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# Measuring Up? The Relationship Between Correlates of Children's Adjustment and Both Family Law and Policy in England

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Over the last two decades, an impressive, albeit incomplete, body of evidence has been built identifying the factors associated with children's adjustment following parental separation. At the same time, English family law and policy have changed and developed considerably for a variety of reasons. In this paper, we explore the linkages between these two developments. We consider, first, the body of evidence documenting the factors associated with adjustment and maladjustment on the part of children whose parents have separated or divorced, and second, the extent to which changing laws and policies in the United Kingdom have been guided by this literature and have helped achieve the desired outcomes for children.

Our assessment is mixed. In broad terms, developmental research has helped to drive law and policy, although other factors, including costs, ideology, and pressure groups, have also been influential. The impact of legal and policy developments on outcomes for children is harder to detect. The extent and frequency of contact between children and their non-residential parents appears to have risen over the last decade, although this probably reflects cultural as much as legal change. Perhaps the greatest success is attributable to the policy of non-intervention emphasized in the Children Act 1989, which has permitted the majority of parents to make contact arrangements without court intervention. Nevertheless, support services to assist children and parents remain underdeveloped and there continue to be significant problems in managing the small minority of cases that do go to court.

## I. WHAT CHILDREN NEED: A SELECTIVE SYNOPSIS

Systematic research on early social development has flourished in the last twenty-five years, and has helped generate a much better understanding of both the normative developmental processes that define the first year of life and the roles played by parents.<sup>1</sup> The

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1. See M.E. Lamb, M. H. Bornstein, & D. M. Teti, *Development in Infancy* (4th ed. 2002); M. E. Lamb & C. Lewis, *The Role of Parent-Child Relationships in*

formation of attachments to parents depends on reciprocal interactive processes that foster the ability to differentiate parents from others. Infant-parent relationships or attachments are consolidated by the middle of the first year of life and are characterized by the onset of separation anxiety and separation protest.<sup>2</sup> Even adequate levels of responsive parenting foster the formation of infant-parent attachments, although some of these relationships may be insecure.

Contrary to Bowlby's initial speculation and widespread "common sense," most infants form meaningful attachments to both of their parents at roughly the same age (six to seven months),<sup>3</sup> even though most fathers in our culture spend less time with their infants than do mothers.<sup>4</sup> This indicates that the amount of time spent together is not the only factor affecting the development of attachments. Although some threshold level of interaction may be necessary, even brief opportunities for regular interaction appear sufficient. Most infants come to "prefer" the parents who take primary responsibility for their care (typically their mothers), but this does not mean that relationships with their less-involved parents are unimportant. Although there is no evidence that the amount of time infants spend with their two parents affects the security of either attachment relationship, it does affect the relative formative importance of the two relationships. Nonetheless, both relationships remain psychologically important despite disparities in the two parents' levels of participation in child care.

The quality of both maternal and paternal behavior is reliably associated with the security of infant-parent attachment.<sup>5</sup> The association between the quality of paternal behavior and the quality of infant-father attachment appears to be weaker than the parallel association between maternal behavior and the security of infant-mother attachment. However, the quality of both mother- and father-child interaction remains the most reliable correlates of individual differences in psychological, social, and cognitive adjustment in

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*Child Development*, in *Developmental Science: An Advanced Textbook* 429–68 (M. H. Bornstein & M. E. Lamb eds., 2005).

2. M. D. S. Ainsworth, *Object Relations, Dependency and Attachment: A Theoretical Review of the Infant-Mother Relationship*, in 40 *Child Development* 969–1025 (1969); J. Bowlby, *Attachment*, in 1 *Attachment and Loss* (1969).

3. M. E. Lamb, *The Development of Infant-Father Attachments*, in *The Role of the Father in Child Development* (M. E. Lamb ed., 3d ed. 1997).

4. J. H. Pleck & B. P. Masciadrelli, *Paternal Involvement by U.S. Residential Fathers: Levels, Sources, and Consequences*, in *The Role of the Father in Child Development* 222–71 (M. E. Lamb ed., 4th ed. 2004).

5. M. S. DeWolff & M. H. van IJzendoorn, *Sensitivity and Attachment: A Meta-Analysis on Parental Antecedents of Infant Attachment*, in 68 *Child Development* 571–91 (1997).

infancy, as well as in later childhood.<sup>6</sup> Not surprisingly, therefore, children appear better adjusted when they enjoy warm positive relationships with two actively involved parents.<sup>7</sup>

Infants and toddlers in particular, and children more generally, need regular interaction with their "attachment figures" if their relationships are to persist and flourish.<sup>8</sup> Extended separations from either parent are undesirable because they unduly stress developing attachment relationships.<sup>9</sup> In addition, young children need to interact with both parents in a variety of contexts (feeding, playing, diapering, soothing, putting to bed, etc.) to ensure that the relationships are consolidated and strengthened. In the absence of such opportunities for regular interaction across a broad range of contexts, infant-parent relationships fail to develop and may instead weaken. For the same reason, it is extremely difficult to reestablish relationships between infants or young children and their parents when these relationships have been disrupted. Instead, it is considerably better to avoid such disruptions in the first place.

Common sense and scientific research thus tell us that both the dissolution of the parents' relationship and the attenuation or loss of a relationship with a parent are likely to have psychological costs. Additionally, there is substantial evidence that children in both the United States and the United Kingdom are better off psychologically and developmentally in two- rather than single-parent families.<sup>10</sup>

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6. Lamb & Lewis, *supra* note 1, at 429–68; R.A. Thompson, *Early Sociopersonality Development*, in 3 *Handbook of Child Psychology* 25–104 (W. Damon & N. Eisenberg, eds., 5th ed. 1998).

7. P. R. Amato & J. G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, in 61 *Journal of Marriage & the Family* 557–73 (1999); E. M. Hetherington & M. M. Stanley-Hagan, *The Adjustment of Children with Divorced Parents: A Risk and Resiliency Perspective*, in 40 *Journal of Child Psychology and Psychiatry and Allied Disciplines* 129–40 (1999); M. E. Lamb, *Non-Custodial Fathers and their Impact on the Children of Divorce*, in *The Post-Divorce Family: Research and Policy Issues* 105–25 (R. A. Thompson & P.R. Amato ed., 1999); M. E. Lamb, *Noncustodial Fathers and their Children*, in *Handbook of Father Involvement: Multidisciplinary Perspectives* 169–84 (C. S. Tamis-LeMonda & N. Cabrera eds., 2002); R. A. Thompson & D. J. Laible, *Noncustodial Parents*, in *Parenting and Child Development in "Nontraditional" Families* 103–123 (M.E. Lamb ed., 1999).

8. M. E. Lamb, *Infant-Father Attachments and their Impact on Child Development*, in *Handbook of Father Involvement: Multidisciplinary Perspectives* 93–117 (C. S. Tamis-LeMonda & N. Cabrera eds., 2002); Lamb, Bornstein, & Teti, *supra* note 1.

9. J. Bowlby, *Separation: Anxiety and Anger*, in 2 *Attachment and Loss* (1973).

10. P.R. Amato, *The Consequences of Divorce for Adults and Children*, in 62 *Journal of Marriage and the Family* 1269–87 (2000); E. M. Hetherington & M. M. Stanley-Hagan, *The Effects of Divorce on Fathers and their Children*, in *The Role of the Father in Child Development* 191–211 (M.E. Lamb ed., 3d ed. 1997);

Researchers agree that, on average, children growing up in fatherless families are disadvantaged relative to peers growing up in two-parent families, with respect to psychosocial adjustment, behavior and achievement at school, educational attainment, employment trajectories, income generation, involvement in anti-social and even criminal behavior, and the ability to establish and maintain intimate relationships.

Interestingly and importantly, only a minority of children in single-parent families are maladjusted; the majority evince no psychopathology or behavioral symptoms, whether or not they experience psychic pain.<sup>11</sup> Such individual differences force us to identify more precisely the ways in which divorce and single parenthood may affect children's lives and, relatedly, the factors that might account for individual differences in children's adjustment following the separation, and possibly divorce, of their parents.

Four interrelated factors appear to be especially significant. First of all, single parenthood is associated with a variety of social and financial stresses with which custodial parents must cope, largely on their own. Single-parent families are more economically stressed than two-parent families, and economic stresses or poverty appear to account (statistically speaking) for many effects of single parenthood.<sup>12</sup>

Secondly, because single mothers need to work more extensively outside the home than married or partnered mothers do, parents spend less time with children in single-parent families and the levels of supervision and guidance are lower and less reliable than in two-parent families.<sup>13</sup> Reductions in the level and quality of parental stimulation and attention may affect achievement, compliance, and social skills while diminished supervision makes antisocial behavior and misbehavior more likely.<sup>14</sup>

Thirdly, conflict between the parents commonly precedes, emerges, or increases during the separation and divorce processes,

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Hetherington & Stanley-Hagan, *supra* note 7, at 963–73; Lamb, *The Post-Divorce Family*, *supra* note 7, at 105–25; Lamb, *Handbook of Father Involvement*, *supra* note 7, at 169–84; S. S. McLanahan, *Father Absence and the Welfare of Children, in Coping with Divorce, Single Parenting, and Remarriage: A Risk and Resiliency Perspective* 117–45 (E. M. Hetherington ed., 1999); S. S. McLanahan & J. Teitler, *The Consequences of Father Absence, in Parenting and Child Development in "Nontraditional" Families* (M.E. Lamb ed., 1999).

11. R. E. Emery, *Marriage, Divorce and Children's Adjustment* (2d ed. 1999); E. M. Hetherington, *For Better or for Worse: Divorce Reconsidered* (2002).

12. Hetherington, *supra* note 11; McLanahan, *Father Absence and the Welfare of Children*, *supra* note 10.

13. Hetherington, *For Better or for Worse*, *supra* note 11; McLanahan, *Father Absence and the Welfare of Children*, *supra* note 10.

14. Hetherington, *For Better or for Worse*, *supra* note 11.

and often continues beyond them. Inter-parent conflict is an important correlate of filial maladjustment just as marital harmony, its conceptual inverse, appears to be a reliable correlate of adjustment.<sup>15</sup> The adversarial legal system tends to promote conflict around the time of divorce although both pre- and post-divorce conflict can be harmful to children. Dr. Joan B. Kelly has argued persuasively that some of the “effects of divorce” are better viewed as the effects of pre-separation marital conflict.<sup>16</sup> Anger-based marital conflict is associated with filial aggression and externalizing behavior problems,<sup>17</sup> perhaps because both parents and children have similar difficulty regulating the negative effects of the conflict.<sup>18</sup>

In addition, most experts agree that conflict localized around the time of separation and divorce is of less concern than conflict that was and remains an intrinsic and unresolved part of the parents’ relationship and continues after their divorce.<sup>19</sup> Similarly, conflict from which children are shielded also does not appear to affect adjustment,<sup>20</sup> whereas conflict that includes physical violence is more pathogenic than high conflict without violence.<sup>21</sup>

Fourth, divorce commonly disrupts one of the child’s most important and enduring relationships—the one with his or her father. As Amato has shown with particular clarity, however, the bivariate associations between father absence and children’s adjustment are much weaker than one might expect.<sup>22</sup> Indeed, Amato and Gilbreth’s

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15. Cummings et al., *Fathers in Family Context: Effects of Marital Quality and Marital Conflict, in The Role of the Father in Child Development 196–221* (M. E. Lamb ed., 4th ed. 2004); J. R. Johnston, *High-Conflict Divorce*, 4 *The Future of Children* 165–82 (1994); J. B. Kelly, *Children’s Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 *Journal of the American Academy of Child & Adolescent Psychiatry* 963–73 (2000).

16. Kelly, *supra* note 15 at 963–73.

17. J.M. Jenkins, *Marital Conflict and Children’s Emotions: The Development of an Anger Organization*, 62 *Journal of Marriage and the Family* 723–36 (2000).

18. L. F. Katz & J. M. Gottman, *Patterns of Marital Conflict Predict Children’s Internalizing and Externalizing Behaviours*, 29 *Developmental Psychology* 940–50 (1993).

19. Cummings et al., *Fathers in Family Context, supra* note 15, at 196–221; E. M. Cummings & A. W. O’Reilly, *Fathers in Family Context: Effects of Marital Quality on Child Adjustment, in The Role of the Father in Child Development 49–65*, 318–25 (M.E. Lamb ed., 3d ed. 1997).

20. E. M. Hetherington et al., *What Matters? What Does Not? Five Perspectives on the Association Between Marital Transition and Children’s Adjustment*, 53 *American Psychologist* 167–84 (1998).

21. Jouriles et al., *Physical Violence and Other Forms of Marital Aggression: Links with Children’s Behaviour*, 10 *Journal of Family Psychology* 223–34 (1996); C. McNeal & P.R. Amato, *Parents’ Marital Violence: Long-Term Consequences for Children*, 19 *Journal of Family Issues* 123–39 (1998).

22. P. R. Amato, *Children’s Adjustment to Divorce: Theories, Hypotheses, and Empirical Support*, 55 *Journal of Marriage and the Family* 23–38 (1993);

meta-analysis revealed no significant association between the frequency of father-child contact and child adjustment, largely because of the great diversity in the types of "father-present" relationships.<sup>23</sup> We might predict that contacts with abusive, incompetent, or disinterested fathers are likely to have much different effects than relationships with devoted, committed, and sensitive fathers. As expected, Amato and Gilbreth found that children's well-being was significantly enhanced when their relationships with non-residential fathers were positive and when the non-residential fathers engaged in "active parenting."<sup>24</sup> (Positive relationships with custodial mothers were also beneficial, of course.) Dunn, Cheng, O'Connor, and Bridges,<sup>25</sup> Simons and Associates,<sup>26</sup> Hetherington, Bridges, and Insabella,<sup>27</sup> and Clarke-Stewart and Hayward<sup>28</sup> likewise reported that children benefitted when their nonresident fathers were actively involved in routine everyday activities. Similarly, data from the National Center for Education Statistics show that both resident and nonresident fathers enhance their children's adjustment when they are involved in the children's schooling.<sup>29</sup> The clear implication is that active paternal involvement, not simply the number or length of meetings between fathers and children, predicts child adjustment. This suggests that post-divorce arrangements should specifically seek to maximize positive and meaningful paternal involvement rather than simply allow minimal levels of visitation.

Of course, the active involvement of nonresident parents is not the only important factor in child adjustment. The level of involvement and quality of relationships between both parents and their children, the amount of conflict between the two parents, and the socio-economic circumstances in which children reside all affect adjustment to divorce and single parenthood. Thus, it is not surprising to find that "father absence" (a broad, inclusive label for a myriad of factors) has deleterious consequences for children. These factors are interrelated, however, and in the absence of intensive and reliable

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Amato & Gilbreth, *supra* note 7, at 557-73.

23. Amato & Gilbreth, *supra* note 7, at 557-73.

24. *Id.*

25. Dunn et al., *Children's Perspectives on their Relationships with their Nonresident Fathers: Influences, Outcomes, and Implications*, 45 *Journal of Child Psychology and Psychiatry* 553-66.

26. R. L. Simons & Associates, *Understanding Differences Between Divorced and Intact Families: Stress, Interaction and Child Outcome* (1996).

27. Hetherington et al., *supra* note 20, at 167-84.

28. K. A. Clarke-Stewart & C. Hayward, *Advantages of Father Custody and Contact for the Psychological Well-Being of School-Age Children*, 17 *Journal of Applied Developmental Psychology* 239-70 (1996).

29. *Father's Involvement in their Children's Schools*, 6(2) *Father Times* 1, 4-6 (1997).

longitudinal data, it is difficult either to discern casual relationships unambiguously or to establish the relative importance of different factors. Child adjustment, paternal involvement in decision-making, the amount of high quality contact between children and non-resident parents and the amount of child support received are all correlated, thus making it difficult to determine which factor is most important.<sup>30</sup> It is possible that increased child support may foster visitation and thereby enhance child adjustment.<sup>31</sup> Furthermore, it is also possible that adequate contact makes non-resident fathers feel more involved and thus more willing to make child support payments which in turn enhance child well-being. Alternatively, well-adjusted, happy children might simply make non-residential parents want to be with and support them financially.

These factors also operate together in complex ways, such that, for example, contact with non-resident parents may not have the same positive effect on children when there is substantial conflict between the parents that contact has when levels of conflict are lower.<sup>32</sup> Step-parenthood and remarriage further complicate efforts to understand the effects of diverse custody arrangements on child well-being.<sup>33</sup>

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30. Amato & Gilbreth, *supra* note 7 at 557–73; S. L. Braver, *Divorced Dads: Shattering the Myths* (1998); S. H. Braver et al., *A Longitudinal Study of Noncustodial Parents: Parents Without Children*, 7 *Journal of Family Psychology* 9–23 (1993); F. F. Furstenberg, Jr. & A. J. Cherlin, *Divided Families: What Happens to Children When Parents Part* (1991); S. S. McLanahan & G. Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (1994); J. A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 *Journal of Marriage and the Family* 79–101 (1991); J. A. Seltzer, *Consequences of Marital Dissolution for Children*, 20 *American Review of Sociology* 235–66 (1994); J. A. Seltzer, *Father by Law: Effects of Joint Legal Custody on Non-resident Fathers' Involvement with Children*, 35 *Demography* 635–46 (1998); U. S. Census Bureau, *Child Support for Custodial Mothers and Fathers*, Report No. P60-212 (1997); N. Zill & C. W. Nord, *Causes and Consequences of Involvement by Non-Custodial Parents in their Children's Lives: Evidence from a National Longitudinal Study*, Paper Presented to the National Center on Fathers and Families Roundtable (November 1996).

31. Zill & Nord, *supra* note 30.

32. P. R. Amato & S. J. Rezac, *Contact with Non-residential Parents, Interparental Conflict, and Children's Behaviour*, 15 *Journal of Family Issues* 191–207 (1994); Johnston et al., *Ongoing Postdivorce Conflict in Families Contesting Custody: Effects on Children of Joint Custody and Frequent Access*, 59 *American Journal of Orthopsychiatry* 576–92 (1989).

33. Hanson et al., *Double Jeopardy: Parental Conflict and Step-Family Outcomes for Children*, 58 *Journal of Marriage and the Family* 141–154 (1996); Hetherington, *For Better or for Worse*, *supra* note 11; E.M. Hetherington, & S.H. Henderson, *Fathers in Step Families, in The Role of the Father in Child Development* 212–26, 369–73 (M.E. Lamb ed., 3d ed. 1997); M. B. Isaacs & G. H. Leon, *Remarriage and Its Alternatives Following Divorce: Mother and Child*



Overall, then, a number of factors help account for individual differences in the effects of divorce, and because they are interrelated, it is difficult to assess their relative importance. As shown later, however, thoughtful interventions can take advantage of these interrelations and thereby initiate processes that minimize the adverse effects on children's adjustment by striving to promote healthy relationships between children and both of their parents, whether or not they live together. In this paper, we focus mainly on factors that affect the quality and extent of contact between non-resident fathers and their children as well as conflict between the parents. We say little about the quality of relationships between children and their co-resident mothers even though this obviously has a major impact on children's adjustment.

## II: MINIMIZING THE ADVERSE EFFECTS OF DIVORCE

Although children's best interests are usually served by keeping both parents actively involved in their children's lives, many custody and contact arrangements may not foster the maintenance of relationships between children and their non-resident parents, especially in the United States. In the Stanford Child Custody Project, for example, twenty-seven percent of the children had no court-ordered contact with their non-resident parents, and an additional eighteen percent had no court-ordered overnight visits; only a quarter of the total were "ordered" to spend three or more nights per two-week period with their non-resident parents.<sup>34</sup> In Braver's Phoenix area sample, similarly, the average child had two or three overnights per month with his non-resident father.<sup>35</sup>

Even when the amount of contact between children and non-resident parents is so little, it typically declines over time, with increasing numbers of children having less and less contact with their non-resident parents.<sup>36</sup> National statistics suggest that about one-third of non-resident fathers in the United States have no contact with their children.<sup>37</sup> Such figures may be misleading, however, because

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*Adjustment*, 14 *Journal of Marital and Family Therapy* 163-73 (1988).

34. E. E. Maccoby, *Divorce and Custody: The Fights, Needs, and Obligations of Mothers, Fathers, and Children*, in *The Individual, the Family, and Social Good: Personal Fulfilment in Times of Change* 135-72 (G.B. Melton ed., 1995); E. E. Maccoby & R. H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (1992); H. E. Peters, *Child Custody and Monetary Transfers in Divorce Negotiations: Reduced Form and Simulation Results* (Unpublished manuscript, Department of Economics, Cornell University 1997).

35. Braver, *supra* note 30.

36. F. F. Furstenberg et al., *The Life Course of Children of Divorce*, 48 *American Psychological Review* 656-68 (1983); Braver, *supra* note 30.

37. Zill, *supra* note 30.

they rely on maternal reports (which frequently paint a less generous portrait of paternal involvement than paternal reports, as noted by Braver).<sup>38</sup> Moreover, these figures include both divorced and never-married fathers, even though never-married fathers are more than twice as likely as divorced fathers to have no contact with their children.<sup>39</sup> In Braver's prospective longitudinal study of divorcing families in the Phoenix area, both parents agreed that ninety percent of the fathers had seen their children in the last year, and somewhere between sixty-seven percent (according to the mothers) and eighty-three percent (according to the non-resident fathers) of the fathers saw their children at least weekly, including essentially all the fathers who still lived in the same town as their children.<sup>40</sup> In this sample, furthermore, these numbers had not fallen three years after the divorce.

Overall, if the relationships with both parents were of at least adequate quality and supportiveness prior to separation, the central challenge was to maintain both child-parent attachments after separation and divorce. This goal is no less important to children's welfare when the divorced parents had "traditional" roles before divorce than when they shared parenting responsibilities more equitably. Our focus should remain on the children's best interests, not "fairness" to the parents.

Because many custody and visitation or contact decrees and agreements do not foster the maintenance of relationships between children and their non-resident parents,<sup>41</sup> initially restrictive arrangements are typically followed by declining levels of paternal involvement over time, especially in the United States.<sup>42</sup> Perhaps this is because these fathers are deprived of the opportunity to be parents and are instead visitors. Children may well enjoy fun-filled "visits" with their fathers and may not regret the respite from arguments about getting homework done, getting their rooms cleaned, behaving politely, going to bed on time, and getting ready for school. However, the exclusion of fathers from these everyday interactions is crucial, ultimately transforming the fathers' roles and making these men increasingly irrelevant to their children's lives, socialization, and development. Many men describe this as a painful experience and that they feel excluded from and pushed out of their children's lives.<sup>43</sup>

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38. Braver, *supra* note 30.

39. Seltzer, *Relationships Between Fathers and Children*, *supra* note 30.

40. Braver, *supra* note 30.

41. *E.g.*, Maccoby & Mnookin, *supra* note 34; Peters, *supra* note 34.

42. Furstenberg, *supra* note 36, at 656-68; Maccoby & Mnookin, *supra* note 34.

43. Braver, *supra* note 30; K. Clark & P. C. McKenry, *Unheard Voices: Divorced Fathers without Custody* (unpublished manuscript, Department of Family

Writing on behalf of eighteen experts on the effects of divorce and contrasting parenting plans, Lamb, Sternberg, and Thompson observed:

To maintain high-quality relationships with their children, parents need to have sufficiently extensive and regular interactions with them, but the amount of time involved is usually less important than the quality of the interaction that it fosters. Time distribution arrangements that ensure the involvement of both parents in important aspects of their children's everyday lives and routines . . . are likely to keep non-residential parents playing psychologically important and central roles in the lives of their children.<sup>44</sup>

As Kelly and Lamb reiterated, the ideal situation is one in which children with separated parents have opportunities to interact with both parents frequently in a variety of functional contexts (feeding, play, discipline, basic care, boundary-setting, putting to bed, etc.).<sup>45</sup> The evening and overnight periods (like extended days with nap times) with non-residential parents are especially important psychologically for infants, toddlers and young children. They provide opportunities for crucial social interactions and nurturing activities, including bathing, soothing fears and anxieties, bedtime rituals, comforting in the middle of the night, and the reassurance and security of snuggling in the morning, that one to two hour long visits cannot provide. According to attachment theory, these everyday activities promote and maintain trust and confidence in the parents, while deepening and strengthening child-parent attachments, and thus need to be encouraged when decisions concerning access and contact are made.

One implication is that even young children should spend overnight periods with both parents when both have been involved in their care prior to separation, even though neo-analysts have long counseled against this.<sup>46</sup> As Warshak has pointed out, the prohibition of overnight "visitation" has been justified by prejudices and beliefs

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Relations and Human Development, Ohio State University 1997).

44. Lamb et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 Fam. & Conciliation Cts. Rev. 393-404, 400 (1997).

45. Kelly, J.B., & Lamb, M.E. *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 Fam. & Conciliation Cts. Rev. 297-311 (2000); M E. Lamb & J. B. Kelly, *Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children: A Rejoinder to Solomon and Biringen*, 39 Fam. & Conciliation Cts. Rev. 365-71 (2001).

46. Kelly & Lamb, *Using Child Development Research*, *supra* note 45 at 297-311; Lamb & Kelly, *Using the Empirical Literature*, *supra* note 45, at 365-71.

rather than by any empirical evidence.<sup>47</sup> When both parents have established significant attachments and both have been actively involved in the child's care, overnight "visits" will consolidate attachments and child adjustment, not work against them. Parents who had been actively involved before divorce but are then denied overnight access to their children are excluded from an important array of activities, and the strength or depth of their relationships suffer as a result. Again, empirical research on normative child development can guide the design of policies that promote better child adjustment, even in the face of the stresses imposed by parental separation and divorce. Of course, when children are young and the non-resident fathers have not been extensively involved before the separation or divorce, overnight visits would not be appropriate until the relationships have strengthened.

Furthermore, to minimize the deleterious impact of extended separations from either parent, attachment theory tells us there should be more frequent transitions than would perhaps be desirable with older children.<sup>48</sup> To be responsive to the infant's psychological needs, the parenting schedules adopted for children under age two or three should actually involve more transitions, rather than fewer, to ensure the continuity of both relationships and to promote the child's security and comfort during a potentially stressful period. From the third year of life, the ability to tolerate longer separations begins to increase, such that most toddlers can manage two consecutive overnights with each parent without stress. Schedules involving separations spanning longer blocks of time, such as five to seven days, should be avoided, as children this age may still become upset when separated from either parent for too long.

Interestingly, psychologists have long recognized the need to minimize the length of separations from attachment figures when devising parenting plans. However, they have typically focused only on separations from mothers, thereby revealing their presumption that young children are not meaningfully attached to their fathers. To the extent that children are attached to both of their parents, however, separations from both parents are stressful and, at a minimum, generate psychological pain. As a result, parenting plans that allow children—especially very young children—to see their fathers "every Wednesday evening and every other weekend" clearly fail to recognize the adverse consequences of week-long separations from non-resident parents. It is little wonder that such arrangements lead

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47. R. A. Warshak, *Blanket Restrictions: Overnight Contact Between Parents and Young Children*, 38 *Fam. & Conciliation Cts. Rev.* 422–45 (2000).

48. Kelly & Lamb, *Using Child Development Research*, *supra* note 45, at 297–311.

to attenuation of the relationships between non-resident parents and their children. Instead, it is desirable to promote continued involvement by both parents, striving when necessary to increase the participation of those parents (typically fathers) whose prior uninvolvement may initially make overnight contact inappropriate.

### III. WHEN SHOULD ACCESS TO NON-RESIDENTIAL PARENTS BE RESTRICTED?

Of course, there are some cases in which the possible benefits of keeping both parents involved are outweighed by the costs. Conflict-filled or violent relationships between the parents are most likely to trigger such cost-benefit analyses because high conflict is reliably associated with poorer child outcomes following divorce.<sup>49</sup> Interparental conflict should be avoided wherever possible, but litigation-related conflict and conflict triggered by the high levels of stress surrounding the time of divorce do not appear to have enduring consequences for children. As a result, their occurrence should not be used to justify restrictions on children's access to either of their parents. Maccoby and Mnookin further caution that minor or isolated instances of domestic violence should not affect decisions regarding custody and visitation.<sup>50</sup> The high conflict found harmful by researchers such as Johnston typically involved repeated incidents of spousal violence and verbal aggression, and continued at intense levels for extended periods of time, often in front of the children.<sup>51</sup> As a result, Johnston has emphasized the importance of continued relationships with both parents except in those relatively uncommon circumstances in which intense, protracted conflict occurs and persists. According to Maccoby and Mnookin, approximately one-fourth of divorcing families experience high levels of conflict around the time of divorce, and perhaps ten percent of them may have conflict that is sufficiently severe and intractable such that it is probably not beneficial for the children concerned to have contact with their non-resident parents.<sup>52</sup>

Significant numbers of children have warm and supportive relationships with parents who have violent relationships with one another, so we must be careful when reports of parental conflict are allowed to influence decisions about parent-child contact.<sup>53</sup>

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49. Johnston, *High-Conflict Divorce*, *supra* note 15 at 165-82; Kelly, *supra* note 15, at 963-73; Maccoby & Mnookin, *supra* note 34.

50. Maccoby & Mnookin, *supra* note 34.

51. Johnston, *High-Conflict Divorce*, *supra* note 15, at 165-82.

52. Maccoby & Mnookin, *supra* note 34; Johnston, *High-Conflict Divorce*, *supra* note 15, at 165-82.

53. G. W. Holden et al., *Children Exposed to Marital Violence: Theory,*

According to Appel and Holden, sixty percent of the children whose parents were violent with one another were not themselves victims of physical child abuse,<sup>54</sup> suggesting that decision-makers need to assess the relationships with parents directly and not simply assume that children must have been abused because their parents were violent with one another. Unfortunately, however, mere allegations of conflict or even marital violence can be powerful tools in an adversarial system, and frequently result in reduced levels of court-approved contacts between fathers and children.<sup>55</sup> Disagreements about the occurrence, nature, and perpetrators of violence are quite common, and do not always reveal self-serving biases.<sup>56</sup>

The quality of the relationships between non-residential parents and their children is also crucial when determining whether to sever or promote relationships between divorced parents and their children. Regardless of the levels of violence, there are many families in which non-resident fathers and children have sufficiently poor relationships—perhaps because of the fathers' psychopathology, substance abuse, or alcohol abuse—such that “maintenance” of interaction or involvement may not be of overall benefit to the children. However, we do not know how many relationships are like this. Unrepresentative data sets, such as those collected by Greif in the course of research designed to study fathers and mothers who lose contact with their children after divorce, suggest that perhaps ten to fifteen percent of parents do not have either the commitment or individual capacities to establish and maintain supportive and enriching relationships with their children following divorce.<sup>57</sup> Taken together, Johnston's and Greif's estimates suggest that, at most, fifteen to twenty-five percent (depending on how greatly the two groups of parents overlap) of the children whose parents divorce might not benefit from regular and extended contact with their non-resident parents. Stated differently, of course, this suggests that more

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Research, and Applied Issues (1998); Maccoby & Mnookin, *supra* note 34; K. J. Sternberg & M. E. Lamb, *Violent Families*, in *Parenting and Child Development in “Nontraditional” Families* (M. E. Lamb ed., 1999).

54. A. E. Appel & G. W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 *Journal of Family Psychology* 578–99 (1998).

55. K. J. Sternberg, *Fathers, the Missing Parents in Research on Family Violence*, in *The Role of the Father in Child Development* 284–308 (M. E. Lamb ed., 3d ed. 1997).

56. S. L. Braver, *Divorced Dads*, *supra* note 30; Sternberg et al., *Understanding Domestic Violence and Its Effects: Making Sense of Divergent Reports and Perspectives*, in *Children Exposed to Family Violence* 121–56 (G.W. Holden et al. eds., 1998).

57. G. L. Greif, *Out of Touch: When Parents and Children Lose Contact After Divorce* (1997).

than three-quarters of the children experiencing their parents' divorce could benefit from having and maintaining relationships with their non-resident parents. Instead of "standard" parenting plans, therefore, individual circumstances should be examined to ensure that the arrangements made are sensitive to the parents' and children's strengths, schedules, and needs.

#### IV. CHILDREN'S NEEDS AND PARENTING PLANS

In all, basic research on early social development and descriptive research on the multifaceted factors of divorce have together yielded a clearer understanding of the ways in which divorce affects children and of how the welfare of many children could be enhanced by changes in common practices. Most importantly, we know that children benefit from supportive relationships with both of their parents, whether or not those parents live together. We also know that relationships are dynamic and are thus dependent on continued opportunities for interaction. In order to ensure that both adults become or remain parents to their children, post-divorce parenting plans need to encourage participation by both parents in as broad as possible an array of social contexts on a regular basis. Brief dinners and occasional weekend visits do not provide a broad enough or extensive enough basis for such relationships to be fostered, whereas weekday and weekend daytime and nighttime activities are important for children of all ages. In the absence of sufficiently broad and extensive interactions, many fathers drift out of their children's lives, placing their children at risk psychologically and materially. It is not clear exactly how much time is necessary to ensure that both parents stay involved in their children's lives. Braver has suggested that at least one-third of non-school hours should be spent with the non-resident parent and most experts would agree that fifteen percent (every other weekend) is almost certainly insufficient.<sup>58</sup>

#### V. THE SOCIO-LEGAL FRAMEWORK IN ENGLAND

We now consider the extent to which these research messages have informed both law and policy in England and how effective legal and policy changes have been in promoting the desired outcomes for children. We start by outlining the framework for private law established by the Children Act 1989. We then explore how the legal and policy reforms initiated by the Act have been translated into patterns of contact and residence. Finally, we outline and assess a number of recent legal and policy developments.

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58. Braver, *supra* note 30.

Partly in response to significant changes in patterns of family formation and dissolution, family law and policy in England and Wales have undergone significant changes over the last two decades, and the pace of change has accelerated recently. As Lewis et al. memorably observed: "In one generation the numbers marrying have halved, the number divorcing have trebled and the proportion of children born outside marriage has quadrupled."<sup>59</sup> Current estimates indicate that thirty percent of children under sixteen with married parents and sixty-four percent of children with cohabitating parents will experience the separation of their parents.<sup>60</sup>

The increasing disassociation of sex, marriage, and parenthood<sup>61</sup> has posed a major challenge for legislators and policy makers; the task has become more complex recently as post-separation parenting, particularly contact, has become a highly visible and contested media and political issue.<sup>62</sup> Although family policy in the United Kingdom has been based upon the principle of "reluctant but necessary intervention,"<sup>63</sup> there has been increasing pressure to "do something."

Observing this tendency, Dewar and Parker have described a shift in English family law from "functionalist" to "complex" eras.<sup>64</sup> In broad terms, Dewar and Parker characterize the postwar functionalist era as technocratic, discretionary, and expert-driven with a focus on welfare, adjudication and individualized outcomes.<sup>65</sup> In the complex era, by contrast, rights, rules and general principles have become more salient, with legislators bypassing experts and encouraging parents to make arrangements privately albeit within a strongly articulated normative framework about how to divorce

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59. J. Lewis et al., *Individualism and Commitment in Family and Cohabitation*.LCD, Research Paper Series 3 (London: Lord Chancellor's Department 1999).

60. J. Ermisch, & M. Francesconi, *Patterns of Household and Family Formation, in Seven Years in the Lives of British Families: Evidence on the Dynamics of Social Change from the British Household Panel Survey* (R. Berthoud & J. Gershuny eds., 2000)

61. J. Lewis & K. Kiernan, *The Boundaries Between Marriage, Nonmarriage, and Parenthood: Changes in Behavior and Policy in Postwar Britain*, 21 *Journal of Family History* 372-88 (1996).

62. One indicator of the current salience of contact as a media and political issue is the composition of the six person short-list for the Channel 4 "Political Impact Award" for 2004. One of the short-listed candidates was a father's rights protester who had scaled the Buckingham Palace balcony. Two other candidates were the former Home Secretary and his ex lover, both involved in a High Court paternity and contact case that had prompted the Home Secretary's resignation.

63. J. Finch, *Family Obligations and Social Change* 1 (Polity Press, 1989).

64. J. Dewar & S. Parker, *English Family Law Since World War II: From Status to Chaos, in Cross Currents: Family Law and Policy in the US and England* (S. Katz et al. eds., 2000).

65. *Id.*



amicably.<sup>66</sup> The Children Act 1989 was the first major development of the complex era and provides the basic framework for contemporary English family law.

## VI. THE LEGAL FRAMEWORK: THE CHILDREN ACT 1989

According to Stephen Cretney, the Children Act 1989 provides a “comprehensive clear and consistent statement of child law, based on clearly articulated principles.”<sup>67</sup> These principles are, to some extent, informed by research. Developmental research highlighting the importance of children’s relationships with both parents following separation was reflected in the concept of parental responsibility (PR),<sup>68</sup> a broad equivalent of legal custody. Instead of leaving consideration of PR to the discretion of the court, the Act automatically confers PR on all mothers and married fathers. Since 2003, unmarried fathers jointly registering a child’s birth also have PR automatically.<sup>69</sup>

In other respects, however, the Act avoids articulating specific guidelines about post-separation parenting. There is no presumption of contact with non-resident parents, though such a presumption or assumption was established (and continues) in case law and local court practice.<sup>70</sup> Nor did the Act specify rules to guide the determination of contact or residence, such as the “friendly parent” or “primary caretaker” rules. Instead the Act requires that the child’s welfare should be the paramount consideration in court decision-making,<sup>71</sup> with courts required to consider the following items on a “welfare checklist:”

- (a) the ascertainable wishes and feelings of the child concerned (considered in light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect of any change in his circumstances;

66. *Id.*

67. S. Cretney, *Family Law in the Twentieth Century* (2003).

68. “[A]ll the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.” Children Act 1989, Ch. 41, § 3(1) (Eng.).

69. Adoption and Children Act 2002, Ch. 38, § 111 (Eng.). The change was informed by research finding significant numbers of unmarried fathers were unaware of their lack of legal status. R. Pickford, *Fathers, Marriage and the Law* (1999). Unmarried fathers who have not jointly registered the birth, or did so prior to 2003, can register a Parental Responsibility Agreement (PRA) with the mothers’ consent, or apply to the court for a Parental Responsibility Order if the mother refuses her consent. Courts seldom refuse to grant PR to genetic fathers.

70. R. Bailey-Harris, *Contact-Challenging Conventional Wisdom?*, 13 *Child and Family Law Quarterly* 361–70 (2001).

71. Children Act 1989, Ch. 41, § 1(1) (Eng.).

- (d) his age, sex, background and other characteristics deemed relevant by the court;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other relevant person, is of meeting his needs; and
- (g) the range of powers available to the court under the Act.<sup>72</sup>

A second major departure was the “non-intervention” or “no order” principle. As the former Lord Chancellor put it, “the principle is that the court should not intervene . . . unless it is necessary. The family is best able to decide these matters, but the Children Act facilitates the intervention of the court.”<sup>73</sup> There is, in fact, strong evidence of a longstanding reluctance by courts to intervene in private family matters. Nevertheless, research data on the deleterious effect of parental conflict on children also initiated a desire to prevent courts from creating or exacerbating parental disputes.

Prior to the implementation of the Act, courts were required to approve the proposed arrangements for children of divorcing couples before a decree absolute could be granted, although the actual level of judicial scrutiny was minimal.<sup>74</sup> In addition, courts routinely made consent orders for custody, care and control, and access in uncontested cases. The Children Act 1989 instead requires the courts merely to decide whether to exercise any of their powers (for example, to make a contact order or order a welfare report) under the Act. Scrutiny of the Statement of Arrangements in divorce petitions has, in fact, been cursory. A recent study, for example, found that ninety-two percent of district judges spent five minutes or less reading the entire case file, and in only one out of 353 cases did the court exercise its powers under the Children Act by ordering a welfare report.<sup>75</sup> Court consideration of contact and residence is therefore almost entirely restricted to contested cases in which parents, whether married or unmarried, opt into the system by presenting their disputes to the court.

When presented with an application, furthermore, the court may only make an order if it considers “that doing so would be better for the child than making no order at all.”<sup>76</sup> The aim is, even at this late stage, to encourage parents to reach agreement and forestall a contested hearing, aided by a long-established settlement culture

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72. *Id.* § 1(4)(a)-(g).

73. See H.L. vol. 568 c. 1163 (Eng. 1996).

74. M. Douglas et al., *Safeguarding Children's Welfare in Non-Contentious Divorce: Towards a New Conception of the Legal Process?*, 63 Mod. L. Rev. 177 (2000).

75. *Id.*

76. Children Act 1989, Ch. 41, § 1(5) (Eng.).

founded on lawyer negotiation, mediation and dispute resolution in court.<sup>77</sup>

## VII. RESIDENCE AND CONTACT IN PRACTICE

How have the aspirations of the Children Act 1989 played out in practice? What patterns of contact and residence now prevail and how are arrangements achieved? In some respects, little has changed. Gendered patterns of residence show little signs of shifting, with ninety-one percent of children in lone or single parent families living with their mothers.<sup>78</sup> Of course, the gender-neutral language of “parenthood” in the Act did not aspire to shift patterns of primary caretaking and the ninety percent figure is not inconsistent with other jurisdictions in the Commonwealth.<sup>79</sup>

Contact is a rather different story. Over the last twenty years, far fewer children appear to be losing contact with their non-resident parents. Although some of the research is methodologically compromised and patterns of direct contact appear to vary across sub-groups, the proportion of children losing contact appears to have dropped from forty to fifty percent in the 1980s to twenty-five percent or less in recent studies.<sup>80</sup> The largest and most recent nationally representative study reported that somewhere between twenty-seven percent (according to the resident parents) and fourteen percent (according to both parents) of children had no contact with their non-resident parents.<sup>81</sup> It is unclear how much, if any, of this shift can be attributed to the Act rather than changing social norms, however. Similar trends are evident in other developed countries, including the United States, France and Australia.<sup>82</sup>

How the quantity and form of contact have changed is much less clear. Most researchers in the United Kingdom have measured frequency rather than the amount of contact. What is clear is that there is considerable variability in patterns of contact, with a group of children relatively contact-rich, a group relatively contact-poor and about one-third having no or hardly any contact. About half of all children have at least weekly contact, while a quarter to a third have

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77. R. Bailey-Harris et al., *Settlement Culture and the Use of the 'No Order' Principle Under the Children Act 1989*, 11 *Child & Family L. Q.* 53 (1999).

78. Office for National Statistics, *Census 2001: National Report for England & Wales* (2003).

79. J. Pryor & B. Rodgers, *Children in Changing Families: Life After Parental Separation* (Blackwell Publishers 2001).

80. Interview with J. Hunt, researching contact (2003).

81. A. Blackwell & F. Dawe, *Non Resident Parental Contact* (2004).

82. Amato & Gilbreth, *supra* note 7 at 557-73; J. Pryor & B. Rodgers, *Children in Changing Families: Life After Parental Separation* (2001).

contact monthly, or even less frequently.<sup>83</sup> Blackwell and Dawe also found that just under a third of the children stayed overnight at least once a week with their non-resident parents, while between one-fifth and one-third stayed overnight at least once a month. One recent study of contact involving children whose resident parents had remarried found that, of the seventy-three percent of children who had contact, thirty-five percent only visited, twenty-three percent stayed for a single night at a time, and forty-three percent stayed for more than one night at a time. For a significant number of children, therefore, the amount of contact, particularly contact involving overnight stays, is unlikely to be sufficient for them to build or sustain meaningful relationships with their non-resident parents.

The impact of the Children Act 1989 on the ways in which arrangements are arrived at is rather more apparent. In 1991, the year prior to implementation of the Act, 162,007 orders for custody and access were made in response to petitions by the parents. This dropped in 1992 to 44,121 orders for residence, contact, specific issues, prohibited steps, and PR. However, since then, the numbers of applications and orders have risen steadily. In 2003, the latest year for which figures are available, 121,303 orders were made,<sup>84</sup> amounting to seventy-five percent of the 1991 figure. The inexorable rise in applications and orders has led Pearce et al. to comment that:

Whilst judicial oversight of uncontested arrangements for children has indeed become more attenuated, parents appear to have compensated for this fact by positively forcing themselves upon the courts' attention through the presentation of an ever-increasing number of disputes.<sup>85</sup>

Although the numbers of applications and orders continue to rise, only a small minority of separated parents make applications for residence or contact orders. In a recent study for the Office for National Statistics, nine percent of resident parents and thirteen percent of non-resident parents reported that contact had been ordered by a court.<sup>86</sup> A further five percent of parents reported that

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83. Blackwell & Dawe, *supra* note 81; J. Walker, *FAINS—A New Approach For Family Lawyers?*, 436 Fam. L. J. 34 (2004).

84. 131,102 applications were made. Of these 6,073 were withdrawn, 1,154 orders were refused and 2,572 orders of no order were made. The orders made consisted of 9,524 parental responsibility orders, 31,966 residence orders, 67,184 contact orders, 9,487 prohibited steps orders and 3,142 specific issues orders. Department for Constitutional Affairs, *Judicial Statistics: Annual Report 2003*, 2004, Cm. 6251.

85. Pearce et al., *Love in a Cold Climate—Section 8 Applications under the Children Act 1989*, 29 Family Law 22 (1999).

86. Blackwell & Dawe, *supra* note 81.

their arrangements had been made through mediation or lawyers.<sup>87</sup> More than four-fifths of the parents had informal "arrangements."<sup>88</sup> These included about one-third of the parents with either no agreed arrangements, no regular pattern, or more commonly, no contact.<sup>89</sup> The informal arrangements also included parents who had agreed upon arrangements themselves, fifty percent of the resident parent sample and sixty percent of the non-resident parent sample.<sup>90</sup>

In broad terms, then, the majority of parents make arrangements privately as the legislators had intended; although a substantial majority do not establish any arrangements or regular contact. There are some indications that the negotiations are typically genuinely private as opposed to bargains made "in the shadow of the law," with lawyers informing parents of their likely chances of success if they litigated.<sup>91</sup> A qualitative study exploring the contact negotiation in thirty-five privately ordered cases included six cases in which neither parent consulted a solicitor at any stage, and twenty-four cases in which the divorcing parents did not discuss contact with their solicitors or the solicitors merely encouraged or supported without comment any of the contact arrangements that the parents had devised.<sup>92</sup> Although lawyers can advise parents on their likely bargaining entitlements (and did so in five of the thirty-five cases), this seems to occur only when parents present specific contact problems to their lawyers. It is, of course, impossible to tell from this qualitative study how often bargaining takes place outside the shadow of the law, but these findings are consistent with those obtained in a study of family lawyers<sup>93</sup> and in other research identifying a strongly collaborative or settlement-orientated family law culture in the U.K.<sup>94</sup>

Some commentators have questioned whether the extent of private ordering adequately safeguards children's interests or ensures extensive high quality contact and collaborative coparenting.<sup>95</sup> Although the research evidence is not extensive, private ordering seems to work reasonably well for many families, especially when parents are able to make informal agreements. Children in these

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. R. Mnookin & L. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L. J.* 950 (1979).

92. L. Trinder, *Contact After Divorce. What has the Law to Offer?*, in *Frontiers of Family Law* (G. Miller ed., 3d ed. 2003).

93. J. Eekelaar et al., *Family Lawyers* (2000).

94. *E.g.*, Bailey-Harris, *supra* note 77, at 53.

95. *E.g.*, Douglas, *supra* note 74, at 2.

families are more likely to continue having contact with their non-resident parents and to have more frequent contact than children whose parents have informal arrangements about which they did not agree or which were made through lawyers, mediators, and courts.<sup>96</sup> Parents who agreed on informal arrangements, particularly non-resident parents, are also more satisfied than parents whose arrangements were achieved in other ways.<sup>97</sup> Certainly, compared with families involved in court cases addressing issues of contact, families in which informal arrangements were made score higher on measures of parental relationship quality, communication patterns, shared decision-making, support for the children's relationship with the other parent, satisfaction with arrangements, and levels of parent and child well-being.<sup>98</sup> It seems fairly evident that there is an effect such that families which experience greater difficulties must turn to the family justice system, rather than the justice system creating the problems. Nevertheless, the family justice system may indeed exacerbate existing difficulties.

Although, the evidence points to the benefits of enabling parents who are capable of making their own agreements, there are still areas of concern. It remains unclear how many children have arrangements that will enable them to sustain positive relationship with both parents. There are some—albeit confusing—indications that children want to have more contact: Smith found that the majority of children considered that the amount of contact was “about right,”<sup>99</sup> while Dunn and Deater-Deckard reported that children wanted more contact.<sup>100</sup> A number of researchers have found that children do not feel adequately consulted about arrangements.<sup>101</sup> Although policy has strongly emphasized private ordering and the importance of collaborative parenting, in practice parents have been left largely unsupported with minimal information and advice services despite evidence that parents need and would welcome more support.<sup>102</sup>

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96. Blackwell & Dawe, *supra* note 81.

97. *Id.*

98. L. Trinder et al., *A Profile of Applicants and Respondents in Child Contact Cases in Essex* (2005) (Dep't of Constitutional Affairs Research Series).

99. M. Smith, *New Stepfamilies—A Descriptive Study of a Largely Unseen Group*, 15 *Child and Family Law Quarterly* 185–98 (2003).

100. J. Dunn & K. Deater-Deckard, *Children's Views of their Changing Families* (2001).

101. *E.g.*, Butler et al., *Children's Involvement in their Parents' Divorce: Implications for Practice*, 16 *Children and Society* 89–102 (2002); Dunn & Deater-Deckard, *supra* note 100.

102. *E.g.*, Lord Chancellor's Department, *Information Meetings and Associated Provisions within the Family Law Act 1996* (J. Walker ed., 2001).

## VIII. DEVELOPMENTS SINCE THE CHILDREN ACT 1989

It is now more than ten years since the implementation of the Children Act. The basic principles and framework of the Act have proven robust, but the increasing politicization of post-separation parenting and concerns over the continuing rise in applications for orders have prompted a series of policy and practice initiatives. The major changes have involved attempts to establish normative rules about how parents should jointly exercise their decision-making powers and to further divert parents from litigation. These efforts, not all of which have come to fruition, have broadly extended and accelerated the shift from a functionalist to a complex framework. The Human Rights Act of 1998, incorporating the European Convention on Human Rights, and particularly Article 8 on the right to respect for private and family life, is likely to further the move towards a rights rather than a utility framework.<sup>103</sup>

The last ten years have seen a number of experiments designed to guide and support parents in privately ordering arrangements. In the mid-1990s, the first national parenting program for separating parents was offered as part of a pilot scheme for the Family Law Act of 1996 (FLA). A single "information meeting" was designed to provide information to separating parents about how to support and consult with children following separation, as well as to encourage mediation and explain the divorce process. Although eighty percent of attending parents found the information useful, the material was insufficiently tailored to their specific needs, few parents gave the specially-designed leaflets about divorce to their children, and even fewer completed newly-formulated parenting plans.<sup>104</sup> Furthermore, only ten percent of attendees subsequently opted for mediation. A parallel study confirmed the unpopularity of mediation and continued reliance on solicitors, even though legally-aided parents were required to attend an intake meeting.<sup>105</sup> The "disappointing" results from the evaluations were cited as the primary reason for the non-implementation of Part II of the Family Law Act in 2001. As a result, efforts to reform divorce law so as to remove fault were observed, as indeed were the information meetings.

Despite the failure of the Family Law Act, elements of the process have been resurrected in a continuing effort to establish

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103. A. Bainham, *Contact as a Right and Obligation, in Children and their Families: Contact, Rights and Welfare* (A. Bainham et al. eds., 2003); C. Prest, *The Right to Respect for Family Life: Obligations of the State in Private Law Children Cases*, 35 *Family Law* 124 (2005).

104. Lord Chancellor's Department, *supra* note 102.

105. Legal Services Comm'n, *Monitoring Publicly Funded Family Mediation* (G. Davis ed., 2001).

normative rules for post-separation parenting. In particular, the expressed wish of parents in the FLA pilots both for more tailored information and support and their preferences for lawyers rather than mediation has prompted another national pilot scheme—the Family Advice and Information Service (FAINS). Here lawyers are intended to act as points of referral to other agencies (e.g., for relationship counseling, mediation, or support services for children) and support parents' consultations with their children. Unfortunately, the evaluation suggests that there are few local services to which clients can be referred.<sup>106</sup>

Attempts to establish a fair and effective mechanism for child support, another crucial element in supporting children's well-being, have also been problematic. In legal terms, arrangements for contact and child support are treated as separate matters, although they continue to be linked in the minds of many parents and do influence patterns of contact.<sup>107</sup> The Child Support Agency (CSA) was established in 1993 in an attempt to replace a discretionary approach to child support with a rule-based approach. An initially complex formula for calculating child support was eventually replaced by a simplified formula, but the parliamentary Work and Pensions Select Committee has recently damned the Agency's performance.<sup>108</sup> The committee observed that many cases were not assessed, that assessment was both slow and inaccurate, and that compliance was achieved in only about half of the cases.

Over the last few years a growing sense of crisis has enveloped the family justice system. A succession of reforms and new agencies have failed to take root—the abandonment of the Family Law Act, parental reluctance to embrace mediation in significant numbers, the FAINS experiment, and the ongoing crisis of the Child Support Agency. One other organizational problem involved the Children and Family Courts Advisory and Support Service (CAFCASS), a body charged with advising the family courts with respect to children's welfare. CAFCASS was set up very quickly, with limited additional funding, from numerous local court welfare services' guardians ad litem panels. The management of the organization was also strongly censured in a report by the House of Commons Select Committee on the Lord Chancellor's Department.<sup>109</sup>

The sense of crisis is particularly apparent, however, in what has become a highly polarized debate between women's groups focusing

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106. Walker, *supra* note 83.

107. Blackwell & Dawe, *supra* note 81.

108. Select Committee on Work and Pensions, Report, *The Performance of the Child Support Agency*, 2005, at 3.

109. House of Commons Select Comm. on the Lord Chancellor's Dep't, *Children and Family Court Advisory and Support Service* (2003).



on contact and domestic violence and fathers' groups focusing on the quantum of contact and enforcement of contact orders. Both sides of the debate have attracted, successively, considerable attention and caused extensive soul-searching from within the family justice system.

The linking of contact and domestic violence came to prominence first, with research playing an important part in stimulating concerns regarding whether presumptions about contact put women and children at risk.<sup>110</sup> In 1999, a report from the influential Advisory Board on Family Law (Children Act Sub-Committee) called for greater awareness of domestic violence, proposing new guidelines for identification, and more effective management of risk, but ruling out a presumption that there should be no contact when domestic violence had occurred.<sup>111</sup> In a leading judgment, the Court of Appeal echoed the report's conclusions.<sup>112</sup> An amendment to the Children Act 1989 required that courts consider the impact on a child of simply witnessing domestic violence when making decisions about contact or residence.<sup>113</sup> Furthermore, the standard application form for an order has been revised, now giving both applicant and respondent an opportunity to detail any allegations of harm. It is unclear at this stage exactly how the courts will deal with this new information because approximately fifty percent of contact and residence cases involve allegations of harm.<sup>114</sup> Meanwhile services to manage risk remain underdeveloped. "Supported" or low-vigilance contact centers have developed rapidly over the last decade but there remain very few "supervised" or higher vigilance centers. The result is that higher risk cases are inappropriately referred to supported contact centers.<sup>115</sup>

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110. *E.g.*, M. Hester & C. Pearson, *Domestic Violence, Mediation and Child Contact Arrangements: Issues from Current Research*, 3 *Family Mediation* 3–6 (1993); M. Hester & L. Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (1996).

111. Advisory Board on Family Law (Children Act Sub-Committee), Report, *A Report to the Lord Chancellor on the Question of Parental Contact in Cases Where There is Domestic Violence*, 1999.

112. *Re L* (a child) (contact: domestic violence); *Re V* (a child) (contact: domestic violence); *Re M* (a child) (contact: domestic violence); *Re H* (children) (contact: domestic violence) [2000] 4 All E.R. 609. The Court of Appeal drew heavily on a specially commissioned report by two eminent child psychiatrists. See C. Sturge & D. Glaser, *Contact and Domestic Violence—The Experts' Court Report*, 30 *Family Law* 615 (2000).

113. Adoption and Children Act 2002, Ch. 38, §120 (Eng.).

114. Buchanan et al., *Families in Conflict: The Family Court Welfare Service: The Perspectives of Children and Parents* (2001); Smart et al., *1 Residence and Contact Disputes in Court* (2003) (Department for Constitutional Affairs); Trinder, *supra* note 98.

115. Aris et al., *Safety and Child Contact* (2002) (Department for Constitutional Affairs).

More recently, however, the concerns of fathers' rights groups have led the agenda with strong critiques of perceived bias in the law and in the family justice system. A range of groups have argued for a statutory presumption of contact, a presumption of a minimum quantum of contact or a fifty-fifty division of time, and stronger enforcement measures for contact orders.<sup>116</sup> The external critiques have been complemented by internal criticisms of problems within the system. In an even-handed, although not necessarily the most integrated fashion, the Children Act Sub-Committee followed its report on domestic violence with a second report—*Making Contact Work*.<sup>117</sup> The report recommended a range of services for families not seeking court intervention, acknowledged that court involvement could make conflict worse, and called for a wider range of enforcement options. A number of High Court judges also entered the fray, highlighting problems of delay, lack of judicial continuity, and problems with enforcement.<sup>118</sup>

In response to widespread popular interest in contact and increasing criticism of the family justice system from a range of quarters, the government responded by issuing a consultation paper on contact, *Children's Needs and Parents' Responsibilities*,<sup>119</sup> in 2004, followed by a consultation response,<sup>120</sup> and a Draft Children (Contact) and Adoption bill in early 2005.<sup>121</sup> The approach is one that gives a little to each constituency without offering radical reform, and, perhaps most crucially, is largely resource neutral. There is not, for example, any scheme for parent information programs of the type included in the Family Law Act, nor is there an expansion of support services for children, despite a dearth of such

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116. E.g., B. Geldof, *The Real Love that Dare not Speak its Name*, in *Children and their Families: Contact, Rights and Welfare* (A. Bainham et al. eds., 2003).

117. Advisory Board on Family Law: Children Act Sub-Committee, *Making Contact Work: A Report to the Lord Chancellor* (2002).

118. *The Father v. The Mother*, [2003] All E.R. (D) 226; *A Father (Mr A) v. A Mother (Mrs A)* [2004] EWHC 142 (Fam); "Those who are critical of our family justice system may well see this case as exemplifying everything that is wrong with the system. I can understand such a view. The melancholy truth is that this case illustrates all too uncomfortably the failings of the system.... Responsible voices are raised in condemnation of our system. We need to take note. We need to act. And we need to act now." *F v. M* [2004] EWHC 727 (Fam) at ¶ 4.

119. Department for Constitutional Affairs, *Parental Separation: Children's Needs and Parents' Responsibilities*, 2004, available at <http://www.dfes.gov.uk/childrensneeds/> (last visited June 9, 2005).

120. The Secretary of State for Constitutional Affairs, *Parental Separation: Children's Needs and Parents' Responsibilities: Next Steps*, 2005, available at <http://www.dfes.gov.uk/childrensneeds/> (last visited June 9, 2005).

121. Draft Children (Contact) and Adoption Bill, 2005, available at <http://www.dfes.gov.uk/childrensneeds/Adoptionpercent20Bill.pdf> (last visited June 9, 2005).

services.<sup>122</sup> In many ways, the government's approach involved now familiar themes: minimizing conflict by improving parental access to services that might help them reach agreement without going to court, encouraging mediation (although mandatory mediation was ruled out), and piloting a legal advice phone line and a collaborative law model. However, for the first time the government has given some—albeit unclear—indication of suitable contact arrangements. The voluntary parenting plans devised for the Family Law Act, which largely consisted of several (very relevant) questions for parents to think through, have been updated and expanded to include contact timetable “templates,” though the Act fails to provide a minimum quantum of contact.<sup>123</sup> The plans are to be widely distributed for parents to complete, with or without a solicitor. The plans are also to be used with families in court.

The government's chief focus, however, was on the ten percent of families that go to court. Despite strong pressure from fathers rights groups, a statutory presumption of contact for contested cases was ruled out, as were presumptions of a minimum amount of contact or fifty-fifty shared care. Instead there is another new procedure designed to ensure continuous case management and avoidance of unnecessary delay.<sup>124</sup> Long-standing efforts to facilitate parental agreement without contested hearings are also continued with plans to extend in-court conciliation, a brief method of dispute resolution on court premises, to all courts.

There are signs, however, that the limitations of the purely legal or forensic approach adopted in *Making Contact Work* are being recognized.<sup>125</sup> The role of CAF/CASS officers is to be refocused, with less emphasis on report-writing and more on monitoring and facilitating the implementation of orders. The draft bill also gives the courts new powers to direct parents in contested proceedings to “contact activities,” either information sessions, parenting programs, or counseling. Likewise, a pilot scheme, the Family Resolutions Pilot Program, combines two parenting sessions with a modified form of in-court conciliation.<sup>126</sup> These potentially more supportive

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122. J. Hawthorne et al., *Supporting Children through Family Change: A Review of Interventions and Services for Children of Divorcing and Separating Parents* (2003).

123. *Putting Children First: Parenting Plans, a Planner for Separating Parents*, available at <http://www.dfes.gov.uk/childrensneeds/> (last visited June 9, 2005).

124. President of the Family Division, *The Private Law Programme* (2005) (Department of Constitutional Affairs), available at <http://www.dca.gov.uk/family/plpguide.pdf> (last visited June 9, 2005).

125. *See Children and their Families: Contact, Rights and Welfare* (B. Bainham et al. eds., 2003).

126. M. Maclean, *The Family Resolutions Pilot Project*, 34 *Family Law* 630 (2004).

interventions are a step forward. How they will work is unclear. The explanatory notes in the draft bill make it clear that referral to a contact activity is largely to be confined to repeat or entrenched cases and yet the cost estimates envisage a short program delivered by voluntary agencies. With the exception of the extremely modest Family Resolutions pilot, therefore, parents in contested cases will infrequently have access to parenting programs, and high conflict cases will not be referred to specialist (and expensive) programs delivered by highly-trained mental health professionals. There are no plans to develop support services for children involved in contested cases, despite research indicating high levels of distress.<sup>127</sup>

Alongside the “support” measures are new powers in enforcement cases, which currently comprise about fifteen percent of contact applications.<sup>128</sup> The new “get tough” options include community service of forty to two hundred hours, curfews (including electronic tagging), or compensation orders for the contact parent when breaches of a contact order have financial consequences, although for the contact parent only.<sup>129</sup> Whether or not these measures will facilitate high quality contact is unclear. However, it is disconcerting that the draft bill merely directs the court to take account of a child’s welfare in exercising these powers, rather than making the child’s welfare the paramount consideration as in all other private law matters. Equally, while the court must take into account “reasonable excuses” for non-compliance, it is not required to first consider the continued appropriateness of the original order before exercising its enforcement powers.

## IX. CONCLUSION

“Plus ça change, plus c’est la même chose.”

—Alphonse Karr, 1849

We began this paper by identifying the key messages from systematic research on factors supporting children’s adjustment following parental separation. In essence, children are most likely to thrive if they have warm and supportive relationships with two authoritative and collaborating parents in addition to financial security. In most instances, this involves extensive contact with non-resident parents, although in a minority of cases continued contact is

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127. Buchanan, *supra* note 114; Trinder, *supra* note 98.

128. Department for Constitutional Affairs, *Parental Separation: Children’s Needs and Parents’ Responsibilities*, 2004, available at <http://www.dfes.gov.uk/childrensneeds/docs/DfesChildrensNeeds.pdf> (last visited June 9, 2005).

129. Buchanan, *supra* note 114.

counterproductive. In the second half of the paper we have traced the main developments in English law and policy over the last decade or so and summarized what is known about the resulting outcomes for children.

The extent to which the research messages and policy initiatives knit together is not straightforward. In some respects, the relationship between the two is strong, in others tangential or even distorted. In broad terms, there is much convergence between children's psychological needs and the "good divorce" involving continuing and collaborative parenting that policy-makers and practitioners have tried to promote. However, some critical research messages have been largely overlooked or else given minimal attention. The quantity rather than the mere continuation of contact is beginning to be considered, but the quality of contact with and parenting by both residential and non-residential parent have largely been ignored. Nor have lawmakers addressed the needs of the twenty to twenty-five percent of children who do not have contact. There has been minimal debate on ways to encourage and support non-resident parents who do not exercise contact for whatever reason. There is also concern that research messages have been transformed or distorted. As Piper argues: "[L]aw has reconstructed the message that harm is imposed on children by parents separating and being in conflict to encourage the two parents to make their own arrangements, to agree and to be cooperative, so aiding settlement and avoiding adjudication."<sup>130</sup> Reaching an agreement, particularly at the door of the court, does not of itself guarantee or even indicate the absence of parental conflict or necessarily produce positive outcomes for children.<sup>131</sup> Above all, there is concern that findings which suggest that contact typically benefits children have been distorted by lawmakers into an inflexible legal rule or contact presumption that, in practice, can preclude consideration of specific circumstances and the needs or wishes of specific children.<sup>132</sup>

Of course, research has not been the only driver behind law and policy. A bipartisan commitment to upholding family autonomy and concern about public spending have meshed neatly with a somewhat partial reading of research on the impact of parental conflict on children to promote private ordering and to encourage diversion from contested hearings. More recently, the impact of pressure groups on policy has been strong. A fourth driver is the European Convention on Human Rights, which is already strongly influencing domestic

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130. C. Piper, *Assumptions About Children's Best Interests*, 22 *Journal of Social Welfare and Family Law* 261-76, 271 (2000).

131. Davis, *supra* note 105.

132. Piper, *supra* note 130, at 261-76.

case law<sup>133</sup> and which may well present the strongest challenge to a broad, evidence-based welfare approach in favor of rules and rights.<sup>134</sup>

What have children gained from the reforms discussed here? In the majority of families, parents do not go to court, children continue to have contact with non-resident parents, and their parents are not embroiled in legal disputes. For them, the emphasis on private ordering appears to have worked and, although there are some concerns about whether children's interests are being safeguarded,<sup>135</sup> there is no guarantee that greater judicial oversight would be beneficial. Doing nothing has probably been the most effective intervention for many families. This allows parents who are able to cooperate to make and adapt their own post-separation arrangements and take advantage of broad changes in social norms regarding father involvement and the importance of continuing parent-child relationships. Nevertheless, although the government has produced a range of high quality information materials, there remains a significant lack of preventative and advisory services for parents and children. While private ordering outside of the courtroom may well have avoided making the situation worse for some families, not enough has been done to help families make things better.

The gains for children whose parents turn to the courts are more difficult to assess. Until very recently the goal has been to enable or pressure parents to reach agreements if at all possible, with the courts making decisions as a last resort. Although early diversion may forestall the escalation of conflict, little has been done to help parents reduce or manage conflict. There are promising signs that more supportive interventions, such as the parenting program elements of the Family Resolution Pilots and "contact activities" proposed in the 2005 bill, may emerge. At present, though, we are a long way away from a differentiated case management system, offering rapid assessment, educational programs, and support for both low and high conflict families.

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133. C. Prest, *The Right to Respect for Family Life: Obligations of The State in Private Law Children Cases*, 35 *Family Law* 124 (2005).

134. Bainham, *supra* note 125.

135. *E.g.*, Douglas, *supra* note 74, at 2.

