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Qualitative Social Work

'Children not trophies': an ethnographic study of private family law practice in England.

Journal:	<i>Qualitative Social Work</i>
Manuscript ID	QSW-19-0182.R2
Manuscript Type:	Main Paper
Keywords:	Ethnography, Private Law Child Proceedings, Law
Abstract:	<p>The welfare of the child in the context of private family law proceedings is of significant international interest. This paper presents findings from an ethnographic study of private law proceedings in England, which explored legal professionals' experiences of and practice within space and place. Data is derived from interviews with professionals, and observations from the waiting areas, canteens, interview rooms and offices of lawyers who represent parents in private family law proceedings. The paper focuses on winners and losers in the area of private family law, and the 'trophy', the child, who appears to be lost in the battleground of legal proceedings, but remains the ultimate prize. The concept of space is explored before moving to reflect upon the data from the interviews.</p> <p>The themes that emerge from the data are the relationships between the public space of the court and the vulnerability of the parties as they attempt with greater or less ease, to navigate the complexities of this formal and procedurally driven space.</p> <p>This paper explores the idea of the child as the ultimate 'trophy' within private law proceedings to consider its significance for family justice practice in England, and to elicit a greater understanding of the importance of space and place in private law proceedings that have remained largely unexplored.</p>

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4 **England.**
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40 **Keywords**
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42 Ethnography, private law child proceedings
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Introduction

There is a dearth of literature available about place and space in what is essentially a private, and closed world of private law proceedings, accessible by those who have the right to be there, either by profession, or as a party to proceedings. It is unusual for a child to be party to such proceedings, although the court can request a welfare report under section 7 of the Children Act 1989, such that the court is made aware of the child's wishes and feelings. In some circumstances, where a case is deemed to be complex, a court may decide that a child does need separate representation from the parents. In such cases the court will appoint a Guardian to represent the child, and the child will therefore be made a party to the proceedings. If a child is made a party to private law proceedings and they have their own Guardian, a solicitor for the child will also be appointed to be the advocate in court.

Whilst this is a case study located in the North of England, the issues will resonate with an international audience of professionals and parents.

We travel faster, more widely, move more often and settle for shorter periods than ever before, yet at the same time we seem to crave a place to stay and return to ever more intensely. Place marks us all, and leaves its traces (Jack, 2010: 756).

Jack refers to a newspaper article that conveys the way people understand who they are and where they belong. Place is crucially important in providing a foundation to a person's security and belonging. In this study we focus upon the lived experiences of lawyers, to provide an important lens into the importance of place not only for themselves, but the children and families who they represent, where place and space are issues that are highly contested within the area of private law family proceedings.

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3 The routine activities of the court building; waiting areas, checking in, interview
4 rooms, is a familiar place, that has meaning to the lawyers who spend time in a place
5 where there are intense and emotional experiences (Rowles, 1983).
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10 Place exists from the courtroom to the interview rooms, and the waiting areas. When
11 people talk about where they 'feel at home', they might be referring to any or all of
12 these levels, capturing the special meaning of different places for the individual,
13 typically based on the experiences and memories associated with them, rather than
14 their physical properties (Tuan, 1974; 1977).
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21 Place attachment is normally understood to be part of a person's overall identity,
22 consisting of the memories, feelings, beliefs and meanings associated with their
23 physical surroundings (Proshansky et al., 1983; Corbishley, 1995; Lalli, 1992). It was
24 helpful to draw upon behavioural geography, and specifically the work of
25 Wilkinson and Bissell, 2006, to gain an understanding of how lawyers and parents
26 respond to the court environment.
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35 Despite the significant changes to family justice there is currently a dearth of place-
36 sensitive information which provides a lens on how the system operates on the
37 ground. Whilst the timetable for the child metric driven approach is pivotal in public
38 law cases, in private law disputes there is evidence of lengthy delays and drift for
39 children (Holt and Kelly, 2018).
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46 This paper seeks to consider 'the child as the trophy', as a feature of legal advocates'
47 talk about, and affective experience of the place, the court, where they work, and
48 spend a significant amount of time during the course of what are often lengthy and
49 protracted proceedings.
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55 It draws on findings from an ethnographic study of lawyers' experiences of space
56 and place generally, which provides a lens in relation to other aspects of lawyers'
57 and parents' experiences of, and practices in, space. (Jeyasingham, 2016).
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Methods

The author was immersed as a barrister and researcher in the everyday practice of private law proceedings over a period of 3 months in 3 sites in the North of England. Observations and semi structured interviews of lawyers were undertaken in order to explore and understand how lawyers negotiated space in their everyday practice and how they talked about space and place with each other and with the researcher. The observational aspect of this work involved relatively covert observation of interactions in courts in waiting areas, café's, interview rooms; and in offices and chambers. The observations followed no predetermined framework and fieldnotes were manually recorded at the time or as soon after observations as possible. Lawyers were observed undertaking their routine duties, during which time discussions took place that enabled the author to elicit a greater understanding of how lawyers navigated around a place where they spend a significant amount of time (Shaw and Holland, 2014).

Semi structured interviews were carried out with a total of 20 barristers and solicitors. The interview schedule was informed by the observations and knowledge of the area of private family law, these were audio recorded and transcribed verbatim. All data was anonymised at the point of collection; pseudonyms were used for all places and participants, and the data was stored securely in compliance with ethical approval. Analysis of the fieldnotes and interviews followed Braun and Clarke (2006) whereby the data was manually coded at several levels before three overarching themes were identified; experience of the disputed area of private family law, the child as trophy, and moving forwards.

Findings are presented from observations and interviews. Excerpts provided emerge from across the data set and it probes the talk of the child being viewed as the trophy by both professionals and parents. The notion of the child as the trophy was not the primary focus of the study, but it emerged as an affective frame through which

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3 lawyers talked about making sense of the hostility between the parties in private law
4 cases, and with the exception of a few lawyers, the general avoidance wherever
5 possible, of taking on private law cases.
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10 The child as the ultimate trophy to be won was evident across all sites and contexts,
11 but the stakes were often seen to be much higher when parents were privately
12 paying. In 90% of cases at least one parent, was a litigant in person, with the other
13 party either privately funding the litigation, or eligible for legal aid due to domestic
14 abuse.
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20 21 22 **Ethnography and the Law** 23

24
25 The law in action has been understood in critical literature, essentially drawing upon
26 debates from legal sociology and legal anthropology. Émile Durkheim (1893), and
27 Max Weber (1922), were interested in probing a greater understanding of the
28 European State and its law. Whereas the classical authors of legal anthropology, for
29 example, Bronislaw Malinowski (1926), and Max Gluckman (1955) focused on the
30 organisation of social order and power in non-legal states that operated outside of
31 Europe (Leach, 1954). Since the early 1970s this division has disappeared and legal
32 anthropologists have focused on the interaction of the formal law with the informal
33 legal forms (Moore, 1973). Similarly, Marxist approaches included a focus on the
34 power relationships within the law (Garfinkle, 2002). The work of Garfinkle was
35 arguably pivotal in the shift towards ethnographic legal research (Travers and
36 Manzo 1997). The approach was focused upon assumptions that legal rules and
37 order is produced by the actions of legal professionals and the people they represent
38 and work with (Dupret, Lynch and Berard, (2015). Whilst not embracing the same
39 epistemological or ontological approach, legal sociologists are similarly focused
40 upon the way professionals and litigants, understand and operate within legal
41 contexts.
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The deeply disputed area of private family law

The use of mobile interviewing of lawyers whilst following them around enabled the author to explore the power relationships within the context of private law child proceedings; notably the relationship between legal professionals and litigants, and between litigants who are represented or in person, and has provided an important lens on how children and their parents are constructed through talk, experience and movement (Holt, 2016).

Arguably, there are few legal contexts where the law is secondary to the agonising disputes concerning arrangements for children following the breakdown of the parental relationship. These disputes are focused upon issues of; contact, residency, parental responsibility, specific issues and prohibited steps, relating to education, holidays, passports or a change of name.

Excerpt 1 demonstrates dispute over contact following parental separation

Lawyer for Mother (Interview 10)

As for the holiday to Lanzarote, my client (mother) said the daughter only went with her father, so he could not say that the mother had stopped her. The daughter rang the mother several times a day saying she wanted to come home, as all the father did was to go on Facebook and look on dating sites. The father wants to take the daughter on holiday again and my client is refusing.

On the face of it the child is not lost in this example, yet the focus of the wishes and experiences of the child are expressed by the mother and the child is portrayed as brokering relationships between the parents.

Lawyers talked about the frustration of working within this deeply disputed area of family law, where they were required to broker more effective relationships between the parties, as opposed to public law child care cases which were more procedurally

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3 driven, and where contact with parents was more prescribed – the battleground in
4 these cases was between parents and the Local Authority, which they felt was a
5 legitimate dispute, rather than between former partners (Holt, 2013).
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10 The child, within the context of private law proceedings, was often regarded as
11 *belonging* to a parent, with parents frequently describing that the loss of a child even
12 for a short period would be like losing a limb. The focus was almost exclusively on
13 the needs of the parents, as opposed to the needs, wishes and feelings of the child. In
14 many cases lawyers would describe how a child was intrinsically linked with the
15 identity of either or both parents, and the reasons for parental separation remain
16 pivotal to the dispute over child arrangements. Crucially important decisions about
17 child arrangements are often made following parental separation when emotions are
18 heightened and the ability to mediate or achieve agreement are reduced (Holt and
19 Kelly, 2015).
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32 Lawyers expressed concern regarding the protracted nature of these proceedings
33 which may continue for over two years, which would result in the child often having
34 limited or no contact with the non-resident parent, and this creates uncertainty for
35 children, who are often aware of the proceedings and therefore the ongoing dispute
36 between the parents, which in turn creates difficulty in re-establishing contact
37 following a lengthy period of absence, as there can be conflicts of loyalty.
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45 Lawyers talk about the impact of this work; dealing with litigants in person who
46 have little or no understanding of the court procedures, and etiquette. It is often
47 difficult for professionals to decide upon the issues and attempt to find a rational
48 solution, particularly where tensions are heightened and the stakes are so high
49 (Trinder et al, 2014). The attempt to find a rational solution is what often introduces
50 delay, as there is a belief on the part of lawyers and members of the judiciary, that a
51 rational solution will be agreed. In practice, the subtle nuances of every case reflect
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3 the messy complexities of family life (Broadhurst et al, 2012) and, therefore, not
4 aligned with the formalities of legal processes.
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8 The child may be the ultimate trophy to either retain or win, but the child has needs,
9 wishes and feelings that often go ignored, when the needs of the parents take a
10 priority. Whilst the welfare of the child is the paramount consideration of the court,
11 the focus of the litigation is often directed to resolving allegations and counter
12 allegations that are presented in the Scott Schedule and narrative statements. The
13 behaviour of the parties during the course of the litigation can be hugely influential
14 in determining the outcome of the application for a child arrangement order.
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23 **Private law proceedings and the child as a 'trophy'**

24 The following discussion seeks to elicit a greater understanding of how the child
25 within private law proceedings is viewed as a 'trophy', within disputes in respect of
26 child arrangements, as it emerged in lawyers' talk about representing parents in
27 these proceedings.
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36 During interviews that were conducted whilst moving around the court building,
37 one lawyer talked about the waiting area as *disorganised chaos*, as court ushers
38 attempted with varying degrees of success to make note of the parties, and the
39 location in the courtroom that they had spilled out into. The court building is where
40 lawyers and parents spend an inordinate amount of time. Despite on the face of the
41 order parties are required to attend at court one hour prior to proceedings, so 9am
42 for a 10am start, for pre-hearing discussions, but also to ensure legally aided lawyers
43 are able to claim for over an hour's attendance at court. In reality, a 10am start is
44 unlikely as it was evident that a number of cases are listed for 10am, and lawyers
45 and clerks learn quickly to check where in the list for a 10am start the case is listed, it
46 may be 3rd at 10am, so in effect it could be a 12 noon start. This effectively allows
47 lawyers to be accommodated, to allow them to take other cases that may also be
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3 listed for 10am. Parents are not able to navigate this space quite so easily, and an
4 already tense situation can escalate quickly within this context.
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9 Lawyers frequently talked about the public spaces in which they worked. Although
10 the court building was occupied by both public law and private law child care
11 proceedings, there was a clear preference to working in the area of public law
12 proceedings which were presented as being more prescriptive, straightforward and
13 less onerous on lawyers having to spend time with parents.
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20 Private law proceedings were reported to be less about the law, with more focus on
21 mediation and attempting to broker more effective resolutions between the parties.
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25 However, in practice there was a distinct lack of warmth towards parents within
26 private law proceedings, which was evidenced by an avoidance on the part of
27 lawyers to negotiate with the parties, in preference to letting them get on with giving
28 evidence as illustrated in excerpt 2:
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34 Excerpt 2
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37 Lawyer for Father (Interview 3)
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40 *"Let the court decide who to go with, there is no point in us attempting to reach an*
41 *agreement outside of court, they will not be satisfied and we just come off worse". There is no*
42 *point in trying to settle, it is much easier to put them in the stand and let the court hear the*
43 *evidence. If you attempt to reach an agreement, you will only be accused later down the line*
44 *of coercing them to agree.*
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52 Lawyers often framed concerns in respect of private law proceedings in terms of
53 gains and losses as illustrated in excerpt 3 and 4:
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57 Excerpt 3
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3 Lawyer for Mother (Interview 14)
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6 *It is all about who has what, where, when and with whom. Grandmother wants the child on a*
7 *Monday, it is her day, always has been. Mother takes her to ballet on a Tuesday, Friday and*
8 *Saturday, always has done, that leaves Wednesday, Thursday, and Sunday. Father works*
9 *shifts and wants alternate weekends. Mother wont budge, and grandmother supports her.*
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11 *Where do I go with that one?*
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18 Excerpt 4
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21 The lawyer for the Father (Interview 11)
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24 *Mother would not agree to anything, and said that he always attempts to win, and she will*
25 *fight his application for the child to have overnight stays, even though previously the child*
26 *had spent periods of time in the care of her father which had been agreed by the parties, with*
27 *no apparent difficulty.*
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Lawyers talked about the importance of power and control within essentially *fragmented and fragile* relationships between the parties. Lawyers talked about the importance of gaining power and control over the other, and the importance often for both parties of the court building being seen as the place that epitomises power and control and *where battles commence, and are ultimately won or lost*. Parties perceive the court building as *something to fear and revere in equal measures*. It epitomises power and parties invest in the process in order to win.

Excerpt 5

Lawyer for the Mother (Interview 18)

The father has continued to send the mother emails and text messages largely in relation to the children, but the mother is of the view that the father is using the children to continue to exert control over her, and that communication in respect of the children should be

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3 *undertaken through children's social care.*
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6 *In November, some five months, the father failed to return the child to the care of the mother*
7 *or allow contact for a period of 13 days, until the mother went to school where the child told*
8 *her that the father had told him that the mother did not want him. We are now in court and*
9 *the child has been returned to the care of the mother, and an order made for the child to spend*
10 *time with the father. We are hoping to conclude the case at the next hearing.*
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18 Parties who have been engaged in litigation for over 12 months, or privately paying
19 litigants appear more confident and in control over the situation. The court building
20 for the litigant in person, or parties who experience increased vulnerability the
21 experience continues to be daunting and confusing. Increased time is required on
22 behalf of lawyers to support those who are not legally represented or require
23 additional support to assist them through the process.
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31 Excerpt 6 illustrates experiences in relation to dealing with litigants in person:
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34 Lawyer for Father (Interview 4)
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37 *They (LIP) come to court not knowing what to do, and we are expected to spend time with*
38 *them to ensure they are ready to go into court. It is much easier when you only have to deal*
39 *with the lawyer on the other side rather than the client, you have to be more careful and it is*
40 *really very difficult to achieve the right balance, particularly when your client is paying, and*
41 *you have to explain that you need to meet with the other side as they are not represented. The*
42 *system is unfair and we are caught in the middle.*
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51 Excerpt 7 illustrates that place is important for lawyers, in the sense that place,
52 specifically the court, is seen as significant for parents who are seeking justice, but
53 also because certain ways of experiencing, thinking about and talking about practice
54 are more available in some places than in others (Genn, 1999).
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60 Lawyer for Mother (Interview 1)

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3 *This place (court) is packed like an airport lounge, except no-one is going anywhere. We*
4 *cannot find a room to interview clients; instead we are talking in the corridors, down*
5 *alleyways, in the listing office, café, anywhere where we can find some space, whilst we are*
6 *waiting to be called in.*
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12 This is a small study and whilst we would not wish to generalise these findings to
13 practice throughout England and Wales, the study provides an important lens to
14 lawyer's experience of place that could be significant to elicit a greater
15 understanding of place sensitive and private family law practice as it is enacted on
16 the ground.
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24 The harm inflicted upon children by using them as the battleground or ammunition
25 in private law proceedings is indisputable. Resolving disputes over where a child
26 should live, who they shall see, and how often, holidays, school and medical care,
27 are most successful when negotiated and agreed between parents or guardians. The
28 abolition of legal aid for private law disputes, with some exceptions, including
29 where there is domestic abuse, introduced with the Legal Aid Sentencing and
30 Punishment of Offenders Act 2012, has resulted in many parents being unable to
31 afford to litigate over their children, and in turn resolve disputes without the
32 intervention of the court.
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44 An interesting observation is where a party either has nothing to lose financially,
45 either by virtue of wealth, or where both parties are eligible for legal aid, they use
46 the court in an attempt to broker a deal with the other party. It is also increasingly
47 the case that where one party is represented by lawyers and the other party is a
48 litigant in person, attempting themselves has resulted in lengthy and acrimonious
49 relationships both inside the courtroom and in respect of agreeing arrangements for
50 children.
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3 There appears to be little comprehension when parents are caught up in this
4 battleground of the impact upon children of arrangements that emerge from what
5 can often appear to be point scoring as illustrated in excerpt 8:
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11 Excerpt 8

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13 Lawyer for Father (Interview 7)

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15 *'He has won again' 'I want every weekend, or at least every Friday and Saturday' 'I want, I*
16 *want, I want, and so it continues. The number of interviews where I want is rehearsed almost*
17 *continually, without any mention of what the needs of the child are, is alarming.*
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23 The term alarming is not used lightly; as a social worker with over 30 years'
24 experience, a barrister, and a chair, author, and committee member, involved with
25 serious case reviews for 33 years, navigating tensions during periods of crisis is a
26 familiar terrain, but nothing quite prepared me for the practice reality of what
27 remains, even within the family justice system, a private domain.
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35 The tactics described by lawyers where parents attempted to score points against the
36 opponent, was noteworthy; the importance of ballet class whereby a parent *must* be
37 the *one* who accompanies the child, and therefore rules out a night the child could be
38 available to see the other parent. The grandparent who accompanies the parent to
39 court, who also has a claim on several nights, *if they get a night, where is my night*
40 *going to come from*, was one comment made by a Lawyer for Father following a
41 period of negotiation between the parties. The reality of the ballet class and who
42 takes the child is not going to define the child, the acrimonious and often protracted
43 proceedings, the details of which are all too often shared with the child following the
44 court hearing will be defining for the child. As one Lawyer for Mother recounted the
45 comments of a parent. *I told her we were back in court today, she doesn't want to see him*
46 *and they cannot make her, it will never work and this has been going on for 2 years, it is*
47 *making me ill.*
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5 In over 50% of cases lawyers confirmed that proceedings had been ongoing for over
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7 2 years, and in one case, 3 years, with little prospect of finding a resolution. The
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9 impact where children are aware of ongoing proceedings that have become almost a
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11 normal part of their childhood, not to mention the impact upon a child where they
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13 have had no contact with a parent during this period of time, and the problems of re-
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15 introducing parents following a lengthy period of separation, or where the child has
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17 never established a relationship with a parent due to the alienation of one parent
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19 cannot be underestimated.
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22 23 **Moving forward**

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27 New guidance has been released by Cafcass to assist Family Court Advisors to
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29 recognise and respond to cases where parental alienation is a feature. Cafcass define
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31 parental alienation as:
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35 *When a child's resistance or hostility towards one parent is not justified, and is the result of*
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37 *psychological manipulation by the other parent. (Cafcass, 2019)*
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41 Pivotal in these cases is the identification of risk of harm, which when the effect
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43 results in significant harm to the child, the local authority may be invited to advise
44
45 the court as to whether a public law order is required to safeguard the child.
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48 The decision to apply for a care order rests with the local authority. The court may
49
50 be concerned about the welfare of a child when resolving a private matter, as with
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52 divorce proceedings. The court may take the view that the threshold criteria is
53
54 satisfied, and the child should be made the subject of a care order. The court is
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56 limited in terms of what action it can take; the court can order a report under s. 37
57
58 CA89, and support it with the making of an interim care order, but, if the local
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3 authority conducts its own enquiries and concludes the making of a care order
4 would not prioritize the welfare of the child, the court can do nothing.
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8 In *Re (A Child: Termination of Contact)* [2019] EWCA 132 (Fam), the court considered
9 an appeal against a decision in respect of R aged 12, where it had been decided that
10 R should have no direct contact with his father, but permitted to send a letter or card
11 once a month.
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17 The court also made a s.91(14) Children Act 1989 order against the father. The Court
18 found that R would suffer harm by continuing the process of seeking to establish
19 contact with his father. However, the court had also found that the mother had
20 alienated R from his father, and as a result R suffered, or was at risk of suffering
21 significant long-term harm by reason of his mother's manipulation. The Local
22 Authority had previously obtained a supervision order, but at the time of the
23 making of the private law orders sought permission to withdraw their application
24 for an extension of the supervision order.
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36 The appeal was dealt with by Williams J, who noted that the findings the court made
37 were in opposition to the conclusions arrived at by the Local Authority who
38 concluded that the threshold for public law intervention had not been met, and the
39 court should have allowed the parties to reflect on the findings and consider what
40 further role the authority might play in assisting R and the parties before making
41 final orders, especially given that the psychologist's view was that there should be
42 contact between R and his father.
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51 The Judge had failed to undertake the necessary balancing exercise to weigh up the
52 harm that would be caused by continuing the process of seeking to establish contact,
53 against the risk of harm to R of there being no contact and him remaining in the sole
54 care of the mother.
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3 Williams J decided that the making of a final order for no direct contact was wrong,
4 because there had not been a full exploration of all the options available to R and
5 direct contact with his father. Accordingly, the s. 91(14) order was discharged
6 pending further consideration as to the assessment of direct contact.
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12 The importance of ensuring that every possible avenue has been explored before the
13 court reaches a decision in respect of severing contact between a child and a non-
14 resident parents cannot be underestimated (Hunt and Macleod, 2008; Maclean,
15 2013).
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21 In the case of *Re C (A child)* [2018] EWHC 557 (Fam) Knowles J, dealing with an
22 appeal against a decision which transferred the residence of a child aged 6 from the
23 care of her mother to her father, by reason of the mother's opposition to progressing
24 contact.
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31 It was found the mother was opposed to progressing contact between the child and
32 her father which had been positive.
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37 The court made a stepped order for the progression of contact, and a family
38 assistance order. Following the making of the order, within less than a month, the
39 father returned the matter to court in an attempt to enforce the order. Cafcass
40 reported to the court that the mother was not engaging with the family assistance
41 order, and the child was subsequently joined as a party to the proceedings, and a
42 guardian was appointed.
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51 The court concluded at the final hearing that the mother had a deeply ingrained
52 hostility to the father and his family, and would only agree to contact on her terms,
53 which did not include overnight and holiday time. It was further found that it had
54 been impossible to progress contact despite the involvement of Cafcass, a guardian
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3 and a family assistance order. The court ordered that on balance it was in child's best
4 interests to move to live with her father.
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8 In cases where there appears to be intractable hostility between the parties, child
9 contact interventions can greatly assist in brokering arrangements in private law
10 child care proceedings (Hunt and Macleod, 2008).
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15 However, they remain rarely used, arguably due to uncertainty around the
16 usefulness and availability of resources. Child contact intervention programmes are
17 primarily focused upon reintroducing children to non-resident parents, and may be
18 recommended as part of a Section 7 report.
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25 Of pivotal importance, is encouraging parents to listen to the views of their children,
26 and focus upon meeting their needs as opposed to being fixated upon the dispute
27 with the non-resident parent (Cobb, 2014). The intervention includes: work with a
28 child and parents to prepare for contact; intervention and observation of contact;
29 sustaining contact and indirect contact. This approach provides the Cafcass Family
30 Court Advisor and the provider of the programme to plan a programme that is
31 specific to the needs of the child and their family. The aim is to create a safe and
32 positive environment for the child to enjoy contact with parents, whether resident or
33 non-resident (Bloch et al, 2014).
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45 Subject to any risk assessment, services can be either centre based or external; such
46 as a Cafcass office, community activities, or within the visiting parents' home,
47 allowing for the flexibility to support families in various settings and enabling them
48 to progress in a safe and supported way without the need for longer term court
49 intervention.
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55 Whilst the involvement of Cafcass remains throughout the duration of the
56 programme, it is not a Cafcass service, although it is funded by Cafcass, but the
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3 service is provided by an independent Cafcass approved provider. Typically, in
4 practice, the programme is delivered for 12 hours over an 8 to 10 weeks period.
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8 The benefits of the programme are the flexibility, with a shift away from adversarial
9 approaches, towards mediation. In cases where this approach is effective, it reduces
10 the need for discussions and negotiations at court in respect of interim contact
11 arrangements, provides for more collaboration and consistent communication
12 between the parties, and to focus upon the matters in issue between themselves.
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19 In addition, the programme can provide important evidence for the Family Court
20 Advisor, to inform the court in relation to protection and welfare issues.
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26 The difficulties with Child Contact Interventions as a potential mechanism to
27 resolving proceedings lie in the availability of the resource itself,
28 a lack of commitment on behalf of one or more of the parties and continued
29 acrimony. However, the continued involvement of CAFCASS does help to
30 ameliorate issues to some degree.
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38 Child Contact Interventions can prove highly effective as the parties can experience
39 a sense of being more in control of the procedure for "time spent" and may be able to
40 engage with the contact centre rather than viewing the location with trepidation.
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44 Professionals in this study were able to recall a number of cases where children were
45 in both "intractable hostility" cases as well as cases where there have been long
46 periods without contact for children, and the Child Contact Interventions have
47 provided an effective brokering of relationships between the parties and the child.
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51 Following the implementation of both the Legal Aid Sentencing and Punishment of
52 Offenders Act (LASPO) 2012, and the Children and Families Act 2014, mediation has
53 been heralded by the government as the holy grail of reforms by effectively
54 diverting cases away from court by a range of alternative forms of dispute resolution
55 (Maclean and Eekelaar, 2012).
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3 However, adopting non-court dispute resolution approaches to resolving matters, in
4 particular mediation, is not a novel idea. In Europe, where mediation is used as a
5 form of dispute resolution in divorce proceedings, it is clear that it is not 'one size
6 fits all' and at best it is described as patchy. A picture of mediation in Europe would
7 resemble a constantly changing patchwork quilt or mosaic. The pieces making up
8 this patchwork have recurring patterns and colours, but they are not uniform and
9 they are not woven to a single design. There are many missing pieces and the
10 patchwork has gaps in it. A variegated patchwork that recognises cultural
11 differences is preferable to uniformity (Parkinson, 2005, p.9).

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14 In the UK there has been a shift towards non-court dispute resolution both within
15 private law and public law proceedings, with the term 'mediation' used within
16 private law disputes and the pre-proceedings protocol within public law
17 proceedings. The aspirations of the government in relation to both are to ensure,
18 within a structured protocol, that parties reach an agreement at an early stage
19 wherever it is safe and possible to do so, to avoid the need for the matter to be dealt
20 with in court thereby saving time and cost (Miles et al, 2012).

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23 The state nevertheless remains in control, but remotely; the protocol is highly
24 procedural and regulated and the state can choose whether and at what stage to
25 intervene. The rhetoric of attempting to reach an agreement between the parties
26 without the need for a court hearing that will inevitably introduce a degree of
27 adversarial contestation is difficult to dispute. When individuals are facing
28 enormous turmoil in their personal lives they should be able to resolve these matters
29 without their personal information being shared in court, where historically the
30 system is highly bureaucratic and impersonal (Holt and Kelly, 2014).

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33 Despite the intentions of the legislators and policy makers there are occasions when,
34 in private law disputes, mediation is neither an appropriate nor an effective remedy.
35 This may be because of the power imbalances within the relationship, and/or where
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3 there has been any form of abuse between the parties, where disputes over the
4 placement of children cannot be agreed, or where capacity issues are relevant.
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8 Since the introduction of mediation in private law matters there continues to be
9 relatively low take-up by parties, arguably for the reasons stated above – the matters
10 involved are often highly complex and require the skill, experience, impartiality and
11 knowledge of a judge to resolve. Despite the lack of appetite for mediation the
12 government continue to progress on this course with further incentives to entice
13 parties to enter mediation prior to making an application to court. The term
14 ‘mediation’ is confusing for parties as it implies an attempt at reconciliation, and
15 only if this is not successful then a settlement out of court should be sought – this
16 interpretation continues to be a feature within Europe, where take-up of mediation
17 continues to be low (Stanić, 2005).
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30 There exists a fundamental confusion between mediation and reconciliation. Whilst
31 they are indeed separate tasks, with reconciliation focused on attempting to save a
32 relationship and mediation focused on achieving an amicable divorce, the
33 perceptions of parties are they are one and the same, and this view may explain the
34 strong resistance and low take-up by parties in the UK (Parkinson, 1997).
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41 The intention of the UK government to introduce a protocol that in theory may
42 provide a quicker, cheaper and more permanent resolution to issues following the
43 breakdown of a relationship is indeed laudable. However, in practice there has been
44 considerable evidence that would suggest the aspirations have not come to fruition,
45 with reports of delays, unfair decisions and additional costs (Welbourne, 2014). It is
46 indeed the case that litigation involving the court is costly in terms of both court
47 resources and the delay that is often built in before important decisions in relation to
48 children can be agreed. However, these are issues that could be resolved in part by
49 effective case management and judicial decision making as opposed to introducing
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3 an earlier and additional layer of procedure and protocol that is likely to increase
4 delay and costs (Maclean, 2014).
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8 Excerpts 9 and 10 illustrate experiences of frustration driven by court processes:
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12 Excerpt 9
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15 Lawyer for Mother (Interview 6)
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18 *It was noted that today's proceedings will be before a fifth judge, this is unfortunate; and in*
19 *my submissions I invited the court to list the matter in any future hearings before a judge*
20 *who has heard this matter previously in order for there to be some judicial continuity.*
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28 Excerpt 10
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30 Lawyer for Father (Interview 19)
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33 *These proceedings have been ongoing for 30 months, with little hope of a resolution soon. The*
34 *judge gives the mother, (LiP) far too much time, it is frustrating as my client has to pay every*
35 *time we come to court, and the costs are huge.*
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40 Discussion

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44 During interviews with, and observations of lawyers, emerged some key strategies
45 that parents could employ, in an attempt to broker relationships between resident
46 and non-resident parents in respect of agreeing arrangements for their children.
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51 The use of email was highlighted by advocates as providing a useful tool, as it may
52 introduce a less intrusive form of communication. Emails can be sent and accessed in
53 a measured way, and it provides a written and dated account that may be useful in
54 reflecting upon where communication is effective and areas for improvement, and
55 could also be used in evidence if required, as opposed to the mass production of text
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3 messages which rarely assist either party. Advocates confirmed that for parents
4 involved in disputes lived with the public scrutiny of emails, text messages and
5 social media being made available in court proceedings, and this often fuelled
6 litigation. It was agreed amongst advocates that parties should be aware that
7 everything could be potentially made available by the other side if it is in the public
8 domain or accessible electronically, therefore careful consideration should be given
9 to the content and mode of communication.
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18 Adopting a more flexible approach with the other party; it is regularly the case from
19 interviews with advocates, that either one or both parties engage in behaviour that
20 knowingly undermines or frustrates the other party. Examples provided were not
21 keeping to scheduled contact times, cancelling without sufficient notice,
22 undermining the other party to the child, and involving the child in the receipt of
23 information in an attempt to alienate the other party. Advocates agreed that parties
24 should attempt to focus upon the impact on this behaviour on the child and to weigh
25 up the gains and losses for the child, both in the short term but also in the long term
26 of what amounts to game playing. Advocates would often advise parties to
27 disengage and avoid reacting to the other party, as this would often elicit change
28 within the dynamics of the relationship, and when it became clear the other side
29 were not reacting the problematic behaviour would be more likely to diminish.
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44 The use of intermediaries, often grandparents, were cited as invaluable, particularly
45 in providing practical solutions to arrangements, but also offering the emotional
46 support to parties in order to keep arrangements on track.
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51 Advocates repeatedly referred to 'hot spots', such as the ballet class that only mother
52 could attend with the child, or the football match that only father could attend to
53 support the child, these customs become entrenched and often become the focus as
54 to why certain spend time with the other party is non-negotiable. The child
55 invariably becomes lost in this battleground, although they are used by both parties
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3 to secure victory over the other. Advocates unanimously all referred to these events
4 which would press the button. As one advocate stated *you have to choose your battles,*
5 *it is simply just not worth the fight. There are often no winners in this approach, and*
6 *certainly not the children who are caught up in this. Who has Christmas, New Year, this*
7 *year, is seen as who wins. The child is the trophy to be won by a parent who has often lost out*
8 *in the relationship.*

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11 It is important to retain the focus upon the welfare of the child, and being technically
12 right or scoring points is often unhelpful. Compromise, flexibility and a supportive
13 approach between the parties may be difficult to achieve, but in order to avoid
14 protracted legal proceedings that are expensive both in terms of financial but also
15 emotional costs, and often do little to ameliorate the impact of parental separation
16 and the subsequent arrangements for the children. Advocates who themselves have
17 separated from partners, talk openly about how they avoid court proceedings to
18 resolve arrangements for the children. A key factor is being able to adopt a flexible
19 approach with their former partner, and this flexible approach over time will often
20 result in agreeing a working relationship that is primarily focused upon making joint
21 decisions in respect of the child.

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