The Empathy Gap Section 11.2

11.2 The 2008 Study of Hunt & MacLeod

In 2008, a report was published by the Ministry of Justice Family Law Division, 'Outcomes of applications to court for contact orders after parental separation or divorce', authored by Joan Hunt and Alison Macleod (2008) of the Oxford Centre for Family Law and Policy, University of Oxford. The study was based on a sample of 308 files covering cases heard in all three tiers of family court which then existed: the family proceedings courts, the county courts and the high court. The criteria for selection were a) that there was an application for a contact order, b) that the applicant was a parent and the child was living with the other parent, c) that the application was made in 2004 (the latter requirement giving sufficient time for most cases to have ended in time for publication in 2008). Where more than one child was involved in a case, one child was selected (randomly) as the index child on whom the data to be collected would focus. Interviews were conducted with magistrates, solicitors and other legal advisors, and officers of CAFCASS (Children and Family Court Advisory and Support Service). Interviews did not address the specific cases studied. No interviews with parents were carried out.

Of the 308 sample cases, 60% involved a single child, mean age 4.5 years (mean age of all children 5.5 years). The vast majority of children (279; 91%) lived for most or all of the time with their mothers; with 23 (7%) living with their fathers. Four children had recently temporarily changed residence (three from their mother and one from their father) and two appeared to be in a *de facto* shared living arrangement.

That 91% of children were living with their mother at the start of the proceedings is of central importance. It will be seen that the operation of the family courts is such that the initial status quo is the dominant factor in influencing the final outcome. To pre-empt our conclusion, the bias in the outcomes for fathers may not be so much a bias in the operation of the family courts as it is the intrinsic bias in society, and hence a bias in the status quo at the start of proceedings.

The average age of the fathers in the sample was 34, but the range was enormous, from 17 to 58. Nine were under 21 at the point they brought the application. The mothers were on average slightly younger (mean 31) but again there was a wide age range (18-50), with 14 being under 21.

In over half the sample cases (162 of 308; 53%) the parents were not married to each other, with 116 (38% of 308) having cohabited. In almost half of cases where information was available, the interval between parental separation and the court proceedings exceeded two years (46% 116 of 255); just over a fifth (56; 22%) had separated within the previous six months. Bear in mind the significance of a delay of the order of years in the life of a child under 5.

Applications were almost all (289; 94%) brought by the non-resident parent, typically the father (265 of 289; 92%) although there were also 24 cases brought by non-resident mothers (24 of 289, 8%). More than half the non-resident parent applicants (156 of 289; 54%) were also seeking other orders, typically a parental responsibility order (107 of 156; 69%), with 49 seeking sole or shared residence (31%). It is worth emphasizing at this point the bias that already exists before the courts begin to operate. The *de facto* position is that about 92% of non-resident parents before proceedings commence are fathers. Fathers are on their back foot from the start, a position of disadvantage from which they will (statistically speaking) never recover.

Another disadvantage, and a most egregious one, lies behind the large number of 'people' applying for parental responsibility orders. None of the 107 applicants for parental responsibility orders will have been mothers, because mothers automatically have parental responsibility: but unmarried fathers do not. Entering the court proceedings without the initial benefit of having legally recognised parental responsibility can only put the father at a significant disadvantage, and this is a disadvantage encoded in law. But perhaps this is less significant than one might imagine, the report noting that,

> *'Somewhat surprisingly, there was no association between whether the non-resident parent got face to face contact and whether the parents had previously been married,*

nor even between whether they had ever lived together. Those who had been previously married, however, were more likely than those who had not to get staying rather than visiting contact (57% compared to 47%)'

One could turn this around, though, and conclude that being married, or having parental responsibility, does mean much in practice. Where information was available (in 286 cases), 38% of resident parents (109 of 286) were known to have been opposed to any face to face contact, with a further 15% (44) wanting supervised contact only, i.e., a total of 53% of resident parents were opposed to anything beyond supervised contact. An additional 11% of resident parents were resistant to 'staying contact', i.e., overnight stays with the non-resident parent. These statistics are very important because, as we shall see, the initial position of the resident parent is the most significant factor in the contact outcome for the non-resident parent.

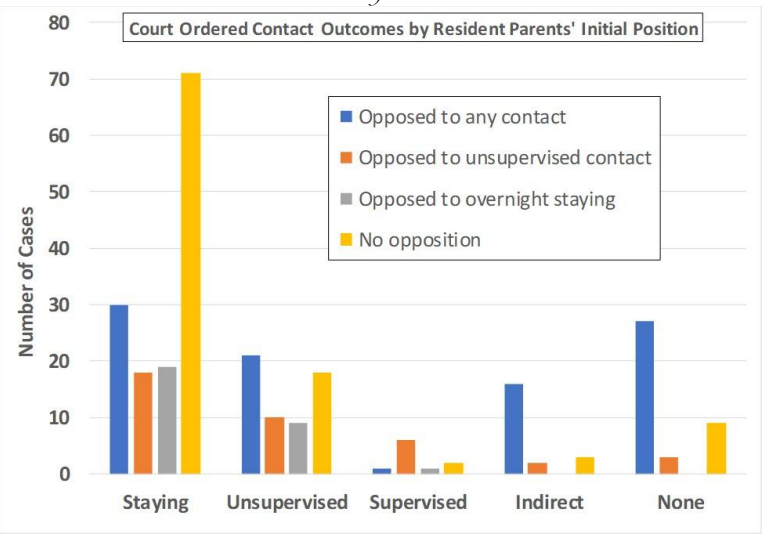
Consistent with other evidence (see chapter 10 and section 11.4), Hunt and MacLeod observed that, 'in exactly half the sample cases (154 cases of 308) allegations of domestic violence perpetrated by the non-resident parent had been made at some point'. Note the distinction between allegation and established fact, and recall that very few of these allegations will ever be subjected to meaningful investigation.

The outcomes in terms of court orders (as opposed to what may actually have transpired) were given by Hunt and MacLeod as follows. Where outcomes were known (286 cases), 49% resulted in "staying" orders, i.e., staying overnight at the non-resident parent's home; 20% resulted in orders for unsupervised visiting; and, 31% resulted in orders for supervised or conditional contact, indirect contact, or no contact at all. Indirect contact refers to contact by 'phone, letter, email, etc., but not face-to-face. No contact at all was ordered in 14% of cases. 95 resident parents initially opposed any form of contact at all (36% of those where this was known, 266). This was virtually equal to the number that did not oppose any form of contact (103, 36% of 286).

The number of cases in each outcome category are displayed in Figure 11.1, which distinguishes according to the resident parents' initial

position on contact. Where the court order was for no contact at all, or for indirect contact only, this resulted overwhelmingly from the resident parent being opposed to any form of contact. Applicants for a staying order by both sexes were comparably successful: 100 being granted out of 124 fathers applying, and 10 being granted out of 12 mothers applying. Hence, 91% of staying order applications were granted to fathers.

Figure 11.1: *Court Ordered Contact Outcomes by Resident Parents' Initial Position*

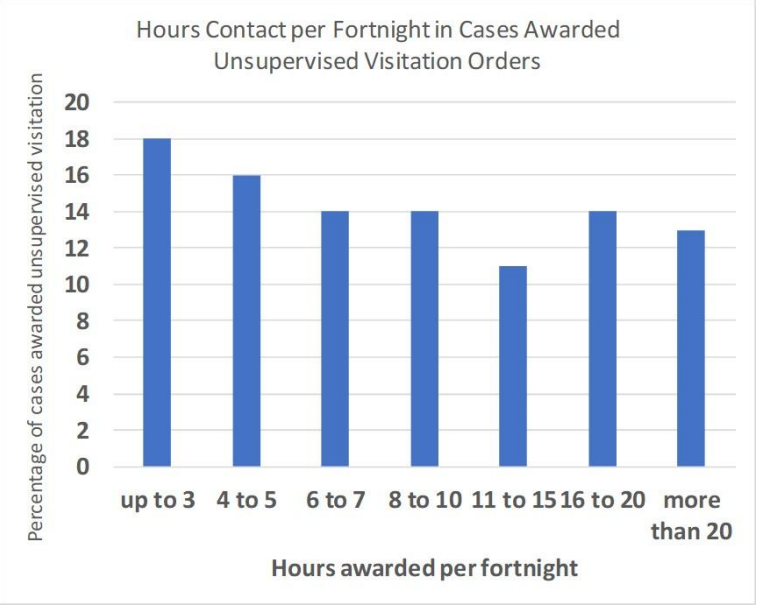


The ordered frequency of overnight staying was: at least weekly 30%; fortnightly 59%; monthly 11%. The number of overnight stays per instance was one (45% of cases) or two (43% of cases) or three (11% of cases). In these cases where staying contact was ordered, non-staying visits may also have been ordered, though in 79% of cases this was only one or two days per fortnight. In terms of total hours contact, staying plus non-staying, this amounts to between 25 hours and 72 hours (i.e., between 7% and 21% of the time) in 76% of cases. Recall that this is the time awarded by the courts, not necessarily what transpires.

Where the court order was for unsupervised visits, the number of hours contact per fortnight was far smaller than when staying contact was ordered, on average just 10.3 hours per fortnight. The range is broad, with any number of hours from just 3 hours per fortnight to 20 hours

per fortnight being almost equally likely (see Figure 11.2). Again recall, this is the time awarded by the courts, not necessarily what transpires. These are the so-called McDads, whose contact with their children is barely sufficient for a visit to the park and a meal in McDonald's once per fortnight. In terms of having a fighting chance of maintaining a meaningful long-term involvement in your child's life a staying contact order must be the objective.

Figure 11.2: *Contact Hours Awarded Per Fortnight in Cases Where Unsupervised Visitation Has Been Ordered (not overnight staying)*



In almost half of cases in which the non-resident parent had come to court to achieve some form of face to face contact (128 of 269; 48%) the outcome fell short in some respect of what the applicant had originally sought. 85 (32%) did not achieve the type of contact they had initially sought (56 failed to achieve face to face contact; 25 got visiting contact rather than the staying contact they had sought; 4 got only supervised contact). 43 (16%) achieved the type of contact sought but not the quantum desired, i.e., less frequent overnights or less frequent or shorter duration visits.

Two factors most influence the outcome for the non-resident parent. The first is the initial attitude of the resident parent, the second is whether there is a claim of a "serious welfare issue" against the non-resident parent. These "serious welfare issues" include allegations of domestic violence, child abuse, neglect, drug or alcohol abuse or mental illness. More than four in five cases which ended with no face-to-face contact involved such issues.

In contrast, where serious welfare concerns were not raised, 90% of cases (112 of 125) ended with either staying (65%) or unsupervised visiting contact (25%). Hence, whilst allegations of domestic abuse do not necessarily prevent staying or unsupervised contact, these results do indicate a strong correlation between failing to gain such contact and a suspicion of 'welfare issues' against the non-resident parent, especially allegations of domestic abuse. What the data do not reveal is whether the refusal by the courts to order face-to-face contact aligns with a genuine risk, or only a concern created by allegation. It is worth noting in that context that "findings of fact" in regard to allegations of domestic violence are relatively rare, as noted in chapter 10. To quote Hunt & MacLeod,

'Asked why finding of fact hearings are not listed more often both CAFCASS officers and solicitors largely attributed this to the courts' reluctance.

(Quote from Judge): We do our best to avoid them (findings of fact) if at all possible because they are totally unproductive and unhelpful, on the whole. It just raises the temperature. And how do you decide whether he hit her or not when it's her saying one thing and him saying the other?'

As regards the significance of the initial position adopted by the resident parent, this is illustrated by Figure 11.1. On the issue of the time it takes the courts to make an order, we read the following in Hunt & MacLeod,

'…few of our sample cases were resolved quickly. The average duration was almost 11 months. Over a third of completed cases (35%) took more than a year and 6% more than two, the longest case having been continuously before the courts for four

years…..the average duration of cases which had not completed was 35 months, the shortest having started 29 months previously, the longest 43.'

'Some of the longest cases in the study were those where the resident parent had been initially opposed to any contact but the outcome of the proceedings was that this was expected to take place. Over half these cases (54%) took more than 12 months….Where the resident parent raises concerns about the safety of the child with the non-resident parent then those concerns have to be investigated. Fifty-eight per cent of such cases took more than 12 months.'

Perhaps there has been an improvement on these times in the last ten years. The Family Court Statistics Quarterly, January to March 2018, indicate in the first quarter of 2018 a mean time from start to completion in Private Family Law of 26 weeks (median 20 weeks), (Ministry of Justice, 2018f).

However, it must be borne in mind that these times are only the time taken from the point of application to a first order. It is common for parental separation to have occurred several years prior to the application being made, as illustrated by Figure 11.3 (from Hunt & MacLeod's Appendix Table 6). In addition, in some cases, there may be later enforcement applications (see section 11.3 and Figure 11.4).

Figure 11.3: *Interval between Parental Separation and Application to the Court*