Nuffield Family Justice Observatory

Focus

The second in a series of reports that aims to build a profile of families in private law proceedings—and their pathways and outcomes—in England and Wales.

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Uncovering private family law: Who's coming to court in England?

About this report

This is the second in a series of reports on private law children cases in England and Wales. It uses population-level data for England to examine trends in demand and develops a demographic profile of the families involved, as well as the patterns of orders applied for. It also provides new evidence on the proportion of repeat applications by exploring the gendered pattern of this phenomenon for the first time.

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About the Nuffield Family Justice Observatory

Nuffield Family Justice Observatory (Nuffield FJO) aims to support the best possible decisions for children by improving the use of data and research evidence in the family justice system in England and Wales. Covering both public and private law, Nuffield FJO provides accessible analysis and research for professionals working in the family courts.

Nuffield FJO was established by the Nuffield Foundation, an independent charitable trust with a mission to advance social well-being. The Foundation funds research that informs social policy, primarily in education, welfare and justice. It also funds student programmes for young people to develop skills and confidence in quantitative and scientific methods. The Nuffield Foundation is the founder and co-funder of the Ada Lovelace Institute and the Nuffield Council on Bioethics.

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Foreword

There is an urgent need to better understand the needs and circumstances of separating families who turn to the family court to resolve disputes over arrangements for their children. This is because the family justice system is struggling to cope with the volume of applications and a system already under great strain is being further tested by the challenges of operating during a pandemic. Debates have tended to focus on the demands on the system and the need to divert families away from it, rather than on the rights and needs of families for help, support and possibly the protection of the court. But regardless of whether the motivation is to improve the support for families, or reduce pressure on the family courts, any course of action taken to address the situation will be ineffective if it does not start with a clear understanding of the families involved—their characteristics, circumstances and needs.

As an organisation dedicated to improving life for children and families by putting data and evidence at the heart of the family justice system, the Nuffield Family Justice Observatory is committed to addressing this gap in knowledge. This report is the second in our Uncovering Private Family Law series—a set of studies that will help us to better understand the characteristics and circumstances of families in private law proceedings. The first report provided a profile of families who are involved in private law proceedings in Wales. This report provides an equivalent profile for families involved in private law proceedings in England.

We often say that we are operating in the dark in the family justice system because of the lack of data to inform decision making. Nowhere is this more apparent than in relation to private law cases. We have started on the journey towards building a much better evidence base. I am very grateful to the authors for their groundbreaking data analysis and clear overview of the key findings. The insights will provide a very important foundation for future decision making.

Lisa Harker
Director, Nuffield Family Justice Observatory

Executive summary

The evidence base to inform policy and practice in England and Wales is much less developed for private than public family law, even though there are more than twice as many private law cases each year.

In this report on England our findings are largely consistent with those reported in the first of the *Uncovering Private Law* series—*Uncovering private family law: Who's coming to court in Wales?* (Cusworth et al. 2020), indicating marked similarities between the two jurisdictions. This report also confirms findings from previously published research on England, while also adding new insights, based on population-level data.

In keeping with previously published research, the majority of private law cases are between two parents, and are mainly brought by fathers, usually the non-resident parent, and concern a single child who is most often aged between one and nine years old. The private law adult population are mainly in their late twenties and thirties.

Key findings

The trend in the volume of private law applications has been modestly upwards over the period (2007/08 to 2019/20), although overall use of the court remains low

- In 2007/08, there were around 35,000 applications. This rose to around 48,000 in 2012/13 and 2013/14, before falling significantly after legal aid changes were introduced in 2013. The number of applications has now almost recovered to previous levels, with 46,500 applications made in 2019/20.
- The removal of legal aid entitlement (except for certain cases involving domestic abuse) appears to have mainly delayed or paused applications, rather than reducing the levels of need for assistance over the longer term.
- Less than 0.75% of all families with dependent children in England (including intact and separated families) make a private law application each year, marginally lower than in Wales (less than 1%).

About a quarter of applications are returns to court

- Between 24% and 27% of private law applications between 2013/14 and 2019/20 were made by an applicant who had been involved in a previous application within the last three years.
- Fathers are more likely to be repeat applicants, whereas mothers are more likely to issue their own application after being a respondent on a previous application.

There is a clear link between deprivation and private law applications, which indicates that the economic vulnerability of private law parents requires closer policy attention

- In 2019/20, 29% of applicant fathers and 31% of mothers making a private law application lived in the most deprived quintile (by definition, representing 20% of the wider population), with 52% of fathers and 54% of mothers living in the two most deprived quintiles (representing 40% of the wider population).

- As with public law cases, level of need and trends vary by geographic area. Rates of private law applications were consistently highest in the North East, North West, and Yorkshire and the Humber regions, and consistently lowest in London and the South East.

There is some evidence of a justice gap following legal aid changes

- There was a reduction in the proportion of applications brought by people living in the most deprived areas, by younger applicants, and involving a child under five from 2013/14 onwards. This provides some evidence to support the emergence of a 'justice gap', where certain sections of the population can no longer afford to bring private law applications following the removal of legal aid from private law cases in 2013, other than for some survivors of domestic abuse.

The overall private law population is broadly stable, but there are some changes in what is being applied for

- The majority of private law applications continue to be for child arrangements orders (CAOs). However, as a proportion of all applications, this has declined from two-thirds (69%) in 2010/11 to just over half (52%) in 2019/20, and is much lower than that seen in Wales.
- There have been proportional increases in applications for 'other' private law orders. The proportion of applications for prohibited steps orders fluctuated between 22% and 26%, with applications for specific issue orders increasing from 7% in 2010/11 to 14% in 2019/20, and those for enforcement orders rising from 3% in 2010/11 to 8% in 2019/20.
- These other orders represent quite a significant shift in the workload for the family justice system towards what may be more challenging or contentious cases. The increase in enforcement applications may reflect greater difficulties with making contact arrangements work, possibly in the post-Legal Aid Sentencing and Punishment of Offenders (LASPO) absence of solicitors who might find other routes to addressing contact difficulties.
- There were substantial differences in the orders applied for by mothers and fathers, with around four of five applications made by fathers concerning child arrangements, compared with just over two in five applications made by mothers.

Data gaps and future priorities

This is the second report in the *Uncovering Private Law* series and has focused on an initial demographic profiling of applications in England. The research programme aims to develop a comprehensive profile of the children and adults entering the family justice system in England and Wales, their pathways, experiences and outcomes. It does so by making use of administrative data linkage opportunities in the SAIL (Secure Anonymised Information Linkage) Databank.

Further priorities for analysis include the following.

- Work to differentiate types of private law cases and pathways of adults and children, including more detailed analysis of returner cases and those where the child is

separately represented (known as Rule 16.4 cases). The use of large-scale linked data (health, welfare and further demographic) could shed more light on what might distinguish the profiles of single, repeat, and multiple (or chronic) users. This would enable earlier identification and intervention to prevent what would otherwise be chronic cases from becoming entrenched.

- A more in-depth look at the pre-court needs and vulnerabilities of adults and children, including the prevalence of mental health difficulties, domestic abuse and other child protection issues. A key priority will be exploring the overlap between public and private law cases.
- Greater exploration of regional and local variations in rates of private law applications, including possible drivers, including levels of deprivation and the availability of mediation and other support services.
- A deeper dive into different case types, particularly the non-standard cases about which there is very little prior research: those with two or more applicants and/or two or more respondents, and those including orders other than those for child arrangements.

Recommendations

This programme of work on private family law for the Nuffield Family Justice Observatory (Nuffield FJO) is still at an early stage, but there are several clear implications for policy makers and service providers at this point.

- As was seen in Wales (Cusworth et al. 2020), this research has established that there is an over-representation in private law of adult parties living in more deprived areas. It is critical that policy makers consider the role of deprivation as a factor in private law cases and its interaction with other factors such as conflict, domestic abuse and other child protection issues. This will be an important step in informing, and possibly reshaping, the response to private law need in both the court and out-of-court context.
- Regional variation in rates of private law applications is not insignificant, and this requires greater evaluation of the provision, uptake and effectiveness of mediation and other support services, and other possible drivers of these differences, including local-level deprivation. Policy responses to court demand need to take into account local need for assistance.
- The evidence of a justice gap following the legal aid reforms is perhaps not as pronounced as in Wales, although there has been a reduction in applications by applicants who are younger, and living in more deprived areas of England. We suggest that the Ministry of Justice (MoJ) reviews this evidence, alongside other research and analysis, to reflect on whether access to justice is being inhibited and what steps can be taken to address this.
- The majority of private law proceedings involve a single child or two siblings. Sibling support is a well-documented resilience factor for children that will be missing in large numbers of private law cases. In addition to addressing the dispute between adults, the research highlights the importance of making support available for children. This is particularly important given the recent focus on enabling the child's voice to be heard in private law cases (Family Solutions Group 2020; Ministry of Justice (MoJ) 2020a).

The Children and Family Court Advisory and Support Service (Cafcass) database is designed to meet operational requirements, rather than for research purposes. However, various improvements could be made to the quality and scope of the data, with minimal time and resource costs, that would enhance its potential for generating evidence to improve service provision. We particularly recommend recording a child’s living arrangements at the time of application, and whether there are allegations of domestic abuse and other safeguarding concerns.

1. Introduction

Private law children cases are disputes, usually between parents after relationship breakdown, about arrangements for a child's upbringing such as where a child should live and/or who they should see.[1] In England and Wales, more than twice the number of private law cases commence each year compared with public law (or child protection) cases—in 2019, 54,930 compared with 18,393 (MoJ 2020b). Despite this, the evidence base to inform policy and practice is much less developed for private than public law. The *Uncovering Private Law* series for Nuffield FJO aims to address this imbalance. This is the second report in the series, following *Uncovering private family law: Who's coming to court in Wales?* (Cusworth et al. 2020) and has a very similar framework.

In contrast to public law proceedings that are brought by the local authority, private law applications are triggered by the decisions of private individuals, usually a parent, rather than the state.[2] As a first step, it is therefore essential to develop a good understanding of who these families are, including their characteristics, circumstances and possible vulnerabilities, needs for support and assistance, and motivations for applying to the family court. This report develops a demographic and socio-economic profile of families involved in private law children applications in England, drawing comparisons with Wales where appropriate. Later reports will describe the pathways of both adults and children through the family justice system in England and Wales, and—drawing on additional data linkages—will focus on their education, mental health and other psychosocial profiles.

The challenges facing the family justice system

Why does this matter now? The family justice system in England and Wales is facing some major challenges. While the great majority of parents do not involve the courts in making arrangements for parenting post-separation, the number of private law applications has risen over the last few years (MoJ 2020b). From a management perspective, there is concern about how the family courts, the Children and Family Court Advisory and Support Service (Cafcass in England and Cafcass Cymru in Wales), and other services will cope with increased demand.[3] The President of the Family Division recently alluded to a situation where 'we are, in effect, running flat out up a down escalator' (McFarlane 2019a).

The COVID-19 pandemic appears to have added to the existing challenges. It has put many child contact arrangements between separated couples under pressure at a time when access to sources of help, including the family court, is constrained. While numbers of applications to the court dropped at the start of the crisis, figures published by Cafcass

[1] The legal terms for these issues have changed over time. 'Custody' and 'access' were replaced by 'residence' and 'contact' in the Children Act 1989, which came into effect in 1991. These terms were subsequently replaced by the wider concept of 'child arrangements' in 2014, although child arrangements can be 'live with' and/or 'spend time with'.

[2] Although the vast majority of private law applications are brought by parents following separation to make arrangements for children, private law orders allow the court to make decisions in disputes about any aspect of parental responsibility. Not all applications are triggered by parental separation, other examples include those for parental orders following surrogacy and special guardianship orders made by grandparents.

[3] Cafcass is the organisation that represents children's best interests in family justice proceedings.

indicate that they increased significantly in summer 2020 and remained high towards the end of the year.[4] The number of open cases was at an all-time high in November 2020. This is the result of both increased numbers of applications and the backlog from earlier in the year caused by court closures, difficulties establishing the technology required for remote hearings, staff sickness and administrative delays.

The introduction of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), which removed legal aid entitlement to all private law cases except certain cases involving domestic abuse, had significant implications for the family courts, and for the families using the courts. Although many private law litigants (the adult parties) have always had to represent themselves in court, the impact of legal aid changes means that the majority are now litigants in person.[5] This raises challenges for litigants, some of whom may experience difficulty in understanding and participating in proceedings due to a variety of personal and circumstantial disadvantages, including communication difficulties (Trinder et al. 2014). It also raises issues for the courts as they are having to deal with lay parties who do not understand the process, which has largely developed on the assumption that litigants would have legal representation.

Intertwined with the impact of LASPO is the challenge of how the family court approaches private law cases where there are allegations of domestic abuse. As we explain below, about half of private law cases involve domestic abuse allegations, but there are longstanding concerns that the legal presumption of parental involvement has been pursued at the expense of safety in these cases. These concerns led to a panel of inquiry set up by the MoJ, which reported in June 2020 (MoJ 2020c).[6] The panel found evidence of 'deep-seated and systematic issues that were found to affect how risk to both children and adults is identified and managed' (p. 3). The panel's 'implementation plan' (MoJ 2020a) calls for major changes in how the family courts approach domestic abuse cases.

To date, the policy response to private law cases has focused heavily on attempting to reduce demand on the courts. Significant effort has been made in trying to divert cases from reaching the court, primarily through encouraging the use of mediation and other forms of alternative dispute resolution. For those cases that do reach court, the emphasis has long been on trying to encourage settlement and to avoid further investigation or further hearings. However, attempts to divert cases have been largely unsuccessful. Take-up of mediation has always been relatively low, but has dropped significantly following the introduction of LASPO, which largely removed the role of family lawyers as sign posters to mediation.[7] More recently, the Private Law Working Group, established by the President of the Family Division to review the system, proposed trialling a triage and track system with different

[4] Cafcass publishes private law demand statistics monthly and annually, see: www.cafcass.gov.uk/about-cafcass/research-and-data/private-law-data

[5] Litigants in person represent themselves in the courts.

[6] For details, see: www.gov.uk/government/news/spotlight-on-child-protection-in-family-courts

[7] Mediation Information and Assessment Meetings remain at a third of the pre-LASPO level; mediation starts and outcomes are at about a half (MoJ/Legal Aid Agency 2020).

pathways for non-domestic abuse cases, domestic abuse cases and returning cases.[8] A further report by the Family Solutions Group (a subgroup of the Private Law Working Group) recommended better provision of information to separating families, and support with issue resolution at an earlier stage, before or alongside a court application, not just as a means of diversion (Family Solutions Group 2020).

The need for a robust evidence base to address challenges

Significant policy and practice responses are required to address the major challenges faced by the family justice system. Both responses are developing, but it is essential that they are informed by a rigorous evidence base. There are many important, interconnected questions to answer. Are there too many cases coming to court and are these the right cases, given access to justice issues after LASPO? How are separated and separating families now supported outside the court process, both to promote good outcomes and as a means of diversion from the court where appropriate? Why are people applying, some more than once? What are their needs, circumstances and vulnerabilities, and how do these differ from those of other separated families and from people involved in public law (child protection) cases? Does court intervention reduce, maintain or exacerbate vulnerability? Is it safe or appropriate to divert cases from court? How well does the planned three-track system map onto the range of cases? What are the outcomes of court involvement, and does this vary depending on the tier, or level, of judiciary involved? Does the court promote or diminish well-being? While some family support services, including local authority powers and duties around children in need are governed by devolved legislation in Wales, private family law proceedings in England and Wales continue to operate under the same legal framework, the Children Act 1989.[9] Are there any national, regional or local-level variations in rates or types of private family law applications?

This programme of research will not be able to answer all these questions, but we hope to make a significant contribution. Above all, we emphasise the need to generate robust evidence to address such questions. This research on England, together with the earlier work on Wales (Cusworth et al. 2020), starts to develop a better understanding of the adults and children who use the system—the 'customers'—and their characteristics, circumstances and needs. These can be overlooked in a system where policy development tends to be driven by resource pressures, and viewed through a professional prism. As acknowledged by the Private Law Working Group reports, there is a need to focus on the rights and needs of private law families for help, support, and the protection of the court. At the same time, it

[8] The Private Law Working Group was established in 2019. It published a consultation report in June 2019 and a second report in March 2020. A final report will follow the completion of the MoJ spotlight inquiry on domestic abuse (see Footnote 6).

[9] The Social Services and Well-being Act (Wales) 2014 came into force on 6 April 2016. This repealed Part III of the Children Act 1989, which contains the legislation about children in need and about looked-after children. **Section 17**—the local authority's powers and duties regarding children in need—has been replaced by a new system of assessing and meeting needs under Parts 3 and 4 of the 2014 Act. Children and adults (and carers of disabled children and adults) who need care and support will be assessed according to Part 3. If the eligibility criteria are met, the person should be provided with a service under Part 4. **Sections 20–30**—the local authority's powers and duties around looked-after children have been replaced by Part 6 of the 2014 Act.

is important to ensure that demand on the family justice system and professionals is monitored and effectively managed.

As the Private Law Working Group continues to review the current system and make recommendations for reform, there is a requirement for a stronger evidence base that can help provide an understanding of the drivers and variability of this demand, and the needs and vulnerabilities of users of the family justice system. Framing the question more broadly, to also understand who the customers are, and what they might need and want, will provide a more balanced and effective approach to policy and practice development and avoid mistaken assumptions. It may also result in more carefully targeted interventions, both within and outside the court.

What do we already know about private law?

We already have some clear findings about private law cases that have been replicated in multiple studies covering England, and sometimes England and Wales. These are summarised in Box 1, with more detail in the relevant sections that follow. However, most of what we know is based on a small number of studies, some of which are now quite old and typically have relatively small sample sizes. Some studies are based on cases from a single, or small number of courts, which limits generalisability. They are also generally snapshots, based on a single point in time, making it hard to identify trends over time.

There are also very significant gaps in the literature. There has previously been little information available about the profile of the parties beyond age and gender, and almost none about socio-economic status and disadvantage and psychosocial factors.[10] The lack of longitudinal data also means that previous studies have not been able to explore the relationship between pre-court well-being and post-court outcomes. We also have very little granular analysis on non-standard cases—the non-parental cases, or applications for less common orders such as specific issue or prohibited steps orders.[11]

[10] The latest annual report from Cafcass (2020) does contain some new information on the backgrounds of the children and families it works with, including ethnicity.

[11] See Chapter 2 for details of the relevant orders and wider legal framework.

Box 1: What do we already know about private law children cases?

- Only a minority of separated or divorced parents turn to the family court to make arrangements for their children. Most parents make arrangements informally between themselves.
- Numbers of applications have risen quickly in recent years, after a significant fall in 2014 following the removal of legal aid for most private family law cases.
- The great majority of cases involve two separated parents and their child(ren), with around a tenth involving grandparents or other family members.
- Most children live with their mothers after separation and spend time with their fathers. This gendered pattern is reflected in court users: most court applications are from non-resident fathers to spend time with their children.
- Most cases involve a single, relatively young child, on average about six years old.
- Between half and two-thirds of private law cases involve allegations of domestic abuse, with between a fifth and a quarter raising other safeguarding concerns, such as substance abuse and mental health difficulties.
- About a third of private law cases return to court with a second application. Only a very small number are chronic litigants with multiple applications concerning the same child(ren).

What this report contributes—and its limitations

This report is based on full service, population-level data collected routinely by Cafcass and available in the privacy-protecting SAIL Databank hosted by Swansea University (Ford et al. 2009; Jones et al. 2014; Jones et al. 2019). The strength of research based on administrative data is that it yields large and representative samples minimising problems of bias, which can limit the generalisations that can be drawn from small or non-representative samples. This report presents the first independent analysis of population-level private family law data held by Cafcass, based on a total sample of almost 546,000 applications, issued between 1 April 2007 and 31 March 2020 in England.[12] Our profile of the families involved in these applications therefore confirms and updates the findings set out in Box 1, but with population-level data, rather than relatively small case file studies.

The report also breaks new ground beyond just confirming existing findings with a larger and more robust sample. By restructuring data to create a longitudinal (or year-by-year) dataset, we have taken a 'longer view' of private law, aiming to identity trends and patterns over more than a decade. Although immediate crises require a family justice system response, it is also important to ask questions about the longer-term and persistent nature of private law need, to inform policy and practice.

We have also taken a 'wider view' of families, going beyond information on private law demand reported by Cafcass as the numbers of new cases received monthly and annually[13] to provide a better understanding of the lives and circumstances of these families outside the court room. In this report, for example, by joining the Cafcass data to publicly available

[12] Given this timeframe, this analysis has not examined the impact of the COVID-19 pandemic on private law applications, although the FJDP plans to do so in a future report.

[13] Cafcass publishes information on private law demand each month on its website, see: www.cafcass.gov.uk/about-cafcass/research-and-data/private-law-data

Indices of Multiple Deprivation it has been possible to consider area-level deprivation for applicants and respondents in private law cases in England for the first time, building on previous analyses for Wales (Cusworth et al. 2020; Johnson et al. 2020). We are at an early stage in terms of linking further data sources, but our aim is to transform our understanding of these families and their outcomes, in line with the vision for Nuffield FJO (Broadhurst, Budd, et al. 2018; Broadhurst and Williams 2019).

This report therefore adds to our understanding of private law cases in England in the following ways:

- it examines trends in demand, and contributes to policy debates about whether too many parents are resorting to the court by exploring the proportion of all families using the family court, and makes comparisons with Wales
- it develops a demographic profile of families, producing important new evidence on the deprivation of private law families
- it profiles who applies for what orders, providing new insights into applications for the lesser used, but still numerically significant, prohibited steps, specific issues and enforcement orders[14]
- it builds on existing findings about the proportion of repeat applications, probing patterns of recurrence by gender and litigation role for the first time
- it gives some tentative suggestions about how legal aid changes may have affected access to justice
- it highlights similarities and key differences in private law applications in England and Wales.

At the same time, we should acknowledge the limitations of this report and the methodology. This programme of work represents a modest first step in developing a private law evidence base, based on population-level data. While we are able to replicate previous studies on a much larger scale and contribute new analyses, use of administrative data does have limitations. Administrative data is established to serve operational needs, not research, and in this instance, the Cafcass database records the extent of its involvement in a case. In private law cases Cafcass' involvement often ends before the outcome of the case is known, limiting our ability to track case outcomes, at least with this data source.

In addition, the data source does not record whether or not there are safeguarding issues, such as domestic abuse, nor does it record directly who a child lives with at the time an application is made. In some instances, we were able to find workarounds for data source limitations, for example finding proxies for identifying residence. However, we have to acknowledge that there are some questions we cannot answer with the Cafcass data as it stands. One objective of the Family Justice Data Partnership (FJDP)—a collaboration between Lancaster University and Swansea University—is to give data providers feedback on the quality and scope of the data, and on potential changes to their data capture. With

[14] The different types of orders are detailed in Chapter 2.

marginal cost implications this will improve the utility of these valuable administrative data assets.[15]

As ever, the choice of methodology brings advantages and disadvantages. Administrative data sources offer the potential to explore total samples over time, and the value of this data can be greatly enhanced through linking justice, demographic, health and social care data, although there are possible limitations to this due to match rates. A further objective of the FJDP is to support the acquisition of additional family justice datasets by the SAIL Databank, including data collected by the MoJ. Use of population-level administrative data does bring significant advantages over the more qualitative case file studies, but it means an inevitable trade-off between breadth and depth. Future work will explore the possibilities of data linkage, as well as the possibility of conducting complementary, intensive qualitative work based on case file analysis.

[15] A flag to record the presence of allegations of domestic abuse and other child protection issues would be one such example, and Cafcass is looking into more routine recording of these issues.

2. The law and legal process

The emphasis on private ordering

It is the responsibility of parents to make decisions about arrangements for children after a relationship breakdown. Unlike in some other countries, in England and Wales there is no requirement for divorcing parents to have arrangements for children approved by a court. Rather than mandatory scrutiny (at least after divorce), the law provides for parents to opt-in to the court process only if they cannot reach agreement privately.

The court orders available

Where parents (or other carers) cannot agree arrangements for their children, one or both may make an application to the court for an order under the Children Act 1989. A range of orders are available for different circumstances. The most common is a child arrangements order (CAO). The CAO is to regulate arrangements relating to (a) who a child is to live, spend time or otherwise have contact with, and (b) when a child is to live, spend time or otherwise have contact with any person (S8(1)). The single CAO was introduced in 2014 to replace separate orders for contact and residence, including shared residence. The change was brought about by the Children and Families Act 2014 and was an attempt to move away from a perceived hierarchy of the 'resident' and 'contact' parent. In practice, CAOs are still regularly described as 'live with' or 'spend time with' as shorthand to capture the reality of children's lives.

Two other orders available under S8(1) address other parenting disputes that may arise: a prohibited steps order (PSO) and a specific issue order (SIO). A PSO forbids a particular step specified in the order being taken by a parent, such as taking a child abroad without permission. A SIO can be made where parents are unable to determine a specific question about a child's upbringing, such as which school a child should go to, religious upbringing or health matters.

Where a CAO is in place, a parent may apply for enforcement of that order. This may be sought by applying for a new CAO or for an enforcement order, under S11J-N.

Unmarried fathers and second female parents may apply to the court for a parental responsibility order (PRO) if they were not registered on a child's birth certificate or have a parental responsibility agreement with the child's mother (S4ZA). Step-parents may also apply to the court for a PRO in the absence of an agreement with existing parental responsibility holders (S4A). Parental orders can also be applied for following surrogacy, under section 54 of the Human Fertilisation and Embryology Act 2008.

Private and public law cases are typically defined as in contrast—private law applications usually involve disputes between private individuals, whereas public law applications are brought where the dispute is between the state (or local authority) and family members. In a small number of cases, however, there is crossover, where a 'public law' (or child protection) case is resolved by a 'private law' order. A local authority may, for example, encourage a grandparent to apply for a CAO to enable a child to live with them as an alternative to the local authority bringing care proceedings. A grandparent, or other potential carer, may also apply for a special guardianship order (SGO) under S4A-G, whether on their own initiative or

with encouragement from a local authority. Such an order gives these alternative carers parental responsibility for a child who cannot live with their birth parents.

The legal principles to be applied

The Children Act 1989 sets out principles that the court must apply when making any decision about a child. Section 1(1) sets out that the child's welfare shall be the court's paramount consideration.[16] A checklist of factors is set out in S1(3) to which the court shall pay attention:

- the ascertainable wishes and feelings of the child concerned (considered in the light of their age and understanding)
- their physical, emotional and educational needs
- the likely effect on the child of any change in their circumstances
- the age, gender, background and any characteristics of the child the court considers relevant
- any harm the child has suffered or is at risk of suffering
- how capable each of the parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting the child's needs
- the range of powers available to the court.

The court must also presume that the involvement of a parent in the life of the child concerned will further the child's welfare, if that parent can be involved in the child's life in a way that does not put the child at risk of harm (S1(2A, 2B)). The court must consider the general principle that any delay in determining the question is likely to prejudice the welfare of the child (S1(2)). Finally, although an application has been made, the court must not make an order unless it considers that doing so would be better for the child than making no order at all (S1(5)).

The court process

The framework for the private law court process in both England and Wales is set out in the Child Arrangements Programme and the associated Practice Direction 12J which deals with the process for domestic abuse cases.

There are a number of features to note.[17]

- As an attempt to divert cases from court, potential applicants are required to attend a Mediation Information and Assessment Meeting, before issuing an application, subject to certain exemptions.

- If applications are issued, Cafcass/Cafcass Cymru undertake initial safeguarding inquiries. These involve checks with police and children's services databases and

[16] www.legislation.gov.uk/ukpga/1989/41/contents

[17] The process for a private law case is set out in a flowchart available at www.justice.gov.uk/downloads/family-justice-reform/cap-flowchart.pdf

separate 30-minute phone calls with the applicant(s) and respondent(s). A safeguarding report should be made available to the court and the parties before the first hearing.

- The first hearing, known as a First Hearing and Dispute Resolution Appointment (FHDRA), is typically used as an opportunity to identify the issues in dispute and achieve an agreement that can be enshrined in a consent order, thereby closing the case. Alternatively, an interim order or adjournment may be made at this hearing.

- The court may order Cafcass/Cafcass Cymru (or a local authority or independent social worker) to produce a 'Section 7 report' for the court 'on such matters relating to the welfare of that child as are required to be dealt with in the report' (Children Act 1989 S7(1)). In these cases, the child would be seen by the report writer as part of their investigations.

Legal representation

The adults and children in private law proceedings are not automatically provided with legal representation, unlike most public law cases. Until April 2013, parties were eligible for legal aid in private law cases, but only if they met a stringent means and merits test. As noted earlier, LASPO restricted eligibility further. Since these changes, legal aid is only available to certain survivors of domestic abuse who also meet the means criteria. In only a fifth of private law cases are both parties now represented (MoJ 2020d).

Under Rule 16.4 of the Family Procedure Rules 2010, children may be made a party to proceedings. A children's guardian would be appointed by the court to independently assess the child's wishes and feelings, and welfare needs.[18] The guardian would then instruct a lawyer to present the child's case in court. Making a child a party only occurs in cases involving 'an issue of significant difficulty' and therefore the rules state it will occur in 'only a minority of cases'.[19] Recent figures published by Cafcass indicate that Rule 16.4 cases have increased by 54% over the last three years from 2016/17 to 2019/20 (Children and Family Court Advisory and Support Service (Cafcass) 2020).

[18] A social worker employed by Cafcass/Cafcass Cymru to represent the needs of children.

[19] Practice Directions 16A—Representation of Children, Part 4, Section 1, para 7.1.

3. Methodology

Administrative data collected and maintained by Cafcass is held in the SAIL Databank (Ford et al. 2009; Jones et al. 2014, 2019).[20] The study used this population-level data on all private law applications made to the family court in England between 1 April 2007 and 31 March 2020 (see Bedston et al. 2020 for more information on Cafcass data). Other publicly available data—Office for National Statistics (ONS) family estimates (ONS 2019) and indices of deprivation (Ministry of Housing Communities and Local Government 2019)—was used to derive and join additional information on to the Cafcass data extract. Deprivation quintiles were assigned to all individuals involved (applicants, respondents and subjects) based on the small area (lower layer super output area (LSOA)) where they were living at the time of application.

Information about the legal orders applied for and the applicants, respondents, and subjects involved were included for applications issued between 1 April 2010 and 31 March 2020, as data of sufficient quality is not available before 2010. We counted each individual application, although in practice some may have been part of the same court proceedings.

We analysed the number of applications made, across England as a whole and across the nine English regions over time.[21] Annual incidence rates were calculated and expressed as the number of private law applications per 10,000 families with dependent children in the general population (ONS 2019). To set this in context, in 2019 there were around 6.9 million families with dependent children in England, a small increase from 6.4 million in 2008.

The majority of applications involved one female and one male adult party (litigant), who were recorded as the (separated) parents of the child(ren)—we refer to these as standard parental applications. We profiled the mother and father applicants, and the children involved in these standard parental applications, including demographic characteristics, deprivation, who the youngest child was living with at the time of application, and the orders being applied for.

Finally, we investigated whether applicants on a current application had been involved in previous private law applications in the last three years, summarising their previous role(s), i.e. applicant, respondent or both, and whether they were returning with the same adult and child parties.

General comparisons were drawn, where appropriate, with patterns for Wales observed in Cusworth et al. 2020. Figures are not directly equivalent as data was analysed by calendar year in Wales and by fiscal year in England.

Full details of the methodology are available in the appendix.

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[20] For this report we have used data collected and held by Cafcass in England (further details are available in Bedston et al. 2020). Cafcass Cymru collects and maintains its own administrative case management records relating to public and private family court proceedings in Wales (further details are available in Johnson et al. 2020).

[21] The nine English regions are North East, North West, Yorkshire and the Humber, East Midlands, West Midlands, East of England, London, South East, and South West.

4. How many families are coming to court?

There is significant concern in the family justice system about the level of private law demand, with a perception that too many parents are becoming over-reliant on the courts to resolve personal disputes (McFarlane 2019b; Private Law Working Group 2019). To examine these concerns, in this chapter we look at the pattern of demand in England over time, comparing with patterns in Wales where appropriate (see Cusworth et al. 2020 for a full discussion of private law applications in Wales). We also offer a new approach to establish what proportion of families use the family courts each year to resolve child arrangements.

Volume of private law applications

Firstly, we consider trends in overall demand in private family law in England, quantifying the volume of applications recorded by Cafcass and the number of children involved. We then analyse the rate of applications per 10,000 families with dependent children each year. It is worth noting that a single application may involve more than one child, and an individual child may be the subject of more than one application (or set of court proceedings) in a single year.

The number of applications made in England each year has risen from 35,380 in 2007/08 to 46,572 in 2019/20 (Table 1). The number of children involved in proceedings has similarly increased from 50,388 in 2007/08 to 65,668 in 2019/20. The rise in applications, and the number of children involved, was not constant over the period. Instead, a steady rise was seen between 2007/08 and 2012/13, with the number of applications and children involved virtually plateauing in 2013/14 (the year which saw the introduction of LASPO, removing access to legal aid for most private law cases). The following year, 2014/15, saw a sizeable decrease in the number of applications and children involved, which then started to rise again, almost reaching pre-LAPSO figures by 2019/20.

Table 1: Total number of private family law applications and children involved, 2007/08–2019/20

Year	Total number of applications	Number of children as subjects
2007/08	35,380	50,388
2008/09	38,015	54,917
2009/10	44,416	63,917
2010/11	44,700	63,584
2011/12	43,237	60,571
2012/13	47,940	65,783
2013/14	48,398	65,407
2014/15	33,617	48,256
2015/16	36,391	51,552
2016/17	40,391	57,023
2017/18	41,882	59,236
2018/19	44,829	63,467
2019/20	46,572	65,668

What proportion of families in England use the courts to make child arrangements?

Examining the changing volumes, or numbers, of private law applications is useful in understanding demand on the courts, but this does not tell us what proportion of families in the general population turn to the family courts for help to resolve disputes associated with separation—a key question for policy makers focused on out-of-court provision as well as those responding to demand within the court system. The President of the Family Division has raised concerns that too many families are turning to the courts when matters could be resolved in other ways (Family Solutions Group 2020; McFarlane 2019b). Simply considering the numbers of applications also precludes meaningful comparison between England and Wales, as the latter has a far smaller population. Various attempts have been made to establish an estimate of the proportion of families that use the family courts to resolve child arrangements issues. This is methodologically challenging for a number of reasons relating to both the numerator—the number of applications to the courts—and the denominator—the total, or baseline, number of families in the general population. For example, should we consider all private law children applications, just those made by parents, or just those for CAOs? Over a set period of time, or ever? Should the denominator include all families with dependent children, all separated families, or just those separating over a certain period?

One established and robust approach has been to use omnibus surveys to identify separated families and then to ask them whether they had used the courts to make child arrangements.[22] Three separate surveys drawn from the ONS Omnibus Survey have reported relatively consistent findings, indicating that use of the family court is low, at 10% or less of separated families (Blackwell and Dawe 2003; Lader 2008; Peacey and Hunt 2008). Other estimates have been based on nationally representative cross-sectional or longitudinal cohort studies. Analysis by the MoJ (Summerfield and Freeman 2014) used data from the 2012/13 Crime Survey for England and Wales, a nationally representative household survey, which included questions about recent experience of the family justice system. It was reported that less than 1% of the survey respondents, around 8% of whom were separated or divorced, had been involved in any type of family court case over the previous two years. Similarly, using data from the longitudinal Millennium Cohort Study, Goisis, Ozcan and Sigle (2016) identified that 9% of parents who had separated before their child was seven years old reported having made contact arrangements at court. To date, and taken together, these studies represent the best estimates we have and are largely consistent with one another. However, Bryson et al. (2017) have raised some of the possible limitations of using existing surveys on account of the small numbers of separated families involved and the differential attrition among separated families, and highlighted the need for new and up-to-date sources.

In search of a more up-to-date estimate, policy and practice colleagues have proposed alternative figures. Williams (2018) used analysis by Bryson et al. 2017 (based on data from the UK Household Longitudinal Study (UKHLS) and earlier work by Benson 2013) that estimated around 2% of families with dependent children separate each year, to in turn estimate that there were around 125,000 separations in 2018. In the same year, around 42,000 private law applications were dealt with by Cafcass, with these figures used to infer that a third of separating families are using the courts, far more than the 'one in ten' usually quoted. This estimate was subsequently modified in a speech by the President of the Family Division to the Resolution Conference 2019 (McFarlane 2019b) to suggest that 38% of separated families resort to litigation, indicating this to be a 'major societal problem'.

It is immensely difficult to establish the number of families that separate each year. The 2% estimate (used by Williams) was based on fairly small numbers of separating couples in the first three survey waves of UKHLS (Benson 2013). These indicated that an average of 1.3% of married parents with dependent children under 16 and 5.3% of unmarried cohabiting parents separated each year. Thus, the overall rate might vary over time, as patterns of cohabitation, marriage and divorce change. We thus do not know if the number of separating families is actually rising or falling, again highlighting the need to establish an up-to-date estimate.

We also know that not all separating couples apply to the family court immediately; a dispute may arise a number of years after separation. Some parents using the family courts may never have cohabited, and these parents would not be identified in any estimate of separating families.

[22] The Omnibus Survey, now the Opinions and Lifestyle Survey, is conducted monthly by ONS in Great Britain to collect information for different government departments.

In terms of the number of private law applications, although most are made by separated parents, we know that each year around 10% involve grandparents or other family members. These do not necessarily represent 'extra' families or even separating families. It is also estimated that around a third of private law cases return to court. Non-parental and repeat applications were not factored into the recent estimates (McFarlane 2019b; Williams 2018), which are based on all private law applications received by Cafcass in one year. Once these factors are considered the estimate of the proportion of separating families using the court is likely to be substantially lower than a third.

Thus, there remains considerable debate around the proportion of separating families that are turning to the family court. While the estimate that a third of separating families apply to the family court is likely to be an overestimate, further work needs to be done to establish robust and up-to-date estimates of the number of separated families in the population and the proportion of these families which make a private law application each year.

Not without its own limitations, here we have adopted a slightly different approach, calculating the rates of private law applications per 10,000 families with dependent children in the population. Using publicly available annual mid-year estimates of the numbers of families with at least one dependent child in England (ONS 2019), we calculated incidence rates, asking for every 10,000 families with dependent children in England, how many private law applications were made each year? Clearly, this is not an estimate of the proportion of *separated families* bringing a case each year or having ever brought a case, as our denominator includes all families with dependent children—the intact as well as those that have separated. Still, it is a useful and complementary estimate of use of the court by the general population of families with children. We also note that some of those families may make multiple applications each year, and as Williams (2018) did, we have counted all applications, not just those made by parents or first applications to the court, so this is likely to be an inflated estimate of unique families turning to the family court.

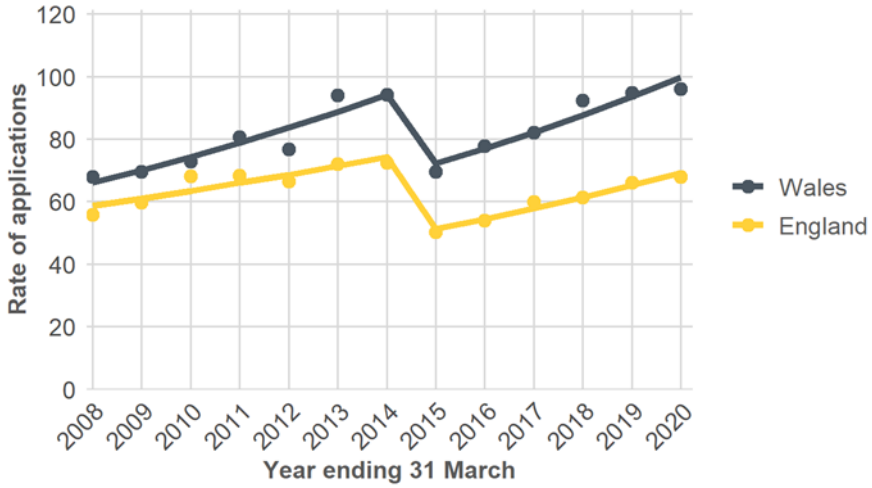
The upward growth in private family law applications per 10,000 families with dependent children in England was found to be consistent over the 13-year period, with the removal of legal aid acting as a one-time shock to the rate of applications (Figure 1). As can be seen, there was an increase from 56 applications per 10,000 families with dependent children in England in 2007/08 to 72 applications per 10,000 families with dependent children in 2012/13 and 2013/14. This was followed by a 31% drop in applications in 2014/15, following the introduction of legal aid changes. Since 2014/15, the year-on-year increase in the volume of private family law applications has virtually returned to that seen pre-LASPO, with 68 applications per 10,000 families with dependent children in England in 2019/20.

If we compare rates of private family law applications in England and Wales, we see a similar overall trend, with some notable differences. Overall rates of applications are consistently higher in Wales, and the average rate of increase is also higher in Wales, both pre- and post-LASPO, resulting in slightly increasing divergence between the two countries' rates of private law applications.

These figures do indicate a sustained and increasing need for assistance, in both England and Wales. They suggest that demand can be influenced by the availability of extra-familial factors, such as legal aid changes. However, the removal of legal aid appears to have

mainly delayed or paused applications, rather than reduced levels of need for assistance over the longer term. The impact of legal aid changes, introduced on 1 April 2013, was relatively immediate, halting the increasing rate of private law applications in 2013/14 before a significant drop in 2014/15.

Figure 1: Rate of private family law applications per 10,000 families with dependent children, with trend line, England and Wales, 2007/08–2019/20



What is also apparent is that only a very small fraction of all families with dependent children are bringing disputes to court in England—72 applications per 10,000 families represents less than 0.75% of all families making an application in 2019/20. This is a slightly smaller proportion than in Wales (less than 1%). Thus, compared with the broader population of families, the proportion of families in need of assistance from the family court are few in number.

The data used in this analysis runs to the end of March 2020, before the major impact of the COVID-19 public health emergency on the family justice system. The crisis initially created a downturn in applications, but early evidence is that the volume of applications subsequently increased.[23] Future data refreshes in the SAIL Databank will enable us to explore the impact of the pandemic on the trend in private law applications.

[23] Cafcass publishes private law demand statistics on monthly and annually, see: www.cafcass.gov.uk/about-cafcass/research-and-data/private-law-data

5. Who are the families involved?

In this chapter we describe the children and adults involved in private law proceedings in England. Whether court use is understood as demand, need or both, it is essential to have a clearer picture of the families involved. As Box 1 showed, we know from previous research that private law cases are mostly applications by non-resident fathers to spend time with a young child living with their mother. In this report we are able to confirm (or 'replicate', in research terms) these findings, using population-level Cafcass data, and make comparisons with the picture in Wales (reported in Cusworth et al. 2020).

We are also able to add new insights to the research base, by exploring continuities and change over time, including the possible impact of legal aid changes. By linking to other data—the area-level Indices of Multiple Deprivation—we are also able to explore the socio-economic profile of private law families in England for the first time.

It is also important to reiterate what we cannot say in this report. Cafcass data has not consistently recorded demographic characteristics such as religion and ethnicity. Nor is information on safeguarding issues such as the presence of domestic abuse, substance abuse or mental health issues included in the Cafcass administrative data available in the SAIL Databank.[24] We know from other case file studies that between a half and two-thirds of private law cases in England involve allegations of domestic abuse (Cafcass/Women's Aid 2017; Harding and Newnham 2015; Hunt and Macleod 2008). These are major gaps given that these factors profoundly shape children's experience and life chances and should also inform the court process. We aim to address these gaps in future research.

Although identifying 'typical' or average cases can be insightful, it can limit the ability to tailor interventions to particular case characteristics. This is particularly important given the interest of the Private Law Working Group in developing different tracks for different types of cases: safeguarding, non-safeguarding and returner (Private Law Working Group 2019, 2020). Here we start to differentiate the types of case within the overall total of around 45,000 applications in England each year. In future reports we will explore how returner cases compare with first/sole application cases.

Differentiating case types: standard and non-standard cases, applicant gender, and returns

During our research we are likely to develop various different case typologies. At this stage in the analysis there are a number of ways to categorise cases: by gender of applicant, their relationship to the child, and whether they have appeared in court before.

Standard parental and non-standard cases. One potentially useful approach is to differentiate cases by the relationship to the child(ren). Past research has distinguished between cases involving two (presumed) parents who have separated and cases involving

[24] The C100 application form for child arrangements, prohibited steps or specific issue orders under section 8 of the Children Act 1989 does include questions about safeguarding concerns (including domestic abuse, child abduction, child abuse and drugs, alcohol or substance misuse). This data is not currently available in the SAIL Databank.

multiple parties and/or one or more non-parents (Cassidy and Davey 2011; Harding and Newnham 2015). On that basis, the evidence suggests that around 90% of private law cases involve two separated parents (which we call 'standard parental cases') with about 10% being 'non-standard' cases involving one (or occasionally) two non-parents. Harding and Newnham's case file study (2015) found that the non-standard cases were most commonly applicant grandparents, followed by step-parents and aunts/uncles.

Our analysis of Cafcass data confirmed that the majority of applications made to the courts in England were between two adult parties recorded as the parents of the child(ren).[25] That almost nine of every ten applications are standard parental cases has been relatively consistent over time, increasing only slightly from 84% in 2010/11 to 88% in 2019/20.[26] This mirrors the picture seen in Wales.

In future reports we will take a detailed look at the 10% of non-standard cases in England and Wales to explore how they compare with standard parental cases. This extended analysis will enable us to develop case profiles of inter-parental and inter-generational disputes about child arrangements. Importantly, it will also allow exploration of public–private law 'crossover' cases, including those where the extended family is used as a resource in child protection cases, and any area-level variations. The remainder of this report however focuses in detail on the 90% or so standard parental cases.

Gender of applicant. Another way to differentiate private law applications is by gender of applicant. As already noted, private law cases are primarily driven by male applicants,[27] typically non-resident fathers. The proportion of standard parental applications being brought by fathers declined slightly, fluctuating between 65% and 69% across the period (2010/11–2019/20) (Figure 2). This is similar to the trend seen in Wales (Cusworth et al. 2020), where the proportion of applications brought by fathers declined steadily from 76% in 2011/12 to 66% in 2019/20.[28]

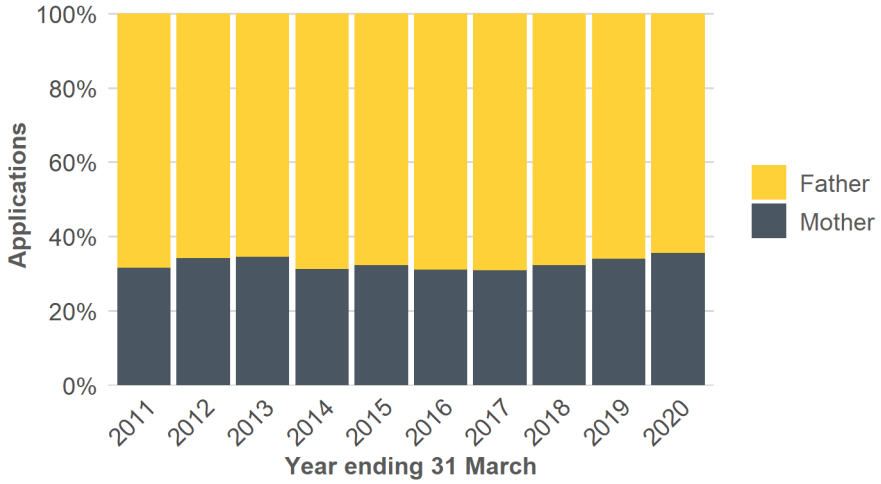
[25] In all but a tiny number of applications (less than 500 each year) these adults were of opposite gender. As the subsequent analysis in this report takes a gendered approach, same-sex parent applications have been excluded.

[26] Table A.1 in the appendix shows the number of parental applications and non-parental applications made each year.

[27] Table A.2 in the appendix shows the number of applications made by mothers and fathers each year.

[28] Due to a change from reporting applications in fiscal years rather than calendar years, these figures for Wales are not exactly the same as those reported in Cusworth et al. 2020.

Figure 2: Proportion of standard parental applications made by mothers and fathers, 2010/11–2019/20



As seen below, there are both similarities and differences to draw out between cases initiated by mothers and by fathers. Understanding what, if any, differences there are may assist further with developing appropriate interventions.

New or returning cases. A further characteristic, which we explore in more detail later, is whether an application is a return to court for one or more parties.

Profiling the children

We start by profiling the children of these standard parental cases. This analysis is able to replicate earlier research—private law children are typically young, appearing on their own or in small sibling groups, and are primarily living with their mother only at the time of application (Harding and Newnham 2015; Hunt and Macleod 2008; Jay et al. 2019).

Who were children living with at time of application?

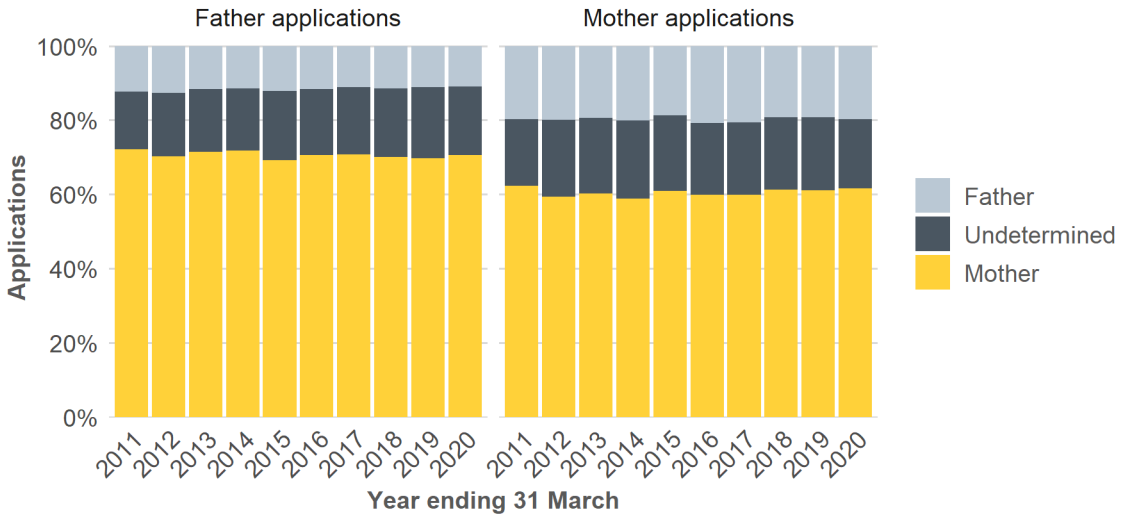
Most children live with their mothers following relationship breakdown, regardless of court involvement (Blackwell and Dawe 2003; Haux et al. 2015; Lader 2008). This pattern of post-separation parenting reflects gendered care patterns and expectations pre-separation. Previous research has found that the same gendered patterns of care in the general community are repeated in private law samples. In other words, families appearing in private law proceedings are just as likely to be mother-resident families as in the wider community. The case file study by Harding and Newnham (2015) for example, found that where arrangements had been established, 83% of children were living with the mother, 13% with the father and 3% had shared care at the time of the application.

Our analysis of the Cafcass data indicates a similar pattern, subject to some data limitations.[29] The majority of children (67–69%) involved in proceedings were inferred to be

[29] The Cafcass data does not include information on who a child was resident with at application. However, details of the small local area (LSOA in which applicant(s), respondent(s) and subject(s) were living is included in the dataset available in the SAIL Databank (based on address details, removed during the anonymisation process). From this we can infer whether a child was living with their mother, their father or in the same small

living with their mother at the time of application, with between 14% and 15% known to be resident with their father. More than one in ten children (16–19%) resided in the same small local area (LSOA) as both parents, so the resident parent could not be determined. Figure 3 shows that in the majority of applications made by fathers, the (youngest) child was known to be living with the mother, i.e. the respondent. Similarly, in most applications made by mothers, the (youngest) child was resident with her, i.e. the applicant. These patterns are fairly stable over time and similar to those seen in Wales.

Figure 3: Who the youngest child was living with at the time of application, for applications made by mothers and fathers, 2010/11–2019/20



The existing pattern of care has obvious consequences for litigation, with the majority of applications being made by fathers. We return to this in Chapter 6.

Gender, age and sibling group size

As with previous research (Harding and Newnham 2015; Jay et al. 2019), we found no evidence that child gender appeared to influence litigation. There were equal numbers of boys and girls involved in litigation in England, in cases brought by both fathers and mothers.

As seen in previous studies (Harding and Newnham 2015; Hunt and Macleod 2008; Jay et al. 2019), the children involved in proceedings were also generally young. In contrast with public law proceedings, where over a quarter (27%) of children entering care proceedings in England between 2007/08 and 2016/17 were under a year old (Broadhurst et al. 2018), there were relatively few infants. Between 6% and 9% of the youngest children in private law cases were under a year old at the time of application (Table 2), with the majority—around four-fifths—aged between one and nine years old. As seen in Wales (Cusworth et al. 2020) the percentage of children aged 0–4 years decreased over the period, with an increase in

local area as both parents. We have done this for the youngest child in cases involving more than one child. This measure is missing for 28% of children, due to address details needing to be available for applicant, respondent and youngest child.

the proportion of children aged 5–9 years old. It has to be borne in mind here that other, older children may be included in cases involving a sibling group.

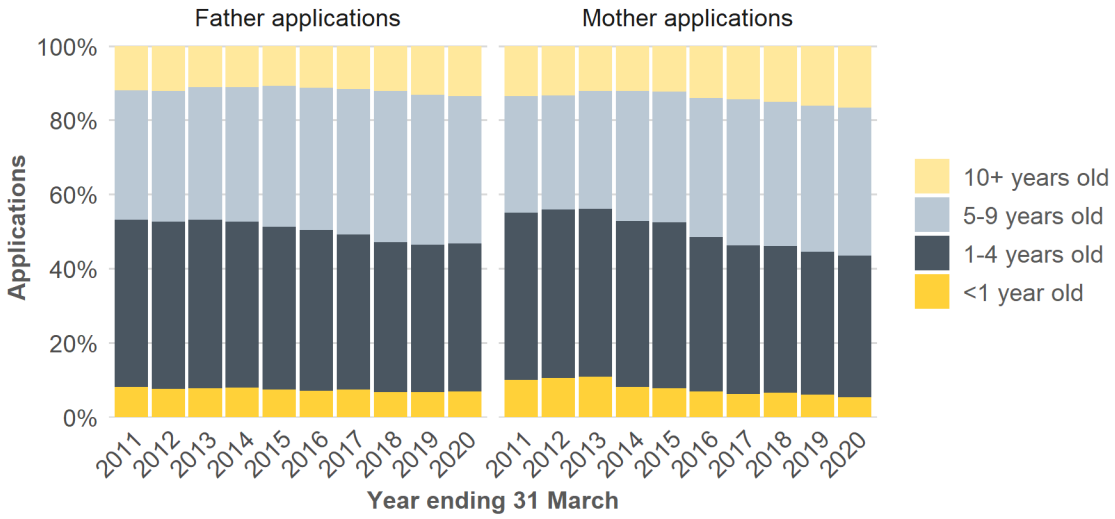
Table 2: Age of the youngest child in standard parental applications (percentages), 2010/11–2019/20

Age	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
<1 year	8.7	8.6	8.7	7.9	7.5	6.9	7.0	6.6	6.3	6.3
1–4 years	45.1	45.1	45.4	44.7	44.2	42.9	41.3	40.3	39.4	39.3
5–9 years	33.7	33.7	34.3	36.0	37.0	38.1	39.2	40.2	40.0	39.8
10 years plus	12.5	12.6	11.6	11.4	11.3	12.1	12.5	13.0	14.2	14.6
Total [a]	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

[a] Percentages may not add up to 100 due to rounding

The age of the youngest child involved in private law cases brought by mothers and fathers does differ. Slightly higher proportions of cases brought by mothers included an infant (under one year old), although this declined from 11% in 2011/12 to 5% in 2019/20, remaining static at 7–8% in applications brought by fathers. The proportion of cases where the youngest child was aged one to four years old was similar in applications brought by mothers and fathers, declining for both since the introduction of LASPO. Correspondingly, the proportion of children in the older age groups has increased in applications brought by both mothers and fathers, with mother applications more likely to have a youngest child aged ten or over (Figure 4).

Figure 4: Age of the youngest child in applications made by mothers and fathers, 2010/11–2019/20



Almost two-thirds (59–62%) of cases involved a single child, with a further quarter (28–31%) concerning two siblings (Table 3). Only about one in ten cases each year involved sibling groups of three or more. The pattern is fairly consistent over time, and replicates earlier

findings about relatively small sibling groups in private law proceedings (Jay et al. 2019). Slightly higher proportions of larger sibling groups were seen in England than in Wales (Cusworth et al. 2020).

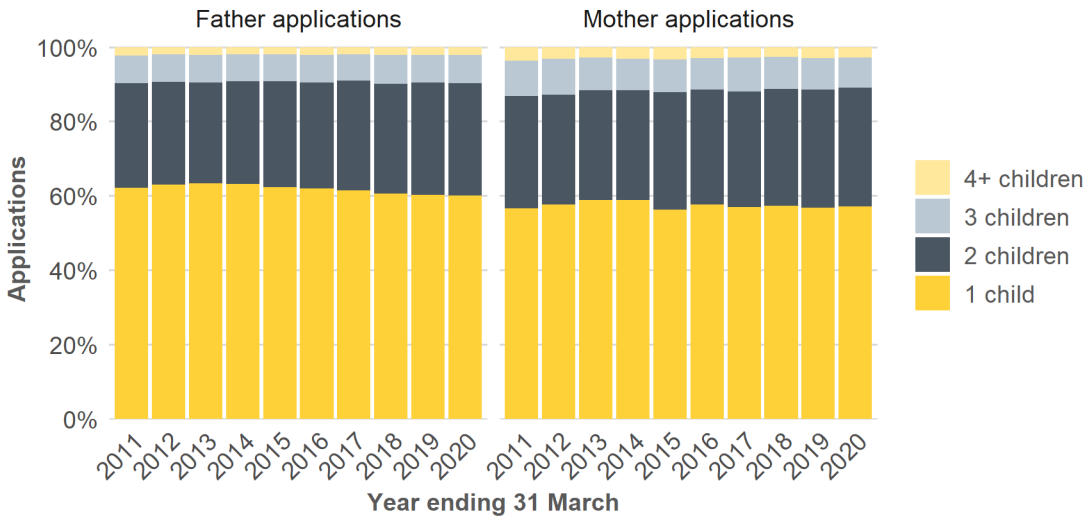
Table 3: Number of children included in standard parental applications (percentages), 2010/11–2019/20

Children	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
1	60.3	61.2	61.7	61.8	60.3	60.6	60.0	59.5	59.0	59.0
2	28.8	28.3	28.0	28.2	29.5	29.3	30.0	30.2	30.7	30.8
3	8.0	8.1	7.9	7.6	7.8	7.7	7.8	8.0	7.8	7.8
4+	2.8	2.4	2.3	2.4	2.4	2.4	2.2	2.3	2.4	2.5
Total [a]	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

[a] Percentages may not add up to 100 due to rounding

There are some small differences in the profiles of children in applications brought by fathers and mothers. Applications by mothers do involve slightly higher proportions of larger sibling groups (Figure 5), a stable finding over the period: 11–13% of applications made by mothers involved three or more children, compared with 9–10% of applications made by fathers. The proportion of applications brought by fathers involving a single child declined slightly over the period from 63% in 2011/12 to 60% in 2019/20.

Figure 5: Number of children included in applications made by mothers and fathers, 2010/11–2019/20



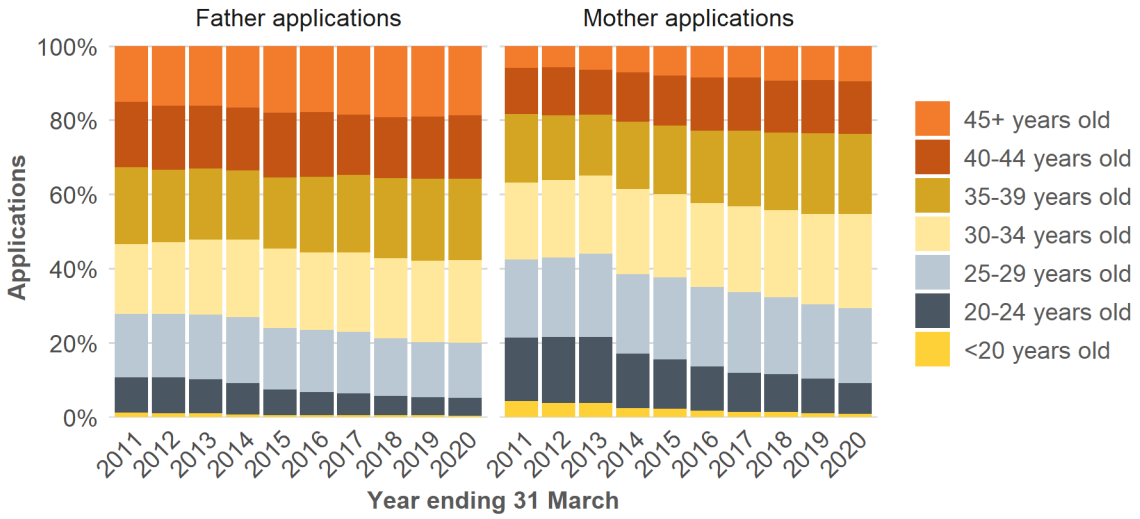
The large number of young single children being litigated over does raise practice implications, particularly around the availability of support for children. There is robust evidence that parental conflict that is frequent, intense, poorly resolved and about the child is associated with multiple negative outcomes for children (Acquah et al. 2017; Grych and Fincham 1990; Harold et al. 2016). The presence of siblings is known to act as a protective factor (Monk and Macvarish 2018) thus the risk may be exacerbated for single children experiencing parental conflict or domestic abuse without the support of a sibling.

Profiling the applicants

The Cafcass database contains relatively sparse information on the adults involved in proceedings, beyond age and gender.

The majority of both mother and father applicants were in their late twenties and thirties, with men somewhat older than women (Figure 6), not dissimilar to parents in the general population. Proportionally, father applicants were older than mother applicants, with around a third (33–36%) of fathers aged 40 or older, compared with under a quarter (18–24%) of mothers. It also appears that the percentage of applicants under 25 years old has markedly decreased over recent years. In 2010/11, 11% of fathers and 21% of mothers were under 25—by 2019/20 this had fallen to just 5% and 9% respectively. For fathers, this appeared as a gradual decline across the period (2010/11–2019/20), whereas the proportion of younger mothers only started to decline in 2013/14, which coincides with the introduction of LASPO.

Figure 6: Age of applicants in applications made by mothers and fathers, 2010/11–2019/20



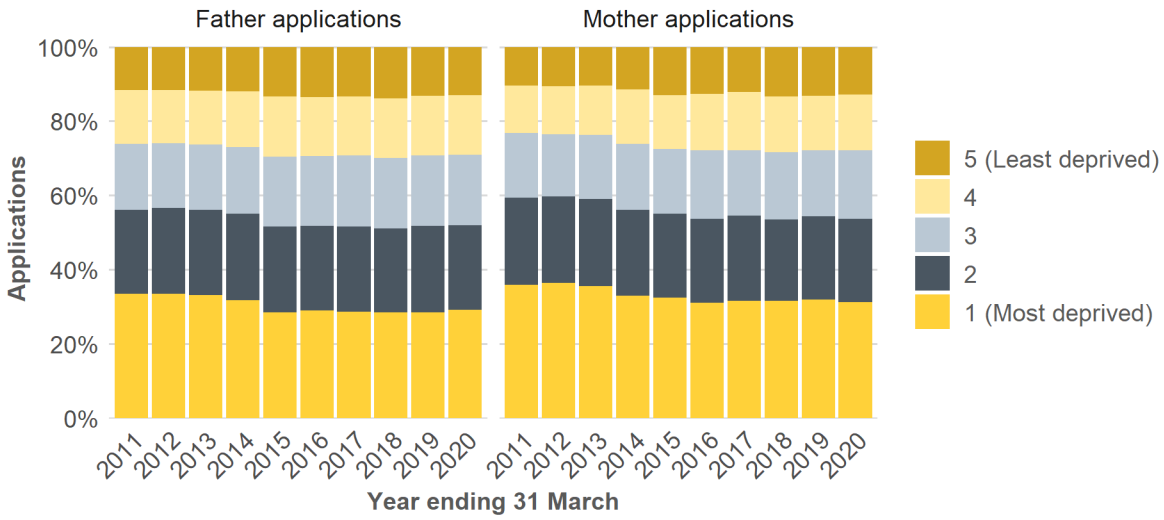
Deprivation and the possible emergence of a justice gap

Socio-economic status, as published research indicates, has an impact on family stress and breakdown—a possible trigger for private law disputes and a point of possible intervention to prevent disputes starting or escalating. Over recent years there has been a considerable focus on poverty and deprivation as a key causal factor in public law or child protection cases (Elliott 2020). There is also a growing body of literature that evidences the concentration of public law cases in the most deprived parts of England and Wales (Alrouh et al. 2019; Bywaters et al. 2016; Harwin and Alrouh 2017). In contrast, there had been very little focus on socio-economic status as a relevant factor in private law children cases until analysis by this research team for Wales (Cusworth et al. 2020; Johnson et al. 2020). This is partly a methodological challenge—that information has not been readily available on court files for researchers. It may also reflect a perception that private law disputes are 'merely' arguments between adults, rather than related to or a reflection of economic stressors (or indeed of domestic abuse).

There has been some prior suggestion that private law parents may be more economically disadvantaged than the wider population, with previous research identifying lower income levels (Goisis, Ozcan, and Sigle 2016), lower levels of work activity (Trinder et al. 2005), and lower occupational level (Blackwell and Dawe 2003).

Using information on the small area (LSOA) where applicants were living and publicly available area-level Indices of Multiple Deprivation (a slightly different methodology to that used in Wales in Cusworth et al. 2020) we can see a clear link between deprivation and private law cases in England, as in Wales.[30] The majority of private law applications are made by applicants living in the most deprived areas (Figure 7). In 2019/20, 29% of father applicants and 31% of mother applicants lived in areas in the most deprived quintile, with 52% of fathers and 54% of mothers living in the two most deprived quintiles.

Figure 7: Proportion of applicants by area-level deprivation quintiles, for applications made by mothers and fathers, 2010/11–2019/20



The association between private law demand and deprivation is seen across our observational window (2010/11–2019/20), indicating a persistent but subtly changing picture over time. A slightly lower proportion of applications were made by both mothers and fathers living in the most deprived quintile post-LASPO, although the effect seems to have been less abrupt for mothers than fathers, possibly due to the continuing availability of legal aid for domestic abuse cases. The proportion of fathers in the most deprived quintile reduced from 32–34% between 2010/11 and 2013/14 to 28–29% between 2014/15 and 2019/20, whereas for mothers the proportion reduced more gradually from 35–36% between 2010/11 and 2012/13 to 31–32% between 2014/15 and 2019/20. This is slightly different from the pattern

[30] The IMD quintile was assigned to each individual via their LSOA at the time of application. The code for the LSOA is provided directly from Cafcass to the SAIL Databank as part of the extract, though is considered 'non-core'. LSOA was added to the Cafcass data for applicants, respondents and subjects, based on address details, which were removed during the anonymisation process before deposit in the SAIL Databank. This measure was missing for less than 4% of applicants.

seen in Wales where we observed a decline in the proportion of applications made by fathers in the most deprived areas post-LASPO, but little variation for mothers.

Although the purpose of this report is not to draw direct comparison between public and private law cases, these findings add to the overall picture of the scale of family justice need in the most deprived areas. Public and private law cases are often counted, managed or analysed in isolation, yet it is only by connecting the two that we appreciate the full scale of need associated with socio-economic deprivation. Given this new evidence, we think it is important to conceptualise private law in terms of need for support and assistance, both outside and within the courts.

In our view, the association between economic deprivation and private law children applications is firmly established. It is vital that the family justice system acknowledges this and begins to consider how the impact of deprivation can be addressed.

Emerging evidence of a justice gap?

Our ability to track patterns of court use over a long period of time provides an opportunity to see if any groups are more or less likely to be involved in proceedings. In private law, the impact of the legal aid changes in 2013 is of particular interest. To date, it has not been possible to compare profiles of cases in England before and after LASPO, but our use of the Cafcass data enables us to do that.

Our analysis in Wales (Cusworth et al. 2020) provided evidence consistent with a justice gap where certain sections of the population, particularly younger, more deprived fathers, who might have previously been eligible for legal aid can no longer afford to bring private law applications (Hunter 2014). However, this is not quite as apparent in England. Whereas in Wales we observed a shift towards an increased proportion of applications made by mothers, this was not seen here for England. We did see a decline in the proportion of applications by young parents, but for both fathers and mothers. Younger parents are perhaps less likely than older parents to be able to afford to bring proceedings without legal aid. The data on deprivation provides further insights into a possible justice gap. We also observed that lower proportions of applications are being made by parents—both fathers and mothers—living in the most deprived quintiles post-LASPO.

These conclusions are tentative, as the data on the possible impact of LASPO is limited. Further analysis and discussion with stakeholders and communities would be needed before drawing any firm conclusions. It is also important to note that the replacement of residence and contact with CAOs occurred at broadly the same time as legal aid changes. This may muddy the picture to a degree.

The geography of private law need

Uncovering the distribution of private law cases by deprivation quintiles does not, however, answer the question: *where do private law families live?* In contrast to public law where decisions to bring court proceedings are taken by local authorities, in private law decisions about litigation are taken by private individuals, albeit often with advice from lawyers and others. However, uncovering the geography of private law as a need for assistance should

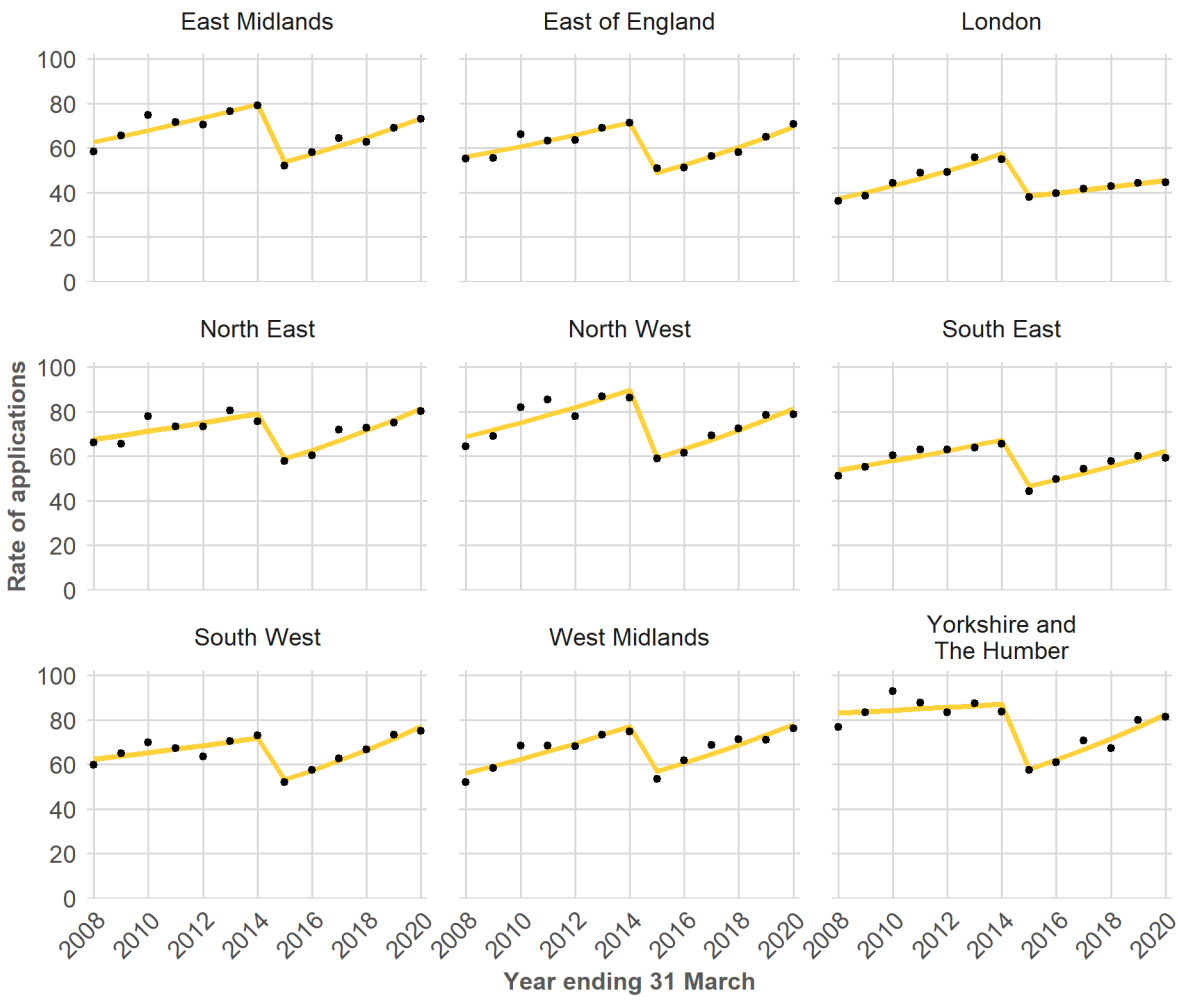
inform any helping strategies, either in or out of court. Put simply, services need to be in the right localities to meet needs.

We calculated incidence rates (total private family law applications per 10,000 families with dependent children) for the nine English regions: London, South East, South West, West Midlands, East Midlands, East of England, Yorkshire and the Humber, North East, and North West. Incidence rates rather than frequencies were calculated, as meaningful comparison can only be made by adjusting for the size of the underlying population. Future work plans to consider the geography of private law need at a more granular level.

All regions saw increasing incidence rates between 2007/08 and 2013/14, a drop between 2013/14 and 2014/15 (following the introduction of LASPO), then a return to an increasing trend (Figure 8). However, there is variation in the regional rates of private law applications, the rate of increase and the impact of LASPO.

In general, rates of private law applications were consistently highest in the North East, North West and Yorkshire and the Humber regions, and consistently lowest in London and the South East. In 2019/20, the rates were between 79 and 81 per 10,000 families in the northern regions, but just 59 per 10,000 families in the South East and 44 per 10,000 families in London.

Figure 8: Rate of private family law applications per 10,000 families with dependent children, by region, 2007/08–2019/20



A similar geographical picture was seen in the incidence rates of S31 care proceedings for all children (Harwin et al. 2018) and for newborns and infants (Broadhurst et al. 2018). Family breakdown resulting in litigation over children is most evident in the North of England, whether we view this through the lens of public or private law. Put together, families appear to be facing greater vulnerability requiring external support. Although public law cases are initiated by the state (local authorities) and private law cases are initiated by private individuals (typically non-resident fathers), the two types of cases are united by geography and level of deprivation. Of course, as with public law, not all the variance can be explained by deprivation. There will always be an interaction between need and the availability and effectiveness of preventative services. Further work is needed to explore the extent to which private law need can be moderated by effective support services.

6. What is being applied for and by whom?

We now turn to what the Cafcass data tells us about the orders applied for, confining our analysis here to the standard parental cases—that is, those involving only two adult parties, recorded as parents of the child(ren) subject of the application. We will explore what orders the non-standard cases seek in a subsequent report.

Before 2014, separate contact and residence orders could be applied for, singularly or together. These were replaced with the single CAO by the Children and Families Act 2014. A CAO can specify whether it is a 'live with' or 'spend time with' order, and Cafcass records whether an application is 'live with' and/or 'spend time with' or both. Thus, in this section, we use pre-2014 contact order and post-2014 CAO 'time with', and pre-2014 residence order and post-2014 CAO 'live with' interchangeably.

Overall trends in applications

The majority of private law applications in England are primarily about child arrangements—where a child should live and who they should see (Table 4). However, as a proportion of all applications, this has declined from two-thirds (69%) in 2010/11 to just over half (52%) in 2019/20. It is also notable that although also declining over the period, the proportion of private law applications concerning child arrangements in Wales was found to be much higher—between 84% in 2011/12 and 69% in 2019/20 (Cusworth et al. 2020).

As a counterbalance to this, the proportionate increase in applications for the other orders in England—enforcement orders, SIOs and PSOs—is substantial, and reflects a greater proportion of these types of application than was observed in Wales. All three types of application might be seen as markers for more difficult or contentious cases, both for the families and the system. The increase in enforcement applications may reflect greater difficulties with making contact arrangements work, possibly in the post-LASPO absence of solicitors who might find other routes to addressing contact difficulties than making an enforcement application.

Why SIOs and PSOs have increased over the same period is not clear. It may reflect changing relationship patterns, with more transnational families.[31] Or it may again reflect a greater number of more difficult cases with less family justice resource, especially legal advice, to contain and divert them. But those suggestions are speculative. We will be doing further qualitative research in this area, given that so little is known about these orders despite their increasing significance to families and the family justice system. Similarly, why the proportions of these types of applications is far higher in England is not clear and warrants further investigation. Considering these trends and variations at a lower-area or household level will also be important to increase understanding of families' needs and experiences.

[31] Where family members are spread across national borders.

Table 4: Types of standard parental applications (percentages), 2010/11–2019/20

Type	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
All CAOs	68.8	63.3	61.6	65.9	57.8	58.1	57.5	56.3	54.7	52.1
- Contact order/ CAO 'time with'	43.6	39.8	39.4	40.9	37.2	39.3	38.4	35.4	32.4	30.1
- Residence order/CAO 'live with'	8.7	8.1	7.6	8.0	8.0	7.7	8.8	11.6	15.1	14.8
- Contact order and residence order	16.5	15.5	14.7	17.0	12.6	11.1	10.3	9.4	7.2	7.1
PSO	21.6	24.9	25.1	20.2	25.2	23.7	23.3	23.7	25.2	26.2
SIO	7.0	8.1	9.1	8.9	10.5	10.6	10.7	11.1	11.8	13.8
Enforcement order	2.7	3.7	4.1	5.0	6.6	7.6	8.4	8.8	8.3	8.0
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

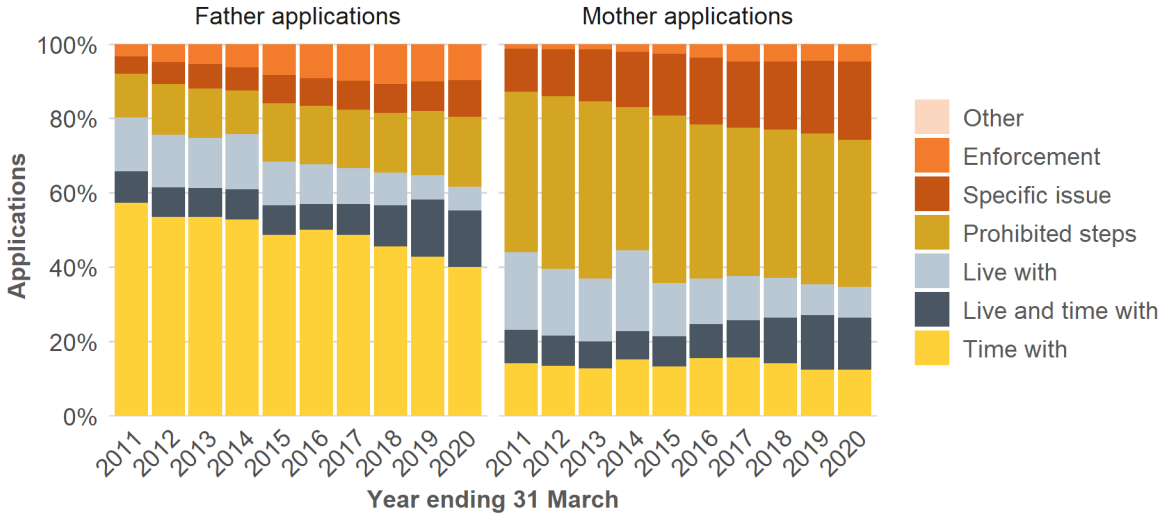
[a] Percentages may not add up to 100 due to rounding.

The percentage of cases that included an application for parental responsibility dwindled from 13% of applications in 2010/11 to 2% in 2019/20. This is almost certainly due to the long-term impact of changes in parental responsibility introduced by S111 of the Adoption and Children Act 2002. Before the Act, unmarried fathers had to apply for parental responsibility by making a formal agreement with the mother or through a court order. From December 2003, unmarried fathers were conferred parental responsibility automatically if they were named on the child's birth certificate.

How do applications made by fathers and mothers differ?

As flagged in Box 1, it is well-established that the pattern of applications in private law is highly gendered—primarily consisting of applications made by fathers for contact. We were able to confirm this pattern for England using population-level data, but we were also able to extend the analysis to explore how gender, and where the child lives, interact with type of application. Figure 9 shows the types of application made by mothers and fathers.

Figure 9: Types of applications made by mothers and fathers, 2010/11–2019/20



Overall, we can see that in 2010/11, four-fifths of applications made by fathers concerned child arrangements, around two-thirds (66%) included a contact or 'spend time with' order and nearly a quarter (23%) included a residence order or 'live with' order (either singly or in combination). In the same year, a far smaller proportion of applications by mothers concerned child arrangements, just 30% included a residence or 'live with' order and 23% included a contact or 'spend time with' order. Thus, within the scope of child arrangements, fathers were more likely to be applying for contact and mothers for residence. Notwithstanding the limitations of the data, we saw in Figure 3 that the majority of children were living with their mother at the time of the application, thus the majority of father applications would be by the non-resident parent seeking to (re)establish or increase contact or possibly to secure residence. We know from case file analysis that a prime motivation for resident mothers to seek an order is to confirm the status quo, including where there are concerns about abduction (Harding and Newnham 2015). At the same time, there will be small numbers of applications from resident fathers seeking to confirm residence, and from non-resident mothers seeking contact or to switch residence.

The overall proportion of applications concerning child arrangements made by fathers, but not by mothers, reduced in 2014/15 following the introduction of LASPO, which removed access to legal aid for most private law applications. For both mothers and fathers, there has been an increase in the proportion of applications for both 'live with' and 'spend time with' simultaneously, perhaps due to reduced access to legal advice before making an application resulting in more speculative or uncertain applications.

That a greater proportion of enforcement applications are made by fathers is as expected given that they are most likely to be the non-resident parent. It is noteworthy that the proportion of applications for enforcement has increased over the period (2010/11–2019/20), for both mothers and fathers. Similarly, the greater proportion of SIO and PSO applications by mothers is also likely to be related to the fact that they are the resident parent in most cases. Why the numbers have increased is not clear. These are areas where case file analysis would be particularly helpful.

7. How many families return to court?

As with public family law, there is increased awareness and some concern about repeat applications in private law. During the scoping review for Nuffield FJO, one of the major issues raised by frontline practitioners was in relation to recurrence (Broadhurst, Budd and Williams, 2018). The concerns are three-fold.

First, repeat applications suggest that children may be experiencing long periods of time in arrangements that are probably not working for them. That could be because those arrangements increase or prolong children's exposure to domestic abuse. It could be because arrangements are not happening (or no longer happening) as ordered, or because circumstances have changed, the original order was inappropriate, or adults and/or children are not complying with the order (Halliday et al. 2017; Trinder et al. 2013). In this context, return to court is an indicator that arrangements are not working for the child, rather than that they are necessarily inherently problematic.

Second, repeat applications mean that children will be the focus of further or protracted litigation. Litigation might be positive for the child, where it resolves issues or improves arrangements. However, developing an effective response to repeat litigation is pressing, given robust evidence that unresolved conflict, which centres on the child, is damaging (Acquah et al. 2017).

Third, repeat litigation is also likely to be a major source of stress and anxiety for adults, impacting not only their own mental health, but possibly also undermining their parenting capacity (Bream and Buchanan 2003; McIntosh and Long 2006; Trinder et al. 2008; Whiteside and Becker 2000). Given the new evidence presented above on deprivation, repeat litigation may add further stress to the lives of parents and children already exposed to considerable disadvantage.

Further, repeat litigation has an impact on the family justice system, adding to existing pressure on resources. That said, there is some recognition that recent attempts to limit the input and support that families receive at court may have increased the return rate. In particular, the Private Law Working Group has queried whether the reduction in the number of review hearings (introduced in the Child Arrangements Programme) to support families through a period of increasing contact had been counter-productive, leading to greater numbers of families returning to court when arrangements subsequently broke down (Private Law Working Group 2020).

Existing evidence

There is a small but developing body of research on the extent of returns in private law cases, both in England and internationally, focusing mainly on repeat appearances for the children involved. The evidence suggests that a sizeable minority of private law cases return to court in England. Returners comprise between a fifth and a third of cases, respectively (Halliday et al. 2017; Jay et al. 2019). It is further estimated that nearly two-thirds of returners (63%) re-litigate within two years of the previous case being closed to Cafcass (Halliday et al. 2017).

There is also evidence that repeated returns, or chronic litigation are rare. Only 3% of Halliday's sample of 40,599 children returned to court more than once, consistent with (limited) international evidence (Hunt and Trinder 2011). However, studies have hitherto involved relatively short observational windows, limiting the ability of researchers to capture multiple returns. This is a methodological limitation that exploitation of administrative data sources should be able to overcome as data improves, both through longevity and incremental changes in the data fields recorded.

Understanding the scale of return

We are able to add to the evidence base by reporting on the return rate in England with population-level data over a longer period, with a focus on applicants rather than children. By extending our analysis beyond questions of scale, we were also able to probe patterns of recurrence by gender and litigation role, as a first step towards understanding what might be driving cases returning to court.

To capture the scale of recurrence in private law, we looked back at the history of adults' appearances in private law applications. We have kept the same focus on standard parental cases with one applicant and one respondent. For applicants in any given year, we asked: *has this applicant appeared on at least one previous application in the last three years? If so, what was their role in those previous applications; applicant only, respondent only, or both?*

Use of administrative data for applied policy audiences requires some rationalisation of the underlying data. On recurrence, readers should note that we have included all instances during the three-year window regardless of whether a) the applicant returned with the same or different respondent, and b) an application was a cross-application—i.e. a further application was made during the course of an initial set of proceedings.

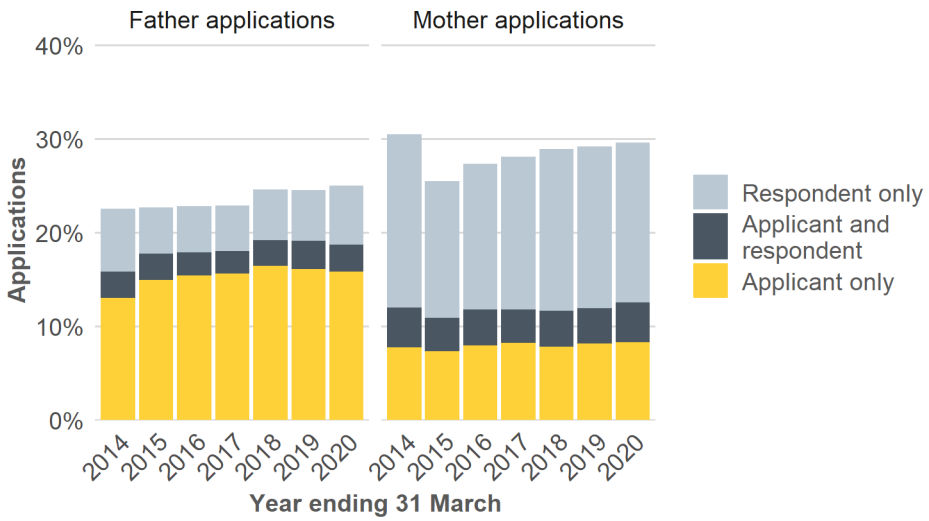
The overall level of return is similar to that reported in previous studies—between 24% and 27% of private law applications between 2013/14 and 2019/20 were made by an applicant who had been involved in a previous application in the last three years. This is slightly lower than the level of return observed in Wales (Cusworth et al. 2020) although in both countries rates of return have increased slightly in recent years.

Beginning to unpack the drivers of return

We were also able to scrutinise the role of applicant gender, with mothers having a slightly higher return rate of between 26% and 31%, compared with between 23% and 25% for fathers (Figure 10).

In terms of litigation role in repeat cases, of those returning to court as an applicant between 2013/14 and 2019/20, fathers were more likely to have been an applicant in a previous application (58–68%) than mothers (25–29%). Conversely, mothers were more likely to have been a respondent in a previous application (57–61%) than fathers (21–30%). A small proportion of both mothers and fathers bringing a private law application in 2013/14–2019/20 had been both an applicant and a respondent in previous applications. Thus, it appears that fathers are far more likely to be repeat applicants, whereas mothers are more likely to issue their own application after being a respondent on a previous application.

Figure 10: Litigation roles of current applicants in previous three years, for applications made by mothers and fathers, 2013/14–2019/20



There is much more work to be done in understanding returns in private law, including the orders applied for and the impact of repeated litigation on children, as well as on adults. Qualitative analysis of case files is likely to be necessary to understand the drivers more fully, building on the work in England by Halliday, Green, and Marsh 2017, and Trinder et al. 2013. Further quantitative analysis of the patterns of return will be possible over the coming years as these longitudinal sources of data mature, in particular to explore *why* some cases return or return repeatedly. This is where the use of large-scale linked data (health, welfare and further demographic) could shed more light on what might distinguish the profiles of single, repeat and multiple (or chronic) users. That understanding may also help earlier identification and intervention to prevent what would otherwise be chronic cases from becoming entrenched. Evidence-informed, practice-led initiatives in public law illustrate that pioneering prevention initiatives can be very effective, where there is a close fit between research and practice change, incorporating user-centred child and family perspectives.

8. Conclusions and implications

This report is the second in the *Uncovering Private Law* series for Nuffield FJO, following *Uncovering private family law: Who's coming to court in Wales?* (Cusworth et al. 2020). It is the first independent analysis of population-level data on private family law applications in England using court data (from Cafcass) joined to other publicly available data. It has demonstrated the potential of taking both a longer-term and broader approach, extending the analysis to identify trends and patterns over more than a decade. And it goes beyond information on private law demand to provide a better understanding of the lives and circumstances of the families involved.

Key research findings

Our analysis has to a large degree confirmed findings from earlier studies in England, and from our own previous report on Wales: the majority of private law cases are between two parents, are mainly brought by fathers, who are mainly the non-resident parent, concern a single child who is usually aged between one and nine years old. Private law adults are mainly in their late twenties and thirties. But we have uncovered some new information, and some interesting differences with the situation observed in Wales.

Private law need or demand

- The modest upward growth in private family law applications per 10,000 families with dependent children in England was found to be fairly consistent over the 13-year period (2007/08–2019/20). These figures do indicate a sustained increase in the need for support and assistance from the family courts over a long period.

- The level of private law applications can be influenced by extra-familial factors, such as the availability of legal aid. However, the removal of legal aid appears to have mainly delayed or paused applications, rather than reducing the levels of need for assistance over the longer term.

- Overall, use of the court in private law cases is low—less than 0.75% of all families with dependent children make a private law application each year in England, marginally lower than the percentage in Wales (less than 1%).

- Although the differences are numerically small, overall rates of applications are consistently higher in Wales, and the average rate of increase is also higher in Wales, both pre- and post-LASPO. This has resulted in slightly increasing divergence between the two countries' rates of private law applications. Overall, Wales has higher levels of deprivation, which clearly offers some important explanation, but further investigation is needed to fully understand reasons for the variance, including provision and uptake of information and support services.

- Levels of need and trends vary by English region, as with public law children cases. Rates of private law applications were consistently highest in the North East, North West, and Yorkshire and the Humber regions, and consistently lowest in London and the South East.

The socio-economic context of private law

- Our research shows a clear link between deprivation and private law cases in England, as in Wales, with an over-representation in private law of adult parties living in the most deprived areas. In 2019/20, 29% of applicant fathers and 31% of applicant mothers lived in areas in the most deprived quintile (which by definition represents 20% of the wider population), with 52% of fathers and 54% of mothers living in the two most deprived quintiles (representing 40% of the wider population).

- A slightly lower proportion of applications were made by both mothers and fathers living in the most deprived quintile post-LASPO, although the effect seems to have been less abrupt for mothers than fathers. This is slightly different from the pattern seen in Wales (Cusworth et al. 2020) where we observed a decline in the proportion of applications made by fathers in the most deprived areas post-LASPO, but little variation for mothers.

- There was a reduction in the proportion of cases where the youngest child was under five, for both mother and father applications, which might suggest that parents are delaying making an application to the court until children are older. There was also a decrease in the proportion of applications made by younger applicants, both mothers and fathers. Younger parents are perhaps less likely than older parents to be able to afford to bring proceedings without legal aid.

- Around two-thirds of 'standard parental' applications were brought by fathers, a proportion that declined slightly post-LASPO. This is similar to the trend seen in Wales, but less pronounced, suggesting that the proportion of applications brought by fathers declined steadily from three-quarters in 2011/12 to around two-thirds in 2019/20.

What are private law parents applying for?

- The majority of private law applications in England are about where a child should live and who they should see. However, as a proportion of all applications, this has declined from two-thirds (69%) in 2010/11 to just over half (52%) in 2019/20, and is much lower than that seen in Wales.

- The proportionate increase in applications for the other orders in England—enforcement orders, SIOs and PSOs—is substantial, and reflects a greater proportion of these types of application than was observed in Wales. This represents quite a significant shift in the workload of the family justice system. It may also reflect an increase in more challenging or contentious cases, compared with child arrangements cases.

- The increase in enforcement applications may reflect greater difficulties with making contact arrangements work, possibly in the post-LASPO absence of solicitors who might find other routes to addressing contact difficulties than making an enforcement application.

- Around four of five applications made by fathers concerned child arrangements, compared with just over two in five applications made by mothers. Within the scope of child arrangements, fathers were more likely to be applying for contact and mothers for residence.

- In line with previous work, around a quarter of applications are returns to court, slightly lower than the level of return seen in Wales. Mothers are somewhat more likely to be involved in a return to court. Fathers are more likely to be repeat applicants, whereas mothers are more likely to issue their own application after being a respondent on a previous application.

Implications for policy and practice

- As was seen in Wales, this research has established that private law cases disproportionally involve individuals living in more deprived areas of England. While the impact of deprivation is well-recognised in public law children cases, it has not previously been considered in private law. The current emphasis on diversion of what are sometimes portrayed as fairly trivial disputes may underestimate the role of deprivation as a potential causal factor in private law need, and as a potential barrier to the take-up of preventative services. There is also a need to understand more about the role of deprivation and its interaction with other factors such as conflict, domestic abuse and child protection. It is critical that policy makers consider this evidence in their responses to private law need, both in and out of court.

- Regional variation in rates of private law applications is not insignificant, and this requires greater evaluation of the provision, uptake and effectiveness of mediation and other support services, and other possible drivers of these differences, including local-level deprivation. Policy responses to court demand need to take into account local need for assistance.

- As noted, the majority of private law proceedings involve a single child or two siblings. Sibling support is a well-documented resilience factor for children, which will be missing in large numbers of private law cases. In addition to addressing the dispute between adults, the research highlights the importance of making support available for children. This is particularly important given the recent focus on enabling the child's voice to be heard in private law cases (Family Solutions Group 2020; MoJ 2020a).

- The evidence of a justice gap following the LASPO reforms is perhaps not as pronounced as in Wales, although there has been a reduction in applications by applicants who are younger, and living in more deprived areas of England. We suggest that the MoJ reviews this evidence, alongside other research and analysis, to reflect on whether access to justice is being inhibited and what steps can be taken to address this.

- The Cafcass database is designed to meet operational requirements, rather than for research purposes. However, various improvements could be made to the quality and scope of the data, with minimal time and resource costs, that would enhance its potential for generating evidence to improve service provision. We particularly recommend recording a child's living arrangements at the time of application, and whether there are allegations of domestic abuse and other safeguarding concerns.

Implications for research and next steps

This report has focused on the demographic profiling of the families involved in private law applications in England, including levels of deprivation, the patterns of order applied for, and the proportion of repeat applications. There are many further avenues to explore.

There is a need to differentiate private law case types in England and Wales, and the pathways of adults and children. The Private Law Working Group proposes to introduce three tracks—for safeguarding, non-safeguarding and returner cases. It would be helpful for the development and success of this tailored approach to have sound empirical evidence, including a better understanding of the different types of cases and the needs of the families involved. This research programme will therefore take a deeper dive into different case types, particularly the non-standard cases, where there is very little prior research. These would be cases with two or more applicants and/or two or more respondents, cases including orders other than those for child arrangements and cases involving multiple applications and returns to court.

We also plan to undertake more detailed analysis of returner cases and those where the child is separately represented (known as Rule 16.4 cases). The use of large-scale linked data (health, welfare and further demographic) could shed more light on what might distinguish the profiles of single, repeat and multiple (or chronic) users. This would enable earlier identification and intervention to prevent what would otherwise be chronic cases from becoming entrenched.

A more in-depth look is needed at the pre-court needs and vulnerabilities of adults and children, including the prevalence of mental health difficulties, domestic abuse and other child protection issues. A key priority will be exploring the overlap between public and private law cases.

This report has used administrative data from Cafcass and has highlighted both the potential and limitations of this approach. We were able to take both a longer view of private law, identifying trends and patterns over more than a decade, and a wider view, going beyond information on court demand to provide a better understanding of the lives and circumstances of the individuals involved. At the same time, information on key factors shaping private law cases and their outcomes are not available in the quantitative dataset maintained by Cafcass and available in the SAIL Databank. Future work will therefore explore the possibility of more data linkage, building on the deprivation data linkage, as well as the possibility of conducting complementary, intensive qualitative work based on case file analysis.

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Appendix

Study design

This study analysed aggregated, annual, population-level trends in applications made to the private family law courts in England between 1 April 2007 and 31 March 2020. Under consideration were the trends relating to: the rate of applications across England as a whole and across the nine regions, the orders being applied for, the administrative characteristics of the individuals involved (applicants, respondents and the child subjects), and the proportion of applicants each year who had previously been involved in an application within the last three years.

Data sources

To address these questions, descriptive analyses were conducted using the Cafcass administrative data available in the SAIL Databank (see Bedston et al. 2020 for more details on Cafcass data). Other publicly available data was used to derive and join additional information on to the Cafcass data, such as ONS family estimates and indices of deprivation. All data in the SAIL Databank is treated in accordance with the Data Protection Act 2018 and is compliant with the General Data Protection Regulation (GDPR).

Cafcass

Cafcass provided SAIL with a data extract of its administrative case management records relating to public and private family court proceedings in England. Cafcass is involved in all private law applications before and including a first court hearing. However, it should be noted that Cafcass is only involved in subsequent hearings in specific instances, such as where concerns over child welfare are unresolved or the court has directed further work or has decided to appoint a children's guardian under Rule 16.4 of the Family Procedure Rules.

Information available in the data extract available for this study included:

- application: date of issue, orders applied for, local authority
- applicant and respondent: week of birth, gender, LSOA at time of proceedings, relationship to the child(ren) involved
- the child(ren) subject: week of birth, gender, LSOA at time of proceedings.

Office for National Statistics estimated number of families

As described below we made use of the estimated number of families with dependent children across the nine regions in England, as made available by ONS (ONS 2019). ONS produces these estimates based on the Labour Force Survey.

English Indices of Deprivation (2019)

The English Indices of Deprivation (Ministry of Housing Communities and Local Government 2019) measure relative levels of deprivation in small areas or neighbourhoods called lower-layer super output areas, or LSOAs, in England. The Index of Multiple Deprivation (IMD) is the official deprivation measure for England, based on 39 separate indicators relating to

seven domains—income, employment, health, education, crime, housing and services and the environment.

For this report we made use of the 2019 version of IMD. Each LSOA, which in 2011 in England contained an average population of 1,614 (ONS 2012), is ranked from 1 (most deprived) to 32,844 (least deprived). IMD ranks were then categorised into five equal groups to obtain IMD quintiles.

Data processing

Within the Cafcass data, de-duplication was performed at the application level. Applications in the same case, made on the same day and relating to the same set of applicants, respondents and orders being applied for were aggregated. This meant applications relating to multiple children but for the same order(s) involving the same adults were combined. All additional information was merged, for example, location, orders applied for and legal outcomes.

The IMD quintile was assigned to each person via their LSOA at the time of application. The code for the LSOA is provided directly from Cafcass to the SAIL Databank as part of the extract, though is considered 'non-core'.

Analytic samples and measures

Two main samples were established for this study: one to enable analysis of the volume of applications over time and by region, and the other to profile the individuals involved in 'standard parental' applications.

Volume sample and measures

The unit of analysis for this sample was 'region-year', with the main measure being the rate of private family law applications per 10,000 families. Applications were counted if they met all of the following four criteria:

- application had an issue date between 1 April 2007 and 31 March 2020
- application had at least one applicant, one respondent and one subject
- applicant had applied for any of the following orders: child arrangements, contact, residence, family assistance, parental order, prohibited steps, special guardianship or specific issue
- case was marked as 'private law' by Cafcass and had a local authority recorded.

A total of 612,380 applications were identified as being issued between 1 April 2007 and 31 March 2020, with 89.1% meeting all four criteria, giving us our selected sample.

The number of applications per year was counted for each of the nine regions in England. To establish incidence rates, these counts were used as the numerator, while the estimated number of families with at least one dependent child each year was used as a denominator.

Profile sample and measures

The unit of analysis for this sample was an application involving only one applicant and one respondent of opposite genders, i.e. 'standard parental' applications. Measures of interest were descriptors of those involved and the orders being applied for. Applications were selected for profiling if they met all of the following five criteria:

- issue date of application was between 1 April 2010 and 31 March 2020
- application involved only one applicant, one respondent and at least one subject
- applicant and respondent were recorded as parents, both had a valid gender recorded and the genders of the applicant and respondent were different
- application had applied for any of the following orders: child arrangements, contact, residence, family assistance, parental order, prohibited steps, special guardianship, specific issue
- case was marked as 'private law' by Cafcass.

A total of 429,270 applications were recorded as private law and being issued between 1 April 2010 and 31 March 2020, of which 372,660 (86.8%) met all five criteria giving us our selected sample. Table A.1 shows the number of parental and non-parental applications made each year.

Table A.1: Number of parental and non-parental applications made each year, 2010/11–2019/20

Number	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
Parental	37,890	36,750	41,320	41,830	29,430	31,930	35,460	36,950	39,920	41,190
Non-parental	7,020	6,590	6,720	6,720	4,330	4,580	5,020	5,080	5,040	5,530
Total	44,900	43,340	48,040	48,550	33,760	36,500	40,470	42,030	44,960	46,720

Several measures were derived to describe the application, the children and applicants involved, comparing applications made by mothers and fathers. Table A.2 shows the number of applications made by mothers and by fathers each year.

Table A.2: Number of applications made by mothers and by fathers each year, 2010/11–2019/20

Number	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
By mothers	11,950	12,520	14,270	13,060	9.500	9,900	10,970	11,890	13,590	14,650
By fathers	25,940	24,230	27,050	28,770	19,920	22,020	24,490	25,060	26,340	26,550
Total	37,890	36,750	41,320	41,830	29,430	31,930	35,460	36,950	39,920	41,190

For the orders applied for, we combined child arrangements orders, contact orders and residence orders into two categories: 'live with' and 'spend time with'. Measures for the applicants and respondents were: gender, age at the application issue date, LSOA and associated IMD quintile at the time of application. The children who were subject to each application were summarised by counting how many were included in the application and

providing descriptors for the youngest subject: age, gender and who they were living with at time of application. Who a child was living with was determined via their LSOA and whether or not it was the same as that of the applicant, respondent or both.

Finally, for applicants only, a 'return to court' measure was created. This summarised their roles (applicant or respondent) on the same sample of private law applications within the previous three years of the application issue date of their current application.

Analytical approach

The analysis of the volume of applications considered changes over time at both national and regional level. The trend of total number of applications being issued per year at national level was modelled using a Poisson generalised linear model offset by the number of family households (McCullagh and Nelder 1989). The model had a covariate structure that averaged the linear relationship of rates pre- and post-2014 with time, as well as a change point at 2014. The trend model at the regional level was similar in structure with the addition of allowing region-specific effects. All estimated coefficients with $p < 0.001$ were seen as significant.

The analysis of the standard parental applications consisted of describing annual proportional changes over time for all private applications and for male and female-led applications separately. Percentages were calculated based on available data for each year, and missing data was effectively ignored. Data processing and analysis were carried out using R v3.5.3 (R Core Team 2019), together with the package tidyverse v1.2.1 (Wickham et al. 2019).

Information governance approval and statistical disclosure control

The project proposal was reviewed by the SAIL independent Information Governance Review Panel at Swansea University. This panel ensures that work complies with information governance principles and represents an appropriate use of data in the public interest. It includes representatives of professional and regulatory bodies, data providers and the general public. Approval for the project was granted by the Information Governance Review Panel under SAIL project 0990. Cafcass approved use of its data extract for this project. The agency considered the public interest value of the study, benefits to the agency itself as well as general standards for safe use of administrative data.

SAIL has strict statistical disclosure processes and policies to prevent potential disclosure of anyone's identifiable information. This includes suppressing information in tables where counts are small or where geographical identifiers might disclose the identity of the person concerned either alone or in combination with other data. Where counts were greater than zero but less than ten, they have been supressed. Percentages were calculated on available counts only. All available counts have been reported to the nearest ten, including totals. All percentages are reported to one decimal place.