

Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991

Final Report to the Department for
Constitutional Affairs

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2006

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First Published 2006

ISBN 1 84099 071 6

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The views expressed are those of the authors and are not necessarily shared by the Department for Constitutional Affairs.

Acknowledgements

Our first thanks are to the children and parents who agreed to take part in this research but who for obvious reasons cannot be identified. It takes courage to talk to outside researchers about complex, personal and sometimes painful family matters. We hope that they will come to know that their participation will have contributed to building a more compassionate and child-friendly family justice system.

The research was commissioned by the Department for Constitutional Affairs. We are particularly indebted to Terry Hunter and her colleagues with whom we liaised at all stages of the study and whose efficiency and support eased our way at various awkward moments. She was a member of a small Advisory Committee chaired by Lord Justice Wall. Other members were Alan Critchley, Joyce Connell and Arran Poyser. We thank them for their support and advice. At the outset we consulted Dame Elizabeth Butler-Sloss, then President of the Family Division who approved the proposal. We are grateful to her and several circuit and district judges in various parts of the country with whom we met in the early stages of the research while we were familiarising ourselves with the workings of r 9.5 “on the ground”. We are grateful also to Elena Fowler and the staff of NYAS (the National Youth Advocacy Service) for discussing their experience of r 9.5 with us.

Following the judgment of Munby J in *Re B (a child) (Disclosure)* [2004] EWHC 411 (Fam) [2004] 2 FLR 142 the departmental practice of allowing authorised researchers access to court and CAFCASS records was temporarily thrown into doubt. While we waited for matters to be clarified, we undertook a national postal survey of solicitors to investigate their experience of separate representation for children in private family law proceedings and to sound their views. Our thanks to Karen Mackay (Chief Executive of Resolution, formerly the SFLA) and Rachel Rogers (Policy Adviser at the Law Society) for their help with providing solicitors’ contact details. Over 400 solicitors responded. We are very grateful for their help which has added an important extra dimension to this study.

The research itself has been an interdisciplinary law and psychology team effort. The research associates, Dr Lesley Scanlan and Dr Claire Miles, both psychologists, shared the design and administration of the project with us. Claire undertook the main burden of the fieldwork abstracting data from records and interviewing the children and parents - sometimes in difficult circumstances. She was ably supported on occasion by Dr Nina Smalley and Sean O'Neill. Our thanks to the four of them. We have also greatly benefited from the invaluable help generously offered by our Law School colleague Julie Doughty and by the expert clerical and technical assistance of Bethan Wright, Clare Pike and Kay Bader.

Whatever errors and shortcomings remain in this report are our responsibility as Project Directors and should not be attributed to any of our advisers and colleagues.

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February 2006

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Executive summary

This summary reports the findings arising from an 18-month study of r 9.5 of the Family Proceedings Rules 1991. This Rule provides for the separate representation of children in private family law proceedings. The study was carried out between April 2004 and October 2005.

Aims

The basic aim was to sample children's views of being separately represented with a view to ascertaining whether the service provided by guardians and specialist children's lawyers was satisfactory as far as the children were concerned. A supplementary aim was to carry out a documentary survey of r 9.5 cases based on an examination of "closed" court records in the four years preceding April 2005 drawn from five major courts believed to make "comparatively high use" of this provision (the rationale for using closed rather than current cases can be found in Chapter One, page 3 at para 1.6. The study also sought interviews with some children's parents. The research began with a national postal survey of solicitors with family law experience to ascertain their views of the value of r 9.5.

The nature of the samples

The resulting data were drawn from qualitative interviews with 15 children (8 boys and 7 girls) between the ages of 7 and 17; and from interviews with 23 parents or carers, 15 of whom had children living with them and 8 non-resident parents. Children and parents who elected to take part were drawn from a sample of 121 court records in which r 9.5 had been applied. Data from the national postal survey of solicitors are based on 420 returns.

Caveat

Rule 9.5 is only applied in cases regarded by judges as causing "special difficulty", and there were formidable research problems to be overcome in order to obtain even a small sample of children in such cases (see further below). The findings reported from the children's study, while highlighting a number of important issues, should not therefore be regarded as necessarily representative of the whole population subject to this provision, or indeed representative of the total number of such children whom we identified in our inspection of "closed" case records. The messages reported from these 15 children should be regarded as suggestive rather than conclusive. However, in a number of respects some confirmation of the points raised by the children can be obtained from the data arising from the survey of solicitors.

Findings

a. The court records survey

The children: Of the 121 r 9.5 cases sampled, the families concerned had 224 children (45% boys and 55% girls). The average age of the children was 8 years.

The applications: (Form C1): 41% (44) of applications were for contact and 40% (43) were for residence. A further 7% (6) cases were for a prohibited steps order, 4% (4) for a specific issue order and 3% (3) for an interim residence order.

The rationale for the use of r 9.5: Very few files explicitly stated the particular reason given by the judge for invoking r 9.5. From a perusal of the parties' statements and from CAFCASS reporter and guardian reports, it was clear that protracted disputes between the parties often involving a number of separate applications and defined by the judge as "intractable" led to the use of r 9.5 in the majority of cases. In about a third (40 cases) it seemed that r 9.5 was applied primarily because the parents questioned the CAFCASS reporter's assessment of the children's welfare. Other reasons recorded were allegations of child abuse (12%: 14 cases), a need to investigate the children's circumstances further (6%: 7 cases) and to enable the parents to receive support and professional help in order to facilitate contact (7%: 8 cases).

Rule 9.5 as a measure of last resort: The majority of cases sampled appeared to show that r 9.5 was applied as a measure of "last resort" when an exasperated judge concluded that the case was intractable and feared that damage to the welfare of the child was worsening. It was also clear that r 9.5 was sometimes used as a measure to manage the case with a view to moderating the inter-personal conflict to which the child was being subjected, as much as a means of enabling the court to hear the voice of the child more clearly by being accorded party status.

Improvements required in court and CAFCASS management information systems: Key items of documentary information in the court files were sometimes missing; in particular we experienced great difficulty in identifying "closed" r 9.5 cases. This was because the courts and CAFCASS areas lack a uniform system of recording this item of information.

b. The children's views and experiences

Although the 15 children and young people and their family circumstances which led to court proceedings varied considerably, a number of consistent messages emerged from their interviews:

- Most of the children liked the idea of someone appointed by the court to help them have their say in the proceedings.

- Most of them believed that if their parents could not resolve their differences in any other way, a neutral judicial authority of some sort was needed.
- The children felt that the court and the judicial authorities should be “child-friendly” and work in such a way that if the children wanted to put their view to the judge directly, the setting and the judge should be sufficiently approachable to enable them to do so.
- A number of children needed someone accessible to them, apart from their parents, to support them through the litigation process. The role required is that of a *passage agent* i.e. a trustworthy person, able to relate to the children with empathy informed by psychological and legal understanding, who can help the child navigate the turbulent waters arising from their parents’ dispute.
- It was clear that for some of these children this role was performed by a guardian from CAFCASS (and in several instances from NYAS). For some older children the solicitor emerged as the key figure in this respect. But there were other children who did not appear to have found anyone they could trust and relate to. They appeared “lost”, withdrawn, depressed and sometimes angered and intimidated, by their contact with the family justice system.
- A number of children were clearly ignorant, confused and made anxious knowing that their parents were going to court to contest residence or contact. They imagined the courts to be “scary places” with judges who have the capacity to “punish” their parents. Some children worried that one or other of their parents could be sent to prison for behaviour for which they themselves felt responsible, such as refusing to go on contact visits.
- The implications of the previous points are that children need to be given reliable information about the court/litigation process in an appropriate form, as far as possible at the beginning of this process. We doubt whether leaflets (however child friendly and well-designed) are necessarily the best way to do this and suggest a more supportive role for CAFCASS in this respect.
- The children generally had clear ideas of what constitutes a “good” guardian i.e.
 - they wanted the person appointed to give them enough time to get to know them;
 - they wanted someone they could trust who could communicate with them at their level and who was not patronising;
 - hasty interrogations were disliked while a friendly conversational style of interviewing was preferred;
 - they wanted clear explanations not only about the guardian’s role but about the whole court process. This was particularly important if parents had failed to explain things or had done so in a biased or inaccurate way.

- They particularly wanted the guardian to report accurately to the court what they had told them. They were upset if it appeared to them that the CAFCASS reporter and/or guardian had promised to respect confidences but had then breached this in the report to the court. Perhaps more than anything else this appeared to be the strongest criticism that the children levelled at guardians.
- A number wanted guardians and/or their own solicitor to keep them regularly informed about the progress of the case. Having an independent neutral source of reliable information was seen as better than having to rely on partial information from parents who were emotionally embattled with each other.
- Where the children had established effective, supportive relationships with their guardian and/or solicitors, they reported feeling having been made more confident both in terms of being able to get their views over to the court and also by the experience of being treated with respect.

c. The parents' perspectives

Of the 23 parents interviewed, 10 were fathers, 12 were mothers and in one case the child resided with an aunt. There were six non-resident fathers and two non-resident mothers, so that the children lived with 10 mothers and 4 of their fathers.

- The majority of parents, like their children, favoured the idea of separate representation and thought that it had had a beneficial effect on their children.
- Many parents were confused about the respective roles of the guardian and the children's solicitor. Some questioned whether it was appropriate to have a solicitor as well as a guardian to safeguard their child's interests.
- Most parents expected the guardians to be impartial with respect to the parental dispute and some were critical if they thought the guardian had taken sides.
- Although the researchers had no way of validating the parents' views, another major criticism of guardians' practice was that in some instances the parents believed the guardian's report was inaccurate in key respects or had misrepresented the children's views.
- With respect to the court process parents wanted to see:
 - greater judicial continuity;
 - earlier court assessment of the case in order to avoid delay;
 - less intimidating courts.
- A number wished that the guardian had been appointed much earlier in order to help "short circuit" escalating conflict and costly litigation.

d. Solicitors' views and experience of r 9.5

How solicitors were appointed: Of the 420 returns from our national survey, 75 percent had direct experience of being involved in a r 9.5 case. Of these, the majority had been instructed by a guardian, mostly through CAFCASS and more occasionally through NYAS. In 167 incidences solicitors reported being directly appointed by the court.

The nature of r 9.5 cases:

- The majority of responses identified “intractable, hostile parents” as the main reason for a r 9.5 appointment.
- In addition to cases of implacable hostility, solicitors reported that r 9.5 was often used in “complicated” cases. These included failure of local authorities to intervene where the court considered the child might be seriously at risk; cases with an international element; cases where complicated mental health issues might have arisen and there was a need for expert psychiatric or psychological assessment; cases where there were allegations of physical or sexual abuse.
- A number of the solicitors felt that the appointment of a guardian had come too late when the parties had become entrenched in their view.
- Solicitors reported that the child’s understanding and competence are often a key factor in the court’s decision whether to order separate representation. Rather than any specific age being mentioned, *Gillick* competence emerged as an important consideration.

The benefits of separate representation: Many solicitors stated that in their view the benefits to the child outweighed the possible disadvantages:

- Of 358 open ended responses to the questionnaire, 137 specifically mentioned giving a voice to the child as a benefit, particularly for those children who might otherwise be intimidated by the system, who were having difficulty in articulating their feelings, or who vacillated or said things simply to please their parents.
- In intractable disputes, a number of solicitors mentioned that an “experienced guardian” could sometimes demonstrate an ability to unlock the case and bring the parents either to a compromise solution or an acceptance of the status quo.
- The most valuable contribution of a well trained and experienced guardian was seen as the ability to verify independently the child’s wishes and feelings and to provide the court with “a balanced and reasoned report”.
- In intractable disputes separate representation was seen as a way of refocusing the parties’ attention on the child and demonstrating the court’s ability to put the child centre stage, facilitating the court’s decision-making in the interest of the child.

Disadvantages of separate representation: In contrast to these positive views, a fifth of the respondent solicitors told us of possible disadvantages. These were:

- The likelihood of added delay and costs to the proceedings.
- The risk that the child would be subjected to a further round of interviews with professionals “prying into their lives” which would add to their stress and confusion.
- The risk that being directly involved with the case will add to the stress on the child and might even make the child the focus of parental hostility.
- Putting the child centre stage may give the child too much weight of responsibility, particularly if the child believes that the judge will make a decision based entirely on their view.
- Separate representation can be a double edged sword in that a manipulative child could use their new found empowerment against the parent, whilst a manipulated child could be persuaded by a parent into repeating unfounded allegations or simply reciting that parent’s view to the guardian.

Recommendations for policy practice and law reform

Our suggestions for improvement in the system of separate representation in these proceedings spring from three general principles:

- i The critical importance of providing children caught up in complex and intractable disputes with reliable impartial support and information throughout the course of the proceedings.
- ii The need for early assessment in order to identify potentially intractable disputes and complex cases which require the children’s interests to be safeguarded through separate representation.
- iii The need to distinguish three distinct roles in the separate representation process all or any one of which can be included: i.e. child advocacy; providing the child with impartial passage agent support throughout the proceedings; and short term intervention aimed at easing or unlocking the intractability of the parents’ dispute.

Summary of recommendations

i. The initial assessment

- Early assessment at the First Hearing Dispute Resolution Appointment of the child's need for separate representation is vital in order to minimise delay.
- That assessment needs to consider not only the risk to the child where domestic violence is alleged but the risk to the child's education, social development and mental health arising from the parents' dispute.
- Longer term, provided the necessary research and development work is undertaken, CAFCASS officers should be trained in the use of simplified psychometric measures in order to provide the family courts with more accurate assessments of this kind.
- Whether the tandem or single practitioner (guardian or child solicitor) model of separate representation is used should be a judicial decision based on the judge's assessment of the needs of the child (i.e. child advocacy, support, case management etc) at the First Hearing.
- There should be a Practice Direction to indicate that when an order for separate representation is made, the judge should be explicit in giving:
 - The reason for referral, and
 - Whether the tandem or single practitioner model is the preferred mode.

ii. The separate representation process

a. The persons appointed to represent children

- Those selected for guardian and children's solicitor work need to be skilled, and in the eyes of the child, experienced as trustworthy persons with clear aptitude to relate to children.
- The roles of guardians and children's solicitors require specialist preparatory training and continuing professional development – for example – in face to face work with children, in mental health aspects of family life and in the assessment of a child's resilience and response to stress.

b. Task performance

- Guardians need always to explain and ensure that the child understands the distinction between the roles of children and family reporter (CFR), guardian and children's solicitor. They or the child's solicitor also need to explain how the family court system differs from the more punitive ethos of the criminal courts.
- Guardians in performing this task need to share the court's impartiality in dealing with the parents' dispute.
- Guardians and those training them need to take account of the children's messages arising from this research concerning what makes for a 'good' guardian (see above).
- Where children have expressed a wish to meet the judge at the end of the final hearing in order to receive an explanation in person of the reasons for the court's decision (and where appropriate to be reassured that their views alone were not determinative), guardians should always bring the matter to the attention of the judge.

iii. Court management

a. Documentation

- Steps should be taken to improve the way court files are compiled and kept in order to show clearly the history of the case, the dates and numbers of each separate application and orders made, and the names of the judges dealing with the case.
- In particular, the FamilyMan information system in all courts should contain a separate code indicating when separate representation has been ordered. The system should indicate to which agency the case has been referred (i.e. CAF/CASS, other agencies such as NYAS or direct to a children's solicitor). In order to assist staff planning and future legal aid expenditure it should also indicate whether a single practitioner was appointed to represent the child or whether the tandem model was used.
- The file should always contain copies of the documentation sent to the referral agency indicating the explicit reasons why the judge ordered the child to be separately represented (see above).
- In the longer term, the Department should consider linking family court records concerning particular children and/or families in order to reveal a child's family court career.

b. Judicial continuity

We recommend the Department should undertake an inquiry into the implementation of the principle of judicial continuity and monitor the extent to which it is being achieved in disputed child-related private law proceedings.

iv. Law reform

a. Enforcement procedures and child representation

In order to safeguard children's interests, we recommend that:

- Before the court makes an enforcement order under s11J and Schedule A1 of the Children Act 1989 as proposed in the Adoption and Children Bill 2005 Clause 4 and Schedule 1, the children concerned should always be separately represented.
- With respect to the proposed monitoring of the enforcement order the officer undertaking this task should have an expressed duty to ensure as far as possible that the child does not experience adverse repercussions while the order is in place and if this seems likely to report the matter to the court.

b. The establishment of local family courts

The Department should give serious consideration to how to make the courts more "child friendly" and less intimidating so that children of sufficient understanding and competence may, if they so wish, participate more fully in the proceedings.

v. Research spin-off

Because of the recognised shortcomings of small scale snapshot qualitative research studies, the government should consider undertaking a well-constructed psycho-social longitudinal research programme to investigate how children are affected over time when they exposed to implacably hostile parental disputes and the impact of adversarial litigation.

Chapter One - Introduction: the objectives of the study

Terms of reference and aims of the research

- 1.1 In this report we present the findings of a study, commissioned by the Department for Constitutional Affairs and carried out at the Cardiff Law School between April 2004 and February 2006. The primary aim was to investigate children's experiences of being separately represented by order of a judge in private family law proceedings under the provisions of r 9.5 of the Family Proceedings Rules 1991.¹ These provisions are intended to apply only in cases of special difficulty. The Department wanted to find out whether the service provided by guardians ad litem (hereafter referred to simply as guardians) and specialist children's lawyers under the so-called "tandem model" of representation were meeting children's needs or whether these could be met in other ways.
- 1.2 By commissioning this research, the Department hoped that children and young people who had been on the receiving end of these particular services could be given the opportunity to contribute to the development of the Department's policy concerning rules, which have yet to be formulated, pursuant to the introduction of s 122 of the Adoption and Children Act 2002. These will concern the separate representation of children in Children Act 1989 cases generally and in particular s 8 cases – i.e. applications for orders concerning residence, contact etc. By seeking feedback from children and young people who had experienced family breakdown, the court system, CAFCASS and other related family justice support services, the Department was following its recent more general policy of involving children and young people in departmental policy making, as announced by Lord Filkin, then Minister in the Department, in the *DCA Action Plan (2004-5): Involving Children and Young People*.
- 1.3 Supplementary aims of the research included investigating the views and experience of parents whose children had been separately represented; examining court records in such cases with a view to finding out why the court had asked for the children to be so represented, and conducting a more wide-ranging national postal survey of solicitors in order to canvas their views and experience of these provisions. It was hoped that this would give an indication why the use of r 9.5 apparently varied widely in different parts of the country.

¹ SI 1991/1247, as amended by the Family Proceedings (Amendment) Rules SI 2001/821.

Setting up the project – obstacles that had to be overcome

The need to establish the accuracy of baseline data

1.4 Although the Cardiff research team had previous experience of interviewing children in divorce proceedings (Butler, Scanlan, Robinson, Douglas and Murch: 2003) using samples drawn from court records, it was recognised at the outset that this new investigation would be more challenging. We knew that the application of r 9.5 at the discretion of a judge was likely to be a comparatively rare occurrence. Indeed, during the passage of the Adoption and Children Act 2002, several peers in the House of Lords had called for greater numbers of children to be separately represented in private family law proceedings. Statistical information made available to us by the Department certainly suggested that there was considerable variation and inconsistent application between circuits, CAFCASS areas and possibly between courts. Two CAFCASS areas in particular stood out as making comparatively high use of this provision – the North West and Yorkshire and Humberside.² By contrast the Eastern area appeared to have no such cases and all other areas relatively few. What was not clear however was how accurate these data were, nor what proportion they represented of the total court case load of s 8 Children Act 1989 cases. Moreover, they took no account of r 9.5 appointments which might have by-passed CAFCASS by going to other agencies such as NYAS (National Youth Advisory Service) which also provided guardians or those cases which the court referred direct to a specialist children's solicitor.³ Despite these uncertainties the suspicion was that judges differed in their propensity to use r 9.5. Several interviews with judges in the preparatory stages of the work revealed that they were reluctant to use it in their areas because CAFCASS apparently had difficulty in finding enough suitable guardians. We were also told that while some judges considered the use of this procedure to be a real advantage and benefit to children there were others who preferred to rely on reports from the CAFCASS Children and Family Reporter (hereafter referred to as a CFR). It was also suggested that in a few areas the use of separate representation was influenced by the reluctance of local authorities to carry out a s 37 Children Act investigation in order to see whether children caught up in private law proceedings ought to be the subject of child protection proceedings.

² See further, Chapter Two below.

³ Subsequently, CAFCASS and the Court Service have taken steps to ensure more accurate recording of r 9.5 appointments. See CAFCASS (November 2005) *Practice Direction: Children as Parties*, CAFCASS London

The need to establish the location of the children potentially falling within the sample

- 1.5 Before we could attempt to interview children who had been subject to r 9.5 we needed to know where they were living and with whom. This inevitably meant finding this information from court or CAFCASS records and doing so in such a way as not to infringe confidentiality and security issues. Although we were approved by the Department and had the support of the then President of the Family Division, Dame Elizabeth Butler-Sloss, we soon encountered a lengthy delay arising from the judgment of Munby J in *Re B (A Child) (Disclosure)*.⁴ This had the effect of casting doubt on the practice of allowing authorised researchers access to court and CAFCASS records. We therefore had to wait while CAFCASS and the Department sought legal advice on the matter. In the meantime we organised a national survey of solicitors. Eventually it was agreed that as the law governing disclosure of confidential records was likely to be modified to permit authorised research, we could proceed on the basis that the senior judge in each court should be asked to approve our having access to court records for purposes of identifying the relevant cases.⁵ Once this consent had been obtained, arrangements were made for the researchers to visit the courts, inspect the records and abstract details of the relevant cases.
- 1.6 The selection criteria for appropriate cases were that the child had to be seven years old or more and the case had to have reached a “final” order between January 2001 and April 2005. After discussion with officials we decided to take “closed” rather than current cases for two reasons. First, it was thought that this approach would cause less disruption to busy court staff than taking live cases which were in current use. Secondly, it would mean that as far as possible the separate representation process would have been completed so parents and children would be in a better position to evaluate its impact on their lives. Moreover, we as researchers would avoid the risk of being seen as unwittingly influencing the outcome of the case. Against this approach we recognised that some children and parents might by then have forgotten salient features of the case. Also a number might wish not to take part because they did not want to be reminded of unhappy experiences associated with family breakdown and the associated litigation. Nevertheless, one judge wrote to advise us that we should have sampled current cases in order to be more up to date with current practice.

⁴ [2004] EWHC 411 (Fam) [2004] 2 FLR 142.

⁵ See Department for Constitutional Affairs (December 2004) *Disclosure of Information in Family Proceedings Cases Involving Children* Annex C Amendment to Family Proceedings Rules 1991 r 10.20 as amended. This now expressly permits a person lawfully in receipt of information or a proper officer to communicate information concerning a child or a family to a person or body on an approved research project.

- 1.7 Those cases deemed as falling within the selection criteria were sent a letter from court explaining the nature of the research and inviting their participation (specimens of this and subsequent letters sent to parents who expressed interest in taking part can be found in Appendices 2 and 3). We were heavily reliant on the good offices of key intermediaries (i.e. court officials and CAFCASS staff) to ensure the necessary records were found. Inevitably some officials were under other pressures and so in some places there were delays in completing these arrangements for us.

Key questions for children and parents

- 1.8 The research was planned as essentially an exploratory qualitative study. At least as far as the children and parents were concerned each case was likely to be idiosyncratic and complex. Thus we decided that rather than using a set questionnaire which might be experienced as rigidly constraining, it would be better to have a more open approach. Therefore we used a checklist of questions to guide the interviewer. This would allow children and parents greater opportunity to tell their story in their own way and lead us to the subjects which were of most interest to us, namely their experience of the separate representation process. Obviously too we recognised that children would vary in their levels of understanding and in their capacity to put thoughts and feelings into words, a further consideration which guided our choice of methodology.
- 1.9 Nevertheless, from the outset we had clear ideas about the kinds of issues and questions we needed to explore. As far as the children were concerned, the key questions were:
- Did they understand the reasons why the court had ordered that they should be separately represented? Did anyone explain the reasons to them?
 - What did their parents tell them about the litigation and did they feel put in an awkward position by having their own representatives?
 - What was their experience of the CFR, the guardian and the appointed solicitor? Did they understand the difference between these roles? Did they feel they could get their wishes and views across to these people?
 - Had they been well informed about the legal process and did they feel that separate representation had been appropriate in their case?
 - Were they informed of the progress of the case and if so by whom?
 - Was the timeliness of the CAFCASS service appropriate in the context of their understanding of the reasons for the court proceedings?
 - Would they have preferred a different mode of representation and a different way of dealing with their family's proceedings?

- Did they wish to see the judge and did they in fact do so?
- Were they confused or made anxious by the proceedings themselves or by their involvement through r 9.5?
- What difference, if any, did the proceedings make to their relationship with their parents and with other members of the family (e.g. siblings, grandparents etc)?
- What impact, if any, had there been on other areas of their life (i.e. education, social relations with friends etc)? Were there any adverse consequences by being the subject of separate representation?
- Would they recommend the use of this provision to other children in similar circumstances?
- What changes, if any, would they like to see in the way serious parental disputes are conducted?

1.10 It will be noted that because of the individual circumstances of the children, not all were able to answer all these questions, but they served as a guide to the interviewer.

Interviews with parents and carers

- 1.11 When we wrote to the parents we gave them some advance indication of the kinds of questions we would want to ask them. While this might have put some off, we hoped that those willing to be interviewed would be able to prepare themselves more easily because they had been given some advance notice. The subject areas covered were as follows:
- The history of the case and who commenced proceedings? What were these about and how long did the proceedings last overall?
 - The extent of judicial continuity – did more than one judge deal with the case? And, if so, how many?
 - The process of separate representation – did they know why the court had ordered their child to be separately represented by a guardian and/or solicitor? What was their experience of these persons? Did they see the CFR and guardian’s reports and what were their reactions to the content?
 - Reflections on their experience of the courts and whether they thought the system needs improving and, if so, in what ways?

The final sample

1.12 A detailed research methodology has been set out in Appendix 1. In the end, 15 children (8 boys and 7 girls) were interviewed. We also interviewed 23 parents or carers comprising 10 fathers, 12 mothers and 1 aunt. Of these, 15 were resident parents (4 fathers, 10 mothers and 1 aunt) and

8 non-resident parents (6 fathers and 2 mothers). Children and parents were widely dispersed geographically in the North, Midlands and London areas. In only three families did we manage to interview both parents.

- 1.13 In addition to the interviews, general information was collected from the court files of 121 r 9.5 cases identified in five courts representing four of the ten CAFCASS regions namely: the North West, Yorkshire & Humberside, West Midlands and Greater London.
- 1.14 Finally, a national postal survey of solicitors was carried out. Questionnaires were sent to 604 SFLA (now Resolution) children panel members and 1424 members of the Law Society's children panel. A total of 420 completed questionnaires were returned. This comprised 300 (21%) responses from members of the Law Society, and 120 (20%) responses from members of the SFLA.

Caveat to policy makers

- 1.15 An interdisciplinary research team at Cardiff University already had experience of investigating children's experience of their parents' divorce in a project which had involved sampling families from court records.⁶ At the outset of this new project, we recognised that it might prove more difficult to obtain a sample of children who had been subject to r 9.5 – cases which the court would have considered sufficiently difficult to necessitate the children being separately represented. This proved to be the case. Despite our best efforts to secure a target sample of forty such children, we only succeeded, within the limited resources of time and staff available, in interviewing fifteen. As has been explained, a number of formidable obstacles had to be overcome.
- 1.16 The task we set ourselves was essentially exploratory and the resulting material from the children interviews was bound to be qualitative rather than quantitative. This is not to say that it is any less valuable. As a recent ESRC report⁷ points out "qualitative methods have a different claim to validity than quantitative" and are "particularly appropriate for examining process through attention to context and peculiarities...Focus on individuals enables

⁶ Butler I, Scanlan L, Robinson M, Douglas G, Murch M (2003) *Divorcing Children: children's experience of their parents' divorce* Jessica Kingsley, London. This project was approved by the President of the Family Division and by the Lord Chancellor's Department. The data from the study were drawn randomly from a representative sample of recently divorced parents from courts in South Wales and the South West of England. It comprised 105 children (51 girls and 54 boys) between the ages of 7 and 15 who were interviewed relatively soon after their parents divorced. This study formed part of the ESRC Children 5-16 Research Programme which was directed by Professor Alan Prout and involved a wide range of studies designed to illuminate the changing nature of children's lives in the UK in the late 20th century.

⁷ Henwood K and Laing L (2003) *Qualitative research resources: a consultation exercise with UK social scientists: a report to the ESRC* ESRC at p49.

us to increase understanding of the often subtle interaction of factors such as social exclusion, resilience and risk". In the context of our particular project, such methods serve to highlight the interaction of family members with the constituent parts of the family justice system.

- 1.17 In a number of respects, the children's circumstances were likely to be exceptional and idiosyncratic otherwise the courts would not have applied these particular provisions. Thus, although the findings obtained from the fifteen children interviewed illustrate a number of important issues, they should not be regarded as necessarily representative of the whole population of children subject to this provision or indeed representative of the total number of such cases which we were able to detect in the courts that were visited. At best therefore, the messages reported by these particular children should be regarded as suggestive rather than conclusive and, on their own without other supporting evidence, should not be taken as reliable indicators upon which to develop policy. However, there are a number of other family justice studies which have interviewed children and parents in relation to other aspects of family justice practice, not least our previous broader study of children in divorce proceedings (Butler et al (2003)) which in certain respects confirm a number of points that we make in our conclusion (see Chapter Seven).
- 1.18 Before presenting our findings, we turn next to the legal background which, amongst other things, explains how the practice of separate representation for children in private law proceedings developed.

Chapter Two - The legal background to the study

Introduction

- 2.1 This chapter explores the legal background and use of r 9.5 of the Family Proceedings Rules 1991 (as amended), which provides a means whereby children may be separately represented⁸ in private family law proceedings. It examines the rationale for such separate representation and traces the history of its development in England and Wales, beginning with its use in wardship and its expansion to public law proceedings and then private law cases. We then examine the practice guidance, culminating in a Direction issued by the President in April 2004⁹ and the reported case-law on its use. Finally, we discuss the available empirical evidence on the extent of the use that is currently made of the rule by the courts.
- 2.2 Whilst separate representation is currently only provided through the Family Proceedings Rules, there is in fact provision for it in primary legislation. Section 64 of the Family Law Act 1996 enabled the Lord Chancellor to make regulations to provide for the separate representation of children in proceedings under Parts II (divorce) and IV (family homes and domestic violence) of that Act, under the Matrimonial Causes Act 1973 and Domestic Proceedings and Magistrates' Courts 1978, or (through subsequent amendment) Schedules 5 or 6 to the Civil Partnership Act 2004 (which make equivalent provision for civil partners as the 1973 and 1978 Acts). This section has never been brought into force. A second provision is to be found in s 122 of the Adoption and Children Act 2002. This provides for proceedings in relation to s 8 orders to be added to the definition of 'specified' proceedings contained in s 41 of the Children Act (previously confined to public law cases), under which a 'children's guardian' is appointed to represent the child (Timms: 2004 at 37-38).¹⁰

⁸ Strictly speaking, being separately represented and being joined as a party to proceedings are two separate things. However, it has been held that, where a child is separately represented, he or she should also be joined as a party (*L v L (Minors)(Separate Representation)* [1994] 1 FLR 156) and the discussion below assumes that both steps have been taken. However, this is not always done, causing problems in obtaining public funding for the child: see Blackburn (2005) at 21.

⁹ President's Direction: *Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, r 9.5* [2004] 1 FLR 1188.

¹⁰ Appropriate rules will require to be made.

However, it is not feasible to extend separate representation to all private proceedings concerning children.¹¹ It is therefore necessary to determine in which cases and which circumstances it would be most effective.¹² The use of this device also needs to be incorporated into the increasing emphasis on case management of children cases, epitomized by the publication of guidance, known as 'The Private Law Programme', issued by the President of the Family Division, which sets out three principles to enable the welfare of the child to be safeguarded in private law cases (January 2005 at 5). These are first, to achieve dispute resolution at a First Hearing where possible; secondly, to exercise effective court control including monitoring outcomes against aims and thirdly, to provide flexible facilitation and referrals so that resources are matched to families. The Programme also declares that the overriding objective is as follows:

'... to enable the court to deal with every (children) case

(a) justly, expeditiously, fairly and with the minimum of delay;

(b) in ways which ensure, so far as is practicable, that

a. the parties are on an equal footing;

b. the welfare of the children involved is safeguarded; and

c. distress to all parties is minimised;

(c) so far as is practicable, in ways which are proportionate

a. to the gravity and complexity of the issues; and

b. to the nature and extent of the intervention proposed in the private and family life of the children and adults involved.'

The rationale for separate representation

2.3 The use of separate representation can be justified on the basis of seeking a better outcome to the case either where a 'welfare' or 'best interests' rationale is adopted – i.e. that the court is concerned to determine what is best for the child – or where a 'voice' approach is taken – i.e. that the court is concerned to 'hear' what the child's own views, wishes and feelings are on the matter in dispute. Indeed, both rationales may be present at the same time: 'hearing the child' is both respectful of the child's personhood

¹¹ Cf New Zealand, where ss 6 and 7 of the Care of Children Act 2004, (entry into force on 1 July 2005), impose 'a requirement to appoint counsel to represent the child in all matters involving their day-to-day care that are likely to proceed to a hearing, unless this would serve no useful purpose (for example if the child was an infant so unable to express any views).' See Boshier (2005).

¹² Concern at 'excessive' use of separate representation has been expressed both in relation to individual courts' use (eg the 'Leeds Syndrome' discussed below) and in recent guidance issued by the President intended to curtail an apparent expansion in use across the country in the wake of her Practice Direction issued in April 2004. See also Timms, (2005 at 26).

and promotes the child's sense of identity.¹³ It may therefore simultaneously benefit the child from a welfare and rights perspective. Of course, courts under s 1(1) of the Children Act 1989 are always charged to reach a decision concerning the child's upbringing which makes the child's welfare paramount and a 'voice' perspective could not supersede this. But the purpose of using separate representation must be to enable the court to reach a better decision (better in the sense of more informed and hence more calibrated to achieve the best outcome for the child). This may turn on the view that more needs to be known about what will be best for the child's welfare, or that more needs to be known about what the child thinks and wants. The two are different things. This has been recognized by the American Bar Association in its Standards of Practice for lawyers representing children (Elrod: 2003; Katz: 2003).¹⁴ The Standards propose two types of such lawyers in custody cases – a 'child's attorney' who would take directions from the child in the same way as with any adult client, and a 'best interests attorney' advocating the child's best interests. The Canadian literature also distinguishes between the advocate, the litigation guardian (guardian ad litem) and the amicus curiae (Bessner: 2002 at 20-25). Our exploration of the background and use of r 9.5 in England and Wales demonstrates that, in practice, and perhaps contrary to expectation, it is a concern for the child's welfare rather than his or her views which currently seems to predominate in such cases.

- 2.4 The reason that this may be contrary to expectation is because usually, discussions about the separate representation of children start from the assumption that this in some way helps to fulfil the well-known requirement under art 12 of the United Nations Convention on the Rights of the Child (UNCRC) to

'assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, [such views] being given due weight in accordance with the child's age and maturity.'

¹³ See too, the views expressed in *Mabon v Mabon and others* [2005] EWCA Civ 634 [2005] Fam 366 by Thorpe LJ at para 23: 'It was simply unthinkable to exclude young men [aged 17, 15 and 13] from knowledge of and participation in legal proceedings that affected them so fundamentally' and Wall LJ at para 44, in asserting 'the need for the boys ... to emerge from the proceedings (whatever the result) with the knowledge that their position had been independently represented and their perspective fully advanced to the judge'.

¹⁴ Katz (2003 at 108-109) suggests that 'the reason for independent representation is that the interests of children and the interests of the parents in divorce may not be the same ... The belief is that the child needs his or her own wishes to be heard and the child's own lawyer can provide that voice': thus conflating 'interests' and 'voice'. For guidance to solicitors in England and Wales who are representing children, see SFLA (1994) and the Resolution website.

For example, Nigel Lowe and Mervyn Murch (2003: 10) argue that

‘children are no longer seen simply as passive victims of family breakdown but increasingly as participants and actors in the family justice process. In consequence, in various family proceedings it is incumbent upon the courts to ascertain and to take duly into account children’s own wishes and views.

Internationally, impetus for this new focus has been given by Article 12 of the [UNCRC].’¹⁵

2.5 Art 12(2) goes on to require states in particular to provide the child ‘the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’ Article 9(2), which has received less attention, also provides that, in any proceedings concerning the separation of a child from his or her parents, ‘all interested parties shall be given the opportunity to participate in the proceedings and make their views known.’ Citing the UNICEF website in support, it has been argued that the child is to be regarded as an interested party (Moynan: 2004 at 175).

2.6 These provisions can be seen to establish a right which may be described as part of the participation, or empowerment, rights laid down in the Convention and in so doing, imply a right of children, as Jane Fortin (2003 at 197) has put it, ‘to convey to the courts their own perceptions of ... family disagreements’. The United Nations Committee on the Rights of the Child (2002 at paras 121, 122) has itself regarded separate representation in this way. In reviewing the United Kingdom’s second report on its implementation of the UNCRC in 2002, the Committee expressed concern that

‘the obligations of article 12 have not been consistently incorporated in legislation, for example in private law procedures concerning divorce, In addition, the Committee is concerned that the right of the child to independent representation in legal proceedings, as laid down in the Children Act 1989, is not systematically exercised. ...’

It recommended that the United Kingdom

‘take further steps to consistently reflect the obligations of both paragraphs of article 12 in legislation, and that legislation governing court procedures and administrative proceedings (including divorce and separation proceedings) ensure that a child capable of forming his/her own views has the right to express those views and that they are given due weight.’

¹⁵ See also, Bessner (2002) whose report advocating greater use of separate representation is predicated on the ‘voice’ rationale.

- 2.7 The focus on participation is underscored by the more detailed European Convention on the Exercise of Children's Rights, which has not been signed by the United Kingdom.¹⁶ This Convention, which relates specifically to family proceedings, in particular those relating to residence and 'access', gives children the right to receive all relevant information, to be consulted and express their views, to be informed of the possible consequences of compliance with these views and of any decision, and to apply for the appointment of a special representative if those with parental responsibilities cannot represent the child due to a conflict of interest.¹⁷ Whilst it does not follow from the terms of either art 12 of the UNCRC or the European Convention on the Exercise of Children's Rights that these expect that a child's wishes and feelings must be acceded to in preference to a decision based on welfare, it is clear that the drafters have in mind a 'voice' approach which enables the child's views to be properly presented to, and taken into account by, the decision-making body.
- 2.8 However, Judith Masson and Maureen Winn Oakley (1999), in their study of children in care proceedings, characterize representation as a right of *protection* as well as one of *autonomy*. They suggest that a client who is represented in proceedings may be protected where the advocate makes 'sure that the court hears arguments based on an assessment of the child's welfare situation and not only the interests of the other parties.' But they also point out that professional representation in legal proceedings is generally regarded as advantageous to all litigants because they are guided through the process and told what to expect. Their advocate can put their case in the strongest and most persuasive way to the adjudicator and can shield the client from some of the damaging aspects of the court process. But one might note that there is also a risk that representing the child simply turns a two-cornered fight into a three-cornered one, with consequential costs and delay, and may create difficulties for the child later. Moreover, Masson and Winn Oakley suggest that a focus on protection may lead the representative to place less emphasis on taking instructions from the child client because the representative adopts a paternalistic approach in which he or she determines what is 'best' for the child.¹⁸
- 2.9 The introduction of the European Convention on Human Rights into English law through the Human Rights Act 1998 has given further impetus to the argument that there may be a greater need than hitherto to accommodate children's separate representation in litigation concerning their futures.

¹⁶ The UK Government is currently considering the implications of the Convention before taking a decision on signature or ratification.

¹⁷ See articles 3-5.

¹⁸ But cf Blackburn (2005 at 22), who contrasts the children's guardian in public law proceedings, with a focus on welfare, with the guardian ad litem in private law cases who is to provide the child with a 'proactive voice'.

Art 6 guarantees the right to a fair trial in the determination of one's civil rights and obligations, and art 8 has been interpreted as having a procedural dimension so that where a person's right to respect for family life is under threat, they must be given an adequate opportunity to participate in the decision-making process concerning control over the exercise of their right.¹⁹ Although children are not mentioned in the Convention, it is clear that they enjoy the same rights under it as adults. Thus it is arguable that these two articles imply a right for children to be actively involved in decision-making affecting their civil rights and obligations or their right to respect for family life. The former President of the Family Division, Dame Elizabeth Butler-Sloss, has indeed suggested that, in the light of these provisions, we may expect to see an increase in the appointment of guardians ad litem – i.e. separate representation for children – in private law cases.²⁰

- 2.10 Alongside these international legal developments, influenced significantly by a growing literature asserting the existence and importance of 'children's rights' (Freeman: 1983), a large body of research evidence exploring the impact of family change, and of legal proceedings, on children, both in the short-term and over their lifetimes, has raised awareness of the need to see children as 'subjects' and 'actors' in their own and their family's lives, and not just as mere 'objects of concern' or passive 'pawns' in their parents' battles (Rodgers and Pryor: 1998; Butler et al: 2003; Smart et al: 2001; Buchanan et al: 2001). Accounts of the perspectives and experiences of children living through family change and the recognition of children as 'people' or even citizens entitled to respect and a say in their own lives are increasingly informing policy developments (DCA: 2004).

Legal provision for separate representation of children

- 2.11 At common law, parents have the right to conduct litigation on their child's behalf unless there is a conflict between the parent's and the child's interests.²¹ Children may in fact be separately represented in private law proceedings through a variety of mechanisms.²² Section 10(8) of the Children Act 1989 enables a child to seek leave to apply for a s 8 order, which leave may be given if the court is satisfied that he has sufficient understanding to make the proposed application. Under the Family

¹⁹ *W, R, O, B and H v United Kingdom* [1988] 2 FLR 445.

²⁰ In *Re A (Contact: Separate Representation)* [2001] 1 FLR 715, at paras 22, 23. For a full discussion of the potential implications of art 8 for children, particularly those in the public care system, see Munby (2004) and Blackburn (2005 at 19).

²¹ *Woolf v Pemberton* (1877) 6 Ch D 19.

²² For a full discussion of representation in both private and public law proceedings, see Fortin (2003: Chapter Seven). For discussion of the wider range of mechanisms available in Scotland, see Tisdall et al (2002, 2004), Raitt (2004).

Proceedings Rules 1991 (as amended) r 9.2A, a child may bring or defend proceedings under the Children Act or the inherent jurisdiction if the court gives leave or if a solicitor acting for the child considers that the child is able to give instructions in relation to the proceedings. The court can override the solicitor's opinion and decide that the child is not so competent²³ but Thorpe LJ has said that 'in the 21st century, there is a keener appreciation [than hitherto] of the autonomy of the child and the child's consequential right to participate in decision making processes that fundamentally affect his family life.'²⁴

- 2.12 A CAFCASS officer appointed in proceedings between the parents must consider whether it is in the best interests of the child for him or her to be made a party and advise the court accordingly.²⁵ Rule 9.5 (as amended) then provides that:

'if in any family proceedings it appears to the court that it is in the best interest of any child to be made a party to the proceedings, the court may appoint -

- (a) an officer of the Service or a Welsh family proceedings officer,
- (b) (if he consents) the Official Solicitor, or
- (c) (if he consents) some other proper person,

to be the guardian ad litem of the child with authority to take part in the proceedings on the child's behalf.'²⁶

- 2.13 The appointment of a guardian ad litem under this rule is the main mechanism utilized where a court reaches the view that the child's interests cannot adequately be identified or served either by means of the evidence and arguments presented by the parties to the proceedings, or the information provided by the Children and Family Reporter in his or her report to the court. It is important to understand that the role of the guardian ad litem in such a case, and the use of the 'tandem model', is welfare-focused, or, as Thorpe LJ has put it:

'essentially paternalistic. The guardian's first priority is to advocate the welfare of the child he represents. His second priority is to put before the court the child's wishes and feelings.'²⁷

²³ *Re CT (A Minor)(Wardship: Representation)* [1993] 2 FLR 278, CA. In such a case, it may appoint a guardian ad litem for the child under r 9.5 of the FPR (below) or continue such appointment where it has already been directed: *Re N (Contact: Minor Seeking Leave to Defend and Removal of Guardian)* [2003] 1 FLR 652.

²⁴ In *Mabon v Mabon and others* [2005] EWCA Civ 634 [2005] Fam 366 at para 26.

²⁵ Rule 4.11B(5)(6).

²⁶ Note that such an appointment may not be made in the family proceedings court: if the issue arose, the case would have to be transferred to a higher court: see Blackburn (2005 at 20) who notes the delay this may occasion.

In cases where these priorities conflict, the child can seek leave to dismiss the guardian and instruct the lawyer directly to present his wishes and feelings, but only where he is sufficiently 'competent' to do so.

- 2.14 Where a guardian is to be appointed, the President's Direction provides²⁸ that the court must first give consideration to appointing an officer of CAFCASS to that role and must enquire whether CAFCASS are able to comply. Where that would cause delay, or there is some other reason which renders the use of CAFCASS inappropriate, someone else may be appointed. This may be an individual solicitor known to the court,²⁹ or NYAS, the National Youth Advocacy Service. For example, in *Re C (a child)*³⁰ the Court of Appeal approved the appointment of NYAS because the 14 year old child (who had Asperger's Syndrome) had lost faith in the CAFCASS officer who had acted as the Child and Family Reporter, and wanted someone 'to see him, to listen to him, and to appreciate his point of view'.³¹ In the view of Wall LJ, the officer had reached the limit of what he could achieve, and further CAFCASS involvement might prove counter-productive.³²
- 2.15 The President issued guidance (February 2005) to attempt to curtail what was described as a 'dramatic increase' in the number of guardians in private law cases.³³ For an interim period, pending full implementation of the Private Law Programme, from 4 April 2005, only a circuit judge may appoint a guardian in a private law case, unless a district judge considers the case to be exceptional because there is no resident circuit judge and the matter is urgent. Where a guardian is appointed, consideration must be given to transferring the case to the High Court.

²⁷ See *Mabon v Mabon and others* (above) at para 25.

²⁸ President's Direction: *Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, r 9.5* [2004] 1 FLR 1188 para 5.

²⁹ See e.g. *Re K (Replacement of Guardian ad Litem)* [2001] 1 FLR 663.

³⁰ [2005] EWCA Civ 300, 16 February 2005.

³¹ *Per* Potter P at para 34.

³² At para 40. See also the Court of Appeal's endorsement of NYAS, albeit that in the circumstances it was decided that the Official Solicitor should be appointed instead because of the father's hostility to NYAS' involvement, in *Re A (Contact: Separate Representation)* [2001] 1 FLR 715.

³³ Discussed further below.

The history of separate representation

Wardship

2.16 The earliest mechanism enabling a child to be represented separately from his parents in family proceedings was developed in the wardship jurisdiction, under which the child could be joined as a party and the Official Solicitor appointed to act for the child (Stone, 1982). The grounds for separate representation in wardship have been based on both 'welfare' and 'voice' factors. Thus it has been said (Lowe and Douglas: 1998 at 693) that it may be directed:

- 'where a teenage ward is in dispute with his or her parents so that the Official Solicitor can express the ward's views to the court;
- where the ward is old enough to express a view, usually aged eight or over, where that view is likely to be of particular importance, for example, if there are allegations of "brain-washing";
- where a specific task has to be carried out by an independent party, such as the psychiatric examination of a ward;
- where there are difficult issues on law or facts, such as international problems or questions affecting the life or death of the ward, disputed medical evidence or where there are special or exceptional points of law'.

2.17 It can be seen that the first two of these are 'voice' factors, whilst the latter are broader and indeed the last may have more to do with 'welfare' in general terms, e.g. to test out a legal issue which may affect others, than with the interests of the ward him or herself. Separate representation in wardship was not, however, automatic or even routine, being confined to exceptional circumstances.³⁴ Masson (1996 at 252) has reported that the case-worker and representative dealing with a warded child did not always see the child, and that an emphasis on expert, especially psychiatric, assessment meant that the child might only have a brief interview with the case worker anyway.

2.18 Nowadays, wardship has been largely superseded by Children Act proceedings and the Official Solicitor's role in family proceedings has been taken over for most purposes by CAFCASS Legal, discussed further below.

³⁴ The FPR r 5.1(3) provides that a minor is only to be made a defendant to an originating summons in the first instance where there is no person other than the minor who is a suitable defendant.

Public law proceedings

- 2.19 The introduction of separate representation for children in care proceedings was a direct result of the Maria Colwell Inquiry in 1974 (Field-Fisher: 1974) where the child's discharge from care back to her mother and step-father had been unopposed by the local authority. At the time, parents were not parties to care proceedings, which were between the local authority and the child as defendant, but the parents were, until 1980, allowed to represent the child and give instructions to the 'child's' solicitor (Masson and Winn Oakley: 1999 at 19-21, 43-44). The Children Act 1975 provided that, in such cases in future, where there was, or might be, a conflict of interest between the child and his or her parents, the child was to be separately represented by an independent guardian ad litem. However, until 1984, this was limited to the precise situation which had led to the Colwell tragedy – an unopposed application for discharge of care or supervision orders. Even thereafter, the court had the discretion whether to order separate representation and parents only obtained full rights to participate in proceedings as parties with legal aid in 1988. It will be seen that the focus of this approach was on a possible conflict of interests between the parents and the child – the fear that the child's interests might not be adequately put forward by the parents acting on his or her behalf (Cretney: 2003 at 703-705). The rationale, then, was very much a 'welfare' one. The child's 'wishes and feelings' were not regarded as particularly significant, a matter which is hardly surprising given that this Act pre-dated the international developments and most of the research evidence which have subsequently informed and reformed thinking on this issue.
- 2.20 By the time of the Children Act 1989 and its overhaul of care proceedings, there was much greater awareness of these matters³⁵ and the use of guardians ad litem was extended to all 'specified' proceedings, unless the court is satisfied that 'it is not necessary to do so in order to safeguard [the child's] interests.'³⁶ The Law Commission (1988, para 6.28) considered that this was necessary because children subject to public law proceedings 'may feel a strong sense of injustice if they are not given some voice in the decision between their parents' and the local authority's plans.' Notwithstanding this recognition of a 'voice' perspective, it is clear that the duty of the guardian (now called a 'children's guardian') is to represent the child's best interests and although he or she must report to the court on the child's wishes, the role is not one of children's advocate as such.

³⁵ The Cleveland child sexual abuse crisis in 1987 and the subsequent Butler-Sloss inquiry were also particularly influential in shifting public opinion about the value of listening to what children are saying (Cretney 2003 at 716-728).

³⁶ Section 41(1).

Where the child's wishes diverge from the guardian's opinion, the child, if sufficiently mature, may instruct the solicitor directly instead.³⁷

- 2.21 Interestingly, the Law Commission (1988 at para 6.26) did not consider that the same need to satisfy a child's sense of justice pertained to private law proceedings. Here, by contrast, there was concern that children should not be asked to choose between their parents, and a view that a more nuanced and subtle approach could be utilized by means of the court welfare officer's report. Subsequent opinion from practitioners and judges upheld this approach, with a particular feeling that children could be damaged by too close an involvement in parental disputes (Sawyer: 1995; Fortin: 2003 at 220). The result was to confirm the Law Commission's view that while there should be a power to order separate representation in private law cases, where appropriate, this does not need to be a universal or even regular imposition.

***Practice guidance on the use of separate representation
in private law proceedings***

- 2.22 It has been noted (Dawson, 2004 at 42) that there has been 'little in the way of coherent national guidance other than [practice notes] which, for the most part, [are] dedicated to procedure.' Some local courts have initiated their own protocols to help them determine when and how separate representation should be considered, but these are seldom published. However, the series of practice directions and notes that have been produced over the years since the Children Act was implemented in 1991 provides some useful insights into what the objectives of separate representation have been as far as the Official Solicitor (OS) and CAFCASS are concerned. Tracing the changes in the guidance also provides a means of identifying how these have altered as new concerns and priorities have arisen.³⁸

³⁷ Section 41(4)(b), FPR 1991 r 4.11A(2).

³⁸ Charles Prest, former Director of Legal Services and Special Casework, CAFCASS, has also traced the development of separate representation in private law proceedings since the Children Act 1989 and suggested that a combination of more cases, experience of the tandem model operating in specified proceedings, and the availability of specialized children lawyers and independent guardians ad litem all contributed to a rise in the number of cases resulting in separate representation: see Prest (2004 at 194).

2.23 The first such guidance emanated from the Lord Chancellor's Department in 1991 and related to the duties and functions of the Official Solicitor under the Children Act.³⁹ This was concerned only with specified proceedings, i.e. public law cases, and dealt with the issue of when it might be appropriate for the OS to represent the child instead of a panel guardian ad litem. The criteria set out as potentially making such appointment appropriate were:

- Any foreign element in the case which would be likely to require the guardian ad litem to make enquiries, or take other action, outside the jurisdiction of the court;
- The likely burden on the guardian where he was to represent several children in the proceedings;
- The existence of other proceedings concerning the child in which the OS was already acting; and
- 'any other circumstances which the court considers to be relevant.'

2.24 It can be seen that the focus of these criteria was on the complexity of the proceedings and in particular the possibility that multiple proceedings were ongoing, making it desirable for one representative to have a full oversight of all the litigation concerning the child. Given the legal expertise of the OS, the focus on complexity is to be expected. Although the court was to be satisfied that there were exceptional circumstances making it desirable in the interests of the welfare of the child to appoint the OS, no reference was made to the voice of the child needing to be presented to the court, presumably because this could be achieved by the involvement of the usual panel guardian.

2.25 In 1991, as can be seen from the terms of this Direction, there appeared to be no official concern about the use of separate representation in private law proceedings. But by 1993 the Children Act Advisory Committee (CAAC) had identified a problem where courts had endeavoured to appoint panel guardians ad litem in non-specified family proceedings.⁴⁰ The OS and CAAC accordingly issued guidance in *Court Business* in January of that year⁴¹ explaining that in exceptional cases, the OS could be requested

³⁹ Lord Chancellor's Direction, *Duties and Functions of the Official Solicitor under the Children Act 1989*.

⁴⁰ And see *Re W (A Minor)(Contact)* [1994] 1 FLR 843 – justices hearing contact proceedings purported to appoint a guardian under s 41. Note that r 9.5 does not apply to the family proceedings court. Whilst children can be joined as parties, there is no provision for the appointment of a guardian ad litem, but according to Jonathan Whybrow (2004 at 505), the child's solicitor could run the case and instruct, with leave, an independent social worker or expert (as indeed was done in some instances before the establishment of CAFCASS). It is more likely that the case would be transferred to the county court, see Dawson (2005 at 44).

⁴¹ Reported at [1993] *Family Law* 95. See also Practice Note: *The Official Solicitor: Best Practice on his Appointment as Guardian ad Litem in Family Proceedings* [1993] 2 FLR 641.

by the court to intervene on behalf of the child. The criteria for such involvement overlapped with but were rather different from those relating to specified proceedings. They included 'cases in which there is disputed medical evidence or medical opinion is at variance, where there is a substantial foreign element, where there are special or exceptional points of law,' or where the OS was already acting for the child in other proceedings. The focus was once more on the complexity of the particular case and it was stressed that in most instances, a court welfare officer's report would be adequate to protect the child's interests.

- 2.26 This guidance was revised twice more during the 1990s. In 1995,⁴² the OS advised that he would accept appointment in exceptional cases including those where
- (1) there is a substantial foreign element
 - (2) there appear to be exceptional or difficult points of law
 - (3) there are unusual or complicating features, such as where one parent has killed the other, or is a transsexual
 - (4) there is conflicting or controversial medical evidence
 - (5) a child is ignorant of the truth as to its parentage, or is refusing contact with a parent in circumstances which point to the need for a psychiatric assessment; and
 - (6) where the OS is already acting for the child in other proceedings.
- 2.27 He added that he would 'almost invariably' accept appointment in certain other cases reflecting the judicial guidance on the matter, including where the court had decided the child was not competent to instruct his own solicitor, the court required the OS to act as *amicus curiae*, difficult issues of medical confidentiality arose, or the case involved the sterilization of or abortion by the child.
- 2.28 These criteria can now be seen to demonstrate a focus on not just the complexity or difficulty of the case, although that still features, but also on the child's welfare, in particular where there may be a conflict of interests between the adult parties such that the case they present to the court may not adequately reflect what is in the child's best interests. Examples include whether the truth about the child's parentage should be discovered and then made known to the child, or whether contact should be directed in the face of potential psychological disturbance to the child (be that as a result of having, or not having, the contact).

⁴² Practice Note: *The Official Solicitor: Appointment in Family Proceedings* [1995] 2 FLR 479.

- 2.29 A small constitutional issue may be noted when scrutinizing these guidance notes. Apart from the first, issued in 1991, they were all issued by the Official Solicitor and indicated when he would be willing to consent to be appointed. The language of r 9.5 makes clear that his consent is indeed required before he can be called upon to represent a child, but nonetheless, in laying down when he would, or would 'almost invariably' agree to become involved, one could argue that he was thereby attempting to circumscribe the court's discretion and jurisdiction to determine when a child might require separate representation. It may be for this reason that the 1999 revised guidance states that only where 'it appears to the court' that the child ought to have party status and be separately represented may the question of appointment of the OS arise.⁴³ The criteria for such appointment were as before, with further additions reflecting points that had arisen in the interim, such as where there is a need for expert evidence which cannot be obtained by the parties jointly instructing an appropriate expert in accordance with judicial and CAAC guidance,⁴⁴ or application is made for leave to seek contact with an adopted child.⁴⁵
- 2.30 The next revision of the guidance came with the establishment of CAFCASS in 2001. The Green Paper (Department of Health et al: 1998 at para 4.11) which preceded the creation of CAFCASS had adopted a similar approach to that taken in the earlier guidance, as one might expect, when considering the kinds of cases where it might be appropriate to have legal representation for the child or enhanced input by the welfare caseworker. Indeed, none of the suggested categories of case suitable for this approach focus on the voice of the child but instead deal with conflicts of interest, violence or psychological problems, or difficult or complex legal issues. When CAFCASS was set up, CAFCASS Legal took over the OS's responsibilities for representing children who are the subjects of family proceedings 'other than in very exceptional circumstances and after liaison with CAFCASS'.⁴⁶

⁴³ Practice Note: *The Official Solicitor: Appointment in Family Proceedings* [1999] 1 FLR 310. Appointment in public law and adoption proceedings is also covered in the Note but not discussed here.

⁴⁴ As to which, see *Re K (Contact: Psychiatric Report)* [1995] 2 FLR 432, CAAC (1997, Chap 5). This only applied to cases concerning parentage and refusal of contact.

⁴⁵ The procedure for which is set out in *Re C (A Minor)(Adopted Child: Contact)* [1993] Fam 210.

⁴⁶ Practice Note: *Official Solicitor: Appointment in Family Proceedings* [2001] 2 FLR 155. The OS stated that he would act, in the absence of any other willing or suitable person (such person could be an officer of CAFCASS, since provision is made for representation in these cases in the CAFCASS guidance issued around the same time, see below), as next friend or guardian ad litem, for a child party whose welfare was not the subject of the proceedings, in cases such as where a child respondent is the parent of the subject child; for a child wishing to seek a s 8 order naming another child (typically for contact with a sibling), for a child witness to some disputed factual issue in a children case who might require intervener status; a child party to a petition for a declaration under Part III of the Family Law Act 1986; a child intervener in divorce or ancillary relief proceedings; and a child applicant or respondent in proceedings under Part IV of the Family Law Act 1996 (for a non-molestation or occupation order). Once more, a welfare focus can be

The new responsibility of CAFCASS to take on the OS's role regarding children in private law proceedings was the subject of its own CAFCASS Practice Note.⁴⁷ Perhaps now more sensitive to the constitutional proprieties, this made clear that it was 'intended to be helpful guidance but always subject to Practice Directions, decisions of the courts and other legal guidance.' The guidance suggested that children needing someone to orchestrate an investigation of the case on their behalf might need party status and legal representation. Other than this, the criteria identified were in similar terms to those adopted in previous guidance and the practice note was primarily concerned with the procedures to be followed.

- 2.31 The Children Act Sub-Committee (CASC) of the Lord Chancellor's Advisory Board on Family Law (2002 at paras 12.7-12.9) noted a strong feeling amongst its respondents that children should be separately represented more often in difficult cases. Whilst recognizing that the New Zealand model was probably not feasible, they did consider that the creation of CAFCASS now offered courts greater flexibility when considering whether to order a child's separate representation and provided implicit support for its expansion.

Current Guidance: The President's Direction⁴⁸

- 2.32 The President's Direction issued in April 2004 made clear that the decision to make a child a party is only to be taken in cases of 'significant difficulty'. The caution to be exercised in making a direction is spelled out in para 4, which stresses that the court must take the child's welfare as its 'primary consideration', taking due notice of the risk of delay and other adverse factors.

The criteria are as follows:

- Where a CAFCASS officer has notified the court that in his opinion the child should be made a party.
- Where the child has a standpoint or interests which are inconsistent with or incapable of being represented by any of the adult parties.

discerned in these examples; indeed, in relation to representation of a child seeking a s 8 order or who is involved in Part IV proceedings, the OS stated that he would need to satisfy himself that the proceedings would benefit the child before pursuing them.

⁴⁷ CAFCASS Practice Note: *Officers of CAFCASS Legal Services and Special Casework: Appointment in Family Proceedings* [2001] 2 FLR 151. Charles Prest has commented that this draft of this practice note wrongly assumed that all r 9.5 cases had hitherto been referred to the OS, and that the OS had handled most of them. Nor did it take account of the possibility of non-CAFCASS officers being appointed in future: see Prest (2004 at 195).

⁴⁸ President's Direction: *Representation of Children in Family Proceedings pursuant to Family Proceedings Rules 1991, r 9.5* [2004] 1 FLR 1188.

- Where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute.
- Where the views and wishes of the child cannot be adequately met by a report to the court.
- Where an older child is opposing a proposed course of action.
- Where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child.
- Where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court.
- Where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of a CAFCASS officer.
- Where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position.
- Where there is a contested issue about blood testing.

2.33 We can here see, brought together, the range of particular instances which have prompted the direction of separate representation over the years together with evidence of new thinking in the light of a more 'voice'-based approach. Paragraphs 3.2, 3.4 and 3.5 all make reference to the child having a position or views contrary to those being proposed by the adults. They therefore suggest a greater sensitivity to the need to hear the child's wishes and feelings and to ensure compliance with art 12 and the ECHR. But the other examples concern either the complexity of the case or the welfare of the child and largely reflect the older practice and assumptions of the courts. Missing, also, (although it may be implicit in para 3.8) is the suggestion that separate representation may be useful where 'the harm element in the welfare checklist has come to dominate other aspects of the child's welfare in the case, but has not yet reached the level to warrant the intervention of social services under s 37 of the Children Act 1989' (Dawson: 2004 at 44).⁴⁹

⁴⁹ It is possible that some judges in fact direct investigations under s 37 instead of utilizing r 9.5. See also the view of Wall J in *Re M (Intractable Contact Dispute: Interim Care Order)* [2003] 2 FLR 636 at 640, that cases where contact has ceased and which have reached the point of requiring a s 37 investigation should also entail separate representation.

- 2.34 The CAFCASS Practice Note⁵⁰ issued in conjunction with the President's Direction adds a gloss to these, by advising that especially difficult cases should be referred to CAFCASS Legal whether or not an appointment under r 9.5 is contemplated. These should include exceptionally complex international cases, where jurisdiction may be in issue; adoption cases where suspect payments may have been made; medical cases involving an older child with views to be taken into account, or difficult ethical issues such as withdrawal of treatment; and freestanding applications under s 7 of the Human Rights Act,. As Whybrow (2004) suggests, this is presumably so that they can decide whether appointment under r 9.5 is desirable and make representations accordingly.

The case-law

- 2.35 Reported case-law has also shed light on the purpose of using r 9.5, although caveats must be entered – case-law is never representative of the norm but relates only to the most unusual and therefore report-worthy issues coming before the courts (Wasoff and Dobash: 1996 at 3-7; Murch and Hooper: 1992). One should also be aware of the likelihood that judges may be attuned to local protocols and approaches to particular issues, and may face particular local circumstances (e.g. knowledge that the local CAFCASS office is over-burdened and could not take on an appointment) which may affect their individual practice.
- 2.36 One difficulty in determining in particular whether a 'welfare' or 'voice' rationale (or both) is being adopted is that judges may use the catch-all term 'interests' to embrace both. For example, echoing the rationale for the original introduction of guardians ad litem in public law proceedings – concern that there may be a conflict of interests between the parents and the child - Wall J has said that
- 'Children in this situation [where contact has ceased and the case has become intractable] frequently have an interest in the proceedings and in the outcome which is independent from the viewpoint being advanced by each of their parents.'⁵¹
- 2.37 He held that, whenever an intractable contact dispute has reached the stage at which it is ripe for a s 37 report by the local authority with a view to public law measures being taken, the children should be joined as parties.

⁵⁰ CAFCASS Practice Note: *Representation of Children in Family Proceedings Pursuant to Family Proceedings Rules 1991, Rule 9.5* [2004] 1 FLR 1190.

⁵¹ *Re M (Intractable Contact Dispute: Interim Care Order)* [2003] EWHC 1024 (Fam) [2003] 2 FLR 636 at para 15.

However, this situation could apply to young children with limited abilities to express even their feelings, so that a 'voice' rationale, at least in the more narrow sense used in art 12 of the UNCRC, would not be the motivation in such cases.

Welfare as the primary rationale

2.38 Examination of the case-law does suggest that a major motivation for the use of separate representation is to ensure that the child's true interests will be properly revealed to the court – a 'welfare' stance. In particular, there is often a concern that they should not be lost in the face of the evidence and arguments being presented by the parents (or, in some instances, such as medical cases, for example, by united parents against the medical professionals). In other words, the same motivation that led to the introduction of guardians in public law proceedings, applies in such instances – a desire to ensure that a conflict of interests on the part of the parents does not obscure the real needs of the child.⁵² Another decision by Wall J, *Re H (Contact Order)(No 2)*⁵³ illustrates the approach. Here, the father suffered from Huntington's disease, which had adverse effects on his mood and personality. The father enjoyed generous contact with the children, now aged eight and five, until he threatened to kill himself and them. The police rescued the children who were unharmed and unaware of the danger they had been in. The mother refused further direct contact, a decision upheld by the county court and on appeal. His Lordship considered that in a case as difficult as this one, consideration should have been given to the children's being separately represented and, where appropriate, expert advice being sought on their behalf. Given the young age of the children, the rationale for such representation must have been to ensure that all sides of the question of whether direct contact could be safely and appropriately ordered could be explored, and a concern that the court would not be adequately informed by reliance on the parties or the CFR's report alone.⁵⁴

⁵² By corollary, a view that there is no such conflict of interests may lead the court to reject an application for separate representation: see e.g. *Re R (Abduction: Immigration Concerns)* [2004] EWHC 2042 (Fam) [2005] 1 FLR 33 at para 35. (It is also worth noting that Charles J appears to have rejected separate representation because the child was too young to instruct, but this is to ignore the purpose of r 9.5 which is to enable separate representation via a guardian ad litem.) C.f. the conflicting judicial approaches to this issue in Canada: see Bessner (2002 at 16-17).

⁵³ [2002] 1 FLR 22.

⁵⁴ See also *M v M (Parental Responsibility)* [1999] 2 FLR 737, (the father, partly as a result of a motor-cycle accident, had severe intellectual impairments leading to aggressive behaviour. Three-year old child separately represented in proceedings brought by the father for parental responsibility and direct contact); *Re W (Contact: Parent's Delusional Beliefs)* [1999] 1 FLR 1263, (father apparently suffering delusional beliefs, but no up to date psychiatric assessment of him available. Children, aged 10 and 11, made parties with the Official Solicitor to instruct a consultant child psychiatrist to report on the effects of contact on them).

- 2.39 A similar concern can be seen in *Re A (Contact: Separate Representation)*.⁵⁵ The mother alleged sexual abuse by the father when he sought staying contact with their four year old daughter. The Court of Appeal considered that the antagonism between the parents was such that neither could be regarded as able to put the interests of the child first. This kind of 'implacable hostility' (in this context, shared by both parents as well as the cases where only one of the parties is so labelled) is a feature of several of the reported cases. In *Re K (Replacement of Guardian ad Litem)*,⁵⁶ for example, the 11 year old child had been the subject of litigation between his parents since he was aged one, and had been made a ward of court. We have seen above that separate representation has not been the norm in wardship cases but is confined to those deemed exceptional. Here, for some reason which is not clear from the report, the child had been ordered to be separately represented by a solicitor acting as guardian ad litem rather than the Official Solicitor. Munby J upheld the appointment whilst noting that it was unusual and was clear that the child needed to be represented by some independent person.
- 2.40 The importance of the welfare rationale can also be seen in a number of cases where it is clear that the court's fear is that one of the parents (usually the parent with residence) may have influenced the child's views and that these cannot therefore be taken at face value. In *Re F (Contact: Restraint Order)*,⁵⁷ for example, there had been a long history of proceedings for contact, culminating in the making of a s 91(14) direction⁵⁸ against the father. The two children, aged seven and six, stated that they did not want contact with their father, and the mother refused to permit the court-directed psychiatrist to interview them. The Court of Appeal appointed the Official Solicitor to act as the children's guardian and gave him leave to consult another child psychiatrist and doctor to examine the children. The Court's actions illustrate the concern that the parents' litigation has lost sight of the children's interests and that once a case reaches a level of complexity, a report from the CFR (or then, the court welfare officer) is insufficient to reveal the true picture. But they also demonstrate the courts' uncertainty in accepting at face value children's (especially young children's) expressed views about their wishes and feelings.

⁵⁵ [2001] 1 FLR 715, noted above.

⁵⁶ [2001] 1 FLR 663.

⁵⁷ [1995] 1 FLR 956, CA.

⁵⁸ Requiring that he would have to obtain leave of the court to make any further applications under the Children Act 1989.

- 2.41 Another example may be seen in *Re W (Contact: Joining Child as Party)*.⁵⁹ The child, aged seven when the proceedings began, expressed growing reluctance to have contact with his father. The district judge ordered that he be joined as a party and represented by a local solicitor, with an independent social worker instructed to report. On this social worker's advice, the judge made an order for no contact. The Court of Appeal, in allowing the father's appeal to the extent of substituting CAFCASS Legal as the child's guardian ad litem, considered that the boy had 'a right to a relationship with his father even if he does not want it. The child's welfare demands that efforts should be made to make it possible that it can be.'⁶⁰ The Court agreed with the trial judge that, given the level of the child's expressed concerns and upset over contact, something 'needed to be done'. Nevertheless, the tenor of the judgment is towards overcoming the child's reluctance to see his father and thus to reaching a decision which better fits the Court's idea of what is in his best interests rather than what he himself might sincerely want.⁶¹ As Adrian James et al (2003 at 892, 2004 at 201) have put it in commenting on this dictum, it 'demonstrates the power of the language of welfare to deny children's agency in expressing their views.'⁶² A similar view has been put forward by Fiona Raitt (2004 at 156 and 160) in evaluating the methods available to courts in Scotland to ascertain children's views. She too, has noted how the courts may discount the child's expressed preferences as the product of parental undue influence. But it is worth noting that one organization with significant collective experience of representing children, NYAS, has reported that children may be very reluctant to express their true opinions because they feel pressured by their parents (Fowler and Stewart: 2005).

'Voice' as the prime rationale

- 2.42 It would not be correct to imply that a court never or rarely seeks to use separate representation to find out the wishes and feelings of the child. There are certainly instances in the case law of this being the prime,

⁵⁹ [2001] EWCA Civ 1830, [2003] 1 FLR 681. It may be noted that, in the face of the child's continuing refusal to have contact with the father, the latter was permitted to withdraw his application for contact in *Re O (Contact: Withdrawal of Application)* [2003] EWHC 3031 (Fam) [2004] 1 FLR 1258.

⁶⁰ At para 16.

⁶¹ See too, *Re C (a child)* [2005] EWCA Civ 300, 16 February 2005. The 14 year old child had Asperger's Syndrome and it was held that the trial judge should have appointed an expert to evaluate his expressed opposition to continuing contact with his father rather than accept the boy's views and refuse contact.

⁶² See also *Re Z and A (Contact: Supervision Order)* [2000] 2 FLR 406 (mother regarded as having alienated children from father and paternal grandparents. Section 37 investigation (under which the local authority are directed to conduct an investigation to determine whether they should seek an order under Part IV of the Children Act 1989 for care or supervision) carried out and local authority seeking a supervision order. Official solicitor representing children. Therapy for both mother and children to be implemented under an interim supervision order).

or a main, motivation. In the important case, *Re L (Minors) (Separate Representation)*⁶³ the Court of Appeal upheld the appointment of a guardian ad litem for three children, aged 14, 12 and 9, who lived with their father, the mother having left home. The father wished to take them back to Australia and the court welfare officer considered that she could not adequately present the children's views to the court.⁶⁴ Butler-Sloss LJ noted that the case had a number of features which brought it within the current OS's guidance, but she also added that there was an 'overall need to ascertain what the children genuinely feel about their future in the present situation'.⁶⁵ A similar concern to uncover what the child might truly want, free from any pressure being placed on her by the emotional turbulence in the family, was also indicated in *Re C (Prohibition on Further Applications)*.⁶⁶ The father alleged 'parental alienation syndrome' when his youngest daughter resisted contact with him, and sought leave to instruct a psychiatrist. In directing that CAFCASS Legal were to represent the child and her elder sister, the President stressed the importance of the emotional problems the children had undergone when the father left the mother and that a mental health expert could usefully examine the situation of the whole family and not just the question of whether parental alienation 'syndrome' existed.⁶⁷

- 2.43 Interestingly, whilst separate representation is rarely directed in cases of international child abduction,⁶⁸ these constitute one of the main categories in the private law jurisprudence where the child has been joined as a party because the court has concluded that the child's voice *does* need to be heard. Since the child's objection to returning to the state of habitual residence may be a ground for not ordering the child's return under the two international conventions dealing with this issue,⁶⁹ one might expect that there could well be situations where it is necessary to 'hear' the child more directly than through the welfare report.

⁶³ [1994] 1 FLR 156.

⁶⁴ It is not clear from the report why the officer thought this, but research has suggested that children may well be dissatisfied with the extent to which CFRs takes on board what they are trying to tell them: see Bretherton (2002 at 452-453).

⁶⁵ [1994] 1 FLR 156 at 160 C-D.

⁶⁶ [2002] EWCA Civ 292, [2002] 1 FLR 1136.

⁶⁷ At para 13.

⁶⁸ *Re S (Abduction: Children: Separate Representation)* [1997] 1 FLR 486 – such representation to be exceptional. See also *S v B (a child)(abduction: objections to return)* [2005] EWHC 733 (Fam) where the President considered that it had been unnecessary to direct separate representation for a sibling of the child who was the subject of abduction proceedings, since there had been no substantial divergence of interest apparent between the sibling and the child's mother (the abductor): para 67.

⁶⁹ Hague Convention on the Civil Aspects of International Child Abduction, Art 13(b); European Convention on Recognition and Enforcement of Decisions concerning Custody of Children, Art 10(b) – the latter requires the court to be satisfied that it is also manifestly no longer in the child's welfare to enforce the original order.

Moreover, the paramountcy principle does not apply in such cases, leaving more space, perhaps, for the court to focus on other concerns. But it is also important to note that in several of these cases, the child had taken the initiative by approaching a solicitor him- or herself and applying for party status. In *Re J (Abduction: Child's Objection to Return)*⁷⁰ the children were returned to Croatia but their father broke undertakings he had given not to harass them or their mother and the mother removed them to England. The father again sought their return. The CAFCASS officer had interviewed the children but did not attend the hearing and the judge dismissed the 11 year old elder child's objections and ordered the return. The mother was refused leave to appeal but the child, on the advice of the organization Reunite, sought legal advice and his solicitor successfully applied to have him joined in the proceedings. The Court, while stressing that separate representation is only to be directed where the court is satisfied that the child has an independent viewpoint that will not otherwise be placed before the court, also noted that it may be difficult for an abducting parent to advance arguments based on the child's objections for fear of being accused of influencing or pressuring the child into objecting.

- 2.44 But the question will also arise whether the child should be a party instructing his or her own solicitor, or should have a guardian ad litem appointed to do so. In *Re HB (Abduction: Child's Objections) (No 2)*⁷¹ the 11 year old girl refused to board the aeroplane to take her back to Denmark, and applied to become a party to seek leave to appeal against the return order that had been made. Her application and appeal were successful⁷² and the case remitted to Hale J, who had made the original return order. Both she and the Court of Appeal condemned the child's parents for having left the child to carry the burden of the litigation, and noted that the child was not really mature enough to participate in the proceedings without a guardian.
- 2.45 Summing up the case-law, it appears that even where the need to identify the child's wishes and feelings prompts separate representation, the court's agenda is a broader one. The overall concern is to obtain a complete picture of the situation, where necessary presented by someone who is independent of the parents' positions. And this will often be motivated less by a concern to hear the child than to explore conflicts of evidence or to hear arguments that neither adult party wishes to put forward. This must be particularly the case where the child is very young or incapable of expressing a view. Thus, we can also find instances of separate

⁷⁰ [2004] EWCA Civ 428 [2004] 1 FLR 64.

⁷¹ [1998] 1 FLR 564.

⁷² *Re HB (Abduction: Children's Objections)* [1998] 1 FLR 422.

representation for infants,⁷³ or children with learning difficulties.⁷⁴ The aim must be to reach the most informed decision and thus, one must assume, the decision most likely to be conducive to the child's welfare.

Empirical evidence of the use of separate representation

- 2.46 Finally, we can survey the available empirical evidence on the extent of use of separate representation. It is first of all worth noting that there are no reliable figures indicating the extent of use of separate representation of children in private law proceedings on a national basis. An important source of published information, but which relates to one area only, is an invaluable article by two district judges, Clifford Bellamy⁷⁵ and Geoff Lord (2003), both of Leeds combined court centre. They undertook their own empirical study of the use of r 9.5 in the Leeds area over a 12 month period in 2001-2. They did so because it had been asserted that there was a 'Leeds Syndrome' of excessive use of r 9.5. They found that over the requisite period, 34 appointments under r 9.5 were made out of a total number of 465 s 8 applications, representing some 7.3% of cases.⁷⁶ Without comparable data from other courts, it cannot be determined whether this is a high or low proportion and in any event, one cannot know what the 'right' proportion should be.
- 2.47 The only other statistical data that is available, is from CAFCASS and the Legal Services Commission showing the number of CAFCASS appointments under r 9.5 made over a given period. The national picture suggests a significant increase in the use of r 9.5 since the President's 2004 Practice Direction, with CAFCASS reporting (2005 at 29) that requests for a CAFCASS officer to assume the role of guardian ad litem had risen from 549 in 2003-4 to 1,141 in 2004-5, an increase of 108 per cent. Indeed, as noted above, further guidance was issued in early 2005 in an attempt to curtail this.

⁷³ See e.g. *R (D) v Secretary of State for the Home Department* [2003] EWHC 155 Admin [2003] 1 FLR 979 (mother challenging refusal of prison authorities to keep her and child together in mother and baby unit); *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148 [2003] 2 FLR 1054 (fathers seeking specific issue orders to require mothers to have children immunized); *Re R (IVF: Paternity of Child)* [2003] EWCA Civ 182 [2003] 1 FLR 1183 (man seeking parental responsibility in respect of child conceived through IVF after he and mother had split up).

⁷⁴ *Re P (Section 91(14))(Guidelines: Residence and Religious Heritage)* [1999] 2 FLR 573, CA (orthodox Jewish parents of child with Downs Syndrome challenging foster placement with non-Jewish carers).

⁷⁵ Now a circuit judge.

⁷⁶ The authors rightly noted that comparing the number of appointments with the number of applications is a crude device for attempting to measure the degree of exposure to r 9.5 in such cases, but we would agree that it is the best mechanism available. It should be noted that the Leeds research was dependent upon CAFCASS data to identify the relevant cases. In other areas where non-CAFCASS appointments are made, CAFCASS would not have data on such cases and so reliance on their figures alone would not produce an accurate picture of extent of use.

- 2.48 Unpublished figures made available for this study relate to the ten CAFCASS regions and reveal that there are certainly areas of the country which appear to make much more use of r 9.5 appointments than others – Yorkshire/Humberside, the North West and the West Midlands have the highest numbers of appointments.⁷⁷ Again using the number of appointments as a proportion of all private law applications⁷⁸ these regions appear to use r 9.5 in up to around 10% of cases, compared with what we might regard as medium-use areas, such as the South West, the West and the East Midlands, at around 5%, and low use areas such as the North East and East at around 2%. But the figures do not show the appointment of non-CAFCASS guardians ad litem, so it cannot be asserted with confidence that these patterns are an accurate reflection of all such use, though that is likely to be the case simply because neither individual solicitors nor NYAS are in a position to take on large numbers of appointments and must give their consent to the appointment, so that they are likely only to be utilized in the most exceptional cases.
- 2.49 There is also only limited data on the reasons the court has for directing that a child requires separate representation. If the main motivation is to ‘hear the voice of the child’ one would expect that the child’s age would be a crucial factor, with older children being more likely to be separately represented than the very young. But the evidence is not clear-cut on this point. CAFCASS figures (see Table 1) show that in 2004, the age breakdown of children separately represented by CAFCASS public law teams⁷⁹ was as follows:

Table 1: Number of children separately represented, by age

Age of child	Number
under 1	23
1 – under 5	126
5 – under 10	320
10 to under 16	199
16 or 17	11
Total	679

⁷⁷ The data do not reveal whether particular courts within these regions make more use of r 9.5 than others.

⁷⁸ But note that appointments relate only to CAFCASS and applications relate to requests for legal aid.

⁷⁹ Unpublished. But note that the data relate only to appointments taken on by ‘children’s guardians’, not ‘children and family reporters’ and so do not present a complete picture of CAFCASS activity under r 9.5.

- 2.50 These data show that just under a third (210: 30%) of the children separately represented were aged ten or over, but nearly half (320: 47%) were aged between five and ten. This age group could arguably be seen as on the cusp of being regarded as 'old enough' to express a view that the court should take into account (but not old enough to represent themselves without a guardian ad litem) and thus as demonstrating a concern by the court to 'hear the voice of the child'. However, if we compare these figures with national statistics showing the age of children whose parents *divorced* between 1989 and 1999, we find that again, the largest group was aged between five and ten with about a third aged over ten, and these patterns have been consistent over the years (HM Magistrates' Courts Service Inspectorate: 2002 Annex D). The CAFCASS figures probably therefore simply reflect the same pattern rather than any particular emphasis on 'voice' as the predominant motive for appointment.
- 2.51 Bellamy and Lord were able to examine 26 files out of the 34 cases in their sample, and categorized them according to five main kinds of factual circumstances. The first category was the 'intractable' cases where proceedings had been ongoing for an extended period of time with no long-term resolution in sight. The second category concerned cases with a significant foreign, ethnic or cultural element, especially where there was a risk of, or actual, child abduction. The third involved cases where a parent had mental health difficulties which impacted not just on the parents' ability to care for the child but on the absent parent's contact with that child. The fourth category concerned cases where there was either an allegation of physical or sexual abuse of a child or there had been violence between the adults which had impacted on the child. Drugs and alcohol abuse also featured in some of these cases. Finally, some cases concerned care of the child being passed amongst extended family members, with multiple applications being brought about the child from different such members.
- 2.52 The authors recognize that such categorization does not, of itself, identify why a r 9.5 appointment was considered appropriate by the relevant judge. They suggest that this will turn on the 'perceived seriousness of the case and the welfare needs of the child' (Bellamy and Lord: 2003 at 267). One factor that might influence a decision to make an appointment, in their view, is the greater ability of a guardian, as compared with a children and family reporter (CFR) acting under s 7 of the Children Act, to put in the extra time and work that is needed to move the case forward. This suggests that an important feature of the use of a guardian is to enable social work (be it conciliation, mediation, counseling or support of other kinds) to be undertaken during the proceedings with a view to helping the parties come closer to an outcome with which each can live.

It also underscores the development of the 'managerial' court which proactively governs the progress of the case.⁸⁰

- 2.53 Charles Prest (2004 at 201) has argued that, underlying all the guidance and the suggestions also made by other bodies, such as the Association of Lawyers for Children, one can identify three general principles – the need for someone to orchestrate an investigation on behalf of the child, the need to ensure an argument is put that might not otherwise have been put, and '(rather less clearly defined) some sort of recognition that at some point it is "right" for an older child to be allowed to participate in the proceedings in this way.' As he comments, none of the guidance nor the individual experience of using it tells us whether it is in fact effective and beneficial in helping a child get through the proceedings, still less in determining the medium and long-term outcomes for the child and the family.

Summary

- 2.54 Although usually regarded as a means of giving effect to the imperative enshrined in art 12 of the United Nations Convention on the Rights of the Child to hear the voice of the child, the development of separate representation in private law proceedings has been prompted at least as much by a concern to ensure that the welfare of the child is properly safeguarded and is not lost from sight underneath the parents' own priorities and concerns. The practice guidance issued over the years reflects this dual purpose. From the available empirical data, the cases in which separate representation is ordered appear to fall into two basic categories. The majority are 'intractable' cases, where r 9.5 is generally used as a last resort because all other approaches to resolving the parents' dispute have been tried and have failed. The other category concerns cases with complex aggravating circumstances such as allegations of abuse of the child, or parental difficulties such as mental illness.

⁸⁰ See also the Guidance issued by the President of the Family Division, *The Private Law Programme* (January 2005). A more robust view is proffered by Blackburn (2005 at 22): 'Sometimes it is a case where perhaps the District Judge thinks that the guardian ad litem will "bang heads together" to produce the miracle result.'

Chapter Three - The children's perspectives of being separately represented

Introduction

- 3.1 Our primary aim in this chapter is to convey, in the words of the children themselves, their view of being separately represented within the family justice system. Because in this study the circumstances of the court proceedings were so varied and idiosyncratic and because the number of children was relatively few, we have decided to set the material in context. Our aim in doing so is to present each child individually. For each case we begin by summarising the salient features and drawing a pen picture of the child which we hope conveys an impression of the way the children responded when they met the researcher. By doing this we hope to provide a full picture of the circumstances of each child which will help contextualise what they told us about how they were affected by their parents' dispute and their contact with the family justice system.
- 3.2 It is always difficult when presenting data of this kind to find the correct balance between understanding an individual's circumstances and developing more general points for policy and practice. The real value of the data presented in this chapter comes from being able to draw out the particular nuances of each child's own experience. However, although the 15 children and young people and their family circumstances which led to court proceedings varied considerably, a number of consistent messages do emerge from their interviews and these are summarised at the end of the chapter.

Adam, 14 years old⁸¹

3.3 Adam was a friendly, articulate boy. He was keen to explain his experiences openly and have his view heard. He was able to talk at great length with very little prompting and generally appeared confident and content. However he revealed considerable underlying anxiety and general pessimism about the future during the course of the interview. Adam recalled several distressing experiences including incidents of domestic violence and occasions when his father's behaviour frightened him. Some of the views Adam expressed appeared too adult for his years. His mother subsequently informed the researcher that Adam was proud to have taken part and that his participation in the research was a very positive experience for him. Only the mother (resident parent) took part in the research. The father was not invited to take part due to confidentiality concerns.

Salient features of the case

- 3.4 The case (now closed) consisted of a protracted contact dispute concerning Adam, an only child, and his non-resident father. Proceedings began when Adam was 6 years of age and ended at the High Court in December 2003 when Adam was 12.
- Contact initially occurred via mutual agreement.
 - In July 1998 the father applied for increased contact and a schedule of contact (including staying contact) was ordered by the judge.
 - In March 1999 the father applied to enforce this order.
 - The judge joined Adam as a party to proceedings and assigned a solicitor and independent social worker (Mr. H). It was explained that a letter from the school (sent to the court with the child's consent) which recorded the views of Adam may have prompted the decision: '*...Dad says mum fills my head with rubbish, telling me all the wrong things. I feel I have a horrible life because of these two arguing.*' At this time Adam expressed the view that things should stay the way they were with him seeing his father every other weekend.

⁸¹ The following case was a pilot case and as such did not originate from the sample of cases produced by the courts. It was referred to the research team by a solicitor who took part in the survey of solicitors.

- In September 1999 the judge stated: 'The dispute of fact really amounted to only one point. Was Adam objecting to the current level of contact because of his own genuine feelings, or was he only reflecting what his mother felt and, perhaps, had told him to say?' He concluded that Adam loved his father and that he should continue to see him. The judge also considered that the mother was not thwarting contact. However, by now, Adam's feelings, as revealed by Mr. H, were that he disliked the amount of contact that had been ordered and wanted to limit staying contact to once per month. Contact was ordered accordingly.
- At a hearing in March 2001 the judge suggested the previous problems still existed. He rejected the father's claims that Mr. H had been unprofessional and that the mother was seeking to alienate Adam from his father. The judge found that Adam had experienced a very unhappy family life and also noted that the father accepted no responsibility for the current situation. The judge concluded that direct contact and further proceedings would cause Adam additional emotional harm and a final order was made for indirect contact only.
- The father successfully appealed in November 2001 and the judge ordered that one more attempt to establish contact should be considered. CAFCASS Legal was appointed as Adam's Guardian (Mrs. P) and a child psychiatrist instructed. They both reported in October 2002, recommending against the re-introduction of contact, and the father applied for a second opinion. Further delays occurred due to the parties' failure to agree on who should be appointed and Adam's reluctance to see anyone else.
- In September 2003, the father formally applied to withdraw his application and the proceedings finally ended.

Adam's views

Why parents went to court and how much the child was kept informed of court proceedings

3.5 Adam was only vaguely aware of what was happening at the court:

'I knew it was about me and who wanted me and who I would go to live with and what would happen to me, but I was never sure what exactly it was.'

He stated that his mother and Mr. H explained the situation to him in a very simple, childish way, yet he understood more than they knew:

'It didn't take me long to grasp what was happening and that's what the court didn't know, and that's what mum didn't know. Nobody knew that I was more aware of the situation than anyone actually knew and nobody took that into account.'

Child's view of the professionals involved

- 3.6 Adam recalled that he met the independent social worker assigned to the case, Mr. H a number of times (he guessed between 6-10 occasions) but only saw Mrs. P from CAFCASS legal once. His view of Mr. H was very positive; he appreciated his style which appeared to be to spend a lot of time getting to know Adam before asking him about his views:

'He was a very ordinary sort of person. I'd be playing one of my games, when I barely had enough money to buy a game - I loved robot games - and he'd be like "we'll play a bit of this and then we'll get down to it... oh get him, get him" like that, and then he'd say "if you don't mind could we talk now?" He was the best.'

Adam was not sure why Mr. H was no longer sent to see him and appeared disappointed that someone else was involved:

'They completely got rid of Mr. H, I saw him every now and then... and he'd be helping someone else and he'd say "hi, how you doing?" and stuff like that. And then I got this time when Mrs. P came and I hated her and CAFCASS because they were very pushy and they never actually fully understood the view.'

He did not seem to like Mrs P because, in his view, she did not spend the time getting to know him:

'The mix that I thought Mrs. P never had was – yes, she was good at her job, but she never actually had time to say "hi, how are you doing?" Some people would say that is because I only ever saw her once. She was more the type of person ... this is going to sound harsh, but she got her work done to get the big fat cheque at the end of the month. She'd seen a distraught kid but "oh well, it's another kid, as long as I get my cheque at the end of the week I'm happy". But Mr. H was like...he wouldn't enjoy that cheque unless he helped them and earned it.'

In response to the question, 'Did you feel able to say what you wanted?' Adam replied:

'There was a lot of stuff that I wished that I had told them now, or when I had the chance as there is a lot more that I'm starting to reveal from my own past that I forget that is there.'

When asked about his view of the child psychiatrist Adam commented on the reason he thought he had to see him:

'The reason why I had to see a mind doctor, mental person or whatever the name is, was because of dad. I think mum maybe knew that I was getting to the point where I would do something silly with the stress because I just couldn't cope and I think the court saw that as well.'

Meeting the judge / having his voice heard in court

- 3.7 Adam explained that he was keen to meet the judge and wished he had had the opportunity to do so:

'I would have been well prepared if the legal system had let me to go up there and say "I do not want to see my dad, I do not want to live with him".'

Adam stated that although he trusted Mr. H to put his views across to the court accurately, he would have preferred to have expressed his views himself. He commented that he is now much more outspoken as a result:

'Some people it helps telling others, but me, it makes me so frustrated 'cos I cannot say it from my own mouth and that would always be the argument with mum – mum would go "and your voice has been heard in court" and I would say "NO it hasn't, it's only part of my voice. To be honest, this situation has made me a very different person. It has brought out the argumentative side that I brought from dad... I was shut up during my situation with my dad and I'm not going to have it anymore.'

Adam explained that he was told he had a solicitor by Mr. H and that Mr H and his mother thought, *'He was very nice'*, but he did not actually meet the solicitor who represented him in court.

Impact of court proceedings

- 3.8 Adam had clearly been affected by the court proceedings:

'Plenty of times stress has caused the whole situation to break down and I felt like the AA man to be honest, fixing mum when she was upset. I felt like crying and it would all come and yes we were a team, but it has been awful and filled with lots of tears.'

'The school was really worried about me and in clay lessons...the clay figure - I done a stick man. I put on the words "help me" and got a plastic clay knife and put it in the middle and the school were very worried that I had done that. I wanted to be like other normal children. Yeah, maybe I could have coped with not having a dad, but why couldn't I not have a dad that didn't care for me?'

'I haven't had a childhood, that's what hurts the most. Like mum would say when I'd come home from dad's and I'd be like "where was my weekend?" and I couldn't see my mates.'

Adam blamed himself somewhat:

'It annoyed me so much 'cos when I was little I used to look in mirror and hate myself and I'm not lying but I hated myself so much that I punched a mirror one day. I used to think, if I was never born then possibly mum and dad would still be together.'

However, one interesting comment was that his life seems somewhat empty without court proceedings:

'It's been odd really. Without having the court it feels like I'm missing an arm or a leg. In a way, I almost sort of just that little bit miss it. And I miss not being able to have my say.'

Advice for other children / changes that should be made:

3.9 Adam had some advice for other children:

"I would say stick up for yourself. If you want to see your dad, and it's mum that's saying no, you tell her and the other people you see, like the social worker. Don't be bullied, stick up for yourself, if you want to see someone just hold firm, 'cos I know it might take ages but it worked for me.'

Adam considered that it may be hard for some children if they have someone like Mrs. P assigned to them, but not if they have someone like Mr. H:

'I reckon it wouldn't be hard for them to say what they wanted from the depth of their heart if they had someone like Mr. H who would come in and spend lots of time with you, and make friends with you and, as I said before, let you start the engine before he starts. Give the ball a little push not a big kick.'

Adam wanted Mr. H to have been involved for longer:

'Instead of seeing him this one time, he'd come back again and again and see "how's the case, how's things going?"'

He appeared to understand the term 'separate representation' and when asked if there were any good things about his experience he commented:

'Being separately represented---To be honest was the only good thing.'

Advice for parents:

'I would say, this is not about you two, it's about your child. The child, if they want to see you or don't want to see you, that's up to the child. You listen, you listen to the child, not yourselves.'

Advice for solicitors and judges:

'Listen to the child. It's not about the parents, it's about the children.'

At the end of the interview Adam informed the researcher that she was much more like Mr. H than the lady from CAF/CASS and seemed to appreciate the researcher's attempts to get to know him. He also commented when asked what he thought about this opportunity to have his say:

'Yeah, it does feel good that hopefully maybe, with all that I've said and what my mum has said and what other people will say, maybe it will change the system.'

Summary

- 3.10 Adam was generally favourable regarding the process of separate representation; that is, he considered it very important that his views were known to the court. However in his opinion, the process did not go far enough. He wanted to express those views himself (although one wonders if this is a view formed in the context of hindsight and if the actual experience would have been daunting for him). Speculatively, if Adam had met his solicitor he may have felt more empowered, although due to his distress and his view at the time (that he was fed up with meeting professionals), it is perhaps understandable why this did not take place. Adam appeared to respond well to his first guardian's approach of taking the time to get to know him.

Brian, 11 years old

3.11 Brian was a polite, serious 11 year old who spoke with minimal emotion even when talking about his hobbies. He appeared content to speak about his experiences (but perhaps because his mother had told him to do so, rather than from a wish to do so himself) and was keen to get on with his activities. Most of his answers were matter-of-fact and short, therefore prompting was required for him to explain his answers. Both mother (resident parent) and father took part in the research.

Salient features of the case

- 3.12 The case primarily concerned the issue of contact. It began soon after the parents separated when Brian was 3 years of age. The final order was made in September 2004 when Brian was 10 years old.
- The first application for residence was made by the father in 1998 but subsequently withdrawn.
 - In 2000, the father applied for contact stating that previously agreed contact was being persistently frustrated by the respondent.
 - Three contact orders were made between 2001 and 2003, the last after consideration of reports by the CAFCASS officer (Mrs. C) and a clinical psychologist (Mrs. F).
 - A final application was made by the father in April 2004 for residence, contact and a penal notice to the existing contact order. He claimed that the mother was discouraging Brian from attending contact and attempting to destroy the relationship he had with Brian.
 - At this stage a r. 9.5 direction was made with the same CAFCASS officer (Mrs. C) assigned to act as guardian. Mrs. C saw Brian twice at home (with his mother) and reported that he was very badly affected by the proceedings; he told his school and the guardian that he did not wish to see his father. The report also stated that the mother and father had discussed the issue and both agreed that they did not want to force contact and that indirect contact was acceptable.
 - In September 2004, a final order was made for indirect contact only, via letters or cards once per month.

Brian's views

Awareness and feelings regarding the court proceedings

3.13 When asked if anyone kept him informed during proceedings, Brian indicated that while both parents mentioned it, his mother told him more than his father:

'It was both my parents actually. I think my mum told me in a more grown up way 'cos my dad just said, "Ah, me and your mum have to do this court thing" ... you know, just casually. But I think my mum told me the way I wanted it to be told ... she knows how to talk to me and she knows the level ... how I want [to be told].'

However, Brian found it difficult to explain why his parents were going to court:

'Well, I think mainly my dad put a lot of things in the way, to try and stop my mum...he'd really say I'll do anything to try and stop her from having me.'

Brian indicated he felt anxious about his parents going to court:

'I was scared...well worried and scared possibly 'cos I was just worried about if my dad got rights of seeing me, 'cos to be honest, I never wanted to see him again.'

He also referred to this fear when he was asked if there were any bad things about his experience:

'The worry of what the court decision would be really...that was all that bothered me. Nobody particularly bothered me like Mrs. C or Mrs. F or any of the court welfare officers...none of them bothered me, just their decision, what happened in the end, that's all.'

Brian seemed to be aware of the final order and that it was what he wanted:

'I'd said to Mrs. C that I didn't want to see my dad but it was alright if he'd write a letter to me just once or a month or... my dad said well if I can't take care of him full time then... that's what I've done but, he hasn't wrote a letter for a long time ago.'

When asked how he felt about this, he explained that the fact that his father had not written did not bother him:

I don't really want him to write a letter to me, to be honest, Mrs. C asked me specially "would you be alright if your dad wrote a letter to you?" and I said, "I'm not bothered, it doesn't bother me if he did".'

In general he also appeared happy with the way things went:

'I feel happy that... if I suddenly went and seen my dad for some reason, or felt an urge to get back in touch with him, maybe phone him or just go over for a couple of hours to see him and his family. I felt as though it was in my hands what had happened and that felt good.'

Brian was also asked if there were any good things regarding his experience:

'I think probably my mum helped me a lot through it... she just helped me through it, and she really made it a lot easier for me.'

Brian's only wish was that it had not taken so long:

'I just felt like it should have gone on for a bit less longer, and just been put through it for absolutely ages, and I never knew when it would stop or something would happen or when... you know.'

Child's view of the professionals he met

- 3.14 Brian could recall quite a few details about the CAFCASS officer (Mrs. C). Although he could remember Mrs. F, he could not recall any details about her role and only commented that he thought she was nice. He explained the reason he had to see Mrs. C was:

'Just to tell her what I was feeling, and how I felt about my dad and how I felt about if I didn't see him and what I'd been through.'

When asked if he had wanted to see Mrs. C or not he commented:

'I think it helped in some ways because I could let my feelings out. I didn't not want to speak to her.'

And in response to how he felt when he was talking to her Brian explained:

'I think sometimes sad and happy ... a mixture of them two. Well, sometimes when I talk about things that I've done, or things that my dad's done or things that my mum's done, sometimes I get quite emotional, but in other times I felt happy so I could just ... as I've said, let my feelings go, and say what I wanted to.'

Brian indicated that there was nothing Mrs. C did that he didn't like, but when asked if there was anything Mrs. C did that was bad he said:

'One of the things was that when she asked what I wished what would happen... 'cos I used to sleep Friday nights as well as Saturday, and I said "I just want to see my dad Saturdays instead" ...but, I thought she meant, just if I had a wish about my dad ... I didn't think she were going to make it true ... so if I thought that she were going to make it true, I'd have said "I don't want to see him at all" ... but unfortunately I didn't realise she could've made it happen.'

Brian also said that he felt able to say what he wanted to Mrs. C and that there was nothing he felt he could not tell her. When asked if he thought Mrs. C understood what he wanted he responded:

'Yes I think she had lots of experience ... she knew what I was talking about.'

Brian was asked if he knew what Mrs. C would do with what he told her:

'I think basically at the start she just said "just let your feelings out" ... she asked me lots of questions and I answered them ... she didn't really tell me what she'd do, but I think by the way she just took it all in I think she was gonna tell the court and try and hold it against my dad and hold it against my mum, you know.'

When asked how this made him feel he explained he was content because:

'I was happy what she was doing and I wasn't fretting and I didn't feel like she was on my dad's side, I just felt like she was fair. It just made me feel a bit better ... she was just coming to talk to me and it felt like really nothing mattered and I could tell her and she'd make it happen.'

The only bad aspect that Brian could recall about having a guardian was that at times it required him to think about difficult times:

'I think sometimes I felt a bit emotional when I was retelling what I'd done and ... what my dad had done and stuff like that.'

Brian further explained that after he had spoken to the guardian he felt happy that someone had come to speak to him but slightly worried because the situation still existed:

'[I felt] a mixture of worried and content because she didn't make me feel any different ... I still felt worried ... in other ways I felt happy as well because I thought that she'd really taken in what I'd said and she'd really make it happen, it would make a difference.'

Advice for other children and suggested improvements

3.15 Brian thought that other children should be assigned a guardian and explained why:

'Because sometimes, if you tell your parent something and they tell the court, the court might not really believe them ... but if you tell a part of the court's staff then they've got evidence of what you've said.'

When asked if there was anything Brian would have liked to change, he indicated that he would have liked to have gone to court:

'I actually think ... I know this isn't a possibility at all ... but I think ... you should either go into the court or maybe the court comes here or something and you actually tell them, just straightly and plainly and just tell them... I kept asking my mum if I could just go into court and tell them and make it a lot easier ... I'd just tell them. That partly helped when Mrs. C came round really because it felt as though that was happening.'

He could not think of an alternative to going to court:

'I think if they can't decide and they are in a dilemma and just an argument and that just carries on ... um ... one wants the child and the other wants it, then you can't do "ip dip do" or something, you just have to take it to court.'

When asked how it could be made easier for other children, Brian suggested that children who have been through the experience should talk to other children about their experiences:

'I think actually other children who've been through the same thing actually tell in the end how they felt just some advice 'cos they know what it's like being put through it. A person that would be mature enough to talk and just, actually, express their feelings so I could help them.'

Brian explained what advice he would give to other children:

'I'd say just keep your hopes up and carry on as life should be and just don't think sad. That was one of my downfalls 'cos I felt that my dad would still be able to have contact with me but you just got to really think happy and really keep your hopes up and just be strong.'

'At the end of the day, if the mum or the dad can't make a decision it's not up to the judge... they might get a complete wrong idea ... I think that the child should just say what they want.'

Brian thought that there should not be an age limit as to whether children should be asked their opinions or not:

'They're never too young to say what they want ... 'cos it can always change as they grow older or they change their mind. I think that the parents should take it back to court if the children change their mind again and it all starts all over again.'

Summary

- 3.16 The final order for this case was made just 4 months after the r. 9.5 direction, suggesting that presentation of the child's view to the court enabled the case to be resolved swiftly. When interviewed, Brian's mother still seemed very emotional (mainly angry) regarding proceedings while his father appeared very sad about the way things had turned out. He was trying hard to accept Brian's decision and move on but hoped that Brian may wish to see him again when he is older. Brian appreciated that his views were taken into account and it helped him feel better about the situation. He did also indicate, however, that having his views represented in court also brought a sense of responsibility and did not resolve all of his anxiety about the proceedings.

Craig, 15 years old and David, 11 years old

3.17 Only Craig had been separately represented but David was also interviewed. Craig was a very matter-of-fact teenager who was polite, confident and blunt. He looked much more mature than his 15 years. He did not find it easy to articulate his views, but was not emotional about any subject. In general he was laid back about speaking of his experiences. David was younger than his brother and he indicated he had very little memory of the proceedings. He was shy and his answers were mumbled. He did not appear to want to talk about his experiences and seemed to be hiding a lot of emotion. He seemed to relax towards the end of the interview. Only the mother (resident parent) took part in the research.

Salient features of the case

- 3.18 Craig and David are two brothers from the same family. The parents lived together for 13 years and were married for 10 years. The case concerned residence and lasted for 3 years, ending with a consent order in August 2004.
- Contact initially occurred on a mutually agreed basis.
 - In December 2001 the mother applied for residence and a prohibited steps order after the father failed to return the children at the end of agreed contact. A judge ordered that the mother allow the children to stay with the father on alternate weekends and also that a CAFCASS officer (Mrs. P) compile a report.
 - In January 2002 Craig absconded from the mother's home and went to live with his father for six days.
 - In April 2002, Mrs. P filed her report, having spoken to both Craig and David. She reported that the father's attitude to residence was somewhat ambivalent and contact had been erratic. She also noted that Craig had told her he ran away because his aunt was saying bad things about his father. Mrs. P reported that Craig had changed his mind and now wished to stay with his mother because he was upset after an argument with his father. Mrs. P also explained that David had been unsettled at school and was worried about the case. David was concerned not to upset his mother or father; he wanted to live with his mother but enjoyed seeing his father. She recommended a residence order for the mother and continued contact with the father, stating that the children's emotional need to spend more time with their father was not being met.
 - Contact was resumed and the father gave an undertaking to return the children.

- In May 2002 Craig absconded once again from the mother's home to stay with the father. A further report by Mrs P indicated that his father had brought Craig to court and he had looked uncomfortable. She concluded that the father should not be awarded residence and that Craig was confused and under pressure. She suggested that Craig might require a child psychiatrist and that because his views differed from what she believed was in his best interests, he be separately represented.
- Accordingly, Mr. C was assigned to work with Craig. He filed his report in October 2002 after having interviewed both Craig and David. Craig had stayed with his father over the school holidays but no longer wished to stay there as their relationship had deteriorated. David was more positive regarding his father as he had grown closer to him since he had fallen out with Craig. However he was not sure how he would cope with contact as he was upset that his father's girlfriend's children called his father 'dad'.
- In October 2002 the judge made a residence order in favour of the mother and ordered the mother to allow the children reasonable contact with the father to take place at the father's home.
- According to the court file there appeared to be no further activity on this case past October 2002, however, records on FamilyMan indicated the case was not closed until August 2004, by parental agreement.

Craig's views

Awareness of court proceedings

3.19 Craig stated that he did not have a choice as to where he was going to live when his parents split up, and nobody asked him what he wanted although he would have liked to have been asked. When asked why his parents went to court, he explained:

'They were fighting over me ..., 'cos I ran away and then came back and I must have done this another two times. I've had all these people come see me and they said that I had a decision to decide where I wanted to live and then I stayed with my dad and because I injured my dad's girlfriend's son and I didn't like how I got a response for it... so I came back.'

Child's views of the professionals he met

- 3.20 Craig's opinion of the first CAFCASS officer appointed as his guardian (Mrs. P) was not favourable. He explained that he saw her about three or four times and thought she was argumentative:

'I had to wait there [in the court waiting room] and she had to speak to me and everything I said, she turned around making it look like I was the bad one for some reason. Me and her were just sat there talking and I said something to her and she turned around and backfired at me like I was being the bad one, which I didn't understand why, she denied it later.'

Craig did not think she understood what he wanted:

'I don't think she really understood where I was coming from ... I think, fair enough, bless mum, I love her to bits, but I think she was more on my mum's side than me or my dad ... 'cos anything I said she turned round and made it look like I said I was the bad one ... which I don't think it was fair at the time.'

When asked why he had to speak to Mrs. P, Craig stated that she was there to take a statement of what he wanted. Craig further explained that he was '*not bothered*' about speaking to her as he had already been told by his solicitor that he was old enough to do what he wanted to do. His opinion of his solicitor was favourable and he explained that the court was responsible for him having one and that she gave him her reports to read:

'I think the court got me a solicitor for my own ... just to ensure me, which the solicitor did okay, she did a very good job. She was there for me more than the welfare ... 'cos I only seen that man once and I seen the other woman, that welfare officer a good few times, but ... the solicitor she were there if I needed her, or I needed to talk to her I could ring her and she'd come see me.'

He also stated that the solicitor, not the CAFCASS officers, kept him informed about what was going on in court:

'She took what I was saying to her and she came back and she said, "I'll take this away, do this, do that, do this," which I liked about it. She was alright and then she said "if you need me, just ring". And then I did ring her once I needed to speak to someone but I can't remember why though.'

When asked what he liked about her, Craig commented:

'She understood where I was coming from and she understood what I wanted and how I wanted it to be done.'

Craig's view of his other guardian, Mr. C, was also positive – he explained that he only met him once when he was at his father's house. When Craig was asked if Mr. C understood what he wanted he replied:

'He did and he didn't in a way because I was telling him things... well we took a walk round my dad's estate and we were just talking and then he asked me questions about what I wanted and then he just asked me general stuff like, do I play sport, this and that, basic stuff, and in time I was back to my dad's and he went. ... At that time it was a confusing time because I was scared ... I wasn't scared of my dad, how I feel about my dad but I was scared. I thought I would never speak to my mum again, I was only young ... I was just like stuck in middle.'

Craig was asked how he felt that someone from the court wanted to know what he wanted:

'I felt alright about it because I am my own person, they could say you couldn't say this, you can't say that, I just told them what I felt and what I wanted.'

Craig's experience of going to court

3.21 Craig explained that he was taken to court when he was living with his dad. He was taken to sit in the waiting room because he had nowhere else to go while his dad was at court, not because he wanted to go. He stated that it was a bad experience:

'That wasn't a good experience because like, I can't remember how old I was ... but you had to walk in this room with guards with guns and stuff, you're just sitting there waiting, you know your mum and dad's in there arguing.'

Craig further explained that although it was not his idea to go to court, he would have rather sat in the court room itself:

'I didn't think it was fair, me sitting in waiting room because I was old enough to understand what was going on, so I think the older the people are, if they can understand what's going on they should be allowed to sit in the court room. Whereas my brother, I think, he wouldn't be allowed 'cos he wouldn't understand it. I would've preferred to sit in and actually seen what's going on.'

Craig had a view on what age children should be allowed to go to court:

'I'd say from 15 plus. 'Cos fair enough if you understand what's going on you should be allowed in and have your say as well 'cos you got your mam and dad saying this and that ... fair enough, your solicitor takes what you say ... but why can't you go in the court room and say what you say ... it just seems that it's not fair ... this is about you, no-one else.'

Recommendations and advice

- 3.22 Craig thought that other children should have the opportunity to speak to someone from the court:

'Yeah, because it does help. Because, if there's no one there you're stuck in the middle of your mam and your dad arguing and you're just there and you've got no one else ... fair enough, I had my little brother but he didn't know what was going on.'

He also suggested that children should have their own solicitor and even recommended the lawyer he had to a friend. His advice to parents who go to court over their children was to listen to them and let them try out where they want to live:

'Tell them to listen to their children ... because the end of the day they have to try it, and I did and I found out what it was like. I know where my bread's buttered!'

David's views

- 3.23 David had very little to say. All of his answers were either one or two words or very short and he was not strictly involved (i.e. the subject of the r. 9.5 direction). He was interviewed partly because it he was interviewed by the CAF/CASS officers and partly because the researcher did not want him to feel left out. Indeed, he seemed proud that he was also interviewed like his older brother. He did not remember talking to anyone from the court and his only concerns were that he wanted his brother back and was worried he would never see his brother or his dad again. He wished he could still see his father and not seeing him made him feel a bit sad and angry. His only memory of the experience was that it was hard because his mother was crying all the time.

Summary

- 3.24 Craig appeared confident and indicated he was equally confident when involved in proceedings but admitted underneath he was scared by the whole experience. Craig was more positive about Mr. C than Mrs. P, perhaps because Mr. C took more time to get to know him. Craig seemed to feel somewhat empowered by having a solicitor and it appeared to make the whole experience easier for him, perhaps because it made him feel more involved and took away the anxiety of not knowing what was going on. Indeed Craig found the role of the solicitor much more useful for him than the guardian role. He appreciated what the solicitor did for him, particularly treating him with a level of understanding. Craig also stated he would have liked the opportunity to go to court and express his views directly rather than having them presented to the court via the guardian or solicitor. David seemed to have found the experience so distressing that it left him unable to articulate or consider how he felt. However his age and unfamiliarity with the researcher may also have contributed.

Elizabeth, 11 years old

3.25 Elizabeth was a friendly, bright and intelligent girl. She spoke very quickly, often stumbling over her words in an attempt to articulate what she was trying to say. The mother was not keen at first for the researcher to speak to Elizabeth. The mother remained in the room and joined in with the interview. However, Elizabeth did not seem perturbed by the presence of her mother and seemed to be able to speak freely. Her mother occasionally reminded Elizabeth of things she thought she had forgotten but generally let her speak without being interrupted. Both mother and child were very pleased at having taken part. Only the mother responded to say she would like to take part in the research.

Salient features of the case

- 3.26 Elizabeth has a younger sister who is 7 years old but who was not as involved in the case and therefore was not interviewed. This case lasted for approximately four years at court; however the issues currently remain unresolved.
- The unmarried parents separated at the end of 1999 when Elizabeth was 5 years old and tried unsuccessfully to arrange contact between themselves with the help of solicitors. Mediation was attempted (as an adjunct to the mother obtaining legal aid) in early 2000 but was halted a couple of months later by the mother.
 - In August 2000 the father was charged with assault and affray when he removed the younger child from the mother.
 - In September 2000 the father applied for residence, defined contact and parental responsibility orders, claiming that contact had been limited by the mother. A CAFCASS officer (Mrs. H) was assigned to the case shortly after the first application and she dealt with the case for a couple of years.
 - In May 2002 a residence order was made in favour of the mother with supervised contact at a contact centre. Towards the end of 2002 Mrs. H wrote a report including a review of contact by the contact centre staff which stated that the mother had major reservations about contact and so seeing their father was not currently benefiting the children. Mrs. H recommended that both parties take a break of 12 months due to ongoing tensions and after this break an attempt at unsupervised contact should be tried.
 - An order was made for a break of 6 months, but the mother was not willing to consider unsupervised contact and her solicitor advised her to move the case to the county court and request that a guardian be appointed. This was done in February 2003. A solicitor for the guardian was appointed but there was a delay of around five months until a guardian from

CAFCASS (Mrs. S) was assigned. The guardian arranged several contact sessions between the children and the father at her office to observe and recommended that both parents be psychologically assessed.

- In March 2004 Mrs. S filed a report regarding the level of contact and whether the father should be granted parental responsibility. Although the mother was opposed to the father being granted parental responsibility, as she was concerned he would interfere in the arrangements regarding schooling etc., the guardian considered there was no good reason for the father not to be awarded parental responsibility. She also recommended approximately 6 supervised contact sessions a year.
- In May 2004 the father was granted parental responsibility and six supervised contact sessions, which constituted the final order.
- After the final order, supervised contact continued. Around Christmas time 2004 the mother was speaking to Mrs. S on the telephone discussing contact and Elizabeth asked to talk to Mrs. S. Elizabeth told Mrs. S that she had said she only wanted contact twice a year. At the next contact session the father indicated to Elizabeth that Mrs. S had relayed their conversation to him. Elizabeth was very upset as she believed that what she had said to Mrs. S was confidential. The mother made a complaint to CAFCASS in March. A contact session was due at the contact centre that Easter but the father contacted Mrs. S and told her that no longer wanted supervised contact as he found it too stressful. Mrs. S's involvement came to end in April 2005 and the parties are still trying to find a workable solution.

Elizabeth's views

Views of the professionals

- 3.27 Elizabeth could not recall much about the Child and Family Reporter (Mrs. H), except that she spoke to her in her room and asked her lots of questions. She explained how it made her feel:

'I can't remember but I think she said quite a bit and all I can remember is she said lots and lots so I felt a bit confused.'

Elizabeth recalled more about Mrs. S. She explained that she was upset when Mrs. S suggested that it was time for her to make a fresh start:

'She asked me if I was happy about what was happening between my parents and stuff and it was quite upsetting actually, for her to say "it's a new year, try and turn over a new leaf", because you can't just wipe your memory of everything that's ever happened so I didn't really like her saying that 'cos I thought it was a bit ... I'm fine with her asking like, "are you happy with it" but I thought that went a bit over the line 'cos that was a bit unfair.'

Elizabeth commented that she did not think the guardian understood what she wanted and she drew a scale to represent this:

'I wrote a letter to my mum and then I let her read it after I'd gone to bed and I like did that [drew a scale from 0-10] ... then I put where she [guardian] was for understanding what we're going through. I put her on 1 or 2 and she thought she knew like, 9, 'cos she thought "I've been employed in this job" and that's what she thought she understood but where she really was, was like 1, 1½ at the most because she's not gone through what I have and what my sister has and also what my mum has.'

She further explained that she wanted less contact than the guardian recommended:

'I said twice a year and I felt they didn't listen at all... I thought we'd get two times a year and if that goes successfully move it up to four times then six because I mean, he took my sister. You can't just [build] your trust up, like from that to full, can you? So you've got to take it slowly instead of just going straight to six times a year - so maybe two, four, six and so on, and it might, that might end up that you're seeing them every two weeks which would make the children happier if they wanted that. And the father and the mother might be happy that their children have had a say in it rather than being totally sort of sat in the corner thinking "can I say something?" "No, just stay there 'cos this is grown up talk".'

Elizabeth commented that she felt 'worse than angry' when her mother told her that the court order said that she must see her father six times a year and she told the guardian this on the telephone:

'I sort of did say to her, "I wasn't happy at all with the decision you made and everything that was said in that conversation that I thought was confidential". When we were actually having contact with my dad she told him everything, so I burst into tears because I thought that was meant to be confidential, and she didn't even tell me she was going to tell my dad and then I'm crying and I go, "Can I go to my mum?" and she goes, "Are you sure?"... and I'm like "Yes I am sure, I want to go to my mum" because I thought "I told you that in confidence"... it's sort of a bit confidence knocking because you build up all this confidence thinking, I've got it off my chest now, and then it sort of all goes bangs the ground when it's fallen down.'

She further explained that she felt Mrs. S was not taking her seriously when she was speaking on the phone:

'When I said stuff, I did hear her actually go "mmm" as if there was like a little laugh in there but she doesn't want to let it out so she went "mmm, yes" and you can tell when something's a laugh can't you? So, so I said "Can you please listen to me because I don't feel you're

listening” and then at the end I said something along these lines ... “I said what I’d like to say so bye”, and I put the phone down ‘cos I thought I’m not wasting my breath on someone who’s not listening to me.’

However after the conversation Elizabeth went on to say that she felt a mixture of emotions:

‘I felt happy, but I just felt a bit worried that she’d put what I said ... was gonna be like held against someone but I don’t know who, and I also felt content with what I said.’

Views of the process in general

3.28 When asked if Elizabeth wanted someone from the court to ask her what she wanted, she replied:

‘Well, I wanted people to ask me because I just wanted my, not my say like ruling everything, but I wanted a say in it to help me. It might have helped, it might have made it worse but I’d have felt good that I had a word in it and I’d made a difference if it was good or bad because if it turned out to be bad that’s their decision and they’ve made a wrong one.’

Elizabeth explained that she wanted to go to court to be there for her mother and to be able to speak for herself:

‘I have said to my mum before this, I really wanted to keep her company and also I just wanted to be there in case anything came up. ‘Cos I’m the eldest child in the situation if you know what I mean and if anything did like [come up] about me and my sister I could speak for me and my sister because I know like, what she feels. If they like said to her [mum] something about your children she could like, say “Well, that’s not for me to answer, that’s for them ‘cos I don’t know what they’re feeling at this minute”. So they could maybe take me in and just let me say that, then take me out so I’m not listening to the rest, it might be a bit unpleasant.’

However, she went on to say that she might find it a bit daunting:

‘I’m not sure what the court was like but it might make me feel a bit uncomfortable, all these people, and then them sort of like, “What am I supposed to say here, is it being planned or something?”

And while she wanted her say, she did not want the decision to be up to her. When Elizabeth was asked whether she would have liked to have met the judge she responded:

'Well, I would've liked to have introduced myself but I wouldn't have liked to have said "I'd like this", 'cos I wouldn't want to interfere with what's going to happen in there. Just thinking about it I don't want to unbalance it and make it a bit like me saying "I like this, I like that", you don't want to sway the decision.'

Advice for children, parents and professionals

- 3.29 When asked if she thought other children in a similar situation should have someone from the courts to talk to she explained that it would be important for the person to get to know the child much better:

'Well I think it might help a bit if, maybe they had someone from the courts but that wasn't always firing questions, maybe, just for example, not move in with them as such, but maybe have a day with them. Just say if the child is living with the father and the mother's moved away, for example, then like spend a day with them and do what they do and then maybe like, just now and again she'll say and "How do you feel with this, like, without your mother?", so it's making them feel a bit more easy than sitting them down and just firing all these questions at them. Especially, because I think I was 9 or something when she came, or 10 so I mean, think about if children were younger, maybe 8 or something. It might make them feel a bit sort of "I don't know what they're talking about", so I think maybe they'll spend a day with that family and see how they're getting on.'

Elizabeth reflected on whether having someone from the court to speak to the children is a good thing:

'It is and it isn't because, it might not be because they might feel a bit under pressure ... but it's good because that might give them the chance to like at the end to say, "Can I just say something?", and that might make them feel better that they've said something about it rather than just answering all these questions that might not even be relevant to it.'

Whilst giving some advice for CAFCASS officers, Elizabeth was able to articulate that there may be benefits for the children if they have the chance to tell the court what they want because they may not worry about it as much:

'Let the children say what they want to say 'cos it will help them and it could affect their sort of outside life because it could distract them at school thinking, "What's going to happen?" and stuff like that so I'd still let them know, because they have got a right to know but try not to let them feel scared. Tell them it's sort of going to be alright because then

it might give them a bit more confidence. Even if they do worry at least it might protect them if something did happen.'

When asked if parents should go to court over their children or if there should be an alternative Elizabeth explained:

'If it gets a bit out of hand, they're just going to argue, argue, argue and maybe it could get a bit physical and we don't want that to happen, so if it does get like that, go to court but maybe try it with their lawyers. It's like court but no magistrate and stuff like that ... to like be sat at a long table so they're well apart from each other. Then like one of them sits there, one of them sits there, their lawyer sits next to them and the same at the other side and then, like the lawyers can ask the other person the question and then the person who's not answered it can have a view in that and maybe that could get somewhere, and if that's not working go to court. But maybe just sit down and talk about it civilly and it might end up better than in court [as that] could go to some drastic measures.'

In terms of any advice or tips she would give to other children, Elizabeth explained:

*'When they're in the room, if they do get fired questions at, don't feel confused just sort of like relax and say what you mean ... 'cos if you're seeing your dad or your mum they might have said to you like, "Just say this, say that". Follow your own instincts and don't let anyone tell you what to say because they're asking what **you** think, not what anyone else thinks. Don't get angry and don't feel sad because it's not worth it...you're allowed to feel sad, but I just wouldn't like, start sobbing, then you might get a bit angry with them 'cos they might say "What's the matter?" and you might go "You don't know what I'm going through" and then they're going to think, "Well, I'm meant to do this job so I think I know what you're going through" and they don't know at all.'*

Summary

- 3.30 Elizabeth was not at all happy with the work carried out by her guardian. She felt extremely let down not only because she felt the guardian did not understand or represent what she wanted but because Mrs. S betrayed her trust when she relayed a conversation they had had to her father. Nevertheless, Elizabeth generally felt satisfied that she had been asked what she wanted by the court, although again she admitted that this does bring with it a certain amount of pressure and she did not want the final decision to be up to her. As with all of the other children described so far, Elizabeth stated that she would also have liked to have gone to court to express her views herself, although upon further reflection she admitted that this might be a daunting experience.

Fiona, 11 years old

3.31 Fiona was a little shy and awkward at times. She had just started secondary school, of which she spoke enthusiastically and at great length. She did not have much to say on the subject of the interview, mostly mumbling very short answers. The researcher had met Fiona briefly at her mother's house a few weeks previously but she appeared to have no recollection of this. When asked to draw a family map she did not include her mother or half-siblings. Both mother and father took part in the research.

Salient features of the case

- 3.32 Fiona has an older brother Harry who is 14 years old. Harry did not take part because his father informed the researcher that he was not involved in the case, and not interested in taking part (although according to the court file he was included in the r 9.5 order). She also has two younger half-siblings who are her mother's children. This case was relatively short regarding the issue of residence (which was uncontested) and lasted just under two years.
- The parents were married for seven years and separated in 1997, after which contact occurred regularly on a mutually agreed basis.
 - Initially Fiona lived with her mother and new partner, her older brother Harry (14), her half-sister from the mother's previous relationship (6), and her half-brother (2). Contact began to deteriorate and the father applied to the court in June 2003 for residence (or contact if unsuccessful).
 - The mother did not attend court at any stage in the proceedings. A district judge directed that a guardian (Mrs. F) be appointed for the children straight away.
 - In August 2003, a prohibited steps order was made preventing the mother from hindering the guardian's efforts. Initially Fiona remained with the mother but her older brother Harry stayed with his father. A few months later Fiona also went to live with the father. An interim residence order was made in favour of the father for both children in September 2003.
 - In October 2003, Mrs. F, reported that the father was concerned about incidents of drinking and domestic violence that occurred between the mother and her current partner. In subsequent reports Mrs. F noted that Harry wished to stay with his father and did not want any formal arrangement to have contact with his mother. Fiona admitted she wanted to live with her father but was concerned about upsetting her mother. Mrs. F recommended a residence order to the father and contact with the mother on a mutually agreed basis, with no formal order.

- In November 2003 an order was made that both children reside with the father, with him to encourage indirect contact with the mother. The case was closed with the parents' agreement at the beginning of March 2004.

Fiona's views

Views of the CAFACSS officer

3.33 Fiona remembered meeting one lady from CAFACSS but when asked why she thought she had to speak to Mrs. F she replied '*I'm not quite sure...because erm...I don't know*'. Fiona was asked how she felt when she was told she had to speak to someone from the court and she said, '*Fine, normal*'. She commented that it felt just like talking to a friend when she was speaking to the CAFACSS officer and they talked about '*Stuff I was doing, how I was and things like that*'. Fiona appreciated that the CAFACSS officer did not spend the whole time they were together asking her about the issues stating '*She didn't question me a lot and ask lots of serious questions. She just, like, acted like normal around me*'. Fiona was sure that the CAFACSS officer understood her views, although she could not say why. When asked if anyone told her about what was happening at court, Fiona explained '*I can't remember if the CAFACSS lady told me. I think she told me little bits*'. She was aware that the CAFACSS officer would tell the court what she said and although she confirmed that she did want the court to know her views, Fiona found it difficult to explain how this made her feel. She was able to identify that she felt a mixture of emotions:

'A bit happy, a bit content and a tiny bit of worry. People talking about court it was a bit strange, when I'm not there. Especially talking behind your back and you don't know what they are going to say.'

Fiona could not identify any bad aspects about having to speak to someone from the court and thought that the experience was good, '*It made me happy*' although she was not sure why. She explained that she felt, '*Normal, happy, content*' when she found out that the judge had decided that the children should live with their father. Fiona commented that there was nothing she worried about when her dad went to court and when she was speaking to the CAFACSS officer she said that she did not worry about her parents.

Recommendations and advice for other children

3.34 Fiona thought that other children in a similar situation to her should have someone to talk to from the court because, '*Some people keep it all inside them and don't tell anybody*'. She also thought that parents should go to court when they can't agree over their children:

'They should obviously get someone to see the children so they know what is happening and the adults know what is happening and it is all written down.'

She had some advice for judges, clearly gleaned from their media portrayal rather than first hand experience:

'Take off their ugly wigs 'cos it's scary! And don't have the big hammer 'cos that's scary as well. They should just sit down on some sofas or something and talk and not be in a big room with all wooden chairs and things, too formal – awful.'

Summary

- 3.35 Fiona found it difficult to articulate how she felt. Generally she seemed distressed by events and would not talk much about her mother, perhaps because she felt her father was not keen for Fiona to see her mother and the interview took place at the father's home. (In the interview the father claimed that 'the children are not bothered about their mother, they were aware she did not turn up to court and that gave the impression that she did not care for them'). Nevertheless, the researcher recalled that she looked comfortable and 'at home' at her mother's home and casually said 'hello' before running off to play. Fiona appeared to be the kind of child who, while she had enjoyed meeting the researcher (she did not want her to leave), needed more time and perhaps neutral territory for her to be able to open up and speak freely about her experiences.

Gareth, 14 years old and Holly, 9 years old

3.36 The interview with Gareth was extremely brief. The mother indicated that he was keen to take part but his body language and the way he engaged in the interview suggested that he really did not wish to do so. Gareth responded to the majority of questions with one word answers with little attempt to recall past information or events. He was polite and courteous and was able to understand and listen to each question. Holly was also not keen to take part, the mother encouraging her to do so. She was extremely nervous and appeared much younger than her 9 years. However, Holly worked extremely hard during the interview trying to recall events which would have occurred when she was approximately 7 years of age. She relaxed during the course of the interview and seemed comfortable with the questions. At the end of the visit Holly appeared pleased that she had participated. Only the mother responded and took part in the research.

Salient features of the case

- 3.37 Gareth and Holly are siblings from the same family. They have a younger sister, Michelle, who is 5 years old and was too young to take part. Gareth is the father's step-son and biological child of the mother. The two girls are the biological children of both parties.
- The parents were married for 7½ years, separating in September 2002.
 - In October 2002 the father applied for a residence order for all 3 children, after the mother left to go on 'holiday' with the children and never returned to the marital home. The father stated that he wanted the children to come home, resume their schooling, and in the longer term to move back with him.
 - A Children and Family Reporter (TB) was assigned to compile a report concerning residence and contact which was submitted at the end of December 2002. The mother was amenable to contact with the father but wanted limited overnight stays. The father wished to be a significant part of the children's lives. The CAF/CASS officer spoke to the two older children. Gareth wanted to live with his mother and was happier now dad was not shouting and threatening to hit mum. He wanted contact at his home not where his father lived. Holly wanted to stay with mum but still see her father. The CAF/CASS officer concluded that the mistrust between parents was contributing to the children's anxiety and recommended that a residence order be made in favour of the mother with contact for the father.
 - At the beginning of February 2003 a judge ordered that the mother make the children available for contact.

- In May 2004 a further CAFCASS report indicated that there were child protection concerns because Gareth and Holly were sharing a bedroom; the father claimed they must move home. The officer reported that the views of the parties had become more polarised and recommended no contact for a year so that the mother and children could establish a new life. The CAFCASS officer also suggested indirect contact should occur and that the mother should promote a positive image of the father while the father must agree to distance himself.
- In August 2004 the same judge ordered that a guardian be appointed to help the children establish contact with the father and work with the mother to see this in a positive manner. Mr. R was appointed and submitted a report in November 2004. The report noted that none of the children had sent letters to the father. A contact session was arranged by the guardian but Gareth declined to attend. However Mr. R reported that the meeting had gone well and future meetings should take place in the children's home town rather than at the father's house.
- No final order was noted; however according to FamilyMan the case was closed.

Gareth's views

Views of current contact

- 3.38 Gareth revealed that he sees his father around 4 or 5 times per year (at his father's home), and that they do not speak on the phone. When asked how he felt about this arrangement, he replied that he would actually like to see him more often and for longer.

Views of the professionals

- 3.39 Gareth could only recall meeting one CAFCASS officer (the guardian, Mr. R). He was not sure what his job was, 'A CAFCASS officer, not sure', or what his role was, 'I don't know, he just came round and spoke to us.' Gareth said that Mr. R did not explain why he had to speak to him and he was not aware that Mr. R wrote a report including his views. He could not recall what they spoke about, just that he asked questions. When asked what Mr. R's questions were about, he replied 'Just if we were alright going down to my dad's house.' When asked if he felt he could talk to Mr. R, Gareth said yes and that he thought Mr R was 'alright'. However, when asked how he felt about Mr. R coming to visit him, he commented that he did not look forward to it. When asked why, he would only comment, 'I just didn't want him to'. Gareth was asked if he wanted the court to know what he thought about his parents, and he replied, 'No, not really'. He did not have anything to say about his views being reported to the court in general.

However, when asked if he thought it was good that someone came to ask him what he wanted, he replied, 'Yes, *kind of*' but was not able to expand on this. In addition, Gareth commented that having Mr. R made things better for him, not worse. Gareth explained that Mr. R did not tell him what was going on at court, but that he was able to find out from his dad.

Views about going to court

- 3.40 Gareth stated that he did not go to court, but that he would have liked to have done so. However he found it difficult to explain why, and could not answer who he wanted to talk to at the court:

"I don't know...to have said something, I can't remember what. I would have probably wanted to say something but I can't remember what it was."

Holly's views

Views of past events and current contact

- 3.41 Holly reported that she sees her father about once a month, at his home. She stated that her father is married and that although they do not speak on the telephone, Holly said that, '*He sometimes sends us letters.*' When asked if Holly would like to see him more or less often, she replied, '*I don't know...It's alright.*' Holly stated that she didn't really remember when her parents split up and that she felt confused as she did not know what was going to happen. She explained:

'The worst thing was when they actually split up 'cos they started arguing and they just started being nasty and it's hard to leave.'

Views of the professionals she met

- 3.42 Holly could remember that, '*There was someone called Mr. R*' who came to talk to her and that, '*He was a man and asked us questions as well*'. When Holly was asked what his role was, she replied: '*I think he was someone called CAF/CASS*'. Holly thought '*He was ok*', however she could not recall what they spoke about. When Holly was asked if she thought he was listening she commented, '*Sometimes he wrote down some stuff that we said*'. Holly could not explain what she thought about Mr. R coming to talk to her and sometimes she did not look forward to him coming, '*In between, 'cos he came quite a few times*'. When asked if it was better or worse for her, having Mr. R to talk to, Holly replied, '*Same really*'. Holly commented that there was nothing she really wanted to tell Mr. R. When Holly was asked if she wanted to go to court, she replied: '*No, 'cos we went to school when mum went to court*'.

When asked if anyone told her what was happening at court, she explained that her Nan and Mr. R did and also her mother. When asked if this made her feel better or worse about the situation, she replied, *“If she didn’t tell me I had to wonder everything, I could get curious.”*

Advice for other children and recommendations

- 3.43 When asked if she had any advice for other children, Holly stated, *‘Try not to listen to the arguments.’* Holly thought it would be a good thing for other children if they had someone from the court to talk to and she also thought that it is important to tell someone what you want because it would make children happy. Finally, Holly commented that judges should talk to the children to see if their mum and dad are liars.

Summary

- 3.44 Gareth was not able to articulate how he felt, nor did he have any views in general regarding any of the issues. This could have been due to a number of factors including: he did not wish to be interviewed and was keen to get away so he could visit a friend, he was distressed by the whole experience, he needed more time to open up, he needed neutral territory to be able to speak about his experiences. Holly also struggled, perhaps for similar reasons.

Ian, 8 years old

3.45 Ian presented as a lively intelligent boy. He appeared willing to talk about himself and engage with the researcher's games and chat about himself and his hobbies. However, as soon as the topic moved on to the issues in question Ian became visibly withdrawn and began to mumble. Many of the things that Ian said were indecipherable and often his only response was to point to one of the cards depicting emotions. He appeared upset by the subject matter (on occasions he appeared as though he might cry) and could not speak generally about the issues, only how they related to him. After the interview Ian was happy to continue to play with the researcher. Only the resident father took part in the research.

Salient features of the case

- 3.46 The file for this case was extremely large (known as a 'fat file case', stored in the court basement), primarily concerning contact between Ian and his mother with the main issue being whether contact should be supervised or unsupervised. Proceedings lasted for approximately four years.
- Ian's parents were never married and separated soon after he was born. Ian lived with his mother until he was 2 years old when the mother asked the father to take over his full time care (around 1998/99).
 - After 7 months the mother returned and wanted contact with Ian. A year of chaotic contact occurred until the mother applied for a contact and/or residence order at the end of 2000.
 - In July 2001 a district judge ordered that the mother have contact with Ian at a contact centre and a Children and Family Reporter (Mrs. C) was assigned to investigate. Five reports were filed by Mrs. C between July 2001 and July 2003, detailing, inter alia, suspected child abuse of Ian by the mother's friend and the maternal grandmother, and several orders were made over this period.
 - The child was made a party to the proceedings in July 2003 and a different CAFCASS officer was appointed to act as guardian (Mrs. B). Mrs. B filed a report at the end of March 2004. She reported that many of the arrangements had not worked to make the child feel safe when he was with the mother (or reassure the father). She commented that the father recognised he needed to change and responded accordingly, but the mother could not see she needed to change. Mrs. B interviewed Ian and reported that he worried when he thought there was trouble between his parents that would affect him. He had an understanding beyond his years and had always been clear about what he wanted and could cope with.

He loved both parents and enjoyed seeing the mother. Mrs. B concluded that the only way forward was for structured contact.

- The final order was made in May 2004, detailing the times and dates for contact to occur between Ian and his mother, to be supervised by the paternal grandmother.

Ian's views

Awareness of proceedings

- 3.47 When asked if he was aware that his parents had gone to court, Ian answered:

'Six years. [mumbling]...she's too afraid that if she tells me what happened ... what she did to me when I was younger that I would hate her but I don't because I couldn't remember what happened.'

When asked how he felt about his parents going to court, he pointed to a 'scared' card. Ian was asked why he felt scared and replied, *'They would take him [my dad] to prison.'* Ian was asked if anyone told him about what was happening at court but he replied: *'Um...I can't...I don't know.'* Ian did not seem to know about the judge, or have any opinion about whether he wanted to go to court.

Views of professionals

- 3.48 At first Ian made no response when he was asked if he remembered anyone from the court, but later admitted to speaking to a lady called Mrs. B. When asked what he thought of her, he said:

'Well, my mum behaved when I used to go to her house and sleep over she'd behave because she wanted everyone to know that ... to think that she was a good mum. She is though, but she just doesn't know how to look after me. She does sometimes, but when I was young she gets me annoyed like.'

When asked why he had to speak to Mrs. B, Ian replied, *'Oh, to say about my mum like... I can't remember.'*

Ian did not always make any response to some of the questions about Mrs. B, or he answered a different question. For example, when asked if Mrs. B asked Ian what he wanted, he replied:

'Yes ... but my mum won't come to see me because she wants more time and that's why she ain't come to see me for five weeks ... it might have been six, five or six.'

When asked what Mrs. B was going to do with what Ian said, he replied:

'I don't know but I think it would be sorted out whatever I say.'

Ian went on to say how this made him feel:

'Happy, but then sad 'cos she wants more time 'cos I'd go to my grandma's so she might come and look after me and she wants more time, that's why she don't come to see me, she says an hour's not enough.'

When asked how Ian felt after he had told Mrs. B what he wanted, he replied that he was confused. Ian was also asked if there was anything he had wanted to say but had not felt able to. He replied:

'I didn't want to be in that place [contact centre] I just wanted to see my mum but she didn't want to.'

Ian was unable to answer any more questions regarding Mrs. B (e.g. if she did anything he did or didn't like). However he did nod when asked if he thought she understood what Ian said. Ian said that the only other person he spoke to (aside from the guardian) was his grandmother:

'My granny....she's gonna sort it, her, out because my mum keeps on saying she's going to ring ... but she keeps on not coming ... because we always have to go there and then she's not come.'

Views of the process and recommendations to others

- 3.49 Ian was asked whether, if he was involved in the courts in future he would like someone from the court to talk to. He answered 'Yes' but when asked why he mumbled [mostly indecipherably]: *'Because I want to see my mum'*, then looked down as if he was about to cry. When asked if a friend of his should have someone to talk to from the courts if they were in a similar situation, Ian said they should because, *'He might be a bit afraid'*. When asked what his friend might be afraid of, he replied: *'Um, something like his parents getting sent to prison like, locked up for like ages.'* When asked if he had any advice for other children, he commented:

'I'd give 'em, bit like, more time ... like if you live with [dad] give 'em a bit more time to like [live with] their mum and if they live with mum like give 'em a bit more time to see the dad.'

Ian explained that not seeing his mum made things hard for him but his dad helped him. Ian could not think of anything that would make it easier for children. When asked if he thought parents should go to court, or what parents should do when they can't agree over their children Ian made no response and just stared at the floor looking sad. Finally, when asked how things are now Ian responded, *'It's alright...it's been alright now.'*

Summary

- 3.50 It appears that a new officer was brought in to obtain a fresh perspective and have more time to work with and support the parties. The guardian carried out a lot of work with the family particularly between the parties to try and build a workable solution and move contact away from the contact centre. Ian was extremely distressed however that his mother has since failed to continue contact and this meant he was unable to think past the emotional distress this caused him. Ian also seemed to fear that his parents might be punished in some way (sent to prison).

Jane, 17 years old, Kathryn, 16 years old and Lee, 11 years old

3.51 The three children were all interviewed individually. Jane's mother indicated that Jane had had a particularly extensive, traumatic experience of the family courts and therefore would like the opportunity to express her views. However the researcher found that she was uninterested and appeared to find the interview an intrusion. Jane was a strong willed young woman and seemed to have a stormy relationship with her mother. Jane did not engage enthusiastically in general conversation about herself. Kathryn presented as friendly and readily engaged in general conversation. She had some interesting, thoughtful comments to make despite being slightly rushed because she had to leave to go to her part-time job.

Lee was a nervous 11 year old and appeared uncomfortable talking about the subject, giving short, mumbled answers. The interview with Lee was very brief. He seemed upset thinking about past events and was clearly affected by the proceedings. He also responded that he could not remember in answer to most questions, perhaps because matters were upsetting to recall. Only the resident mother took part in the research.

Salient features of the case

3.52 The proceedings began over contact but then became concerned with the children's application to change their surname, with them claiming that they wanted nothing to do with the father. In total (including both contact and name change) the case lasted some three years and a guardian was only assigned for the issue concerning the change of surname.

- The parents separated in 1999, after which contact initially occurred on a mutually agreed basis until August 2000 when the father hit the mother in the presence of all three children.
- In February 2001 the father made the first application to court for a defined contact order, stating that the mother had not promoted contact and regularly involved the children in adult issues. He also stated in his application that he was aware that Jane did not wish to have contact with him but that this was not true of Kathryn and Lee.
- A Children and Family Reporter (Mrs. E) was assigned to the case and submitted her report to the court at the end of August 2001. Mrs. E reported that the father acknowledged that he had made a big mistake regarding the assault on the mother. The mother believed the children were at risk of being physically abused by the father and as a result she felt unable to encourage contact, but would agree to indirect contact. Mrs. E reported that, at the children's request, she had spoken to them as a group. They stated that they had sometimes had nice times with their father but Jane

had refused to see her father before contact stopped altogether because he had head-butted her. They said they wanted no contact although Lee considered meeting him to tell him how he felt. Mrs. E also noted that Jane had asked her why someone else (i.e. the judge) should make decisions about them. Mrs. E considered that it was not in the children's interests to force contact with their father. She therefore suggested indirect contact, with the hope of re-establishing a relationship on the children's own terms.

- In September 2001 there was an order that the father should have indirect contact only by sending letters and cards.
- In early 2003, when she was 15, Jane was approaching her GCSE exams and decided that she did not want her father's name on her certificates. She accompanied her mother to her solicitors but they advised her that Jane was too young to change her name. Jane and her mother did some research and Jane contacted NYAS who appointed her a solicitor and social worker. [There is no record of the application for the name change on the court file, but a NYAS report states that the mother made the application.] Around August 2003 a letter was received by the court written by Jane to the judge stating, *'You will be deciding what our surname will be so I thought I should write and introduce myself whilst expressing my wishes as it appears to us that the court does not wish to acknowledge them.'* She further stated that she understood that in most cases the court likes to keep contact between parents and children but in her case, *'I feel strongly that the court is wrong'*. She stated that it was unfair that a complete stranger would decide on something that would affect the rest of their lives and thus, *'I therefore request you meet us all and realise how strongly I feel'*.
- In December 2003 an order was made that the children were to have party status and be represented within the proceedings with NYAS appointed as guardian (Mrs. R). Mrs. R submitted her report that month, indicating that the father was strongly opposed to the name change and was concerned that the children only saw him as a provider of money. Mrs. R interviewed the children both individually and together. Jane stated that she wanted to distance herself completely from her father. Kathryn reported similar wishes although not as single-mindedly as Jane. Lee was ambivalent about his current feelings towards his father. He was not sure about having direct contact but said he would consider it in the future. Mrs. R concluded that the children were not united in their consideration of this matter and that Lee needed the opportunity to consider the matter for himself.

- The final order was made at the end of January 2004 when the court recorded its concerns for the emotional wellbeing of the children. The judge noted that he had considered the commissioning of psychological assessments of each party and the children but that the mother and Jane were opposed to such reports. As Jane was due to do GCSE exams shortly, to submit her to be assessed against her wishes would be contrary to her best interests. Therefore, the mother was given permission to withdraw her application to change the children's surname.

Jane's views⁸²

Views of the professionals she met

- 3.53 Jane briefly recalled the first Children and Family Reporter, Mrs. E, who came to speak to her. She thought it was regarding the issue of 'custody':

'I think it was the custody one the first one that was why she came to see us. She was fine, she listened to us and she was really nice.'

Jane read the report that Mrs. E submitted to the court and thought that it was accurate: *'That's exactly what we said and she listened to us. It was good, she was really nice.'* She was asked how she felt that someone from the court wanted to know her views and she explained that this was a good thing: *'She made us feel happy to have our say and that was fine.'* Jane's views of the social worker from NYAS were not so positive. She recalled:

'She wasn't very nice, she didn't listen to what we said, she wrote down things that we didn't say and the report that came back wasn't what we'd said at all. She was sat in with all three of us at the same time and what my brother was saying she was then saying back to him but she put the words then into his mouth and he just agreed but it wasn't what he'd said in the first place. So I actually turned round to her and said, "You're putting words into his mouth 'cos he's not actually saying that".'

It was the fact that Jane did not feel that the NYAS guardian listened to her which she did not like:

'She didn't listen to us, well, it came over that she had no idea about anything ... she had some kind of idea about what she wanted and then she was trying to make it so that it was like he [Lee] was saying that.'

⁸² All three children were aware of the final order that they were not permitted to change their surnames and all three children had read the report of the NYAS officer.

Jane explained that she wanted to meet the judge because in the last court hearing he made a decision without meeting the children:

'I wrote a letter saying that I'd like to meet the judge because from one of the court hearings he hadn't written to us or met us and he made a judgement about what should happen to us and it was like, well, he'd never met us, he didn't know anything about us, so he shouldn't really be able to make that without meeting us but I don't think we ever heard anything back.'

Jane explained that she started out with a solicitor from NYAS but later she had to have another solicitor because she did not agree with the report that was written. She met both of the solicitors although she did not like the solicitor from NYAS:

'I didn't personally like her [NYAS appointed solicitor] because she wasn't easy to talk to and I just didn't like her. But then the solicitor I got myself, she was really nice and she tried hard ... it was only because of the fact that it felt like they sided more with my dad rather than because of the report that they'd done.'

Views of the process in general and recommendations

3.54 When asked if children should have people to represent them in court Jane explained:

'I think they should as long as it's someone who's actually going to listen to them, rather than, like, the NYAS lot that didn't and they tended to have their own views about what should happen. But the solicitor I had, yeah, she was really nice and she did her best. I think it's a good thing that you should be able to tell the court what the child thinks and they should listen to you.'

However personally, Jane felt let down:

'From my personal experience the court don't listen to you, so there isn't actually any point 'cos until you get to a certain age, they just don't listen to you at all, regardless of what you say, they didn't listen to me.'

Jane suggested that each case should be looked at on its individual merits and not decided on the basis of one document (i.e. the NYAS report):

'The experience as I say was negative because they didn't listen and they made us really awkward. It wasn't very fair 'cos they didn't just look at our case, they looked at other cases and it's like, we were different from other cases. They should look at each case individually rather than judging it on what's already happened in other cases and if they'd [the judge] spoken to us all then they'd have realised that we were different from the other cases, but they didn't.'

Jane had some suggestions for parents who are going to the family courts:

'They are going to fight a losing battle because they can't win because the courts just ... well our case has found that they always blame the mother, they blamed her for everything and we were saying, "No it wasn't", but they weren't listening to us again and they think it's her that's been influencing us and that's why. Until you get to a certain age they don't think you've got an opinion of your own. I disagree with that because my sister, well my brother particularly, they thought that he was being influenced but I mean, he's not stupid and no child's stupid 'cos if they see something going on they have their own opinion on it.'

When asked if the court should always speak to the children or if there should be an age limit, Jane stated:

'I don't think there should be an age, I think they should speak to the child first and then see what the child has to say and then they're going to realise whether the child has their own opinion or not from having spoken to the child.'

Kathryn's views

Kathryn's views of the professionals she met

3.55 Kathryn's memory of the CAFCASS officer (Mrs. E) who was brought in to investigate the issue of contact was positive, from the little she could recall:

'I don't remember too much about it but I remember that she seemed really nice. I saw the report and I liked the report, and she listened to us, she could understand what we were telling her. She even let Lee have a ride in her car and she was a lot more friendly and warm and felt as if I had someone to talk to about things.'

When Kathryn was asked what it was about Mrs. E that she thought was good, she explained that along with getting to know the children first:

'She kind of sat really close to us and talked to us as if we were equal and on the same wavelength, and she just talked as though like she understood us and that she could see where we were coming from and she actually wanted to listen to what we were saying.'

However, as with Jane, Kathryn's opinion of the NYAS social worker was not so positive and she did not think Mrs. R understood her:

'She wasn't as nice, I don't think she really understood what we were telling her...well me and Jane listened outside the door when she was talking to Lee and she put a lot of words into Lee's mouth 'cos he was only young, he just kind of went along with it and she didn't communicate well in the way the other woman had done.'

Furthermore, Kathryn talked about a time when she went to court (once) with her mother and sister and she saw her father for the first time for two years and the NYAS guardian's response to her fear upset her:

'She wasn't that sensitive either 'cos when we were actually at the court on the day when I saw my dad I had a panic attack and went into shock and just started crying, and she came up to me and she turned round and said "Well it's a big world and there's plenty of places to hide." At the time it shocked me because that's not the kind of thing you'd say. She obviously hadn't understood anything I'd told her because otherwise she would have been more sympathetic.'

When Kathryn was asked if Mrs. E or Mrs. R explained to her what they would do with what she told them she said that:

'The second lady told us that she was going to write a report and it would be shown to the judge and he would read that and then the decision would be made.'

Kathryn went on to say that at first this gave the children hope that they would be able to change their name as requested:

'At first, before she'd written it I think we were all a bit nervous and we wanted it to be good enough so that we could actually change our name but then, when we read it, we didn't really like it.'

When asked how the fact the judge would be able to discover what she wanted made her feel, she described again that it gave her hope at first:

'It felt good at first because that's what we wanted and we wanted someone to listen to us and be able to change it even though we were young. We were all quite excited that we had someone on our side that would be fighting for us. But then, as I say, when it came back we were all a bit disappointed.'

However, Kathryn also explained that having someone from the court to put their views across gave her more confidence:

'I think it gave us more confidence as well that someone actually might do something about it because the judge might not necessarily listen to just the child but there is more chance that they will get their point across by an adult.'

Kathryn spoke highly of her solicitor and barrister, both of whom she met. She particularly liked the barrister because she treated Kathryn like an adult and explained the situation to her:

[She] saw our point of view a lot more and treated us like adults. So that was good because we wanted to be taken seriously rather than the other lady from NYAS who didn't understand us.'

Due to her unpleasant experience of court Kathryn chose not to attend again. However, she thought that having her own representation was a positive experience, despite the fact that she was disappointed with the final outcome:

'It made ourselves feel stronger, the fact that we had, like, a solicitor and a barrister as well. We thought it would have more effect but it didn't.'

Kathryn's views about separate representation and recommendations

3.56 Kathryn stated that if she had to go through the experience again, she would like someone to talk to from the court to listen to her views, and thinks all children should have this opportunity:

'I think they should 'cos I think it helps. I think having someone else put their point across, people might take it more seriously rather than just the child, I would have thought.'

In terms of advice for other children, Kathryn recommended that they should be honest and open: *'Just tell them exactly how you feel and what went on and why.'* When asked if she had any advice for professionals who have been asked to speak to the children she recommended:

'They should learn to communicate with children a bit better and talk to them as if they are equal because that's what we want to try and be, and try and get our point across as though we are equal rather than talking down to us and saying we don't really know what we want when we do.'

Kathryn thought that the family courts would be a good place to go to resolve family disagreements if there was a 'fair trial':

'I think it should be a fair trial and that the judge should look at everything rather than just one report which is what he did to us. If it's a fair trial then yeah, but not if the judge is just going to, like, not take it very seriously which was what we thought happened.'

In addition, Kathryn had some specific advice for judges:

'I think they should look at what the children are saying more and actually think about why they would want to do this ... 'cos they blamed my mum a lot, the judge said that my mum was putting words into our mouth but we weren't, we weren't really children when it happened. We were old enough to have a view of our own and I don't think they understood that we do we can have a point of view ourselves. It might be a good idea if the judge could actually meet the children so he could see their personalities and if they have got quite a strong personality he might know that what they are saying can't be influenced by anyone else.'

On reflection, Kathryn thought that in general the children should have been involved more in proceedings:

'I think it would be easier if we were explained a bit more about the situation because we weren't really told that much. We were just told that we had people who were going to speak to us about the situation. So if we had been told a bit more about it we would have understood a bit more and felt more involved, but as it was, we just felt someone was fighting for us but we wanted to be a bit more involved ourselves.'

Lee's views

Views of the professionals he met

3.57 Lee could only recall meeting the guardian (Mrs. R from NYAS):

'There was the social worker that came round that was asking us but she wasn't very nice 'cos in the report that she wrote I'd said to her about my school reports that I would just like a "well done" there and she'd said that I'd want contact with him in the report.'

He did not feel that she understood what he wanted which upset him:

'Because everything I really said she just kind of put it different in the report. [It made me feel] kind of like upset, so he'd [father] think that I wanted to see him when I didn't.'

Lee stated that he did not have any worries when he was asked to speak to Mrs. R, but that he could not remember if she had explained what she was going to do with what he had told her. When asked if he felt able to say what he wanted to the NYAS officer he had mixed views:

'Sometimes, and then other times kind of not. She like asked me a question and then like give me an answer to say.'

When asked if Lee had ever gone to court, he explained he would have liked to have been allowed to go: *'Well when my mum and my sisters went I did kind of want to go but I wasn't allowed to which I was a bit annoyed about.'* However when asked why he wanted to go, he was not sure: *'I don't know, I just thought I wanted to be there.'*

Lee thought that all children should be given the opportunity to go to court because:

'If like the rest of the family is going then they should be allowed to know what's going on as well and shouldn't have to wait to find out. The family might know stuff that they don't want to tell them but they might want to know anyway.'

Advice and recommendations

- 3.58 When Lee was asked if he had any advice for children who may also be involved in the family courts he suggested:

'Probably just like, if they're worried about it then they should tell their parents and if they don't want to then they just need to know that everything will turn out for the best.'

His advice for parents would simply be to: *'Think about their children'*.

Summary

- 3.59 Jane was clearly angry about her experience. She felt strongly that children should be listened to despite the fact that she was not happy with her guardian. Due to her age she also felt bitter that her views were not assigned more importance.

Kathryn appeared to be much less emotional about the issues that were discussed than her sister. She appreciated the first officer who took time to get to know the children and, like Jane, felt very protective of her younger brother. Kathryn also considered that having one's views heard in court was very important despite the fact that she was unhappy with the NYAS guardian. Finally she stated that whilst she found court stressful, she would have liked to have been more involved in proceedings in some way.

Lee was clearly very distressed by proceedings. It was evident Lee had been in a very difficult position and possibly felt torn between many sides including his sisters, mother and father.

Mark, 14 years old

3.60 When the researcher arrived the father asked if he could stay in the room. Mark commented that he did not mind if his father was present. Mark appeared slightly nervous but engaged well and tried to answer the questions as best he could. He did not appear to be inhibited or distracted by his father's presence. He only asked his father questions on a couple of occasions in relation to accuracy of times/dates etc. His father would respond and then return to his work. Both mother and father indicated they would like to take part in the research. The father did participate but although an appointment was agreed with the mother, she did not appear to be at home at the agreed time and did not respond to subsequent telephone messages that were left by the researcher.

Salient features of the case

- 3.61 Mark is one of two children; he has a sister, Suzy, who is 8 years old and lives with his mother. Mark lives with his father. His parents were married for 18 years, separating in August 2003. The case concerned several different issues including residence, contact and inter-sibling contact, and lasted approximately 11 months.
- Upon separation, the mother left with Suzy and Mark stayed with his father. Interim residence orders were granted to allow each child to stay with the parent they currently lived with, and contact was ordered to occur with the non-resident parent.
 - In November 2003 the father applied to the court to vary the interim contact order. He stated that difficulties had arisen over the contact arrangements between Mark and his mother and that the mother had withdrawn contact arrangements for Suzy to see her father.
 - A Children and Family Reporter (Mrs. M) was assigned to the case and reported that current contact arrangements were not working. A residence order was made for Mark to reside with the father and Suzy to reside with the mother along with a further interim contact order. The order also noted that at the next hearing the court would consider psychological assessment of Mark and/or both parties.
 - In December 2003 a further contact order was made requiring the mother to make Suzy available for contact with her father and, when she obtained her own accommodation, the father to allow Mark staying contact with his mother.

- In March 2004 the mother made an application concerning Suzy for a prohibited steps order with a penal notice attached and a variation or discharge of the current contact order. The mother stated that contact had not taken place because Mark did not want to see her at her parents' house, but that she had now moved. In addition the mother stated that Suzy was not enjoying contact with the father as he was favouring Mark. The court then directed that Mark and Suzy be made parties to the proceedings and the papers be released to NYAS to allow them to consider whether their involvement would be appropriate. NYAS agreed to act and in April 2004 assigned Mrs. H to act as guardian.
- Mrs. H submitted her report in June 2004 and a further interim contact order was made that the parents make the children available for inter-sibling contact, to be facilitated by NYAS. In addition the paternal grandmother (regarding an application she had made for contact with Suzy) was joined as intervener. Statements by both the mother and father made in September 2004 reported that since the involvement of Mrs. H, contact had actually taken place between the siblings and between Suzy and her father but that Mark still refused to see his mother.
- In September 2004 a final report was submitted by Mrs. H addressing the progress with contact. Mrs. H reported that the parents were supportive of the inter-sibling contact. The mother was also supportive of contact between Suzy and her father and was keen for the situation to move forward. The mother wrote a card for Mark saying she missed him and hoped that he would stay with her when she had moved. Mrs. H stated that contact between Suzy and her father had gone well and should continue. She concluded that there was still high animosity between the parents but this should subside. In addition she stated that the mother should be patient with Mark but that if his levels of anger continued he might need counselling. Finally the guardian concluded that both children need to hear positive messages regarding the absent parent to prevent long-term effects.
- A final contact order was made in September 2004 requiring the mother to make Suzy available for contact with Mark, her father and paternal grandmother and the father to make Mark available for contact with his mother and sister, subject to his wishes and feelings. The court expressed concern as to Mark's hostility towards his mother and invited his GP to make an urgent referral to the mental health services.

Mark's views

Awareness of proceedings and views of court

3.62 Mark seemed to be aware of the court proceedings:

'They went to court and it was for a residence order for me and I'd already said I wanted to live with my dad.'

Mark explained that he briefly went into the court, but not the court room itself:

'I went to court but I didn't go into court ... I got taken to court but they said I wasn't needed there in the end so I only just saw the barrister and I didn't even say anything to him then I just went out.'

Mark was not sure if it would have helped if he had told the court what he wanted directly. Mark's father told him about the final decision of the court and commented that it was what he wanted.

Views of the professionals

- 3.63 It quickly became apparent that Mark preferred the work done by NYAS to that of CAFCASS. He stated that CAFCASS were involved at the beginning and when asked what they were brought in to do, Mark explained that it was because he and his sister were separated:

'I think they were trying to sort the whole thing out and stop it being messed up and decide who was living where, trying to get them to talk again and sort things out but it didn't really work.'

Mark explained that he spoke to the CAFCASS officer before and after he had to visit his mother:

'I went down to their offices in town with my dad firstly, but it was like, separate, and I went in there and just spoke because my dad had been there before. Then I went in and I had an interview with the CAFCASS worker and basically just telling them about everything I'd been through and that and asked me why I wanted to live with my dad and stuff. Then there was another interview I think after that and they were asking me all these different questions about going down there [to mum's], because I'd already said "I don't like going down there and don't want to be there".'

Because CAFCASS arranged for him to visit his mother even after he had explained his reluctance, Mark thought that they did not listen to him:

'They still didn't listen and I started to go down there [to mum's] 'cos I had to in the end. It was the Saturday that I was supposed to be going down there and I went outside and basically just refused to go down there and I was shaking, trying to say I don't want to go down there anymore.'

However, he went on to explain that perhaps the CAFCASS officer did listen, but just failed to act on his wishes: *'Yes she was listening, but she wasn't doing anything about it, really. She just wasn't doing anything.'*

When asked why he thought CAFCASS wanted him to see his mother even though he had said he did not want to see her, he speculated:

'She'd believe in some of the lies and that from my mum ... I don't know.'

Mark described an event that upset him when the CAFCASS officer asked him to go into a room with her and explain how he felt directly to his mother:

'On this Wednesday, I went down there and we had to see the CAFCASS officer with me, my sister and my mum at the time. We went down there and I was talking to her [CAFCASS officer] and I was saying I didn't want to see her [my mother] any more because [of the way] she was treating me and that down there. So she'd [CAFCASS officer] taken me into a room and asked me, said "I want to go and tell your mum all of this, but do you want to come in there with me?" And I said "No, not really because it's going to be really awkward." She said "Well, it will make it a lot easier for me to do it." So I said "OK, I'll go in there." I was shaking going in there and she basically told her everything I'd just said! And I'm just sitting there like... "Oh God, what am I supposed to do?" [I felt] really really nervous and shaking. You're not sure how to react because you can see her looking at you... That night I had to go back down [to my mother's house] for my dad to pick me up, because of the court contact thing..., and it was hell because she was giving me abuse about it and that, basically just ignoring me and telling me she hates me...and I was like, "It's not my fault that I hate you"... and then when I got back I had to walk down that road and got loads of abuse off her family, they were telling me, "See what you've done now?"'

When asked if Mark was aware if the CAFCASS officer had told the court what he wanted, he replied, *'There was a CAFCASS report at the end of it or something.'* Mark was not sure if the judge or CAFCASS had decided that he no longer had to see his mother:

'I don't know. I think it was the judge, but I think CAFCASS didn't help the situation as such because, it's really awkward now because she kept my sister separate so it's awkward and it was made ten times more awkward because we have different contact and it would have been a lot easier if we had both been living together.'

In contrast, Mark's view of NYAS was very positive. He explained that they became involved because he was not seeing his sister and that NYAS:

[They] basically made the thing a whole lot better because they got contact with my sister and knew that I didn't want to go down there and I explained every last grievance why I didn't want to go down and see her and they understood and said "Yes, that's no problem".

When he was asked what he thought when he was told that someone else was going to get involved he explained that he thought:

'Well its worth a shot because they are trying to help and I don't see how they are going to make anything worse 'cos there was nothing that they could say that was going to change my mind after what she [my mother] did.'

Mark was able to make comparisons between CAFCASS and NYAS, concluding that he wished that NYAS were involved from the beginning:

'I don't know if they were doing different jobs but it seemed so because ... NYAS were more like contact, everything to get me and my sister to see each other again and build that up, but the other one ... CAFCASS, they didn't really care about that as much. It was more like ... we'll just talk about it, trying to get them [the parents] together but that wasn't going to work after everything and seemed pretty pointless. It would have been better if NYAS were in from the beginning to do that job because ... it would have saved a lot of upset. ... NYAS are mainly for the children and CAFCASS for the adults.'

Mark also preferred the way that the NYAS guardian worked, as opposed to the CAFCASS Reporter:

'She [NYAS guardian] came to the house, whereas with CAFCASS we went down to their offices. But NYAS came here and spoke to me and I told them the whole thing...I think they did the same thing with my sister and they seemed to help get things back together.... CAFCASS seemed to treat you as if you were a little kid in a way even though I was 12 at the time, but NYAS sort of treat you the age you are really.'

Mark was aware that the guardian had spoken to his sister and he explained that Mrs. H did this better than the CAFCASS officer because she spent more time with Suzy and was able to reveal what she really thought, away from the influence of the mother:

'At the time it was awful, because my sister didn't want to see my dad because my mum had basically been getting into her head I think, that because I didn't want to see her she was going to twist what I say, I mean my dad. Because she'd said, "I don't want to see him because of this and this", and the way NYAS had done it, they got into my sister and tried to open up ... they eventually got it out of my sister that she does [want to see my dad], they did it well. She was originally saying "Oh, I don't want to see him, I want to see my brother" and they talked to her for a few times in school away from anyone's harm and it said that in the end "I do want to see him."'

Impact of court proceedings

- 3.64 When Mark was asked how he got on with his father during the proceedings he explained, *'Well, we stuck together through it really. It was hard, not seeing your sister and that. But it could have been worse.'* He commented that at one point the stress of proceedings began to affect his school work but he was given a 'mentor' at school to help him through the stress he felt from not seeing his sister. Mark commented that it made him, *'Upset over little things instead of the usual, that's why I started seeing a mentor at school.'* The only thing that Mark had hoped for but did not happen was that his sister live with him: *'Because she had gone down the judge must have thought she should stay down there it would be a lot easier or something, I don't know.'* He explained however that it must have been hard for his sister to say where she wanted to live:

'I said at the time, "I want to live with my sister but I want to live with my dad as well." But it would be a bit strange because if she went and was asked "Who do you want to live with?" that would be a bit awkward to put on my sister wouldn't it? I imagine she would have really hurt saying.'

Recommendations and advice for other children

- 3.65 When Mark was asked if he thought parents should go to court if they cannot agree about their children, he replied:

'Well yes because otherwise its going to go pretty badly, isn't it? And they are not going to be able to sort things out. Obviously the courts help to sort things out like that but they probably listen to you a bit more and make the situation like, when kids want to live together with each other.'

Mark thought that children should be given the option to go to court if they want to:

'If they wanted to then yes, if they felt that was a lot easier they should have the choice. Because then you can get their say in what they want.'

When Mark was asked how it might be made easier for children going through the process he explained:

'Take action instantly instead of having to wait. Because there has to be a report which has to go to court, which took a while when I was starting to go down there. But if it just took action instantly and said "OK, then, next week you don't have to go down there, and see how that works" or just "Cut the sleeping over contact say, just for a few hours by yourself just you and your sister"... Just meet up and see each other for a bit instead of having to come up here or go down there ... started off like that, because it took a long time.'

Mark explained that it would have been a good idea if the CAFCASS officer could have gone with him to see how contact actually went then,

'They would have realised it and took action then, instead of waiting to write it all in the report and send it off to court and see what the court says.'

Mark had some advice for other children:

'If you don't want to do something, refuse to do it... Say they didn't want to go and see their mum or dad whatever, just refuse... because obviously it's hard, because it was hard to go out there and turn round and say "I don't want to go down", so I'd probably say stand up for yourself really.'

Mark also had something to tell parents:

'Ask them what the child wants. Then the parents know how the children feel about it. And don't just force them into things.'

Summary

3.66 Mark had clearly experienced considerable emotional distress both during the marriage breakdown and court proceedings. He was immediately 'stuck in the middle' between his parents after the parties separated. Unlike most of the other children, Mark did not appear to have any desire to go to court. But like some of the others Mark felt let down by the CAFCASS officer because he thought she had gone against his wishes. The fact that the CAFCASS officer disclosed how Mark felt to the absent parent put him in a difficult position and caused him considerable distress. Mark was much more satisfied with the NYAS guardian. Indeed, it did appear that the work she carried out re-establishing relationships between father and daughter and brother and sister was invaluable.

Natalie, 11 years old

3.67 Natalie appeared over-excited and curious when the researcher arrived. She wanted her sister to stay in the other room during the interview. She also instructed her father to stay sitting next to her throughout the interview and she held his hand. Her father explained that she is always shy with people she does not know and does not talk a great deal until she is familiar with someone. Throughout the interview, Natalie sat close up to her father and glanced at his face following most questions and answers. She appeared a little restless at times. Because she spoke so quietly it was hard on many occasions to decipher what she said. Many of her answers were very brief. Only the resident father was invited to participate because the mother now lives abroad.

Salient features of the case

- 3.68 Natalie is one of two siblings. Her sister Sara is 7 years old and was too young to be interviewed. Both sisters live with their father. Her parents were married for nine years until they separated in 2001. The case was relatively brief, lasting approximately nine months, but involved the children possibly being taken abroad.
- The children initially lived with their mother and her partner (Mr. C), whom the mother married in 2003. Contact took place until June 2004 when the father discovered that the mother had sold her house, taken the children out of school and had gone abroad on holiday. This prompted him to apply for a residence and prohibited steps order in July 2004.
 - In August 2004 a without notice order was made that the maternal grandparents provide information as to the whereabouts of the children and any plans to return the children to the UK. At a hearing in August it was established from the mother's solicitors that the children were now residing abroad and that the mother claimed the father had given his permission for this. The judge directed that a hearing be scheduled to consider the father's application for residence and that the children be made wards of the court on their return.
 - In September 2004 a further order was made granting interim residence to the father until the end of December 2004, with contact to the mother and an order prohibiting the mother from removing the children from the jurisdiction. In addition, the children were made parties to the proceedings and a CAFCASS officer (Mrs. B) was appointed as guardian.
 - In January 2005, the mother made, but then withdrew, an application for a residence order and in response the court ordered that the children's

passports be lodged at the court and the children have contact with their mother in the interim.

- A final contact order was made in March 2005 that the father make the children available for contact with the mother, with several conditions attached, e.g., that the mother must not let the children see Mr. C and that contact took place in the UK.

Natalie's views

Awareness of court proceedings

3.69 Natalie was unaware of the court proceedings until her father told her. She explained that this made her feel sad, confused and angry at her mother because she didn't know what the court was. Natalie said that she wanted to live with her father but, *'I didn't have the guts to tell my mum'* until her mother asked her one day. *'She sat us down in the bedroom and said "Right, who do you want to live with, me or your dad?" and I said "Dad" and she was crying like and she was going to the airport and I started crying 'cos obviously I'm upset.'* Natalie was aware of the final order, that she could live with her father and see her mother now and then. She described how she felt about this:

'I was happy about it, I had a big celebration, when I was waiting for the news, and then we heard the news and then we were happy.'

Views of the professionals

3.70 Natalie explained that Mrs. B was nice and she was a CAFCASS officer. When asked what her role was, Natalie replied, *'Take whatever we say and take it to court.'* She further commented, *'I answered a load of questions when she asked me and it was OK.'* When she was asked why Natalie thought she was nice, she responded, *'Just... very understanding.'* Natalie felt more confident the second time she met her because by then, *'I knew who she [Mrs. B] was.'* Natalie also mentioned she met her barrister (along with Mrs. B) and thought she was also very nice. However she did not understand that they had different roles. When she was asked what was the difference between the guardian and the barrister she replied, *'Nothing. Well, G was a barrister and Mrs. B was a CAFCASS officer and that was it.'* She could not tell they had different roles because, *'They were both asking the questions and they were both writing it down.'* Natalie could not recall what she spoke about with the guardian but she stated that she definitely felt comfortable speaking to her, although she admitted that she did worry that her mum would know what she said, and she said this had affected what she told the guardian. She commented,

'I was like piggy in the middle. It was hard, I was tired of being piggy in the middle.'

Recommendations and Advice

3.71 When asked if she had any advice for other children, Natalie replied,

'Just tell the truth. It depends what they want, then they might not be comfortable there in the first place. They might want to go with their dad then they would be happier and you wouldn't hear any more lies.'

Natalie found it hard to decide whether the courts are a good place for parents or not:

'Don't know, 'cos I don't really know what goes on in court. If it was a court case for one day I'd say no.'

She did not think that children should be allowed to go to court because, *'It is scary'*.

Finally, Natalie had some advice for parents,

'Just support your children because you don't know what they are going through and just whatever they want go through with it. And don't argue.'

Summary

3.72 Natalie's experience of the family courts was relatively brief. She appeared to have limited awareness of proceedings and did not have much understanding of the court. Although Natalie met her barrister she was unaware that the barrister and guardian had different roles.

Olivia, 11 years old

3.73 Olivia had been off school with a head cold the day the researcher visited but she engaged well with the interview nonetheless. She appeared to be a relaxed, friendly, articulate, happy and confident girl. She seemed to be quite content to share her experiences, and asked the researcher general questions about the research. From her demeanour and responses she was a girl who enjoyed and appreciated being able to speak about her experiences. Only the resident mother responded and took part in the research.

Salient features of the case⁸³

- 3.74 Olivia is the eldest of two girls. She has a sister Sarah who is 6 years old and was too young to interview. The parents were married for 10 years and separated in March 2001. The case began soon after the parents separated and lasted until January 2005. Proceedings concerned the extent of contact between the father and the two children. The case was noted by several judges to be a long and bitter fight, with the mother refusing to comply with the majority of orders made.
- It was apparent from the file that the mother refused to accept any professional opinion (including those of two senior CAFCASS officers and a consultant psychiatrist) that contact with the father would be beneficial for the girls. Several CAFCASS officers had attempted to work unsuccessfully with the mother and so NYAS were assigned to the case.
 - In February 2003 a finding of fact hearing took place to investigate claims (made by the mother) of domestic violence and violence towards the children alleged to have been carried out by the father.
 - In October 2003 one of the judges dealing with the case left a note on the file explaining the reasons why he proposed that NYAS represent the children. He was aware that CAFCASS Legal were inundated with work and had to give priority to children at risk. He considered that the mother would not co-operate with CAFCASS and that NYAS would provide clear and independent representation.

⁸³ The file for this case was extremely large. Due to limited time for data collection the majority of notes were made from judgements and the most recent NYAS reports.

- In March 2004 a note by a different judge explained why she was transferring the case to the High Court. She had ordered the mother pay fines on two occasions for contempt of court (rather than sending her to prison) and the mother had become more intransigent as the case had progressed.
- In September 2004 the NYAS guardian (Mrs. T) submitted a report responding to complaints that the mother had made about her work. The mother stated that she was unhappy with several features of Mrs. T's conduct of the case. In addition, the mother claimed that Mrs. T was acting in direct conflict with the children's interests. In the report, the guardian attempted to clarify her role. She recommended that an order be made that the mother allow Olivia to speak to Mrs. T on her own. She also sought judicial guidance as to whether she was required to represent both children or just Olivia.
- A letter from the child psychiatrist, Dr. Z, reported that Olivia revealed she could not tell the NYAS guardian the things she told Dr. Z because she was worried that someone would try to change her views, or that they would not be recorded accurately. Dr. Z explained that she asked Olivia if she could tell the court what they had spoken about but Olivia indicated that she did not wish her to do so.
- A further report written by Mrs. T in January 2005 praised the mother and father because contact between Sarah and her father was taking place as agreed. The NYAS guardian reported however that Olivia now refused to meet the guardian on her own because she said that Mrs. T would bully her like she bullied her mother. Olivia was still unwilling to meet her father and did not like Sarah seeing him. However, Mrs. T stated that Sarah seemed happy with contact and talked about seeing her father.
- In January 2005 a judge noted that there was deep, disproportionate hostility by the mother towards the father which was so entrenched it had contaminated the children. The mother continued to argue that contact between Sarah and her father was preventing Olivia from having a relationship with her sister. The judge disagreed and suggested that Olivia should also see her father with Sarah if this was an issue. The mother stated that she wanted Olivia to see a psychologist but the judge would not allow this. He stated that all the professionals involved in the case had reported that Olivia is a bright, happy child.
- The judge noted that he had considered seeing Olivia on her own but decided against it as he wished to respect what she had said and did not want to force her to see her father. The judge asked the mother to tell Olivia that it was his sincere wish that she consider meeting her father in the future and if she changed her mind to write to him. The mother disagreed with the judge in court and told him she would not comply with his orders.

The judge commented that this was the final order and if the mother did not comply she would face prison (*'I do not issue idle threats'*).

- The final order was made at the end of January 2005 stating that the parents were to have a joint residence order in relation to Sarah, with the father to have indirect contact with Olivia. Finally, the mother was prohibited from referring Olivia to a psychologist.

Olivia's views

Awareness of court proceedings

- 3.75 Olivia appeared to have had little understanding of the court case initially, but as she got older her awareness grew:

'I don't remember when they first started going to court but I do the last couple of years because mum never told me when she was going to court apart from when I was older, but you could always tell when she was, 'cos she'd always be in a suit. Nan would look after us. Mum didn't really talk much about what when on in court. When I got a bit older I started to understand it, not everything, and at the end I understood why they were going to court.'

When asked why she thought her mother did not tell her much about court she speculated: *'I think she kind of wanted to protect me and not to worry about things.'* When Olivia was asked if Mrs. T told her what was going on in court she said: *'No, I don't think she was allowed to.'* However when asked why her parents went to court she admitted that she still did not really understand but that her mother and grandfather had said they would explain it to her when she is older:

'I'm not sure completely, but I guess they were trying to fix things, not trying to get back together...Mum will go to try and help me and Sarah but I'm not really sure what my dad would go for.'

Olivia worried about her parents going to court and was torn between wanting to know what was going on or not:

'I was kind of worried, I wanted to know what was going on but I was kind of in the dark but at the same time I didn't want to know what was going on.'

When Olivia was asked if she asked her parents what was going on at court she replied, *'No...I don't know why I never but I just didn't.'* In addition, Olivia explained that she was constantly anxious throughout the time her parents were involved in proceedings:

'I was always worried or scared and yes... upset and worrying about something and [I] seemed to be worrying about something else and always feel a bit angry and upset.'

Olivia explained that the main reason she felt so worried was because she did not know what was going on and she was uncertain about the future:

'About things like what was going to happen and what was going on because I was a bit in the dark so I didn't really understand, 'cos even like now, I still don't understand what was going on.'

It appeared that Olivia was aware of some of the final decisions of the judge:

'At the end he [the judge] definitely said "If Olivia doesn't want to go she doesn't have to go anymore". But they said that Sarah has to go. I think it was 'cos she was so small, 'cos she is only six so she didn't really get a choice to say whether she wants to go or she didn't. But they said that I don't have to go.'

Olivia confirmed that it was her mother who told her what the final order was:

'My mum told me that they said I didn't have to go and she also told me that Sarah had to go, and why she had to go, 'cos she was so small.'

However Olivia did not mention that the Judge had expressed his sadness at her decision. Olivia stated she has mixed feelings about the final order:

'I was happy 'cos I didn't have to go but I was kind of angry that Sarah did 'cos like, I've never spent ages without Sarah and every two weeks, Sarah goes for a weekend and I don't see her and I don't want her to go 'cos I always worry about her.'

Views of the professionals involved

3.76 Olivia seemed to be somewhat confused by the number of different professionals she had spoken to, struggling to recall names and roles of the various people. This made it quite difficult to decipher to whom she was referring. Understandably she recalled most about the latest officer assigned to the case – the NYAS guardian, Mrs. T. Olivia only vaguely remembered a lady from CAFCASS:

'There was another lady, but I don't know if she was from the same place. She was called B. But that was right at the start, she was only involved for a bit. She set up this space, I can't remember where it was, but we used to go to this place to see my dad and she would come and talk to us sometimes.'

Olivia also remembered another lady whom she spoke to near the beginning of the case, but she did not know where she was from (a CAFCASS officer or psychologist):

'I can't really remember whether I started to see someone before I went to Dr. Z. I think the courts stopped that too. I think that was before Mrs. T... I can't remember really, but she was really nice and I used to do games and things together and it would always make me feel better talking to her because we would talk but do it all in games.'

Olivia explained her views about Mrs. T:

'Yes, there was one lady, near the end, she didn't seem to listen to me or understand. If I told her I didn't want to see my dad she would ask me questions and then the next questions she would ask was "Well, do you want to go and see your dad?" and I just told her I didn't, so she would say "Do you want to write him letters?" and I just said no, and then she said "well do you want to talk to him on the phone?" and I said no and she just kept asking me questions. But I'd already told her I didn't want anything to do with my dad and I think that she didn't really like me or my mum and she liked my dad and she was like trying to help him.'

Olivia recalled that she met Mrs. T quite a few times:

'She used to keep coming to talk to us quite a lot and that's good 'cos once she came and we were in the other room and she was here for like two or three hours and she was asking me all questions and stuff.'

Olivia was aware that Mrs. T would tell the court what she said:

'She would talk to me and then she would always go to court whenever mum and dad used to go to court. She was supposed to tell the court what I wanted and stuff.'

When asked how she felt about speaking to Mrs. T, Olivia explained that she was frustrated that she did not appear to be listening to her:

'Kind of frustrating 'cos she wasn't listening to me and then she kind of turned things around when she went to court. Some things she said I wanted this, but I didn't really, she wasn't listening.'

In addition, Olivia felt angry when she found out what the guardian had reported to the court but she did not feel she could confront Mrs. T with this:

'Well, I didn't find that out right away, but I have to be honest that I listen to people's conversations. I kind of found out... I felt quite angry with her 'cos she hadn't listened to what I'd said and she made it sound like I wanted to talk to my dad, which I didn't. [After this] whenever she'd ask a question about my dad I'd kind of ignore her a bit. I'd say no, and I'd just keep saying, and whatever she'd say I would make it clear that I didn't want to see him, but I think after a while she kind of still didn't understand.'

Thus it appears that Olivia's view of the NYAS guardian changed after she found out that that Mrs. T had apparently not represented her correctly:

'At the start I thought that she'd always be there and that I could talk to her and trust her but near the end I kind of couldn't really trust her.'

Overall it appeared that Olivia thought it was a good thing that she had someone like Mrs. T:

'It felt good but it took quite a while for people in court to listen to me. At first, they just thought you were just saying that to get your own way. But after a while they started to listen. When the judge listened I felt very happy that things were actually working my way now. It was kind of good to have someone else to talk to 'cos I wanted to talk ... 'cos I think when you talk to someone it kind of makes things a bit better. Talking to people makes me feel better. I don't know for anyone else, but for me talking to someone is always made me feel a bit better.'

When Olivia was asked if she felt able to tell Mrs. T what she wanted she explained that she also spoke to a child psychologist (Dr. Z) whom she felt she could talk to more than Mrs. T.

'I kind of trusted her 'cos I thought she would listen to me. I kind of trusted her at the start, so I would tell [her] things. I went to see a special children's person called Dr. Z, 'cos when I found out that I didn't really like Mrs. T, my mum took me to this place, I can't remember where it was, and I talked to a specialist called Dr. Z. I could talk to her and she wouldn't tell anyone else. [But it was] stopped 'cos the court said I couldn't go because... Mrs. T actually said to me "Dr. Z asked me if she could tell them" ... [Dr. Z] asked me and I told her that I didn't want her to, so she [Dr. Z] told the court that she wouldn't tell them. She said that she wouldn't tell them anything that I told her' 'cos it was confidential... and [the court] said I couldn't go to her anymore.'

Olivia was asked why she didn't want Mrs. T to know what she had spoken about with Dr. Z:

'Cos she would have told the court and then everyone would have known and I wanted them to know how I didn't want to see my dad but I didn't want them to know everything.'

Olivia was not sure whether it was the court's or her mother's idea that she should have a guardian:

'I don't know really. I don't think I asked for one, 'cos I had a person to talk to at the time. I don't know if it was my mum's idea or the court's idea to have someone to talk to, I think it might have been a bit of both.'

Later she speculated that it was her mother's idea for her to see a psychologist but the court's idea that she see Mrs. T.

Views about going to court and court procedure

3.77 Olivia explained that she did not go to the court, but her mother and grandfather spoke for her to tell the court that she did not agree with what Mrs. T had written:

'No I haven't been to court but I know that mum and grandpa told the judge that I never said that and I think the judge kind of listened to me in the end.'

When asked if she would have liked to have gone to court, Olivia was not sure:

'I don't really know. I would have kind of liked to know what was going on a bit, but it seemed kind of a bit scary. But I always wanted to go to help mum and see what was going on.'

Olivia thought that only older children should be permitted to go to court if they wish:

'It was kind of good that I never went to court 'cos probably, if I did, I would have been worrying about things more. But sometimes, you just want to know what is going on 'cos sometimes you can go to court I guess. Maybe if you are a bit older say, like 14 or something like that, for some people it would be good that maybe they could go once in a while 'cos they probably understand things more. But when you are like seven or something it wouldn't be a good idea.'

Olivia did not think that she had her own solicitor.

Advice and recommendations

3.78 Olivia considered whether she would want a guardian to come and ask her what she wanted if she had to go through the experience again:

'I don't think I'd really want someone where Mrs. T came from 'cos I don't know whether I'd trust them again, but I might after a while, but I don't think at the beginning. I don't think I'd really want it. I guess it's just 'cos I've had a bad experience. I'm not saying all of them would be like that again, it ... I would just think after that experience I wouldn't want someone from there again.'

However, Olivia explained that a different guardian may be useful for other children who may go through a similar experience. She considered what she would say if a friend of hers was told that a guardian was coming round to talk to them:

'If they seemed happy about the idea I wouldn't kind of say, "Oh you know it was all bad for me" 'cos it might not be like that 'cos the person might be really nice, and if I've said something, like told them...they might think other people would be like that even though they have a really nice person but they might not see it 'cos they might be like, "They're all horrible".'

Olivia also stated that generally it is important for children to have someone to talk to, whether they are from the court or somewhere else:

'It is good for children that need someone to talk to, 'cos it's always nice to know that you can say to someone and talk to someone and that they'd listen to you and you think that you've got another friend.'

When asked to consider if parents should have to go to court when they can't agree, Olivia commented:

'It seems like for some people a good way to sort things out, but to me and probably for other people as well it's kind of scary 'cos you don't know what's going on. I think it's bad.'

However, she could not think of an alternative to court.

When Olivia was asked about what could be done to make the family court experience easier for children, she considered that the most important thing was that children have someone to talk to:

'I don't know really. I think that it's good that all children have someone to talk to, because I know it made it a bit easier for me knowing that I had someone to talk to. Not really Mrs. T but even if you weren't involved with the courts it was good to know that you could just go and see them whenever you wanted to see them 'cos you had an appointment and you could talk to them and tell them how you are feeling, and you knew that no one else would know what you're saying unless you wanted them to.'

Olivia explained what advice she would give to other children:

'Find someone that you know that you can talk to who is a friend or say even a teacher. Friend or family, just someone you can talk to, that is always a good thing to have 'cos it's really important to have someone to talk to 'cos it kind of helps you get through and it's also good to just try and be strong. It's really hard not to just burst out crying or something but you've just got to try and be strong.'

Olivia also had some advice for judges and guardians:

'I'd tell them they need to listen to everyone even if they have two different points of view. You need to listen to everyone and help everyone and not just "I'm going to help this person and ignore that one" and you need to listen to both sides and help them both and figure out which is the right side. But if both of them are right and both good, to try and help them both and to listen to everyone.'

Finally, Olivia considered listening to children:

'I guess that's the most important thing 'cos the children are mostly the ones, well I think are the most important things to say 'cos they normally, I don't know, but they have a better brain for some things. I think all the judges and stuff they should listen to the children as well and not just ignore them.'

Summary

3.79 Speaking to Olivia revealed that she was indeed caught up in a very difficult situation which appeared to cause her considerable emotional distress. Nevertheless it was also apparent that Olivia has been able to cope with difficult circumstances and in fact she commented that she considered herself a stronger person as a result. This apparent resilience could partly be a result of the fact that she felt she had had several different people to talk to (including court reporters and psychologists and counsellors) and for Olivia, talking about her problems seemed to help her deal with the situation. This case therefore highlights how important it is for children to feel they have someone to speak to. It also highlights the fact that children in these difficult situations are torn between the anxiety created by being aware that proceedings are taking place but not knowing exactly what is happening and the (perhaps comparable) anxiety of knowing what is happening at court; suggesting that both situations can be distressing for the child.

Summary of children's interviews

- 3.80 In general the children accepted the idea that if their parents could not resolve their differences in any other way, a neutral judicial authority of some sort was needed. The children wanted the court and the judicial authorities to be "child-friendly" and work in such a way that if they wanted to put their view to the judge directly, the setting and the judge should be sufficiently approachable to enable them to do so.
- 3.81 Most of the children liked the idea of someone appointed by the court to help them have their say in proceedings. Furthermore, a number of children wanted someone accessible to them, apart from their parents, to support them through the litigation process. The role required by the children is that of a *passage agent* i.e. a trustworthy person, able to relate to the children with empathy informed by psychological and legal understanding, who can help the child navigate the turbulent waters arising from their parents' dispute. For some children this role was performed by a guardian from CAFCASS (and in several instances from NYAS). For some older children the solicitor emerged as the key figure in this respect. But there were other children who did not appear to have found anyone they could trust and relate to. They appeared "lost", withdrawn, depressed and sometimes angered and intimidated, by their contact with the family justice system.
- 3.82 A number of children were clearly ignorant, confused and made anxious knowing that their parents were going to court to contest residence or contact. They imagined the courts to be "scary places" with judges who have the capacity to "punish" their parents. Some children worried that one or other of their parents could be sent to prison for behaviour for which they themselves felt responsible, such as refusing to go on contact visits.
- 3.83 The implications of these findings are that children need to be given reliable information about the court/litigation process in an appropriate form, as far as possible at the beginning of this process. We doubt whether leaflets (however child friendly and well-designed) are necessarily the best way to do this and suggest a more supportive role for CAFCASS in this respect.

- 3.84 The children generally had clear ideas of what constitutes a “good” guardian i.e. they wanted the person appointed to give them enough time to get to know them; they wanted someone they could trust who could communicate with them at their level and who was not patronising; hasty interrogations were disliked while a friendly conversational style of interviewing was preferred; they wanted clear explanations not only about the guardian’s role but about the whole court process. This was particularly important if parents had failed to explain things or had done so in a biased or inaccurate way. They particularly wanted the guardian to report accurately to the court what they had told them. They were upset if it appeared to them that the CAFCASS reporter and/or guardian had promised to respect confidences but had then breached this in the report to the court. Perhaps more than anything else this appeared to be the strongest criticism that the children levelled at guardians. A number wanted guardians and/or their own solicitor to keep them regularly informed about the progress of the case. Having an independent neutral source of reliable information was seen as better than having to rely on partial information from parents who were emotionally embattled with each other.
- 3.85 Where the children had established effective, supportive relationships with their guardian and/or solicitors, they reported feeling having been made more confident both in terms of being able to get their views over to the court and also by the experience of being treated with respect.

Chapter Four - Parents' views

Introduction

- 4.1 The following chapter is a summary of parents' views regarding the process of separate representation. Of the 23 parents interviewed, only 22 parents are included in the analysis of parents' views below. This is because one non-resident mother (from the PRFD) was unable to provide any information on the topics we covered because she was in a disorganised, vulnerable state when the interviewer visited her. At least five other parents included in the sample were also in either difficult circumstances or appeared to have some level of emotional distress. Six parent interviews were conducted on the telephone either because the parent felt more comfortable or for safety reasons.
- 4.2 The table below provides some details of each parent's case. The children whose interviews are discussed in Chapter Three can be identified by name, although as with them, all names have been changed to protect parents' identities.

Table 2: Details of parents in the sample

Parent	Originating court	Children (age)	Length of case (years)	Type of case	GAL – same or different	No. of judges	Contact occurring?
Harry NR Father	Manchester	Girl (13)	4	Residence & contact	Same	10	Yes
Brenda R Mother	Leeds	Brian (11)*	8	Contact	Same	3	No
Douglas NR Father							
Susan NR Mother	Leeds	Girl (12) Boy, (7) Boy (6)	1 ½	Residence & contact	Same	1	Yes
Georgina R Mother	Leeds	Girl (15) Girl (8)	3	Contact	Different	2	No
Vicky R Aunt (of girl only)	Leeds	Girl, (10) Boy (9)	3	Residence & contact	Different	1	Yes
Geraldine R Mother	Leeds	Craig(15)* David (11)*	3	Residence & contact	Different	3	No
Tanya R Mother	Leeds	Elizabeth (11)* Girl (7)	4	Contact	Different	3	No
Mark R Father	Leeds	Boy (14) Fiona (11)*	2	Residence & contact	Same	1	No
Lucy NR Mother							
Sarah R Mother	Leeds	Girl (16)	14	Contact	Different	2	No
Robert NR Father							
Ivan NR Father	Leeds	Girl (7)	5	Contact	Different	2	Yes
Jackie R Mother	Leeds	Gareth (14)* Holly (9)* Girl (5)	7 ½	Residence & contact	Same	1	Yes
Darren R Father	Leeds	Ian (8)*	4	Contact	Different	6	Yes
Colin NR Father	Liverpool	Boy (8)	6	Contact	Different	13	No
Beverly R Mother	Liverpool	Jane (17)* Kathryn (16)* Lee (11)*	3	Contact & name change	Different	6	No
Jimmy R Father (of boy only)	Liverpool	Mark (14)* Girl (8)	1 ½	Residence & contact	Different	6	Some
Bobby R Father	Liverpool	Natalie (11)* Girl (7)	9 months	Residence	Same	1	Yes
Ginny R Mother	Liverpool	Olivia (11)* Girl (6)	4	Contact	Different	10	Some
Zoe R Mother	PRFD	Girl (7)	Ongoing (4 years)	Contact	Same	6	Yes
Roger NR Father	PRFD	Girl (8) Girl (8)	Ongoing (5 years)	Contact	Different	5	No

* = The child was also interviewed, see Chapter Three.

R = Resident Parent. NR = Non-Resident Parent

Nb. One child is missing from the table (Adam) because his mother produced no usable data.

Demographics of the cases

- 4.3 As can be seen from the summary table, of the 19 cases included in the interview sample of parents, the majority originated from Leeds (58%). This is not surprising considering the highest number of cases which had been subject to a r 9.5 direction were identified in Leeds Combined County Court. Just over a quarter of families interviewed had their case heard in Liverpool County Court. The remaining cases where at least one family member took part in the interviews came from the PRFD (2 cases) and one case from Manchester County Court.
- 4.4 The cases lasted from nine months to 14 years and were on average four and a half years in length.⁸⁴ However, the two cases originating from the PRFD had not yet been concluded and court proceedings had already begun again in one other case. In addition, in three other cases one party informed the researcher that further court proceedings were likely. Just over half of all cases (58%) concerned contact arrangements only, whilst the remainder (42%) dealt with issues of both residence and contact. One case initially addressed contact arrangements and subsequently the issues surrounding the children's wish to change their surname. In just under half (47%) of cases no contact was occurring, while in two cases some contact was occurring with some parties in each family. The mean number of different judges that parents estimated had dealt with their case was just over four. In just over half of cases (58%) parents indicated they saw three judges or fewer, while three cases reported seeing ten or more different judges.
- 4.5 The majority of cases (12, 63%) had a new officer assigned to the case to carry out the role of guardian, while in 7 cases (37%) the professional assigned as children and family reporter also carried out the role of guardian.
- 4.6 Not all parents were able to give their opinions on all of the topics below. In some cases this was because they were the non-resident parent and so had a lacked knowledge regarding certain issues, particularly when contact was not taking place. In other cases high emotion meant the interviewee often became distracted when attempting to answer a specific question. Specific circumstances also meant some parents could not comment on all issues. For example, one non-resident mother, Lucy, played a minimal role in proceedings (she never attended court and had little to do with the guardian) which meant she could not comment on many of the issues covered in the interview. Another non-resident mother, Susan, suffered

⁸⁴ Four years if outliers are removed.

from severe depression at the time of proceedings which may have impaired her ability to answer all questions. In cases where there is missing data statistics are calculated based on those parents who were able to provide data to give a fair representation of views.

The role of the children and family reporter (CFR)

- 4.7 Three parents (Lucy, Mark and Bobby) could not comment on their understanding of the role of the CFR because these cases were relatively short and they did not appear to experience the work of a CFR, but only a guardian. The majority of comments below are by parents who had a different officer acting as CFR and guardian. Parents who had the same officer for both roles were less able to comment on the two roles individually. Almost all parents interviewed understood that the CFR was there to write a report for the court after interviewing the parties. Just one (Lucy, a non-resident mother, mentioned above) did not have this opinion; instead she was not sure that any reports had been written or, if any had been written, she had not read it. Some parents (5, 26%) explained that the CFR was there to investigate the situation. For example, Geraldine (a resident mother) explained:

“The first time I had to go to her office. She just wanted to know my life story really. She just built up a sort of picture of me as a person, as a mum and also built up a picture of my ex husband.”

Other parents (4, 21%) reported that the officer was assigned to investigate allegations made by one party. Robert, a non-resident father, reported that the CAF/CASS officer set up a contact session to investigate allegations made by the mother:

“The only reason for doing it would be to look for evidence which would substantiate the mother’s claim of sexual abuse”.

Two parents (11%) mentioned that the CFR was there to provide an independent view. Ginny (a resident mother) stated:

“Well she was independent. She was supposed to do a court report on the best scenario for the children and what was the problem. She was not being employed by my ex’s side, she was not being employed by my side, she was being employed by the court to give an independent view. She never said she was there to work with any of us. She was there to write a report about the whole situation and give her professional point of view as to what the best outcome would be.”

Just under a third of parents (6, 32%) thought that the role of the CFR was to set up and/or supervise contact. For example, Rodger (a non-resident father) explained:

“...they needed to understand how the children responded to me and to do that they had to have an observed contact.”

Some parents (7, 37%) mentioned that the CFR was there specifically to interview the child, or for the benefit of the child. Each parent who expressed this view had a different officer brought in as guardian:

“Well she wasn’t really interested in me. She was just sort of giving me an outline of what she was here for, but it was all about Craig and that was fine, I understood, but I felt more at ease that she told me that this was what she was here for, this was how she was going to do it”

[Ginny, Resident Mother]

“The CAF/CASS thing was there to sort of go ‘Come on guys, play fair, think of the child’, you know, all that routine.” [Darren, Resident Father]

“I thought they were there to represent the kids. That’s just how I thought, to see where the kids were going to live and that stuff.”

[Jimmy, Resident Father]

Satisfaction with the Children and Family Reporter

- 4.8 Similar to the issue above, parents who had the same officer acting as CFR and guardian were less able to separate their satisfaction with the service performed under the guise of CFR to that of work carried out as guardian, or indeed differentiate their views on the person in general in each role. The number of parents who were able to give their opinion on this subject exclusively was just 14. Of the parents who were able to explain their satisfaction with the CFR, just over a third (5, 36%) were satisfied with the service they performed. Exactly half of parents (7, 50%) were not satisfied with the officer and the work they carried out while the remaining parents (2, 14%) expressed mixed views regarding the CFR assigned to their case. All of the parents who held positive views of the CFR also indicated that they either agreed with the parents’ views and/or the outcome went in their favour. Similarly, all of the parents who expressed negative views of the CFR suggested that the officer disagreed with them or the final order was not what they were hoping for.

Positive views of the CFR

- 4.9 Parents who expressed positive views of the CFR often explained that they felt supported, understood and listened to. For example:

“She [the CFR] was really good because I felt that was good for Craig, that he didn’t have to go another official environment - she came to the family. She told me what she was about and made me feel okay. I felt that she had a good insight and she weighed everything up right, as if she’d actually really seriously listened and took on board what we’d said because she seemed to, in the report, added such good balance to it. She seemed to have worked it out really well. I was quite impressed.” [Geraldine, Resident Mother]

"I was quite happy with her because I felt that, number one, she believed us, and number two, she was on our side. I felt that she was very supportive." [Sarah, Resident Mother]

"She [the CFR] was okay with the children. I mean, she met Lee, she had a wonderful sports car and let him go and play with the roof and everything, she was quite child-orientated so I was happy. I mean, I didn't stay in the room with them, but the way she was, I thought, you're not going to have any detrimental effect on my children, because that was a concern. When we got the report back it was fair. She put down my views... she actually wrote it as I said it, what my views were. She didn't make out I was some woman who was trying to manipulate my children." [Beverly, Resident Mother].

Parents who had positive views also appreciated that the CFR added an independent view of the situation. However, one non-resident father thought that the impartiality of the CFR actually had a negative effect on the case:

"He [the CFR] was very tactful, very reasonable, very understanding. In a way he was sympathetic to both of us without actually taking any side and I thought that was very tactful. In some ways it was why it didn't work really. He was so tactful that he couldn't recommend either or anything to the court eventually." [Roger, Non-Resident Father]

Negative views of the CFR

- 4.10 The main reason parents gave for not thinking that the CFR played a useful role was that the individual assigned was biased towards the other party (4, 57%). In addition, all but one of the parents who had this view also claimed the CFR lied in the report. For example, Robert (a non-resident father) explained:

"Certainly in the very early stages all the support was going on to the mother's side and absolutely no support coming on to my side. The feeling that I had was that they all believed the mother, that it was an open and shut case so why bother, let's nail the bastard. I never felt there was open sense of inquiry. The court welfare officer lied in that report ... She claimed that she had consulted two child psychiatrists. [I] contacted the court welfare officer to find out who these two psychiatrists were which she referred to in the report because there were no names given in the report and they didn't exist."

Ginny, a resident mother, also complained that the CFR was not independent and lied in the report:

"Her [the CFR's] relationship with my ex was unprofessional to put it bluntly. She would walk in, she has actually looked at me and walked past me and not even acknowledged me and then ... it's been witnessed ... she would go over and have a full in depth conversation

with my ex and his family and totally blank me. She was never independent at all. The complaint was her reports were one-sided - the lies that were in the reports. I got told that that was my own fault that they should have been questioned in court, but there is no way you could go in there and say 'the CAFACSS report this time, there are a couple of things I would like to point out on there that aren't right' the judge would just say forget it."

Two parents (29%) mentioned that one reason why they were not satisfied with the work of the CFR was because they did not accurately represent the child. Tanya and Ginny (both resident mothers) both explained that they either did not include the child's views in their report, or they did but it was not what the child had said. Other reasons that parents gave as to why they were not happy with the CFR included: the report was 'textbook'; the officer did not understand the parent's point of view; the parent had to go to the CAFACSS office to meet the reporter; and contact was badly supervised. Two parents expressed mixed views which indicated that they were generally satisfied with the CFR except for one or two details. For example, Darren (a resident father), thought that the officer was good at her job but her role was limited, while Jimmy (also a resident father) was generally happy except he was disappointed that the officer insisted on arranging contact even when his son was against it.

The role of the guardian

- 4.11 Over half (13, 59%) of parents appeared to have some understanding of the role of the guardian while just under a third (6, 27%) indicated they had limited understanding of the role the guardian was there to perform. The remainder of parents (3, 14%) appeared to have mixed understanding of the role of the guardian. All of the parents who seemed to have some awareness as to the role of the guardian indicated that the guardian was there to represent the child, find out what the child wanted, or protect their rights:

"They needed to get a proper understanding of how the children felt about it independently from me which I totally understand. I know there are women out there who try and convince their children it is in their best interests not to see their father. It's a very selfish motive."
[Georgina, Resident Mother]

"The guardian was there to represent my daughter's interests in that she was there on her behalf as far as I understand it. She was there to look after my daughter's rights." [Robert, NR Father]

"She [the guardian] was very positive, saying she was going to see the children as many times as possible, she was going to discuss with them outside of their mother's influence various things, properly and professionally. She wouldn't just openly ask them silly questions but

she would try and glean from them how they felt about contact that they might be able to arrange with me.” [Roger, NR Father]

“To be the man in the middle but not to take sides. His job was to listen to her side, listen to my side, and write a report based on what he said and put my daughter’s side as well.” [Harry, NR Father]

Three parents (Georgina, Colin, Zoe, 14%) commented that the guardian was there for the child, not the parents. For example, Georgina (a resident mother) explained:

“He [the guardian] said to them [the children] that he was working in their best interests, not in mine, not in their father’s, and that whatever he recommended would be for their good”

Just under a third of parents did not mention that the guardian was there for the child. These parents’ account of the role of the guardian included: to organise mediation between the parties, to visit everyone and write reports, to arrange and/or observe contact, to assess risk and to break the deadlock between parties. For example, Douglas (a non-resident father) at first thought the guardian was the child’s solicitor, possibly because he had the same CAFCASS officer acting as guardian, and did not notice a difference in her role, although he was aware that her title had changed:

“There was just the CAFCASS officer and then she assumed some other bloomin’ title or whatever, family reporter and whatever. She was just carrying on as she was before but she had a title change or something.”

One non-resident mother, Susan, was not sure what the person acting as guardian did, possibly because she had suffered from severe depression and had been asked to leave her ex-partner’s house which she saw as ‘losing the children’. She had trouble recalling facts around that period as she admitted she was, *“in a mess, I had absolutely nothing”*. She was aware that someone came to speak to the children (aged 12, 7 and 6 years old) from the court, but she did not think it was a good idea:

“From what I gather, that man who came here went back to speak to them [the children] but what could kids at that age know? The kids at that age don’t know anything really.”

Ginny (a resident mother) thought that the guardian should have been there for the child, but in her view the officer did not act accordingly:

“The guardian did not do anything different from what CAFCASS did. You’d say to her, ‘you’re here to represent the children’s views’ but she’d say ‘I’m here to do a report for the court’, ‘no, you’re here for my children’ and I even ... we had some, not heated discussions because she had to say in one of her reports even when I disagreed with her I was always polite about it.”

Three parents (14%) had mixed views regarding the work carried out by the guardian. Ivan, a non-resident father generally found the interview difficult because he experienced anger when talking about the case. At first he did not think the child had been assigned a guardian:

"It wasn't actually a guardian, it was just a solicitor... no it wasn't, it was a higher ranking CAFCASS officer who came round her, it was not a guardian as such. He just came round and had a look. Was he the guardian? [refers to his paperwork] Yes, she was ordered a guardian and her own solicitor."

Another parent with mixed views regarding the role of the guardian was Jackie, a resident mother. She was able to explain what the guardian did at various times throughout the interview including: listen to and befriend the children, agree contact, mediate between the parties and explain the situation to the children. But on several occasions during the interview she also stated that she did not know or understand what the guardian's role was:

"I don't understand what the guardian is for. That wasn't clearly explained to me. Well, I didn't explain to them [the children] about this guardian bit because I didn't understand it. Because he didn't do anything from that point. He did more as a CAFCASS officer than he did as a guardian. I don't understand what he was there to do, other than to please my ex-husband and calm him down"

Of the twelve parents who had the same person acting as CFR and guardian, two (Jackie and Douglas) explained that they did not see a difference to the person's role after the title change. One resident mother (Zoe) found it difficult to articulate the role of the person when they assumed either title. For example, when she was asked about the role of the CFR she stated, *"She was supposed to be neutral, not me or him, she had to be with my daughter"*. When asked what that person's role when she had assumed the role of guardian, she replied: *"Again, to ask my daughter why she doesn't want to go and sleep at her dad's house"*.

Satisfaction with the guardian

- 4.12 Just under a third of parents (7, 32%) did not have a favourable view of the guardian or what they did; another third of parents (7, 32%) were satisfied with the guardian while the final third of parents (8, 36%) had mixed views. Similar to satisfaction with the CFR, all of the parents with negative views of the guardian were also dissatisfied with the outcome of the case, while all but two of the parents with positive views were also satisfied with the final order.

Positive views of the guardian

4.13 The reasons parents gave for their positive view of the guardian included:

- They were good for the child:
 - The guardian built up a good relationship with the child (Brenda, Georgina, Vicky, Mark, Bobby)
 - The child was pleased to have someone to talk to (Georgina, Vicky, Mark, Jimmy, Bobby)
 - The guardian helped the child in some way (Georgina, Jimmy)
 - The guardian understood what the child wanted (Brenda, Georgina, Geraldine, Bobby)
- They had a good understanding of the situation (Brenda, Sarah)
- They provided support to the parent (Brenda, Georgina, Vicky, Geraldine)
- The guardian was truthful and honest (Georgina, Colin)

As can be seen from the list above, six parents reported that the guardian was good for the child in some way. For example, five parents explained they thought it was positive that the guardian was able to build up a good relationship with the child:

“He took the trouble to develop a relationship with the children, which I was very grateful for because in actual fact, he was more like a big brother by the end of it and they trusted him.”

[Georgina, Resident Mother]

“Over the period of the report she came to see Fiona twice, once here and she took her out for tea which I thought was really good because it gets away from the family and I think the most difficult thing I suppose for children is to get them talking and without them feeling questioned.”

[Mark, Resident Father]

Five parents had a positive view of the guardian because they thought that the child was pleased to have someone to talk to:

“I think it was an absolute relief [for the children]. He just had this way with the kids and he’s lovely, I like people who are straight forward and he was very straight forward. And like I say, he wasn’t on my side, he wasn’t on my husband’s side, he was on the children’s side and he wanted what was best for them. That was the way to go as far as I was concerned.” [Georgina, Resident Mother]

“I mean, she did tell the guardian some things, she did say, ‘You won’t tell my auntie what I’ve said?’ So I don’t really know what she said but she was quite at ease with the guardian, she felt as though she could talk to her.” [Vicky, Resident Aunt]

"I think it helped Fiona. Because it was like having someone in the middle, somebody who would go to court but it was somebody who she could talk to. I think it was good and I'm sure it helped because Fiona was in the position where she wanted to see both [parents] there were times that I found out [she said], 'I didn't want to tell you that dad because you would be upset'. She couldn't tell me but she could tell someone else ... Fiona needed someone to confide in because there was a fear of it upsetting me. So I think it was a good idea."
[Mark, Resident Father]

In addition, four parents were pleased when they thought the guardian understood what their child wanted:

"These people are trained they know what they are doing, they do listen to your children, at least I had a positive experience with mine. He really was bang on the money and he understood exactly what they meant, where they were coming from. He didn't patronise them, which again is very important." [Georgina, Resident Mother]

"Yes the guardian understood my worries for the girls and the girls' worries as well, not just mine." [Bobby, Resident Father]

Another example of why parents thought the guardian was good for the child was because they helped the child not only providing emotional support, but also in practical ways:

"Every time there was going to be a contact session the guardian would come round and talk to her and find out how she felt afterwards and debrief. Which I think she found very useful as she was able then to express herself fully and if he'd [her father] said something that disturbed her, such as 'I miss you, do you miss me?' At one stage I remember she said 'if he says do you miss me I don't know what to say because I don't want to hurt his feelings but I don't want to say yes I do because I don't'. And the guardian suggested that she say 'well I'm here now so let's just enjoy today' and actually she did say that to him so he was able to give her tools, because at this stage in the game she didn't really want to be in the situation she was in but she didn't want to hurt anybody's feelings. At the same time, she didn't want to say things that she knew were not going to be true ... its quite a dilemma for a little girl, but he was very useful in as much as he really did give her something to work with." [Georgina, Resident Mother]

Finally, many parents felt the guardian provided support for them, for which they were grateful. For example, when Vicky (a resident aunt) was asked what was most helpful to her throughout proceedings she replied:

"Having the guardian to help me. I think it helped me a lot her coming to talk to me". Brenda had a similar experience:

“It’s such an emotional time, it definitely helps that you’ve got somebody, it helped me without a doubt. I can’t speak highly enough of her, she really was very good.” [Brenda, Resident Mother]

Negative views of the guardian

- 4.14 The reasons parents gave as to why they were dissatisfied with the work of the guardian were as follows:
- When one party refused to comply with the contact order the guardian was not able to enforce it (Harry)
 - They would say one thing to the parent then write something different in the report (Harry)
 - They were biased towards the other party (Harry, Tanya, Robert, Jackie)
 - The guardian didn’t help the child because:
 - The guardian put too much pressure on the child (Brenda, Douglas, Sarah, Jackie, Roger)
 - They broke the trust of the child (Tanya)
 - The questions they asked the child were inappropriate (Jackie, Sarah, Zoe)
 - They forced contact (Sarah, Ginny, Jimmy, Georgina)
 - They were not child-oriented (Beverly)
 - They didn’t represent the child accurately (Tanya, Beverly)
 - The parent didn’t agree with the guardian’s recommendations or actions (Tanya, Lucy)
 - The guardian didn’t listen to or understand the parent’s concerns (Tanya, Darren, Ginny, Zoe)
 - They lied in the court report (Tanya, Robert)
 - They left child alone during supervised contact (Tanya)
 - They weren’t approachable (Lucy)
 - They didn’t do what the parent hoped they would do (Robert, Jackie, Roger)
 - The guardian saw the parent in a bad light according to a stereotype (Jackie)
 - The report was inaccurate (Jackie)

As can be seen from the list above, one reason parents were dissatisfied with the guardian was because they thought they had a negative effect on the child in some way. For example, five parents thought that the guardian put too much pressure on the child by asking them for their views:

“When the guardian turned up at his school, I don’t know whether she brought him sweets or whatever to bring him round, he’d be just sat there like that [folds arms and doesn’t say anything], which I can understand, it’s a bit of pressure to put on him.”

[Douglas, Non-Resident Father]

Three parents believed that the guardian asked their child too many or inappropriate questions, or attempted to manipulate the child. For example, Sarah, a resident mother explained:

“I just think it is a shame that she had to keep asking her the same questions over and over again and not accepting what my daughter was saying. She [the child] was extremely frustrated because she was at an age where she was quite able to say what she did and didn’t want.”

Another resident mother, Zoe, had a similar opinion. This perception meant that she would not allow the guardian to speak to her daughter without her being present:

“There were lots of leading questions to her [the child]. I wrote a letter saying that you asked leading questions [when] you didn’t get the response you were looking for.”

Two parents were unhappy with the guardian because they felt they did not represent the child accurately. For example, when Tanya (a resident mother) tried to tell her solicitor that the guardian’s report did not reflect what her daughter Elizabeth wanted, she was told that her daughter was unlikely to tell her what she really wanted from fear of hurting her:

“I’d let Elizabeth go in and see the guardian on her own to the office, and Elizabeth said to her, ‘I don’t want to see him’ [her father]... Elizabeth told me the guardian said to her, ‘how about a new beginning with your father and how about seeing him more?’ and it was totally the opposite of what Elizabeth had said and I felt that she was prompted, that it was inappropriate. So I told the solicitor what had gone on. They just said that Elizabeth would say a different thing to you because she wouldn’t want to hurt your feelings”

Another common reason why parents did not like the guardian was because they felt the guardian sided with the other party:

“He [the guardian] came across to me that he was on their side and if I want anything I have to prove it to them that I deserve it. I felt I had to try and prove myself all the time to him, to the courts, whoever was involved which I didn’t believe I should have had to do. Whatever I said, if he couldn’t disprove you are supposed to take it as true but he didn’t, he formed his own opinion of what he thought I meant and that is what he put in his report and it never came out the way I’d said it.”

[Harry, Non-Resident Father]

“I got the impression that she [the guardian] was totally on my ex’s side, completely and utterly, that there was no impartiality about it, the children weren’t the main focus which they should have been really.”
[Tanya, Resident mother]

Finally, some parents believed the guardian did not understand their concerns:

“All the way through I always got the impression that she [the guardian] was going to pat me on my head. She’d ring me up occasionally and you know [I’d say] I can’t cope with this, I can’t cope with this you know. She wasn’t really understanding, told me to buy some of that herbal remedies.” [Tanya, Resident Mother]

Similarly another resident mother (Ginny) felt the guardian did not understand her situation which made her mistrust the guardian and as a consequence she had insisted on being present when the guardian spoke to the children:

“I think it was on the second interview with me she [the guardian] just turned round and she said, ‘well it’s basically your fault - you’ve got to take part of the blame for the domestic violence’. When she left I was so distraught. I just said I can’t have her. I couldn’t have her in the house again without someone else being there because what she was saying to me, I just couldn’t believe that someone of her profession could say [that].”

Mixed views of the guardian

4.15 Just over a third of parents had mixed views of the guardian. For example, while Brenda (a resident mother) stated that the guardian was good because she built up a good relationship with Brian allowed him to feel happy, later in the interview she reported that sometimes the child resented having to meet her as she would often come to his school which meant he had to miss his favourite lessons. In addition, while she thought the guardian understood the situation, she was unhappy with her recommendations because she felt they were watered down so as not to offend the father.

Sarah (a resident mother) had similar mixed views regarding the guardian. She also stated that the guardian understood the family and was good with her daughter, but explained her daughter found the situation difficult and felt frustrated with the guardian because she asked the same question repeatedly, and in Sarah’s opinion was putting pressure on the child to agree to contact.

Ivan (a non-resident father) had difficulty articulating his view of the guardian, and while he stated that the guardian put his daughter in a difficult

position because she felt she had to please her mother, he later stated that the guardian being appointed did not cause any problems.

The role of the children's solicitor

4.16 Just over a third of parents (7, 35%) appeared to have a good understanding of the role of the children's solicitor, another third (7, 35%) had some understanding, while the final third (6, 35%) appeared to have little or no understanding regarding the role the solicitor representing the child played in the proceedings. Six parents appeared to have little or no understanding of the role of the children's solicitor. Two parents (Lucy and Sarah, both non-resident mothers) appeared unaware that a solicitor was appointed for the child. For example, Sarah indicated at first that she thought the children did have representation in court but then decided they didn't:

"I don't really remember much about that really. They [the children] did have someone representing them though. Well I know there was me and my solicitor and him and his solicitor but I don't know if there was anybody else there. I don't think there was anyone else there, no."

Four parents were aware that a solicitor was assigned for the child, but they could not articulate their role. For example, Harry (a non-resident father) was aware his daughter was appointed legal representation but as far as he was concerned the solicitor was an enemy to him. Another parent, Colin (a non-resident father whose case went on for six years without contact) withdrew his application just after NYAS had been appointed as guardian, perhaps explaining why he had little awareness of a children's solicitor. For example, when he was asked if a solicitor was appointed to represent his child, Colin stated, *"Well NYAS ended up representing the child because CAF/CASS wouldn't come to court..."*

Another third of parents had some understanding of the role of the solicitor. For example, Brenda (a non-resident mother) explained:

"She [the solicitor] was appointed because the judge said he wanted a psychologist's report ... and then he was going on about sections of the law, etc and that this solicitor should be appointed as - guardian, I think they call them, don't they? Although she never met Brian, she never introduced herself to me ... I was a bit puzzled by the whole procedure really. I didn't fully understand that other than I worked out that his solicitor acted as his voice, you know ... in whatever limited capacity she could, as he's never met her ... I presumed it was just a legal thing."

Jackie (a resident mother of children aged 14, 9 and 5 years old) seemed able to explain the role of the children's solicitor, yet she also commented in the interview that she did *not* understand what their role was:

“She [the children’s solicitor] came here to see the children, didn’t say anything. I don’t know what her role was, she was at court once or twice and she didn’t say. She was really nice ... I don’t know [where she came from], that was very confusing, although I did speak to her. The children certainly didn’t speak to her. When the judge was sat making his decisions, I mean he asked her ‘is that ok with you?’ and she said ‘I think the children will be fine with this’ but it wasn’t very relevant. She was the children’s solicitor... she was working for the children and they should be able to speak to her and tell her what to do or if they were happy with the decision. Other than that I don’t see why she was there, but that didn’t happen.”

Bobby (a non-resident father) stated that he was advised by Fathers 4 Justice that his children needed their own solicitor but he had difficulty distinguishing the difference between the guardian and the solicitor, perhaps because the solicitor visited the children with the guardian to interview them. When asked what the role of the solicitor was, he replied, *“Her job [the solicitor’s] was to interview the girls and see what the girls wanted, how they felt towards my ex’s new partner.”*

The final third of parents (7, 35%) seemed to have a good understanding of the role of the solicitor, often stating that the solicitor was there to represent the children:

“The children were also appointed a solicitor. I suppose the reason for a children’s solicitor to be appointed is to give a view from the children’s side of matters. The CAF/CASS officer, she was representing the children but I suppose if there is a legal point, that is why the children had to be appointed a solicitor.” [Mark, Resident Father]

“The solicitor was appointed by the guardian to present Lisa’s [the child’s] views so she [the guardian] would speak to Lisa in person or on the telephone and she would report back to Lisa’s solicitor but the solicitor himself never had any contact with Lisa.” [Sarah, Non-resident Mother]

Satisfaction with the Children’s Solicitor

4.17 Just under a third of parents (7, 32%) could not comment on their satisfaction with the children’s solicitor, another third (7, 32%) had neutral or mixed views and 8 parents (36%) were dissatisfied with the lawyer who represented the child. It did not appear that the outcome of the case was related to parents’ views of the solicitor: of the parents who were not satisfied with the child’s solicitor, just 3 (38%) were also dissatisfied with the outcome of the case. Just under a third of parents found it difficult to evaluate the work carried out by the child’s solicitor. This is understandable for the two parents (Lucy and Sarah) who seemed to have no awareness that a solicitor was appointed for the children. Other parents perhaps found

it difficult for other reasons, for example, as we have noted above, Colin (a non-resident father) withdrew his application shortly after the guardian and solicitor were appointed. When Ivan was asked what he thought about the guardian and solicitor working together he became distressed, explaining:

“Well the whole situation shouldn’t have been there anyway. The courts had created all this problem. There is no problem. We keep psychoanalysing the problem that isn’t there. It’s just getting bigger and bigger and everyone is getting involved.”

Mixed views of the Children’s Solicitor

- 4.18 Another third of parents had neutral or mixed views on the utility of the solicitor. For example, Georgina (a resident mother) initially thought the solicitor was useful and supportive:

“I thought she [the children’s solicitor] was very useful. She did come round with the guardian and she spoke to both the children. She got a fair appraisal from what she heard from both the children as well as what the guardian was able to fill her in with. She actually was very supportive, she was totally in the children’s corner. In my case yes [that was useful]. Therefore I did feel that she was able to put their perspectives from their point of view without involving me, without involving him, completely independent.”

However she went on to say that she was unsure if this role needed to be carried out by someone with legal training although she also thought that the fact that it was someone with legal status was useful:

“My impression is that the judges listen a great deal to what independents say and because she came in as an independent and could say she’d met the children without me present she was another completely independent witness to what my children were saying, so from that perspective I do think she was very useful. But I don’t think from the legal standpoint that they really needed a lawyer; it would have worked just as well with a psychologist or social worker. I do also think because she was a trained solicitor and she had lots of experience that what she had to say was taken very seriously.”

Finally, Georgina concluded that having the solicitor was positive in that it allowed the children to feel, *“they were actually being listened to”*, and from that perspective:

“I think it needed to be the solicitor, they were aware that mummy had a solicitor, daddy had a solicitor and the fact that they had one meant that they were of equal standing within the system.”

Roger (a non-resident father) also found it difficult to evaluate the effectiveness of the children’s solicitor, perhaps because the r 9.5 direction had recently been made and the case was still ongoing. Nevertheless he

predicted that they might well be useful in the future when the children get older and if the case continues:

"I don't really know how things will go, but if the case does go on for any length of time I'm sure that they [the children's solicitor] will be involved should the children themselves, outside of their mother's influence, show an interest and ask, if they themselves want to set up some kind of a meeting with me, quite some time in the future maybe. The possibility that they become old enough to be in control of asking in their own way about their own rights as it were if they would like to meet and have some kind of contact session."

Finally, Bobby (a resident father) thought the solicitor was good because he was advised it would help his application for residence of his daughters and his children were very happy to have their own solicitor:

"They [the children] were made up. I've heard from Fathers 4 Justice that, I went to them and they said the girls need their own solicitor, they are old enough. So I said that to Helen [eldest daughter] and she said 'Oh, can we have our own solicitors?' and I said 'we'll find out.'"

However Bobby found it difficult to see the difference between the guardian and the child's solicitor:

"Very little difference really. Apart from the girls' solicitor you didn't really see her much, she was there but she didn't say anything 'cos her barrister said it all."

Negative views of the Children's Solicitor

- 4.19 The final third of parents indicated that the children's solicitor was not useful or not necessary. For example, Brenda (a resident mother), who was unclear of the solicitor's role, struggled to see any benefit this appointment brought to the case:

"I didn't have any disagreement with what Brian's solicitor said ... she had a limited involvement. There was no benefit to Brian. [It made] no difference at all to the case. It didn't help the case, from anyone's point of view, myself, my-ex, Brian, she did nothing the court welfare officer couldn't have done."

However, she also commented that having a solicitor for the child did not cause any problems, *"Apart from the lack of understanding as to the benefit of having her"*. She also stated that the solicitor made no difference to Brian in her opinion as:

"He didn't know he's got one [a solicitor]. I will have explained at the time, but it meant nothing to him, he didn't see her. He was already seeing the guardian on a fairly regular basis. He was having his

schooling interrupted. He wasn't bothered that nobody else was seeing him."

Mark (a resident father) also could not see that the solicitor played any role and therefore did not think it was necessary:

"I'm not sure. As the case progressed maybe because it was all one sided because my ex wasn't there, I kept thinking what a waste of time, what is she there for? The CAF/CASS officer, she was representing the children but I suppose if there is a legal point ... that is why the children had to be appointed a solicitor. You could argue it's a waste of resources so I would imagine the legal system pays for that. It was almost like lip service to whatever was going on, I don't think there was ever a point where she interjected and said 'No no, stop, that's not right.' Well, it didn't bother me because I wasn't, well I hope I wasn't paying for the children's solicitor along the way. But I did think, well, it seemed a duplication along the line, maybe CAF/CASS officers could be trained solicitors? And you'd have one person doing the two roles. Because a couple of times the children's solicitor didn't turn up because of, at the time I thought it was very annoying, other engagements. I mean, hang on, what's more important? At the time it's [this], this is important. But the fact that the case and the discussions were able to freely continue without them [the solicitor], you think well what are they there for in the first place? If it had been my solicitor couldn't be there, well, they would have been postponed. The fact that it was allowed to continue without her there confirmed my view that it was a bit of an extra cost along the line for the whole system."

One reason that Sarah (a resident mother) did not think the solicitor for the child was useful was because she felt they were biased towards the father because he was unrepresented and in her view she thought they helped him:

"He [the child's solicitor] was always hostile to me from the start particularly in the last proceedings ... from 1997 onwards my ex dispensed with his solicitor and represented himself but what happened was - Lisa's solicitor was supporting him! I mean he wouldn't agree that he was supporting him but from my point of view he was because whenever we were stood in the waiting area to go to court, the guardian, Lisa's solicitor and my ex would all be stood together in a huddle and I'd be someone excluded sat somewhere seething and glaring at them. I once managed to glare at the solicitor sufficiently for him to look uncomfortable and move away. He supported my ex through proceedings and he even helped him with his bundle and he didn't need that help. I was absolutely incandescent with rage, he was supposed to be independent and impartial."

Therefore, Sarah also wondered if the solicitor was necessary:

"I'm not quite sure if she needed a solicitor as well because he was quite superfluous, certainly in our case he was performing more for my ex than for Lisa. Really, the guardian was sufficient, I couldn't see the purpose of his role. She did the investigations and he spoke in court, but I thought he seemed a bit superfluous really Because I felt he'd been on my ex's side from the beginning I felt he probably influenced the guardian anyway."

Jackie was another resident mother who had a negative view of the child's solicitor not only because in her view she did not achieve anything, but also because the term 'guardian' to her children implied to Jackie that she was replacing her role as mother:

"If she was there to make decisions for the children, that was taking my role away as their mother and their parent, but that didn't happen either. It was just a figure of someone to be there for legal reasons I think - I don't know."

Finally, two resident mothers also did not see the utility of the child's solicitor, both referring to the fact that they did not meet the child:

"He [the child's solicitor] didn't make any difference because at the end of the day he was someone representing her [her daughter Sally] but expressing the views from the CAFCASS officer and psychotherapist. Sally was not there, Sally was never asked by the solicitor...it is more a case of the books say this so we have got to do this. But I didn't see any benefit of that. [It was not necessary] for Sally to have her own solicitor, no. Because before, when they had the CAFCASS officer, they called her in the court so she is the one who represented Sally."
[Zoe, Resident Mother]

"Well ... I think the solicitor for the guardian ad litem was a waste of time and a waste of space, she didn't even say hello or introduce herself ... no, she never met them [the children] at all...and yet she's the solicitor who's meant to represent them but knew nothing of them."
[Tanya, Resident Mother]

Parents' understanding as to why r 9.5 was ordered

4.20 All parents (except the two non-resident mothers who were unaware of the order) were able to give their views as to why they thought the judge considered it necessary to order that the child be separately represented. The reasons parents gave are as follows:

Because a psychologist was appointed (Brenda)

The officer working with the family had run out of ideas (Douglas, Ginny)

"I think to be quite honest with you the CFR had had this case from about 2001 and she was scratching her head and she was running out of ideas, to be quite honest, and I think she needed some support."

[Douglas, Non-resident Father]

"CAFCASS said there was nothing more they could do and it got handed over to NYAS and this is where the guardian came from."

[Ginny, Resident Mother]

The situation needed looking into in more detail (Georgina)

"He [ex partner] demanded contact with the children and this particular woman was assigned to come and speak to the children from CAFCASS. And she basically didn't see a problem with him having contact so I took it back to the court and my solicitor said my client is not happy with this, there is more going on here than meets the eye and at that point the judge appointed a guardian."

[Georgina, Resident Mother]

The judge needed an independent view of the child (Georgina, Sarah, Robert, Jackie)

"The reason why the guardian ad litem was appointed was my ex partner felt that I was influencing Lisa and they wanted Lisa to have her independent voice, so because she was too young to go court herself the guardian would be her voice." [Sarah, Resident Mother]

"I pushed for it. With the reaction I got from the court welfare officer with this very dodgy report she prepared and from the investigating social worker, I felt that neither of these two had an objective approach and therefore what we really needed was for somebody to come ... independently to look at it. The only way I could see of getting that was through a guardian who could be independent and not on my side and not on [the mother's side]." [Robert, Non-resident Father]

Because the mother had a history of involvement with social services (Vicky)

"Well I think it was ... with her [the mother's] past history of not keeping the house clean and not looking after the children I think he [the judge] was quite concerned and I think he wanted the guardian to look into it."

[Vicky, Resident Aunt]

To protect the child's interests (Geraldine, Jackie, Colin)

"It was [explained to me] to protect his [Craig's] interests so that he [the judge] would listen to everything ... which again, I suppose at the end of the day he was old enough to have his opinion."

[Geraldine, Resident Mother]

“Because the judge said I needed a CAFCASS officer to be there for the children, to listen to them and to speak to them ... I don’t know it’s very hard to describe.” [Jackie, Resident Mother]

*“Because CAFCASS refused to come into the court, the child had to have someone ‘cos it would be me and the child’s mother and the child’s got no one, what’s right for him, what’s best for him. So they judge then said NYAS [had to get involved].”
[Colin, Non-Resident Father]*

Because one party did have a good relationship with the CFR (Geraldine)

“My husband didn’t like her [the CFR] ‘cos it wasn’t going in his favour, so they brought in the court guardian then. I think it was put from the CFR to the judge and the judge just said ‘Yeah, do it.’, because, as I say my ex husband wasn’t happy with what the welfare lady was saying.” [Geraldine, Resident Mother]

It was “automatic” when the case moved up from the magistrates to the county court (Tanya)

*“Whatever was in the report I wasn’t comfortable with and my solicitor said if I’m not comfortable with this either for your sake, I think we should take it higher and get a guardian ad litem involved, that’s the only option, sort of thing, for where we go from now. She said judges have more powers, they’ve got a bit more understanding of it and the magistrates really couldn’t do a great deal more for us because I couldn’t think about unsupervised [contact], that’s what their father wanted. It got passed up to the county courts and I presume within that the judge, it’s automatic ... a guardian ad litem gets appointed.”
[Tanya, Resident Mother]*

Because the mother did not attend court and the court was aware she had assaulted one of the children (Mark)

“Because I think there seemed to be a bit of urgency in the case with mother not wanting to take part in it and I think the judge decided to quicken it up as best to avoid the queue in the system and a CAFCASS officer was appointed. Although the mother didn’t turn in up in person she did write a couple of letters to the judge and the content of those was very childish in a way. I think the judge just went ‘well’, so that might have triggered ... it’s not a case of although she’s not here, there are no issues here that need looking at and investigating. The mother assaulted my son, I had to actually throw her out of my own house and that led to, what you may describe as a brawl in front of the children, it was horrific and I said to my son. ‘I’ll have to call the police’, and I think when that was reported to the solicitors and that reached the court it was then it was said we have to get someone else involved there is an issue.” [Mark, Resident Father]

Because the case had gone on for too long (Ivan, Darren)

Because the CFR could not do what was required – to assess the risk to the child (Darren)

“I got my barrister and said, ‘Look, just say this, she’s [CFR] not there to assess risk’ and he went with me on that one and she got pushed out of the thing and then the guardian came in. I believe the vibe was it’d gone on too long and they needed someone to come in and deal with it and they also brought in a clinical psychologist/psychiatrist.”
[Darren, Resident Father]

The judge was concerned because both parents were saying the child did not want contact with the other parent (Jimmy)

“The courts decided [on separate representation] because my ex was saying my daughter didn’t want to see me and I was saying my son doesn’t see my ex.” [Jimmy, Non-Resident Father]

The parent’s lawyer said it was the usual step if cases cannot be resolved (Roger)

“It was pointed out that in certain cases of very recalcitrant ex-partners the idea of an independent guardian was the usual way forward and that in this particular case because there was such a serious problem - it was my barrister that suggested it earlier in the court before the full hearing in December as a possibility should the case not be resolved, and when the case wasn’t resolved the idea was to look to this guardian as a means of facilitating a movement forward. That was my side that put the idea forward and it was court then that just actioned that.” [Roger, Non-Resident Father]

Parent’s views as to the appropriateness of the r 9.5 direction

4.21 The majority of parents (16, 72%) indicated that they were in favour of the r 9.5 direction, whether they believed it helped their particular case or not. Four parents (18%) had mixed or neutral views and two parents (9%) did not think separate representation was appropriate for their child.

Positive views of r 9.5

4.22 Of the parents who were in favour of the child being separately represented, just under a third (5, 31%) indicated they either felt ‘ok’ about it, or that it was a good thing but they could not articulate why. Others gave a variety of reasons as to why they thought the r 9.5 direction was a positive event. For example, Harry (a non-resident father) explained that he thought the child needed her own representative because she was in a difficult position being torn between two parents:

"I'd asked the CAF/CASS officer for my daughter to have her own representative for the simple reason that she will not speak in front of her mum. 'Cos quite obviously she has got to go home with her mum at the end of the day so she will say what needs to be said and I said I want her to have her own solicitor so she can do her own thing."

A resident mother, Geraldine, stated that in her view the order enabled the child's interests to be protected and the child was old enough to be asked his opinion. However, she admitted that at first she was nervous regarding the idea because she feared her son might be influenced by his father:

"I suppose at the end of the day he was old enough to have his opinion. If I'm really honest, in the beginning it sort of threw me a bit because I wasn't sure, with him [Craig] not living here, he was living at his dad's ... I thought that perhaps he was going to be influenced to make the wrong decision. I mean, I'd be happy with him living with his dad if it was the right decision." [Geraldine, Resident Mother]

Another third of parents (6, 38%) suggested that the order was positive because they wanted the child to have a say (Mark, Darren, Beverly, Jimmy, Bobby and Ginny)

"I was quite pleased ... I said to them all along, 'I don't care how old he [Ian] is, ask him, ask him what he wants to do, ask him what his mum's done, don't ask me. He's not stupid, don't look at him 'cos he's this big and think he hasn't got a mind in there.' It took six years [for the court] to listen to him." [Darren, Resident Father]

"The children don't get to be heard and I wanted them to be heard." [Bobby, Resident Father]

"I couldn't wait 'cos he'd get his own representation. It would be his honest opinion without being manipulated by anyone." [Jimmy, Resident Father]

"I'd asked from word go for someone to be there solely to represent the children, so I thought that whatever the outcome was there's someone saying listen to the children, put the children's point of view forward. That's all I wanted." [Ginny, Resident Mother]

"Without it there is a danger that what they [the children] want is not fully being covered" [Mark, Resident Father]

Mixed or neutral views of r 9.5

- 4.23 A minority of parents had mixed or neutral feelings about the r 9.5 direction. For example, Lucy, a non-resident mother, explained that she did not have a problem with anyone asking the children what they wanted as they were aware of the situation and old enough have an opinion:

“I think they were old enough to discuss it anyway, and they were aware of what had gone on and what hadn’t gone on so, no it didn’t bother me speaking to them at all.” [Lucy, Non-Resident Mother]

Sarah (a resident mother), made positive and negative comments regarding the application of separate representation in her case. She explained she did not have a problem with the suggestion and thought the concept that the children need to be heard was good, but that the individual acting as guardian was not very competent:

“My solicitor advised me it was probably quite a good thing to agree to, I’m not quite sure why now ‘cos I don’t think it was. I knew I wasn’t adversely influencing my daughter but I can understand there are women who do. So I didn’t have any problems at all. My only concern was that it was done considerately which it was initially. Yes, in principle it was good that someone was there to represent her because she would not have wanted to have gone to court at any point.”

Another resident mother, Jackie, also had mixed views regarding whether separate representation was appropriate:

“I was put in that category as the mother stopping the children from seeing dad and I wasn’t. I wanted them to see and hear what the children [wanted]. I don’t know why he was made to be a guardian of the children because all I felt was that I was quite offended because it’s like taking me as their mother away from them. I felt like I was not trusted to do the right thing by my children. I think they were too young to talk about it. I think it would upset them too much.”

Finally, Roger (a non-resident father) thought the order was good in principle but the children shouldn’t have been in the situation in the first place:

“I understood the need for someone to interview all of us including the children and make some kind of representation to the court, our situation, how we do or don’t relate to each other. I agreed with it because I understood the difficulty I was facing and possibly that it is necessary in my particular case and maybe it is only necessary in extreme cases because I understand I am in an extreme situation with my ex partner.”

Negative views of r 9.5

- 4.24 Just two parents indicated they did not think separate representation was an appropriate step in their case:

“It’s not a good idea. She shouldn’t have even had to go into that situation. I don’t know, it’s not a good idea. My mum used to hit me everyday so I wanted her hit by a truck but I do love her ... so if Emma is playing and I won’t let her do anything and then you come round and say ‘Do you want to be with your mum or your dad?’ and she says ‘I want to be with my mum.’ With kids it’s awful putting them on the spot. She shouldn’t have even known the court and solicitors, she just should have a normal life.” [Ivan, Non-Resident Father]

“Her concerns were for both parents not being able to put her needs first. I didn’t think it was right, why should Sally be involved with a psychotherapist? I had also taken Sally before to see a psychotherapist but to help her, not to have a CAFCASS officer to write a report to the courts. She just needed backup on her report from a professional.” [Zoe, Resident Mother]

The effect of r 9.5

- 4.25 Three parents found it hard to articulate the effect of the r 9.5 direction, two of these were the non-resident mothers (Lucy and Sarah) who were unaware of the order and one parent (Roger, a non-resident parent) had not gone back to court since the order was made and so was not in a position to comment on how it would affect the case. Of the remaining parents who were able to articulate what effect they thought the r 9.5 direction had on their case, seven parents (37%) indicated that there were positive effects, eight parents (36%) had mixed views and often mentioned both positive and negative effects and four parents (21%) indicated the direction only caused negative effects. Of the parents who thought separate representation was of some benefit, over two-thirds (5, 71%) experienced a favourable outcome; whilst all but one of the parents who believed the order did not help the situation (75%) were unhappy with the final order.

Positive effects of the r 9.5 direction

4.26 The examples of why parents thought r 9.5 had a positive effect are as follows:

It had a positive effect on the child in some way:

- Helped the child cope (Georgina, Jimmy)

“I think appointing the court guardian was a very positive thing. Through what the guardian had written and really it saved her [youngest child] because up until then she was not sleeping very well, she was not eating very well, and she was frantic” [Georgina, Resident Mother]

“He calmed right down, picked right up and calmed down. He’s come on in leaps and bounds now, he really has” [Jimmy, Resident Father]
- Enabled the children to feel they were being listened to (Georgina)

“They [the children] felt like they were actually being listened to.” [Georgina, Resident Mother]
- The parent was reassured the child was being supported (Geraldine, Colin)

“I felt there was support for them [the children]. I mean the court guardian listened to them and talked to them and Craig had a solicitor.” [Geraldine, Resident Mother]
- The child needed to give their opinion (Geraldine, Mark, Darren, Jimmy, Bobby)

“I think he needed to be able to give and voice his own opinions in court.” [Geraldine, Resident Mother]

“He couldn’t wait for his own solicitor because he couldn’t get things off his chest, he couldn’t tell people.” [Jimmy, Resident Father]
- It helped the judge make a decision / enabled the case to be resolved (Geraldine, Brenda, Jimmy)

“The guardian was a mine of information ... he would have added sort of a more balanced sort of view of Craig, sort of a medical, mental state and all those, you know, psychological ... whereas a normal person wouldn’t be able to sort of judge all those, would they?” [Geraldine, Resident Mother]

“It helped the process because that was the only way that the judge who made the ultimate decision could be aware of Brian’s feelings. That’s the only contact [he had] with Brian. A case without one [a guardian], I don’t know where we’d be, we’d probably still be in court. Who would hear the child? It was the only positive part of the case” [Brenda, Resident Mother]

“Well it was 12 months of hardly seeing my daughter and the kids not speaking, but once NYAS got involved and they had a guardian there, things moved. It was slow, but at least it moved.”

[Jimmy, Resident Father]

- It highlighted things the parent hadn't thought of (Geraldine)

“He [the guardian] gave Craig's opinion as well as mine [in the reports] and when he gave me feedback it was all good quality stuff you know, that I sometimes hadn't thought of.” [Geraldine, Resident Mother]

- It speeded things up (Tanya, Darren, Bobby)

“Actually things speeded up a bit when she was on the case.”

[Geraldine, Resident Mother]

“The judge hurried everything through quite quickly.

Even my solicitor said she is rushing this, putting things through.”

[Bobby, Resident Father]

- Contact started again (Darren, Jimmy)

- It has had a long lasting influence on how the parent runs his household (Bobby)

“It was very important they [the children] had their say. Even now, they have their say, what do you want to do next week. I ask them what they want, I would never force them.” [Bobby, Resident Father]

Mixed views of the effects of the r 9.5 direction

- 4.27 The majority of parents indicated that there were good and bad effects from their child being separately represented. For example, Harry (a non-resident father) mentioned positive and negative effects:

“If anything I think it should have helped her [the child], but then again a stranger of importance speaking to a young child, it might be intimidating. We never got to speak about it. We just got on with life.”

Zoe (a resident mother) also had mixed views. She stated that she did not see any point in the r 9.5 direction:

“I don't think there is any point in having a .. it is more a case of the books say this so we have got to do this. But I didn't see any benefit of that.”

However, she went on to say that while she did not see any use, the order did not cause any problems:

“I can't say it is bad but I can't say that it has helped my daughter in any way because [it was] an issue of contact. He was never denied contact, so I wouldn't see why there would be someone else involved.”

Finally, Tanya (a resident mother) suggested it would only have been useful if she hadn't had such a good relationship with her daughter.

Negative effects of the r 9.5 direction

- 4.28 Just four parents believed that the direction that the child be separately represented had purely negative effects. For example, Douglas (a non-resident father) explained that his son having a guardian and solicitor made things worse because Douglas felt that the mother was negatively influencing the child (Brian), so that including Brian's view was just adding another version of the mother's view:

"They [the court] tended to take notice of the other side more. It was more his mother's opinion than Brian's. It was doubling the mother's view. I think all it did was more heavily influence the other side's back-up really"

In addition he thought the order meant that there were too many people interviewing the child which also had a negative effect:

"You've got to do it somehow [ask the child] but the more people interrogating him, the solicitor, the guardian. Fine, but the more people it just makes the situation worse really, but I can't suggest an alternative."

Sarah (a resident mother) felt that one effect of separate representation was that she felt the judge blamed her for the fact that the child refused to have contact with her father:

"Because of the solicitor and guardian, I felt even the judge was saying that it was such a shame that it had come to this, I felt he was blaming me as well."

Sarah also stated that the order made the child withdraw and feel disempowered because she made it clear how she felt yet the case dragged on:

"The guardian Lisa had did listen to her but she was determined to get her round to her way of thinking and of course that made Lisa very set and that was it - she withdrew completely. She said 'I don't want anything now at all.' If you think about it, it made her [Lisa] feel extremely disempowered because her father didn't take any notice of what she requested and ultimately neither did the guardian."

Another resident mother, Jackie, also thought r 9.5 had negative effects as she explained that although the order was supposed to make sure the focus was the children, she did not think this happened:

“They [the court] basically focus on the children, but I didn’t see that in the court. I didn’t see the children’s happiness, I saw my ex-husband’s rights and yeah, he’s got his rights but I think above that his children suffer”.

Beverly, a resident mother perceived that in general the direction had no effect on the case because the children were not represented accurately:

“I was thinking we’ve got three barristers, three solicitors and a guardian, I felt we had great guns and I thought it would help, but no. Unless they [the children] are going to be represented truthfully then I don’t think it makes any difference at all, no.”

Finally, Ginny, another resident mother, thought that the r 9.5 order meant that the children had to meet lots of different people, which was negative:

“I mean if you worked out how many different strangers the children have had to meet because of the courts ... no child should have to meet that many. You are the fourth, the fifth stranger that I have met in the past four years and I’m fed up, and the one thing Olivia said was ‘I’m fed up of this. I’m totally fed up’.”

Were the child’s wishes taken into account?

4.29 Six parents (five non-resident fathers and one non-resident mother) were not able to answer whether they thought the child’s wishes had been taken into account. Two of these parents (Robert and Colin) had not had contact with their children since they were very young and thus were not able to determine if their wishes considered. When Ivan was asked if his child’s wishes had been considered he simply replied: *“She shouldn’t have even known the court and solicitor”* and moved on to a different topic. Harry, another non-resident father who did have contact with his daughter also did not seem able to consider whether his daughter’s wishes had been considered by the court as when asked, he stated, *“I think what she [his daughter] wanted was a normal life, whether that was with me, with her mum, with whoever.”* Finally, Lucy a non-resident mother, stated:

“You know we’re not there to see what they [the guardian] are asking them, it’s all done cloak and dagger for the kids. You don’t know what they’re asking them. So I never used to ask Fiona after what did she say, or what didn’t she say, I didn’t put her in that position.”

Of the parents who had an opinion on this question, three parents (14%) had mixed views, six parents (27%) believed their child's views were considered while seven parents (32%) did not think their wishes had been considered. Of the parents who thought the child's views had been heard five (83%) considered the outcome of the case to be favourable, while 71% (5 parents) believed the child's wishes had not been considered were also disappointed with the final order.

Mixed views as to whether the child's wishes were considered

- 4.30 Three parents had mixed views as to whether the r 9.5 direction enabled their child's wishes to be taken into account. For example, when Brenda (a resident mother) was asked if her child's wishes were heard by the court she replied, "Yes, 100%", however she also stated that her son Brian did not feel like he was being listened to because the case continued even when he'd indicated what he wanted:

"He [Brian] kept saying 'Nobody's listening to me, I'm saying all these things to the guardian and she's listening and writing them down but you're still going to court, why am I saying these things? What impact is it having?' And he really felt nobody cared and nobody listened."

Another resident mother with mixed views was Georgina, who suggested that only her eldest daughter was listened to but not her youngest (who was 8 years old) because she was considered too young:

"Because of her age she was being forced in a position where she had to see her father. I think his [the guardian's] hands were very much tied with what legislation stands at the moment, in as much as you have to be a certain age before you are listened to in a court of law and despite the fact that he was busy saying to the judge 'I've spoken to this little girl she knows her own mind she knows what she wants'. I don't really think it was the judge's fault particularly, I just felt that it is legislation."

Later she explained that although the children felt listened to when they were appointed a guardian and a solicitor, they felt the judge had not listened when contact was ordered because Georgina believed they did not wish to see their father:

"Well, I know we said we'd listen to you but guess what [you've got to see your father]. And I did feel that my eldest particularly felt a bit betrayed and my youngest was absolutely disgusted and I've got to confess I myself was rather disgusted."

Views that the child's wishes had been considered

- 4.31 Six parents agreed their child's wishes had been taken into account.
For example:

"Craig seemed quite happy because he [the guardian] seemed to have listened to him and seemed reassured that his man was actually taking on board what he said." [Geraldine, Resident Mother]

Douglas (non-resident father) explained that in his opinion the child's wishes had been taken into account because shortly after the guardian had been appointed and the child interviewed, the case was resolved.

Views that the child's wishes had not been considered

- 4.32 As mentioned above seven parents stated that their child's wishes had not been considered. For example, Tanya (a resident mother) reported that she did not think her child's wishes had been taken into account because her daughter informed Tanya that the guardian was not listening to what she said. In addition, when Jackie (a resident mother) was asked if her children's wishes were considered she replied:

"No, they [the children's wishes] weren't mentioned at all, it was just mentioned that my feelings towards my ex-husband were reflected on the children which wasn't true ... and he [the guardian] didn't mention the children's feelings at all because they found it difficult to talk to him. I think the children's views weren't seen. They were too young. They found it hard to speak, so they weren't able to explain their opinion."

Beverly (a resident mother) also did not think the child's wishes had been taken into account because:

"I think they were treated as children who didn't know what they wanted and I don't think they were believed. It was more about them [the court] wanted to see that I was the woman who was manipulating them. Lee was really treated as though he had no mind of his own whatsoever... so I don't feel the kids were really listened to at all."

Another resident mother, Ginny, also thought neither of her children had been listened to and this was particularly true for her youngest daughter (who was 6 years old):

"Their views and wishes were not put to the court once. More so for my eldest 'cos my youngest has never been asked but when my eldest has been interviewed but everything she's asked for or has said has always seemed to have gone the other way. I do have two children by the same father and one refuses to see him and the other one has to see him because apparently she is not of an age yet where she has any

rights, which I know is a load of garbage, but that is basically what we are being told - she is not old enough yet to make her own mind up."

Finally, Zoe (a resident mother) stated that it appeared her child's views had been listened to, but she thought it was more because the psychotherapist had the same view as the child and so it was not really that the child's views were being considered.

Recommendations

4.33 Most parents were able to suggest some recommendations for how the process could be made easier. The things that parents wished had happened or should happen in future were as follows:

- i. Judicial continuity and continuity of the professionals involved (Brenda, Geraldine, Colin, Beverly, Roger)

"It was brought back to court. Why it was brought back to court with a different judge and different welfare officer, that's one of the issues I have, one of the complaints I have. There's no facility for continuity of care in the legal system. It's brought back again to court, but nobody says just a minute, these people spent five years in court they need to see the same court welfare officer and the same judge, they just list to anybody." [Brenda, Resident Mother]

"One child should have one judge right the way through the case, until that judge dies, then it gets passed over. It doesn't get passed over because the judge is sick or something like that. It's a massive problem when it's going in front of different judges and they don't know what you're talking about." [Colin, Non-Resident Father]

"Never the same judge - that appalled me at the time because I thought, why do we keep seeing different judges? Because they can't follow on, there's no continuity in the cases. I would've preferred to have the same judge." [Beverly, Resident Mother]

- ii. Continued monitoring / support once the case has finished (Harry)

"I wanted CAFCASS to keep an eye on my daughter once the case was over to make sure that she is alright but nobody does that, there is no one on that side that goes and checks her well being or that she is going to school. Her guardian, her solicitor and the courts should do something, a follow up to make sure, even if they are not giving me custody or let me have access or anything they should have some follow up procedure." [Harry, Non-Resident Father]

- iii. Employ two CAFCASS officers instead of one (Harry)

"I think there should have been two CAFCASS people, male and female, so between them ... what he didn't understand or couldn't relate to maybe she could, then whatever question a man fails to ask regarding the children a woman might pick it up and the woman would have more of an idea if the mother was genuine or whether she was just playing the system." [Harry, Non-resident Father]

- iv. More protection and support for parents and children (Brenda, Geraldine)

"There needs to be more protection for the mums involved, more physical protection and more provisions of care for the mental state. There needs to be some acknowledgement of the effect it has on the child, at the moment there's none and there needs to be some overview of the whole situation." [Brenda, Resident Mother]

"Support for the family or person who's going through it, as well as the children." [Geraldine, Resident Mother]

- v. Allow greater child involvement if wanted (Brenda, Geraldine)

"I think he [Craig] would've liked to have been a bigger part of it. I think he would've liked to be in on the hearings and the court, I think he would've liked to have heard all that. I'm not sure whether it was appropriate for him to hear it all though." [Geraldine, Resident Mother]

- vi. Encourage the parent-child relationship (Douglas)

"There's not enough emphasis on my relationship with him [the child] and trying to build that up, it was more what can we do to cut it down rather than build it up." [Douglas, Non-Resident Father]

- vii. Not force contact (Georgina, Jimmy)

"Had they listened in the first instance to the guardian's recommendations rather than a lawyer come in and say 'Ah, but this hasn't been tried'. You have an expert saying well, this is it, but they push and push and legally the judge says 'Well yes, quite, we haven't tried that one, so possibly we should try that'. What they are not taking into account is you are not dealing with a puppy, you are dealing with an intelligent being who is already going through absolute trauma." [Georgina, Resident Mother]

- viii. Appoint a guardian sooner rather than later (Georgina, Jimmy)

"I think the court guardian should have been listened to at the outset, rather than let's try this and see if we can get this right ... You are not playing with little white rats in a lab. Perhaps having read the complexity of the case perhaps the guardian should have been appointed sooner rather than later." [Georgina, Resident Mother]

“They [NYAS] need to be involved straight away. Both kids should be able to talk and let them know their feelings.” [Jimmy, Resident Father]

ix. Assess parents before the case begins (Georgina)

“Well, it probably would cost money but maybe save money in the long term, if a behaviourist or a psychologist had individual meetings with the two parents and asked relevant questions to find out what the background is all about. You’d save yourself a lot of time and money and the court a lot of time and money. Because I don’t think the court would be particularly interested if they knew it was just about a personal vendetta. And he [ex partner] is not the only one there are many men who do this, pursue woman through the court system and the minute they see they have been sussed, disappear! And they don’t bother getting in touch with their children, nothing. Which is very disappointing for the children actually, they feel let down.”

[Georgina, Resident Mother]

x. Make court less intimidating and more open (Vicky, Sarah, Beverly)

“I would have preferred it not to have been in court as such, just a place that wasn’t court because just that word sounds terrible. It scared me really even though I’d done nothing wrong.” [Vicky, Resident Aunt]

“Something not as overbearing as the court arena where you feel quite intimidated just by the formality of it all. Having the opportunity to speak. I found that incredibly frustrating ‘cos things were being said which I felt incorrect or didn’t agree with I didn’t have the opportunity to say. That is more important than having someone for support I think, although if you have someone there for support and you were able to speak you would feel far more confident.” [Sarah, Resident Mother]

“Why should they just discuss it with these so called experts or social workers or solicitors? Because if it’s about you, it’s your life, it’s supposed to be a free country so you should be allowed to go in and voice your opinion. I mean I know there’s protocol in courts and you’re not allowed to say anything to the judge but I wish I had now.”

[Beverley, Resident Mother]

xi. Encourage communication between parties (Robert, Jackie, Zoe)

“It’s not ever going to work in terms of resolution, you will get a legal judgment. But no, with these family matters in my book you have to do your best to get a relationship working that allows some dynamic to take place between the parties. If that’s not there then really you’ve got two immovable objects, it’s a foregone conclusion what’s going to happen. You have to get away from this idea of proof of accusation and denial. When you are concerned with a family, you are never going to get a right or a wrong position because in trying to achieve that you are basically vindicating one side at the expense of the other.”

That's not going to unite the parties, it's going push them further apart."
[Robert, Non-Resident Father]

"I think parents should be made to communicate because this is something that will go on for years and years. I am quite happy to speak to my ex-husband but he is still angry but he needs to - he's got to learn to communicate, so it's mediation rather than dragging up things, blaming people, things getting very aggressive, costing a lot of money, time, not being able to carry on with your life. There's still no communication between me and my ex-husband and that's no good ."
[Jackie, Resident Mother]

"I would say, try not to let the communication break down to such a degree, leave a communication door open but someone could have said that to me but then it is out of my hands. Use the process but try and keep communication open 'cos it is important."
[Roger, Non-Resident Father]

- xii. Not allow the case to drag on (Jackie)

"I think it was just bitterness and that was ridiculous. It was long, it dragged on, it shouldn't have been allowed to drag on. It was irrelevant – the whole thing." [Jackie, Resident Mother]

- xiii. The judge should get to know the child better (Ginny, Beverly)

"I do think if the child is old enough the judge actually could see a video interview of the child or actually meet them so they know the child is not just another name. Then they would know the child's point of view without having it distorted in the report. Because all the judge gets is the report and they rely a lot on reports." [Ginny, Resident Mother]

Summary of parent interviews

- 4.34 The interviews with parents revealed insights into their perceptions of the process and effects of separate representation. While many parents appeared to have some understanding of the role of the CFR, approximately 40% had limited understanding of the role the guardian was assigned to carry out. In general, parents were often unhappy with the work carried out by the CFR and guardian if these did not agree with their views, made suggestions the parent did not agree with, or the parents were not happy with the final outcome of the case. A common complaint was that the officer was biased towards the other party. In contrast, approximately a third of parents indicated they felt supported by the CFR and/or the guardian, which they appreciated. In addition, when parents talked about their satisfaction with the professionals involved they often framed their views according to the effect on the child. For example, when discussing their satisfaction with the guardian, parents who were satisfied often mentioned that the guardian helped the child in some way, while dissatisfied parents often indicated that the guardian had negative effects on the child, including putting too much pressure on them or asking what the parent considered to be inappropriate questions. The majority of parents interviewed (just over two-thirds) appeared to have little or no understanding of the role the lawyer appointed to represent the child was there to carry out, while a similar number were dissatisfied or had mixed views regarding the utility of the child's solicitor.
- 4.35 The majority of parents were in favour of separate representation, often indicating that they thought it was an appropriate step regardless of how much they thought it achieved. Parents identified both positive and negative effects of r 9.5, with the majority (two-thirds) suggesting separate representation had either purely positive effects or a mixture of positive and negative influences. However equal numbers of parents thought the child's wishes were and were not considered by the court, perhaps reflecting confusion as to whether the court had 'heard' the child or whether the court had heard the child and *acted in accordance with their wishes*. Finally, parents made some interesting recommendations for how they considered the court process could be improved. The recommendation made by the largest number of parents was the suggestion that there should be a greater attempt at judicial continuity. The other most common recommendations included making the court less intimidating and encouraging communication between parties.

Chapter Five - The experience and views of solicitors regarding the use of rule 9.5

Introduction

- 5.1 There is a paucity of data relating to the extent of use of r 9.5, not least in relation to determining the number of separate representation appointments made in England and Wales. CAF/CASS provides a total figure for 2004-2005 of appointments of CAF/CASS officers as guardians ad litem, reporting that the total number of appointments rose to 1,141 from 549 in 2003-2004.⁸⁵ However, as we noted in Chapter Two, this total does not include other appointments, such as of NYAS or individual solicitors.
- 5.2 Unpublished data from CAF/CASS and the Legal Services Commission (LSC) can, however, be taken as a relatively accurate guide as to the general pattern of use across the ten CAF/CASS regions. Analysis of this data revealed that using the number of appointments as a proportion of all private law applications, three distinct patterns of use emerged; high-use representing around 10% of cases, medium use representing around 5% of cases, and low-use representing around 2% of cases. Hence, Yorkshire/Humberside, the North West and West Midlands were categorised as 'high-use', the South West, East Midlands and South East 'medium-use', and the North East, East, Greater London and Wales 'low-use'. This demonstrates a marked difference in the current practical application of rule 9.5 and raises the question, why do some areas of the country appear to make more use of separate representation than others?
- 5.3 To try to answer this question and to obtain a fuller picture of legal practitioners' experience of acting for guardians ad litem – and children – under r 9.5, we collected information via a postal questionnaire from 420 members of the Law Society and SFLA Children's Panel. The quotations included below are all from the open-ended responses to questions contained in the questionnaire.

⁸⁵ See CAF/CASS, (2005 at 29).

Table 3: Categorisation used for analysis

Frequency of Use	Area	Questionnaire response rate
High-use:	Yorkshire & Humberside	62
	North West	45
	West Midlands	34
TOTAL		141
Medium-use:	South West	65
	East Midlands	40
	South East	56
TOTAL		161
Low-use:	North East	19
	East	35
	Greater London	34
	Wales	29
TOTAL		117

5.4 Pearson chi-square tests were used to investigate the relationship between the area (high, medium and low-use) in which the solicitor respondents practised and their responses for each item on the questionnaire. We found significant relationships between area and response for four items: involvement in a rule 9.5 referral; number of cases; familiarity with the 2004 President’s Direction; and local discussion. In order to explore these relationships, respondents’ open-ended answers were considered in order to investigate whether any differences were noted across the three different areas. We found subtle differences in emphasis between the three groups across the four relationships. Generally, the pattern of results reflected the three distinct patterns of use that had emerged from the CAFCASS data. Thus, our data supported the presence of high, medium- and low-use areas, where the high- and medium-use groups produced relatively similar results and the low-use group was associated with less detailed responses, perhaps reflecting the limited experience respondents working in these areas had of r 9.5 appointments.⁸⁶

⁸⁶ However, these results must be treated with caution, not least due to the highly purposive sample used.

Respondents' involvement in a rule 9.5 case

5.5 We asked the solicitors whether they had ever been involved in a case that had been referred under r 9.5, and found a significant relationship between area and reported involvement.⁸⁷ The data presented in Table 4 suggests that the patterns of response reflect the patterns of use across area. Hence, respondents in the high-use areas reported a referral rate of 48%, the medium-use areas 35% and the low-use areas a rate of 18%. For those who reported that they had never been involved in a case that had been referred under rule 9.5, the pattern of results differed, with those in the medium-use areas appearing to have the highest level of non-involvement (33%).

Table 4: Have you ever been involved in a case that has been referred under r 9.5?

Area		YES	NO	TOTAL
High-use	No.	150	24	174
	%	48	24	
Medium-use	No.	110	50	160
	%	35	33	
Low-use	No.	55	27	82
	%	18	27	

In order to contextualize this finding, it is worth noting that no significant relationships were found between area and the number of years experience respondents had in dealing with family cases or proportion of time that they reported they spent dealing with child cases. Therefore, despite similar levels of experience in dealing with family cases and nature of caseload, the only significant relationship we found was that cases in the high-use areas were more likely to be referred for separate representation than either the medium- or low-use areas, thus supporting the three patterns of use that emerged from the CAFCASS and LSC figures.

⁸⁷ ($\chi^2 = 17.97, df=2, p<.000$).

5.6 Respondents were asked to state how many of the cases that they had been involved in had been referred over the previous five year period. When this finding was considered in relation to area, a significant relationship was found.⁸⁸ Table 5 illustrates that respondents in the high-use areas reported more involvement than the other two groups, at all levels from 'between 5 and 10 cases' to 'more than 20 cases'. Interestingly, 58% of respondents in the medium-use areas reported that none of their cases had been referred under rule 9.5 in the previous five years as compared to 25% in the low-use areas.

Table 5: Over the past five years, in how many r 9.5 cases have you been involved?

		None	Fewer than 5	Between 5 and 10	Between 11 and 20	More than 20	Total
High-use	No.	2	88	45	5	10	150
	%	17	40	66	50	100	
Medium-use	No.	7	87	17	2	0	113
	%	58	40	25	20	0	
Low-use	No.	3	45	6	3	0	57
	%	25	21	9	30	0	

Experience of an increase in resort to r 9.5

5.7 Respondents were asked to indicate whether they had observed any changes in the volume of r 9.5 cases over the previous twelve month period. Forty-three per cent of respondents indicated that the volume of r 9.5 cases had increased, whilst 6% reported a reduction and 23% stated that there had been no change. We did not find a relationship between area of practice and increase in r 9.5 use over the previous year. This would appear to suggest that the above findings cannot be attributed to a larger increase in r 9.5 use over the last year for the high-use areas than the medium- and low-use areas. Rather, it would seem that the high-use areas were more likely to have used r 9.5 over the previous five years, suggesting that higher usage rates may relate to there being more established practices and protocols in such areas than elsewhere.

5.8 Analysis of the open-ended responses revealed that three main themes emerged for the increase (increased awareness, the President's Direction, and resource limitations associated with CAFCASS reporting) whilst two themes were highlighted for why there had either been no change or a reduction in use (judicial reluctance and lack of funding). When asked specifically about the potential impact of the 2004 President's Direction, the division of responses reflected the emergent themes above,

⁸⁸ ($\chi^2 = 32.07, df=8, p<.000$)

with approximately one third of responses indicating that the Direction had influenced r 9.5 usage. Further analysis of the open-ended responses revealed that increased awareness and the guidelines it offered have served to encourage use. Finally, respondents were asked whether they thought that the President's Direction would have an impact on future use of r 9.5. Generally, respondents reported that such Directions take time to filter down the system but that it would increase future application. In doing so, the potential impact on already over-stretched resources emerged as a concern.

Increased awareness of r 9.5

5.9 This increased awareness was not limited to the judiciary.

'Judges are more readily acknowledging the appropriateness of hearing directly from the child/young person through a r 9.5 guardian rather than a limited CAFCASS report.'

We were told that parents, guardians and practitioners were more knowledgeable about the need for the child's voice to be heard.

'As a firm, I am sure the number has increased; heightened awareness of the rights of the child.'

'Greater awareness of the issues and benefits of separate representation.'

The impact of the President’s Direction

5.10 Seventy-five per cent of respondents were aware of the 2004 President’s Direction, whilst 22 per cent stated that they had not seen it. A significant relationship was found between awareness and area.⁸⁹ Further analysis of the frequency data (Table 6) revealed that respondents in the high-use areas reported greater levels of awareness (45%), with those in the low-use areas reporting the least (17%). But contrary to what we might have expected, the medium-use areas were associated with the highest number of respondents who were not familiar with the Direction. Slightly fewer respondents were aware of the CAFCASS Practice Guidance (60% were aware and 16% were not).

Table 6: Are you aware of the recent Practice Direction from the President of the Family Division concerning r 9.5?

		YES	NO	Total
High-use	No.	140	30	170
	%	45	32	
Medium-use	No.	120	36	156
	%	38	39	
Low-use	No.	53	27	80
	%	17	29	

5.11 For those who were aware of it, the President’s Direction was seen as a positive step because it provided guidance which clarified r 9.5 usage, with some respondents hoping for greater consistency in its implementation. In addition, the endorsement of separate representation in the President’s Direction has, in the view of respondents, given rise to increased judicial confidence in applying and using the rule:

‘In this area, judges have become increasingly aware of the benefits of 9.5 appointments. Since the most recent High Court judicial endorsement of the idea, still more appointments have been made.’

‘With the recent guidelines from the President and its approval of the use of 9.5, the number of cases has increased.’

‘The Practice Direction recently issued by Dame Elizabeth Butler-Sloss has given courts and practitioners better direction as to its use.’

⁸⁹ ($\chi^2 = 7.99, df=2, p<.018$).

Local discussion about the application of the President’s Direction

5.12 A significant relationship was found between area and local discussion regarding the application of the President’s Direction.⁹⁰ As Table 7 demonstrates, respondents from both the high and medium-use areas reported similar awareness of local discussion, whilst only 4% of those in low-use areas stated that they knew of such discussion occurring.

Table 7: Are you aware of any local discussion about the application of the Practice Direction?

		YES	NO	Total
High-use	No.	24	117	141
	%	49	45	
Medium-use	No.	23	92	115
	%	47	36	
Low-use	No.	2	50	52
	%	4	19	

Analysis of the open-ended responses revealed that respondents in the high and medium-use areas were aware of both formal and informal discussion. They gave similar accounts of seminars, training and informal discussion as well as particular forum discussions across both groups.

5.13 Respondents regarded the main effect of the Practice Direction to be that of raising awareness as to the availability of r 9.5 amongst the judiciary and practitioners.

‘Courts are far more receptive to the notion of ordering separate representation.’

‘The Court seems at least far more willing to consider the need for the child to be separately represented.’

Whether this had served to increase use was a matter of contention however, as some respondents felt that even though r 9.5 was considered more often, its use was still relatively rare.

‘It is considered more often but still rarely happens.’

⁹⁰ ($\chi^2 = 7.23, df=2, p<.027$)

Guidelines for use

- 5.14 As well as increasing awareness, the President's Direction encompasses clear guidelines as to when to invoke the rule. For many respondents, this was a valuable addition because it serves two main purposes; identifying when r 9.5 is appropriate and also when it is not.

'Judges are clearer about the procedure and about when it is appropriate.'

'I had to dissuade the judge from using r 9.5 as it was not appropriate on an uncontested private application.'

'Provided a case falls within the guidelines in the Practice Direction, then a court is more likely to make a direction under 9.5. There should be more consistency in its application.'

- 5.15 The need for consistency emerged with respondents emphasising the need for all courts to apply the rule in a similar way. This reflects the current variations of r 9.5 usage nationally. In one high use area the respondent stated that the President's Direction simply confirmed current practice, whilst other respondents in high and medium use areas indicated that the Direction merely repeated earlier Directions that had been issued.⁹¹ Therefore, it would seem that the President's Direction has, to a certain extent, fulfilled its purpose in that it provides clear guidelines as to when r 9.5 should be used for those areas that were not currently making such appointment and perhaps constraining high use areas by clarifying when r 9.5 should not be used.

Over-stretched resources

- 5.16 The anticipated increase in the use of r 9.5 led many respondents to express concern as to stretching resources both in terms of funding and CAFCASS:

'The effectiveness will depend on whether CAFCASS can realistically deal with increase in demand on the service.'

Alternatively, others warned that regardless of judicial and practitioner requests, increased use was simply not possible in the present circumstances.

'There are difficulties with CAFCASS having no spare resources.'

'The court is likely to give more detailed consideration to appointment but much however, will depend on the availability of guardians.'

⁹¹ As Chapter Two shows, this is partly correct, as each Direction has built upon those issued earlier.

'Judges must recognise that the profligate use of r 9.5 will overload the system to beyond breaking point.'

Lack of resources as a spur to use of rule 9.5

- 5.17 The perceived increase in r 9.5 utilisation was also linked to limitations within CAFCASS. Respondents stated that CAFCASS officers were constrained by strict time limits for each case so that reports did not always contain the level of detail required. This also impacted upon the child, as we were told that:

'Reports are superficial when it comes to finding out the child's wishes and feelings. More time should be spent with the child.'

'CAFCASS unsure of what the child is actually saying or the child itself expresses dissatisfaction at the CAFCASS report.'

'My experience of Family Court Reporters' investigations is that they are superficial, that they do not visit the respective homes, carry out sufficient observations of the relationships, or make sufficient enquiries of other agencies.'

Experience of reduction in, or low use of r 9.5

Judicial reluctance

- 5.18 Whilst respondents indicated an apparent reluctance to make the child a party, no explicit reasons were given.

'Courts are reluctant to involve children/youths in court cases at a practical level.'

One respondent hypothesised that professionals do not fully understand the capacity and needs of children or that some professionals, including the judiciary, are wary of stepping outside of traditional roles, opting instead to pursue other avenues as opposed to making the child a party to court proceedings.

Lack of funding

- 5.19 Another possible reason for this apparent reluctance may be because judges are aware of the wider funding issues surrounding making such appointments:

'In my experience, judges hardly ever allow a child to be separately represented in a private law case and the recent directions have made no apparent difference to this judicial policy. This policy is partly due to the fact that it is well known that CAFCASS is under-resourced.'

'Judges are reluctant to appoint 9.5 guardians because of the public funding position.'

'Ideally, children would always be separately represented for the same reasons as in public law. Realistically, resources do not permit this.'

Respondents' views of when r 9.5 is used

- 5.20 Having explored current usage and the impact of the President's Direction, this section of the chapter focuses upon respondents' experience of separate representation, specifically asking why it had been directed. Three main categories of reasons emerged: the nature of the case; the competence of the child and the need for expert assessment.

Nature of the case

Intractable hostility between parents

- 5.21 In line with the findings of Bellamy and Lord (2003) the majority of responses clearly identified 'intractable, hostile parents' as the main reason for a r 9.5 appointment, with no apparent difference between high, medium and low- use areas. In these cases, it was reported that parents often become entrenched in their views, locked in a battle that may make them less responsive to their child's wishes and feelings. Respondents reported that parents would offer conflicting accounts of their child's wishes and feelings or that the child him- or herself would disagree with their parent's account.

'Where courts are faced with serious case of implacable hostility, parents' intractable position means 9.5 is the only way forward.'

'...because of the bitterness of the parents, the welfare of the child was being overlooked.'

'Children's voices are being lost amongst adults' hostility and inability to prioritise.'

The effects of such parental hostility on the child's emotional wellbeing were also noted:

'In almost all of my cases, r 9.5 has been involved when there is implacable hostility and the children appear to have been exposed to emotional abuse as a result. Generally, the situations appear to relate to families where the children have been damaged, sometimes seriously, by the parents' attitude to each other.'

'Many contested contact and residence disputes are emotionally abusive to the child but the parents are so caught up in their petty squabbles they don't see that.'

However, the prevalence of r 9.5 in such cases demonstrates that this rule is usually only invoked after intractable hostility has developed over a period of time:

'Mostly used where there is a high level of conflict between parents and it is hoped that the guardian (as opposed to the Court Welfare Officer) with legal help, can ameliorate this. Unfortunately appointment is often made too late so that the parties have become entrenched in their views.'

'Yet early use of the rule was deemed to be beneficial as a means of working with parents in order to alleviate conflict sooner.'

'In difficult cases to intervene at an early enough stage to manage contact, re-educate parents that contact is beneficial and to allow a wider range of interventions. The crucial factor is timing; at the moment, separate representation comes too late in the proceedings.'

Thus, we found that r 9.5 was most likely to be used in cases that had long histories. It was often seen as 'a last resort'; something which could be invoked once everything else had been tried and failed.

'Implacable hostility has set in, court proceedings have been exhausted over 3-5 years with no success.'

'Usually, after many years of either continued litigation or numerous applications to the court regarding contact, the case reaches a stalemate and the judge has run out of options, patience or both!'

'Cases that have not progressed for years or are repeatedly returning to court.'

'Courts have reached the impossible and need a fresh approach.'

Complex Cases

5.22 In addition to implacable hostility, respondents reported that r 9.5 was often used in 'complicated cases' (see too, Bellamy and Lord: 2003). Examples of such cases include failure of the local authority to intervene, those with an international element or due to a history of serious litigation.

'The realisation that some cases are so complex and difficult that a referral to CAFCASS alone and a report will not suffice.'

'Where Social Services do not take out care proceedings even though they have been involved.'

'In the case I have there should probably be local authority involvement but that has been woefully inadequate. The section 37 report had no useful conclusion.'

'Largely because they should be public law cases where Local Authority have failed to take appropriate action or cases which are genuinely private law cases but which have complex issues.'

'Complicated issues – residence abroad, immigration issues and religious issues.'

'Child torn between parents with lengthy history of litigation and no resolution in sight or some concerns, e.g. child abuse but local authority declining to take proceedings.'

Respondents from the medium-use areas were more likely than those elsewhere to identify separate representation as being directed in cases where there was no effective local authority intervention. They were more likely to report that the local authority had declined to take action, yet due to concerns such as alleged child abuse or the general welfare of the child, separate representation was directed.

Competence of the child

- 5.23 When asked about the rationale for invoking r 9.5, respondents often cited the age of the child. It appeared that the child's understanding and competence were key factors in the court's decision as to whether to order separate representation.

'Children are of an age where their views will carry weight.'

'Because the child is Gillick competent and disagrees with some elements of the case.'

'Age and maturity of the child and the child's wish to become a party.'

In addition, respondents felt that older or more mature children had increased ability to contribute, rendering CAF/CASS reports limited in scope.

'Consistently the CAF/CASS Officer makes 'superficial' enquiries (limited to 20 hours maximum) and I feel that the child/ren have limited opportunity to state their views particularly if they are 10 years or older. Children of 10 or older have more than just "wishes and feelings".'

'Judges seem to know about this now and find r 9.5 useful in difficult cases where the child is old enough to have a view.'

'Where the child is of an age that the court has felt that s/he should have a "voice", especially where a parent is stating that the child has very strong views.'

Thus far, our findings suggest that competence of the child was a more often used factor in deciding whether to invoke r 9.5 than that of the need to establish the child's views. However, we did find that on occasion the rule was used in cases where the child's views were difficult to ascertain:

'Where there have been difficulties in establishing the child's true wishes and feelings.'

- 5.24 We found slight variations between the three area-groups in how respondents framed the courts' desire to hear the child. Respondents in the low-use areas tended to focus on the maturity of the child, strength of voice and the court's desire to hear the child's wishes and feelings, whereas those in the medium-use areas tended to focus on the need to hear the child as a means of resolving conflicting accounts, either between the child and the guardian, or the child and one or both parents. By contrast, those in high-use areas did not present a particular preference but rather provided a wide range of reasons for hearing the child, from the child not being adequately represented to the court by any other party, to the parent's implacable hostility giving rise to a lack of child-focus for the case.

'The child is of an age where the court has felt that he/she should have a 'voice', especially where a parent is stating that the child has strong views.'

'In cases where the children are expressing a strong view that puts them in conflict with the parties.'

Respondents from all three area types perceived age of the child to be a factor in determining whether a r 9.5 appointment was made. However, slight differences in emphasis were noted where those in high-use areas stressed its use with 'older children'; those in the medium-use areas reported use with 'competent children' and those in the low-use areas emphasised the need for 'Gillick competence' and the child having clear and consistent views.

Need for expert assessment

- 5.25 Respondents from all three area types identified access to public funding for expert assessment as a benefit of r 9.5 and as such, a key determining factor in some appointments. This was especially so where it was deemed necessary for parents to undergo assessment but where they had not been awarded legal aid and could not afford or refused to pay for the necessary expert report(s).

'Quite often there is a range of resources available at public funding expense such as psychological assessments being more readily available.'

'Complexity of cases especially where expert evidence from psychologists is required. Funding can also be a reason, e.g. one case I am dealing with now where neither parent is legally aided and complexity apart, the only funding for psychologist fees is the child's public funding certificate.'

'It assists if professional assessments are required (and have to be paid for).'

Respondents' views of the advantages of r 9.5 to the court

5.26 The majority of respondents (66%) perceived r 9.5 to be beneficial to the court, with 61% believing it to have an impact on the dynamics of the case. Further analysis of these findings revealed four main benefits: gaining an objective and balanced view of the case; obtaining detailed reports; refocusing attention on the child and facilitating decision making. However, in doing so, respondents highlighted that r 9.5 is not necessarily beneficial in all cases. Not all cases were deemed to warrant such intrusive intervention, and 46% of respondents considered that its use could lead to delays and increased costs. This viewpoint reflects that of the President:

'The President's Direction very properly states that r 9.5 orders should only be made in a limited number of special cases which may not be within the range of expertise of a Children and Family Reporter.'

Objective and balanced assessment

5.27 Perhaps the central, most valuable contribution of a well-trained, experienced guardian was seen as the ability to provide a balanced and reasoned report as well as independently verifying the child's wishes and feelings. As noted, separate representation is often used in cases of intractable hostility rendering the need for an independent and impartial stance that can present the child's view extremely important for the court.

'The parents will be arguing their case from their subjective point of view. They will not necessarily impart all of the relevant information, or may impart it in a very partisan way making it uncertain whether the court will hear all of the story, or just the story the parents tacitly agree the court needs to hear.'

'Allows the judge/court/lawyers to 'out-manoeuvre' more acrimonious/contentious approach from parents.'

'In cases where the a child is separately represented the issues are usually examined in greater depth, often with expert evidence which can lead to a greater understanding on the part of the parents as to why a particular course of action is being recommended. There is a greater chance of agreement being reached and adhered to.'

'Presents matters more independently without being so bogged down in parents issues. It is easier for the court to consider what is right for the child with input from the Guardian in this way.'

Some respondents also took the view that this measure provided the opportunity for more long-term solutions to be found.

Enabling more work to be done in the case

- 5.28 In addition to providing a balanced and objective approach, respondents felt that r 9.5 gives the guardian more time to spend on the case and as such, the opportunity to interview the child and parents, and request assessments such as psychologists' reports, school reports or social services assessment. Respondents felt that, under r 9.5, the child had the opportunity to spend more time with the guardian and ultimately, to ensure that their wishes were represented.

'These are usually very difficult cases where establishing facts can be nigh on impossible and even counter-productive. The detailed and skilled input from a guardian can greatly assist the court in deciding the issues where there are facts to be found. The guardian can assist with independent investigations and information gathering and assist the process, perhaps to include the instruction of suitable experts.'

'The judge receives a more concentrated, detailed report usually based on a larger number of hours spent with the child and children with whom they have formed a relationship. Often options are identified to a court which would not ordinarily be workable with r 9.5.'

- 5.29 As stated above, some respondents found the CAFCASS reports to be limited in scope and at times, found that the child disagreed with their findings. Respondents from both the high and medium-use areas identified the use of r 9.5 as a means of overcoming the limitations of these reports. Respondents from the high-use areas complained about CAFCASS officers 'sitting on the fence' and failing to deal with the complicated issues of the case, whilst some in the medium-use areas stated that CAFCASS reports were consistently 'superficial' and failed to provide sufficient information. Respondents in the low-use areas did not report this to be a factor in determining whether separate representation was made.

'The guardian can sometimes act as a catalyst to unlock static positions. The guardian does more work than a CAFCASS Reporter (as they are allowed to do so) and so is in a position to make better informed recommendations to the court.'

Refocusing attention onto the child

- 5.30 The entrenchment of parental views can result in the child's interests becoming overlooked or submerged. The respondents acknowledged the value of appointing separate representation so that the child moved to the forefront and the child's welfare became the central focus for all parties concerned.

'If a child understands what is happening, their views should be canvassed and their opinion expressed to the judge. They are, after all, the subject of the proceedings and therefore the most important person, their views should be expressed to the court by their own solicitor.'

'The court is helped to maintain its child-centred approach. There can be a tendency for one or other parent to gain the sympathy of the court because of their own needs, difficulties and for parents to pursue self-interested 'side issues' in which the needs and interests of the child may become lost. The child's representative keeps the court's eye on the ball.'

'It gives more leverage to the judge to press the parents to adopt what is clearly in the child's interests as opposed to their view thereof.'

Facilitates decision making

- 5.31 By providing balanced and objective reports that are detailed and refocus attention onto the child, the main benefit of r 9.5 appointments was seen as that of facilitating decision making, where the judge can be satisfied that s/he had fully considered the welfare checklist and is not simply having to consider one parent's views against the other's.

'Judges are provided with succinct, clear indicators as to what is in the best interests of the child as opposed to a report outlining simply parties' views and inviting the court to decide the case following a hearing. I think although the appointment may cause delay in time, it is more effective in reaching a conclusion without a contested hearing.'

'I think in certain cases the judges feel "stuck" and don't know how to take a case forward, particularly if you have a parent who has no fear in ignoring court orders. Separate representation often leads to expert evidence which can assist the court greatly.'

Respondents' views of the effects of separate representation on the child

- 5.32 Having discussed the perceived benefits of r 9.5 for the courts, this section of the chapter focuses on what effects respondents felt that separate representation may have on the child.

Potential benefits of separate representation for the child

- 5.33 Sixty-six per cent of respondents reported that r 9.5 may be beneficial to the child in some cases, 8% in all cases and only 1% believed that it was never beneficial. Analysis of the open-ended responses showed that respondents identified two main benefits: giving the child a voice in the proceedings and ensuring a child-centred focus.

Giving the child a voice

- 5.34 Respondents felt that the benefits of enabling the child to voice his or her wishes and feelings could be very empowering for the child who up until that point may have felt powerless within a situation that directly affects them. 137 of the 358 open-ended responses specifically identified 'giving the child a voice' as a benefit of r 9.5 to the child.

'The children have been amazed that someone takes their views seriously and will be speaking to the judge for them.'

'Children are so often unable to articulate their feelings at short notice, they often sit on the fence or say things to please the parent with whom they reside, and separate representation gives them a greater chance to be heard accurately.'

As well as making children feel as though they were being listened to and not sidelined, respondents identified the indirect effect of encouraging parental communication outside of the courtroom. Respondents felt that the mere presence of independent child representation served to reduce parental conflict:

'Parents less likely to be extreme because they know if the child's representative does not agree, it is 2:1!'

'Separate representation can be a 'deterrent' (in part) to some of the dishonesty (intentional or otherwise) indulged in by the parents.'

The difference between the child's welfare and the child's voice was alluded to but seldom made explicit.

'The child becomes a real "player" rather than the subject of a dispute which may often be motivated by factors other than the child's welfare.'

'To concentrate on the welfare of the child and wishes of the child, provided that it is clear that whilst his or her view will now be heard, it will not ...[necessarily] prevail as adults make decisions and not children.'

The possibility that the child's views would differ significantly from either one or both parents was a central concern. Again, this may reflect the predominance of r 9.5 in seemingly intractable cases where parents have become embroiled within arguments with each other to the detriment of the child.

'Many children are caught up in contested proceedings between their parents that can go on for years. Children and Family Reporters do not have the time to see children in a relaxed setting away from their parents and children's real feelings often do not show themselves unless and until there is someone there for them. Many contested contact and residence order disputes are emotionally abusive to the child but the parents are so caught up in their petty squabbles they don't see that.'

Ensuring a child-centred focus

- 5.35 The value inherent in appointing an independent representative extends beyond that of giving the child a voice and removing the parents' agenda. Guardians were seen as being in a position to 'identify the risks and start the process of evaluating such risks'. Respondents saw the guardian as going further than merely listening to and repeating the child's wishes and feelings. Rather, the guardian may spend time exploring the child's position as well as serving as a barrier between them and their parents.

'It helps the child explore their wishes and feelings where they have a conflict of loyalties between parents.'

'They help to define the issues in a child-centred way where the child can be helped to say what they have been prevented from saying by pressure from carer or other adults.'

'It provides an independent and robust view to be advocated from the child's position with a clear 'take' on the child's welfare needs and a clear exposition of the child's wishes and feelings.'

Potential difficulties of separate representation for the child

- 5.36 Twenty-one per cent of respondents felt that rule 9.5 created difficulties for the child as opposed to the 47% who did not perceive this to be the case.

Introducing another professional

- 5.37 As stated, r 9.5 is often used in cases that can be characterised by intractable hostility, often with long histories and that can be described as having reached a 'deadlock'. Whilst largely dependent upon age of the child and parental style, many children will have been aware of the conflict and possibly of repeated court orders. Many if not nearly all children who are

made the subjects of r 9.5 will have already been interviewed by a CAFCASS officer. The immediate effect of a guardian appointment is that another professional will want to interview the child over a longer period of time or, in some cases, the Children and Family Reporter may take the guardian role and will need to re-interview the child about the same issues but in more depth. In doing so, respondents reported that the child may feel embarrassment, stress, increased pressure, or general distress.

'The child very often has to meet another professional. Then on top of that, the child meets an expert, maybe a psychologist. The signal given to the child is that this is not over and that even worse, there may be something wrong with them. So it can have a negative impact.'

'Having yet another professional, such as a solicitor, prying into their lives.'

Interestingly, only one respondent mentioned the importance of the guardian being able to put the child at their ease. One respondent highlighted the difference between solicitors with public and private law experience, stating that those with private law experience are often insufficiently equipped to deal with r 9.5 cases.

Imposing responsibility upon the child

- 5.38 Respondents suggested that separate representation may serve to empower the child in a situation where s/he can be made to feel like a 'trophy'. Suddenly, the child 'has to accept a central role in the dispute' and if it is not handled sensitively, this can give the child too much responsibility for the outcome. This can serve to cause anxiety as well as to raise expectations where the child may believe that the judge will make a decision based entirely on their view. This appeared to be a double-edged sword, in that a manipulative child could use this power against their parents whilst a manipulated child could be pressurised into repeating allegations or reciting one parent's viewpoint. Respondents acknowledged that voicing a different opinion to that of the resident parent could 'increase tensions in day to day living' or lead to the child being 'got at' for saying the wrong thing. Thus, the risk of introducing conflict into the parent-child relationship emerged as a potential problem of separate representation:

'It can bring out issues between them and a parent or parents which have not surfaced before. These can then be difficult to get over once the proceedings have ended; it can be a Pandora's Box.'

'I fear in some cases it empowers a manipulative child to vacillate and bargain.'

Benefits outweigh difficulties

- 5.39 Many respondents stated that an experienced guardian would reduce many of the difficulties highlighted above. Even in cases where difficulties arose, we were told that the unique ability of r 9.5 to unlock seemingly intractable cases outweighs any potential problems.

‘Such children that require separate representation are usually already in a difficult position; they need all of the help they can get.’

However, the need for ‘experienced guardians’ was echoed throughout the responses. In this regard, respondents considered the need for training for guardians and practitioners to be a major factor in effective separate representation for the child, parents and court.

‘It totally depends on how good the guardian is. There needs to be training of the officers appointed.’

‘Solicitors appointed to represent the children tend to be experienced in public law children cases, and the court probably recognises that a better focus is achieved on the best interests of the child by this procedure.’

Such views echo the findings of our own interviews with the children⁹² and the importance of the quality of the individual guardian (or other professionals in the case) in being able to develop a relationship with the child from which to support the child and enable the family to move forward.

The age and understanding of the child

- 5.40 Given the significance of the ‘welfare’ vs. ‘voice’ rationale for separate representation, we asked respondents whether they felt there is a usual minimum age below which separate representation would not be directed. Despite 43% of respondents stating that there is no such usual age, the open-ended responses suggested that they considered there is a marked preference for using r 9.5 where the children are regarded as having ‘competent views’. The ability of the child to understand the case and express their views seemed to respondents be a key determining factor.

‘The Courts seem to accept that the older child needs a voice more.’

‘Judges seem to know about 9.5 now and find it useful in difficult cases where the child is old enough to have a view.’

⁹² See Chapter Three.

Indeed, respondents often simply wrote ‘*Gillick competence*’ in answer to this question.

[Rule 9.5 is used] *where there are apparent issues on the child’s wishes and feelings and the children are Gillick competent.*’

These findings appear to suggest, contrary to the views noted above as to intractability and complexity of the case, that the rationale for using r 9.5 lies in ensuring the voice of the child is heard, as opposed to establishing the child’s welfare needs:

‘The court only benefits from Gillick competent children.’

‘Courts discourage applications with younger children. I suppose it is thought that CAFCASS officers can reflect their view and that they do not have sufficient understanding.’

- 5.41 The older, more competent child was deemed more able to resist parental influence with both practitioners and judiciary welcoming those children with stronger views. Yet in associating the use of r 9.5 with ‘*Gillick competent*’ children, respondents appear to be under some misapprehension. Such children are, by definition, capable of instructing their own lawyer, and should thus potentially be granted separate representation under FPR 1991 r 9.2A, nor r 9.5.⁹³ They have no need for a guardian ad litem to represent them to the court. The fact that r 9.2A is not apparently used in such cases suggests that it is the additional aspects of the guardian’s role – the ability to devote more time to the case; to instruct experts; to support the child; to work towards a settlement – which is the underlying purpose of the appointment after all, which takes us back to a ‘welfare’ rather than ‘voice’ rationale.

Keeping the child informed about the case

- 5.42 Over half (57%) of respondents stated that the child was kept informed about progress of the cases with only 4% indicating that this was not the case. Slightly more (59%) indicated that the child would be given feedback about the outcome of the case, with 2% receiving no such information. Overwhelmingly, we were told that the age and understanding of the child would determine whether the guardian and/or solicitor would take this role and also the form in which the information was given. Younger children tended to see only the guardian in a face to face meeting whilst older children might see both the solicitor and guardian in at least one such meeting. It appeared that most solicitors sought guidance from the guardian as to how to inform the child, with many producing written explanations of the outcome for the guardian to explain to the child.

⁹³ See Chapter Two for an explanation of the difference.

- 5.43 In terms of what information was given to the child, again respondents appeared to take their lead from the guardian but generally a picture emerged whereby the child received a summarised version of events:
- 'It is not necessarily good for children to have a blow-by-blow account of each court hearing or development as it is likely to cause anxiety for them.'*
- 5.44 On some occasions, we found that the solicitor would see the child alone, or attempted to use child's preferred mode of contact; for example, some children opted for text messages whilst others asked for email contact. We found variations as to perceived appropriateness in that whilst some respondents clearly felt that it was never appropriate to write to a child others would only use this method.
- 5.45 Perhaps the most disturbing finding was that some respondents felt it appropriate for parents to provide progress reports and feedback to the child. Whilst this was a rare occurrence it does highlight the potential for the child to experience some of the difficulties already identified such as feelings of responsibility, distress and anxiety about their role in the case. Therefore, as one respondent suggested, the role of the guardian should perhaps be extended to that of 'guarding against the child getting "adjusted versions" of events from contending parents'.

Summary of solicitors' responses

- 5.46 The responses from the solicitors reflected the pattern of use of r 9.5 across the regions, as shown by CAFCASS' own figures. Not surprisingly, solicitors in high-use areas were more familiar with the rule than those in other areas.
- 5.47 The types of case in which respondents reported r 9.5 being used reflected the analysis of Bellamy and Lord. The primary type of case concerned an intractable dispute between the parents, with other cases of 'complexity' forming the other main category. Again, this is unsurprising: one would expect judges to be using the criteria laid down in the President's Direction (and previous iterations) into which these categories can be fitted quite comfortably.
- 5.48 Respondents saw the value of r 9.5 as lying in both 'welfare' and 'voice' dimensions. They reported that it may enable more in-depth work to take place with the family, or for expert reports to be obtained, but also as providing a means whereby the proceedings may become more child-focused, both in terms of 'hearing the voice of the child', and in enabling the child's interests to be properly explored and advocated to the court.

- 5.49 The use of r 9.5 for older children who can express their views and are 'Gillick competent' suggests that there is either some confusion on the part of the respondents or the courts as to the correct mechanism for enabling children to have their say, or that the purpose of using r 9.5 is to get more resource into the case.
- 5.50 The respondents identified both benefits and difficulties for children who are represented by a guardian ad litem, a picture also revealed by the interviews we conducted with the children in our sample, as discussed in Chapter 3.

Chapter Six - Court data

Introduction

- 6.1 This chapter is based on our analysis of court records and presents a more quantitative picture of the full sample of r 9.5 cases. This analysis must be interpreted with some caution, however. First, it should be remembered that our primary aim in examining court files was to identify a sample of children to be interviewed and the data collection from files was a supplementary task. In addition, because of various shortcomings and variations in the nature of record keeping the analysis contains a substantial amount of missing data. We found, for example, that in some instances applications, orders and statements were alluded to, but missing from the records. In addition a number of forms were partially completed or contained very limited information. As a result, we are unable to provide a detailed analysis of information contained in the court records. Nevertheless, the findings of this chapter throw some light on the nature of the full sample of cases we examined and, in addition, our experience as outside visitors to the courts has highlighted what seem to us to be certain weaknesses in the way information is assembled and stored in court records. We reflect on these in Chapter Seven.
- 6.2 Overall, five courts participated in the study, representing four of the ten CAFCASS regions, namely the North West, Yorkshire & Humberside, West Midlands and Greater London. According to annual CAFCASS statistics provided to us by the DCA on the number of r 9.5 appointments, these courts comprised both high-use areas (North West, Yorkshire & Humberside and West Midlands) and low-use areas (Greater London).
- 6.3 Each court was responsible for contacting CAFCASS in order to request details of the number of r 9.5 cases that had been recorded within a given period. From this process a potential sample of 191 cases were identified and once our screening criteria had been applied a final sample of 121 cases were included in the data collection from court files (see Appendix 1 for detailed methodology).

- 6.4 A data collection sheet (see Appendix 5) was completed for each case which fitted the sampling criteria. This collected information from the major components of each case, namely: the C1 application form (the standard form for an originating application in Children Act 1989 proceedings), any orders on file, individual party statements and reports from any Divorce Court Welfare Officers, Children and Family Reporters or guardians involved in the case. To maintain confidentiality, names and addresses of the parties were not removed from the court and only general information about the case was recorded.
- 6.5 In order to facilitate quantitative analysis, data were coded into broad categories and analysed using SPSS. In doing so, data has been presented in the form of percentages of respondents who gave that response. As such, this analysis provides a basic overview of the types of r 9.5 cases as opposed to providing detailed information about each case or providing a comprehensive investigation of the documents involved in a r 9.5 case.

Findings

- 6.6 From the original sample of cases identified by CAFCASS a total of 87 cases were deemed suitable to be invited for interview. Of the 35 cases that were not deemed suitable, the most common reason for exclusion was that the child was below five years of age and so considered to be too young to take part in an interview. Cases were also omitted if the child(ren) were not living in this country or where the file indicated that the carer's address was not to be disclosed. In addition, it was decided that following judicial permission, general information would be recorded from all relevant cases regardless of whether the parties would be invited to participate in an interview or not. Therefore, the following analysis provides a general picture of the types of cases in which r 9.5 had been invoked for all 121 cases.

The children

6.7 There was a total of 224 children across all the families in our sample of whom 45% (101) were boys and 55% (123) were girls. Children ranged in age from 1 to 18⁹⁴ years with an average age of 8.2 years at the time of first application (see Table 8).

Table 8: Age of children (at time of first application)

	Frequency	Total (%)
1 – 2 years	12	5
3 – 4 years	28	13
5 – 6 years	40	18
7 – 8 years	26	12
9 – 10 years	32	14
11 – 12 years	33	15
13 -14 years	19	9
15 -16 years	12	5
17 – 18 years	2	1
Missing	18	8
Total	222*	100

* Two children were born after the date of the first application

Applications

6.8 The father was named as applicant in 57% (69) of cases and the mother in 29% (35) of cases. Of the remainder, we found a near even dispersal across maternal and paternal grandparents and aunts, as well as siblings, and carers. Hence, the mother appeared as respondent in 63% (77) of cases, and the father in 27% (33) of cases. In 63% of cases the child(ren) resided with the respondent and in 29% of cases the children resided with the applicant. The remaining 6% resided with other relatives.

⁹⁴ Court files including children up to 18 years of age.

- 6.9 From the primary application on each file we found that contact, at 41% (44) and residence at 40% (43) were the most frequently sought orders. To a lesser degree, applications were made for prohibited steps orders 6% (6), specific issue orders 4% (4), and interim residence orders 3% (3).

Table 9: Types of order applied for (primary application)

	Frequency	Total (%)
Contact	44	41
Residence order	43	40
Interim residence order	3	3
Parental responsibility	1	1
Prohibited Steps Order	6	6
Specific Issue Order	4	4
Want application rejected	1	1
Seek to suspend contact	1	1
Non Molestation Order	1	1
Supervised contact	2	2
Total	106	100

Secondary applications

- 6.10 In 48 cases it was indicated that a second application had been made. From these applications we were able to establish that 21% (26) were made by the initial applicant and 12% (15) by the respondent. A similar pattern of findings emerged in relation to the types of order applied for with both contact at 12% (15) and residence at 12% (15) being the most common requests. Three per cent (4) of second applications were for prohibited steps orders and 3% (3) for interim residence orders.

Applications for Residence Orders

- 6.11 A more detailed examination of cases involving an application for residence found that concern about a child's safety was the most frequently cited reason for applying for a residence order. Residence applications included allegations that the child(ren) was not safe with the mother in 14% (18) of cases and the father in 4% (5) of cases. Another 6% (7) of residence applications came from parents or carers who had previously been found unfit to care for the child(ren) and were making a new application on the basis that they had 'sorted themselves out' and wished to take over responsibility as primary carer. Finally, in 5% (6) of cases, the applicant stated their concern that there was a danger of the child being removed from the jurisdiction.

Applications for Contact Orders

6.12 A further examination of the cases involving an application for a contact order showed that in 22% (26) of cases the application for contact had been made because of difficulties with either establishing or maintaining contact. Child resistance to contact was given as a reason in 8% (10) of cases, whilst parental resistance to allowing contact was given in 7% (9). We also found that in 6% (8) of cases, applicants were requesting the details surrounding contact to be changed (e.g. frequency, venue, indirect contact to direct contact, etc). Again, issues of safety emerged with concern expressed over neglect in 3% (4) of cases, parental mental health in 2% (2) of cases and alleged abuse in 9% (9) of cases.

Additional information concerning the children

6.13 In 36% (44) of cases, the applicant indicated that there had been other proceedings involving the children (no information was provided about the nature of these proceedings). When this information was included on the application form, 57% (69) of the children were generally described as being in good health, 10% (12) as having special needs and 34% (41) as known to Social Services. The data collected suggested that only 28% (34) of parents had been married; however, yet 55% (67) of application forms did not include this information. A similar pattern was noted concerning whether the parents had other children; 21% (26) indicated that they did, 25% (31) that they did not, but 53% (65) neglected to give this information.

Orders made

6.14 A total of 285 orders were made and recorded across the 121 cases (Table 10). Twenty eight per cent (79) were contact orders, 22% (63) were residence orders, 6% (17) were prohibited steps orders and 4% (10) were for parental responsibility. In 9% (25) of cases, an interim contact order was granted pending resolution of the case. For many cases, the order was simply recorded as a s 8 order (39: 14%). Finally, permission to withdraw was granted in 4% (12) of cases.

Table 10: Numbers and types of order made

Type of Order	Frequency	Total (%)
Contact Order	79	28
Residence Order	63	22
Section 8	39	14
Interim Contact Order	25	9
Parental Responsibility	10	4
Permission to withdraw	12	4
Prohibited Steps Order	17	6
No order	9	3
Section 16	7	2
Dismissed	3	1
Interim Care Order	5	2
Section 41(1)	4	1
Other*	12	4
Total	285	100

*Totals less than 1% have been omitted, examples of which include one section 37, one section 38 etc.

Rationale for r 9.5 use

6.15 On the basis of the documentary evidence we found in the files, very few of the cases stated the specific reason for invoking r 9.5 in the order given by the judge. Evidence of the rationale for the use of r 9.5 was therefore taken from Divorce Court Welfare Officer or Child and Family Reporter and guardian reports, and where necessary applicant and respondent statements. These data revealed that the most frequent reason for using r 9.5 in 33% (40) of cases was to attempt to resolve ongoing disputes between the parties (Table 11). We found that in 30% (36) cases, the judge simply requested a general assessment of the child’s welfare, particularly with respect to what action was in the child’s best interests, and in 6% (7) of cases the judge requested an investigation into the circumstances of the child within the present residence arrangements. Investigations into allegations of abuse (including physical and sexual abuse) were apparent in 12% (14) of cases. To a lesser extent, in 7% (8) of cases ongoing difficulties in enforcing contact arrangements had led to the need to use r 9.5.

Table 11: Rationale for r 9.5 use

	Frequency	Total* (%)
Ongoing disputes between parties	40	33
To determine what is in the child’s best interests	36	30
Alleged abuse	14	12
Support and help contact to proceed	8	7
To investigate the circumstances of the child within present arrangements	7	6
Child currently in foster care	4	3

*Does not add up to 100% due to missing data

Length of proceedings

6.16 The nature of record keeping made it extremely difficult to ascertain the exact duration of cases. However, in order to calculate an estimate of the length of proceedings we noted the earliest date of application on file to the date each case was closed. We are certain, however, that these figures are an underestimate of the overall length of proceedings as in a number of cases previous applications had been made which were not kept in the file. It should also be noted that these figures are based on the particular proceedings in which r 9.5 was invoked and do not necessarily present an accurate picture of the child’s⁹⁵ court ‘career’. The resulting data showed

⁹⁵ We recognise that each set of proceedings or individual applications do not always apply to all of the children in a family. As a result children within the same family may each have their own individual court ‘career’ which is even more difficult to measure.

that on average the length of proceedings in the cases sampled was 22 months, with the shortest case being closed after 4 months and the longest recorded case lasting more than 6½ years. From Table 12 it can be seen that nearly half of the cases were between one and three years in duration.

Table 12: Estimated length of court proceedings

	Frequency	Total (%)
0-6 months	9	8
7-12 months	21	18
13-24 months	32	27
25-36 months	23	20
37-48 months	9	8
49-60 months	3	3
61+ months	2	2
n/a still open	16	14
Total	115	100

Further analysis of data on estimated length of proceedings and the geographical area of the case showed that all of the longest cases of between four and six years in duration were recorded in the Yorkshire and Humberside and North West regions. All of the Greater London cases were still open and it was therefore impossible to estimate the final length of these cases. We can report, however, that these cases had already been open for between 2 and 48 months with an average length of 24 months.

Judicial continuity

6.17 The data collected from court files provide some sense of the level of judicial continuity experienced by families in the cases sampled. It should be noted, however, that these findings too almost certainly underestimate the number of judges involved in each case. Our interviews with parents suggest that there were often more judges involved in a case than we were able to ascertain from court files. This was partly because data were only collected from the main orders made in each case, whilst other judges may have been involved in additional directions hearings, and also because a number of cases had involved previous proceedings not included in the file. Overall, the data collected show that a range of between one and nine judges were involved in the cases sampled with an average of 2.4 judges per case. Table 13 presents the total numbers of judges recorded in our sample of cases.

Table 13: Number of judges recorded in each case

	Frequency	Total (%)
One judge	34	29
Two judges	38	32
Three judges	26	22
Four judges	10	8
Five judges	9	7
Six judges	1	1
Nine judges	1	1
Total	119	101

From Table 13 it can be seen that only 29% (34) of cases recorded the same judge throughout all of the proceedings. Thirty two per cent (38) were overseen by at least two different judges, with 22% (26) having three and 8% (10) encountering four different judges throughout the duration of the case. Eleven of the cases we sampled (9%) had more than five judges involved. Variations in the length of cases may to some extent reflect differences in approach to case management.

- 6.18 Further analysis of the data on judicial continuity suggests that there may be some relationship between the number of judges involved in a case and the geographical area of the case. Of those cases involving only one judge, 62% came from Yorkshire and Humberside, 30% from the North West, 9% from the West Midlands and none from Greater London. A very similar pattern was evident for cases involving only two judges with the majority (61%) from Yorkshire and Humberside and a further 32% from the North West. This pattern is unlikely to be due to the extended length of cases in these regions as many of the longest cases we recorded were also found in the Yorkshire and Humberside and North West regions.
- 6.19 Interestingly our data show that the number of judges involved in a case was not correlated to the length of the case. Close examination of the longest cases we identified (5 cases of more than 4 years in duration) show that one case lasting more than five years only ever had one judge involved. A further three cases of just over four years in length involved only two judges and our longest recorded case of more than 6½ years involved a total of three judges.

Outcome of cases

6.20 Although a number of the files examined did not contain a final order or lacked precise information on the outcome of the case, it was possible in all but seven cases broadly to categorise how the case had been resolved as far as the court proceedings were concerned. Table 14 provides a summary of these data and show that in 26% (30) of cases, for which data was available, it was recorded that parental agreement had been reached. Other than the 14% (16) of cases which were still open, the majority of the remaining cases resulted in a s 8 order being made. Contact orders were most common as the resolution in 19% (21) cases, residence orders in 9% (10) of cases and a residence and contact order occurred in 15% (17) cases.

Table 14: Outcome of 9.5 cases sampled

	Frequency	Total (%)
Parental agreement	30	26
Contact order	21	19
Residence and contact order	17	15
Still open	16	14
Residence order	10	9
Parental responsibility order	5	4
Application withdrawn	5	4
No order	5	4
Case dismissed	2	2
Family assistance order	1	1
Discharge care order	1	1
Applicant died	1	1
Total	114	100

Summary of court data

6.21 Whilst we are very conscious of the shortcomings of the data collected from court files (the reasons for which have been explained above) some general points have emerged:

- The prevalence of missing data in the files
- Difficulties in finding clear evidence of the reason why judges invoked r 9.5
- The apparently high number of judges per case which, if anything, is probably an underestimate
- How the current management of information in court files seems to be based around the numbers of applications and orders made, perhaps reflecting the traditional way in which judicial statistics are compiled rather than in a way which is more child-focused.

- 6.22 What we would like to see is a method of approach to data recording which compiles information concerning a child's court 'career' so that it would be possible to distinguish those children and families who have relatively short contact with the family justice system from those whose cases come back to court time and time again. We envisage a standardised system of child focused record keeping in the way that is currently used in the NHS⁹⁶ which could 'move' around with the child and provide a comprehensive case history either when new proceedings begin, when a case is transferred from one court to another or when the child moves from one area to another.

⁹⁶ This has also previously been suggested in relation to adoption or long-term fostering records for previously looked after children (Lowe and Murch: 2002 at 154).

Chapter Seven - Conclusions, reflections and recommendations

Introduction

- 7.1 In this chapter we draw together those key points emerging from the study which appear relevant to the use of separate representation for children in private law proceedings. In so doing we summarise the main findings and outline possible implications for policy and practice. We conclude with some broader reflections concerning the process of separate representation and offer some recommendations which might help to make the court system more child-friendly.
- 7.2 First, to recap on the main purpose of the research. In a written ministerial statement concerning the implementation of s 122 of the Adoption and Children Act 2002 and related Rules,⁹⁷ the Parliamentary Under Secretary at the Department for Constitutional Affairs, Baroness Ashton of Upholland, neatly explained why the Department commissioned the research; namely, to inform the Department's consideration of what rules of court might be made in connection with s 122.⁹⁸ The Minister stated:
- 'We wanted to understand whether formal representation through a solicitor and guardian is meeting children's needs, or whether there are other ways in which their needs can be met. It (i.e. the research) also met our commitment to consult with children on this issue.'*
- 7.3 While of course needing to address the issue of whether or not the tandem model is always appropriate in r 9.5 cases, for a number of reasons, in designing the project it was necessary to take a broader focus. First, children and their parents would in any case probably view our research in the context of their involvement with the family justice system as a whole and would probably want to explain to us its impact on their lives. Secondly, we needed to understand and evaluate r 9.5 against fast moving policy developments springing from the two Green Papers (HM Government: 2004, 2005), the new strategic approach announced in the Private Law Programme (President of the Family Division: 2005), the announcement that the Government was launching a cross-Government review of the childcare proceedings system and of the family justice system of England

⁹⁷ Issued from the Press Office, Communications Directorate at the DCA on 12 January 2005.

⁹⁸ Section 122(1)(b) and (2) provide rule making powers for the separate representation of children in Children Act 1989 cases generally and in particular in s 8 cases. Both these provisions commenced on 30.11.2005 (see Adoption and Children Act 2002) (Commencement No. 9) (Order 2005) but Rules have yet to be formulated and implemented.

and Wales (DCA: July 2005 at 38), the consultation concerning the proposed professional and organisational changes for CAFCASS (2005), and of course the President's two Practice Directions of April 2004 and 25 February 2005,⁹⁹ which regulate the circumstances under which r 9.5 can be applied. We also needed to take account of several studies which throw light on children's views of other aspects of family law practice: Lyon, Surrey and Timms (1998); Masson and Winn-Oakley (1999); Gollop, Smith and Taylor (2000); Buchanan, Hunt, Bretherton and Bream (2001); Smart, Neale and Wade (2001); Thomas, Beckford, Lowe and Murch (2001); Trinder, Beek and Connolly (2002); Buchanan and Hunt, (2003); Butler, Scanlan, Robinson, Douglas and Murch (2003); Trinder (2003); Smart, May et al (2005).¹⁰⁰

- 7.4 When we began our study, the use of r 9.5 in s 8 cases was believed to be comparatively rare and, as far as we could tell from the limited available statistics, geographically highly variable – what CAFCASS has recently referred to as a postcode lottery (November 2005).¹⁰¹ We therefore knew it would be a particularly challenging task to identify and recruit sufficient numbers of children and parents who were willing to participate in this research. Research ethics dictated that both the children and their resident parents had to give informed consent. Given that r 9.5 is only used in cases which cause the courts 'special difficulty', further intervention from researchers after the case was supposedly 'closed' could be unwelcome to many parents who might regard it as intrusive and likely to be upsetting to a number of their children. For these reasons we realised that we would have to cast our initial sampling net wide and because of the expected small number of participants the resulting data were likely to be essentially qualitative. However, as already pointed out¹⁰² this did not necessarily decrease its value since qualitative information gleaned from a relatively small specialist sample would allow us more easily to illuminate the processes of family relationships and their interaction with the family justice system and related services. As it was, we hoped to balance such data against the more quantitative representative information drawn from our examination of court records and the large national postal survey of solicitors.

⁹⁹ See Chapter Two above.

¹⁰⁰ For an informative comparative study of children's and adolescents' views of guardians in Germany which revealed many similarities with our own findings see Stötzel and Fegert (2005).

¹⁰¹ See also the President's Practice Direction and Guidance issued by CAFCASS (February 2005). Amongst other things, this required CAFCASS service managers to record the number of r 9.5 cases where the case was allocated to an individual or organisation *other* than CAFCASS and to record the court's reasons for so doing. A reminder stressing the importance of this matter was issued to CAFCASS service managers on 1 December 2005.

¹⁰² See Chapter One above.

Commentary on main findings

7.5 In this section we summarise and comment on the main findings emerging from the various parts of the research beginning with the child's perspectives:

The children's perspective

Children's need for reliable information

- 7.6 Earlier research into children's views of divorce has revealed the importance to children of obtaining reliable information about their parents' separation and divorce so that they can have a better understanding of what is happening and what to expect (see e.g. Butler et al: 2003 at 186). We know from such research that although professionals encourage parents to explain things to their children, many parents find it difficult to do so, particularly in a way that does not denigrate the other parent. Moreover, children often do not know how to ask for information that they need to help them understand what is happening as their family life undergoes critical and often stressful change.
- 7.7 In the current research where inter-parental conflict had often been prolonged with repeated resort to court proceedings, children's needs for information and support were even more pronounced. A number were clearly ignorant, confused and made anxious by knowing their parents were going to court to contest residence or contact. They imagined courts to be 'scary places' and believed that the judge could and would punish their parents, even send them to prison, for behaviour which they themselves felt responsible for, at least in part, such as refusing to go on contact visits.
- 7.8 We discuss below the implications of this with respect to the enforcement provisions in the Children and Adoption Bill currently before Parliament. Here, we consider the more immediate practice issues, particularly as they might concern family lawyers and CAFCASS.
- 7.9 As far as giving children information is concerned, it is not enough, in our opinion, in these complex cases merely to distribute leaflets to parents to encourage them to keep their children informed, or to give children themselves leaflets (however well designed) explaining the nature of family court proceedings and how they differ from the popular stereotypical image of courts with criminal jurisdictions. Moreover, we note that HM Inspectorate of Courts' Administration (April 2005 at para 3.22-3.24) found that:

'Most courts visited by Inspectors have little or no written information about family proceedings suitable for children... Neither did Inspectors find any examples where the views of children about the adequacy of information given to them is sought and evaluated.'

- 7.10 But even if written information can be improved as HM Inspectorate recommends, in our opinion children caught up in these disputes need a much more sophisticated and personal source of support and information, ideally from the beginning when the case has been set down for a First Hearing Dispute Resolution Appointment, as proposed under the Private Law Programme. How might this be done? We note that in the *Next Steps* report (HM Government: 2005, para 57) the Government and CAFCASS are committed in setting up these appointments to exploring the effectiveness of various models of in-court conciliation and will give consideration to such questions as:

‘Whether and at what age the scheme ought to involve children directly; where interviews should take place and how and whether legal representation ought to be involved.’

- 7.11 In this context when children and young people come to the appointment we consider CAFCASS should have responsibility to ensure that they are given the opportunity to meet a member of CAFCASS staff who can explain the nature not only of conciliation, if that is to be attempted, but also the family litigation process and how it differs from criminal proceedings, particularly if the case is likely to proceed to a full hearing. As we have seen from Chapter Three, it is particularly important that children are given clear explanations, not only about the guardian’s role but about the whole court process. In these r 9.5 cases, this includes explaining the differences between the role of the CAFCASS reporter and guardian (particularly if the two distinct roles are to be performed by the same person) and the purpose of the child’s legal representative. One cannot assume that the parents will do this in an unbiased and accurate way. The first appointment before the district judge would seem the opportune moment to provide this sort of information at least to older children. We note in this respect that it is hoped that on these occasions a CAFCASS practitioner will be present and so could have the opportunity to undertake this task. We also note that where a local scheme provides for it and where resources exist these appointments may be attended by any child aged nine or over. We believe that it is very much in the interests of children, even for some below the age of nine who might have the capacity to understand, that appropriately resourced schemes of this kind are provided as soon as possible.

Meeting children’s support needs

- 7.12 Not only do children embroiled in their parents’ dispute need reliable information, they also need emotional comfort and support throughout the litigation process. Although parents and close friends are the most obvious providers of support, it is clear that not all children receive it.

- 7.13 Coping with continuing conflict between their parents, with recurrent crises and the problem of divided loyalties, was particularly taxing for a number of the children in our sample – the more so when the child felt isolated, had little understanding of what was going on and was fearful about the future.
- 7.14 We have concluded that a number of children need a concerned impartial person accessible to them apart from their parents to support them and help them manage the critical family transitions following the breakdown of their parents' relationship, a role we have termed 'passage agent' support. This may need a little explanation. Divorce and family breakdown involve family members in a change of social status. Michael King (1977 at 8) has written:
- 'A status passage occurs whenever an individual moves to a different part of the social structure involving a loss or gain of privilege, or power and a changed identity or sense of self. The concept of status passage covers a wide variety of social transitions, from illness to promotion, from marriage to dying.'*
- 7.15 Glasser and Straus (1971 at 51) suggest that the task of assisting people in their change of status is one which many professions perform, for example, doctors helping people through periods of serious illness. They postulate that the clients of passage agents are often dependent on the agent for successful navigation of the passage from one status to another.¹⁰³ In the context of marriage breakdown and divorce, the solicitor is perhaps the most important passage agent, at least for the divorcing couple, although an earlier study suggested that on occasion this role could also be performed to a lesser extent by a divorce court welfare officer (Murch: 1980 at 166).
- 7.16 Both our previous study of children in divorce (Butler et al: 2003 at 188-191) and our current r 9.5 investigation have shown convincingly that children generally lack any form of institutional support from the beginning to the end of the proceedings. In the present study, however, it was clear that for some children, this role was in fact performed well by a guardian from CAFCASS, and in several instances from NYAS, while for some of the older children, the solicitor emerged as the key figure. Those who received such support seemed strengthened by it – a view confirmed by some of the children's parents. But there were also other children who appeared not to have found anyone they could trust and relate to, despite having a guardian. They appeared 'lost', withdrawn, depressed, intimidated or angered by their contact with the family justice system. In the eyes of these children, short

¹⁰³ Glasser and Straus write (at 51) 'doctors, lawyers, social workers, counsellors and others see sections of the passage as rough and conceive of themselves as agents who are alert to unknown contingencies with consequences that can be softened. Passage agents make a profession of managing transitions to get passagees through without any bruises'.

term investigations by a children and family reporter (CFR) or guardian did not serve to meet their passage agent support needs. As far as the family justice system was concerned, these children felt that they were left alone to grapple with the complexities and emotional pressures stemming from their parents' dispute, for example, when it came to their part in trying to negotiate with their parents over contact arrangements. Little wonder that some simply refused to contemplate it when they had no impartial expert to rely on.

- 7.17 All this points to a need to emphasise and give greater reality to the element of 'support' for children contained in the title Children and Family Court Advisory and *Support Service*. We recognise this could involve more CAFCASS staff time per case because, as we have seen, in a number of instances the children had wished that the guardian had spent more time getting to know them. We suspect that pressure of time may have been one of the reasons also why some children experienced their guardian and/or reporter more as an impersonal interrogator than someone who would listen to them in a non-patronising supportive empathetic way.

Giving the child a voice in court

- 7.18 A number of children had only a hazy idea of the distinction between a CFR, a guardian and a specially appointed solicitor. But for all that, they generally understood and approved of the idea of having someone to help them have a say in proceedings. Most of them believed that if their parents could not resolve their differences in any other way, some sort of judicial authority was needed. But confusion (or ignorance) over the guardian's role meant that some children were disappointed or resentful if the guardian did not accurately relay their views as they wanted them put to the court.
- 7.19 The success of a CFR, guardian or solicitor in meeting the children's needs for information, support and representation clearly depends upon the individual skill of the person appointed, not on the label they have attached to them. Sensitivity and experience are obviously important attributes but skill in direct work with children is also something that can be enhanced by suitable training – a point to which we shall return. Where the views of the child and guardian diverged, we suspect that some guardians were not skilled enough to make clear to the child what the role of the guardian entailed. It must also be remembered that confused and disgruntled parents might compound the child's confusion in this respect – all the more reason therefore for the children's representative to ensure that the child has a clear understanding.

7.20 Turning to the children's view of the courts, we have seen that for several children they were thought to be 'scary places'. They wanted courts to be more child-friendly and to work in such a way that they could, if they so wished, put their view directly to the judge, or at least meet the person who was taking important decisions about them. Such views are, in our opinion, an important endorsement of separate representation, partly because it implies a recognition of children and young people as valuable citizens. This in itself might be morale boosting at a vulnerable time. We are reminded of the principle acknowledged years ago by the Finer Committee that people coming before the Family Court should be regarded as 'the subject of rights not the object of assistance'.¹⁰⁴ In this modern day and age this applies every bit as much to children as to adults. It is a principle which, in our opinion, should be central in any future proposals to reform the family jurisdictions¹⁰⁵ and to establish a revamped local system of family courts.¹⁰⁶

The parents' perspective

7.21 It is important to remember that in agreeing to be interviewed, these children's parents were usually motivated by a wish to see improvements made in a system about which they were often critical. It is easy for those who have not been on the 'receiving end' to dismiss their more negative criticisms as simply stemming from a mix of ignorance, wounded emotions resulting from the breakdown of their parental relationship and embittered disappointment because things had not gone their way in litigation. But whether or not these parents' criticisms were justified – and we had no way of validating them – they generally seemed to contain a germ of credibility. It would be wiser to take the parents' negative criticisms as seriously as their plaudits, which also emerged quite strongly.

7.22 Inevitably in our interviews with parents a lot of ground was covered concerning their general perceptions and experience of the family justice system. Much of what they told us resonated with the findings of the Leeds investigation of residence and contact (Smart, May et al: 2005). However in reporting our particular findings (see Chapter Four) we have focused on their perceptions of the process by which their children were separately

¹⁰⁴ See Finer (1974 at para 4.285). In explaining the principles which should govern the Family Court, the Report stated 'through the Family Court it should be possible to make a new and highly beneficial synthesis between law and social welfare and the respective skills, experience and efforts of lawyers and social workers; but the individual in the Family Court must in the last resort remain the subject of rights not the object of assistance'.

¹⁰⁵ See Department for Constitutional Affairs (July 2005 at para 7.16) in which it is stated that the Government is 'examining the way in which the core principles of the Children Act 1989 are being met by the current, over-represented approach within the courts, and examining whether these principles could be better met by using a more inquisitorial system'.

¹⁰⁶ See H M Courts Service (17 February 2005 at 9). See also DCA Press Release (21 November 2005) in which Baroness Ashton said 'unifying family court jurisdictions and creating a single family court is our long term objective but this will take time and require primary legislation'.

represented, as well as on their views of how the family justice system as a whole could be improved. Much of the evidence in Chapter Four speaks for itself and we consider here only those points which either confirm or diverge from the views of the children reported in Chapter Three.

- 7.23 Like their children, the majority of the parents favoured the idea of separate representation. Moreover, more parents believed that it had had a positive effect on their children than those who thought otherwise. Not surprisingly the minority who disagreed were largely those who had 'lost' their case.
- 7.24 Amongst the positive effects noted was the recognition that their child had felt reassured and supported, that the child's behaviour had 'calmed' down, and that the process had enabled some parents to see things in a different light and so to recognise the validity of the child's perspectives. There were also some who appreciated that representation for their child had 'helped to move things on' and had enabled the judge to better appreciate the child's position.
- 7.25 Like their children, many parents were confused about the respective roles of the guardian and children's legal representatives. A number had only the haziest idea why the child required a solicitor as well as a guardian and questioned its appropriateness and cost. Overall, the guardian appeared the more important of the two as far as parents were concerned.
- 7.26 Some parents were also critical that the guardian had been drawn into taking a partisan stance in the dispute between the parents and had therefore failed to adopt a more impartial position which would in the opinion of the parent, have facilitated a clearer understanding of the child's perspective.
- 7.27 Those responsible for training guardians need to give thought to the more negative criticisms which some parents made. We of course realise that achieving the appearance of impartiality¹⁰⁷ in the face of what might appear irrational and destructive parental behaviour is sometimes much easier said than done. Yet, based on an earlier study of parents' reactions to the intervention of divorce court welfare officers (Murch: 1980 at 73) it was noticed that in contrast to the partisanship of their solicitors (Davis: 1983), welfare officers, like judges, were expected to be impartial in any conflict between the divorcing couple. It was observed:

¹⁰⁷ See report of H M Inspectorate of Courts' Administration (October 2005 at para 4.26) in which it is recognised that the court needs to 'demonstrate clearly that it is neither biased against or in favour of one party'. We believe that as the courts' agents this goes for CAFCASS staff as well. Moreover, it seems to us that some of the children whose loyalties and affections were divided by their parents' dispute, appreciated the need for impartiality as well and welcomed it. It was recognised as one of the qualities of a good guardian.

'Curiously, even parents involved in the most acrimonious conflict seemed to retain a sense of an illusive middle ground between them which with skill and understanding, could be identified by someone who was fair and impartial. It seems as if many people in conflict realised that their perceptions of each other (in their more reflective moments) had become in some way distorted and often welcomed the intervention and agency of concerned outsiders in their attempts to correct that distortion.'

Again, we think that training, particularly in respect of the psycho-dynamics of family interaction and an appreciation that behaviours such as depression and anger can be a grief reaction to acute loss and separation, can help guardians retain an impartial perspective.

- 7.28 Some parents, like some of their children, were annoyed when they believed their views had been misrepresented in court by the children's representatives. We had no way of validating such criticisms. Nevertheless, difficult though it may be in practice, we think the risk of this happening can be minimised if the guardian can make time to give some feedback to the parents before the hearing and demonstrate their intention to be fair and accurate in their reports. It may seem a statement of the obvious, but facts which can be checked need to be kept separate from professional opinion. Clearly the trickiest aspect of this matter is the reporting of the child's views in the report, particularly if the child has said one thing to the guardian (or solicitor) and the opposite to a parent. As most family justice practitioners will know, when parents are in serious conflict with each other, children can try to appease both, thus compounding communication distortions within the family system. Again it takes time and skill professionally to address this problem (which may not be assisted by the framing of adversarial procedure), but again we believe it can be helpful for the professionals concerned to recognise the risks and, before reporting to court, address and explain it directly as far as possible to the parents and the children.
- 7.29 Since the Government is considering once again the establishment of local family courts, we here highlight three key points raised by parents when they were asked to make recommendations as to how the process might be made easier.

Judicial continuity

- 7.30 The first concerns the continuity of judges as well as other professionals. It is astonishing that of the 22 parents interviewed, seven estimated that they had been before at least six judges and three of these thought that they had been dealt with on various occasions by no fewer than ten. The desirability of trying to ensure that as far as possible the same judge deals with the

case throughout has been urged on several occasions.¹⁰⁸ Clearly there might be some correlation between the number of separate applications and hearings and the numbers of judges involved. Of course, one can see merit on some occasions of having a new judge to bring a fresh perspective and address a difficult recurrent issue. We also appreciate that listing is a complex matter, aggravated in some areas where there is a problem concerning the availability of experienced family judges. Even so, having to go over the history of a case every time the matter comes before a new judge must strike many parents as inefficient, wasteful of court time and costly. Moreover, it was noticeable in our small sample that the courts seemed to differ with respect to how far they achieved a degree of judicial continuity (Leeds apparently being more successful in this respect than Liverpool, Manchester or the Principal Registry). The desirability of judicial continuity is now accepted as a key aspect of effective court control in the Private Law Programme (President of the Family Division: 2005 at 6), and we consider that the implementation of this principle should be systematically investigated and monitored by the DCA.

The need for earlier assessments and appointments of guardians

- 7.31 The need for early investigation and assessment, firmer court management and an earlier appointment of a guardian to avoid delay, make up a further package of sensible recommendations from these parents. They are also all points which chime with many past official recommendations, particularly the need to avoid delay. But in this small r 9.5 study, perhaps the most significant was the parents' call for an earlier guardian appointment, especially in those cases where the parent considered that the guardian had helped their child and managed to 'unlock' some of the intractability in the case. Such parents believed that this might have forestalled an escalation of hostilities and avoided further costs of litigation.

Less intimidating court settings

- 7.32 As far as the court process itself is concerned, the Leeds study (Smart, May et al: 2005) has explored what disputing parents expected to get out of it and their satisfaction or otherwise with the outcome. We explored a rather different matter, namely their reactions to the court setting itself. Here it came as no surprise that a number wanted the atmosphere to be less intimidating, echoing the views of a number of the children that the courts were frightening places.

¹⁰⁸ See e.g. *Re O (Contact: Withdrawal of Application)* [2003] EWHC 3031 (Fam), [2004] 1 FLR 1258; *V v V (Contact: Implacable Hostility)* [2004] EWHC 1215 (Fam), [2004] 2 FLR 851; *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam), [2004] 1 FLR 1226.

The solicitors' perspective

- 7.33 To a large extent, the results of our large national survey of solicitors concerning the use of r 9.5, reported in Chapter Five, confirm many of the points that emerged from the more qualitative interviews of children and their parents and from our examination of court files; for example, that r 9.5 is mainly used in longstanding cases defined by the court as 'intractable'. To a lesser degree, it seems it is used in otherwise complex cases such as where a local authority is reluctant to institute care proceedings or where there might be an international element short of child abduction. Here we highlight those matters which seem to call for a policy or practice initiative.
- 7.34 The majority of respondents took the view that the benefits of r 9.5 outweighed its potential disadvantages. Thus, on the positive side, there was the value of giving the child or young person a voice in the judicial decision-making process and the potential for unlocking an intractable case; by putting the children centre stage it was considered that some parents' preoccupation with their mutual antipathy could be lessened. On the negative side, there were problems of further delay and the risks that the introduction of another professional might increase pressure on the child, and if things were not properly handled, the child might feel burdened by extra responsibility.
- 7.35 Such findings point in our view to two obvious conclusions. First, earlier assessment and the earlier decision to use separate representation are highly desirable in order to avoid delay – a point, as we have seen, stressed to us by some parents who felt that such measures could have short-circuited escalating hostility which had been aggravated by the adversarial nature of the proceedings.
- 7.36 The second conclusion, emphasised in different ways by the children and parents as well as solicitors, concerns the crucial importance of having well trained and experienced practitioners to represent the children. It is important to select practitioners who have rather special qualities in being able to relate to children and who also have the capacity to take a compassionate, non-judgemental impartial stance in relation to the parents' dispute. As we have already pointed out, training which increases skill and understanding can reinforce such qualities. In this respect therefore, we welcome and strongly endorse what HM Inspectorate of Courts' Administration has said about training, staff support and supervision in their *Safeguarding Children* report (HMICA: April 2005 at paras 2.15-2.19). Also, because the emotional pressures which these complex and intractable cases can exert on practitioners can be so intense, we think it could be important for practitioners to have available to them consultative

professional support in addition to any supervision that might be provided.¹⁰⁹

- 7.37 The difficult question is how courts might identify earlier those cases that require separate representation. As already mentioned, the first hearing procedure under the new Private Law Programme will offer a way forward – a matter we consider further below. Here it is only necessary to point out that we consider early assessment should not merely be confined to the task of risk assessment where domestic violence is alleged, important though that is. This research and other child-related family justice studies indicate that the needs and opinions of children need to be framed more broadly than that to cover the risks to their education, social development and mental health: all aspects covered in the Children Act 1989 welfare checklist.

The court record survey

- 7.38 Although our survey was limited to five large courts, and although our primary aim in examining court records in so-called ‘closed’ cases was to identify a sample of children to be interviewed, we soon found that data collection from court files was a complicated business. This was largely because of various shortcomings and variations in the way the files were compiled and kept. Quite often key items of information appeared to be missing. Nevertheless, despite these problems, Chapter Six sets out our findings from this survey and they at least give some sort of quantified indication of the r 9.5 caseload in these particular courts. In this Chapter, we highlight three key points which may have implications for the way management information concerning r 9.5 cases should be handled in future.
- 7.39 First it seemed clear that the courts and CAFCASS lack a uniform system of recording this item of information. As explained in Appendix 1, within the FamilyMan management information system only one court (Leeds) had made a separate code for these cases. We think it would greatly help the Department and CAFCASS plan for future staff deployment and estimate legal aid expenditure if this was to be included as a standard category in FamilyMan. In addition, the system should indicate to which agency the case has been referred i.e. to CAFCASS, other agencies such as NYAS or direct to a children’s solicitor. We think it would be helpful too if the

¹⁰⁹ Although beyond the scope of this research, there is an important distinction to be made between supervision as part of line management and client-centred case consultation where the consultant has no responsibility for case management (Caplan and Caplan: 1993 at 86-100). Unfortunately too, supervision where it exists is often part of anxious agency ‘fire fighting’ case management rather than a process of continuing professional development aimed at increasing reflective understanding (Woodhouse and Pengelly: 1991 at 236).

FamilyMan system showed whether a *single* practitioner was appointed to represent the child or whether the tandem model was used.

- 7.40 The second point concerns the difficulty of identifying from the documentation in the court file the precise reason why the judge ordered the child to be separately represented. As we have seen in Chapters Two and Five and discuss further below, there appear to be several different reasons why it can be used - to give the child a stronger voice in proceedings particularly if there is a conflict of interest between the child and the parent; to enable the guardian to make further efforts to 'unlock' an apparently intractable case; and to provide a child with 'passage agent' support during the course of complex and protracted litigation which may be having adverse consequences for the child. Of course some or all of these reasons may apply in any given case. Yet, from the evidence which we have seen on the files, it seems that the reasons in the referral to the guardian are often couched in vague terms, such as, that the judge wanted an assessment of the child's welfare to determine what was in the child's best interest. Of course, if the guardian and CFR functions are performed by one and the same person, the guardian may already be familiar with the case and the reasons why separate representation is needed. But if CAFCASS or NYAS simply receive a referral in an unfamiliar case without it having been specified exactly why separate representation was needed, it would be understandable if they played safe by always instructing a solicitor to activate the tandem model approach. We would not want to appear dogmatic on this point because all we had to go on was the documentation on the files and of course the referral process may have taken a different route (phone, email etc). But on the face of it, our data suggests that judges, in exercising their discretion whether to order separate representation, should be explicit as to their reasons for the referral. We suggest that the Department and CAFCASS look into this matter more closely.
- 7.41 The third point concerning court records and management information is more fundamental, complex and for the long term. It arises from our observation that records as currently compiled are specific to the particular proceedings. It is not always possible to find out accurately, even from the CFR or guardian's reports, whether there have been earlier proceedings or, for example, how many different judges have dealt with the child and family. We realise that the CAFCASS information systems may enable different kinds of proceedings to be linked together in a cumulative record which charts a child's family court career. But as far as we could tell this is not possible for court records, perhaps in part reflecting the traditional way in which information is collected for purposes of compiling judicial statistics.

Data which reveals a child's court career would make it much easier to distinguish between those children and families who have a relatively short term contact with the family justice system and those who come back to court repeatedly. Given the growing importance of assessment to be carried out at the initial hearing before a district judge, under the provisions of the Private Law Programme, having such data on-line could be a real asset, just as NHS medical records which follow the patient assist doctors in their diagnosis and treatment.

Research spin-off

7.42 This investigation has helped to meet the DCA's commitment to consult with children who were separately represented as part of the Department's broader policy of consulting children.¹¹⁰ In this study, despite the methodological difficulties encountered, we have established that children who have been represented under r 9.5 have a number of important things to tell us. Nevertheless, we recognise that the research suffers from shortcomings subject to all small scale 'snapshot' qualitative studies which are reliant on retrospective recall of events. However, viewed in relation to various other studies which have sampled children's views of family proceedings, certain common themes emerged – the children's needs for better information, passage agent support, the recognition that some sort of court is needed if parents cannot agree and the need for more child-friendly courts where children can participate more fully if they so wish. Even so, the relatively small scale and ad hoc nature of these various studies of children's perspectives have produced a rather patchy, short-term and incomplete picture of the effects of family proceedings on children's lives. Most existing studies fail to chart the progress and developments of children's cases over time and have not sufficiently identified the interplay of factors which might aggravate or resolve inter-parental conflict, including the nature of the litigation process itself and the part played by the parents and children's legal representatives, mediators and CAFCASS staff over time.

¹¹⁰ Department for Constitutional Affairs (September 2004). This emphasises the Department's intention to involve children and young people in its decision-making process as a whole. Stated benefits include 'obtaining fresh perspectives and new ideas how to improve services, policies and the democratic process' and 'keeping the Department informed about changing attitudes and needs of this section of society'.

- 7.43 We agree therefore with the report of H M Inspectorate of Courts' Administration (2005 at para 4.18) which states that:

'There is a wide range of influences on children's developments and achievements, both within the family setting as well as in the broader community such as at school. This means that it will always be exceptionally difficult to establish an unambiguous causal relationship between key decisions about children taken in the context of family proceedings and specified better outcomes for children, perhaps assessed many years later.'

Rightly the report states:

'Longitudinal studies and other research methods can provide valuable insights by highlighting associated problems and probabilities that link key family proceedings related decisions about children to longer term consequence.'

- 7.44 Therefore, a well-constructed psycho-social longitudinal research programme is needed if we are to unravel answers to such questions as why some parents' child-related conflicts become implacably hostile and intractable while others do not? How permanent is the so-called intractability? Does it reduce over time? And, if so, why? What happens to children over time when they are caught up in intractable disputes? What are the consequences for their educational performance, mental health and social development and why do some cope better than others? What accounts for differences in children's vulnerability to stress associated with parental breakdown (Rutter: 1996 at 371)? What makes for resilience among children who face the adversity of their parents' relationship breakdown (Emery and Forland: 1996 at 64)?

- 7.45 As far as evaluations of intervention designed to reduce the hazards for children of stress associated with severe parental conflict and litigation are concerned, Sir Michael Rutter has argued (1996 at 375):

'What we need now is systematic exploration of the most promising range of ways in which all the effects of stress and adversity might be tackled together with a testing of the effects of well planned interventions.'

This suggests that one useful piece of research which could take advantage of the current geographical variations in the use of r 9.5 would be a well-structured comparison between a sample of intractable cases in which separate representation was ordered in high use areas with a sample of such cases from areas where the provision was not used. Again the longitudinal approach which can chart pathways through the system and outcomes would be preferable to yet another snapshot study. It should be noted that a need for well constructed evaluative research concerning the effectiveness of intervention programmes of one sort or another for high

conflict families, as a corrective to other claims that particular interventions have been shown to work, is one of the points that emerges from the recent review of practices in other jurisdictions conducted by Roberts and Hunt (2005 at 8).

Reflections and recommendations

The use of the tandem model and the need to differentiate roles

- 7.46 In discussions about the purpose of separate representation in contested private law proceedings, it is clear that there are at least two, possibly three, quite different roles that have been suggested to us. Confusion about these roles may be reflected in some of the points which the children and parents have raised. First, there is the role of ascertaining the voice of the child to assist in the court's decision-making. Secondly, there is the way in which the child representation process can be used by the court and the children's representatives as part of their efforts to moderate the intractability of parental disputes (what some of the solicitors have referred to as 'unlocking the case'). Thirdly there is the role of providing children with a source of reliable information and support during the course of the proceedings to help them cope with the associated anxieties and uncertainties – what we have termed as 'passage agent' support. It can be seriously misleading to lump these three distinct roles under the single label 'separate representation' which in any case carries the traditional connotation of the adversarial process.
- 7.47 In intractable and complex cases, we recognise that the combined skills of a guardian and solicitor working in tandem may well be the most effective means of ensuring that the child's viewpoint and interests are put centre stage – sometimes where necessary with a view to moderating the parents' mutual antipathy as part of a strategy of proactive judicial case management assisted by judicial continuity. Yet there may also be less difficult cases where the court may conclude that the tandem model is unnecessary; that what the child needs first and foremost is a source of reliable neutral information and support while the litigation proceeds.
- 7.48 In saying this we are not arguing against the tandem model as such. Rather we are suggesting that the nature of the various tasks currently subsumed under the term 'separate representation' needs to be distinguished and the staff resources of guardians and solicitors need to be deployed flexibly and appropriately according to what the court hopes to achieve. It would be wrong to conclude from this view that we believe the current level of resources deployed by CAF/CASS and through the civil legal aid fund is necessarily adequate. Indeed what we know from other research (Rogers and Pryor (1998), Buchanan and Hunt (2003), Butler, Scanlan, Robinson, Douglas and Murch (2003)) suggests that there might be many more

children in need of specific kinds of support in these circumstances than are currently benefiting from this provision. But a more clearly focused application might enable more children to benefit while enabling the family justice system to give better value for money.

- 7.49 When it comes to considering, from the child's perspective, the distinction between the roles of the CFR, guardian and children's solicitor our research findings need to be read with caution because of the small size of our sample and because of the fact that in most instances we were interviewing the children some months after the case was concluded. Nevertheless, what really stands out is the importance to the child of having a person from the family justice system who can establish a positive trusting relationship with them; a neutral person who explains things clearly and checks that it is properly understood; a person who keeps the child informed as the vagaries of the litigation develop. As we can see from both the children's and parents' interviews, when such a supportive relationship can be established, the effect can be experienced as strengthening. This is not to say that it cannot be performed 'in tandem' by the guardian and solicitor together, but it is clear that it is the quality of the professionals – whoever they are - as skilled and trustworthy persons that matters the most.
- 7.50 We have concluded that 'passage agent' support is particularly necessary in cases of intractable disputes when children are faced with two parents dug in to well defended entrenched positions – whether or not separate representation serves to unlock the case and to give the child a stronger voice in proceedings. At the present time, where this role is well performed, it happens rather as a by-product of the court's requirement for the formal processes of separate representation. Accordingly, we would like to see it always considered by judges as a valid reason in itself for appointing a guardian – a point which we suggest should be explicitly recognised either by the Rules or through a Practice Direction.

The role of the court determines the nature of the separate representation process

- 7.51 The relative weight that one might give to these different roles will depend on how one views the primary task of the court in any given private law case. On the one hand one can take a traditional view of the civil adjudication process. Here the parties, unable to resolve the dispute themselves, come to the seat of justice and ask the judge to 'hand down' the decision having heard all the evidence, including in these particular circumstances the children's wishes and feelings as conveyed by the children's representatives and the views of any experts or social workers of what might be in the child's best interests. This is the orthodox jurisprudential model under an adversarial system of justice. Many argue that realistically this is all a court can and should do.

- 7.52 On the other hand, there is growing evidence that family courts have been extending their view of the court's role to include a more managerial, even 'therapeutic' approach when confronted with parental disputes – a recognition that the family law process interacts over time with the psycho-dynamics of family life. We note that in *Re M (Intractable Contact Dispute: Court's Positive Duty)*¹¹¹ the Court of Appeal established that in cases of intractable dispute concerning contact, the court has a positive duty to take appropriate case management steps in an attempt to resolve the deadlock. Indeed, more generally the Government is committed to improving case management by the courts through such measures as earlier listing of cases, hearing them more quickly and effectively, greater judicial continuity, ensuring a rapid return to court where needed (H M Government: 2005 at para 75), and above all seeking to minimise delay (DCA: July 2005 at 38) Such a view has developed pragmatically over the years as the judges have increased their understanding of the interdisciplinary aspects of family law practice and have seen what can sometimes be achieved by skilful short-term social work/therapeutic intervention particularly when backed by the symbolic authority of the court. In this respect, we agree with the conclusion of Smart, May et al (2005 at 86, 87) that in a number of instances it will not be possible to avoid or prevent disputing parents coming to court but that when they do so they may need a more understanding and supportive approach, particularly when the judge hands down orders that will be experienced by the losing party as painful.
- 7.53 Both approaches imply a recognition that the authority of the court is often accepted, albeit reluctantly, by warring parents in order, as it were, to structure and contain the more destructive and chaotic emotions that can flow from dangerously inflamed conflict, even though it may do no more than lead to a grudging truce.

¹¹¹ [2005] EWCA Civ 1090, noted at [2005] *Fam Law* 938, by Rebecca Bailey-Harris, who comments that the growing emphasis for the courts to act proactively to resolve the deadlock may be in part influenced by jurisprudence developing under the Human Rights Act 1998 with its acknowledgement of the positive duties imposed on the courts as agents of the state by Arts. 6 and 8 of the European Convention on Human Rights.

Assessment, training and the application of research-based knowledge

- 7.54 But both approaches, by focusing attention on the disputing parties, can easily fail to take proper account of the children. In our view, by so doing, the complexity of serious family conflict is over-simplified and may lead to the paradoxical state of affairs where everyone pays lip service to the welfare of the child while in effect marginalising them and denying the reality that (actively or passively) children inevitably participate in and may even contribute to the family's problems and in their family's interaction with the family justice process. Harold and Murch (2005 at 185) have shown that there is now a strong body of research coming from cognitive family psychology which supports this view and which reinforces the need for what has been termed 'participant justice' (Murch: 1980 at 151; Murch and Keehan: 2003 at 111-113). Moreover, we would argue that this view is supported by some of the older children in our study who said that they wished to see the judge and by those who, in general, welcomed the idea of someone from the court to listen to their viewpoint and to support them during the litigation. As far as children's attendance at court is concerned, we appreciate that opinion amongst the judiciary and CAFCASS staff is mixed (HMICA: April 2005 paras 2.28 and 3.4-3.11).¹¹² We take the view that at the very least, if a child wishes to meet the judge at the end of the final hearing to receive an explanation in person of the reasons for the court's decision, this is better than obtaining it second hand in a possibly distorted way. Because some children clearly wish to meet the judge for these and other reasons, we suggest this could be brought to the attention of the judge by the guardian.¹¹³
- 7.55 Moreover, it is imperative that we get away from the use of r 9.5 as a measure of last resort and that we avoid unnecessary delay by reducing the length of time during which some of these children have had to endure the stresses and strains of their parents' prolonged litigation – sometimes lasting the greater part of their early childhood years. It seems to us incontestable that a real effort has to be made to improve early assessment in order to identify those cases which show signs of becoming intractable. We are here mindful that previous research (Trinder, Beek, Connolly, 2002 at 44, 45) has shown that many disputes about contact develop vicious circles of deteriorating relationships, which were often established 'early in

¹¹² In respect of judges seeing children it is stated in the HMICA Report that 'judicial views were mixed as to whether this is, on balance, a good idea in certain situations. Some members of the judiciary said that on a few occasions they talk with the child at the end of the final hearing. Typically this is where they consider it important that the child is given a direct explanation, rather than risk the child receiving, at a later stage, a distorted or biased version from a parent or relative' (para 3.11). Para 4.3 sets out further arguments in favour of children's court attendance and calls for research into this matter.

¹¹³ This could be done by including this item in the standard CAFCASS guardian report template (CAFCASS: 2004).

the contact process', with 'family members acting and reacting' to the behaviour of each other and which were not helped by 'prolonged court engagement'. One might use a medical diagnosis analogy here: we do not wait for a tumour to get very big before taking action to excise it. Of course early diagnosis does not prevent fatality in every case but it certainly improves the chances of survival. So in the family justice context, why do we wait to see how a dispute develops before deploying appropriate resources to deal with it? We recognise that one must tailor resources to needs. Early use of r 9.5 as a means of trying to put the child's viewpoint and interest more clearly centre stage in an attempt to unlock the intractable behaviour of the parents is not going to work every time, even though the child might benefit in other ways. But if the views of those solicitors and the children's parents who pointed to the value of r 9.5 in this respect are anything to go by, it is surely worth making every effort to intervene early in those cases which show signs of otherwise deteriorating. If we are to move to such an approach, we clearly need a more systematic and well-informed early assessment procedure. We cannot from this research pinpoint the key diagnostic factors that might be required but our study does highlight the urgent need to find out what they might be.

- 7.56 In the short term, measures announced in the Private Law Programme should go some way towards this, but effective assessment will largely depend on the intuitive good sense of the district judges and CAFCASS staff. Unfortunately at present, they do not have much if any sound research-based knowledge concerning outcomes based on well constructed longitudinal studies to guide them. Moreover, we suspect that as things stand at the moment many practitioners will be more concerned with identifying the risk of domestic violence (driven by a risk avoidance culture) than with being alert to ways of promoting positive resilience in children and family mental health and buffering the potential adverse effects that come from serious inter-parental conflict, particularly in relation to the child's educational performance. In this respect recent research led by Harold (Harold, Shelton and Aitken: in press)¹¹⁴ has established that the quality of relationships that exist between parents significantly affects children's academic achievement in the early years of secondary school (years 7-9). The point to note is that these effects were observed even in families where the parental coalition was intact. Other studies such as that by Buchanan and Hunt (2003 at 375) have shown that in litigated s 8 cases

¹¹⁴ Based on a sample of 543 children, parents and their children (representing all family types) derived from nine schools in South and Mid Wales, families were assessed each year for three years. The study showed that inter-parental conflict exerted effects on academic achievement when the children felt that they were at fault or blamed themselves for their parents' marital argument as well as the impact that these arguments had on the children's general behaviour (e.g. aggression or anti-social behaviour etc).

the emotional cost to children is particularly high.¹¹⁵ In Chapter Three in this respect we illustrate how at an individual level children suffer from such anxieties and stress. The likely long term negative impact of severe parental conflict on children's educational attainment is particularly worrying since it may affect their life chances for years to come. All the more reason therefore for the family court and CAFCASS through the application of separate representation and other measures to do what it can to help children buffer the impact of their parents' unresolved conflicts.

- 7.57 Unless practitioners have good training and experience in mental health aspects of family justice practice, they may experience difficulty in distinguishing between aggression fuelled by serious psychopathology, mental illness or sub-culturally determined values concerned with the control of women and children from that which arises from depression and anger associated with loss and separation. Likewise, it may be difficult for practitioners to distinguish between irresponsible parental indifference in a non-resident parent and a defensive flight response designed to avoid experiencing intense emotional upset when seeing the children and/or having contact with the other parent.
- 7.58 Longer term therefore, we would envisage the courts, lawyers and CAFCASS officers being able to use simplified psychometric measures to provide a more accurate assessments of this kind, provided that the necessary research and development work can be undertaken. At least three recent studies (Dunn and Deater-Deckard: 2001; Trinder et al: 2003 at 394; Murch and Keehan: 2003 at 108-111) indicate some of the parental, rather than child, factors which might need to be taken into account in developing such a method. These include a history of conflicted parental relationships characterised by persistent arguments, mistrust, fear and sometimes violence combined with harsh or insensitive parenting; difficulty in accepting and adapting to non-resident parent status after separation; and acute difficulty in distinguishing between the former marital and continuing parental role etc. The degree of severity and frequency of conflict are also key variables which would need to be built into the design of a workable psychometric instrument.

¹¹⁵ This study using the Goodman Strength and Difficulties Questionnaire for children showed that 'more than half the boys and just under half the girls had borderline or abnormal scores' - such findings being three times the level of dysfunction that one would expect to find in the general population. Measured again a year later, this study showed that while levels of distress in girls had dropped, in the boys they remained high.

- 7.59 The various ways, constructive and destructive, in which children experience and adapt to the crisis of parental separation and conflict also have to be taken into account in any assessment. Many factors need to be considered such as age, gender, attachments not only to parents but to siblings and other family members, and the importance to the child of friends who are often a vital source of comfort and support (Dunn and Deater-Deckard: 2001, Smart et al: 2001 and Butler et al: 2003). Moreover, the level of a child's understanding and whether they are by nature extraverted or introverted are also important considerations which could be systematically assessed by practitioners using well designed psychometric measures as are being used in other child development contexts. Grych, Harold and Miles (2003 at 1176) have shown that children's attributions of threat and self blame accounted for (or mediated) the relationship between marital conflict and children's internalising symptoms (depression, anxiety) and their externalising problems (aggression, hostility). As has been pointed out elsewhere (Harold and Murch 2005 at 185) psychological research shows that when children have been exposed to parental conflict which is frequent, intense and poorly resolved, girls' feelings of threat exacerbated their symptoms of depression and anxiety (internalising) more so than for boys, while boys' feelings of self blame and responsibility (for their parents' conflict) exacerbated their aggressive, hostile and anti-social (externalising) behaviours more so than for girls.

Towards more child-friendly courts

- 7.60 A further factor to consider is the possible effect of the adversarial system itself as a generator/aggravator of parental conflict – another matter which probably needs more careful research and analysis. While Smart, May and colleagues (2005) would wish courts to be more understanding and supportive of parents, the questions thrown up by our particular study are how to make courts more child-friendly. It is important to note that most of the children in our study recognise the need for a judicial authority to take difficult decisions when their parents were unable to do so; but quite apart from those young people who want to participate more directly in proceedings (seeing the judge etc) the prevailing image seems to be of the courts as scary places with a punitive ethos which could, in intractable cases, lead in fantasy at least, to the child believing he/she could be separated not only from the non-resident parent but from the resident parent as well. The enforcement provisions concerning breach of contact orders being brought forward by the government in the Children and Adoption Bill 2005 seem likely to reinforce such fears.

Enforcement and the need for separate representation to safeguard children's interests

- 7.61 Even in our small qualitative sample, several children expressed concern that their *own* reluctance to have contact with their non-custodial father might be misinterpreted by the court as meaning that their mother was being intractable. Their worries were that their mother might be sent to prison for contempt, further fragmenting the family. But it is not only the threat, real or imagined of separating the child from the resident parent through imprisonment that could have, in our opinion, adverse repercussions for the child. One can easily imagine that an obdurate resident parent ordered to undertake periods of unpaid work (possibly in the company of convicted offenders) under the proposed s 11J and Schedule A1 to the Children Act 1989¹¹⁶ might bitterly resent this, with the consequence that the child who had refused to see the non-resident parent would become the butt of that resentment.
- 7.62 In order to safeguard against such eventualities, we recommend that before making an enforcement order, the child should always be separately represented. We see this as necessary in order to give the court the best opportunity to ascertain not only the wishes and feelings of the child but to assess the likely impact on the child of the enforcement order. Secondly, with respect to the proposed monitoring of the enforcement order we consider that the officer undertaking this task should have an express duty also to ensure that the child does not experience adverse repercussions while the enforcement is taking place, a point supported by other research (Buchanan and Hunt: 2003 at 383).¹¹⁷
- 7.63 While enforcement proceedings, being more akin to the law of contempt, are not governed by the paramountcy principle as were the original child-related proceedings, that is not to say that the courts dealing with enforcement should ignore the welfare of the child. The judge contemplating making an enforcement order has to weigh the long term welfare of the child against the risks of doing nothing to a parent who has persistently flouted the authority of the court. This dilemma was considered

¹¹⁶ To be inserted by the Adoption and Children Bill 2005, cl 4 and Sch 1.

¹¹⁷ Buchanan A, Hunt J in a paper summarising findings from an earlier pre-CAFCASS research concerning children's and parents' views of the divorce court welfare service and making reference to several American studies observe that: 'To proceed further down the punitive enforcement role, in our view could potentially be very damaging to children and in the absence of good evidence to the contrary very questionable even in order to 'encourager les autres'. They further comment that in some cases, particularly where there is a possibility of no contact, or of an order for enforcement, or the child is resisting contact, separate representation may be the only way to ensure that the voice of the individual child is heard strongly and their interests remain central in the decision-making process.'

by the Court of Appeal in *M v M (Breaches of Orders: Committal)*.¹¹⁸ While it was acknowledged that the welfare of children is not the paramount consideration in committal proceedings,¹¹⁹ it was nevertheless regarded as a material consideration. In this case the Court of Appeal sought to resolve the dilemma by asking the High Court to look at the case again. The judgment of Ward LJ on this point (at para 20) is illuminating. In our submission it supports our suggestion that in enforcement cases a guardian should be appointed. Delivering the Court's judgment (Clarke, Neuberger LJJ concurring), Ward LJ said:

"In the judge's conclusion something has to be done to try and find a new way forward. I agree. The new way forward is for the High Court to do what this court requested it to do when this matter was before me on a previous occasion: that is to take a good, thorough long look at this unhappy case and make an order which then has to be respected and obeyed. Mr M cannot go around believing he can flout the order of the court forever with impunity. But let the High Court consider this matter, first having full regard to the interests of the children which will then be paramount, having regard to the advice tended by their guardian now appointed to represent their interests, having regard to the psychological evidence to be produced on both the father and the mother, and any other psychological and/or psychiatric evidence that might be admitted relating to the children themselves."

- 7.64 In other words when this dilemma is confronted by a judge wishing to protect the welfare of the children while keeping the threat of enforcement open the suggested remedy now set by this precedent, is to reactivate the original proceeding so that the paramountcy principle can be applied and a guardian brought in to represent the children. While we agree totally with the objective of this approach, it seems cumbersome and will delay matters. In our submission the advantage of our particular proposals is that when the court is contemplating enforcement proceedings the welfare of the child should be safeguarded straight away by the appointment of a guardian. In that way a judge may make the enforcement order assured that a guardian will safeguard the children's interests. Moreover, if an enforcement order is made under our second proposal, a CAFCASS officer would monitor the children's circumstances and, if it seems that the child needs further support and protection, report the matter to the judge.¹²⁰

¹¹⁸ [2005] EWCA Civ 1722.

¹¹⁹ See *A v N (Committal: Refusal of contact)* [1997] 1 FLR 533 at 540 in which His Lordship said 'it is obviously a material consideration and any judge who does any family work at all is always alive to the grievous effect the implementation of an order is likely to have on the life of the children whom the mother is unwisely seeking to protect in her own misguided way'.

¹²⁰ If such a provision is not included in the Children and Adoption Bill, then perhaps consideration could be given to the matter when the consequential Rules are being formulated.

7.65 As things stand at present, attempts to make the enforcement of Children Act orders more effective carry the risk of shifting the focus of policy attention away from the children who are ostensibly the subjects of the proceedings, onto the parents. Yet, at the same time, by failing to address the underlying causes of parental disputes, which lie deep in the history of the parties' relationship, enforcement measures may simply exacerbate the difficulties between them and cause their children further distress. The commissioning of this research demonstrated the concern of the Department to understand the perspectives of these children at first hand, and its determination to shape future policy in the light of those perspectives. The children in this study have spoken powerfully of their experiences and what they found helpful and problematical in being separately represented in court. Their messages have been supported by the views of their parents, and of legal practitioners involved in cases such as theirs. The task now is to ensure that the legal process provides mechanisms that will enable their voices to be heard in ways that suit the individual children themselves, and that meet their needs for support through what is too often a long and painful process of adjustment to post-separation family life.

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Appendix 1 - Research methodology - Child and parent interviews

Introduction

The aims of the research have already been described in Chapter One. In summary, they were primarily to sample children's views of their experience of being separately represented in private family law proceedings where r 9.5 was used. In addition, supplementary aims were: to collect baseline data from the court records of cases that involved a referral for a r 9.5; to interview the parents as well as the children; and to collect data from solicitors on their experience and use of r 9.5

To achieve these aims the research progressed in two main phases:

1. the identification of and negotiation of access to court files of cases that involved a referral for a r 9.5. This was planned to provide the sampling frame from to select cases for interview and to identify and illustrate patterns in the nature of the cases referred for r 9.5.
2. the recruitment of a sample of families for interview. Our target was to identify and interview up to 45 children and, where possible both of their parents.

The sample

Selecting the sample

In order to achieve our target sample of interviews with 45 children and their parents' it was decided to attempt to identify cases which had involved a 9.5 referral and which were completed in the years January 2001 – April 2005. The sample was restricted to "closed" cases (i.e. where there is an order determining the outcome of the case) rather than current files which excluded a large majority of cases. First, we did not want to inconvenience busy court staff unnecessarily by seeking information from records which were likely to be currently in use. Second, when it came to seeking the consent of the parents and children to be interviewed, we wanted to ensure that they would not think we were in any way interfering with the conduct of the case. We did not want to imply that by inviting them to participate in the research, we could influence in any way the outcome of their case. For the purposes of identifying a sample of families for interview, it was decided only to include those cases where the child subject to r 9.5 was over the age of 7 years.

Access to court files

At the start of the project it was agreed with the DCA that we would draw our sample of 9.5 cases through the courts. Fourteen courts were initially identified as representing a range of high and low use areas (according to CAF/CASS figures provided by the DCA). These were: Manchester, Leeds, Birmingham, Liverpool, Birkenhead, London - Wandsworth, London - Bow, London (Principal Registry of the Family Division), Cardiff, Newport, Exeter, Taunton, Gloucester and Swindon). Initial contact was made with each court by the DCA who introduced staff to the study and asked them to provide a contact person with whom we could discuss the feasibility of data collection from files in their court. Court Service HQ then provided the research team with a list of contact names in all of the requested courts.

Nine courts from the original 14 contacted were subsequently selected as representing a range of high and low use areas and, in our view, with the potential of providing a sufficient number of cases from which to draw our sample. These were Leeds, Manchester, Liverpool, Birkenhead, London (PRFD), Exeter, Taunton, Birmingham and Bow. Direct contact was made by the research team to each of these courts to arrange reconnaissance visits. It was explained to court staff that the aim of the visit was to discuss the approach which should be used to identify 9.5 cases and the mechanism for inviting families to participate in the research. In addition, we were able to provide further details and answer any questions about the research and to agree provisional dates to carry out the data collection from court files.

Problems in identifying Rule 9.5 cases – searching for needles in haystacks

On the basis of our reconnaissance visits, we quickly discovered that courts do not have a standardised management information category for r 9.5 cases. Within the Family Man management information system, only one court (Leeds) had made a separate code for these cases. Lack of a standardised system had two consequences for us. First, all the other courts in our sample would have to approach their local CAF/CASS office on our behalf in order to obtain a list of relevant closed cases where a CAF/CASS officer had been appointed as a guardian. Second, it meant that except in one court (Liverpool and Birkenhead) we could not identify those other r 9.5 cases which had been referred elsewhere for a guardian, for example, to NYAS or where the court had decided to dispense with the CAF/CASS guardian and simply appoint a specialist children's solicitor. We knew from our preliminary reconnaissance that in certain areas these practices exist. This means that statistics drawn from CAF/CASS alone can under-represent to an unknown extent the true picture of r 9.5 use in private law proceedings. However, apart from Liverpool and Birkenhead, most of the courts that we used told us during our initial reconnaissance that they only use CAF/CASS. Therefore the loss of potential "bypass" cases did not seem to us to be a serious problem in our particular research.

We agreed with the Department that on the basis of management information figures provided by CAF/CASS, we would examine appropriate records from five apparently “high use” courts (Manchester, Leeds, Birmingham, Liverpool and Birkenhead and the Principal Registry in London). Then as a check we would visit four apparently “low use” courts (Cardiff, Bow, Exeter and Taunton). In the event as far as finding suitable cases, we drew a complete blank in these low use courts.¹

This meant that we concentrated our court record scrutiny of identifying r 9.5 cases in the five apparently high use courts. In all, a total of a 191 cases were identified as being subject to a r 9.5 order.

Delay arising from Mumby J’s judgment in Re B (a child) (Disclosure) [2004] EWHC 411 (Fam) [2004] 2 FLR 142 at 190

Just before our investigation was due to start, following the judgment in this case delivered on 19 March 2004, the departmental practice of allowing authorised researchers access to court and CAF/CASS records was thrown into doubt. There followed considerable delay in commencing our data collection from court files while CAF/CASS and the Department sought legal opinion whether we could go ahead with our study (in the meantime we conducted a survey of solicitors’ views - reported in Chapter Five). Eventually it was agreed that as the law governing disclosure of confidential documents was likely to be modified² to permit authorised research, we could proceed on the basis that the senior judge in each court should be asked to approve our having access to court records for purposes of identifying cases subject to r 9.5.

Once this consent had been obtained, arrangements were made for the researchers to visit the courts, inspect the records and abstract details of the relevant cases.

Data collection from courts

At the courts, with the helpful assistance of court staff and with access to ‘Family Man’ court records were carefully screened in order to check that the case was, in fact, a r 9.5 case and to ensure that the case was closed. The research team then selected those cases that were suitable for data collection. Cases were excluded

¹ Cardiff produced six cases, all of which were still open. At Bow, the local CAF/CASS service manager was unable to identify Rule 9.5 cases as this category was apparently not recorded on their management information system. Likewise the CAF/CASS office serving the Exeter court was unable to identify Rule 9.5 cases without a good deal of difficulty and delay which we considered could not be justified given that the numbers were likely to be very few and we were pressed for time. The same was the case in Taunton.

² See DCA July 2005 “Disclosure of information in family proceedings cases involving children” Annex C Amendment to Family Proceedings Rules 1991 Rule 10.20 as amended. This permits a party or person lawfully in receipt of information or a proper officer to communicate information concerning a child or a family to a person or body on an approved research project.

for the following reasons: 1) the case was still open, 2) the case had been transferred to another court, 3) the file was currently in use and therefore unavailable, 4) the case dealt only with care issues, or 5) where the file could simply not be located.

In employing these screening criteria, 66 cases were excluded from four of the five courts. For the fifth court, the screening criteria could not be employed as this court had only identified cases that were still open. Whilst this contravened previous procedures, a low response rate and time constraints gave rise to the decision to carefully select cases where both parties and children could be invited to participate in an interview without affecting the case. Therefore, the final sample consisted of 121 cases (see table 15).

Table 15: Number of cases included in data collection

Court	Number of cases included in data collection	Total (%)
Birmingham	7	6
Leeds	59	49
Liverpool	17	14
Manchester	23	19
London	15	12
Total	121	100

Data were collected from each court case file by means of a data collection sheet (see Appendix 6). In order to maintain confidentiality, names and addresses of the parties were not removed from the court and only general information about the case was recorded. Firstly, information was collected from the C1 application form (the standard form for an originating application in Children Act 1989 proceedings). From this form the following information was collected: type of order sought, whether all children were included in proceedings, whether there were other court proceedings involving the children, details on the health of the child, whether the child was known to Social Services and whether the parents had any other children. Secondly, the following information was collected from any orders on file: type of order, date order given and name of the judge. Finally, a summary was taken from individual party statements, Divorce Court Welfare Officer or Child and Family Reporter reports and Guardian reports.

Recruiting families

As already mentioned, the primary aim of our access to court files in the 9.5 cases identified was to provide the sampling frame from which we could select cases for interview. Although general information was collected from all 121 case files identified, in a number of cases families were not invited for interview for one of the following reasons: 1) the children were too young (below 5 years of age), 2) limited time and resources gave rise to the omission of cases where language interpreters were needed for either one or both parties, 3) where one of the parties had a

confidential address, 4) where no addresses were on file, or 5) where it became apparent that the case was purely care oriented. In addition, a few extra cases were excluded from the interview sample because further examination of the file revealed that: the children were in care, the r 9.5 order had been set aside or the case had recently reopened. Once allowance had been made following the exclusion of those cases which did not fit our criteria or as explained above were deemed unsuitable for other reasons, the original 121 cases were reduced to a total of 84 (see table 16).

Table 16: Number of cases invited for interview

Court	Number of cases included in data collection	Number of cases invited for interview
Birmingham	7	3
Leeds	59	48
Liverpool	17	11
Manchester	26	16
London	15	6
Total	121	84

With the agreement of Court staff we prepared a letter to be sent to both parents in each identified case (see court letter at Appendix 2). In a few cases no letter was sent either because one of the parties was living abroad, because of indications of violent behaviour or because no address was held. Hence from the potential sample of 84 families to be invited for interview 161 letters were sent.

The purpose of the letter was to introduce the research and ask parents whether they would be willing for the research team to contact them with more details about the project. The letter explained that the research was confidential and made clear that taking part would not influence any ongoing legal proceedings. Parents were asked to return a reply slip indicating whether they were happy to be sent further information about the study. At the time of drawing the sample, we compiled lists showing the name, address, court number and unique study number of each person sent a letter. This list was left with Court staff to protect the confidentiality of those who opted out so that the research team at no time held names or addresses of these people.

Those parents who agreed to be contacted to be sent further information were then contacted directly by the research team and sent a research information pack. This included an introductory pack for parents and a children's invitation pack (examples of child and parent letters and fact sheets can be seen in Appendices 3 and 4). The parents' introductory pack contained an introductory letter, a fact sheet about the project and a response form. The children's invitation pack contained a fact sheet (designed for the appropriate age of the child) and a response form.

The response from parents

From the total of 161 letters that were sent to parents from the courts 14 letters were returned to the court marked as “not known at this address” leaving a total potential sample of 147 individuals. Of the 147 people who were thus in the original parent sample, 9 people (6 per cent of the total potential sample) returned the form indicating that they did not wish to take part nor receive any further information regarding the project. Thirty four individuals (23 per cent of the total sample) responded to this initial letter indicating that they were interested and would like more information. This meant 104 individuals made no response and thus a reminder letter was sent again from the courts. Only 5 additional individuals responded after receiving the reminder letter and so a total of 39 individuals (27 percent of the total potential sample) indicated interest in the study.

Upon receipt of the further information pack which was sent to them after the initial approach letter 29 parents (75 percent of parents who expressed an initial interest, 20 percent of the total potential sample) responded to indicate they were willing to be interviewed. Six of the 29 parents who indicated they would like to take part were not interviewed due to the following reasons:

- One non-resident father and one resident mother agreed an appointment time on the phone but when the interviewer arrived at their house they did not answer the door or the phone and have not responded to a letter asking if they would like to rearrange.
- Three parents (two fathers and one mother) have not been contactable on the telephone number they provided nor responded to further letters
- One father was unsuitable for face-to-face interview (history of violence and manipulation of interviewers) and was offered a postal questionnaire

Therefore a total of 23 parents were interviewed (with roughly equal numbers of resident and non-resident parents and roughly equal numbers of mother and fathers).

Reasons for non-participation and participation

A number of resident parents who told us that they did not wish to take part explained their reasons. One mother, for example, who had a thirteen year old son phoned us to say that while she thought the research was very important (hence here initial expression of interest) when she read the second letter and information pack which set out the type of questions we would be asking, she did not think either she or her son were emotionally strong enough to go over all the events of the past with us – it would be just too painful. Likewise several other resident parents wrote to say that they did not want to revive memories of painful litigation and “bad times” which they felt they and their children were trying to put behind them. We might assume from such communications from these non-responders

that many other parents who did not reply to the initial court letter would have reacted similarly.

After all, we have to remember that even though the focus of this part of the investigation was on children's and parents' experience of the litigation process, it would have been impossible for most to have talked to us without mentioning often intensely personal painful events arising from the inter-parental conflict which had been contested in the courts. In our culture the social values of privacy and loyalty are powerful mechanisms that protect families from intrusion by outsiders and are learnt by children from an early age. It therefore takes some confidence and trust to talk about such matters to complete strangers, however skilled and sensitive the researchers might be and however much we promised to respect their confidences and not to name or identify them in any resulting research publication.

It is also important to remember that shortage of time meant that we had to proceed on a snapshot single interview basis. This meant that some of the children and parents might have been "on their guard" during the interview because they had insufficient time to weigh up how far to trust us. Indeed evidence for this can be seen in the children's interviews whereby some parents wished to be present when their child was interviewed and some children wished their parents to remain present when they were interviewed. The limited time also meant that by not having time for a second follow up interview, children and parents might have been denied the opportunity for more reflective thought and for telling us of any developments subsequent to the interview. We had to remember that the snapshot approach is like freezing a single frame in what is after all a moving picture in which each child and parent will have a different ongoing interacting story to tell. In certain respects of course, the "parachuting in and flying out" nature of our encounter with them might have mirrored their experience of brief meetings with CAFCASS officials and other professionals.

It is interesting to note that for participating children and parents alike, what proved decisive in their decision to participate was often the altruistic thought that by taking part they might be helping to develop practices and procedures to enable other children and parents avoid some of the more painful aspects of the litigation process. Other consumer researches that we have conducted in more general divorces cases and in respect to adoption have found likewise.

The final sample

In all, 15 children (8 boys and 7 girls) were interviewed. We also interviewed 23 parents or carers comprising 10 fathers, 12 mothers and 1 aunt. Of these, 15 were resident parents (4 fathers, 10 mothers and 1 aunt) and 8 non-resident parents (6 fathers and 2 mothers). Children and parents were widely dispersed geographically in the North, Midlands and London areas. In only three families did we manage to interview both parents.

Interviews

Interview schedules

Because of the idiosyncratic and complex nature of 9.5 cases sampled, we decided that rather than using a structured interview schedule which might be experienced as rigidly constraining, it would be better to have a more open approach. Semi-structured interview schedules were therefore developed for both the child and parent interviews based on a checklist of questions to guide the interviewer. We felt this would allow children and parents greater opportunity to tell their story in their own way and lead us to the subjects which were of most interest to us, namely their experience of the separate representation process. Drawing on pilot work, the schedules broadly covered the following topics: brief information about the background of the case, experiences of and feelings about the professionals met during the proceedings, views about children's involvement in proceedings, the perceived impact of being involved in proceedings and recommendations for others. Parents also completed a short questionnaire providing basic demographic and background information on the case. Six parent interviews were conducted on the telephone either because the parent felt more comfortable or for safety reasons.

All interviews were tape recorded, transcribed and analysed with the aid of NVivo.

Child interviews

Before the main interview each child was given a copy of a short 'activity book'. The activity book was designed to serve as an 'ice-breaker' and allowed the interviewer time to build rapport with the child before the main interview. The short activity book was designed to collect some brief background information from the child and allowed them to draw a picture map of all the people who were important in the children's lives including immediate and extended family, friends and professionals. This exercise helped the researcher and child to develop their rapport; provided the researcher with background information to draw on during the interview; and allowed the researcher to make a gentle transition between the warm up and the interview itself.

For some interviews (depending on the age and appraisal of the interviewee) children were given the option of using a range of cards with colourful face depicting a variety of emotions (including happy, sad, angry, content, confused, scared etc). This proved a useful tool for children (particularly very young children) who found it difficult to articulate how they felt about certain topics.

We were very aware that for some children the interview might involve talking about difficult and upsetting matters and we were keen to ensure that all children were left on a positive note. As such, the end of each interview was finished with the researcher asking the child to reflect on their experience, to say what were the

worse and best points, what they thought they had learned or gained, and what advice they would give to other children, parents and adults who might have to deal with a similar situation in the future.

At the end of the interview all children who took part were offered a small token of appreciation in the form of a £10 voucher of their choice.

Research methodology – Survey of solicitors

In preparation for the national survey of solicitors contact was made with Karen Mackay (Chief Executive of Resolution, formerly the SFLA) and Rachel Rogers (Policy Adviser at the Law Society). After consultation with Co-Chairs of SFLA's Children Committee and the Strategic Research Unit at the Law Society it was agreed to send an exploratory questionnaire to all solicitors on the SFLA children panel and the Law Society Children Panel. The SFLA provided us with a list of mailing labels of all their children panel members. These names were crossed checked with a database of Law Society Children Panel members. A total of 604 questionnaires were sent to SFLA children panel members and a further 1424 questionnaires to members of the Law Society's children panel.

The questionnaire was designed to ask solicitors about their experience and use of r 9.5, their views on the application and impact of r 9.5, and some general questions about the separate representation of children (see Appendix 7 for solicitor questionnaire).

Overall we received a total of 420 completed and returned questionnaires. This comprised 300 responses from members of the Law Society, and 120 responses from members of the SFLA children panel. All data were coded and analysed using SPSS.

Appendix 2: Court letter

In confidence

Over the next year, the Government department which is responsible for family law and the courts (the Department of Constitutional Affairs) are looking at ways to improve the court process and make the courts more family and child friendly. To help them do this they have asked an experienced team of researchers at Cardiff University to carry out research into the way in which the courts deal with family law matters involving children.

We are writing to you to ask whether you would be willing to help with this important research. Because of your recent experience of the court process, you are someone whose views would be extremely valuable.

The research team would like to talk to parents and young people about their experiences of the court process and how they think it should be improved.

It may help you to know that:

- ❖ Your involvement in the research will be confidential - your name will not be associated in any way with the information you give and you will not be identified in any reports or publications about the research.
- ❖ Taking part will make no difference to any proceedings you may be involved in.
- ❖ By taking part you will be contributing to improvements that the government hopes to make in the family courts and other services for children and families. In this way you might be helping other families avoid some of the difficulties with the system you and your children may have experienced.

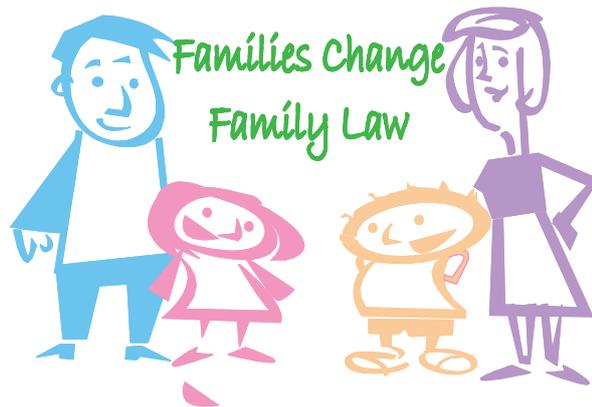
At this stage we would simply like your permission for the research team to contact you to tell you more about the research project and what would be involved in taking part. It would then be entirely up to you to decide whether or not you would like to help.

Please return the attached slip by in the FREEPOST envelope provided.

Thank you for considering taking part in this important study.

Yours sincerely

Appendix 3: Example parent letter and fact sheet



date

Dear ,

Recently you were contacted by your local court to ask whether you would be interested in helping with our important research project 'Families Change Family Law'. Thank you very much for your interest in our study.

We are now writing to send you an information pack. Included in the pack is a parent fact sheet and response form and an information pack for your child. These should tell you all you need to know about the project and make it easier for you to decide whether you and your child would like to take part.

Please begin by reading the Parent Fact Sheet. Then if you are interested in taking part, and are happy for us to invite your child to take part, please give them the enclosed Children's Fact Sheet which should help your child decide whether they are also interested in helping us.

We hope you will be able to help us. Once you and your child have made a decision we would be grateful if you would let us know by each returning a response form in the enclosed FREEPOST envelope.

If we do not receive your blue forms within 10 days we hope it will be all right to contact you again to see if we can help you with your decision.

We look forward to hearing from you.

With best wishes,

Claire Miles

Families Change Family Law Fact Sheet for Parents

The Project

Over the next year, the Government department responsible for family law and the courts are looking at ways to modernise and improve the court process and make the courts more family friendly. To help them do this they have asked us, an experienced team of researchers at Cardiff University, to find out what parents and children think about the way in which family courts and lawyers deal with families following parental separation.

Aims

- We would like to talk to parents and their children about their views and experiences of the family court process, what they think about the current system and how it should be improved.
- This will allow us to contribute to improvements that the government hopes to make in the family courts and other services for children.

Interviews

The interviews will:

- Be arranged over the telephone at a time that is most convenient to you
- Usually take place at your home, although other arrangements can be made if you or your child prefers
- Be conducted on a one-to-one basis
- Last for about an hour, depending on how much you'd like to tell us
- Be tape-recorded so that we can be sure we capture everything accurately

Questions

We would like to ask you about:

- the arrangements for where your children live and their contact with both parents
- your views about the court process
- your experience of legal personnel such as solicitors and court welfare officers / family court advisors
- how you think things could be improved
- your advice for other parents and professionals

We would like to ask your children to tell us something about:

- their experience of the legal aspects
- how they think things could be improved
- advice for other children, parents and professionals

To help your child during the interview we have developed some materials that should make communication easier, even fun.

The Children's Invitation Pack

These packs contain a leaflet to let children know:

- ❖ who we are and where we work
- ❖ why we want to speak to them
- ❖ what we want to talk about
- ❖ answers to possible questions
- ❖ how they can contact us if they have any questions
- ❖ that they can talk to someone to help make up their mind

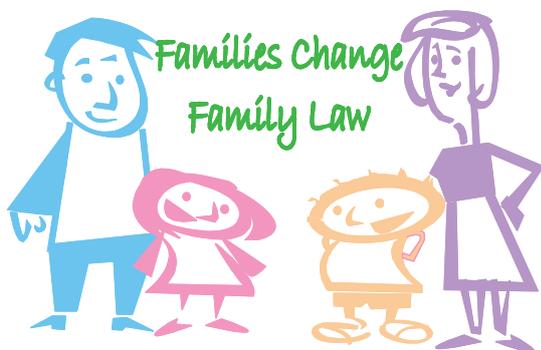
Consent and Confidentiality

- Even if you agree to be interviewed you or your child can withdraw at any time.
- The information you give to us will be completely anonymous - this means that your names will not be associated with anything you say to us.
- Please be assured that anything you or your child tells us is entirely CONFIDENTIAL. This means that none of the information either of you give us will be shared with the court, each other or any other members of your family.
- A letter has also been sent to your child's other parent inviting them to give their views of the family court process. **We would very much like to hear your views regardless of whether they decide to take part.**

Findings

Once we have spoken to as many families as we can we will write a report for the Government. A summary of our findings will also be sent to all those families who take part.

If after reading this fact sheet you would like to discuss any aspect of the study please contact us at Cardiff Law School on 02920 876705 extension 7184 or email to MilesCJ1@cardiff.ac.uk



Cardiff Law School
Cardiff University
Museum Avenue
Cardiff
CF10 3XJ

02920 876705 ext 7184

Appendix 4: Example child fact sheet

Hello!

(PHOTO HERE)



Our names are Lesley and Claire and we work at Cardiff University.

We have been asked by the government to find out what young people think about the family courts and how they help families and children whose parents have split up.



To help us do that, we will be talking to lots of young people like you all over the country.

We need **YOUR** help. We'd like to ask about your experience of deciding important things like where you live and keeping in touch with both parents.

What I didn't like was...



Who did you speak to? Did you have your say? What helped? What made things more difficult? Would you change anything?

We'd love to hear what you think about these and other questions like this.

What helped me was...

We hope you will be able to help us. By talking to you, we will be able to help make the family courts better for families and young people like you.



This is your chance to help too!



You may have some questions:

How long do you want to talk to me?

For about an hour, but if you've got more to say it could be more.



Will you tell anyone what I say?

What you say to us will be confidential. This means that only the people working on the project at the university will be able to read your views.

We will **not** tell your parents or your teachers anything you say to us.

Why should I speak to you?

No-one really knows what young people think about the family courts. We would like to give you the chance to have your say. In this way we hope to make things better for other children in the future. Only young people like you can tell us what helps.

All those who take part will get a £10 voucher to say thank-you



Will you write down what I say?

Maybe, but we would like to tape what you say if that's ok.



Will both of you come to speak to me?

No, just one of us.

Where do I have to go to speak to you?

We will usually come to your home (but if you would like we can arrange to meet you somewhere else)

Can I change my mind?

Yes, you can change your mind at any time.

What if I'm not sure?

Don't worry, take your time. Talk to someone else if it helps.

What if I have more questions?

Give us a ring, on 029 20 876705 ext 7184 or email us at MilesCJ1@cardiff.ac.uk



Appendix 5: Child and parent interview schedules

Child Interview Schedule

Current Situation

- How do you feel about living with your ...(RP)
- Do you see your NRP?

If yes:

- How do you feel about seeing your NRP?
- What does your mum/dad think about you seeing yourNRP?

If no,

- Do you have any other contact with your mum/dad (i.e., indirect contact via phone, letters etc?)
- Does anyone talk about yourNRP?

ALL

- How do the visits/letters make you feel?
- What do you think of the arrangements?
- WHY?

Legal process

- Do you remember when your mum and dad first split up?
- Did anyone talk to you about what was happening when they first split up?
 - How did you feel?
 - WHY?
- Did anyone ask you about what you wanted? [did you want to say what you wanted?]
 - How did that make you feel?
 - Do you think you were listened to? [was it easy or hard?]
- Did you talk to anyone about the disagreement between your mum and dad?
 - Mum, Dad, Friends, Teachers, Grandparents (maternal or paternal), Siblings

- What were your parents arguing about at court?
 - How did that make you feel?
 - WHY?

Did you remember ever meeting with or talking to any of the following people:

Children and Family Reporter

(someone who is asked to help the court decide what is best for you. He or she may have talked to you about the disagreement between your mum and dad and what you thought about what was happening)

Children's Guardian (note: this may have been same person as CFR)

(same as above)

Judge

(the person who decides what happens to children when their parents can't agree. You may have seen pictures of them with a hammer and wig)

Solicitor

(a person who tells the court what the person wants. They know about the law)

Social Worker

(a person who usually works for the local council and may come to see children when they need help)

Experts e.g. psychiatrist/psychologist

(somebody who is specially trained to help adults and children sort out their problems)

For each,

- How many times did you meet, where with whom?
- Why did you have to speak to him/her?
- Did you want to speak to him/her?
- How did you feel before you spoke to the?
- What did you tell him/her?
- How did you feel when you were talking to him/her?
- What did they do that was **good**/you liked? (e.g. played games, made you feel relaxed)
- What did they do that was **bad**/you didn't like? (rushed in and out, didn't listen)
- Did you feel able to say what you wanted?
- Was there anything you wanted to say but couldn't?
- Do you think he/she understood what you wanted?

Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991

- Did they give you any leaflets or anything to read? [show leaflets]
- Did he/she tell you what he/she was going to do with what you said?
 - How did you feel about that?
- How did you feel afterward you had seen the ...?
- Overall, how happy were you with having a ...? OR what did you think about having your own guardian?
- What was **good** about having a guardian?
- What was **bad** about having a guardian?
- WHY?
- If your friend's parents were going through the same thing, do you think they should have a guardian like you did?
 - WHY?

Impact of proceedings

- What was the final decision of the judge?
 - Who told you?
 - How did you feel?
- How did you get on with your ...RP **during** the court visits?
- How do you get on with yourRP **now**?
- WHY?

- How did you get on with your ...NRP **during** the court visits?
- How do you get on with yourNRP **now**?
- WHY?

Advice for children, parents and professionals

Now that you are an expert on these matters and have more experience than most children, what would you like to say to the government / what would your advice be to other children?

- What were the bad things about your experience (anything made it harder)
- What were the good things about your experience (anything made it easier for you / you would want again?)
- Is there anything that you wanted but did not get?
- Anything you wished didn't happen?
- Is there anything you would change if you had to do it again?

Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991

- Do you think parents should go to court when they can't agree over their children?
- Do you think children should go to court when their parents can't agree over them?
- How can it be made easier for children?

- Finally, what are your top tips for the following people (*back to activity book*):
 - Other children in your situation
 - Parents who cannot agree on the arrangements for their children
 - Professionals – family court reporters, guardians, judges, solicitors.

Parent Interview Schedule

Introduction

We would like to ask you about the following topics:

- Some facts about the background of your case
- Your views regarding your child's guardian and solicitor
- Your experiences of the professionals you met during the proceedings (e.g. Child and Family reporters (C&FR's), other experts)
- Your views about your child's involvement in the case
- The impact of your court experience on your relationship with your child and your own well being
- Recommendations to others

List of Professionals:

Did you meet any of the following:

- Judge/s (how many?)
- C&FR (CAFCASS / non-CAFCASS? One or more?)
- Children's Guardian (same / diff person?)
- Children's Solicitor
- Social worker
- Additional experts (e.g. psychologist)
- Did you have your own solicitor?
- Did your ex-partner have his/her own solicitor?

Brief history of the case

- Who made the initial application?
- What was the date of initial application?
- What was the nature of the application? (residence/contact/parental responsibility/prohibited steps/specific issues)
- In your view what was the disagreement between you and the other parent over?
- What was the outcome of the first application?
- If the court made an order, what did it say?
- How did you feel about this order / agreement?
 - Why did you feel that way? (about the initial order / application)
- How did the order/agreement work out in general?
- Why did this arrangement brake down / why was another application made?

Subsequent applications (for each determine):

- Why previous arrangement broke down (if not already covered)
- Who made the application
- When the application made
- What type of application was made
- What was the outcome of the application
- How felt about this order / agreement
 - Why felt that way

Overall

- Roughly how many different judges did you see?
- Did you try mediation at any stage in the proceedings (an outside agency)?

If yes:

- When?
- Was it useful?
- Did you attempt in-court conciliation at any stage (with CAFCASS / lawyers)?

If yes,

- When?
- Was it useful?
- When did the case finish?
- What was the final order / agreement?
- How did you feel about this final order / agreement?
 - Why did you feel that way?

Current residence and contact arrangements

(nb. if more than one child check arrangements are the same for each)

- Who does the child live with now?
- If the child lives elsewhere how often do you see them?
- If the child lives with you how often does the other parent see them?
- Is there any indirect contact?
- How do you feel about the current residence and contact arrangements?
 - Why do you feel that way?

The professionals you met

The C&FR:

- What did you think of him / her?
- How many times did you meet?
- Where did you meet?
- What was the role of ...?
- How did you feel about having to talk to ...?
- What did you talk about?
- Did you feel able to give your views / that you were listened to?
- Did you feel they understood your views and feelings?
- Was a report prepared?
- Did you see the report?
- How did you feel about what was written in the report?
- Did the report accurately reflect what you said/wanted?
- Did you have any concerns about what was written?
- Overall, how satisfied were you with ...?
 - Why?

If met child's solicitor ask similar questions as above.

Understanding and experience of the process of separate representation

(i.e. child having own guardian and solicitor)

- When was it decided that your child should be separately represented?
- Who suggested that your child be separately represented?
- What was involved when it was ordered that your child be separately represented?
- Why was your child separately represented?
- Who explained these reasons, or separate representation to you?

- How did you feel about your child being separately represented?
- Was the Guardian the same person as the C&FR or different?

If same:

- What did the person do differently?
- What was the role of the children's guardian?

Your child's involvement in the case

- How many times did your child meet with their guardian and / or solicitor?
- Did they talk to you about their meetings with their guardian or solicitor?

If yes, what did they tell you?

- How do you think your child felt about being separately represented?
 - Do you think that your child had any **problems** because they were separately represented? (e.g. felt torn between two parents)
 - Do you think that there were any **good points** about your child having separate representation? (e.g. happy to be asked what they wanted?)
- Did your child meet with the judge?
- Did anyone tell your child what was going on in the case?
- Do you feel that their wishes were taken into account / that they were listened too?
 - Why?

Impact of the proceedings

What effect, if any, have the proceedings had on:

- You?
- Any other important relationships (e.g. with new partner / rest of your extended family etc.)
- Your child?
- Your relationship with your child?
- Your relationship with your ex-partner:
 - How did you feel about your ex-partner BEFORE proceedings began? (E.g. how often were you talking / how conflictual / harmonious / how much did you dislike / like them etc).
 - How was your communication during your marriage / time together?
 - How did you feel DURING proceedings?
 - How do you feel about your ex-partner NOW?
- Since the case finished, how have things been?
- Has the order/agreement been working?
- Are there any ongoing problems?

Recommendations

- Looking back, what were the good and bad bits about the process?
- What was helpful or unhelpful to you?
- What was helpful or unhelpful for your child?
- Can you suggest any changes/improvements to the current system?
- Do you think the court is an appropriate place for parents to go to when they cannot agree on arrangements for their children?
 - If yes, why? (e.g. no alternative, helps resolve the stalemate)
 - If possible, (i.e. agreement of both parties) would you have preferred to avoid the court system?
- If you had to go through the experience again, would you want your child to be separately represented?
- Do you think other children in a similar situation should be separately represented?
- What would you say to other parents who may have to contend with a similar experience?
- Overall, do you think the process of separate representation for your child made things easier or harder:
 - For you
 - Why?
 - For your child
 - Why?

Appendix 6: Data collection sheet

ID: COURT/CASE [...../.....] CASE NUMBER:

CONFIDENTIAL

**Research into the Operation of Rule 9.5 of the Family Proceedings
Rules 1991**

Funded by the Department of Constitutional Affairs.

DATA COLLECTION SHEET

Contact:

Dr Lesley Scanlan or Dr Claire Miles
Families Change Family Law Project
Cardiff Law School
Cardiff University
Museum Avenue
Cardiff
CF10 3XJ

02920 876705 ext 7184

Email: ScanlanLC1@cardiff.ac.uk or MilesCJ1@cardiff.ac.uk

Date case closed on FM and FO details (& judge):

.....

FAMILY CONTACT DETAILS

Applicant's name Relationship to child

Respondent 1 name Relationship to child

Respondent 2 name Relationship to child

OTHER DETAILS

Guardian name Date appointed.....

Child and family reporter name Date appointed

Social worker name Date appointed

DETAILS OF THE CHILDREN

Child number				
Child name				
Gender				
Date of Birth				
Relationship to Applicant				
Relationship to Respondent 1				

APPLICATION 1 FORM DATE ISSUED

Applicant

Type of order sought

Concerns all children or only some (*please specify*)

Other proceedings concerning the children (*summarise, with dates*)

The respondent

The care of the children (*give brief details*)

1 = Child with applicant, 2 = Child with respondent, 3 = Other (*please specify*)

Child known to Social Services (*give details*) **Y** **N**

Child good health (*give details*) **Y** **N**

Child special needs (*give details*) **Y** **N**

The parents of the children

	Child 1	Child 2	Child 3	Child 4
Birth Mother				
Mother c lives with (if different)				
Birth Father				
Father c lives with (if different)				

Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991

Married	Y	N
Living together	Y	N
Involved in court case concerning a child	Y	N
Any other children (<i>give details</i>)	Y	N
Other adults at address (<i>give details</i>)	Y	N

Reasons for applying and plans for the children

APPLICATION 2 FORM DATE ISSUED

Applicant

Type of order sought

Concerns all children or only some (*please specify*)

Other cases concerning the children (*summarise, give dates*)

The respondent

The care of the children (*give brief details*)

1 = Child with applicant, 2 = Child with respondent, 3 = Other (*please specify*)

Child known to Social Services (*give details*) **Y** **N**

Child good health (*give details*) **Y** **N**

Child special needs (*give details*) **Y** **N**

The parents of the children

	Child 1	Child 2	Child 3	Child 4
Birth Mother				
Mother c lives with (if different)				
Birth Father				
Father c lives with (if different)				

Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991

Married	Y	N
Living together	Y	N
Involved in court case concerning a child	Y	N

Any other children (<i>give details</i>)	Y	N
---	----------	----------

Other adults at address (<i>give details</i>)	Y	N
--	----------	----------

Reasons for applying and plans for the children

ORDERS

ORDER 1 - DATE ISSUED JUDGE

TYPE OF ORDER

DETAILS

ORDER 2 - DATE ISSUED JUDGE

TYPE OF ORDER

DETAILS

ORDER 3 - DATE ISSUED JUDGE

TYPE OF ORDER

DETAILS

ORDER 4 - DATE ISSUED JUDGE

TYPE OF ORDER

DETAILS

ORDER 5 - DATE ISSUED JUDGE

TYPE OF ORDER

DETAILS

ORDER 6 - DATE ISSUED JUDGE

TYPE OF ORDER

DETAILS

STATEMENTS for each include

- Who made report
- Key dates
- Summary of important information
- Recommendations

REPORTS for each include:

- Who made report
- Key dates
- Summary of important information
- Recommendations

DETAILS

Date of referral

Judge

Reason for referral

ANY OTHER INFORMATION ON FILE

Appendix 7: Solicitor questionnaire

Code:

Cardiff Law School

Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991

Solicitor Questionnaire

**Please complete and return this questionnaire in the FREEPOST envelope provided by:
30th September 2004**

If you would prefer to complete an electronic version of the questionnaire please email Dr Lesley Scanlan at: ScanlanLC1@cardiff.ac.uk

Please note that your name will not be associated in any way with the information you give us and you will not be identified in any reports or publications relating to the research.

Part A) Background Information

- 1) Are you: Male Female
- 2) How long have you been dealing with family cases? (*please tick*)
- 0 - 1 years 2 - 5 years
- 1 - 2 years 6 - 10 years 10 years or more
- 3) What proportion of your case-load is spent dealing with children cases? (*please tick*)
- 0 - 25% 50 - 75%
- 25 - 50% 75 - 100%

Part B) Extent of use of rule 9.5

- 5) Have you ever been involved in a case that has been referred under rule 9.5?
- Yes No → **If No, please go to Part E**
- 6) Over the past 5 years how many cases have you been involved in that were referred under rule 9.5? *Please tick one box*
- None Between 11 and 20
- Fewer than 5 More than 20
- Between 5 and 10
- 7) Of this number, in how many cases did you act for the child?
- 8) Of those cases in which you acted for the child, in how many were you:
- a) directly appointed by the court?
- b) instructed by a guardian?

9) Has the number of rule 9.5 cases you have been involved in increased or decreased over the last year?

Increased Decreased Stayed the same

If **increased** or **decreased**, what factors do you think have influenced this?

10) In your experience, do all the cases that are referred for rule 9.5 go through CAFCASS?

Yes No

If **No**, to whom are the cases referred and why?

Part C) Application of rule 9.5

11) In your experience, why are cases chosen for separate representation under rule 9.5?

12) Have you ever asked the court to order that a child be separately represented under rule 9.5?

Yes No

If **Yes**, why and what happened?

If more than one case, please give brief details of each

13) In your experience is there a particular age range of children for whom rule 9.5 is usually used?

Yes No

If **yes**, what is the age range?

If **yes**, why do you think cases are more likely to be referred for children in this age range?

If **yes**, is the age range appropriate in your view?

14) Are you aware of any rule 9.5 cases in which a judge has actually seen the child who is being separately represented?

Yes No

If **yes**, please give brief details (but not names).

If more than one case, please give brief details of each

Part D) Impact of rule 9.5

15) In your experience how does a referral for a rule 9.5 change, if at all, the procedure of a case in terms of the following?

Please tick all that apply and give a brief explanation for each

Time delay

The dynamics of the case

Other
Please specify below

16) Do you think it is beneficial for the child to be separately represented in private family law cases? (*please tick*)

Yes (in all cases)

Yes (in some cases)

No, not at all beneficial

If **Yes**, in what way is it beneficial for the child?
If **No**, why not?

17) Do you think it is beneficial to the judge/court for a child to be separately represented in a private family law case?

Yes No

If **Yes**, in what way?

18) In your experience, does rule 9.5 create any difficulties for the child who is separately represented?

Yes No

If **Yes**, what difficulties?

19) Are children who are separately represented kept informed about the progress of the case?

Yes No

If **Yes**, by whom and how?

20) Are children who are separately represented given feedback about the outcome of the case?

Yes No

If **Yes**, by whom and how?

Part E) Practice Directions

21) Are you aware of the recent Practice Direction from the President of the Family Division concerning rule 9.5?

Yes No → If No, please go to Part F

22) Are you familiar with the latest CAFCASS Practice Note?

Yes No

23) Do you think the recent Practice Direction has had any influence on the use of rule 9.5?

Yes No

If **Yes**, in what way? If **No**, why not?

24) Do you think the recent Practice Direction will have any influence on the use of rule 9.5?

Yes No

If **Yes**, in what way? If **No**, why not?

25) Are you aware of any local discussion about the application of the Practice Direction?

Yes No

If **Yes**, of what kind and where?

Part F) General questions

26) In your opinion, what are the merits of rule 9.5? *Please comment*

27) In your opinion, what are the drawbacks of rule 9.5? *Please comment*

28) Are there any other questions or issues that you think we should address as part of our research into the use of rule 9.5?

29) Finally, would you be prepared to be interviewed about your experience of and views about rule 9.5 and the separate representation of children?

Yes No

If yes, please provide your preferred contact details, e.g. name, email address, telephone no. etc.

Thank you for taking the time to complete this questionnaire.

