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This article examines the extent to which children are consulted about their wishes and feelings in residence and contact disputes in three county courts in England. We found that children's preferences and feelings were included on court files in approximately one quarter of cases brought under section 8 of the Children Act 1989 applications. The reason for this low representation of children's voices appeared to relate to the age of the children involved (the younger they were the less likely they were to be consulted) and to whether parents came to an agreement before a report was ordered or before it was allowed to influence the outcome. We found that older children were more likely to influence the final outcome of a case; that children tended to be consulted in cases involving a high degree of conflict; and that children whose wishes and feelings did not coincide with the court welfare officer's conclusions often found their wishes overridden in the outcome of the case.

Introduction

There has been a concern for some time in England and Wales that children are really not able to participate in private law proceedings relating to divorce and separation. n1 This concern is not without foundation because, although
children are in many ways at the centre of attention in these proceedings, there is as yet no clear policy or set of procedures that take children's participation as the norm. There still exist, in practice at least, tensions between the meanings of children's welfare, children's rights and parents' rights. n2 Thus family law practitioners continue to struggle to find a balance between these principles, and in private law proceedings there is no routine invitation to children to participate in decisions about residence and contact notwithstanding that these decisions crucially affect their lives. n3 In comparable jurisdictions such as Australia and New Zealand, it appears that more progress has been made, in particular, by including children's views in the mediation process in the context of properly constituted family courts. n4

Recent empirical studies in the UK have suggested that, after their parents separate, only a minority of children are consulted about arrangements which have a direct effect on their lives. n5 This is in spite of the fact that research has also suggested that many children want at least the choice of whether or not to be heard. n6 The way children's voices are usually heard in court cases involving contact and residence disputes is through reports by children and family reporters. n7 However, it is not the children and family reporter's duty to represent the child, but to report to the court on matters relating to the welfare of the child. n8 Whether and how children are to be heard is left to the discretion of the courts and consequently there are also varying practices as to when children are heard, for example depending on the age of a child. n9 There is also currently some concern over the ability of various representatives of the court to approach and consult children in an appropriate manner. n10

Because of the pressures put on parents to settle their disputes before they get to court, many children are never seen by a representative of the court, n11 and even fewer are seen alone without their parents present. n12 Sawyer n13 found that court welfare officers in her study believed their job to be to conciliate between the parents - or 'bang their heads together' - and to make parents understand that contact was the child's right. n14 Because their efforts were often deemed to be successful, the court welfare officers rarely saw the children. The time restraints placed on the preparation of welfare reports may also contribute to the relatively low number of children being consulted. n15 Piper n16 has noted that despite the apparent focus on children's welfare, there is an undercurrent of non-engagement when it comes to children, as evidenced by the fact that only a minority of children are actually heard.

A recent study by James et al also found that practitioners tend to work with a particular model or understanding of childhood and 'locate the child's "best interests" in the context of a universal model of childhood and "the child"'. n17 This can mean that their recommendations do not always reflect the individual child's wishes and feelings but rather what is considered to be in the best interests of children in general. This finding might suggest that it is seen as relatively unimportant to interview each child because adults always already know what is best for children. This would support Piper's perspective and might indicate why there is little enthusiasm for proactive measures to involve children. However, the findings from our study do not entirely endorse the perspectives emanating from these other studies. There are a number of reasons for this, including our different methodological approaches and the different sorts of 'data' we examined, so we suggest that our findings do not
detract from these studies but should be added to the overall picture in order to try to understand how far our family law system still needs to travel adequately to include the participation of children. It is our argument that we need a baseline understanding of what is happening on the ground so that we can ascertain whether the general feeling that 'not enough is being done' is accurate. We also need to have a reasonable grasp of what is happening in practice in order to build on the progress (or lack of progress) being made. Finally, we need to know whether the views of children are collected as an apparent gesture towards the welfare checklist, or whether these views appear to be influential. We therefore set out to map the routine activities of ordinary county courts when it comes to hearing children's views.

Methodology

We selected as the focus of our study three county courts (which we have called Northay, Minster and London) in different counties of England on the basis of their different catchment areas. We achieved a reasonable geographical spread as well as a variety of different cultural localities. We examined a random sample of court files initiated by a section 8 application for residence or contact in the year 2000. Our sampling method produced baseline data for 430 cases. These data provided us with basic figures on, for example, how often children were consulted by the courts, but we also wanted to gain a more in-depth understanding of the process that the cases went through. To this aim, we selected a sub-sample of 281 cases, which we analysed more thoroughly. This meant a close reading of the all the documents on file, such as, for example, welfare, social services and medical reports, as well as statements by the parties and their friends and family. The arguments we present in this article derive largely from this second round of analysis.

Our findings are, therefore, based on the information held in court records and these provided a very valuable data set. However, these documents do not always reveal a comprehensive story. Written official information tends to be partial (if only because it is a précis of events) and it is not always easy to calculate why a particular order might have been made based on the information we could find on file. The documents rarely gave an insight into why, in the midst of a major conflict, some parents 'suddenly' agreed over contact or residence, nor why one party might withdraw. There are, therefore, methodological limitations inherent in relying on this form of documentary evidence alone. This is why we urge that these findings are read in relation to other studies.

We took an inductive approach to our analysis. This means that, although we were in part guided by our original research questions, which in turn were derived from problematics established by the wider research community, our results are based on the central issues that arose from the data. We collected cases that shared similar issues or characteristics under indicative headings such as 'children's participation' and 'domestic violence'. But we quickly found that any given case might have to be listed under several headings. This is not an unusual dilemma in social science research and in this study we have sought to resolve the problem of an enforced over-simplification through categorisation by balancing our accounts with case examples. In choosing these case examples, our guiding principle was to ensure a balance between different types of case. Thus we do not suggest that individual case studies should be regarded simply as 'typical' of particular cases or families, rather they are chosen to provide a
fuller sense of the complexity of the problems that the courts are asked to resolve. In any event, we did not find typical cases; rather we found a range of common issues and problems that were juxtaposed in a uniquely formed arrangement in every case. Thus our close analysis of the cases on file revealed that the courts deal with what should be seen as a kaleidoscope of issues. Although many cases resembled each other, each case always combined a variety of aspects in a unique way. So a small 'tilt' of the kaleidoscope in a different direction could reveal a different world with very different sets of experiences. Our case examples thus act as an illustration of the uniqueness and complexity of the family problems that the courts routinely deal with, while ironically confirming that the same problems keep on recurring. Thus they are each 'typical' and 'unique'.

As we note above, children are rarely directly involved or independently represented in private law cases in England. This meant that reports prepared by court welfare officers n22 provided the only access we had to an understanding of the role of children in these disputes at the point of going to court. It is one of the duties of court welfare officers/children and family reporters to ascertain the wishes and feelings of the child and to provide the court with background information and offer a recommendation as to which solution would best serve the welfare of the child. It is they who will speak directly to children and, notwithstanding the limitations of these files as records of complex events, the final section of each report addressed explicitly the welfare checklist and so clearly addressed the wishes and feelings of those children who had been interviewed. This means that in studying court records we did not have direct access to the voice of a child and this must be borne in mind when considering our conclusions. Nonetheless, the reports do give an indication of what the children may have said and whether their wishes appear to have influenced the outcome of a given case. n23

Consulting children

Forty-seven per cent of our 430 cases had a court welfare, or social services, report on file and in one half of these children had been consulted. n24 This means that children had been consulted in only one quarter of the cases we examined. n26 Our impression was that, where children were not directly consulted, the most usual reason was related to the age of the child (usually under 5 years n27 ) or the fact that the parents managed to come to an agreement. n28 We shall return to these reasons below.

There were differences among the three courts as to how often a report was ordered (see the table overleaf), and we found that these differences mainly reflected local practices and resources. For example, in Minster Court a court welfare officer was situated in the court building and frequently provided oral reports and even on-the-spot assistance in a number of cases. This reduced the need for written reports but, ironically, the low number of reports could give the erroneous impression that the court did not use the court welfare service/CAFCASS a great deal. In fact, the opposite was the case. In Northay Court, the court welfare officers moved out of the court building when the court welfare service became CAFCASS, but nonetheless they were situated very close to the court and retained close working practices. In London Court, the CAFCASS office was in another borough altogether. This, together with the overstretched budget and workload of both the court and CAFCASS, perhaps explains why so few welfare reports were ordered at this court.
Table - Patterns of reports to court and consultation with children

[EDITOR'S NOTE: A table appeared at this point which could not be reproduced for electronic purposes. Please see original.]

The use of reports also varied depending upon whether the application under consideration was for contact (51%) or for residence (34%). Cases involving allegations of domestic violence were almost twice as likely to include a report (63%) than cases with no reported domestic violence (34%). This undoubtedly reflects the concerns the courts have for the welfare of children where violence occurs, although it is perhaps surprising that in one third of these cases there was no apparent investigation into the welfare of the children involved.

We found a continuum of children's involvement in these cases. At one end of the continuum children were not interviewed at all and thus appear to have had no influence on the outcome of the case. Further along the continuum there were cases where the children were interviewed extensively and appear to have had an influence on the final outcome. Then, at the furthest end there were cases where the children decided the outcome of the case themselves, going against the wishes of the court welfare officer by 'voting with their feet'. These children simply went to live with the parent of their choice or restricted contact according to their own wishes. We found that three factors were central to children's involvement in a case:

* the child's age;
* the level of conflict between the parents; and
* the degree of congruence between the children's wishes and the court welfare officer's assessment of the case.

The child's age

Not surprisingly, the older the children were, the more likely they were to be seen by a representative of the court and to have their wishes and feelings considered in detail. n29 The desire that children have to exercise some control over their own destinies often becomes more apparent as they grow older. Previous studies n30 have shown that sometimes parents are unwilling to allow children to alter arrangements even when the children become adolescents and wish to spend more time with friends, on hobbies or even on school commitments. In these sorts of cases the court welfare officer appeared to have an important role in mediating between the children and a parent who seemed incapable of hearing what his or her children were saying. This suggests that there may be an important role for CAFCASS in helping families accommodate to change and also in helping parents to understand the sorts of changes their children go through.

Northay Court, case no 130 n31

The father applies for contact with his two children aged 13 and 10, saying that the children have asked for contact to be extended. When the court welfare officer interviews the family, it becomes apparent that not only are the parents in disagreement over the amount of contact, but also over the manner of transport to and from contact and over child maintenance. The children tell the court welfare officer that they are happy with the current contact arrangements.
and would not want them to be extended. The older child says she wishes the father would be more flexible over contact; she has missed a party because the father insisted on contact. The younger child, on the other hand, indicates that he misses the mid-week visiting contact he used to have. The court welfare officer concludes that a change in contact against the children's wishes would not be helpful, and that the father could help matters by 'respecting the children's need to be involved with their peer groups as they get older'. The court orders contact in line with existing arrangements, in addition to which the mother is to permit the children to have mid-week contact if they so choose.

In cases such as the one above, the role of the court welfare officer was not only to focus on which parent might best provide for the welfare of the children but also to contain the conflict and help the parents understand their children's views. The ongoing conflict or distrust between parents may obstruct their ability to hear their children unless there is outside involvement. The court may, therefore, be providing a useful forum for resolving such issues and court welfare officers can help to deflect conflict between parents into a better appreciation of the actualities of children's lives in post-divorce families.

It is also sometimes hard for parents to appreciate that different children in a family may want different arrangements for contact and residence. One child may be happy to stay overnight with a parent, while another might not be. One child might be frightened of a parent and the other might not be. We found cases in our sample where the courts demonstrated that they were able to understand these differences and were willing to make different orders for siblings if the report recommended it. The following case involved a violent incident in which the daughter said she had witnessed the father attacking her mother. Her brother had not witnessed it and felt differently about his father.

Northay Court, case no 121

The father makes an application for contact with his two children after the daughter, aged 12, refuses to see him after witnessing an 'incident' between the father and the mother. The son, aged 14, continues to want to see his father, but the father refuses to see him alone. The son tells the court welfare officer that this is 'unfair' and that the father should be happy to see him. When meeting the court welfare officer, the daughter remains adamant that she does not want to see the father, whom she is scared of because 'he has done too many things that are wrong'. The father tells the court welfare officer that to say that his daughter is scared of him is 'rubbish' and blames her upset on the mother. The court welfare officer recommends that both the children's wishes carry weight, and reproaches the father for showing 'disregard' for his son's feelings and for 'not taking responsibility for his actions'. The court welfare officer warns the father that he may well lose contact with his children altogether, which would mean that the son's 'emotional needs of seeing' the father would not be met, while the chances of the daughter re-establishing contact 'would be negligible'. The parties reach an agreement and an order of 'no order' is made.

In this case the father was at first unable to understand that his daughter might feel frightened of him and tried to exert pressure by refusing to see his son unless his daughter came too. The role of the court welfare officer appears to have been significant in this case because the conflict was deflected and the
father's stance was not treated as legitimate. Cases such as the one above make it plain that 'welfare' is an elusive and contentious concept that cannot really be defined by a simple standard. n32 The court welfare officer in this case may have been safeguarding the possibility of there being contact in the future, but allowed the daughter's feelings to take precedence. Thus the court welfare officer may have had a pro-contact disposition, yet it would seem that he was basing his recommendations on the needs of the individual child. In this sense a general principle, such as one that insists that contact is always beneficial, can conflict with the fact that each child's needs are unique and that they change over time. This is something that court welfare officers on the ground may be well aware of and their flexibility to act in the interests of individual children might only be hampered by a greater shift towards a more rigid presumption in favour of contact. n33

We also found cases where the children were old enough to 'vote with their feet' and where both the parents (or guardians) and the court welfare officer found that their adult concerns seemed to hold little sway.

Northay Court, case no 137

In this case, the dispute over the residence of two children aged 13 and 11 years is between the paternal grandmother and the mother. The children have been placed in the grandmother's care by social services due to the mother's mental health problems. The older child is happy living with the grandmother, but the younger child wishes to return to live with the mother. Social services find it difficult to make a recommendation because of the younger child's determined wish to live with his mother. A residence order made to the grandmother is therefore likely to break down, yet social services have concerns over the mother's ability to provide consistent parenting and indicate that if the child was to return to live with his mother he would likely be taken into care. In the end, the court grants the grandmother a residence order for the older child only, noting that the younger child has returned to live with the mother.

It was not always the case that children's stated wishes resulted in the outcome they appeared to want. Younger children (especially children under seven) were less likely to be influential in terms of outcomes, particularly if their accounts did not have some form of corroboration. Davis and Pearce n34 identified that one of the tests used by the courts is that only children over a certain age can be deemed to have valid opinions (although this age often varies from one representative of the court to another). Consequently, what younger children say is irrelevant to the final outcome of a court case. We did not find that court welfare officers or judges directly dismissed the opinions of younger children. Rather we found that court welfare officers appeared to take the view that young children were not speaking for themselves, or they tended to come to the conclusion that these children could not adequately weigh up the advantages and disadvantages of their preferences. In other words, the children were not seen as fully competent.

Minster Court, case no 21

In this case, which began in 1997, both parents claim that the children, aged 10 and 7, want to live with them and accuse the other of sub-standard parenting. The older child tells the court welfare officer that he wants to live with his father, but the court welfare officer cannot ascertain why. The younger child
whispers to the court welfare officer that he does not want to live with his father, but does not want to discuss the matter further. The court welfare officer concludes that the older child has 'not reached the maturity to think in the abstract and to consider the (dis)advantages of hypothetical scenarios' and recommends that the children remain living with the mother. Soon after the court has granted the mother a residence order, the children move to live with their father.

The initial outcome in the case above is perhaps worrying in light of Kaltenborn's n35 longitudinal study on children's agency in residence disputes. He found that if the outcome of a residence dispute went against a child's wishes, this could lead to an eventual change in residence, as occurred in the case of one child in the example above, or to no small degree of unhappiness for the child in future years. He concludes that even infants should be regarded as having enough emotional intelligence to be able to form 'suitable' opinions based on 'sensible and profound reasoning'. n36

Previous studies have also found that if children appear resistant to contact, the professionals involved are likely to see this reluctance as the result of influence from the mother. n37 Sawyer n38 found in her study of the practices of court welfare officers that if they felt that the children voiced the 'wrong' opinions, or the parents came to the 'wrong' agreement (ie that there be no contact), the court welfare officers were prone to attempt to dissuade the parties involved and to persuade them of the beneficial effects of contact. n39 So, although our findings indicate that there was a reluctance to 'force' older children to maintain contact with non-residential parents, younger children might be required to continue contact visits.

The level of conflict between the parents

It would seem that children's views became central to a case either when there was a high degree of hostility between the parents (often involving violence) or where parents offered different accounts of what the children wanted. Where the parents could not reach an agreement and continued to present differing versions of events and circumstances, it was not unusual for court welfare officers to turn to older children in order to gauge which account was 'true'.

What was interesting were cases where parents might be in conflict, denouncing the other parent as an inadequate carer, but where the children might be content to have contact as long as they had some control over the situation. Thus children could refuse to have staying contact, but be happy with day contact. Or the children might wish to cease to have contact for a period of time until a parent 'got themselves together'. In cases like these, one can see the children attempting to exercise a degree of control over their lives that can be denied to them in the heat of conflict between parents. The following case is a good example of this.

Minster Court, case no 103

The legal dispute over residence begins in 1998, when the father applies for residence for his daughter aged 11. The mother suffers from mental health problems, and the father believes it is more appropriate for their daughter to live with him because the mother's bouts of illness have become more frequent.
The child tells the court welfare officer that she feels safe with her father, whereas living with the mother made her frightened. The father is granted a residence order. In 1999, the child refuses to stay with her mother, who then applies for contact. The child tells the court welfare officer that she recognised during her last contact that the mother was not taking her medication and the mother's behaviour frightened her. The child refuses to see her mother until she demonstrates that she is well. The court welfare officer concludes that the child's wishes have to be respected. The court makes an order of 'no order'.

Overall, we found that the courts paid heed to children's views if they voiced concerns over their own safety during contact:

**London Court, case no 61**

The mother applies for a residence order after a violent attack from the father has resulted in her admission to hospital. When the court welfare officer talks to the older child, aged 7, the child says that the father often hits the mother and that he is scared of the father. The child says the father has also occasionally been violent towards him. The child says he is much happier now that the father has left and does not miss him. The court welfare officer concludes that the child is clear in his wish not to see his father, and that contact would have a distressing effect on the mother, and on the child who has already suffered emotional harm. After a finding of facts hearing which finds against the father, the court welfare officer states that the father's 'failure to acknowledge his violence makes it difficult to see how any form of contact can take place'. The father subsequently withdraws his application.

The following case, however, reflects the tendency of the courts to prefer a parental agreement to an order imposed by the court on the basis that 'parents know their children best'. In the example, the children had clearly stated to the court welfare officer that they were too frightened of their father to go on contact visits, yet when the parents reached an agreement over contact, the court granted the father a contact order.

**Minster Court, case no 57**

The legal dispute begins in 1998 with an application for contact by the father for his three children born between 1991 and 1995. The father makes further applications in 1999, 2000 and 2002. The dispute centres around the venue for handovers, which are fraught with violent incidents, and the amount of contact. The police are involved. The mother says that contact was stopped in 1998 because the father hit the older child. It is only in 2002, after contact has once more ceased that the children are heard by the children and family reporter; they say they were too frightened to go for contact because of their father's earlier physical abuse of the older child and violence towards the mother. The children and family reporter proceeds to observe contact at the father's home and concludes that the children appear comfortable and relaxed. The parents come to an agreement over contact, and the court grants the father an order for staying contact.

The documents on file do not indicate how agreement was reached, but given the level of conflict and hostility it is perhaps surprising that the parents did agree in the end. Cases such as this one seem to raise the question put
forward by Bailey-Harris et al n42 of duress, that is whether parents are always freely agreeing. This case could also be an example of how court welfare officers are not prepared to accept the views expressed by children if these views do not fit with how s/he interprets the situation; n43 a matter to which we turn in the following section.

The court welfare officer's assessment

As we show above, there were cases in our sample where the outcome contradicted the expressed wishes and feelings of the children involved. Either the court welfare officer considered these not to be in the child's best interests, or the parents reached an agreement that was not in line with what the children had said they wanted.

In the following case the child wanted contact with his mother, but because of his increasingly unstable behaviour, social services recommended that contact with her be suspended. In the end, however, after things calmed down, indirect contact was resumed.

London Court, case no 31

This dispute is one over residence between the mother and father of a 12-year-old boy. The child moves to live with his father after an incident where the mother hits the child. For a while, the child refuses to communicate with his mother and indicates he wants to remain living with his father. The court grants the father a residence order, with reasonable contact granted to the mother. The child then begins talking about running away to live with his mother. The situation worsens when the child demands contact with his mother and becomes violent towards his father. A social services report concludes that the child is confused and inconsistent with his wishes, and recommends that there be no contact with the mother despite the child's wishes. The court orders contact with the mother to be suspended. The relationship between the child and the father improves, and the child begins telephone contact with his mother.

James et al have found that: 'practitioners attach greater importance to their judgements about the welfare of the child than to the child's wishes and feelings. When in practice these principles come into conflict with each other, the welfare principle has to predominate'. n44 Our findings substantiate this conclusion but we do not suggest that this means that the recommendation of the court welfare officer was 'wrong'. Rather we would suggest that it may be these cases that most need ongoing support so that children have access to independent assistance should their view of the situation prove to be confirmed.

Often it would seem that there was 'supporting evidence' for the children's views such that, given the facts of the case, the child's wishes were not incongruous or surprising. Thus if a child voiced an opinion that was in line with the court welfare officer's assessment, it seemed as if the child's opinion was given prominence in the report as lending extra weight to the court welfare officer's conclusions. Thus we found that children's 'wishes and feelings' could be used as an argument in cases where, had the child's wishes clashed with the court welfare officer's conclusions, the child would probably have been deemed to be too young to formulate a valid opinion.

Northay Court, case no 78
The father applies for an increase in the amount of contact ordered in 1997. The mother claims that the child, aged 5, is difficult after contact visits. Both parents accuse each other of making contact arrangements difficult. The court welfare officer observes contact and forms the view that the child would like to stay longer with the father and recommends that the amount of staying contact be increased. The court makes an order accordingly.

This suggests that chronological age is not an entirely independent variable. A young child could be disregarded on the basis of age if he disagreed with the court welfare officer, but another child of the same age could find his voice being used to support an outcome when he agreed with the views of the court welfare officer.

Conclusion

In the cases in our study, children were consulted in only one in four cases but their views could be important to the case and its outcome. The cases where children were not heard (as far as we can tell from the documents on file) were mainly cases where the children were seen as too young to express a view, where the issue was 'cut and dried', or where the parents came to an early agreement and no reports were ordered. In other words, children were only given the opportunity to be influential when there was serious conflict. This raises the question of whether children should have opportunities to participate in other, less hostile, cases that come to court. Of course, the prospect of ordering reports in all cases is alarming given the huge costs that would be entailed and the intrusion into people's lives. Certainly it seems appropriate for there to be reports in all cases involving domestic violence, but policy on this is constantly under review and practice guidelines changed during the period of our study. It seems likely that reports will become routine in these cases before long. Moreover, it may be that rather than suggesting that there should be reports in all cases, it would be more sensible to focus on ways in which children's voices can be heard in mediation before some disputes get to court. Furthermore, the current system, where the children and family reporters meets with the children perhaps once for half an hour, probably does not provide children with the 'social and legal contexts [...] to enable and promote children's agency'. To do this, considerably more funds would be needed to create a genuinely child-centred approach.

We gained the impression that the views of children over 7 years of age were taken seriously, especially where children were old enough to 'vote with their feet'. In such cases, the courts were unwilling in the end to force children to stay with a parent or to have contact. We also found that the courts did not necessarily resort to formulaic one-size-fits-all solutions in cases where the children of a family wanted different things. In particular, older children's wishes for flexibility of contact seemed to be taken into account in a number of cases. The court welfare officers were found to take a mediating role, mediating not only between parents but also between parents and children. Thus for some children, when they were given a chance to speak, we got the impression that their voices came across loud and clear.

Although there is concern that children should not be asked to 'choose between parents' because this could impose an unfair burden on them, in the cases we read it seems that the agenda was indeed about allowing children to indicate a preference. We do not suggest that court welfare officers asked the
children in such a direct fashion, but it does seem that many children took the opportunity to state their preferences clearly. This took us by surprise because the straightforwardness of many of the children's views (as reported on file) seems to sit uncomfortably alongside the coyness that currently surrounds the subject of speaking to children on sensitive issues. What we found suggested that many children were perfectly aware of the conflicts between their parents and also well versed in their shortcomings too. Often these families had multiple problems and a long history of conflict and difficulties such that the children had no difficulties in deciding whom they wanted to live with. We were left with the impression that older children seemed perfectly competent in expressing their views no matter how apparently sensitive the issues were.

The wishes and feelings of younger children could also have an impact, but only if what they had to say 'chimed' with other evidence and with the court welfare officer's assessment. In such cases the children's expressed views were used as added 'proof' that the conclusions of the welfare report were correct. When their views appeared to be out of line with other evidence however, it seems that they were disregarded. It may be that these children were only being treated in the same way as adults might be, in that highly incongruent or contradictory accounts tend to be treated cautiously by the courts. But the problem is that with children it is very hard to know (from documentary sources) whether they are ignored because of their status as (young) children or whether it is because it would be genuinely unsafe to place too much weight on their views. So while there is room for improvement in terms of allowing older children to participate in decision making in courts, the main concern arising from our reading of the court files was for younger children who often seemed caught between a rock and a hard place. It is particularly worrying that after a decision has been made which may go against their wishes, they typically have no access to support and no means of bringing the matter back to a forum outside the family if they become really unhappy. It is perhaps now timely to give more thought not only to allowing all children the opportunity to participate in family proceedings, but to the particularly difficult issue of younger children who currently appear to have little voice or influence.

RETURN TO TEXT

FOOTNOTES:


N8 CHILDREN ACT 1989, S (7)(1).


N10 A. O'QUIGLEY, LISTENING TO CHILDREN'S VIEWS: THE FINDINGS AND RECOMMENDATIONS OF RECENT RESEARCH (JOSEPH ROWNTREE FOUNDATION, 1999), AT PP 1-4; AND N. LOWE AND M. MURCH, OP CIT, N 1, AT PP 143-144.

N11 C. PIPER, OP CIT, N 7, AT P 798; AND A. O'QUIGLEY, IBID, AT P 37.


N15 A. O'QUIGLEY, OP CIT, N 10, AT P 37.

N16 C. PIPER, OP CIT, N 1, AT P 93.

N18 CHILDREN ACT 1989, S 1(3).

N19 SEE C. SMART, V. MAY, A. WADE AND C. FURNISS, RESIDENCE AND CONTACT DISPUTES IN COURT, VOLUME 1 (RESEARCH SERIES NO 6/03) (DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, 2003) FOR A MORE DETAILED DESCRIPTION OF THE STUDY.

N20 A CASE INCLUDES ALL THE APPLICATIONS MADE IN RELATION TO ONE FAMILY. ON AVERAGE THERE WERE TWO APPLICATIONS MADE PER CASE.

N21 IT SHOULD BE NOTED THAT WE ARE NOW IN THE PROCESS OF INTERVIEWING PARTIES TO THESE CASES IN ORDER TO TRY TO GAIN A FULLER PICTURE OF EVENTS.


N23 A.L. JAMES ET AL, OP CIT, N 17, AT P 894 HAVE FOUND THAT COURT WELFARE OFFICERS AT TIMES 'INTERPRET' WHAT A CHILD HAS SAID, OR DECIDE NOT TO INCLUDE THE CHILD'S WISHES AND FEELINGS IN THE REPORT, IN ORDER TO PROTECT THE CHILD FROM FUTURE CONFLICT WITH HIS OR HER PARENTS.


N25 CHILDREN WERE DEEMED TO HAVE BEEN CONSULTED IF THE COURT WELFARE OFFICER, CHILDREN AND FAMILY REPORTER, OR A SOCIAL WORKER HAD SPOKEN TO THE CHILDREN, MADE AN EFFORT TO DISCOVER WHETHER THE CHILD IN QUESTION MIGHT HAVE A PREFERENCE AS TO RESIDENCE AND/OR CONTACT AND DOCUMENTED THESE VIEWS IN A WRITTEN REPORT.

N26 ALTHOUGH WE CANNOT, OF COURSE, SAY TO WHAT EXTENT CHILDREN HAD BEEN CONSULTED BY COURT WELFARE OFFICERS IN CASES WHERE A WELFARE REPORT WAS NOT PREPARED.


N29 A.L. JAMES ET AL, OP CIT, N 17, AT P 891 HAVE FOUND THAT ONE OF THE ASSUMPTIONS THAT GUIDES COURT WELFARE OFFICERS' WORK IS THAT OF THE AGE-RELATEDNESS OF CHILDREN'S COMPETENCE.
N30 C. SMART ET AL, OP CIT, N 6, AT PP 135-136.

N31 IN ORDER TO ENSURE THE ANONYMITY OF THE PARTIES INVOLVED, WE HAVE IN THE SHORT EXAMPLES SLIGHTLY ALTERED MINOR DETAILS SUCH AS THE NUMBER, AGE AND GENDER OF THE CHILDREN, IF THESE ARE NOT VITALLY RELEVANT TO THE CASE. IN SOMEInstances, WHEN WE HAVE FELT THAT SUCH ALTERATIONS WOULD NOT BE ENOUGH TO PROTECT THE IDENTITY OF THE INDIVIDUALS INVOLVED, WE HAVE CONSTRUCTED A COMPOSITE CASE FROM TWO OR MORE CASES THAT SHARE SIMILAR ELEMENTS AND OUTCOMES.


N41 SEE A. O'QUIGLEY, OP CIT, N 10, AT P 37.

N42 R. BAILEY-HARRIS ET AL, OP CIT, N 40, AT P 56.

N43 SEE C. SAWYER, OP CIT, N 13, AT P 174.

N44 A.L. JAMES ET AL, OP CIT, N 17, AT P 893.

N45 K. -F. KALTENBORN, OP CIT, N 35, AT P 488.