

The Empathy Gap, Section 11.4

11.4 The 2015 Study of Harding and Newnham

I turn now to the study by Maebh Harding and Annika Newnham (2015) funded by the Nuffield Foundation. This is the study which provoked the press headlines quoted at the start of this chapter. The study was based on a sample of cases which they describe as follows,

‘The research is based on document analysis of a retrospective sample of 197 case files from the County Courts. We examined case files from five different County Courts in England and Wales.....The sample was limited to Section 8 application cases which were disposed of by final order in a six month period between February and August in 2011.’

Here “Section 8” refers to the Children Act, (UK Government, 1989), and is the section which relates to child arrangement orders, parental responsibility orders, and associated orders. The authors selected just under half the relevant “Section 8” cases from the chosen courts over the six month period. They do not state how that selection was done, or claim that the sample is either representative or random. Instead they write, rather disconcertingly,

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

It is difficult to be certain what this ungrammatical sentence means, but it appears to admit that their sample is not representative. More disconcertingly, the authors appear to have selected cases on some undeclared basis. There are other reasons to suspect that this is the case, as we shall see.

Of the 197 cases selected by Harding & Newnham only 174 related to parents, and the rest of the report focuses on those. In common with other sources, Harding & Newnham note that 50% of cases involved

allegations of domestic violence (40% against father, 2% against mother, 8% against both). They further note that, of the 86 cases in which allegations of domestic violence were made, the new LASPO evidential requirements (see Table 10.1) were satisfied in 45 cases (52%). Noting that the LASPO requirements are minimal, this may have a bearing on the likely validity of the remaining allegations.

The sample of cases addressed by Harding & Newnham include at least 30 applications by mothers for sole residency, and at least 32 cases by fathers for sole residency (Harding & Newnham section 2.2). It is striking, and unexpected, that these two figures should be almost equal. Father's applications for sole residency were 18% of the total cases considered (32 out of 174), and mother's applications for sole residency were 17% of the total. One would expect a substantially greater number of sole residency applications from mothers, an expectation confirmed by Hunt & MacLeod's sample which included just 9 cases of fathers seeking sole residency (3% of 308), compared to 44 mothers seeking sole residency (15%). This suggests that Harding & Newnham's sample has an uncharacteristically large proportion of cases in which fathers were seeking sole residency.

Another indication that Harding & Newnham's sample may be unrepresentative relates to where the child was living at the time of the court application. Their table in section 2.6.1 indicates the child was with the mother in 126 cases (76%) and with the father in 39 cases (24%), ignoring the few indeterminate cases. This contrasts with only 9% of cases involving residency with the father at the start of proceedings in Hunt & MacLeod's sample.

This concern that the child's residence at the time of application may indicate the unrepresentative nature of Harding & Newnham's sample relates particularly to fathers' applications for sole residency. Of the 32 such applications, to quote section 2.8.5 of Harding & Newnham, 'Dad was the pre-application status quo primary caregiver in only 7 of the 32 applications by fathers for residence....However, in 20 applications the child was in the care of the father at the time of the application'. This is

an extraordinarily high proportion of residence with the father at the time of application (63%), compared with all cases (typically 8% or 9%). Clearly, these 32 are mostly self-selected cases in which the father has deemed he has an unusually great chance, or need, of winning sole residency.

It is worth clarifying how Harding & Newnham can claim that fathers were the “status quo primary caregiver in only 7 of the 32 applications by fathers for residence” when in 20 of those 32 applications the child was living with the father at the time of the application. This is explained simply by Harding & Newnham defining the “status quo primary caregiver” as ‘the main carer of the child for over one year’. The peculiar circumstance that only 7 of the 32 fathers are labelled as “status quo primary carers”, and yet 20 of the 32 cases involved children living with their fathers at the time of application, results from many children having very recently moved residence. Specifically we read,

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

Consequently, the claim made by Harding & Newnham that, “fathers’ applications for residence were mainly to change, rather than protect, the status quo or to reflect a recent change in care” could easily be misunderstood – largely as a result of the particular usage of the term “status quo”. In fact, 20 of these 32 applications by fathers for sole residency were in order to consolidate the arrangements which prevailed at the time of application, and so were not ‘mainly to change’ existing arrangements at all.

A further concern that Harding & Newnham’s sample may not be representative relates to the proportion of their sample which involved ‘serious welfare issues’ *excluding* domestic violence. More of these issues were raised against mothers than against fathers. Such issues were raised

in 79 out of the 174 cases (45%), of which 30 were against fathers (17%), 34 against mothers (19%), and 12 against both (9%). Harding & Newnham themselves note that, as regards the 32 applications by fathers for sole residency,

'What stood out from these cases was how many of the fathers' residence applications featured quite serious fears about the children's safety (i.e., from the mother), which were usually shared by social workers or healthcare professionals. If we look at the reasons given by the fathers in the 32 applications for sole residence, 8 mentioned local authority involvement, 7 claimed that Mum was incapable and 3 were made to protect the child from the mother.'

This appears to be an abnormally large proportion of mothers deemed to be a risk to their children in this particular set of 32 cases. Recall the press headlines following publication of Harding & Newnham's study in 2015, quoted above. The publicity release by the (Nuffield Foundation, 2015) gives a key conclusion as,

'There was actually no indication of any bias towards mothers over fathers by the courts; in fact we established there was a similar success rate for mothers and fathers applying for orders to have their children live with them.'

This claim is based on the number of orders made for sole residency, namely 40 for mothers and 24 for fathers (Harding & Newnham section 4.2). One could reasonably argue that these figures do not support the claim (40 is significantly larger than 24), especially in view of the number of *applications* for residency by fathers in their sample exceeding the number by mothers.

But the more serious objection is the apparently unrepresentative nature of their sample cases. The preceding observations have indicated that Harding & Newnham's sample, (i) included an abnormally large proportion of applications for sole residency by fathers, (ii) that these applications involved an abnormally large proportion of children who were already resident with their fathers at the time of the application, and, (iii) that there were an abnormally large number of mothers in these 32 cases against whom there were serious child welfare concerns.

Consequently, Harding & Newnham's highly publicized claim that, 'we established there was a similar success rate for mothers and fathers applying for orders to have their children live with them' must be ruled as lacking valid substantiation. The cases chosen appear to be highly uncharacteristic.