

# Enforcing contact orders: *problem-solving or punishment?*

Liz Trinder, Joan Hunt, Alison Macleod, Julia Pearce & Hilary Woodward



The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at [www.nuffieldfoundation.org](http://www.nuffieldfoundation.org)

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# 1. Summary

There are long-standing concerns that the family courts fail to enforce their own court orders in child contact cases following parental separation. This report presents the findings from the first major research study of enforcement applications in England and the first to explore the use of the new punitive sanctions available to the courts introduced by the Children and Adoption Act 2006. The research attempted to explain the puzzle of why the family courts so infrequently used punitive sanctions in these cases.

## Context

- For the last decade or more, policy-makers and father's groups had expressed concern that contact orders are being flouted and that the courts are not acting robustly in response. Part of the problem has been that the available sanctions – fines, imprisonment or change of the child's residence – may be impractical or harm the child. The Children and Adoption Act 2006 sought to address this by introducing a new sanction of unpaid work (community service) for a defaulting parent. This new sanction has been rarely used.
- In 2012 the Coalition government announced a consultation on possible further sanctions, including the withdrawal of passports and driving licences. In 2013 it decided against introducing further sanctions following the consultation.

## Study design

- There has been very little prior research on enforcement and none since the 2006 reforms. This research study was designed to address the gap in the evidence base on enforcement by addressing the key policy questions: why cases return to court for enforcement, whether the courts deal with these cases effectively or not and what additional powers or sanctions might be helpful.
- The study was based on case file analysis of a national sample of enforcement applications. The sample consisted of every 205 enforcement application made in England in March and April 2012, excluding 11 applications by grandparents. This was combined with a further 10 cases from November 2011 to October 2012 where the court made an enforcement order for unpaid work. The combined sample was therefore 215 cases where enforcement was sought and/or the court imposed enforcement sanctions.
- The cases were accessed through the electronic case records held by the Children and Family Courts Advisory and Support Service (Cafcass). The records for each case included the application form (the C79 Application to Enforce a Contact Order), reports to the court and any court orders made. The data includes the perspectives of both parents,

the children (if seen), safeguarding information (including police and local authority checks), numbers and types of hearings, the outcome of the case and any further applications.

### **The cases**

- Relatively few contact cases return to court seeking enforcement – about 1,400 each year - but they are difficult cases for both policy-makers and courts to address.
- As might be expected, most enforcement applications had been made by non-resident fathers in cases where contact arrangements had broken down completely. Most of the parties were returning to court for only the second time, with only a small minority of cases involved in multiple sets of proceedings.
- Very few of the original (or index) contact orders had never been complied with at all. Far more common were cases where contact had occurred following the index order but all contact had since broken down. Contact was ongoing but with partial compliance in a third of cases.
- There was a high incidence of safeguarding allegations, with concerns about domestic violence or child abuse or neglect in a third of cases. Around half of cases had involved a referral to the police and/or children's services at some point. A third of applicants had at least one conviction for drug/alcohol offences or crimes of violence/against the person.
- The public perception of enforcement cases is of implacably hostile mothers deliberately flouting contact orders and the courts failing to be robust and ensure compliance.
- Implacably hostile mothers do exist, but they are a small minority of enforcement cases. The most common type of case involved parents whose conflicts with each other prevented them from making a contact order work reliably in practice. The second largest group involved cases with significant safety concerns, followed by cases where older children themselves wanted to reduce or stop contact.

### **The approach of the court**

- We identified five distinct approaches to enforcement cases. The most common approach, used in nearly half of all cases, was one of co-parenting support that focused on helping parents address the conflict that was preventing contact from working. About a fifth of cases were tackled with a pure settlement approach that simply set out a new or revised timetable for contact. A protective approach based on risk assessment and management was used in a fifth of cases. One in ten cases were approached in a participatory or child-led manner based on eliciting and largely following the wishes of older children. Courts used a punitive approach in fewer than a tenth of cases.



### **Understanding the court's approach**

- In most cases the court appeared to adopt the 'appropriate' approach for the particular type of case. Thus conflict cases were mostly handled with the pure settlement or co-parenting support approach; child refusal cases were mostly dealt with by a participatory approach and the relatively few implacable hostility cases were mostly dealt with by a punitive approach. The only exception to this pattern were risk cases, only half of which were handled with a protective approach.
- Courts generally had some independent information about the case, ranging from a basic summary of safeguarding issues through to multiple welfare reports. There was limited use of non-Cafcass experts and very few fact-finding hearings to test allegations.

### **Evaluating the court's approach**

- The approach of the court to enforcement cases was evaluated on a range of variables: efficiency, robustness, safeguarding, children's participation and addressing conflict.
- Courts typically handled cases fairly speedily, with most cases getting into court quickly and finishing earlier than at index stage. Risk and refusal cases took longer to complete. A minority of cases experienced problems due to the non-cooperation of the parties. Both applicants and respondents could fail to comply with the court process, albeit for differing reasons.
- Courts were judged to be sufficiently robust in the great majority of cases, given that few cases involved implacable hostility. There were as many examples of courts being too robust as being not robust enough.
- The approach to safeguarding was less satisfactory, with only half of risk cases rated as having safeguarding issues dealt with appropriately. There was evidence that safeguarding issues were marginalised by a strong presumption of contact and by misinterpreting the issues in the case as mutual conflict or implacable hostility.
- Children's participation varied significantly. Many children were too young to participate but only half of children of eight years or more were consulted. There were examples where the final order may have been contrary to the reported views of children who were not involved. Where older children were consulted they often appeared highly influential.
- The courts attempted to address parental conflict by providing new or more detailed orders, recitals that urged parents to work together and by referral to the Separated Parent Information Programme (SPIP). The attempts to address conflict were in most cases quite modest and in others entirely absent. There were very few cases where children received any direct help or support despite widespread concerns about emotional abuse resulting from prolonged exposure to litigation.

## **Outcomes: compliance and relitigation**

- A year after the application, three-quarters of cases had been closed and there had been no further applications. A tenth of long-running case remained open. A further tenth of cases involved a new application to court. This relitigation rate appears modest and a possible indicator of success although we do not have information about how the cases which did not return to court were faring.
- The 9% of cases that did return to court were, again, mostly not implacable hostility cases. Instead most further litigation involved mutual conflict or safeguarding issues in cases where contact was still ongoing.

## **The use and effectiveness of unpaid work**

- Courts made very limited use of the new provision for unpaid work, primarily as few cases required a punitive approach. Courts made greater use of unpaid work as a threat – whether in the form of assessment or as a suspended order – rather than as a punitive sanction. The assessment-only and suspended orders did have higher success rates than the activated orders. Only one activated order achieved a positive outcome in ensuring compliance.

## **Compensation for financial loss**

- A fifth of cases included an application for financial compensation where there had been expenses incurred as a result of non-compliance. Many of these were for the court application fee of £200 although parliament had intended compensation to be targeted on travel and accommodation expenses. Few of the applications appear to have been successful although our records are incomplete.

## **Conclusions and implications**

- Adequate punitive sanctions are in place, are mostly used when needed and can secure compliance. It would be helpful for policy attention to refocus away from the few implacably hostile cases and towards finding sustainable, safe and child-centred solutions for the full range of enforcement cases.
- Ordering unpaid work: the finding underline the importance of a thorough assessment of the case and the reasons for non-compliance before ordering punitive sanctions. Courts could consider that assessment for unpaid work and suspended enforcement orders can work to secure compliance without having a negative impact on the child. If an enforcement order is deemed appropriate after thorough assessment, then sanctions

should be pursued robustly rather than allowing cases to drift or result in further non-compliance.

- Additional resources: The government's proposed triage system (MoJ 2013) could be an effective mechanism for handling enforcement cases but needs some adaptation to address the full range of enforcement cases.
- Some of the most difficult cases in the sample, including some of the 'implacably hostile' cases and some of the non-meritorious chronic litigants involved parents with mental health difficulties and personality disorders. In these circumstances a therapeutic approach may well be more productive than a purely punitive approach but at present there is a dearth of appropriate services, particularly outside London. Given the disproportionate cost of these chronic cases then some front-loading of investment is worth considering.
- The government's proposal for an enforcement-specific contact activity (MoJ 213) could be extremely useful although it will be logistically challenging given that cases are thinly spread geographically. It would be important not to restrict such an intervention to C79 cases but to consider the benefits for all high conflict cases or indeed applications to vary where the issue is non-compliance.
- Courts could make greater use of the existing parent education programmes (SPIP) or family counseling.
- There was a serious mismatch between the number of children described as at risk of emotional abuse and the number of children who were offered any form of support or counseling. This omission should be addressed.
- Safeguarding: The Cafcass Schedule 2 safeguarding report was a critical source of information for the court but is not strictly required within the private law pathway. We recommend that its use is mandatory in the proposed new Child Arrangements Pathway. Assessing risk is likely to be more challenging in a post-LASPO era where there may be no public funding for drug/alcohol tests and expert evidence
- There is evidence that courts are still failing to assess and then manage risk appropriately in all cases. More fact-finding hearings are likely to be needed to test evidence. Where serious domestic violence is found then referral must be to a suitable intervention such as the Domestic Violence Perpetrator Programme and not to an anger management course or to SPIP.

## **2. Introduction**

There are long-standing concerns that the family courts fail to enforce their own court orders in child contact cases following parental separation. Part of the problem has been that the available sanctions – fines, imprisonment or change of the child’s residence – may be impractical or harm the child. The Children and Adoption Act 2006 sought to address this by introducing a new sanction of unpaid work (community service) for a defaulting parent. But this new sanction has been rarely used.

In 2012 the Coalition government announced a consultation on possible further sanctions, including the withdrawal of passports and driving licences. To date, however, there has been no research on enforcement to inform policy-makers either about the nature of the cases or the approach taken by the family courts. The current study was designed to address this evidence gap by providing a profile of enforcement cases and evaluating how courts respond to applications. The research was based on detailed case file analysis of a national sample of 215 enforcement applications made in England in 2012.

### **3. Enforcement – the context**

#### **3.1 The enforcement problem**

It is well known that most parents decide their own parenting arrangements after family breakdown. Only about 10% of separated parents have contact arrangements that were made through the courts (Blackwell & Dawe 2003; Lader 2008). A fraction of those 10% seek enforcement of the court order. In 2011-12 there were fewer than 1,500 applications to enforce a contact order<sup>1</sup>. To put that in context, 38,405 children were the subject of a contact application in England and Wales in 2011<sup>2</sup>.

The issue of enforcement does, however, have a public and private significance far beyond its numerical size. Fathers' groups have consistently raised concerns about problems with enforcement, and have had a generally sympathetic response from the media and policy-makers. The House of Commons Justice Select Committee, for example, recently noted that the primary issue for non-resident fathers was not getting a court order in the first place, but having it enforced (2013: para 154). Indeed a common refrain amongst fathers is that orders are 'not worth the paper they are written on':

“the message given to [resident mothers] is ‘you can ignore a court order. They’re meaningless, because even when he’s got a penal order you can muck that up and do what you like.’”<sup>3</sup>

Any failure to implement a court order risks damaging public confidence in the family justice system and undermining the rule of law. Thus the Justice Select Committee (2013: para 154) considered that addressing the problem of enforcement was more likely to change public perceptions about the family justice system than introducing a statutory presumption on shared parenting.

#### **3.2 The constraints on the court**

One of the reasons why enforcement cases are so difficult to deal with is that the remedies available to address non-compliance give the courts little room for manoeuvre. The court may make further more specific orders about contact where the original order has been breached. If that option does not work then until recently the only alternative open to the

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<sup>1</sup> The precise number of enforcement applications is unclear. The Cafcass system recorded 1,383 applications for

<sup>2</sup> Judicial and Court Statistics 2011, London: Ministry of Justice, table 2.3.

<sup>3</sup> Data from non-resident father collected for a 2006 study on in-court conciliation (Trinder et al 2006).

court was to treat the breach as a contempt of court with the option to impose a fine or imprisonment for a maximum of two years. However, the 'nuclear option' of fine or imprisonment has been rarely used as the general belief is that it may well have a negative impact on the carer, and consequently the care of the children, and is unlikely to strengthen the child's relationship with the non-resident parent. As a group of family lawyers noted to researchers in 2008 (Hunt and Macleod, 2008:207), the powers available to the court for dealing with non-compliance were "of limited utility, being either impracticable, counter-productive or likely to have adverse effects on the child" Judges were therefore faced with a Hobson's choice between not enforcing a court order and thereby potentially harming a child's relationships and undermining the credibility of the court process or pursuing the existing sanctions and potentially damaging the care of the child and the child's relationship with the non-resident parent.

There is some suggestion from reported cases that judges have been more willing to use committal over recent years, although there is little hard data. Certainly, there has been some shift from what had been the leading case of *Churcharde v Churcharde* [1984] F.L.R. 635, CA where Ormrod LJ viewed committal as a "legalistic but futile remedy" that was "the last hope of the destitute" causing "appalling" damage. More recently in *A v N* [1997] 1 F.L.R. 533, CA the Court of Appeal has shown greater willingness to support committal, noting that "orders of the court are made to be obeyed. They are not made for any other reason". However, actually grasping the committal nettle is more easily said than done. In *Re L-W (children) (contact order: committal)* [2010] EWCA Civ 1253 Court of Appeal case, Munby LJ described the difficulties of handling these cases clearly, noting "the understandable reluctance to resort to such a drastic remedy as committal". The judgment aptly illustrated the dilemma in that whilst Munby LJ called for greater use of brief periods of imprisonment as an early 'warning shot', he nonetheless ruled out committal of the resident parent (the father) in the instant case.

One apparently increasingly common alternative to committal or fine is the use of transfer of residence or the threat of transfer through a suspended residence order (e.g. *Re A (Suspended Residence Order)* [2010] 1 FLR 1679. As with committal, there may be welfare or practical considerations that may limit the use of the tool. For example, the child may have little or any pre-existing relationship with the non-resident parent. Or the child may simply refuse to comply. In the recent case of *Re S (A Child)* [2010] EWCA Civ 325 the court aimed to end ten years of litigation by ordering transfer of residence but the teenage son refused to accept the decision. Transfer of residence remains therefore a "weapon of last resort" (*Re A (Children)* [2009] EWCA Civ 1141).

### 3.3 The Children and Adoption Act 2006: a new approach?

There have been attempts to give the courts more tools to tackle enforcement. The Children Act Sub Committee in its 2002 *Making Contact Work* report recommended a triple strategy of prevention, education and intervention, the latter including community service for non-compliant parents.

The Children and Adoption Act 2006 incorporated several of the CASC recommendations. The 2006 Act gave courts three tools to help *prevent* non-compliance. First, the power to direct parents to attend 'contact activities' or parent education to establish, maintain or improve contact with a child<sup>4</sup>. Secondly, the Act gave courts power to order the monitoring of contact orders for up to 12 months so that breaches could be identified early.<sup>5</sup> Thirdly, all contact orders were to have a warning notice automatically attached setting out the consequences of non-compliance. That removed the need to apply for a penal notice to be attached to an order before contempt proceedings could be initiated.<sup>6</sup>

#### **BOX 1: Tools available to the court after the Children and Adoption Act 2006**

##### **Preventative**

- All contact orders have a warning notice attached automatically setting out the consequences of non-compliance.
- Power to direct parents to attend 'contact activities' (or parent education) to establish, maintain or improve contact with a child.
- Power to order the monitoring of contact orders for up to 12 months so that breaches could be identified early.

##### **In response to non-compliance**

- Further more specific Contact orders
- Transfer of residence
- Fine or imprisonment for a maximum of two years
- Unpaid work (community service) of between 40 and 200 hours
- Compensation for financial loss

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<sup>4</sup> Under section 11A-G. The most common type of contact activity has been the Separated Parent Information Programme (SPIP). The SPIP is a four hour programme where both parents attend the course but in separate mixed gender groups. SPIP was well received by parents and professionals, although the early version of the programme had less impact on behaviour. See Trinder et al 2011 for an evaluation of the SPIP programme.

<sup>5</sup> Under section 11H(6)).

<sup>6</sup> Under section 11I. It is also possible to apply for a warning notice to be attached to orders made before 8 December 2008.

The 2006 Act also introduced new powers to deal with breaches. Courts could now order a parent to undertake 40-200 hours of unpaid work where it was established beyond reasonable doubt that a parent had failed to comply with an order – wilful non-compliance - unless it was shown on a balance of probabilities that there was a reasonable excuse for non-compliance (see Section 10.1 below). Courts could now also make an order of compensation where a parent can prove (on the balance of probabilities) a financial loss suffered as a result of a failure to comply with a contact order (see Section 11 below).

The courts have made extensive use of the new parent education courses as a preventative measure, with over 18,000 adults attending the Separated Parent Information Programme (SPIP) in both 2011-12 and 2012-13 (Cafcass Annual Report 2012-13). However, the 2006 Act has not resulted in a significant increase in the use of sanctions. Data from Cafcass suggests that only a very small number of enforcement applications resulted in an Enforcement Order for unpaid work (Table 1.1). Instead courts were most likely to make a new contact order in response to enforcement applications or applications were more likely to result in an order not being made, an order of no order or to be withdrawn. It is not clear whether the 30 residence orders identified in Table 1.1 were transfer of residence cases but even if they were then their use is as equally uncommon as an Enforcement Order.

**Table 1.1: Selected legal outputs of completed C79 applications, April 2011 to March 2012**

<i>Legal Output Type</i>	<i>Apr</i>	<i>May</i>	<i>Jun</i>	<i>Jul</i>	<i>Aug</i>	<i>Sep</i>	<i>Oct</i>	<i>Nov</i>	<i>Dec</i>	<i>Jan</i>	<i>Feb</i>	<i>Mar</i>	<i>Total</i>
Contact Order	25	26	30	24	23	26	24	23	45	26	25	34	331
Adjournment	13	20	16	14	17	27	26	28	15	15	18	16	225
Unknown Outcome			1	2	5	6	9	13	23	25	34	20	138
Order not made	6	7	13	8	11	9	18	8	9	7	5	10	111
Order of No Order	9	12	11	9	10	11	8	7	4	7	8	4	100
Withdrawn	5	10	6	10	9	5	6	11	7	7	9	6	91
Refused/Dismissed	4	7	5	1	7	3	8	2	8	6	3	4	58
Enforcement Order	2	4		2	8	1	2	3	1	3	2	3	31
Residence Order	3	3	4	4	1	3	1	2	2	2	1	4	30
[Other outputs .....]													
Total	77	107	110	100	117	111	122	125	133	123	130	128	1383

Source: Cafcass case management system



### **3.4 Another new approach?**

In June 2012 the Coalition government launched a consultation document on both cooperative (or shared) parenting and enforcement. The document *Co-operative Parenting Following Parental Separation* noted that existing sanctions, including the new unpaid work requirement, were “little used” (DfE 2012:para 6.2). It argued that a “tougher approach” was needed in such cases, hence a need to explore “additional enforcement sanctions” where there was “a wilful refusal” to comply with a court order (paras 6.1- 6.2). The consultation sought views on a range of proposals. These included extending to contact cases the enforcement measures that were being adopted in the child maintenance field: the use of curfew orders and the withholding of passports and driving licences (para 7.3). The government also proposed ensuring that cases were swiftly returned to court (para 7.1) and that the automatic warning notice on contact orders introduced by the 2006 Act be amended to include reference to the possibility that the court might order a transfer of residence (para 8.2).

It was this policy announcement that triggered the research on which this report is based. An application for funding was made to the Nuffield foundation in early September 2012 and the project began in early November 2012.

The government’s proposal on shared parenting was published in November 2012 but the response to the consultation on enforcement was delayed. The government noted that it had “listened to various concerns raised by a number of respondents and wishes to take the opportunity to reflect further on these before making final decisions. The Government will publish its response to that aspect of the consultation shortly” (DfE 2012:3). It is possible that the enforcement was delayed to allow early findings from this study to be conveyed to ministers. Indeed the team did brief civil servants about the emerging findings from November 2012 onwards.

The response to the consultation on enforcement was finally published in February 2013 (MoJ 2013). The Government announced that it had decided that it would be premature to introduce new sanctions even though the majority of respondents, albeit mostly individual fathers, were in favour of new sanctions. Instead the government proposed focusing on ensuring the early return of cases to court and developing a new contact activity for enforcement. The reason given for not introducing further sanctions was that a punitive approach was unlikely to be appropriate in many cases or help future cooperation between

parents (2013:14). The report also referred to gaps in the research about the use and effectiveness of existing sanctions that needed to be addressed before taking further action.

In March 2013 the Children’s Minister Edward Timpson confirmed the new direction of travel during the House of Commons Committee stage on the Children and Families Bill. At that stage the research team had produced an interim briefing based on analysis of 81 out of 215 enforcement cases (reproduced as Appendix A of this report). The Minister cited the briefing as support for the Government’s proposal to develop an enforcement-specific case assessment and intervention pathway *and* suggested that it demonstrated that the government had taken “a mature approach” to resolving the problem of enforcement.<sup>7</sup>

### **3.5 What do we know about enforcement in practice?**

As we completed this report, the Court of Appeal had recently handed down a judgment in *Re A (A Child)* [2013] EWCA Civ 1104. In that case the father had tried to establish contact over 12 years and 80 or more orders. The Court of Appeal found that the family justice system had systematically failed the father and child. The question for an empirical study is to assess how typical such a case is within the family justice system and how common it is for the system to fail so comprehensively.

There is already a fairly extensive body of research on enforcement of child support (e.g. Skinner et al 2007 and Huang 2009). There is also some literature on high conflict and entrenched contact cases (for a summary see Hunt & Trinder 2011) and a burgeoning, though methodologically problematic, literature on parental alienation (see Bala 2011 and especially Saini et al 2012). To date there has been very little research on the enforcement of contact orders and none at all on the use of the new provisions following the 2006 Act.

The two studies on enforcement of contact orders that are available are Rhoades (2002) and Hunt & Macleod (2008). The Rhoades study was a case file analysis of 100 enforcement cases. It was conducted in Australia and is now rather dated. The Hunt & Macleod study was a case file analysis of 308 English contact cases, that included 30 ‘enforcement’ cases. All of these cases occurred before implementation of the 2006 Act.

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<sup>7</sup> HC Deb 14 March 2013 col 293

The two research studies offer a fairly limited evidence base but they do raise questions about the reality of enforcement cases and how common cases like *Re A* are in practice. Both suggest that the cases are more heterogeneous than the rather one-dimensional picture of the 'wilfully obstructive' or 'hostile' mother might suggest. Rhoades (2002), for example, found that the great majority of Australian enforcement applications involved unworkable or outdated rather than flouted orders, with courts finding a breach occurring in only nine out of a hundred cases. Hunt & Macleod (2008) found a similar pattern in England. Fewer than half of the cases in that study had the previous order reinstated, with or without a penal notice. Half of the cases did not have the order reinstated and in ten of those the court decided that direct contact was not appropriate, either because of serious welfare concerns or child refusal. The researchers concluded that there were only two cases in which the courts could be said to be insufficiently robust.

However, the two studies have relatively small samples of enforcement cases and neither offers guidance on how the English courts are operating within the post-2006 enforcement framework. There is a need for systematic research to inform policy and public debate. The Cafcass data on case outputs (Table 1.1 above) suggest that the key questions are about how the courts are responding to applications to enforce orders, whether the new enforcement powers are being under- or, over-used and to what effect, and whether new powers might indeed be needed.

## 4. The study/methodology

This research was designed to address a gap in the evidence base on enforcement by exploring some key policy questions: why cases return to court for enforcement, whether the courts deal with these cases effectively, or not, and what additional powers or sanctions might be helpful.

The study was based on case file analysis of a national sample of enforcement applications accessed through the Children and Family Courts Advisory and Support Service (Cafcass) electronic records. A case file methodology was selected as the only means to generate a robust and representative sample of cases. The alternative of a retrospective survey of parents involved in enforcement cases would be likely to have a very low response rate.

The case file sample consisted of all 205 applications to enforce a contact order made in England in March and April 2012, excluding 11 applications by grandparents. As this sample of 205 included very few cases where the court imposed enforcement sanctions, we sampled all other cases for the year from November 2011 to October 2012 where the case outcome was recorded as unpaid work. This added a further 10 cases, giving greater insight into the court's use of punitive measures.

### 4.1 Research questions

The research was designed to address three main issues – the nature or profile of enforcement cases, the approach adopted by the court and the outcomes of the intervention.

#### 1. Profile of enforcement cases

There has been very little research about the nature of enforcement cases and our understanding has been largely shaped by popular images about implacably hostile mothers. The study sought to address the gap in empirical understanding and to test the accuracy of the popular perception of enforcement cases. This involved two main questions.

- *What is the demographic profile and litigation histories of enforcement cases?*  
This would include the litigation history (number/types of application), gender of applicant, number/ages of children, legal representation, date and nature of the index contact order (consent order or not, specificity), contact pattern (when and how arrangements have broken down, wholly or in part, continuously or intermittently), reason for the application (and any response).

- *To what extent do enforcement cases match the popular perception of the wilfully obstructive resident parent who persistently and deliberately flouts court orders?*

## **2. The approach of the court**

The key public and policy concern in this area has been that the courts are not being tough enough in the face of non-compliance with court orders. The study therefore set out to identify how the courts respond to enforcement applications and to evaluate the robustness of that approach. This element of the research involved five questions:

- *What processes or steps does the court go through for each case? How long does it take to process applications? What type of reports or expert evidence is available? In what proportion of cases is a punitive sanction considered?*
- *What orders does the court make? What are the initial outputs of the application, including change of residence, unpaid work etc? How do orders differ in specificity/contact pattern from the index order? How many hours are specified in a UWR?*
- *What is the approach of the court to enforcement cases? How can the approach be characterised?*
- *What appears to influence the approach of the court? What is the relationship between case profiles/assessment and outputs?*
- *How robust and how appropriate is the response of the court in each case?*

## **3. Outcomes of court interventions**

The third set of issues concerns what impact the intervention of the court has on cases. The research explored three main questions

- *What is the extent of compliance with the index or any subsequent orders?*
- *What are the rates of relitigation?*
- *How do those outcomes relate to particular court approaches?*

## **4.2 The nature and representativeness of the sample**

The cases were accessed via the Cafcass electronic records system. Using this system enabled the research team to draw a total sample of all applications made in the period in all English courts. This approach of drawing a total sample has a significant methodological advantage over attempting to select 'representative' courts when there may be a range of unobserved variables that may skew the findings.

The sample for the study consisted of two sub-samples: the main Application sample and a UWR sample.

### **The Application Sample**

The main Application sample consisted of 205 cases where the applicant claimed that a court order had been breached and had applied to the court for enforcement using the C79 form *Application related to Enforcement of a Contact Order*.

It is important to note that this definition will not pick up cases where the applicant considers an order is not being complied with but makes an application to *vary* the original order rather than apply for enforcement. Nor will it pick up those cases where an order is fully or partially frustrated, but the applicant does not seek enforcement, whether for lack of emotional or financial resources or considering that there might be limited prospect of success. We would have needed a different and much larger study to pick up these cases. However, whilst the C79 applications are not the only cases where there are compliance issues, they are likely to be the cases where the problems are most evident and as they are flagged as 'enforcement' they are likely to elicit the strongest or most robust response from the court.

In selecting months to sample we were guided by two considerations. First, the Cafcass Electronic Case File system was only rolled out nationally in late 2011/early 2012 and we wanted to allow sufficient time for this to bed in to ensure as many of our cases as possible were live on the system. Second, we wanted to sample from as early as possible to allow maximum time for enforcement cases to be completed and to allow for any subsequent litigation to be launched. We chose March and April 2012 as the months most likely to achieve the balance between maximum electronic availability and post-intervention time. We have no reason to believe that the applications lodged in those months throughout England were in any respect different from earlier or later months. The achieved sample of 205 C79 applications does therefore provide a very robust means of studying enforcement cases in England.

The team were originally supplied with a list of 216 C79 case numbers lodged between 1<sup>st</sup> March 2012 and 30<sup>th</sup> April 2012. This list was reduced to 205 eligible cases: two separate applications were consolidated and were treated as a single case, one case was not available on the Cafcass system and two cases had been miscoded and were not C79 applications. We had also made a decision prior to data collection that we would exclude applications made by grandparents as our focus was on parental disputes and that the inclusion of a small number of grandparent cases would confuse the analysis. There were 11

grandparent applications within the original list of 216 applications. Their exclusion left us with 205 C79 applications made by a parent in England in March/April 2012 (the 'Applications' sample).

### **The Unpaid Work sample**

The Applications Sample included all C79 applications to enforce an order, regardless of the court outcome. However, it was clear from the Cafcass records that the two month sample of C79 applications would include very few cases where the court had made an enforcement order for unpaid work. Given our interest in these cases we decided to draw a second sample consisting of all cases in England where an order for unpaid work was made between November 2011 and October 2012 – the Unpaid Work sample. The second sample was intended to enable more detailed analysis of the types of case where unpaid work was ordered and the relative effectiveness of unpaid work compared with other outcomes.

Cafcass provided the team with an initial list of 45 case numbers where the case outcome was recorded as unpaid work. On closer inspection it turned out that the bulk of these had been miscoded and were not in fact orders for unpaid work. In a few cases the court had ordered an assessment for unpaid work but did not go on to make the order. Eventually the list yielded 10 cases – seven where unpaid work was ordered and three where there was an assessment but no order. In addition, six orders for unpaid work and two assessments without an order were made within the sample of 205 application cases. Taking the Assessment and UWR samples together, we have data on 13 orders for unpaid work and five cases where the case was assessed but an order for unpaid work was not made.

### **4.3 Data sources: CMS and ECF**

The cases were accessed through electronic case records held by Cafcass in two linked systems: the case management system (CMS) and electronic case files (ECF). The combined records typically include dates of hearings, court application forms, Cafcass reports and court orders made in the case. The information available therefore includes the perspectives of both parents, the children (if interviewed), safeguarding information (including police and local authority checks), numbers and types of hearings and the outcome of the application.

It has to be acknowledged that the CMS/ECF system is administrative data collected from a Cafcass perspective. It is designed to facilitate and record Cafcass involvement during a

particular phase or phases of a case, rather than necessarily the entire lifetime of a case. The Cafcass files are far less likely than paper court files to include party statements or legal correspondence. There is a possibility, in particular, that the perspectives of respondents (typically resident mothers) may be less well represented in the data than applicants who have filed a C79. However, the advantages of accessing a total national sample rather than selecting a small number of 'representative' courts to visit to read paper files outweighed those disadvantages, not least as the reports on file summarized the positions of both parents.

The Electronic Case File system includes Cafcass-generated electronic documents in Word/PDF/e-mail form and third party documents scanned into the system as pdf files. The ECF is structured into 13 sections as follows<sup>8</sup>:

- Case information – details of parties and children
- Contact log (a detailed summary of all Cafcass involvement in the case ordered chronologically and continuously updated).
- Correspondence - all case-related letters, faxes and emails
- Case Plan prepared by Cafcass
- Risk and safety process – screening checks, risk assessments etc
- Reporting to court – including welfare reports, Schedule 2 safeguarding letter, letters to court to place on court file
- Direct work with the child / young person - drawings, letters, wishes and feelings reports
- Court orders - all orders and directions made by the court.
- Court papers - including applications and statements, Cafcass information from a previous case
- Information from other agencies e.g. experts, other agencies.
- Legal advice (from Cafcass legal)
- Further information.
- Work to First Hearing (WTFH) including C100 and C1A and C79 application forms

One of the strengths of the Cafcass system is that it is possible to access details of the previous and any subsequent proceedings that the parties had been involved in. Thus for all cases we were able to gather at least some basic information about the index proceedings (i.e. the original proceedings where the contact order was made) via the CMS and often the

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<sup>8</sup> Details are set out in the Cafcass Case Recording and Retention Policy  
<http://www.cafcass.gov.uk/pdf/Case%20recording%20and%20Retention%20policy%20FINAL2.pdf>



full details of the case were available in ECF. For all cases we were able to search quickly to see if there had been any further applications or contact with Cafcass after the enforcement proceedings.

#### **4.4 Data collection instrument**

The team used a specially designed data collection instrument of approximately 200 variables, including numbers and dates of hearings, family demographics, numbers and types of reports ordered, allegation of risk etc. The responses were entered directly into the statistics package SPSS.

The data collection instrument was developed during a pilot phase. To maximise coder consistency, during the pilot each member of the team independently rated the same three cases and then compared findings. Subsequently the list of 215 cases was randomly divided into four with each case assigned to one of the four data collectors (AL, JP, LT and HW). All four had considerable previous experience of coding from court files.

In addition to the SPSS instrument designed to capture quantitative data, a one to two page profile was drafted for each case. The case profiles were designed to provide an overview of the case, chronology of case events and summaries of reports and orders.

#### **4.5 Analysis**

The case file data mainly used pre-coded fields that were inputted straight into SPSS for analysis. Most of the research questions require mostly descriptive statistics with some basic bivariate analysis to explore relationships and differences.

Some of the research questions required the team to make subjective judgments about the nature of the case or the court's approach. These judgment calls were: the type of case, the court's approach, whether the court was sufficiently robust and whether the court dealt adequately with any safeguarding issues (see Sections 5.5, 6.2, 8.2 and 8.3). As these four questions were pivotal to the analysis, but were based on subjective judgements, it was essential that our approach was consistent. The team therefore set out criteria and definitions for each of the four coding judgments. Each case was then coded independently on the four variables by two team members: the person who had read the case and a second person who read the case summary. Where there was any disagreement between the researchers then the case was discussed by the whole team to reach agreement.

## **4.6 Ethical aspects**

The project involved access to highly sensitive and confidential material. Approval for the project was required and obtained from the Cafcass Research Governance Committee, the President of the Family Division and the Research Ethics Committee at Exeter University. All members of the research team were required to have a current enhanced CRB check before accessing the Cafcass system. All data collection took place on Cafcass premises using their secure systems.

The project did not involve contact with litigants or their children. The main ethical issue therefore was ensuring that cases could not be identified. We have therefore omitted some details in some of the case profiles, especially when describing the unpaid work requirement cases where numbers are low and cases are therefore more easily identifiable.

## **5. Profiling enforcement cases**

Much of the discussion about enforcement has focused on cases where a resident parent, typically a mother, refuses to comply with court orders and unreasonably and consistently blocks all contact or makes contact extremely difficult. In this section of the report we test whether or not this perception reflects the reality of the majority of enforcement cases. We start by describing the demographic features of the cases and outlining their past history of litigation. We then present a typology of four types of enforcement case, derived from in-depth qualitative analysis of the cases in our sample. The main message from this section of the report is that whilst the 'implacably hostile' mother case type does occur, it constitutes only a minority of cases. More commonly enforcement cases are characterised by mutual conflict, safety issues and children refusing contact, rather than the unreasonable resistance of one parent.

### **5.1 Who applies for enforcement?**

The great majority (86%) of applicants for enforcement were non-resident fathers. The remainder were non-resident mothers (9%), followed by resident mothers (2%) and 1% each of resident fathers, shared care fathers and shared care mothers. The predominance of non-resident fathers as enforcement applicants is not surprising. It broadly reflects the living arrangements of children post-separation where about 90% of children live with their mothers following separation or divorce (e.g. Blackwell & Dawe 2003; Lader 2008; Walker et al 2004). It also reflects the gender balance in the 10% or so of the separated/divorcing population who make contact arrangements via the family court where again about 90% of applicants for contact orders are fathers (e.g. Trinder et al 2005, Hunt & Macleod 2008). Interestingly, Hunt & Macleod (2008) had an identical proportion of non-resident father applicants in their sample of contact applications.

The Cafcass files also include a limited range of other demographic variables. The average age of the fathers in the sample was 38.4 years; slightly younger, 34.2 years, for mothers. Most parents were white (86% fathers, 91% mothers), with roughly equal numbers of black and Asian parents. Many parents lived relatively close to each other, the median distance being eight miles apart. The 215 cases involved 312 children, with 66% of the cases involving a single child. The average age of the 312 children was 7.63 years. This demographic profile is similar to the general profile of litigating parents (see, for example, Hunt & Macleod 2008).

The court forms and Cafcass database do not collect data systematically about marital status or income. A quarter of the parents had definitely been married but information on marital status was not available for a third of the sample. Our impression was that the sample was heavily skewed towards economically disadvantaged backgrounds.

## **5.2 What is the litigation history?**

The perception of enforcement cases is that the parties have been involved in multiple sets of proceedings over many years. Although this was true for some families in the sample, most families had had limited experience of litigation. In total 66% of families had been involved in only the index<sup>9</sup> and current enforcement proceedings. A further 30% had been involved in between one and three further sets of proceedings. At the other extreme, only 5% of the enforcement cases had been involved in four or more (with a maximum of eight) further private law children applications. Only 11% of families had been involved in a previous C79 enforcement application before the current enforcement proceedings, although some of the previous applications for the other cases may have been to vary contact in response to problems with compliance.

Relatively few of the cases, therefore, could be described as chronic litigation cases with repeated returns to court. However, our sample of enforcement applications does include more cases with repeated litigation (35%) than Hunt & Macleod's (2008) study of contact applications. In that study only 4% of cases had been involved in previous proceedings.

The degree of scrutiny and intervention that had occurred in the index proceedings was also highly variable. Out of 180 cases where there was enough information available, we rated 28% as 'routine settlement', that is where the case was dealt with in one or two hearings, a Schedule 2 safeguarding letter<sup>10</sup> but no welfare report and concluded with a consent order. This suggests that in a quarter of the sample the case at index stage appeared to present quite limited concerns or that the court's approach was somewhat cursory.

The remaining three quarters of the sample can be divided between limited and significant investigation by the court in the index proceedings. In 27% of 'limited investigation' cases there had been three or four hearings, a single s7 welfare report and most often a consent

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<sup>9</sup> By 'index' we are referring to the original proceedings where the contact order was made that the applicant is now seeking to enforce.

<sup>10</sup> A Schedule 2 letter is a short two to four page report prepared by Cafcass prior to the first hearing. The letter sets out a summary of safeguarding issues based on police and local authority checks and, where possible, phone calls with the parties.

order. The remaining 44% of cases were classified as 'significant investigation' with multiple hearings, more than one s7 report and concluding in a consent order or judicial decision. In all, 100 cases at index stage had a Cafcass s7 report (68 multiple issues, 17 single issue, 12 wishes and feelings and three s16A risk assessments). A further 20 s7 reports were requested from the local authority.

The level of reporting at index stage was therefore variable. It is worth noting, however, that a welfare report had been ordered in three quarters of cases, suggesting that the court had considered that there were safeguarding concerns requiring further investigation. By comparison, Hunt & Macleod's (2008) sample of contact applications included approximately the same number of cases with a welfare report (65% compared with 71%). Their sample, however, contained fewer cases where multiple reports had been ordered (29% compared with 44% in the enforcement sample). Our enforcement sample, therefore, was mixed in terms of apparent case difficulty but with a higher proportion of more difficult cases compared with a contact application sample.

### **5.3 When and where are enforcement applications made?**

Over four fifths (82%) of enforcement applications were freestanding applications brought after the previous (index) proceedings had been concluded. A fifth of applications therefore were brought whilst the index proceedings were still ongoing. An example of the latter would be where the applicant considered that an interim order was not being adhered to fully.

The speed at which a case returned to court for enforcement varied considerably amongst the 213 cases where we have information on both index and enforcement dates. Over half (59%) of enforcement applications were brought within 52 weeks of the original (index) court order for which enforcement was sought, including 15% of cases where the application was within the first three months. Another fifth (17%) were late applicants, applying between two and eight years after the index order.

Two-thirds (68%) of the enforcement cases were made in the county court, a third in the family proceedings court and only two cases in the High Court. Most enforcement cases (82%) were brought in the same court where the index order had been made, with limited transfer to a different level of court or sideways to a court in a different area. Further, only one case in the sample involved an appeal.

The 215 sample cases were very widely distributed across 110 different courts, indicating that most courts and judicial officers would have limited experience each year of enforcement applications. We consider the implications of this further below.

We also have information on the legal representation of the parties and children at index and enforcement stage. We are less sure of the accuracy of this information than any other element recorded on the Cafcass system. The information was typically garnered from the applicant's C79 form and therefore may underestimate the representation of respondents. More importantly, there was evidence from the court orders that the parties moved in and out of legal representation although it is unlikely that the Cafcass database was always updated to reflect those fluid patterns. We suspect therefore that there is a possibility of over-counting where parties were represented at application, lost that representation but were still recorded as represented throughout the proceedings.

That said, the level of recorded representation was lower at enforcement stage. At index stage 74% of applicants and 50% of respondents were recorded as represented. That compares with 63% of represented applicants and 54% of respondents during the enforcement proceedings.

In contrast, the data on the representation of children is entirely accurate as it records a core Cafcass activity. At index stage the children in 3% of cases were represented, similar to Hunt & Macleod's (2008) figure of 4%. At enforcement stage, however, the proportion of children who were separately represented tripled to 9% of cases.

## **5.4 What is the presenting problem for the application?**

All the cases in the sample presented with some form of problem about contact and compliance with the index order. The duration and extent of problems with compliance varied across the sample.

As Hunt and Macleod (2008) also found, cases where the index order had never been implemented in any form were rare. Only three of the 215 cases could be described as 'never compliant' where no contact had taken place following the index order (e.g. case #137 below). Far more common were cases where some contact had occurred following the index order but all contact had since broken down. These 'subsequent breakdown' cases represented 70% of all the cases in our sample. How long contact had lasted or how recently contact had broken down varied, but most applicants returned to court fairly quickly once

contact stopped. In over half (56%) of these cases contact had broken down just before/up to three months prior to the enforcement application.

**Case profiles: Never compliant**

*F had not seen his child, a toddler living with M since shortly after the birth. An interim order was made for contact supervised by the maternal grandmother. This never happened. F applied for enforcement after contact broke down. The Cafcass Schedule 2 letter indicated that there was some documentary evidence that F had damaged property belonging to M's family, was behaving aggressively and erratically and was possibly abusing drugs or alcohol. #137*

**Case profiles: Subsequent breakdown**

*Long lapsed contact: Toddler living with M. The index order provided that the parents agreed contact arrangements themselves. Contact had taken place for a short period when F got a new job involving weekend and night shifts. According to F he asked M for a couple of weeks off contact to enable him to settle into the new job but received no reply when he contacted her to make new arrangements for contact. M moved subsequently to a new address. There had been no contact for more than a year. #078*

*Recent breakdown: Primary school age child living with M. Contact had been taking place for two to three years but had broken down three months earlier. The trigger, according to F, was when M arrived at the handover point an hour late and without giving an explanation. F then texted M to say he would return the child an hour later. M arrived at handover an hour later than the revised time. There was a brief exchange where F reported that he called M "scum". M texted later that evening to stop contact. #172*

Just under a third (30%) of cases could be described as 'ongoing partial compliance'. In these cases contact had continued since the index order but there were occasional or recurrent problems with punctuality or with whole sessions being missed, including for significant events such as family weddings or festivals. The deviation from the index order ranged from very minor e.g. a ten minute delay in a phone call (Case #211) to significant departures such as where contact was repeatedly limited to daytime rather than overnight contact (Case #100).

In a handful of cases there was no evidence of non-compliance but applications were brought as a result of a misunderstanding about the terms of an order (e.g. case #009) or, for

example, where the applicant wanted to use the court process to send a 'warning' to the other party (e.g. case #147 below)

***Ongoing partially compliant***

*Missed contacts: Middle school age child living with M. Contact was ongoing in accordance with a 2011 contact order. F applied for enforcement saying M had refused contact on Christmas Eve and also tried to persuade the child not to go away with F on holiday at New Year. M said she was concerned about the number of applications F was making, that the father refused to communicate other than by text, and that the child was spoilt by the father who could and did spend a lot of money on him. CAF/CASS reported their concerns about the use of the Court's time and especially the impact of the ongoing conflict on the child's emotional wellbeing. #042*

*No staying contact: Very young parents of a toddler. Staying contact had started according to the index order but was then limited to daytime only contact by the resident M. F had previously made a referral to Children's Services alleging the child was unclean and unkempt and that M was neglecting the child's basic needs. M said that staying contact had since resumed after breaking down briefly following concerns about differences in parenting practices, including toilet training. She was also concerned about F's possible cannabis use following an earlier positive test. #100*

***Case profile: 'warning shot' application***

*Two eastern European parents. Two children, 6 & 11, with M. The index order provided for staying contact. The enforcement application was made three months later. F stated that contact was taking place but he was making the application as M had not initially complied with the order and he wished to have an enforcement order in case she changed her mind in future. M denied that she was making contact difficult and said that F was manipulative and controlling. She said she had facilitated contact but F was unreliable and kept changing contact plans on short notice. She claimed that F was abusing alcohol but that F had told the children not to talk about it otherwise F would cease having contact. #147*

Not surprisingly, it was the resident parent who was said to be blocking all (62% of cases) or some (34% of cases) contact (n=212). However, in 9% of cases the non-resident parent was alleged to be refusing to return the child(ren) from all or some contact. In 49% of cases one or all the children were reported to be refusing some or all contact. That is a higher level of child refusal than Hunt & Macleod's (2008) study where a quarter of children were opposing contact.



The case studies above highlight the salience of child or adult safety issues as one of the factors in the dispute. Previous research on litigating cases has underlined that these concerns are common and are often implicated in children disputes (e.g. Rhoades 2002; Hunt & Macleod 2008; Trinder et al 2006;).

In our sample concerns about child or adult safety were raised by one or both parents at some point in 75% of cases (n=200 where information was available for both index and enforcement stages). In 63% of cases these concerns were raised at both index and enforcement stages, 8% at index stage only and 8% at enforcement stage only. In addition to the 75% of cases where concerns were raised in the case, a further 6% of cases had safeguarding concerns but these were not an issue in the case. Only 19%, or a fifth of cases, had no safety concerns at all.

The most common concern reported by parents was domestic violence, reported in a third of cases at index and enforcement stages (Table 5.1). Concerns about child abuse, substance abuse and mental health issues were also common and were raised in nearly a fifth of cases.

**Table 5.1: Incidence of safeguarding issues at index and enforcement stages**

<i>Safety concern raised by one or both parents</i>	<i>Issue in case at index %</i>	<i>Issue in case at enforcement %</i>	<i>Issue in case at both stages %</i>	<i>N=</i>	<i>Hunt &amp; Macleod (2008) %</i>
Domestic violence	48	32	30	176	34
Child physical or sexual abuse or neglect	30	31	23	175	23
Alcohol abuse	21	18	16	174	21
Psychiatric illness or personality disorder	20	18	16	173	13
Drug abuse	16	16	13	174	20
Abduction	6	6	3	174	15
Learning disability	2	2	1	173	1
Emotional abuse (including impact of litigation raised by professionals)	36	46	12	170	-

Note: table includes percentage of cases where information was available for both stages

Table 5.1 also indicates that concerns were typically sustained over the full course of a case, with little difference between rates of concern-raising at index and enforcement stages. There are two exceptions to that. First, the incidence of domestic violence concerns did drop from 48% of cases at index to 32% of cases at enforcement although it remained the most common parental concern. The other exception is the emotional abuse of children, which was raised as a concern primarily by professionals to draw parental attention to the impact of continuing litigation on children. For some reason these concerns were not raised or recorded at both stages in many cases. However, as concerns about emotional abuse were raised in high numbers at index and enforcement stage then cumulatively a parent or professional were known to have raised concerns about emotional abuse in 89% of cases (n=170).

The final column of Table 5.1 includes the comparable figures from the Hunt & Macleod (2008) study of enforcement applications. The degree of similarity about the prevalence of concerns between the two studies is quite striking. The only issue where the two studies depart from each other is on the lower incidence of a fear of abduction in the enforcement study and even there the difference is relatively small.

The extent of safety concerns is also reflected in reports to the police and children's services. In 52% of cases one or more incidents had been reported to the police at either index or enforcement stage. In 44% of cases there had been at least one referral to children's services at index or enforcement stage or the family were known to children's services.

There was also a high rate of convictions amongst the parents, particularly amongst applicants. In all 39% of applicants had at least one conviction of some kind, whilst 36% had a conviction for drug/alcohol offences or crimes of violence/against the person. Further 8% of respondents had at least one conviction and 7% a drug/alcohol or crimes against the person conviction. Whilst the rate of convictions appears high, it is also very likely an underestimate of the convictions amongst the sample: we did not include a 'convictions' variable in our initial analysis as we had not appreciated how common convictions were amongst this population.

The sample population therefore had a high incidence of safety concerns, involvement of police and children's services and of criminal convictions. This does not mean, of course, that allegations or concerns would be substantiated or, even if so, that they would be deemed to provide a reasonable excuse for non-compliance with an order. What it does suggest, however, is that as a whole the sample includes significant numbers of cases with difficult and troubling issues and backgrounds.

## 5.5 The main types of enforcement case

The aggregate data provides a very useful indication of the overall level of difficulties within the sample, but is less helpful in understanding how cases are similar or different from each other or what cases are really about. The research team therefore developed a typology of the main types of case. This was done by a process of constant comparison whereby we began by identifying a small number of cases that seemed to share similar characteristics. This small group was then compared with a group of contrasting cases as a means to isolate the core features of each case type. We went through this process with all 215 cases and eventually established that there were four main types of case. The final step was to allocate each of the 215 cases to one of the four case types. Each case was independently rated by two different members of the team, (including the person who had read that particular case), and the results compared. If there was any discrepancy the case was discussed in a team meeting to arrive at a consensus. Most cases were readily allocated to a case type, whilst some were more difficult. Three cases could not be categorised due to a lack of information on file.

The essential features of the four case types are set out below.

**Conflicted:** intense competition or chronic levels of mistrust between the parents meant that they were unable to work together to implement the court order. Both parents had some responsibility for the conflict. Parents were unable to negotiate relatively insignificant changes to contact arrangements to accommodate illness, family events etc. Minor incidents became flashpoints. Everyday challenges became insurmountable problems that, given lack of trust or communication, could not be resolved without external intervention.

**Risk/safety:** one or both parents raised significant adult and/or child safeguarding issues, most commonly domestic violence, child physical abuse and neglect, alcohol and drug abuse or mental health issues. The risk cases were not the only ones with safeguarding issues, but they were categorised as such because it was the safety concerns that were the primary driver of the case, not parental conflict and competition.

**Refusing:** an apparently appropriate and reasoned rejection of all or some contact by an older child (10+). The refusal appeared to reflect problematic behaviours/lack of sensitivity by the non-resident parent. The resident parent may have been neutral or negative about

contact but the child's decision appeared genuinely to be their own opinion rather than a simple reflection of the resident parent's position.

**Implacably hostile/alienating:** sustained resistance to contact by the resident parent. The resistance appeared unreasonable and was not a response to significant safety concerns or the problematic behaviour of the other parent. In some cases the resident parent may have influenced the child so that the child refused all contact but without the well-founded reasons that characterised the refusing cases.

Somewhat surprisingly, given the public discussion of enforcement, we classified only nine cases - 4% of the total - as 'implacably hostile/alienating'. Far more common were the 116 cases (55%) we classified as 'conflicted', followed by 66 'risk' cases (31%). Twenty-one cases (10%) were classified as 'refusing'.

We describe each of these case types in more detail in the following sections.

### **Conflicted cases**

The conflicted cases were by far the largest grouping with 116 cases or 55% of the combined sample of applications and UWR cases. This group was characterised by ongoing conflict between both parents, with each bearing some responsibility for the problems with contact and the inability to implement the court order. Whilst safety issues and child refusal were raised in some of these conflict cases, our reading was the primary driver was parental conflict. Indeed these cases were less likely to involve safety issues than other cases in the sample. For example only 16% of conflict cases raised domestic violence issues at the enforcement stage compared with 32% of the whole sample. Similarly, only a fifth of 'conflict' applicants had a relevant conviction compared with more than a third of the whole sample. Contact was also rather more likely to be ongoing in these cases than the whole sample (37% compared with 31%).

There was some variation amongst this large grouping in how conflict was expressed or manifested itself. In some cases the conflict appeared to take the form primarily of an ongoing competition between the parents for the child's time or affection. The problems with enforcement tended to involve minor deviations from an order rather than large-scale departures or the complete breakdown of contact. These cases typically involved, though were not confined to, middle-class parents. The safety issues raised tended to be minor bumps and scrapes although these cases were ones where professionals often raised

significant concerns about the emotional abuse of children who were clearly caught up in the parental conflict.

**Competitive conflict cases:**

*Case #106. Pre-school child living with M. Highly detailed index order. F applied for enforcement several months later following one or two instances where a contact session was missed. Contact was ongoing otherwise and the court characterised the problems as primarily about parental conflict. Cafcass described the parents as in “intense competition” for the pre-school child, with the competition reflected in the child’s everyday life including bedroom decorations (Hello Kitty vs Peppa Pig). The child was reported to be developing a stammer, linked by Cafcass to an acute awareness of the conflict and that it was centred around her. F had recent convictions but no safeguarding issues were raised other than professional concerns about the impact of the conflict on the child. The case concluded with a two page consent order specifying in minute detail how handovers would occur, including how the child should move (or run) from F’s car to M’s front door.*

*Case #031. Very acrimonious separation with numerous reports to the police and a non-molestation order preventing F contacting M. The index order was a shared residence order (SRO) setting out an approximate 60/40% shared time arrangement for the three children, aged between 5-9 years. The arrangement worked for eight months and then F applied to enforce the order stating that M was blocking weekend contact. M made a cross-application to vary the order, claiming that the older child would like more contact but the younger ones would like more flexibility in the arrangements and to be able to phone each parent from the other’s home. Cafcass reported the children wanting to please both parents and hating the conflict. The court ordered that the SRO would continue with further detail setting out further contact for the oldest child.*

A second and probably larger sub-group of conflict cases appeared less focused on maximizing each parent’s time with the child and much more about chronic mistrust and an inability to negotiate everyday challenges or changes in circumstances to put an order into practice over the long or short term. These ‘fragile/dependent’ cases appeared reliant upon or required legal or social work assistance to manage relationships in the absence of effective communication or trust between the parents. The cases could have safety issues, sometimes quite significant ones, in the background but they did not appear to drive the case. Rather concerns and criticisms about the other’s parenting appeared to help fuel the conflict. The following case studies provide examples of the fragile/dependent cases. The

first illustration is of a case where the inability of the parents to communicate prevented the full implementation of the index order. The second profile is an example of the quite common occurrence where the parents were unable to discuss or address relatively minor incidents leading to contact breaking down, often in the context of cross-allegations of poor care to children's services or the police.

***Fragile/dependent cases:***

*Case #154. The two parents now lived at different ends of the country and travel for contact required plane flights. The index order provided for fortnightly weekend contact with F in M's home town with additional holiday contact to take place at F's new location. The holiday dates were not specified in the index order and were to be agreed between the parties. A review was planned for nine months hence. Weekend contact was implemented and appeared to be working. The holiday contact did not take place as F said M failed to provide enough dates or to confirm dates in time to allow the booking of flights. F applied for enforcement and financial compensation for missed flights. M says F was making unreasonable demands for holiday contact without considering the needs of the child or his half-siblings. The Cafcass officer noted that the parents could not resolve the issue themselves.*

*Case #159. Separated parents of a six year old living with M. F appeared to have learning disabilities. He had several previous convictions, but not child related. There were protracted proceedings at index stage with multiple reports. F was assessed as able to meet the child's needs so long as he had support from his partner. M was reluctant for this to occur. Shortly after the conclusion of the index proceedings M stopped contact on the grounds that F had a new dog that had scratched the child. M was insisting that F got rid of the dog. F applied for enforcement. He also made allegations to the police and children's services that M was using cocaine. At the second hearing the court made a consent order reinstating the contact timetable set out in the index order, but with handover via the maternal grandmother. The recitals to the order included a number of messages directed at each parent. F was noted as not pursuing the allegation of drug misuse, and that he would maintain careful supervision whilst the child was in the presence of the family dog. M was recorded as accepting that contact should be reinstated forthwith. Both parents were told that they should discuss any child welfare concerns with each other rather than taking the matter straight to the police, children's services or the court..*

## **Risk/safety**

The second largest group were the 66 cases or 31% of the total that we classified as risk/safety. These cases were those where either parent raised significant adult and/or child safeguarding issues and where the case largely hinged around those allegations and concerns. In contrast to the relatively minor issues raised in some of the conflict cases, the safeguarding allegations in these cases were more serious. Just over three quarters of the risk cases had had some police involvement at some stage of the case compared with half of the full sample, and 58% of cases had had some contact with children's services compared with 45% for the sample as a whole. Applicants were more likely to have at least one conviction (68% compared with 39%). The most common safety issues raised at the enforcement stage were domestic violence (58% of risk cases), followed by child abuse (46%) and then drugs, alcohol and mental health issues (each 33% of risk cases). It is important to note, however, that few of these allegations were tested in court with a fact-finding hearing, so that we are not able to say how many allegations would be substantiated.

Most typically in these cases allegations about safeguarding issues were put forward by the resident parent/respondent as grounds or justification for not complying with the index order. In some of these cases, as described below, the resident parent was alleging that there was evidence of new safeguarding concerns following the making of the index order. In others there had been no further incidents or change in circumstances but the resident parent considered that the index order was unsafe. In some the court did re-examine the evidence.

### ***Risk/safety cases: further incidents***

*Case #155. Pre-schooler living with M. F had convictions for theft, drugs and assault, including against M. Protracted index proceedings resulted in fortnightly supported contact. M failed to comply and F sought enforcement. Enhanced police checks revealed incidents of ongoing intimidation by F and his family resulting in a harassment order. The court made no order regarding enforcement and contact resumed at a contact centre.*

*Case #040. Middle school age child living with M. F had a history of alcohol abuse, reflected in undertakings provided in the index proceedings five years earlier. Contact had been ongoing but broke down following a recent episode of the child having to call M to collect her as F was drunk. F had also recently assaulted M in front of the child. F refused to have supervised contact. Unsupervised contact was re-established by the parents but on a visiting basis only. F sought enforcement of staying contact. Alcohol tests were ordered. There was a further incident when F arrived drunk in the morning to collect the child by car and the child refused to go. F did not undergo the alcohol tests and withdrew the application.*

**Risk/safety cases: re-examination of the index order**

*Case #023. Primary school boy living with M at a concealed address. Both parents of middle eastern origin. M alleged a history of threats and domestic abuse, including threats to abduct child to F's home country. Child was made a ward of court. A series of contact orders provided for fortnightly contact at a contact centre, with detailed provisions for who left first, F to pay M's travel expenses. F applied for enforcement in the continuing proceedings, after M had missed four contact sessions (not consecutive) over four months. Around the same time, the designated contact centre was closed and contact had to be relocated which caused a further hiatus in contact. A Children's Guardian was appointed. F rang CAFCASS frequently and hectoring staff. A fact-finding hearing was ordered at the Guardian's suggestion. This found M's allegations proven in nearly every respect. A psychologist's report indicated that contact was unlikely ever to progress beyond being supervised in a contact centre and suggested limiting it to postbox contact.*

**Refusing**

Twenty one or 10% of the cases were classified as 'refusing'. These were cases where it appeared that the non-compliance with an order was primarily driven by one or more older children. In these cases the position taken by the children appeared to reflect the child's own views of the situation, and in particular, a balanced appraisal of the non-resident parent. It did not appear to be a merely a reflection or echo of the hostile views of the resident parent or the child's attempt to limit or avoid ongoing parental conflict about contact. In these cases the resident parent may indeed have been negative about the other parent but that negativity was not the primary influence. It appeared instead to be the problematic behaviours or lack of sensitivity of the non-resident parent that was most influential. We therefore distinguish these refusing cases from the implacably hostile/alienation cases considered below.

**Refusing cases**

*Case #170. Two early teenage children. Lengthy index proceedings against background of F's domestic violence and drinking. Index order provided for fortnightly staying contact. The children were increasingly reluctant to attend. F sought enforcement which the Court initially considered ordering. The children subsequently refused all further direct contact after they witnessed a physical assault by F on his new partner. Cafcass supported their position, noting F's minimization of violence. Indirect contact was ordered.*



**Refusing cases, cont.**

*Case #098. Nine year old boy living with M. Both parents middle eastern. Domestic violence background. Ongoing proceedings for four or more years. The index order provided for Friday-Monday fortnightly contact but was often cancelled due to child reluctance. F applied for enforcement. The court initially threatened M with unpaid work. A wishes and feelings report then found that the child would like to reduce contact for good reasons – F insensitive, having to share bed with F, and missed M over three nights. By the next hearing overnight contact had stopped completely because the child was refusing. He was willing to have visiting contact. A subsequent Section 7 supported visiting contact only three times weekly.*

**Implacably hostile/alienating cases**

In nine (4%) cases the primary problem appeared not to be mutual conflict or safety issues but the resistance to contact of the resident parent. These cases were characterised by behavior that was deliberate, unreasonable and almost entirely/solely the responsibility of the resident parent in the face of a non-resident parent who appeared to show an appropriate and persistent commitment to the child. Implacably hostile cases involved a repeated pattern of behaviours over a period of time rather than a single or occasional problem with contact. In some instances the hostility to contact of the resident parent had influenced or was beginning to influence the attitude of the child to contact, particularly younger children who were reluctant or refused to have contact. It is worth reiterating that whilst these cases figure large in public debate they were rare within our sample.

**Implacably hostile/alienating cases**

*#142. Pre-school child living with M. The index order provided for staying contact. F sought enforcement immediately as no contact was taking place. M made repeated allegations about assaults by father and his family. The police investigated all allegations but none were found to be substantiated. M's behavior was increasingly erratic, including taking the child to hospital repeatedly claiming harm by father. The court made an order for unpaid work for repeated breaches. A change of residence was under consideration.*

*#109. Index order for staying contact with six year old with M. Unrepresented M did not cooperate fully with the court process. Contact broke down immediately triggering an enforcement application. The same judge threatened transfer of residence if M did not comply. Further contact agreed. F later contacted Cafcass to say contact was being undermined.*

***Implacably hostile/alienating cases cont.***

*#011. Ten year old living with M. Long history of litigation. Contact was very intermittent with the child saying she did not want contact because F made her spend time with his new partner's child, contact was boring etc. F applied for enforcement within existing proceedings. The Cafcass officer thought that the child was being influenced by M against contact. Several attempts were made to set up contact but the child refused or ran off. At a meeting between F and child the child refused to face F when taken into room with him.*

## **5.6 Summary**

As might be expected, most enforcement applications had been made by non-resident fathers in cases where contact arrangements had broken down completely. Most of the parties were returning to court for only the second time, with only a small minority of cases involved in multiple sets of proceedings.

Contrary to public perceptions and our own expectations, very few of the cases involved implacably hostile parents who unreasonably refused all contact. Instead the majority of cases involved two parents involved in mutual conflict over their children, followed by cases where there were significant safeguarding concerns that were impacting upon contact and by cases where older children wished to stop or reduce contact.

## **6. The approach of the court**

In the previous section we noted that the enforcement cases in the sample had significant problems with contact, although few conformed to the classic image of the implacably hostile mother. In this section we explore how the courts respond to these applications for enforcement.

### **6.1 The non-punitive orientation of the courts**

One of the most powerful themes emerging from the analysis of the cases was that courts overwhelmingly adopted what we describe as a problem-solving rather than a punitive orientation to cases. In the great majority of cases the focus appeared to be less on analysing why contact had broken down and whether and how to punish the wrongdoer and much more on how to get contact restarted and moving the case forward and out of the family justice system.

As we discuss further below, this problem-solving, future-oriented approach is typical of how the family courts approach contact cases in general. It appears that the approach is extended to enforcement cases as well.

Thus, although each case had been brought on the basis of alleged non-compliance with a court order, there appeared to be relatively few cases, as least from the evidence on the court orders, that the court had sought to establish whether a breach had occurred and, if so, if there was a reasonable excuse for it. Only 14% of orders recorded whether or not there had been a breach of the index order. We did see terms such as 'breach', 'reasonable excuse' and 'sentencing' in some orders but it was in stark contrast to the usual phrasing of orders that focused on setting out the details of contact timetables and finding ways to improve parental cooperation and communication.

The non-punitive approach was reflected strongly in the outcome of the applications. Only 3% of the March/April enforcement applications resulted in an order for unpaid work (Table 6.1). By far the most common response was to make or amend a contact order, in other words to try to get contact restarted. Otherwise, nearly a third of cases of cases resulted in the application being withdrawn, dismissed, an order not made or an order of no order.

**Table 6.1: Outcome of applications by Application, UW and full samples, percentages**

	<i>Application sample (n=205)</i>	<i>UW sample (n=10)</i>	<i>All cases (n=215)</i>
Contact order made or amended	63	20	61
Enforcement order/UWR	3	70	7
Transfer of residence	1	-	1
Order not made	5	-	5
Case dismissed	18	-	8
Order of no order	2	-	1
Withdrawn	15	10	14
Not known	4	-	4
Total	100	100	100

## 6.2 Typology of approaches to enforcement

We identified five distinct approaches to enforcement cases adopted by the courts:

- 1) a (new) contact timetable (pure settlement approach) (39 cases, 19%)
- 2) encouraging parental cooperation (co-parenting support) (95 cases, 46%)
- 3) adopting protective measures (35 cases, 17%)
- 4) responding to children’s wishes (participatory approach) (20 cases, 10%)
- 5) seeking compliance through punitive measures (18 cases, 9%)

A punitive approach was the least used, co-parenting support the most. We describe each approach in more detail below.

### (1) Pure settlement approach

In a fifth of cases (39 cases, 19% of the total) the court adopted what we have termed a pure settlement approach to enforcement. Here the focus was primarily on confirming or clarifying the basic details about when, where and how contact was to occur. The court’s intervention was restricted to confirming or revising an existing court order or drafting a new order. The key question for the court was entirely future-oriented in the form of “what contact is to take place and when?” There was limited, if any, exploration of the causes of the dispute or attempts to address the wider issues other than through providing clarity about the future timetable for contact through a court order.

In some pure settlement cases there was in fact little required from the court if the parties had already reached agreement before a hearing. For example, in case #083 the parties had written to the court apparently having reached an agreement through their solicitors before the first hearing. In that case the court simply adjourned with permission to restore. In other cases, the parties reached agreement on a new contact regime at court and the court order simply reflected the content of that agreement. Case #093 ended, for example, with a consent order that the index order should stand with variation to allow the resident parent to take the child abroad for one month.

There were some cases where a pure settlement approach was adopted, however, where the court might have done more than set out a new contact timetable. In case #114, for example, the case involved cross-allegations of domestic violence and the applicant non-resident mother had significant mental health issues. These were not addressed in a consent order that simply set out dates for contact and such other contact that the parties could agree.

## **(2) Co-parenting support approach**

In nearly half of cases (95 cases, 46%) the court took a more expansive approach to cases compared with a pure settlement approach. The co-parenting support approach reflected recognition that additional measures were needed to ensure that contact took place or took place in a relatively non-acrimonious fashion, beyond a very basic order setting out a contact timetable. What clearly underpinned this approach was the framing of the dispute as interparental conflict, rather than the purely obstructive behaviour of one parent. The key questions for the court, therefore, were “how can we get these parents to work together?” and “how can we make this work for children and protect the children from parental conflict?”

The additional measures could include undertakings or recitals to orders addressing parental behaviour and the conduct of contact. Recitals often included detailed instructions about the presence of new partners or how handovers would take place, down to details about how a child would walk/run from a car to a front door. Most commonly recitals referred to parents not denigrating each other or behaving in a civilised manner.

The co-parenting support approach also included use of additional measures to facilitate parental cooperation or communication. The most often used was referral to the parent education programme (SPIP), and sometimes to mediation, as a means to help parents address the conflict. Far less commonly it involved referral to family counselling or family therapy. In some cases the approach could also involve actively managing the case using

trial periods and review. Case #126 is a good example, where contact had ceased partly due to allegations about the over-medication of the child. The case concluded with undertakings about medication by the child:

***Example of a co-parenting support approach***

*Five year old living with M. Parents separated when the child was two. There had been multiple applications over a short period. The index case suggested that the parents were unable to communicate over minor issues. The index proceedings concluded with an order for fortnightly staying contact. The contact continued but F made repeated allegations to children's services about M's care of the child, including an allegation of sexual abuse. M then stopped contact. F applied to enforce the index order. M applied to vary the order following allegations that F was over-medicating the child. The Schedule 2 letter expressed concern about emotional abuse of the child as a result of the conflict. The Court heard both applications together. The order noted both parties should comply with order. The Court secured concessions from both parents to enable the restarting of contact – handovers by the maternal grandmother, F to give undertakings re medication. The parents were referred to a project to consider family counselling. #126, conflict type*

**(3) Protective approach**

The protective approach, used in 35 cases (17% of the total), meant that the court was treating the case substantially as one focused around safeguarding issues rather than reading it as about conflict or implacable hostility.

The approach could encompass:

- 1) assessing risk, e.g. by a drugs testing regime or a fact-finding hearing,
- 2) managing risk by restricting contact (typically supervised or indirect contact) and/or
- 3) seeking to change or modify the behaviour of perpetrators (e.g. by referral to anger management or domestic violence perpetrator programmes).

The questions driving the court's approach were "Is the child safe?" and "What is needed to make the child safe?"

The following example is of a case involving domestic violence and drug/alcohol abuse where the protective approach focused on risk assessment:

### **Example of a protective approach**

*Child aged 9 lives with M. The index order provided for fortnightly staying contact. F applied for enforcement two years later, having had no contact for six months. M raised a number of issues. One was that there was domestic violence during their relationship and F was now abusive on the phone. The second was that F was frequently intoxicated during contact and that the child was refusing to go on holiday as F was reported to have been drunk most of their previous week away together. M was willing to support visiting but not staying contact. F did not attend the first enforcement hearing, instructing counsel by phone. An order was made for the visiting contact proposed by M. At the next hearing F was observed to be shaky. Cafcass recommended drug testing since drug misuse featured in the previous case. Cafcass also reported that the child had expressed a desire for overnights with F – and wished parents would be nice to each other. An order was made by consent for the same daytime contact pending tests for F. If all tests were clear, contact would revert to the index order. F's testing was repeatedly delayed meaning a hearing had to be adjourned. At the next hearing, the testing had still not been completed. The court ordered contact was to continue on a visiting basis. An update from F's GP was to be filed, and the drug testing completed. A hearing was listed to consider the tests and overnight contact. If F did not comply with the testing, the next hearing would be vacated and the visiting contact order would be regarded as the final order. #167*

### **(4) Participatory/child-led approach**

The participatory or child-led approach, used in 20 cases (10% of the total), involved the court taking steps to elicit and then typically seek to implement the views of older children. In most cases those views were to reduce or stop direct contact. The question here was a fairly simple one of “What does this child or young person want?”

There has been significant controversy over the question of how to distinguish between alienation of a child that has no rational basis and a justified rejection of an insensitive and abusive parent (for a summary see Saini et al 2012).

In this sample Cafcass and the courts appeared to be able to distinguish relatively easily between what were reasoned and reasonable positions taken by children in light of their circumstances and cases where the resident parent was exercising undue influence. Case #192 provided a good example:

### **Example of participatory/child-led approach**

*F sought enforcement after having no direct contact with his son, now 12, for several years. F had a history of mental health issues. The son had clear memories of F's domestic violence. The index order provided for the parents to instruct an independent social worker to assist with contact. However, the son was unwilling to have direct contact although he was prepared to have indirect contact. F applied for enforcement. At the first hearing it was agreed that F's GP would provide a report. Meanwhile indirect contact was to continue. F failed to attend the next hearings and no report was submitted from the GP. The Cafcass s7 report reported the child's very detailed memories of the violence towards M and himself, F's threats of suicide and a recent incident where F had approached him in the street. M was reported to be willing to support the son's choice whatever it was. The s7 report recommended continuing with indirect contact. The court made an order for indirect contact and for the son to initiate direct contact if and when he felt it to be appropriate. #192*

### **(5) Punitive approach**

In a tenth of cases (18 cases, 9% of the total) the court adopted a punitive approach. In these cases the court sought to ensure one party complies with (a) the index order and/or (b) the court process. The critical questions for the court were "has a breach of the contact order occurred or is the resident parent failing to comply with the court process?" and if so, "what is needed to make the resident parent comply?"

The court had a range of options to seek compliance. The court may order an assessment for unpaid work requirement and then go on to make an order that one party undertakes unpaid work requirement (e.g. #067 below). The court can threaten or order imprisonment for contempt of court. This draconian measure was used in only one case in our sample (e.g. #024 below).

There is also scope to transfer residence as a punitive measure, however, the potential impact on child welfare may preclude this option. In our sample only one case involved the transfer of residence. In that case, however, the transfer was conducted entirely as a protective rather than a punitive measure as the child was at immediate risk of significant harm from the resident parent (#001) who had been diagnosed with a severe mental illness.



### **Examples of punitive approaches**

*Former cohabitants, recently separated. Two year old child living with M. Some domestic violence in the background, including F's conviction for battery against the mother. Extensive litigation over contact. Father applied for enforcement as no contact was taking place. No information on Mother's view. The court at the first hearing made a suspended enforcement order. The father called Cafcass to report that he was now having weekly contact and also that he and mother were now on speaking terms. #067*

*Both parents were eastern European. F appeared to assume residency of the two children while M is visiting her home country. She returned to the UK and applied for a residence order. Both parties made counter allegations about safeguarding and mental health issues. The court ordered indirect and supervised contact for M pending risk assessment. She then applied for enforcement. F (in person throughout) admitted breaching the order at the subsequent hearing. The court ordered a s7 report. M made a second enforcement application. F failed to attend the next two hearings. At a third hearing, for committal for contempt of court, F was committed for 28 days immediately. Over subsequent hearings the court established a shared residence arrangement. #024*

## **6.3 Summary**

We identified five distinct approaches to enforcement cases. The most common approach, used in nearly half of all cases, was one of co-parenting support that focused on helping parents address the conflict that was preventing contact from working. About a fifth of cases were tackled with a pure settlement approach that simply set out a new or revised timetable for contact. A protective approach based on risk assessment and management was used in a fifth of cases. One in ten cases were approached in a participatory or child-led manner based on eliciting and largely following the wishes of older children. Courts were least likely to use a punitive approach of ordering community service.

## 7. Understanding the court's approach

In the previous section we established that the court most commonly responded to enforcement applications by trying to get contact restarted with a pure settlement or co-parenting support approach. Courts were least likely to use a punitive approach. In this section we explore in more detail why the court responded in that way. We start by examining what information was available to the court in the form of reports and expert evidence. We then go on to explore the relationship between the case type and the court approach and how case type also relates to other processes and outcomes. Our main point in this section is that on a range of outcome indicators, the court is not typically failing to act but rather is responding appropriately according to the nature of the case before it.

### 7.1 The availability of external evidence

The amount of independent reporting to assist the court in assessing the case was highly variable, ranging from none to multiple reports. In all but a handful (4%) of cases, however, the court had at least some information from sources other than the parties themselves. In nearly half (45%) of cases the objective information was limited to a Cafcass Schedule 2 letter<sup>11</sup>. The depth and breadth of these could vary significantly. Many were very comprehensive but in some cases the report writer had been unable to speak to one or both of the parties. Less often the police/children's services checks had not been received. It should also be noted that whilst the Schedule 2 letter can provide a basic analysis of any safeguarding issues, it is not designed for comment on other issues such as the causes of the dispute other than safety matters.

In half of the cases the information available to the court was more comprehensive. In a quarter of cases the court had the initial Schedule 2 letter as well as a subsequent s7 welfare report provided by Cafcass or, less frequently, a report by the local authority or a report on suitability for unpaid work. In a further quarter of cases the court had multiple reports, including the Schedule 2 letter and at least two further reports whether from Cafcass (e.g. wishes and feeling report and a single issue report), the local authority or from experts.

The availability or the ordering of reports was quite closely related to case type. As Table 7.1 indicates, the court was more likely to rely solely on Schedule 2 letters only in conflict cases.

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<sup>11</sup> The Schedule 2 letter is a two to four page report prepared prior to the first hearing, setting out any safeguarding issues based on police and local authority checks and, where possible, phone calls with the parties.

The court was more likely to order additional reports in risk, refusing and implacably hostile cases.

**Table 7.1: The availability of reports and expert evidence by case type, percentages**

	<i>Risk (66 cases)</i>	<i>Conflict (116 cases)</i>	<i>Refuse (21 cases)</i>	<i>Implacable (9 cases)</i>	<i>All cases (n=212)</i>
No reports	3%	5%	5%	-	4%
Schedule 2	27%	61%	10%	44%	45%
Sch 2 + single report	26%	21%	52%	11%	25%
Multiple reports	44%	13%	33%	44%	26%
Total	100%	100%	100%	100%	100%

It is worth noting the extent to which the court relied on Cafcass for reporting. Despite the seriousness of some of the cases in the sample, reports were ordered from other non-Cafcass sources in only 46 cases (21%). Reports were actually filed in even fewer cases – just 32 cases or 15% of the sample. In descending order the sources from which reports were requested from non-Cafcass sources were (with some cases having reports from more than one source):

- Local authority s7 or s37 report (27 cases)
- Liver function and/or drug tests (13 cases)
- Psychiatrist/psychologist reports (9 cases)
- GP report (7 cases)
- NYAS/Contact centre report (4 cases)
- Other (DVIP, school liaison, CAMHS) (4 cases)

The ordering of reports and tests from non-Cafcass sources was mainly used in the risk cases (33 out of 46 of non-Cafcass sources were in risk cases). As might be expected, the use of expert evidence - drug/alcohol tests and psychological reports - was also mostly confined to the risk cases.

Despite the prevalence of risk allegations, the court held only three fact-finding hearings at enforcement stage. In two cases all allegations were upheld, the third hearing was pending. We consider this further in Section 8.3 below.

## 7.2 The views of Cafcass

Given the reliance of the court upon reports from Cafcass, it was important to assess whether the Cafcass reporter’s conclusions were more or less supportive of the positions of the two parties. It is worth reiterating that the Cafcass reporter had access to all perspectives in the case as well as external data such as police and local authority checks.

Our ratings indicated that the Cafcass report was more supportive of the applicant’s case in only a minority (15%) of applications. More commonly the Cafcass report supported neither parent’s case (42%), the respondent’s case (26%) or was partially supportive of both parents’ case (18%). As Table 7.2 indicates, however, the position of the Cafcass reporter did vary to some extent by case type. In conflict cases Cafcass were most likely to support neither parent, but in risk and refusing cases they were more likely to be most supportive of the respondent’s position. The nine implacable hostility cases invoked the most diverse response from Cafcass though with least support for the respondent’s position.

**Table 7.2: Cafcass support for the parties’ positions by case type**

	<i>Risk (64 cases)</i>	<i>Conflict (110 cases)</i>	<i>Refuse (20 cases)</i>	<i>Implacable (9 cases)</i>	<i>All cases (n=203)</i>
Applicant	11%	16%	10%	33%	15%
Respondent	44%	9%	65%	11%	26%
Neither	33%	51%	25%	33%	42%
Partially support both	13%	24%	-	22%	18%
Total	100%	100%	100%	100%	100%

## 7.3 The relationship between case type and court approach

Having classified all cases according to type and then separately according to the court’s approach, the next step in the analysis was to cross-tabulate both variables. The results are shown in Table 7.3. What we found was that in the majority of cases the court’s approach largely fitted what most observers would suggest would be appropriate for that particular case type. Thus more than three quarters of conflict cases were dealt with by a settlement or co-parenting approach, that is where the court sought to address the parental conflict with a more detailed order and often referral to parent education. Similarly, 70% of the refusing cases were handled by a participatory approach where the court elicited and gave

considerable weight to a child’s views. Likewise, most (though not all) cases involving an implacably hostile parent were dealt with robustly within a punitive approach.

**Table 7.3: The relationship between case type and court approach**

	<i>Conflict (n=114 cases)</i>	<i>Risk (n=64 cases)</i>	<i>Refuse (n=20 cases)</i>	<i>Implacably (n=9 cases)</i>	<i>All cases (n=207)</i>
Pure settlement	<b>25%</b>	14%	5%	-	19%
Co-parenting support	<b>63%</b>	27%	20%	22%	46%
Protection	1%	<b>52%</b>	5%	-	17%
Participation	5%	-	<b>70%</b>	-	10%
Punitive	5%	8%	-	<b>78%</b>	9%
Total	100%	100%	100%	100%	100%

Note: the ‘appropriate’ approach for each case type is denoted by bold text.

Not all the cases, however, were approached with what appeared to be the most appropriate method. Notably, the relationship between case type and court approach was weakest for risk/safety cases. Half of these cases were indeed approached within a protective frame, but courts could also appear to sometimes ‘misread’ the risk cases as mutual conflict cases, requiring a co-parenting or pure settlement approach. Indeed 41% of risk cases were approached in that way and a further 8% viewed as implacable hostility. We explore the approach to safeguarding further in Section 8.3 below.

The type of final order (or last known order) made in the case was also related to case type. There were three main types of order used: an enforcement order, a new contact order or an order that in effect recognises that the application is unnecessary/no longer necessary or without merit (Table 7.4 overleaf). It is interesting to note that all the implacably hostile cases ended in a new order, whether for contact or enforcement and that none of them were withdrawn or dismissed. In contrast, around a third of all other cases ended up with the enforcement application being withdrawn, refused or dismissed.

**7.4 Substantive outcomes and case type**

We had a number of other measures of the outcome of cases, including the amount of contact that was ordered and whether the court imposed any restrictions of contact. In 204 cases both the index and enforcement orders were available on file and so we were able to

compare whether or not the court made any changes to the substantive outcomes of the case.

**Table 7.4: The relationship between case type and type of last or final order**

	<i>Risk (64 cases)</i>	<i>Conflict (114 cases)</i>	<i>Refusing (20 cases)</i>	<i>Implacable (9 cases)</i>	<i>All cases (n=207)</i>
Enforcement order or transfer of residence	8%	4%	0%	56%	7%
New contact order	66%	64%	60%	44%	63%
No order, refused, dismissed or withdrawn	27%	32%	40%	0%	30%
Total	100%	100%	100%	100%	100%

On the question of the amount of ordered contact, the court order provided for the *same* amount of contact at enforcement as at the index stage in 56% of all cases (Table 7.5). The court ordered *more* contact at enforcement than in the index order in 15% of cases, and *less* contact in 29% of cases.

**Table 7.5: Contact quantity ordered at index and enforcement stages by case type**

	<i>Risk (62 cases)</i>	<i>Conflict (113 cases)</i>	<i>Refuse (20 cases)</i>	<i>Implacable (9 cases)</i>	<i>All cases (n=204 cases)</i>
De facto reiteration of index order	42%	71%	20%	44%	56%
Increase in contact quantity	19%	12%	5%	44%	15%
Decrease in contact quantity	39%	18%	75%	11%	29%
Total	100%	100%	100%	100%	100%

There was some variation according to case type. The court was mostly likely to make an order for the same amount of contact as at index stage in the conflict cases. Indeed nearly three quarters of conflict cases ended in an order for the same amount of contact. The implication here is that the index order had been correct but that the parents either needed to try again to make it work or that some additional help was needed in the form of more detail about implementation (e.g. handovers) or additional support such as parent education.

In contrast, the orders for the other three groups were more likely to make substantive changes to the index order. The risk and refusing cases included significant numbers of cases where the amount of contact was reduced, while the implacable hostility cases included the highest proportion of cases where the amount of contact was increased. For these three types of case the deviation from the amount of contact ordered at index stage may suggest that either the index order was flawed in some way or that circumstances had changed making the index order no longer appropriate.

We also compared the index and enforcement orders to examine whether or not the court increased or decreased the level of supervision of contact or any other restrictions on contact. In the majority of cases (74%) the level of restriction remained the same, with most cases involving unsupervised contact (Table 7.6). In 19% the court imposed restrictions for the first time or increased the level of supervision from index stage. This was particularly the case in risk and refusing cases where in approximately a third of cases the court introduced or extended the use of indirect contact or supported/supervised contact at the enforcement stage. In 8% of cases the court actually eased restrictions compared with the index order. This was most marked in the implacably hostile cases although the numbers were small.

**Table 7.6: Restrictions on contact at index and enforcement stages by case type**

	<i>Risk (n=62 cases)</i>	<i>Conflict (n=113 cases)</i>	<i>Refuse (n=20 cases)</i>	<i>Implacable (n=9 cases)</i>	<i>All cases (n=204)</i>
De facto reiteration of index order	55%	89%	45%	67%	74%
Increase in restrictions or control	36%	6%	45%	-	19%
Decrease in restrictions or control	10%	4%	10%	33%	8%
Total	100%	100%	100%	100%	100%

Finally, we also attempted to assess any changes in the specificity or level of detail of the court orders. The rationale behind this was to see if the court appeared to consider that a lack of detail might have caused problems with compliance or that further detail might aid compliance. We found that in 73% of cases the index and enforcement orders contained the same level of detail, in 6% there was less detail and in 21% there was more detail. There was little variation between the types of case on this variable.

In practice we found that most index orders were already quite detailed, at least in relation to the timetable for contact. There were no index orders that relied solely upon the formulation of 'reasonable contact' or 'such contact as can be agreed'. Instead most index orders set out quite detailed timetables of what contact was to take place. One exception was case #154 noted above where the index order had detailed the weekend contact but had left the dates for holiday contact to be arranged between the parents. That lack of detail caused significant problems that were later remedied in the new order. In other cases the court order in the enforcement proceedings added little if any further detail to the *timetable* for contact but, as with case #106 above, elaborated on related matters such as precisely how handovers would occur.

There is a dilemma for courts, however, in striking a balance between providing sufficient detail in an order to ensure clarity and providing further issues for parents to fight over. This problem was acutely demonstrated in case #009. In that case the parents had been litigating for many years. Both were unrepresented. The index order ran to three pages, covering not only the timetable but also various 'what-if' scenarios for when either parent was late or ill etc. However, the father applied for enforcement the following day on the basis that the mother had said she would not comply with the timetable. At the first hearing, however, it emerged that there had been an error in the order, amended under the slip rule. The father had based his application on the previous version of the order. The case illustrates the challenges of trying to produce very detailed orders that attempt to micro-manage behaviour in the absence of parental communication amidst high levels of mistrust. That point was not lost on the court when in the recitals to the order successive bullet points instruct the parents, variously to comply with the order in strict terms, but then also to comply with the spirit of the order and not take issue with minor variations in times.

## **7.5 Summary**

Courts generally had some independent information about the case, ranging from a basic summary of safeguarding issues through to multiple welfare reports. There was limited use of non-Cafcass experts and very few fact-finding hearings to test allegations of harm.

In most cases the court appeared to adopt the 'appropriate' approach for the particular type of case. Thus conflict cases were mostly handled with the pure settlement or co-parenting support approach; child refusal cases were mostly dealt with by a participatory approach and implacable hostility cases were mostly dealt with by a punitive approach. The only exception to this pattern were risk cases, only half of which were handled with a protective approach.



## 8. Evaluating the court's approach

In this section of the report we seek to evaluate the response of the court to enforcement cases on five different dimensions:

- 1) speed and efficiency
- 2) robustness
- 3) safeguarding
- 4) children's participation
- 5) addressing parental conflict

### 8.1 Efficient handling?

Issues of efficiency and the need to avoid delay have been recurrent issues within the family justice system. We turn now to the question of how efficiently the courts were at managing these enforcement cases. We consider below the question of the effectiveness of the approach.

#### Case duration and case closure

On the whole cases were processed fairly rapidly. Most enforcement cases got into court quickly, on average four weeks from application to the first hearing (n=214) and with 81% of cases reaching first hearing within six weeks of the application.

Cases also appeared to be relatively quickly concluded. As of 1<sup>st</sup> June 2013, 85% of the 205 enforcement proceedings initiated in March/April 2012 had concluded (excluding the 10 additional UWR cases and seven of the Application sample where the outcome was unknown). The median case duration from application to final hearing for these 174 closed cases was 17 weeks (mean 21.4 weeks), with an average of two hearings. A quarter (24%) of the completed cases were disposed of in a single hearing. Only 11% of cases required five or more hearings. The median case duration for all cases, with the still open cases calculated up to 1<sup>st</sup> June 2013, was 21 weeks (mean 27.9 weeks) and three hearings on average.

There is some indication that courts processed enforcement cases somewhat faster than index cases. The index proceedings for this enforcement sample took a median 31 weeks (mean 41.5 weeks) from application to final (index) order, compared with 21 weeks (mean 27.9 weeks) for the enforcement cases (albeit some were still running). By way of further comparison only 72% of the index cases were concluded within 12 months against the 85% of cases at enforcement stage.

Interestingly, the duration of our cases at index stage was very similar to the study of contact order applications by Hunt & Macleod (2008:258). In their study the mean case duration was 44 weeks and 65% of cases had concluded within 12 months.

The shorter duration of enforcement cases is probably to be expected given the emphasis of the court of understanding the case at index stage. In contrast, the focus at enforcement stage was often more on simply getting the index order going again, particularly with the conflict cases.

Of course, faster is not necessarily better. The court must balance avoiding delay whilst dealing appropriately with the case. There is some indication that the courts spent more time and resource on particular case types. In broad terms courts took a quicker approach with less complex cases and were able to close them quickly and were more likely to undertake more investigation and longer interventions with harder cases. The 'conflict' cases were dealt with relatively quickly (median 16 weeks) and in a median two hearings. In contrast, the courts spent more time on average dealing with the implacably hostile, risk and refusing cases. These had medians between 29 and 38 weeks and four hearings on average. The conflict cases were also easier to close with 95% completed within 13-14 months compared with 67% of implacable, 71% of refusing and 73% of risk cases.

Hearing duration and case closure were also closely linked to the court's approach. Pure settlement and co-parenting support approaches were linked with short case durations, few hearings and case closure. The pure settlement cases were on average only eight weeks and a single hearing from start to finish and all cases were closed within 13-14 months. In contrast, participatory and protective approaches were far more lengthy and resource-hungry, typically due to the need to order and prepare one or more welfare reports. Participatory cases took on average 27 weeks/4 hearings to complete and protective cases 30 weeks/4 hearings. Participatory cases were easier to close with 90% concluded by the end of the sampling period. In contrast only 69% of protective cases were closed by then.

Interestingly punitive cases were relatively short at 15 weeks although there was far more variation in case length in this grouping than all others. Thus only 72% were closed within 13-14 months.

**Rapid processing**

*Index order provided for fortnightly staying contact for F with five year old child living with M. F applied for enforcement alleging frequent breaches of the order. M said she had complied with the order and encouraged contact unless the child was unwell or not wanting to go. Neither party was represented in the enforcement proceedings. The Schedule 2 report noted no safeguarding concerns but expressed concern about emotional upset for child on handover and consequently recommended the parents attend SPIP. The parties reached an agreement at the first hearing about contact and were referred to SPIP. #061, conflict type.*

**Slow nursing of a case**

*Five year old child with M. Unclear if the parents ever lived together. Contact was weekend visiting only. M stopped contact for reasons that were unclear. The enforcement case involved five hearings. M was unrepresented throughout. At first directions a consent order provided for visiting contact. At the second hearing it was reported that contact had not occurred exactly as per the order. A second consent order established the same amount of visiting contact but on a day where the child did not have other activities. The parents were also referred to SPIP. M did not attend the third hearing but the Clerk to the Justices phoned her at home and got her agreement for staying contact. At the fourth hearing it was clear that the Clerk to the Justice's persistence and problem-solving approach had paid off. The parties concurred that the contact had gone very well and agreed to further interim contact. At the final hearing a final order for weekly staying contact and holiday contact was made by consent. Case #063, conflict type.*

**Attendance and cooperation with the court process**

One of the factors associated with case progress was the cooperation of the parties and, in particular, their attendance at hearings. Most of the parties cooperated fully with the process with 85% of applicants and 79% of respondents attending all hearings and engaging with Cafcass as required. The levels of cooperation varied somewhat between applicants and respondents and by case type. Participation was lower for applicants in risk cases and for respondents in implacable/alienation cases. The majority of non-attendees were litigants in person.

There were a range of reasons why parties did not attend hearings or avoided appointments with Cafcass. Beginning with applicants, there were three main reasons for lack of cooperation.

In a small number of cases applicants initiated proceedings but appeared to lack the will or commitment to follow through and the case was dismissed. The reasons for this varied. They included a case where the applicant left the jurisdiction for family reasons (#043), and a case where an applicant was in hospital for the first hearing, was discharged by the second hearing but still did not attend court (#113). In one case neither party – both litigants in person – attended, possibly due to a failure to serve papers (#110). In another case (#117) the respondent attended both hearings but no reason was given for the non-appearance of the applicant.

A second group of applicants attended the first hearing(s) but dropped out or walked out after an unfavourable welfare report. This could be because of a child's reported unwillingness to have contact (#018). More commonly it was a result of safeguarding concerns and adverse recommendations. In case #029, for example, the applicant father did not attend the final hearing after a recommendation for a psychological report. In cases #110 and #145 the applicant fathers both walked out of a hearing and refused to engage further with the court process after safeguarding issues were identified and protective measures recommended.

The third group of applicants were those with chaotic lifestyles whose drug and alcohol issues appeared to prevent them engaging in the court process. Case #026 and #135 both involved non-resident mothers applying to enforce contact who failed to keep Cafcass appointments or attend hearings. In the first case the court eventually barred the mother from making further applications for a year.

The apparent reasons for the non-cooperation of respondents were also heterogeneous. There was a group that did appear to be attempting to frustrate the court process. It was these cases, typically implacably hostile cases, that were most likely to generate a negative response from the court. In contrast with non-attending applicants whose case was often dismissed, in these cases the court was more likely to adopt a punitive response. The cases involved one where the repeated non-attendance of the respondent and failure to apologise to the court resulted in committal (#024). Other cases where the respondent failed to comply with Cafcass appointments or attend hearings attracted a penal notice and/or a enforcement order (e.g. #014, #020 and #213).

In some cases the respondent appeared to bury their head in the sand and hope proceedings would go away rather than seeking to frustrate the court process and contact. In case #140 the children were reported to be refusing contact. The mother missed some hearings, not attending Cafcass meetings or filing a statement.

The third group were those where women reported significant safety concerns. Their non-attendance could also be a head in the sand approach. For example, in #017 the mother failed to attend the first hearings and an enforcement order was made. When Cafcass did finally contact her she then disclosed a significant history of violence. In one case (#088) the mother missed the first four hearings and never responded to Cafcass letters despite proof of receipt. A GAL finally spoke to her when she said that she was too frightened to attend court in case she met the father who, she alleged, was involved in gang violence. She was also fearful that her confidential address would be disclosed, having previously been moved to a new town by the police following very serious incidents of violence.

There were also cases where respondents missed hearings due to administrative problems apparently stemming from the applicant's status as a litigant in person. In case #103, for example, the LIP father had only served the papers the day before the hearing.

## 8.2 Sufficiently robust?

A key aim of the research was to explore the key policy concern about whether or not courts were handling cases effectively, especially whether the courts were being tough enough in handling non-compliant parents. To test this the research team independently rated each case according to whether or not the court appeared to have been sufficiently robust in dealing with any non-compliance. There was insufficient information to make a judgment in eight cases. The remaining 207 cases were rated on a three-point scale as follows:

- *Not robust enough:* (a) there were no reasonable grounds for non-compliance with the index order and (b) a more punitive approach would be more likely to secure compliance than a pure settlement, co-parenting support or participatory approach.
- *About right:* either (a) there were some grounds for non-compliance (inappropriate order, changed circumstances, behaviour of NRP, child wishes) and/or (b) the court adopted a different approach that appeared to have some prospect of securing compliance
- *Too robust:* (a) the non-compliance was minimal, and/or (b) there were reasonable grounds for non-compliance with the index order and/or (c) a purely settlement or co-parenting support approach would be more likely to secure compliance.

We rated the court's approach as 'about right' in the great majority (198 cases, 96%) of cases. This rating is in line with our analysis in Section 7.3 that the court generally adopted the appropriate approach given the nature of the case. Given that few cases involved implacable hostility then a punitive approach would not be appropriate in many cases.

There were four cases (2% of the total sample) where the approach adopted was judged to be insufficiently robust. Two of these were conflict cases and two implacably hostile. The circumstances in each case were widely different but in all four cases the resident parent did not appear to have any reasonable grounds for non-compliance whilst the court's response appeared ineffectual. In one case (#014 described in section 10.4 below), the court did consider the breach serious enough to warrant an enforcement order but prevaricated when the mother refused to undertake the unpaid work that had been ordered.

***Examples of insufficiently robust handling***

*#054. Two children living with M. The Index order, made by consent, provided detailed arrangements for contact – alternate weekends and one evening per week and provision that transport and costs of transport should be shared. F's enforcement application, made two years after the index order, was based on M having refused to share transport and costs since then. F claimed he had tried to negotiate, suggested mediation, etc., but M had refused to engage. Contact had continued otherwise. In court M gave only very limited commitment to share transport (doesn't like driving unfamiliar roads, work commitments). The order made no order in respect of F's enforcement application, and provided for the index order to remain in force. Both parents were to fulfil transport obligations.*

*#168. Two children living with M. The mother had previously made allegations of neglect and domestic violence against F. He applied for enforcement after M refused contact for two weekends. M said it was because F had refused to supply emergency contact details whilst the children were with F. The court made a new contact order that restored and extended contact. M walked out of the hearing before the end. F applied for enforcement again two months later after weekend contact was again refused. M did not provide any real explanation for her actions. The court made no further order but informed M that if she did not comply again that they would consider making an order that she paid the F's costs.*

Conversely, we rated the court's response in five cases (2%) as too robust. These were all cases where the court was unaware of the extent of safeguarding issues until later in the court process. The five cases included two where the court ordered punitive sanctions, the

'non-compliant' parent completed community service but then applied successfully to have the contact order varied in light of safeguarding issues (#017 and #022 Section, 10.4 below).

***Example of overly robust handling***

*One pre-schooler living with M. Multiple previous proceedings, including a previous application for enforcement which constituted the index proceedings. M did not attend the final hearing where an index order provided for supervised contact giving way to unsupervised contact. F applied again for enforcement several months later alleging that no contact had taken place. At the next hearing the court ordered a s7 report (a report from the local authority also appears to have been ordered around this time). At the next hearing the report was not available. The court made an order to defer sentencing for M's proven breaches of the order to six months hence. Meanwhile contact had by then restarted and the court made a new order (by consent, the Mother unrepresented) for extensive overnight contact. The s7 report subsequently noted extensive safeguarding concerns relating to both parents, including the mother's serious mental health issues and father's alleged violence and drug and alcohol issues. Both the local authority and Cafcass reports noted concerns that the child was not coping with the sudden and unplanned increase to extensive contact with F who was assessed as needing considerable support over time to be able to provide safe care. Both reports recommended reviewing contact urgently with a view to reducing contact until a plan could be put in place. #108*

### **8.3 Making safe decisions?**

We reported in Section 5.4 above that there was a high incidence of safeguarding concerns in the sample as a whole, though particularly so in the 'risk' cases. We also reported that only 52% of the risk cases were dealt with using a protective approach.

The research team also independently rated each case in the whole sample, (i.e. not just the 'risk' cases), according to our judgment about the safety of the courts approach based on what evidence was available to us. In eight cases there was insufficient information to make an assessment. Otherwise the rating options for the 207 cases where there was sufficient information were as follows:

- *Safe approach*: either (a) no safeguarding issues were involved in the case or (b) safeguarding issues appeared to be addressed appropriately
- *Marginal*: the court's approach appeared to be on the borderline between being safe and unsafe
- *Unsafe*: safeguarding issues did not appear to be addressed adequately

On this basis we rated 81% of the 207 cases as adequately addressing any safeguarding issues, 16% (32 cases) as marginal and 4% (eight cases) as not addressing safeguarding adequately. While relatively few cases were judged to be unsafe, the marginal and unsafe cases combined represented one in five of the whole sample of 207 cases. The proportion was even higher for the 'risk' cases. We judged that in a little over half (56%) of the 64 risk cases for which sufficient data was available safeguarding issues were handled adequately, 33% were marginal and in 11% they were not addressed adequately.

### **Examples of marginal or unsafe outcomes**

The marginal or unsafe decisions were manifested in various ways. In some cases it might mean making an inappropriate referral to mediation or SPIP, or a failure to refer to, or to ensure compliance with, an anger management or domestic violence perpetrator programme. In other cases it meant making orders for unsupported/unsupervised contact where supervision, or possibly indirect contact only, might have been appropriate.

There were also a number of examples where the court referred cases with serious safeguarding issues to SPIP and/or mediation. The referral suggests that either the court was unaware that mediation and SPIP are seldom if ever suitable for high risk cases or the court had misread the case and minimised the safeguarding issues. In case #113, for example, the father had a recent conviction for arson plus numerous convictions for violence. He was currently being treated in a rehabilitation unit for alcohol dependency. The court referred the case to mediation but the mother refused to attend.

In case #092, described in Section 8.4 below, the father was referred to an anger management programme. The course providers reported that he was unsuitable for the programme and reported to the court that he should instead be referred to a more in-depth and intensive Domestic Violence Perpetrator Programme (DVPP). The court instead made what appears to be an entirely inappropriate referral to SPIP.

In some cases there was evidence that SPIP and mediation providers were failing to screen effectively. Morris (2003) has identified that whilst all mediators do routinely screen for violence, the effectiveness of that process is unclear. There were a number of examples where high risk cases appear to have proceeded into mediation, either as a result of no or ineffective screening, as in #027 below.



### ***Mediation and risk***

*Long history of domestic violence. At index stage the court ordered the local authority to prepare a s7 report suggesting the court had safeguarding concerns. F applied for enforcement. Continuing incidents of violence were alleged. Contact was to be in a supported contact centre. F was to attend an anger management course. Cafcass described the case as “very high risk”. Contact broke down and F applied again for enforcement. The parents were referred to PIP and mediation. The parents were presumably screened but proceeded into mediation despite the history of violence. They did not reach agreement and returned to court. #027*

There were some risk cases where it was apparent that there was a clear recognition of the problem but where the court failed to pursue a protective approach. In a small number of cases this seemed to be because both parents appeared to pose a risk to the child. In one case the local authority did gain an Emergency Protection Order and started care proceedings. There were others, however, where the child continued to be exposed to risk from both parents. In #046, for example, the resident father was a ‘functioning’ alcoholic with major health issues. The mother had issues with mental health and drug/alcohol misuse. . There was a history of domestic violence and the father’s behaviour was described as controlling. The child remained living with the father but the court ordered extensive contact for the mother.

In other cases, the court appeared to fail to address, or continue to address, the concerns that had been identified. Typically, these were cases where Cafcass identified concerns and recommended a protective approach but the court did not pursue that recommendation:

### ***Identified risk and lack of protective measures***

*History of DV including F’s threats to kill M. The index contact order allowed for direct contact. F was then convicted of battery against M and made subject to a non-molestation order. M stopped contact after F breached the order. F then applied for enforcement. Cafcass recommended a Domestic Violence Perpetrators Programme (DVPP) and fact-finding hearing followed by gradual reintroduction of direct contact at a contact centre. Instead the enforcement case ended in a consent order for unsupervised contact. Cafcass notified the local authority about the outcome. #095*

**Identified risk and lack of protective measures cont.**

*DV case with M and children living in a safe house. M did not comply fully with supervised contact arrangements. F sought enforcement. The court made an order for supervised contact on condition of completion of a Domestic Violence Perpetrator Programme (DVPP). Cafcass initially refused to comply with supervising contact before F engaged fully with DVPP, citing its national guidelines. The father attended the DVPP regularly at first. The court made an order for staying weekend contact order on the basis of F's early progress with DVPP. F then dropped out of the programme but the court still made a final order for unsupervised staying contact in the absence of the (unrepresented) parties and against the advice of the Cafcass officer. #008*

**Explaining the approach to risk**

The findings on how the courts approach risk in enforcement cases may not be particularly surprising given the high incidence of safeguarding concerns within the litigating population and the difficulties the family courts have had in facilitating safe contact. Over a decade ago, Bailey-Harris et al (1999) in a highly influential article noted that the courts were operating an almost rule-based presumption in relation to contact cases that was at odds with the discretionary welfare-based approach based on the needs of individual children set out in the Children Act 1989. They argued that the contact presumption was very difficult to challenge even in cases of domestic violence.

The problem has been recognised within the family justice system, but changing practice has proved more difficult. In an important first step the Children Act Sub Committee (2000) *Report to the Lord Chancellor on Contact between Children and Violent Parents* and the Court of Appeal in *Re L (A Child) (Contact: Domestic Violence)* [2001] Family 260 urged courts to take seriously the issue of domestic violence and set out guidelines to enable the courts to do so. In the mid 2000s, however, research by the Family Justice Council (2007) indicated that the guidelines were having little effect on practice and that allegations of domestic violence continued to be marginalised. The FJC research led to a strengthened Practice Direction in 2008, subsequently revised in 2009. Recent research by Hunter & Barnett (2013:8) concluded that the PD was “not operating as intended” with cultural and material barriers to its implementation.

We explore below how some of these cultural and material barriers may have operated in some of the cases where we judged the decision to be marginal or unsafe.

## Reading of the case

A key factor in the approach to the case was how the Cafcass officer and the court 'read' the case. As reported earlier, we judged that in most instances the court both 'read' cases appropriately and made an appropriate response, tailored to interpretation of what the problems were in the case. However, in our view, some risk cases were misinterpreted, either being reframed as about mutual conflict or as implacable hostility.

The 'misreading' of the case took two forms: reframing violence as mutual conflict or as implacable hostility. In the first, reframing violence by one partner as mutual conflict between the parties, meant that the logical consequence is that the court followed a co-parenting support rather than a protective approach. The two examples below exemplify this problem. In the first case a pattern of controlling violence as well as psychiatric issues was disregarded and the court made a shared residence order. In the second the enduring impact on a child of witnessing severe domestic violence, compounded with the child's autism, was overlooked and both the Cafcass reporter and the court focused instead on parental communication.

### ***Reframing as conflict***

*Case #068. Two very young children living with M. Extensive litigation. F had a recurrent psychiatric condition. M said F was very controlling in the relationship, including locking her in rooms. She had left the relationship to live in a refuge. F had a conviction for battery against an earlier partner. The index order specified unsupervised contact progressing to overnight. Contact broke down when F made allegations of sexual abuse against M. No further action was taken by children's services. The Cafcass report noted the father's psychiatric condition and the mother's description of a pattern of violent and controlling behaviour but made the somewhat surprising point that a fact-finding hearing into the allegations would not make any difference as the court had already ordered unsupervised contact. The Cafcass analysis mutualised the problems by noting that both parents wanted the best but needed to trust each other more and communicate better. It recommended mediation. F had also admitted to smacking the children as a form of discipline. The report recommended F used a naughty step approach. The court dealt with the enforcement application by making a shared residence order. The parents were to attend mediation. The father was not to smack the children. The parents were to try to harmonise their approach to parenting.*

***Reframing as conflict cont.***

*Case #134. Primary school age children with M. Significant and documented history of DV leading to hospitalisation for M and a custodial sentence for F. F applied for contact and was referred to a DVPP programme. Overnight contact started during the DVPP but there was a subsequent verbal altercation. M applied to vary the order stating that contact was having a negative impact on one child. F cross-applied for enforcement. A psychiatric report noted that the child had witnessed a severe attack on M and was now making threats to self-harm. A GP letter noted the child's panic attacks and mood swings. Both reports indicated that the child was on the autistic spectrum. The Cafcass single issue report, however, noted that DV was considered fully in a previous report and, in effect, bracketed the issue. It stated that the main issue was the differing views of the parents regarding the child's behaviour and the acrimonious relationship between the parents and that both parents needed to control their emotions. It recommended staying contact at the earliest opportunity. A subsequent report by a family social worker noted that the children wanted contact but the child on the autistic spectrum could not cope with the change of routine, was fearful of overnight stays and behaviour at school had deteriorated. Nonetheless a consent order was made for staying contact. The recitals to the order reframed the issue as about mutual conflict and directed the parents to respect each other and each other's accounts of their experience of the child's behaviour.*

The second way of misreading a case was to assume that a mother/resident parent was implacably hostile rather than raising valid safeguarding issues. The clearest examples of this were two 'reversal' cases (described more fully in Section 10.4) where the resident mothers completed unpaid work but where the court had to subsequently reverse its position after a more thorough risk assessment revealed that the non-resident parent did pose a safeguarding risk to the children (#022 and #017).

The ways in which allegations about risk are marginalised have been identified before. In a study of in-court conciliation Trinder et al (2010) explored the way Cafcass officers marginalised domestic violence or child protection concerns by not picking up on cues or asking for detail and actively switched topics away from allegations. In particular they noted how officers downgrading allegations by mutualising instances of one party's violence into joint conflict (e.g. 'beating up' one person became an 'old family feud'), or historicising

violence so that it was reconstructed as only relevant to the past rather than the future, even if it had been very recent.

Underpinning the way in which allegations were marginalised is the very strong contact presumption within the family courts that has been identified in repeated socio-legal studies and that may conflict with a focus on protecting children from harm (e.g. Bailey-Harris et al 1999; Hunt & Macleod 2008; Trinder et al 2010). Whilst the court took appropriately protective measures in half of the risk cases, in others the strength of the contact presumption appears to have diverted the court's attention from effectively assessing and managing risk. In the following case the court appeared to prioritise contact, indeed shared residence, above what appeared to be very significant safeguarding issues:

#### **The strength of the contact presumption**

*Two year old living with M. F had an extensive list of convictions including for various assaults and cruelty to animals. F applied for residence. The parties were referred to mediation. They reached an agreement for shared residence together with recitals not to expose the child to smoke or provide salty snacks. The agreement was subsequently incorporated into a court order as the index order. F subsequently applied to enforce the order stating contact had stopped. M applied to vary the order saying F's behaviour had become increasingly erratic and that he appeared to have returned to drug-taking. She had had numerous threatening texts and phone calls and the police had installed a panic alarm. At the next hearing the parents were referred to SPIP, a drug test ordered and the index order was to continue. At a subsequent hearing the court made a SRO not by consent. #194*

#### **Lack of information or corroboration**

We noted above that the court generally had some evidence other than from the parties in the great majority of cases. In just over half the cases this was restricted to a Schedule 2 report. Many of these were very comprehensive but in some cases checks had not been completed or, the parties had not been spoken to before the hearing. This could be the result of the resident parent being very reluctant to engage with the court process.

Nevertheless the Schedule Two report typically presents allegations rather than admitted or proven incidents. The onus is then on the court to determine whether those allegations were relevant to the case. However, courts were very hesitant to order fact-finding hearings (FFHs) to test any allegations. There were only three FFHs into abuse allegations at enforcement stage and indeed there had been only three at index stage. In four of the six

FFHs all the allegations were upheld whilst no information was available about the other two cases.

The reluctance to order a FFH in this sample is consistent with what is known about their use within private law proceedings more generally. Hunter & Barnett (2013) in a survey of family justice practitioners found that few FFHs were ordered and that FFHs were sometimes actively avoided. The main reason given was a concern that they are time-consuming and add to delay in resolving a case.

Whilst a FFH may consume resources it is also clear that not being able to test the evidence means that the court may proceed, or indeed fail to act, without a definitive assessment of risk. This may leave an adult or child exposed to serious risks if the court orders unsupervised contact. Alternatively, it may mean a child or non-resident parent having their relationship unfairly restricted if the court wrongly adopts a protective approach.

The reluctance to order a FFH in all but a handful of cases did also mean in some cases that the lack of a definitive account meant that cases kept returning. In one case, the parents had litigated over the last six years accompanied by repeated children's services referrals and investigations. The latest enforcement application followed the blocking of contact by the resident parent after concerns about sexual abuse. The Schedule 2 report recommended that the allegations should be investigated and tested. The court declined to undertake a fact-finding hearing that would allow the court to move forward assertively, in either direction to establish contact or to take appropriate protective measures. The court instead referred the parties to SPIP and mediation, both of which would be entirely inappropriate responses if the resident parent's concerns had any basis (#105).

## **8.4 Hearing children's voices?**

### **The extent of involvement in proceedings**

The extent to which children were involved in proceedings varied significantly. Overall, in 36% of cases all the children of the family were directly consulted. In a further 3% of cases the oldest child of the family only was involved. The average age of the children in proceedings was 7.63 years, indicating that a substantial proportion were really too young to be directly involved. Older children were more likely to be consulted: 55% of older children aged 8 and above had their wishes and feelings elicited compared with 22% where the oldest child was seven or younger.

Children were also much more likely to be consulted where a welfare or expert report of some kind was prepared. Nearly three-quarters (71%) of cases involving a report meant that the oldest or all the children were consulted, compared with 7% where there was no report or just a Schedule 2 safeguarding letter. Similarly, children were most likely to be involved when the court adopted a participatory/child-led or protective approach and least likely to be involved with a pure settlement and punitive approach.

In addition children were separately represented in 9% of cases. This was higher than the 3% of children separately represented at index stage. The increase presumably reflects the court's concern about the impact of ongoing proceedings on the child. The representation was unevenly divided across the case types. In 18% of risk cases the court had ordered separate representation, 11% of implacable hostility cases and 5% of conflict and refusing cases.

The level of involvement of children in these difficult cases is relatively low but is a little higher than that found in other studies. May and Smart (2004:308), for example, found that only a quarter of children in their sample of residence and contact cases had been directly consulted by professionals. Even where a welfare investigation had been ordered the involvement of children was still not automatic, with children consulted in only half of those cases.

### **Identifying an appropriate role for children**

Whether or not the court should make greater attempts to elicit children's wishes and feelings is difficult to judge. In enforcement cases the law does not require that children's views should be elicited. The court is only required to *take into account* the welfare of the child<sup>12</sup>, rather than for it to be the *paramount consideration* as with the making of a section 8 contact or residence order<sup>13</sup>. Further the Children Act 1989 welfare checklist, and specifically the requirement that the court have regard to the ascertainable wishes and feelings of the child, only applies to the making of section 8 contact orders. It does not apply to enforcement cases although there is an argument that it would, in any case, carry considerable weight.

Nonetheless, there is ongoing concern that children are often excluded from directly participating in private law proceedings and thus have no direct opportunity for their wishes and feelings to inform the decision-making process (e.g. Scanlan et al 2000; James et al

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<sup>12</sup> Section 11L(7) of the Children and Adoption Act 2006

<sup>13</sup> Section 1(1) of the Children Act 1989

2004; May & Smart 2004; Hunter 2007; Norgrove 2011). Aside from the practical and logistical constraints there are more fundamental issues about the involvement of children in private law proceedings. As May and Smart (2004: 305) note, there remain continuing tensions between recognition of children's rights, children's welfare and parents' rights. In the court context, there is some balance to be struck between a welfare imperative focusing on a desire to protect 'vulnerable' children from the burden of responsibility for decision-making and supporting children's participation rights (e.g. Trinder 1997; Sawyer 1999, James et al 2004; Hunter 2007).

Further, Piper (1999, 2000), James et al (2004) and Sawyer (1999), amongst others, have argued that dominant constructions of child welfare may actively divert attention from efforts to elicit the views and experiences of individual children. In particular, Piper (2000: 265-6) notes that the idea that contact is good for children - the 'contact presumption' - has acquired the status of a universal norm that is then applied to all children regardless of the unique circumstances or wishes of an individual child. This universal presumption thereby diminishes the need to consult children individually. The risk, however, is that welfare becomes, as James et al (2004: 199) note, "a generalised socio-legal concept, rather than an individualised human concept" based upon generic or universalised understandings of childhood and not the unique experiences of a particular child.

The problem with relying on a generic approach is that children do not all share the same views. In our study of enforcement, the views of the children who were consulted were quite mixed, often nuanced and not necessarily easily predicted. We assessed their reported views as more supportive of the applicant's position in 18% of cases, of the respondent's position in 40% and partially supportive of both parents in 22% of cases. In the conflict cases the children were most likely (39%) to be partially supportive of the position of both parents but 26% were most supportive of the applicant's position and 16% of the respondent. Children were more likely to be supportive of the respondent's position in risk (39%), implacable (50%) and refusing (79%) cases.

This does raise the issue about the extent to which the court is making orders without taking into account the views of children who are not consulted. We have no means of establishing whether or not the orders that were made were inconsistent or incompatible with children's perspectives. However, in a few cases the views as reported by one of the parents do appear at odds with the final outcome. Case #183 described below is a good example where the resident parent reported that the children had a range of views and the Schedule 2 writer raised the possibility of a wishes and feelings report. The court instead adopted a pure



settlement approach and produced an order quite at odds with the children's (reported) views and that appears to typify Piper's concern about the contact presumption being applied to all children regardless of their individual views and preferences.

***The unconsulted children***

*Three children aged between eight and 12 living with M. There was a background of serious domestic violence. The youngest child had significant behavioural difficulties. The index order provided for weekend staying contact. F applied for enforcement saying none of the children were staying over and two of the children were refusing all contact. M said she had made the children available each time, but that the youngest was refusing to have any contact, the middle child was reluctant and the oldest was happy to visit but not overnight. At the hearing the issues appear instead to focus on changes F's employment pattern. A new order was made for fortnightly staying contact plus visiting contact and shared holidays. #183*

Conversely, where children were heard, their views often appeared to influence the outcome of the case. There were exceptions to this. Whilst all would accept that children should be heard but not necessarily determine the outcome, there were cases where their views appeared to be overridden for what appeared to reflect the preferences of one of the parents. In case #092, for example, the early teenage child was separately represented. He wished to continue contact but to reduce or end overnight contact. The father in that case had a significant history of domestic violence, including assaults on the child and his siblings. The father was referred to but failed to complete an anger management course. The guardian's report in the enforcement case recommended further investigation before reaching a decision about the future of contact. The court nonetheless made a final order reaffirming the index order for staying contact, contrary to the child's wishes.

More commonly, however, the views of older children that appeared to be well-founded and thought-through were influential, if not determinative, of the outcome. In some instances children were simply reporting that they wanted arrangements to be more flexible and to work around non-family activities that were important to them. In case #200, for example, the two early teenagers had a weekly Saturday activity which, combined with Friday-Sunday contact, meant extensive car travel. The court made a final order that produced a compromise that met the needs of all parties. Interestingly, and unusually, the final order included the option for contact at any other times "the parties *and the children* may agree".

There were other cases where older children were refusing all or extensive contact with a non-resident father who they experienced as angry and/or physically abusive and the court stopped or reduced direct contact as a result. Examples included two cases where the children refused direct contact after witnessing their father's assault on his new partner (#101 and #170); a case where child wanted to switch from staying to visiting contact with a domineering father (#098 cf #092 above) and a case where a young teenager wanted indirect contact only with a father with significant mental health issues and a history of violent behaviour (#192 above).

The evidence on the extent to which the courts are attuned to the wishes and feelings of children is therefore mixed. On the whole the views of older children, of 10 and upwards, were more often than not elicited and more often than not highly influential. However, a significant number of children were not seen, whether as a result of their age or the focus on early settlement. In some cases, too, the court seemed to privilege the contact presumption against what appeared to be thoughtful and well-grounded views expressed by older children.

## **8.5 Addressing conflict?**

It is very well established in the literature that parental conflict has a negative impact on children's adjustment, particularly where children are implicated in the conflict. Private law disputes are, of course, a paradigm case for this type of conflict. There is now a very high level of awareness within the family justice system of the need to address conflict. Indeed in this enforcement sample concerns were raised about possible emotional abuse stemming from the dispute in nearly half of cases at enforcement stage. The concerns were usually raised by professionals rather than by parents. The question this section of the report addresses, therefore, is how effective the court was in attempting to address this conflict.

There were numerous examples within the study of cases where the court attempted to tackle the parental conflict. This was particularly evident where the court adopted a co-parenting support approach to 'conflict' cases, as in the examples below.

In a substantial number of cases, however, there was little attempt to address the conflict directly. The 19% of cases dealt with by a pure settlement approach were a case in point. In those cases the focus was entirely on addressing the legal dispute – the conflict over the contact timetable – rather than addressing the underlying issues between the parents.

**Case examples: co-parenting support and conflict**

*Case #051. Teenage son with severe autism living with M. Long history of repeated litigation, most recently with contact ceasing following an unspecified incident at F's home. The Cafcass report was very critical of both parents for putting inappropriate pressure on the son. He had said how much he hated his parents arguing over him and that he would rather be adopted. Eventually it was agreed that the boy would continue to see F and once he was ready stay overnight again. Until then there were very detailed arrangements in the order with regard to venue, transport costs and arrangements and other contingencies.*

**Case examples: co-parenting support and conflict cont.**

*Case #121. Three children living with M. The index order provided for staying contact but the father applied for enforcement after contact with the oldest two (teenage) children broke down. A welfare report concluded that the teenagers had decided to stop contact themselves, that the children were over-identifying with M although she was not alienating them and that F was behaving in an insensitive manner. The recommendation was for counselling to repair family relationships. The court accepted the recommendation and ordered a series of sessions with Relate with each parent in turn, with the children and then with both parents together. The counselling was funded, in a highly creative fashion, by the forthcoming sale of the matrimonial home. An updating report from Cafcass noted that the parents were communicating better but that the children were reluctant to engage and would need time to observe the improved relationship between the parents. At the subsequent review hearing the counselling had clearly paid off. Contact was proceeding on an informal basis. Both parties agreed to withdraw their applications and previous orders were rescinded in accordance with the no order principle.*

Even in the co-parenting support cases the interventions were typically quite limited. Given the numbers of high conflict cases it was surprising how little use was made of more intensive or therapeutic interventions. Case #121 above was something of an exception in the use made of external counselling services. It is probably pertinent that the parents in that case were able to pay for the counselling themselves.

Otherwise few of the 'conflict' cases got much additional assistance beyond pleas or instructions to the parents to be more civil, a more detailed order and perhaps a referral to a parent education programme, even though it was clear that in many cases the parents were not able to follow the terms of the order by themselves without additional support to help them interpret and implement it. The one positive was that the SPIP programme is now very

much at the forefront of the court's awareness and that fairly extensive use was made of it as a court-connected programme. However, there were some cases where the court did not refer the parents to SPIP even though it had been recommended and where it seemed entirely appropriate (e.g. #111).

Similarly, despite the prevalence of concerns raised about emotional abuse only a handful of children in the sample (e.g. #210) were provided with any counselling or support. Nor in the refusing cases were there examples of any work undertaken with either parent and children to help them develop or rebuild their relationship or to help the non-resident parent to become more attuned to the children's needs.

The limited use of alternative educational and therapeutic interventions may well reflect the longstanding emphasis within the family court on rapid case processing in the context of an ever-increasing workload and restricted resources. It may also reflect the limited awareness and availability of other options.

## **8.6 Summary**

The approach of the court to enforcement cases was evaluated on a range of variables: speed, robustness, safeguarding, children's participation and addressing conflict.

Courts typically handled cases fairly speedily, with most cases getting into court quickly and finishing earlier than at index stage. Risk and refusal cases took longer to complete. A minority of cases experienced problems due to the non-cooperation of the parties. Both applicants and respondents could fail to comply with the court process, albeit for differing reasons.

Courts were judged to be sufficiently robust in the great majority of cases, given that few cases involved implacable hostility. There were as many examples of courts being too robust as being not robust enough.

The approach to safeguarding was less satisfactory, with only half of risk cases rated as having safeguarding issues dealt with adequately, whether through unsupervised contact, inappropriate referrals to mediation or SPIP or failing to refer or enforce attendance at perpetrator programmes. There was evidence that safeguarding issues were marginalised by a strong presumption of contact and by misinterpreting the issues as mutual conflict or implacable hostility.

Children's participation varied significantly. Many children were too young to participate but only half of children of eight or more were consulted. There were examples where the final order may have been contrary to the reported views of children who were not involved. Where older children were consulted they often appeared highly influential.

The courts attempted to address parental conflict by providing new or more detailed orders, recitals that urged parents to work together and by referral to the Separated Parent Information Programme (SPIP). The attempts to address conflict were in most cases quite modest and in others entirely absent. There were very few cases where children received any direct help or support despite widespread concerns about emotional abuse.

## **9. Outcomes: compliance and relitigation**

We now turn to the question of how effective the court's intervention appeared to be in ensuring compliance. Our information here is largely restricted to the rates of relitigation, rather than an assessment of whether and how an order was being implemented on the ground. Although s11H of the Children and Adoption Act 2006 gave courts a power to order Cafcass to monitor compliance with a contact order, we did not find a single example where such monitoring had been ordered. As a result there is no information in the Cafcass files other than cases where further applications had been made or, in some instances, where one of the parties contacted Cafcass to report difficulties with the order. The data reported in this section therefore provides a very accurate picture of rates of relitigation but gives little insight into the extent of ongoing contact problems short of relitigation.

### **9.1 Extent of further legal activity**

For most of the cases there had been no further legal activity in the year following the enforcement application. By our census date of June 1<sup>st</sup> 2013 three-quarters of cases (161 cases, 77%) were closed and there had been no further applications. There were 27 (13%) 'long-runners' or enforcement cases that were still not concluded. Twenty cases (9%) involved a fresh application to the court. These can be divided into 15 'revived' cases where the enforcement proceedings had ended but a new application had been issued and five cases where there was a further application in ongoing enforcement proceedings. Outcomes are unknown for seven cases.

It is quite difficult to appraise whether the 9% relitigation rate is low or high. There are few studies that track relitigation in private law cases. The only possible comparator is a study of relitigation in a sample of in-court conciliation cases, six and 24 months post-intervention. In that study 18% of parents reported a fresh application within six months and 40% within 24 months (Trinder et al 2006: 74; Trinder et al 2007 p11). The comparison is not exact as the conciliation sample was likely to comprise fewer hard cases as it was based on a wide range of cases at first hearing. With that caveat, however, the relitigation rate of 9% in the enforcement sample does appear to be comparatively low.

What we do not know is whether that modest 9% relitigation rate is a indication that the court's intervention was reasonably successful at resolving the dispute for most cases or whether contact remained problematic and litigants were preparing either to launch proceedings or were unable or unwilling to pursue proceedings. We suspect that a significant

number of cases had reached at least some resolution. This is based on the grounds that from all 161 closed cases only three parties had contacted Cafcass to report further allegations of non-compliance:

***Bubbling-under cases***

*Case #161. Long-running case with two previous enforcement applications. Both sides of the extended family had been drawn into the dispute, with allegations of abuse against the paternal grandfather and counter-accusations against the maternal grandmother. The young teenager was refusing contact given the conflict surrounding her. The Cafcass officer was considering recommending a s91(14) order prohibiting any further applications. However at court a new order was made by consent setting out contact arrangements and allowing the involvement of all grandparents in contact as long as they made no hostile or critical comments. Several months later F phoned Cafcass to report that the child was refusing contact following critical comments by a paternal grandparent. No further applications had been issued at that point*

*Case #038. Two junior school children with M. F applied for residence. The index order instead provided for visiting contact. F applied for enforcement and shared residence claiming M was ignoring the court order and reneging on an agreement made in mediation and he had only seen the children once in the past 20 months. He also expressed concerns about M's ability to parent. Cafcass report that M was well able to parent and that F's concerns were disproportionate. M expressed concerns about F's consistency – that he had previously lacked commitment re contact but that the children would like visiting and possibly staying contact. Cafcass recommended that shared residence would not be appropriate and was not wanted by the children. The court referred the parents to SPIP and made a consent order for visiting and then staying contact. The case was listed for review nine months later. Prior to the review F wrote to Cafcass, complaining that indirect contact had failed over Christmas and that there was a dispute over a specific weekend contact. Cafcass spoke by phone to each parent and advised each parent to provide longer notice for potentially clashing family occasions. There was no record on file of any further applications.*

Analysis of the types of cases involved in relitigation revealed some interesting patterns. As might be expected, cases with an extensive background of litigation were more likely to be involved in further litigation. Indeed six of the twenty new applications were repeat/chronic litigation cases, i.e. on at least the third set of proceedings. Clearly the court had failed to find a resolution in those cases.

The majority of new applications were from non-resident parents. However, by no means all of the new applications were about non-compliance and enforcement issues. In fact, only a minority of these new proceedings resulted from contact having broken down or not running in accordance with the index/enforcement order. The following illustrates the wide range of types of application amongst the twenty relitigating cases:

- Further applications for enforcement by the non-resident parent (6 cases)
- Applications from non-resident parents to extend contact, e.g. to overnight, (3 cases)
- Applications for residence from non-resident parents (5 cases)
- Cross-applications for residence from both parents (2 cases)
- Cross-applications to vary the contact order from both parents (2 cases)
- Applications to vary (reduce/restrict the contact order from resident parents (4 cases)
- Care proceedings initiated by the local authority (1 case)

We examined all twenty cases to classify the main issues or problems that had resulted in the renewed application. As with the original enforcement applications, we found that relatively few cases involved significant compliance issues and more commonly the application resulted from risk or conflict issues. The relitigation cases fairly clearly divided into three groups:

- Ongoing non-compliant/implacably hostile resident parents (3 cases)
- Ongoing conflict with minimal breaches (7 cases)
- Risk cases where contact was usually ongoing (10 cases)

The first group consisted of three cases where there was significant non-compliance by the resident parent without any reasonable excuse. The first of these was a case where the resident mother had moved the two young children elsewhere to prevent the father having contact, prompting a second enforcement application. The mother's case was that the children were adamantly refusing contact but her case appeared weak. She had previously walked out of court (see #168 above). The second case was one where the court had already ordered UWR but the resident parent refused to comply with that order, prompting a further enforcement application (#014 discussed further below). The third case was one where the resident mother of a toddler had blocked all contact, alleging failings in the father's care and that the child was too young for contact. The father sought enforcement and then an application for residence when the mother was still not complying (#142 and see below).

The group of seven 'ongoing conflict' cases did not involve significant breaches of the index or enforcement order. More commonly these fresh applications, whether for enforcement,



residence or to vary contact, resulted from an inability to make any necessary day to day changes to the contact timetable. The parents were unable to communicate or cooperate or compromise. Applications were triggered, for example, when a different person did the pickup (#074) or when the parents could not negotiate changes to accommodate overseas work trips (#152) or to agree a holiday abroad (#215). None of the cases involved any safeguarding issues other than repeated concerns by Cafcass about emotional abuse of children involved in continuing proceedings.

The largest group of the cases that came back to court were those where there were significant safety issues. In these ten cases contact was mostly ongoing. The applications were from non-resident parents to enforce (1 case) or extend contact (2 cases) or for residence (2 cases). Four applications were from resident parents to reduce or restrict contact. One application was from the local authority. These cases were not centred on compliance or enforcement but rather were families with chronic and sometimes acute problems. It is difficult to compare the severity or chronicity of risk profiles but our impression was that these 10 cases included some of the most complex cases and serious safeguarding issues.

The group of ten risk cases can be further subdivided into three. The first sub-group – the ‘problematic applicants’ – consisted of three cases where the non-resident parent applied to the court to enforce or extend contact or seek a residence order but the court examined the case and decided that the applicant posed a risk to the child and imposed or extended restrictions on contact (e.g. #190 see box below). The second sub-group were four cases where the resident parent applied to restrict or reduce conflict. In all cases there were significant neglect/abuse and drug/alcohol issues involved. Interestingly three of the four were applications by resident fathers (e.g. #026). The third sub-group were three cases all initiated by the non-resident parent but where the court identified significant concerns regarding both parents, primarily about child neglect (e.g. #205).

***Relitigating risk cases: Problematic applicants***

*Non-resident F with mental health issues. Domestic violence background and recent breach of restraining order. F was a litigant in person throughout. The enforcement application was dismissed as contact was ongoing at a contact as ordered. F made a new application for residence and contact but refused to talk to Cafcass. He then made a further application for enforcement and for a very large amount of financial compensation. The court dismissed the applications and reaffirmed the existing contact order. #190*

**Relitigating risk cases: Resident parents seeking restrictions**

*Non-resident M with longstanding drug and alcohol issues. The index order provided for informally supervised contact alongside a drug/alcohol test regime. The resident F stopped contact as M had not complied with the tests. M applied for enforcement. Reports were ordered. F then applied for an order barring the mother from making further applications. This was supported by Cafcass. The court subsequently made a Prohibited Steps Order barring the mother from making applications in the next twelve months. #026*

**Relitigating risk cases: Both parents presenting safeguarding concerns**

*Four year old child living with M. She had significant drink and drugs problems affecting the care of the child. F had multiple convictions for violence and drugs. F applied for enforcement and for residence after the mother stopped contact. The court ordered a s37 report from children's services and drugs tests for both parents. Contact was ordered at a supervised centre. Subsequently the local authority applied for an Emergency Protection Order and initiated care proceedings. #205*

The final question to consider is whether the court's approach to the enforcement case had any impact on the likelihood of subsequent litigation. As can be seen from Table 9.1 the new applications were fairly widely spread across the different approaches, although there were no further applications from participatory cases. There is some suggestion that cases dealt with by a punitive approach were more likely to result in further applications, with a fifth of 'punitive' cases being relitigated. We cannot, however, draw any substantive conclusions from this. First, the numbers involved are very small and just one or two cases were influencing the results. Second, it is clear that the 'punitive' cases were amongst the most difficult cases and would be likely to relitigate regardless of how the court approached the case. We explore the use and effectiveness of enforcement orders next.

**Table 9.1: Cases with new applications by the Court's approach to enforcement**

<i>Approach to enforcement</i>	<i>Number of cases with new application</i>	<i>% of approach with new application</i>
Punitive	4	22
Pure settlement	5	13
Problem-solving	7	7
Protective	4	11
Participatory	0	0

## **9.2 Summary**

A year after the application, three-quarters of cases had been closed and there had been no further applications. A tenth of long-running case remained open. Just under a tenth of cases involved a new application to court. This relitigation rate appears modest and a possible indicator of success although we do not have information about how the cases which did not return to court were faring.

The 9% of cases that did return to court were, again, mostly not implacable hostility cases. Instead most further litigation involved mutual conflict or safeguarding issues in cases where contact was still ongoing.

## 10. The use and effectiveness of unpaid work

We now turn to look in detail at the use and effectiveness of orders for unpaid work (enforcement orders). This new sanction was the major innovation for dealing with non-compliance introduced by the 2006 Children and Adoption Act. It allows courts to order a party to undertake 40-200 hours of unpaid work if they fail to comply with a contact order without a reasonable excuse (see box for a summary of the main provisions). As reported earlier, however, that even though unpaid work was introduced to be a more proportionate and less draconian sanction than imprisonment or fines, it has still been infrequently used. In this section we examine how the courts approached the use of unpaid work and how effective it appeared to be in addressing non-compliance.

### **Enforcement orders – the relevant provisions**

#### **11J Enforcement orders**

- (1) This section applies if a contact order with respect to a child has been made.
- (2) If the court is satisfied beyond reasonable doubt that a person has failed to comply with the contact order, it may make an order (an “enforcement order”) imposing on the person an unpaid work requirement.
- (3) But the court may not make an enforcement order if it is satisfied that the person had a reasonable excuse for failing to comply with the contact order.
- (4) The burden of proof as to the matter mentioned in subsection (3) lies on the person claiming to have had a reasonable excuse, and the standard of proof is the balance of probabilities.

11J(9) The court may suspend an enforcement order for such period as it thinks fit.

#### **11L Enforcement orders: making**

- (1) Before making an enforcement order as regards a person in breach of a contact order, the court must be satisfied that—
  - (a) making the enforcement order proposed is necessary to secure the person's compliance with the contact order or any contact order that has effect in its place;
  - (b) the likely effect on the person of the enforcement order proposed to be made is proportionate to the seriousness of the breach of the contact order.
- (2) Before making an enforcement order, the court must satisfy itself that provision for the person to work under an unpaid work requirement imposed by an enforcement order can be made in the local justice area in which the person in breach resides or will reside.

(3) Before making an enforcement order as regards a person in breach of a contact order, the court must obtain and consider information about the person and the likely effect of the enforcement order on him.

(4) Information about the likely effect of the enforcement order may, in particular, include information as to—

(a) any conflict with the person's religious beliefs;

(b) any interference with the times (if any) at which he normally works or attends an educational establishment.

(5) A court that proposes to make an enforcement order may ask an officer of the Service [Cafcass] or a Welsh family proceedings officer to provide the court with information as to the matters in subsections (2) and (3).

(6) It shall be the duty of the officer of the Service or Welsh family proceedings officer to comply with any request under this section.

(7) In making an enforcement order in relation to a contact order, a court must take into account the welfare of the child who is the subject of the contact order.

#### **11M Enforcement orders: monitoring**

(1) On making an enforcement order in relation to a person, the court is to ask an officer of the Service or a Welsh family proceedings officer—

(a) to monitor, or arrange for the monitoring of, the person's compliance with the unpaid work requirement imposed by the order;

(b) to report to the court if a report under paragraph 8 of Schedule A1 is made in relation to the person;

(c) to report to the court on such other matters relating to the person's compliance as may be specified in the request;

(d) to report to the court if the person is, or becomes, unsuitable to perform work under the requirement.

(2) It shall be the duty of the officer of the Service or Welsh family proceedings officer to comply with any request under this section.

### **10.1 Assessment for unpaid work**

Before ordering a person to undertake unpaid work, the court must first satisfy itself beyond reasonable doubt that a person has failed to comply with the contact order (s11J2), that making an order is necessary to secure compliance (s11L1(a)) and that the order would be proportionate (s11L1(b)). Further, the court must undertake an assessment to consider the

likely effect on the person (s11L3), including the impact on religious beliefs, work or education (s11L4). The child's welfare is not the paramount consideration but the court must take it into account (s11L7). The assessment does not have to be completed by Cafcass (or Cafcass Cymru) but both organisations must comply with any request for assessment made by the court (s11L5,6).

In our sample the court ordered Cafcass to undertake a UWR assessment of suitability in 11 cases. In six of these the court then went on to make an enforcement order having had a formal assessment. In the remaining five cases the court ordered the assessment but did not make an enforcement order for unpaid work. In a further seven cases the court made an enforcement order without having ordered a formal assessment from Cafcass. There was limited evidence that an assessment took place at court in lieu of the formal Cafcass assessment. If so, that would not be consistent with s11L(3) of the 2006 Act. As we see below, there could be problems where unpaid work was ordered without a full prior assessment.

Where Cafcass were asked to prepare assessments these were done either as a standalone assessment (6 cases), as part of a s7 report (3 cases) or as part of the updating of a Schedule 2 report (two cases). The standalone assessments were done using a Cafcass pro forma with specific sections addressing the key statutory provisions: local availability, accessibility to the party, suitability of the party, the likely effect and (with a note to include only if necessary) any further relevant information about the welfare of the child or risk assessment. The s7 or Schedule 2 reports did not follow the same format and tended to be more discursive analyses of the situation. They were also more likely to make recommendations to the court about whether or not UWR was appropriate, whereas the pro forma assessments were more factual summaries of the practicalities rather than consideration of the principle of making an enforcement order.

The purpose of the assessment was to identify suitability or lack of suitability. Six of the nine available reports either identified significant obstacles to UWR or reported that there were limited or no significant obstacles. Interestingly, the more practical issues flagged in the statute were not usually problematic. All of the reports confirmed that work placements were available in the area, although they were often limited in nature. Placements were generally accessible either by car or public transport. None of the parties had particular religious beliefs that might pose restrictions and only one (#002) appeared to be employed or studying.

The obstacles that Cafcass officers generally identified related more to the suitability and effect questions. The issues raised fell into three main categories, with cases often raising multiple issues.

The first issue was childcare. A number of resident parents had very young children who were not in daycare arrangements. In case #213 the resident mother had a toddler, as well as a primary school age child, which limited her availability for community service outside school hours. The mother in case #020 had two children under the age of two. The Cafcass officers noted that this might restrict their availability and might also impact on the children involved.

The second issue raised was the potential vulnerability of the party. The mother in #020 had been diagnosed with post-natal depression and was also currently breastfeeding. The mother in #208 had three children under five years and was pregnant whilst the mother in #212 was about to have a major operation.

The third main issue raised was a concern that unpaid work would be counter-productive and would increase rather than reduce conflict. In case #208 the report suggested that unpaid work might reverse the recent progress made in parental cooperation and recommended instead that the mother be referred to SPIP. Elsewhere the Cafcass officer raised or reported concerns that the unpaid work would have a negative impact on the child(ren)'s view of their father (e.g. #002, #212).

## **10.2 The impact of the assessments**

In practice there was no clear link between the assessments identifying significant obstacles and whether or not the court ordered UWR.

Of the six cases where assessment reports identified significant obstacles, three resulted in UWR and three in other outcomes.

In three cases there was a clear difference of opinion between the assessing Cafcass officer and the court. All were in the direction of the Cafcass officer being more cautious about UWR and the court being determined to act, as in the following case:

### ***Differences between Cafcass and the court***

*Both parents with a history of offending. M has a care background. Multiple referrals to children's services relating to violence, drink and drugs for both parents. Pre-school child living with M who had a transient lifestyle. M stopped contact because of an alleged cigarette burn. F said it was chicken pox. F applied for enforcement. The court ordered a s37 report and directed both parents to attend SPIP. M repeatedly failed to attend SPIP and the court therefore ordered an assessment for UWR. The UWR report, interestingly, said that because the mother was not willing to do UWR, it was unsuitable and that the likely effect of an order for UWR would be a swift breach by mother, with the risk of increasing penalties including imprisonment, and therefore loss, distress and disruption to child. The FCA reported that the purpose of SPIP had now been explained to the mother and she was more willing to attend. Further, the FCA reported that the father was now having regular contact. The mother failed to attend the next hearing. The court asked the FCA to check if unpaid work was available for the mother locally, noted that a s37 report had found no concerns or unmet needs, and ordered 24 hours UWR suspended for 56 days. #028*

### **10.3 Ordering UWR**

The court has the power to order enforcement immediately or to suspend an order for such period as it thinks fit (s11J(9)). Only four of the 13 enforcement orders were immediately implemented. Seven of the 13 UWR orders were suspended, including one where “the sentencing” for a breach was suspended. In two cases it was not clear from the file whether the order had been suspended or not.

This limited use of immediately activated orders might suggest that courts viewed unpaid work primarily as a threat to ensure compliance rather than as a punishment. Alternatively, it might indicate caution given their lack of experience in the use of unpaid work as an intervention or simply the perceived logistical difficulties in finding a suitable placement.

The period of suspension varied, from for 56 days to twelve months. In one case a second suspended order was made by consent as contact continued to progress (#013).

The Act provides for the hours of unpaid work to range from 40 to no more than 200 hours (Schedule A1, Part 1 s3(3)(a)). In fact, the UWR orders ranged from 24 hours to 80 hours. The 24 hour order in case #025 was for 12 hours for the original breach plus a further 12 hours for a second breach. The total 24 hours is less than the statutory minimum of 40 hours,



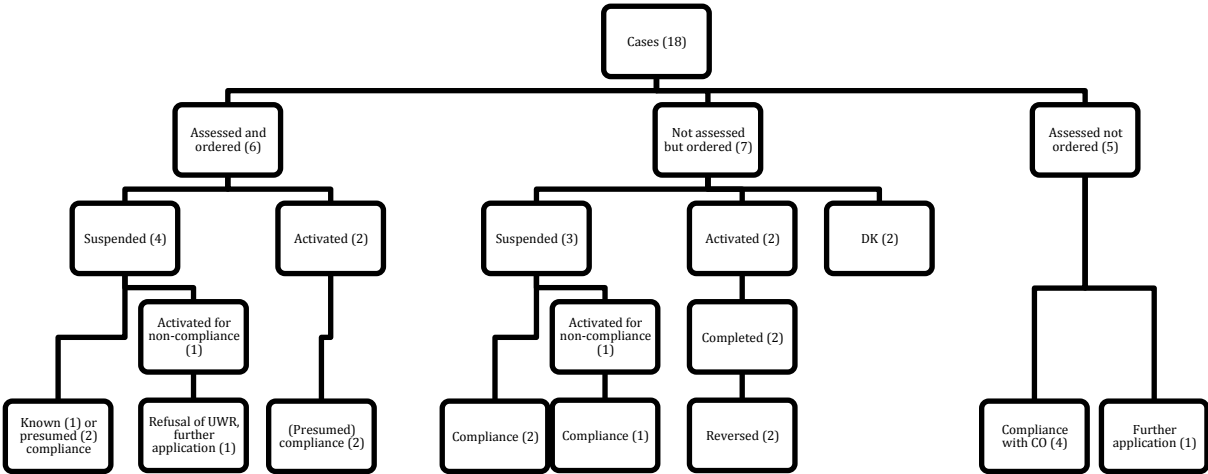
probably reflecting the lack of familiarity of the court with enforcement orders. It is noteworthy that the highest amount ordered was for 80 hours, less than half of the statutory maximum of 200 hours.

The unpaid work available was painting and decorating (#025) and charity shop work.

### 10.4 Achieving compliance

We now look at the effectiveness of UWR both as a deterrent and as a punishment. We established above that the court made very limited use of UWR. We also found that this use was not straightforward, and that while in some cases UWR was both assessed and ordered, in others it was assessed but not ordered or ordered but not assessed. Figure 5.1 below tracks the varied pathways that the cases took. In sum, five cases were assessed for UWR but not ordered, suspended orders were made in seven cases and in four cases UWR orders were immediately activated. In two cases the nature of the enforcement order was unknown.

Figure 10.1: The outcome of UWR assessments and orders



One interesting finding is that merely ordering an assessment for UWR but not proceeding to make an enforcement order could be an effective deterrent. In four out of five cases where the court just assessed for UWR but did not go on to make the order the resident parent began to comply with the index order. In case #020, for example, the threat of unpaid work was sufficient to force a resident mother to engage with the court process for the first time and a new contact order was made for fortnightly supported contact which appeared to be working. In case #213 the resident mother failed to attend the first two enforcement hearings.

An assessment for UWR was ordered together with a new contact order. That order was implemented without fail and the court then sought to extend contact further.

The suspended orders were also relatively successful. Only two of the seven suspended orders were quickly activated for non-compliance with the contact order (#025 and #014). In contrast three of the remaining five suspended orders were known to have resulted in compliance (#028 above) and the other two appear to have been compliant although the evidence is more limited.

***Effective suspended order***

*Nine year old living with M. Proceedings have been ongoing over 5-6 years. Contact has occurred sporadically at a contact centre over the last 2-3 years. M was implacably hostile to contact for reasons that are unclear from the files other than hints about F's possible violence and drug use in the past. The child was refusing contact, possibly as a result of M's influence. F is described as somewhat overbearing. The court finally ordered a UWR assessment. The FCA was ambivalent about whether UWR would help or not. The court made an order for 60 hours UWR suspended for 12 months and an order for unsupervised visiting contact. Contact then got going and was gradually extended over a succession of hearings. The court then made a second suspended UWR with M's consent and commented that the UWR had 'improved' M's attitude to contact. #013*

The six immediately active or activated orders had more varied outcomes. One case was clearly successful. Case #025 concerned a resident father of a teenager. The father had previously admitted breaching the contact order and had received a suspended UWR. Contact broke down again following an alleged assault on the father by the mother's new partner. The allegations were found to be unsubstantiated. The mother applied again for enforcement and the court activated the suspended order with additional hours for the further breach. The father completed the unpaid work and subsequently contact appeared to restart.

In three cases the UWR was clearly unsuccessful (see box below). In one case (#014) the resident mother simply refused to undertake unpaid work. In two cases the resident mothers completed unpaid work but then successfully applied to reduce contact on the grounds of risk (#017, #022).

The outcomes were unknown in the other two cases.

## **Unsuccessful enforcement orders**

### **Reversal case 1**

*Case #017. Child of nine living with M. Contact stopped when M alleged the child was returning smelling of cannabis. F applied for residence and contact. Index order provided for visiting contact. F's hair test was negative. F applied for enforcement saying contact had broken down. M, who had been a litigant in person throughout, failed to attend the first hearing. The court issued a penal warning. M failed to attend the second hearing and the court ordered 80 hours of UWR. The mother completed the UWR. Meanwhile Cafcass finally managed to speak to M who reported that the child did not want contact, remembering serious incidents of domestic violence. Cafcass recommended a fact-finding hearing. Before the FFH could be listed the parents agree that some of the incidents happened and there was no need for a hearing. The child was referred to a contact centre for assessment but refused to continue attending after several sessions. At the final hearing an order was made for indirect contact only.*

### **Reversal case 2**

*Case #022. Child of seven living with M. There was a long history of litigation with multiple previous applications. The index order provided for visiting contact with an expectation of staying contact in future. F then applied for enforcement citing breaks in contact. A wishes and feelings report noted that the child wished to see the father and made a brief reference to mediation being unsuitable given the domestic violence in the case. The court made a final order for overnight contact plus an Enforcement Order for 60 hours UWR (with no prior assessment for suitability). The mother completed the UWR. Shortly after she applied to vary contact, citing physical and emotional abuse against her and the child. A new Schedule 2 was ordered (it was unclear if there had been an earlier report). The FCA decided instead that a full s16A Risk Assessment was needed. That report noted an extensive history of domestic violence with a recent incident witnessed by the child, together with concerns about deliberate acts of physical harm, emotionally abusive and rejecting language and talk about suicide. The case was seen as beyond the scope of a Domestic Violence Perpetrator Programme (DVPP). At the next hearing the court suspended all previous contact orders and the case was transferred up to the county court.*

### **Unsuccessful enforcement orders cont.**

#### **The refusal case**

*Two primary school age children living with M. Index order provided for staying contact. F applied for enforcement several months later and the mother cross-applied to vary the arrangements. The court made a suspended UWR order. F applied for enforcement again four months later stating that the order had been immediately breached. M claimed that the children do not want to go. Cafcass were unable to speak to M. At the next hearing the court deemed the application for activation of the enforcement order to be a fresh application for enforcement. The court ordered Cafcass to report on suitability for UWR and a wishes and feelings report. The report noted the children's increasing alienation from F and suggested a gradual reintroduction of contact. The court instead made an order for 40 hours unpaid work. However M refused to attend, citing a range of illnesses. Cafcass wrote to the court twice seeking directions. F made a third application for enforcement seven months later with contact still very episodic and with increasing concerns about M's behaviour and the children's emotional wellbeing. At the next hearing the court ordered a s37 investigation and statements from the parties. #014*

## **10.5 Evaluating the use of UWR**

Our evaluation of the use of UWR must be limited given the risks of over-generalising from a small sample. We should also point out that the courts/Cafcass experience of using these orders is very limited and that routine/consistent practice has not yet developed.

That said, our analysis of case outcomes above suggests that UWR may well be more effective as a threat – whether in the form of assessment or as a suspended order – rather than a reality. It is striking that only one activated order achieved a positive outcome in ensuring compliance. In contrast, cases with assessment only or suspended orders were somewhat more likely to result in compliance. It should be acknowledged, however, that an activated UWR is most likely to be ordered in the more difficult cases. Expectations of success might therefore have to be modest.

Whilst UWR is an additional tool for courts to use in difficult cases, it is difficult to envisage its use being more widespread. There are number of reasons for that.

First, as we have seen above there will be limited numbers of cases where a punitive sanction will be appropriate. The numbers of implacably hostile/alienating cases were small.

There were only nine cases in the sample that we coded as implacably hostile/alienating and five of them were subject to a UWR assessment or suspended or activated enforcement order.

The second reason is that even though UWR is less draconian than imprisonment and may be more feasible than a fine, it is still likely to be impractical in some of the cases where a robust response is needed. Leaving aside the question of whether a punitive approach would inflame conflict, as we noted above, several of the potential candidates for UWR had very young children and/or a range of physical and mental vulnerabilities. In those cases it would be difficult to envisage the women being able to cope with unpaid work and the consequent impact on their children meant that UWR was not a realistic prospect.

Third, there were some cases where the defaulting parent appeared to have significant mental health issues/personality disorders (e.g. #014 and #142). In these cases the hostility to contact appeared to be less a matter of wilful and malicious refusal requiring punishment and more an indication of more organic issues where a mental health and/or child protection response might be more appropriate. It is interesting to note that there was only one case in the sample where the court ordered the transfer of residence. This was a case involving a resident father with a very severe and unstable mental health condition (#001). The question of unpaid work never really arose in that case.

Finally, one of the real challenges for the court is that cases do not always comprise one defaulting and one child-centred parent. The UWR sample could include two parents locked in competition but where the court appeared to condemn the behaviour of one parent (e.g. #002). More commonly, cases involved two parents with parenting capacity impaired by mental health issues or drugs and alcohol dependency. In those cases, again, the risk was that the court adopted a binary approach where one parent must be punished.<sup>14</sup> The result was a punitive approach against one parent where the other parent may also pose significant risks or where the benefits of contact for the child might be very tenuous or marginal. In case #013, for example, the mother complied with the suspended order. At the same time the recitals to the final order contained a litany of issues that the father had to address, including having the paternal grandmother present as much as possible at contact, agreeing to be more sensitive to the child's personality and feelings, being more tactile and physically

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<sup>14</sup> This was in contrast to the more common approach in other cases where courts tended to mutualise parental disputes - see Section 8.3 above.

affectionate, being more creative in how they use their time, doing activities wherever possible and not to force certain foods. It is possible that the list was included as a sop to encourage the mother to comply with the order. Even so it does illustrate that in some cases enforcement was taking place in situations where the parenting of the non-resident parent was far from ideal.

## **10.6 Summary**

Courts made very limited use of the new provision for unpaid work, primarily as few cases required a punitive approach. Courts made greater use of unpaid work as a threat – whether in the form of assessment or as a suspended order – rather than as a punitive sanction. The assessment-only and suspended orders did have higher success rates than the activated orders. Indeed only one activated order achieved a positive outcome in ensuring compliance.

## 11. Compensation for financial loss

The 2006 Children and Adoption Act enabled parents to gain financial compensation where they could prove (on the balance of probabilities) a financial loss suffered as a result of the other parent's failure to comply with a contact order. The losses envisaged were for travel and accommodation expenses such as holiday bookings.

### Compensation for financial loss – key provisions

#### s110 Compensation for financial loss

- (1) This section applies if a contact order with respect to a child has been made.
- (2) If the court is satisfied that—
  - (a) an individual has failed to comply with the contact order, and
  - (b) a person falling within subsection (6) has suffered financial loss by reason of the breach,it may make an order requiring the individual in breach to pay the person compensation in respect of his financial loss.
- (3) But the court may not make an order under subsection (2) if it is satisfied that the individual in breach had a reasonable excuse for failing to comply with the contact order.
- (4) The burden of proof as to the matter mentioned in subsection (3) lies on the individual claiming to have had a reasonable excuse.
- (5) An order under subsection (2) may be made only on an application by the person who claims to have suffered financial loss.
- (9) The amount of compensation is to be determined by the court, but may not exceed the amount of the applicant's financial loss.
- (10) In determining the amount of compensation payable by the individual in breach, the court must take into account the individual's financial circumstances.
- (14) In exercising its powers under this section, a court is to take into account the welfare of the child concerned.

### 11.1 The applications

A fifth of enforcement applicants in the study sought compensation for financial loss following alleged breach of an order. The average amount claimed was £200, but ranged from £50 to £19,000.

There was detailed information about the claims in 41 cases. Ten claims were for travel and/or accommodation costs, twelve were for the £200 court fee only, eight were for legal costs and the court fee, four for loss of earnings and the court fee, three for travel costs plus legal fees and four for other costs or an unspecified amount.

In total 24 claims included the £200 court application fee and this was the most common item claimed for. This is in contrast to the original issues flagged up during the passage of the 2006 bill when the focus was on thwarted travel costs rather than court or legal fees. Indeed it is not at all clear that parliament intended these should be counted as legitimate costs.

Some applications were for modest and well-justified travel costs. The applicant in case #010, for example, claimed compensation for a long haul flight when contact had not taken place. In contrast, a number of applications appeared to be for inflated sums or lacked supporting evidence. In case #190 for example, the applicant claimed £19,000 for legal costs - despite being a litigant in person - plus tens of thousands of miles in travel expenses. Although the father did have a long drive for contact the sum appeared to be exceptionally high given the frequency of contact and claim period. In case #107 the applicant claimed several hundreds of pounds for comics and presents that he said he had continued buying for the children every week even after contact had broken down some time previously.

## **11.2 The outcomes**

The Cafcass system records that only four claims were awarded. We do not know if this reflects the success rate of applications or, as we suspect is more likely, that the outcome of the financial applications was not recorded on the Cafcass system with its focus on children. Either way, we suspect also that many claims were dismissed or withdrawn rather than awarded.

The four cases where it is known that compensation was awarded provide some interesting insights into the court's response to claims. In two cases the court awarded the full compensation claimed by the applicant. In case #037 this was modest transport costs of £60, and in case #105 the court required the respondent who had failed to attend the hearing to pay the full court fee of £200.

In the other two cases where compensation was awarded, the court appeared to consider that both parents had some responsibility for the problems with contact, and were trying to send a signal to the parents communicating the court's frustration with their behaviour. In case #010 the claim was for the court fee plus travel and parking. The court did not award



costs for travel and parking and then split the £200 cost of the court application by requiring the respondent to pay £100 leaving the applicant to bear the cost of the other £100. A very similar approach was evident in case #112 where the applicant claimed for the court fee and lost wages. The court did not award the lost wages and again split the cost of the court fee by requiring the respondent to pay £100. Both cases involved very high conflict and long-running cases. It is worth noting that the courts in these cases did appear to count the court fee as a legitimate item for compensation.

### **11.3 Summary**

A fifth of cases included an application for financial compensation where there had been expenses incurred as a result of non-compliance. Many of these were for the court application fee of £200 although parliament had intended compensation to be targeted on travel and accommodation expenses. Few of the applications appear to have been successful although our records are incomplete.

## 12. Conclusions and implications

This report presented the findings from the first major research study of enforcement applications in England and the first to explore the use of the new punitive sanctions made available to the courts by the Children and Adoption Act 2006. The research attempted to explain the puzzle of why the family courts so infrequently used punitive sanctions in these cases. Was it because the courts are biased against fathers and unwilling or unable to take a robust approach with mothers who flout orders, as fathers' groups often argue? Or was it a sign of widespread systems failure of the kind recently highlighted in the case of *Re A*?<sup>15</sup>

In fact, what emerged was that the public perception of the nature of enforcement cases is inaccurate. Implacably hostile mothers, as in the case of *Re A*, do exist and do unreasonably frustrate contact and defy the court. But their numbers are very small. Systematic analysis of a nationally representative sample of enforcement applications revealed that most enforcement cases are not about an implacably hostile parent but rather troubled or conflicted sets of parents, significant safety issues and children making reasonable and understandable decisions to limit contact. The study only looked at C79 applications but there is no reason to suspect that there would be a higher proportion of implacably hostile parents in cases where the non-resident parent applied to vary a contact order to deal with non-compliance rather than using the C79 enforcement process.

Whilst analysis of the few Court of Appeal cases involving non-compliance might reveal a higher concentration of these implacably hostile cases, they still constitute a very small fraction of the hundreds of enforcement cases at family proceedings and county court level. Our findings are at odds with the public understanding of the nature of enforcement cases, but they are in fact entirely consistent with the two earlier studies of enforcement by Rhoades (2002) in Australia and Hunt & Macleod (2008) in England and Wales.

The second main finding from the study was that courts do not approach cases with a punitive mindset. Instead they appeared to approach most cases with very much the same orientation as they approach most contact cases, that is with a focus on settlement rather than adjudication and focusing on problem-solving rather than identifying whether or not a breach has occurred and sanctions needed. This orientation reflects the default approach of

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<sup>15</sup> *Re A (A Child)* [2013] EWCA Civ 1104. See Section 3.5 above.

the family justice system that successive socio-legal studies have shown is pro-contact, pro-settlement and future-oriented.

What the study clearly identified was that the courts made an assessment of the nature or type of the case and then usually tailored its approach to the circumstances. Given that few cases in the sample hinged exclusively on the unreasonable and sustained hostility of the resident parent, then the limited use of punitive sanctions was appropriate. Thus as we highlighted above, cases involving mutual conflict were dealt with by a new contact timetable or by efforts to address the conflict and support cooperative co-parenting; cases involving safety concerns were handled by a protective approach based on risk assessment and management; whilst cases where older children had taken a reasonable decision to limit contact were approached by eliciting and typically responding to children's wishes and feelings. Where the court identified that the resident parent was unreasonably and systematically blocking contact – implacably hostility – then usually it responded with punitive sanctions.

The courts are therefore acting appropriately in the great majority of cases by focusing on facilitating co-parenting, implementing protective measures or heeding the nuanced views of older children. In only a handful of cases were the courts insufficiently robust in handling implacably hostile parents and those cases were outweighed by the cases where the court was too robust in imposing punitive sanctions in domestic violence cases.

Whilst we found that the courts generally adopted the appropriate approach for the case type, that is not to say that the courts always got it right or did enough. The problem-solving approach can default to over-hasty, “cookie-cutter” case processing. In some instances the focus was too much on rapid case processing, contact and settlement at the expense of addressing the underlying issues driving the dispute, or managing any risk safely. Some of the high conflict repeat litigation cases returned to court quickly after very limited input. There was very little support available for children, despite widespread concerns about emotional abuse. In some cases, risk was inadequately assessed and/or managed given the strength of the contact presumption and limited resources to manage risk.

Given these findings, we consider that it would be helpful for policy to refocus somewhat away from the few implacably hostile cases requiring punitive sanctions and towards finding sustainable, safe and child-centred solutions to the full range of enforcement cases. Whilst this is a particularly challenging time for the family justice system given severe resource

constraints, it is still worth considering what types of interventions might be more helpful and might indeed lead to savings in the long-run.

We make the following suggestions for policy and practice.

### **The need for further sanctions**

- The government's decision in 2013 not to introduce further new sanctions is entirely consistent with these research findings. There is no evidence that further or new sanctions would be more widely used than the existing range of sanctions, not least given that most cases do not involve implacable hostility. In those cases where punitive sanctions are appropriate, we think it is unlikely that courts would be more inclined to order electronic tagging or withdrawal of passports and driving licences than unpaid work, fines or committal.

### **Ordering unpaid work**

- Courts should ensure there has been a thorough assessment of the case and the reasons for non-compliance before ordering punitive sanctions. There were examples in the study where enforcement orders were made without prior assessment and where the court subsequently acknowledged that it had been the wrong decision.
- Courts could consider that assessment for unpaid work and suspended enforcement orders can work to secure compliance without having a negative impact on the child.
- If an enforcement order is deemed appropriate after thorough assessment, then sanctions should be pursued robustly rather than allowing cases to drift or result in further non-compliance.

### **Additional resources**

- There is a need to switch policy attention from the very small number of implacable hostility cases to the broader spectrum of high conflict and chronic litigation cases involved in enforcement. The government's proposed triage system (MoJ 2013) could be an effective mechanism for handling enforcement cases but needs some adaptation to address the full range of enforcement cases.
- Some of the most difficult cases in the sample, including some of the 'implacably hostile' cases and some of the non-meritorious chronic litigants involved parents with mental health difficulties and personality disorders. In these circumstances a therapeutic

approach may well be more productive than a purely punitive approach. In *Re A*<sup>16</sup> the Court of Appeal suggested that a multidisciplinary team was essential for achieving a resolution in these types of cases. At present access to this resource is extremely limited, particularly outside of London. Given the disproportionate cost of these chronic cases then some front-loading of investment is worth exploring.

- The government's proposal for an enforcement-specific contact activity (MoJ 213) could be extremely useful although it will be logistically challenging given that cases are thinly spread geographically. It would be important not to restrict such an intervention to C79 cases but to consider the benefits for all high conflict cases or indeed applications to vary where the issue is non-compliance.
- Courts could make greater use of the existing parent education programmes (SPIP) or family counseling.
- There was a serious mismatch between the number of children described as at risk of emotional abuse and the number of children who were offered any form of support or counseling. This omission should be addressed.

### **Safeguarding**

- The Cafcass Schedule 2 safeguarding report was a critical source of information for the court but is not strictly required within the private law pathway. We recommend that its use is mandatory in the proposed new Child Arrangements Pathway.
- There is evidence that courts are still failing to assess and then manage risk appropriately in all cases. More fact-finding hearings are likely to be needed to test evidence. Where serious domestic violence is found then referral must be to a suitable intervention such as the Domestic Violence Perpetrator Programme and not to an anger management course or to SPIP. Assessing risk is likely to be more challenging in a post-LASPO era where there may not be public funding for drug and alcohol tests and expert evidence in cases where that evidence is needed.

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<sup>16</sup> *Re A (A Child)* [2013] EWCA Civ 1104. See Section 3.5 above.

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## Appendix A

### Interim research findings: Submission to the Bill Committee March 2013

#### The enforcement of court orders for child contact: interim research findings

**Professor Liz Trinder<sup>17</sup>, Alison McLeod, Julia Pearce and Hilary Woodward (Exeter University) and Joan Hunt (Oxford University)**

1. This submission is designed to share early findings from a Nuffield Foundation funded study of applications to enforce contact orders in private family law cases. The study is due for completion in the summer but the Committee may well find it useful to see early findings from analysis of 81 recent enforcement cases.
2. Enforcement is a highly salient issue given recent statements from the government<sup>18</sup> and the Justice Select Committee<sup>19</sup>. It is a policy area with no previous research. Understanding of the issue has been shaped by personal testimonies. Whilst powerful, like any individual accounts or other anecdotal evidence, these are not necessarily representative or complete. The current study was designed to address the evidence gap by providing a profile of enforcement cases and evaluating how courts respond to applications.
3. The research is being conducted by a team of socio-legal researchers with many years of experience of family law research. The Nuffield Foundation has funded the research, but the views expressed are those of the authors and not necessarily those of the Foundation. The research team would like to thank both Cafcass for enabling access to their electronic records and the President of the Family Division for granting permission for the study.

## INTRODUCTION

### The policy context

4. It is well known that most parents decide their own parenting arrangements after family breakdown. Only about 10% of separated parents have court-determined contact arrangements. A fraction of those 10% seek enforcement of the court order. In 2011/12 there were just 1,383 applications for enforcement in England<sup>20</sup>. To put that in context, 38,405 children were involved in contact applications in England and Wales in 2011<sup>21</sup>.
5. Although numbers are small, any non-implementation of a court order is serious and risks damaging public confidence in the family justice system. The challenge for legislators and judges has been to find appropriate interventions for non-compliance. Courts can impose

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<sup>18</sup> Ministry of Justice *Co-operative parenting following family separation: proposals on enforcing court-ordered child arrangements: Summary of consultation responses and the Government's response*. February 2013.

<sup>19</sup> Justice Select Committee *Pre-legislative scrutiny of the Children and Families Bill*, HC 739, December 2012, especially paras 40, 55, 154 and 188.

<sup>20</sup> Cafcass Case Management System data for April 2011-March 2012. Cafcass Cymru records data separately.

<sup>21</sup> Judicial and Court Statistics 2011, London: Ministry of Justice, table 2.3.

fines, imprisonment or transfer a child's residence but these may be impractical, counter-productive or harmful to a child. The Children and Adoption Act 2006 made new sanctions - community service and financial compensation - available, but these have been little used.

6. Following a consultation, the government has decided against curfew orders or the withholding of passports and driving licences as further sanctions<sup>22</sup>. Policy will focus instead on returning cases swiftly to court. Consideration is being given to extend powers of committal to Magistrates and District Judges. A new enforcement-specific Contact Activity (or parent education programme) is also mooted.

## The study

7. The study is based on analysis of a national sample of enforcement applications. The final sample will be every C79 application made in England in March and April 2012, a total of 215 applications. This submission is based on initial analysis of 81 C79<sup>23</sup> applications. The research team has been examining the cases in date order, starting from March 1<sup>st</sup> 2012. There is no reason to suggest that this initial sample of 81 early-mid March applications differ in any way from late March/April applications.
8. The cases are being accessed through electronic case records held by the Children and Family Courts Advisory and Support Service (Cafcass). The records typically include court application forms, Cafcass reports and court orders made in the case. The information available therefore includes the perspectives of both parents, the children (if interviewed), safeguarding information (including police and local authority checks), numbers and types of hearings and the outcome of the application.
9. The data reported here are interim findings. The final report in mid 2013 will provide a more comprehensive analysis of the larger final sample. Focus groups with judges will also provide further understanding of how courts approach these cases.

### KEY MESSAGES FROM THE INTERIM FINDINGS

- Few cases come back to court for enforcement activity
- Those that do are complex cases involving high levels of parental conflict and/or allegations of child welfare or safety concerns. Very few are 'stereotypical cases' of a single implacably hostile parent
- Courts seldom use punitive measures to enforce orders. Instead they focus on problem-solving, usually seeking to restore contact using further contact orders
- The findings support greater attention to risk assessment and management in contact cases and the development of psycho-therapeutic interventions for high conflict cases

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<sup>22</sup> Ministry of Justice *Co-operative parenting following family separation: proposals on enforcing court-ordered child arrangements: Summary of consultation responses and the Government's response*. February 2013.

<sup>23</sup> The C79 is the form used to apply for enforcement of a contact order.

## FINDINGS

### Who applies for enforcement?

10. As might be expected, most (85%) enforcement applications in the sample of 81 cases were from non-resident fathers. In 60% of cases, contact had broken down, half of these within the last three months. A quarter of enforcement applicants also sought compensation for financial loss following alleged breach of an order. Most claims were for the £200 court fee.
11. Over half (59%) of applications were brought within 52 weeks of the index order, including 18% within the first three months. Another fifth (22%) were late applicants, applying two to eight years after the index order.
12. Only five cases could be characterised as chronic litigants with 3-6 previous applications for a court order prior to the enforcement application.

### What is the cause of the dispute?

13. The debate on enforcement has focused on cases where resident parents, typically mothers, are said to repeatedly and unreasonably defy court orders. In our sample of the 81 cases, the resident parent was said to be blocking all or some contact in 67% and 29% of cases respectively.
14. Respondents presented a range of counter-arguments to justify their actions, including the behaviour of the applicant and the wishes of the children. Concerns about child or adult safety were present in 75% of the 75 cases where information was available. In 51.9% of cases concerns were raised at the index stage, 53.3% at enforcement stages and 41.3% at both stages. Concerns at the enforcement stage were about child physical or sexual abuse and neglect (31% of cases), domestic violence (21%), alcohol abuse (22%), drug abuse (13%), mental health (11%) and abduction (7%).
15. The children were alleged to be refusing all contact in 31% of cases or some contact in 38%.

### The main types of enforcement case

16. It is difficult to gain a sense of individual cases from aggregate statistical data. For each case the research team is drawing up a case profile to be used to develop a typology of case types.
17. At the interim stage the great majority of cases fall fairly evenly into two main types of case - conflicted or risk/safety.
18. *Conflicted*: Cases where poor parental relationships and chronic mistrust resulted in an inability to negotiate the everyday challenges/changes in circumstances necessary for contact to occur reliably. Safety issues, often mutual allegations of poor parenting, may be in the background. Parents require external assistance to work out solutions to contact problems. Case example: *Detailed index order setting out arrangements for father's contact with pre-school child. Contact continues but with handover problems prompting enforcement application. Cafcass reports that the parents are in intense competition for the child, expressed in clothing (mummy's or daddy's clothes) and bedroom decorations (Hello Kitty vs Peppa Pig). The child is developing a stammer, attributed by Cafcass to an acute awareness of the conflict. The father is seen as focused on his rights, the mother as distrustful and anxious. The case concludes with a two page consent order specifying in even greater detail how handovers will occur and the precise seating arrangements for future school functions (I-65).*

19. *Risk/safety*: Cases where one or both parents raise, or continue to raise, significant adult and/or child safeguarding issues. Contact in these cases may be intermittent or have stopped. Case example: *History of DV including father's threats to kill the mother. The index contact order allows direct contact. Father is then convicted of battery against the mother and subject to a non-molestation order. Mother stops contact after father breaches this. Father then applies for enforcement. Cafcass recommend DV Perpetrators Programme and Fact Finding hearing followed by gradual reintroduction of direct contact at a contact centre. Instead the enforcement case ends in a consent order with unsupervised contact. Cafcass notifies the local authority (I-59).*
20. *'Implacably hostile'*: In a small number of cases the primary problem appeared not to be mutual conflict or safety issues but the resistance of the resident parent. These cases figure large in public debate but were rare within the sample of 81 cases. Case example. *The index order specifies staying contact with a 6 year old. The unrepresented mother does not cooperate fully with the court process. Contact broke down immediately triggering an immediate enforcement application. The same judge threatens a transfer of residence if the mother does not comply. Further contact was agreed. The father later contacts Cafcass to say that contact is being undermined. Note – the mother had raised concerns about domestic violence issues at index stage but none in the enforcement proceedings(I-68).*

## **The problem-solving approach of the court**

21. One of the most powerful themes emerging from the analysis of the 81 cases was that courts overwhelmingly adopted a problem-solving approach to case, the problem framed typically as about restoration of contact. Courts did not usually adopt an investigative or punitive approach and seldom commented explicitly on whether a breach had occurred. The focus was on moving the case forward. Case example: *Teenage son with severe autism living with mother. Long history of repeated litigation, most recently with contact ceasing following an unspecified incident at father's home. The Cafcass report was very critical of both parents for putting inappropriate pressure on the son. He had said how much he hated his parents arguing and would rather be adopted. Eventually it was agreed that the boy would continue to see his father and once he was ready stay overnight again. Until then there were very detailed arrangements in the order with regard to venue, transport costs and arrangements and other contingencies (I-22).*
22. The outcome of applications exemplify this approach. The court ordered punitive sanctions (unpaid work) in only four cases, two of which were suspended. In contrast, in 62% of cases the court amended or made a new contact order<sup>24</sup>. In most cases the new order was similar or identical to the index order. The same amount of contact was ordered in 50% of these cases, more contact in 24% and less contact in 26%. In six cases (16%) the court ordered (more) supervision, in 4 cases (10%) less supervision and in 74% there was no change. Follow up orders contained a higher level of specificity in 30% of cases, the same level of detail in 60% and less detail in 9%.
23. Planned focus groups with judges will explore how courts approach cases, especially why punitive sanctions were not considered more often. The case data, strongly suggest two possible explanations.

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<sup>24</sup> In 12% of cases the application was withdrawn. In five cases the case for enforcement was dismissed, in two cases no order was made and there were other outcomes in four cases.

24. First, the problem-solving approach to enforcement is very similar to how courts approach contact cases in general – with a pro-contact, pro-agreement and orientation to the future not the past.
25. Second, although courts clearly acknowledged when there was a problem with contact, they did not necessarily or typically accept the applicant’s view of the cause or the solution. The Cafcass reporter, for example, had access to all perspectives in the case as well as external data such as police checks. Our ratings<sup>25</sup> indicated that the Cafcass report was supportive of the applicant’s case in only a minority (24%) of applications. More commonly the Cafcass report supported neither parent’s case (29%), the respondent’s case (24%) or was partially supportive of both parent’s case (23%).
26. The court’s approach therefore often involved measures that would address the behavior of both parents, including agreements or orders including provisions relating to how parents behave with each other or referral to parent education. Case example: *Young parents of a toddler. Father subject to a non-molestation order regarding the mother. The index contact order was followed quickly by each parent making allegations against the other of physical abuse of the child (a slap, a bite mark). The father applied for enforcement after mother stopped contact. After local authority investigations proved negative, the court declined to impose sanctions, reaffirmed the index order and referred both parents to a Parenting Information Programme (PIP). (I-31).*
27. Children were consulted for their wishes and feelings, usually by Cafcass, in just 31 cases. Their views were similarly mixed. We assessed their reported views as more aligned with the applicant’s position in 21% of cases, with the respondent’s position in 36% and partially aligned with both parents in 32% of cases.

## The limits of rapid case processing

28. Most enforcement cases were dealt with fairly rapidly. The median wait from application to the first hearing was four weeks. As of February 2013, 86% of these proceedings initiated in March 2012 had concluded. The average case duration was 14.5 weeks from application to final hearing. A third (35%) of the completed cases were disposed of in a single hearing and 26% in two hearings.
29. The courts relied heavily on relatively brief Cafcass Schedule 2 reports<sup>26</sup> to understand the issues in the case. These were filed in 91% of cases but varied in the level of detail. Other more in-depth Cafcass reports – on single or multiple issues or on children’s wishes and feelings - were filed in 36% of cases. Only three cases included reports from experts such as psychiatrists. There were no Finding of Fact hearings into abuse allegations at enforcement stage<sup>27</sup>.
30. The fairly swift timetable for most cases did have some drawbacks. In some cases with safety allegations the court proceeded with what appeared to be insufficient information. In one case, concerns about sexual abuse continued to undermine contact but the court declined to undertake a Fact Finding hearing that would allow the court to move forward assertively, in either direction. In another case, a resident mother was ordered to undertake community service for non-compliance. Afterwards she applied to vary contact following further incidents. The subsequent and far more thorough risk assessment identified significant longstanding safeguarding concerns resulting in an order for indirect contact only (I-11).

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<sup>25</sup> We will present the full methodology in the final report.

<sup>26</sup> These are 2-4 page reports prepared prior to the first hearing. They set out a summary of safeguarding issues based on police and local authority checks and, where possible, phone calls with the parties.

<sup>27</sup> Only two FoF Hearings were held at index stage, both upholding the allegations fully or in part.

31. There were some safety cases where there was a clear understanding of the problem but limited follow through. In one case a father seeking enforcement of a supervised contact index order was required to attend a Domestic Violence Perpetrator Programme as a condition of contact. He dropped out of the programme but the court still made a final order for unsupervised staying contact in the absence of the (unrepresented) parties and against the advice of the Cafcass officer (I-8).
32. Given the numbers of high conflict cases it was surprising that little use was made of more intensive or therapeutic interventions. A therapeutic approach could work. In one case the court found a creative way for parents to pay for family counseling. The result was that contact was restored in a case where the teenage children had been refusing all contact (I-71).

### **How effective is the courts' approach in securing compliance?**

33. The courts have made very little use of powers to order the monitoring of contact orders. Thus little information is available on the outcomes of orders, beyond rates of relitigation.
34. Given the level of case difficulty, the relitigation rate was relatively low. There have been seven new applications. In a further two cases, the former applicant contacted Cafcass to allege non-compliance. Three of these nine 'further activity' cases were chronic litigation cases.
35. The limited further activity rates suggest that the approach of the courts may work in reducing immediate relitigation for many cases. However, the likelihood is that not all non-compliance is reported.
36. The punitive approach had mixed results in securing positive outcomes. Three of the unpaid work requirement cases (including the two suspended orders) remain closed. As noted above, the fourth completed UWR case was unsuccessful and it became apparent, was an entirely inappropriate order.

### **SUMMARY AND IMPLICATIONS FOR POLICY**

37. Three principal findings are evident at this interim stage of the research. First, very few enforcement cases fit the popular media image of the implacably hostile resident parent. This stereotype does not capture the full picture available to the courts where most enforcement cases involve troubled or conflicted sets of parents or significant safety issues.
38. Second, courts focus on problem-solving and getting contact restarted rather than identifying whether or not a breach has occurred and sanctions needed. This orientation reflects the default approach of the family justice system that is pro-contact, pro-settlement and future-oriented.
39. Third, the problem-solving approach can default to over-rapid, "cookie-cutter" case processing. In some cases, risk was inadequately assessed and/or managed. Some of the high conflict repeat litigation cases returned to court quickly after very limited input.
40. There are a number of implications for policy. The government's decision not to introduce further new sanctions is consistent with these interim research findings. It is unlikely that new punitive sanctions would be used when existing sanctions are not. Nor is there evidence, at least at this interim stage, that greater use of sanctions would be particularly helpful given that very few cases are about the stereotypical implacably hostile parent where a punitive approach might be appropriate.

41. We would have concerns about extending powers of committal to all tiers of the judiciary. Cases where committal would be under active consideration would be the most difficult and probably should be reserved for the most experienced judges.
42. Our interim findings suggest courts do a reasonable job at handling cases quickly. But dealing effectively with enforcement cases is difficult. They are tough and complex cases. The government's proposal to develop an enforcement-specific case assessment and intervention pathway is a positive step forward. If any further tools are needed, however, they are not additional penalties but the time and resource for effective risk assessment and management in safety cases and therapeutic interventions for the high conflict cases.

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