parents succeeded in obtaining contact where they had had none before and getting the *type* of contact sought.

- 70% of those who sought to establish/re-establish direct contact (129 of 184) succeeded.
- Where there was to be direct contact 78% of those who sought overnight stays (110 of 142) got them.
- Where there was to be only visiting contact, 94% of those who wanted this on an unsupervised basis succeeded (60 of 64).

Those who achieved staying contact typically got the amounts sought.

- 67% achieved the desired frequency (41 of 62).
- 67% obtained the length of stay they asked for (26 of 39)
- 79% got the additional visiting sought (19 of 24)

⁵ Detailed information was not always available on both what the applicant sought and what they obtained. Numbers in relation to visiting contact were particularly small.

Those who only obtained visiting contact mainly did not get as much as they wanted, although the data was very limited.

- Only 5 (of 12) got the frequency wanted.
- Only 2 (of 6) got the duration.
- 8 (of 12) did not get either.

Applications to give effect to previous orders or agreements rarely completely succeeded

- Only 8 applicants (of 26) succeeded in getting the original arrangements reinstated and, where sought, a penal notice attached.
- 4 got the order confirmed but not the penal notice requested.
- 14 did not succeed in any respect, 10 getting no direct contact, two having their contact reduced and two getting defined orders changed to either reasonable contact or as and when the child wanted contact.

Overall, non-resident parent applicants stood an even chance of getting *everything* they had initially sought.

- Just under a third (85; 32%) did not achieve the *type* of contact they had sought at the start of the case: 56 did not achieve direct contact; 25 got visiting rather than staying; four got visiting but only supervised.
- A further 43 (16%) did not achieve everything they wanted in terms of frequency or duration.
- Four more did not get the penal notice sought although they succeeded in getting the previous arrangements reinstated or even improved on.
- In total 49% of non-resident parent applicants (132 of 269) did not get everything they had originally asked for.

Resident parent respondents were much less likely than non-resident parents to be successful in achieving their initial objectives⁶

- 60% (98 of 163) of resident parents initially opposed to staying, unsupervised or any direct contact did not achieve this:
 - 56% (55 of 99) failed to prevent direct contact.
 - 72% (26 of 36) failed to prevent unsupervised contact.
 - 61% (17 of 28) failed to prevent staying contact.
- In contrast, only 32% of non-resident parents failed to achieve their objectives in terms of getting contact established and getting the *type* of contact they sought.

The prevalence of welfare concerns

Serious welfare issues were raised in the majority of cases.

⁶ Information on the resident parent's position at the start of the proceedings was generally limited to whether they were opposing a particular type of contact or any contact at all. It was unusual for their views on the amount or frequency of contact to be known at this point.

- In 54% of cases (167 of 308) the resident parent raised concerns over serious welfare issues: domestic violence (34%); child abuse or neglect (23%); parenting capacity affected by drug abuse (20%), alcohol abuse (21%), mental illness (13%) or learning difficulties(1%); fear of abduction (15%). The proportion rose to 82% of cases (89 of 108) where the resident parent initially opposed any direct contact.
- In a further 27 cases there had been such welfare concerns in the past, although they were not raised as an impediment to contact in the sample proceedings, while in 41 cases there were past welfare concerns in addition to those being raised in these proceedings.
- Only 114 cases (37% of 308) were entirely free of serious concerns. Allegations of domestic violence at some point featured in half the cases (154).

Explaining the outcomes

Certain key factors were linked⁷ with the outcome in terms of whether there would be any direct contact and the type of contact although none was invariably determinative.

1. Whether the resident parent had raised serious welfare concerns.
 - 85% of cases ending in no contact involved such concerns compared with 81% with indirect contact; 73% with supervised visiting, 47% unsupervised visiting and 42% staying contact.
 - **But**, 60% of cases involving welfare concerns ended with staying or unsupervised visiting contact.
2. The position of the resident parent at the start of the case.
 - In 69% of cases ending with no contact and 76% of those with only indirect contact, the resident parent had opposed any contact (compared with 22% with staying contact).
 - **But**, 57% of cases in which the resident parent had opposed contact ended in direct contact, 32% in staying contact.
3. Whether there was any contact at the point the application was made.
 - In 46% of cases ending in staying contact there was some contact at the outset compared with none of those ending in indirect contact and 8% of those with no contact at all.
 - **But**, 65% of cases with no contact at the outset ended in direct contact.
4. The interval since the child was last seen.
 - 76% of parents who got staying contact had seen their child within the past three months, compared with only 19% of those who got indirect contact and 24% of those with no contact at all.
 - **But**, 55% of parents who had not seen their child for more than six months ended up with direct contact.
5. The age of the child at the end of the proceedings

⁷ All the factors cited were statistically significant (ie the association was unlikely to be a matter of chance).

- 8 of the 13 cases involving teenagers and 30% of the 49 with children between 10 and 12, ended in no direct contact compared with only 16% of those with children aged 5-9. This was linked to the greater likelihood that the court would take more notice of the opposition of older children. All the teenagers opposing contact had their views respected, compared with just over half of those aged 5-9.
- Where there was to be contact overnights usually involved older children. However 41% of children under 3 were to have overnight stays.
- Those with supervised contact tended to be the youngest (mean 3.9 years).

Why did some non-resident parents not achieve what they had sought?

Those who did not achieve direct contact

These outcomes were rarely the result of a court decision (7 of 61; 11%). Typically (39; 64%) non-resident parents formally withdrew, dropped out partway through, did not turn up to the final hearing or, while not consenting to the outcome, did not actively oppose it. Several did not cooperate with the court process.

We concluded there were at most 10 cases in which the outcome of no direct contact could be regarded as unfair to the non-resident parent in that there were no serious welfare concerns and they had cooperated with the process. Six involved children resolutely opposed to contact, four resident parents who might be seen as 'implacably hostile'.

Those who did not achieve the *type* of contact they sought

There were many reasons why *staying* contact was not achieved, from the contact parent's continuing use of drugs to the child's or the resident parent's refusal. There were some where contact restarted early in the proceedings and the contact parent may have decided not to 'rock the boat' by pursuing staying and others where achieving any contact had been so difficult they probably gave up the attempt and settled for what they could get.

Of these 20 cases (only one of which had a contested final hearing) there were two which were clearly unfair in terms of either process or outcome and three which were nearer that end of the spectrum. Three were patently not unfair, given the welfare issues. The rest were difficult to determine.

In nine cases the non-resident parent ended up with *supervised* contact having originally sought unsupervised or even staying contact. None went to adjudication. Only one outcome seemed to us to be unfair to the non-resident parent. In contrast six were clearly justified by the welfare concerns. In the two remaining cases there was insufficient information to make a judgement.

Those who did not achieve the *amount* of contact they sought

Thirty-five of those who achieved *staying* contact did not obtain everything they had sought. However all but eight were at least partially successful (getting either the frequency they wanted, duration, number of overnights, additional staying contact or overall hours). Indeed in 15 the total package probably represented a positive

outcome in terms of the actual amount of staying contact, which probably explains why these non-resident parents did not persist with their original demands.

Only eight cases went to a contested final hearing. While most tended to favour the resident parent on the narrow issues by then at stake, the picture looks rather different if one takes into account that in several cases the resident parent had originally opposed unsupervised contact. Non-resident parents may have lost the final 'battle' but they had generally won 'the war'.

The yardstick used to assess 'fairness' was the arrangements typically made in other cases and whether there were circumstances which might have explained the outcome. This suggested a maximum of 10 cases in which the outcome might be seen as 'unfair': five in terms of frequency; seven duration, and two the refusal of midweek overnights.

None of the eight cases in which applicants achieved unsupervised *visiting* contact but not the amount they wanted went to a contested hearing. It was impossible to tell why these parents settled for less. However it seems probable that since in seven the resident parent had initially opposed either any contact at all or unsupervised contact they decided to be content with the considerable amount they had achieved. There was only one case in this group in which the outcome might be considered to be unfair.

Those who failed to get a previous order or agreement made effective

Although the circumstances in these cases were very varied there were two common factors: the resident parent had voiced serious welfare concerns and/or the child was refusing contact. A careful analysis of the data revealed only two in which we considered the court should have been more robust. .

Are non-resident parents treated fairly by the courts?

The views of our solicitor interviewees can be summed up as follows:

1. The courts and Cafcass are not biased against non-resident parents, who generally get a fair deal. But,
2. Resident parents start off from a position of strength and it is easy for them to spin things out; some applicants give up because the process is too long and costly, both financially and emotionally;
3. Some resident parents and children remain persistently opposed to contact and the court's abilities to deal with this are limited, and
4. At the end of the day the court has to act in the interests of the children and sometimes that means the non-resident parent may lose out.

While generally giving a positive picture of the court process, our file data also indicated cases in which non-resident parents might have reason to feel aggrieved. However this is not because the courts are biased against them. It was clear from file, transcript, and interview data that courts, lawyers and Cafcass start from the principle that there should normally be contact and they make considerable efforts to bring this about. The fact that they are not always successful should not tempt us into accusing the system of favouring resident parents. Indeed it would be easier to make the opposite argument.

Solicitors, the judiciary and Cafcass officers saw the resistance of the resident parent and/or the child as the two main obstacles to achieving contact. Often these could be overcome; implacable hostility was considered to be quite rare. Our data supports this: there were only 10 cases in the sample in which non-resident parents ended up with no contact because of persistent hostility which did not appear to have any basis in the non-resident parent's behaviour. This works out at under 4% of the 275 completed applications by non-resident parents.

The resident parent's 'unreasonable' hostility is typically addressed initially through persuasion, with sterner measures coming into play if this fails. Most resident parents come round; a few do not. Eventually the non-resident parent gives up or the court, very reluctantly, has to acknowledge it can do no more with its current powers and resources. Dealing with the child's hostility is even more testing. It may be very difficult to get at the root of the problem. It also poses two dilemmas. First, how to balance the obligations to take account of a child's views and to act in the child's long term interests. Second, how long to persist trying to get contact going when this may expose the child to the damaging effects of uncertainty and conflict.

The family justice system is not perfect. There are issues about delay, resources and services which need addressing in order to meet the needs of the troubled minority of families who resort to litigation most effectively. Adults have a right to a process which is as fair as possible. It is crucial, however, to focus on children and give effect to the overriding principle of the Children Act, the paramountcy of the interests of the child.

