

Shared parenting – a 70% solution?

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In the context of increased litigation over contact, this article examines the debate around proposals for a presumption of 'shared parenting'. It concludes that such a presumption would not achieve the aims of its proponents. Its introduction would also be fraught with practical and doctrinal problems.

In 1987 Michael King¹ criticised the Law Commission's proposals for the reform of the law relating to custody and access, the proposals that were subsequently embodied in the concept of parental responsibility in the Children Act 1989.² He argued that custody battles were often seen as symbolic contests affirming the parties' relative fitness as parents and that joint custody often amounted to a mechanism used to mollify non-residential parents. The proposed changes would likewise, he said, be largely symbolic in nature. They would have limited practical significance since courts have no control over future events, orders are subject to extra-legal re-negotiation and, in the case of older children who can vote with their feet, the court's pronouncement can be overridden completely. To suggest, as the Law Commissioners did, that the law is capable of 'maintaining beneficial relationships' is to confuse legal rhetoric with social reality.³ While the symbolic recognition of both parents might help to reduce bitterness, King said, the law is not capable of changing human behaviour.

In fact, the report of the Law Commission in 1988 reveals that the Commissioners were not solely preoccupied with the supposed instrumental effects of the law.⁴ They suggested that giving equal status to parents should not only be seen as part of a general aim to encourage both to feel 'concerned and responsible'⁵ for their children, but also as part of the objective of decreasing the incidence of symbolic litigation.⁶ It was hoped that the incorporation of the concept of parental responsibility into the Children Act 1989, together with the 'no-order' principle, would have the effect of reducing conflict. Because neither parent would lose parental rights or status on divorce, there would be less to fight over.⁷ The persistence of parental responsibility, it was thought, might lower the stakes and avoid casting the non-resident parent in the role of 'loser' who loses all.⁸

NEW PRESSURE FOR CHANGE

Yet the package that the Children Act 1989 offers to parents would appear not to have worked to increase parental co-operation and decrease litigation and, once again, dissatisfaction with the lot of non-resident parents is being voiced. First, evidence suggests that co-operation in the form of joint parenting and joint decision making are far from the norm; indeed, many

¹ 'Playing the Symbols – Custody and the Law Commission' [1987] Fam Law 186.

² *Family Law, Review of Child Law: Custody*, Working Paper No 96 (HMSO, 1986).

³ Referring to para 3.7 of the Working Paper (ibid). And further: 'Here it seems to me, the Commissioners are entering a fantasy world in which the courts have the power to ensure the welfare and happiness of all children who come before them' (M. King, op cit, n 1, at p 187).

⁴ *Family Law, Review of Child Law. Guardianship and Custody*, Law Com No 172 (HMSO, 1988).

⁵ Ibid, at para 2.10.

⁶ Ibid, at paras 2.11 and 4.5. Indeed, the Law Commission stated: 'we are only too well aware of the limits of the law in altering human relationships', at para 4.5.

⁷ Ibid, at para 4.5. See also J. Roche, 'The Children Act 1989: Once a Parent Always a Parent?' (1991) 5 *Journal of Social Welfare and Family Law* 345. Although, in practice, one parent, the resident parent, would be in a better position to exercise parental responsibility after separation, both parents, in law, would retain the full range of parental duties and powers.

⁸ Op cit, n 4, at para 4.5.

non-resident fathers lose contact with their children altogether.⁹ Secondly, bitterness and conflict have apparently not been reduced. Continuously erupting contact disputes – what Grant J referred to 20 years ago as ‘perennials’¹⁰ – have not been eliminated. On the contrary, the volume of disputes has increased.¹¹

The law is once again being criticised and reforms debated. Some of the criticism comes from campaigning groups such as Families Need Fathers and the Equal Parenting Council, groups representing non-resident parents, many of whom express deep feelings of anger and betrayal. But concern about contact is reported to be more widespread than this. A recent consultation paper prepared by the Children Act Sub-Committee of the Lord Chancellor’s Advisory Board on Family Law¹² was issued largely, it seems, as a response to concerns noted by respondents from diverse disciplines to an earlier consultation paper.¹³ Those concerns related to the perception that court orders did not achieve the objective of facilitating or sustaining relationships between children and non-resident parents and also to the difficulties involved in enforcement.¹⁴

Once again, the search is on for mechanisms that will promote agreement, reduce litigation and encourage responsible parenting. One of the proposals for change, advocating what is termed ‘shared parenting’, rests on the (now familiar) argument that equality of status or rights will achieve these aims. It is this proposal that we wish to consider here.

SHARED PARENTING

The notion of shared parenting has already come to be seen as potentially useful by some academics and practitioners in other jurisdictions where disillusionment about the law regulating contact has become apparent. One such jurisdiction is Australia. A new Part VII of the Australian Family Law Act 1975, which was introduced in 1996 by the Family Law Reform Act 1996, embodies concepts and aims similar to those central to the Children Act 1989. It ‘too’ emphasises that parenthood survives the end of the parents’ relationship. It ‘too’ casts parenthood as an obligation rather than a right and as one that is shared between both parents,¹⁵ and it ‘too’, according to research into its operation, has provoked discontent among non-resident parents. The aim of ensuring that parents would continue to share responsibility for raising children after separation and the introduction of a right of contact for children¹⁶ created a situation where non-resident parents, who ‘had been led to expect’ ‘extra entitlement’, have been disappointed by the courts.¹⁷ The researchers go on to suggest that while some parents might find agreement easier under the Act, others regard it as providing a new and more powerful armoury to be deployed in a battle over the children. In order to avoid

⁹ See B. Simpson, P. McCarthy and J. Walker, *Being There: Fathers after Divorce* (University of Newcastle upon Tyne, Relate Centre for Family Studies, 1995), at chapter 3. See also M. Maclean and J. Eckelaar, *The Parental Obligation* (Hart Publishing, 1997), at p 121.

¹⁰ *Conciliation and Divorce* (Barry Rose, 1981).

¹¹ R. Bailey-Harris, G. Davis, J. Barron and J. Pearce, *Monitoring Private Law Applications Under the Children Act: A Research Report to the Nuffield Foundation* (University of Bristol, 1998).

¹² Consultation Paper issued by the Children Act Sub-Committee of the Lord Chancellor’s Advisory Board on Family Law, *Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact between Children and their Non-residential Parents and the Enforcement of Court Orders for Contact* (LCD, 2001).

¹³ *Ibid.*, at para 1.3.

¹⁴ *Ibid.*, at para 1.4.

¹⁵ J. Dewar and S. Parker with B. Tynan and D. Cooper, *Parenting, Planning and Partnership: The impact of the new Part VII of the Family Law Act 1975*, Family Law Research Unit Working Paper No 3 (Griffith University, 1999), at p 4.

¹⁶ See H. Rhoades, ‘The “No Contact Mother”: Reconstructions of Motherhood in the Era of the “New Father”’ (2002) 16 *International Journal of Law, Policy and the Family* 71, at p 72, referring to Australia, Senate, Family Law Reform Bill 1994, Explanatory Memorandum (November 1994), at para 5 and Family Law Act 1975 (Cth), s 60B(2)(b), respectively.

¹⁷ J. Dewar and S. Parker, *op cit*, n 15. See also, evidence from an official enquiry after 2 years of operation of the 1996 amendments *Child Contact Orders: Enforcement and Penalties* (Family Law Council, 1998); H. Rhoades, *op cit*, n 16, at p 72.

such battles, some lawyers and mediators use ‘symbolic’ shared residence orders¹⁸ to ‘sell’ a settlement to the parties. These symbolic orders give liberal ‘parenting time’ – contact – to the non-resident parent.¹⁹ Their use in cases of conflict, may, the researchers think, constitute evidence that they might have settlement-promoting potential in some instances.

Shared parenting is being promoted also by those concerned, in several jurisdictions, about so-called ‘parental alienation syndrome’ (PAS).²⁰ Mental health experts in the US have suggested that ‘time-share’ over extended periods such as alternate weekends and holidays can help to repair relationships between children and ‘rejected’ parents. These periods, they say, should be set by means of court orders and it should not be in the parents’ power to alter them.²¹

In the UK too now, there is an emerging view that greater use of similarly designated court orders would be beneficial. The words ‘shared residence orders’ and ‘shared parenting’ are being used in some influential quarters in relation to post-separation parenting, with the argument being put forward that such arrangements are fairer, good for children and help to encourage settlement. For instance, at a recent conference jointly organised by the Family Courts Consortium and the Lord Chancellor’s Department (LCD), Hamish Cameron, a consultant child psychiatrist, advocated ‘a transparent, easily understood framework’ for shared parenting. By this he meant a court-specified presumptive tariff of ‘balanced parenting time’ – which might be a 70/30 split – which would be enforced from the first directions appointment in section 8 applications.²² Tony Hobbs, a psychologist, recommends a similar measure as a means of ‘disarm[ing] the majority of PAS-based legal battles at a stroke’:

‘Following separation, rather than requiring court action for contact between children and either parent to be maintained, consideration could be given to developing a satisfactory form of legal “default” position, whereby child–parent contact continues to be shared, unless there is a valid reason to the contrary.’²³

MAKING CONTACT WORK

Most significant, however, is the appearance of the debate about ‘shared residence’ or ‘shared parenting’ in the report published by the LCD in February 2002, *Making Contact Work*.²⁴

¹⁸ Op cit, n 15, at p 73.

¹⁹ This is not, of course, a new suggestion: see, for example, A. Bainham who suggested in 1990 that commentators should focus their critical faculties on what, if anything, the Children Act 1989 was doing to promote ‘time-sharing’ (‘The Privatisation of the Public Interest in Children’ (1990) 53 MLR 206, at p 212).

²⁰ H. Rhoades, for example, refers to an Australian case, *In the Marriage of Johnson* (1997) 22 Fam LR (op cit, n 16, at p 74, n 44). See also, a Canadian article by N. Bala, ‘A Report from Canada’s “Gender War Zone”’: reforming the child-related provisions of the Divorce Act’ (1999) 16 *Canadian Journal of Family Law* 163. In the UK, there is considerable scepticism about the existence of parental alienation syndrome (PAS). It was argued in an expert report submitted to the Court of Appeal that PAS does not exist in that it is not generally recognised in the area of mental health and that the concept is unhelpful (C. Sturge in consultation with D. Glaser, ‘Contact and Domestic Violence – The Experts’ Court Report’ [2000] Fam Law 615). Their view was accepted by the court (*Re L (Contact: Domestic Violence)*; *Re V (Contact: Domestic Violence)*; *Re M (Contact: Domestic Violence)*; *Re H (Contact: Domestic Violence)* [2000] 2 FLR 334, per Thorpe LJ). The judgment in a more recent Court of Appeal case has been interpreted by one commentator as acknowledging the existence of the syndrome (*Re C (Prohibition on Further Applications)* [2002] 1 FLR 1136 discussed in T. Hobbs, ‘Parental Alienation Syndrome and UK Family Courts – The Dilemma’ [2002] Fam Law 381). However, this interpretation is not borne out by the words of the judge (see J. Masson ‘Parental Alienation Syndrome’ [2002] Fam Law 568, and C. Williams, ‘Parental Alienation Syndrome’ [2002] Fam Law 410).

²¹ See M. Sullivan and J. Kelly, ‘Legal and Psychological Management of Cases with an Alienated Child’ (2001) 39(3) *Family Court Review* 299, at p 305.

²² ‘Sanctions of the Last Resort’ talk given at the ‘Making Contact Work’ conference, 20 November 2001: see, now, Conference Report by the Family Courts Consortium, 2002.

²³ T. Hobbs, ‘Parental Alienation Syndrome and UK Family Courts – The Dilemma’, op cit, n 20, at p 386.

²⁴ The Advisory Board on Family Law: Children Act Sub-Committee *Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-residential Parents and the Enforcement of Court Orders for Contact* (LCD, 2002).

Responding to the submissions of Families Need Fathers,²⁵ The Equal Parenting Council and the Association for Shared Parenting on this 'important question',²⁶ the report endorses the objective of 'full involvement' on the part of both parents²⁷ and sets out the proposal of the three groups aimed at achieving this. The proposal they make is that, in order to counter the idea that 'winner takes all' and to promote parental involvement by means of the least adversarial methods possible, there should be a presumption of shared parenting.²⁸ The argument put forward in support of this proposition is that such orders, which would not necessarily mean equal division of time, would amount to recognition of the importance of both parents and, if they were to become the norm, would 'set the tone' for negotiation and 'remove obstacles' to contact. How far it is intended that this presumption would extend is not clear from the report; no distinction is made between married and unmarried parents or between those with and without parental responsibility.

The LCD report makes no recommendations on shared parenting, noting that such 'radical reform' went beyond the scope of its remit.²⁹ It also evinces some scepticism about the benefits of a move towards shared parenting, observing that 'substantial investigation and validation' would be required first. Financial constraints and distance might make shared parenting impractical; parents might not be able to afford two homes 'with suitable child facilities and within easy travelling distance of each other'.³⁰ In addition, one parent might need protection from the other, as might the child.³¹ Finally, the report states that 'while we understand the argument that an expectation of shared parenting as the norm should restrict the scope for acrimonious disagreement, we doubt its efficacy in practice'.³² Nevertheless, while it questions the practical application of a principle of shared parenting, the report emphasises that 'we would certainly wish to encourage it'. It goes on to suggest that the Government might consider setting up a pilot scheme to test the effect of such orders.³³

Despite the circumspect attitude to shared parenting in the report, the references to it in the document have had an impact. Very quickly the press took up the debate³⁴ and an international conference, chaired by Dame Margaret Booth, was arranged to examine the possibility of a 'presumption of shared parenting with the public law threshold of "good reasons"'.³⁵ It appears, therefore, that shared parenting is now on the law reform agenda.³⁶

RE-VISITING THE PAST

That the idea is being treated as new and that shared parenting is attracting serious consideration as a solution to the problem of parental conflict over contact is puzzling. In effect, the proponents of shared parenting have resurrected the old debates over joint custody

²⁵ H. Rhoades notes that the majority of calls for legislative change in Australia came from fathers' groups and references, *inter alia*, M. Kaye and J. Tolmie, 'Fathers' Rights Groups in Australia' (1999) 12 *Australian Journal of Family Law* 19, at p 33; R. Graycar, 'Law Reform by Frozen Chook: family law reform for the new millennium?' (2000) 24 *Melbourne University Law Review* 737 (H. Rhoades, *op cit*, nn 16 and 20).

²⁶ *Op cit*, n 24, at para 6.

²⁷ *Ibid*, appendix 3, at paras 1 and 5.

²⁸ *Ibid*, appendix 3, at paras 3 and 8.

²⁹ *Ibid*, preface, at para 9.

³⁰ *Ibid*, appendix 3, at para 13.

³¹ *Ibid*, appendix 3, at para 14.

³² *Ibid*, appendix 3, at para 14.

³³ *Ibid*, appendix 3, at para 16.

³⁴ See M. Driscoll, 'After the split, the marrying of minds' (2002) *The Sunday Times*, February 17, and M. Freely, 'Children First' (2002) *The Guardian*, March 27.

³⁵ A. Sealy, 'A Different Framework for Contact' [2002] *Fam Law* 88.

³⁶ Calls for increased use of shared parenting are likely to intensify when the details of the new child support scheme become more widely known. The Child Support, Pensions and Social Security Act 2002, amending the Child Support Act 1991, increases the possibility of a reduction in payments for non-resident parents (NRPs) where staying contact occurs. See further, N. Wikeley, 'Child Support – The New Formula, Part 1' [2000] *Fam Law* 820, at p 822.

that took place during the 1980s. At that time, much was made of the developments in the USA where joint custody or shared residence orders were in vogue as the preferred answer to the conflict resulting from a win–lose situation between the separating parents. Indeed, the Report of the Matrimonial Causes Procedure Committee in 1985 had advocated joint legal custody as a solution for England and Wales but had warned that it should not be mandatory.³⁷ The 1986 Report of the Law Commission found that the case for a legal presumption in favour of joint custody had not been made out.³⁸ The Commission considered both joint legal custody and joint physical custody and concluded that the former would be potentially undesirable in practice,³⁹ while the latter would be potentially contrary to the interests of both mothers and children.⁴⁰ The Law Commission, in common with many feminist commentators, was concerned that imposed joint custody could detrimentally alter power balances and could increase the likelihood of litigation. There are cases, it said, where the needs of custodial parents and children to feel free from any threat of interference ‘must be put before the symbolic advantages of joint custody’.⁴¹ And, it commented, in the absence of genuine shared care, joint custody would be largely symbolic.⁴² In its 1988 report,⁴³ the Law Commission showed no greater enthusiasm for joint custody and it clearly did not favour the introduction into the law of any presumptions. Instead, it opted for a flexible menu of orders and explicitly rejected the idea that the court should specify how the child’s time should be divided.⁴⁴

The absence of a presumption of joint custody in the Children Act 1989 is, then, the result of considerable debate over a period of time. The scheme of parental responsibility, section 8 orders and the ‘no order’ principle was devised after careful deliberation and there were cogent reasons for the decision not to introduce a shared parenting presumption. Yet there is a myth emerging to the effect that the omission of a shared parenting provision was an error or was inadvertent. The President of the Family Division is reported as saying that the shared parenting philosophy underpinning the Children Act 1989 was ‘thought out, but not sorted out’⁴⁵ and Cameron likewise commented: ‘We just took it [the new thinking of the Children Act] on board, we didn’t actually think through what we were trying to do’.⁴⁶

This is not to deny that disagreements persisted after the passage of the Children Act 1989. While some commentators looked on the parental responsibility provisions with a somewhat cynical eye, others saw in them an unsuccessful attempt to introduce equality between parents. Edwards and Halpern fell into the former category. They maintained that the Children Act 1989, along with the Child Support Act 1991 and the Criminal Justice Act 1991, included provisions designed as mechanisms to restructure thinking on parental responsibility so as to legitimate a reduction in state support for members of the family.⁴⁷ In contrast, Bainham, for example, contended that the Children Act 1989 was intended to promote dual parenting but had failed to do so; it promotes neither co-operative decision making nor ‘time-sharing’, he said.⁴⁸ More recently, the Equal Parenting Council produced a ‘Shared Residence Guide’, which argues that shared custody was Parliament’s intention behind the Children Act 1989. It goes on to give reasons for supporting such a legal principle, referring to US practice and, notably, to

³⁷ (HMSO, 1985), at para 4.131, which proposed that ‘prominence’ should be given to joint custody to ‘reinforce the idea of continuing joint parental responsibility’. The report did not recommend a presumption because it would ‘detract from the overriding principle’ of the welfare of the child (at para 4.132).

³⁸ Op cit, n 2, at para 4.46.

³⁹ Ibid, at paras 4.40–4.41.

⁴⁰ Ibid, at para 4.45.

⁴¹ Ibid, at para 4.43.

⁴² Ibid, at paras 4.40 and 4.43.

⁴³ Op cit, n 4.

⁴⁴ Ibid, at para 4.10.

⁴⁵ Dame Elizabeth Butler-Sloss P, quoted by M. Driscoll, op cit, n 34.

⁴⁶ Conference Report, op cit, n 22, at p 15.

⁴⁷ S. Edwards and A. Halpern, ‘Parental Responsibility: An Instrument of Social Policy’ [1992] Fam Law 113.

⁴⁸ Op cit, n 19, at pp 211–212.

the endorsement by George W. Bush, as Governor of Texas, of 'joint managing conservatorship'.⁴⁹

Whatever the intention of members of the legislature, it has become apparent over the last decade that parents – particularly fathers who do not have their children living with them – have come to see the current legal framework as no more helpful to their situation than the old. They argue that parental responsibility is a sham, that courts will not properly consider shared residence and that by failing to enforce orders, they allow recalcitrant mothers to obstruct contact. Specifically, the legal concept of parental responsibility is seen as conferring on many fathers what is merely a dubious symbolic affirmation of their parenting, since they do not have what they consider to be enough involvement with their children.

PROFESSIONAL ATTITUDES

In some respects this perception is surprising in that courts, in the 1990s, developed what – until Thorpe LJ re-named it an assumption – was clearly a presumption in favour of contact.⁵⁰ Several cases reiterated that it was almost always in a child's interests to have contact with both parents. Notions of the implacably hostile mother and something akin to 'parental alienation syndrome' were developed in the course of judgments revealing an increasingly tough line on 'recalcitrant' parents. Courts were also showing greater willingness to employ coercive measures to enforce orders as, for example, in *A v N (Committal: Refusal of Contact)*.⁵¹ It is only very recently that judicial attitudes have begun to change and, moreover, these changes are limited in scope. In cases of domestic violence, proof of violence (the risk is not sufficient)⁵² may offset the assumption, but it does not necessarily do so. Nor, as *Re L* makes clear, does it create a presumption against contact.⁵³ And while Thorpe LJ in *Re L* sought to stress that other factors might also offset the assumption, there are as yet no reported decisions affirming his view.

Solicitors and mediators too have tended to exhibit a strong preference for the dual-parent post-separation family. Family solicitors have been trained to promote responsible parenting, co-operation and contact and they have become skilled at doing so. They talk in terms of 'responsibilities' and 'involvement' and stress the continuing nature of parental responsibility for both mothers and fathers.⁵⁴ They also act together to encourage their clients to make an agreement – a development that 'creates an impression of solicitors acting in concert in the face of one (or two) difficult parents'.⁵⁵ And they vigorously promote contact: 'The only time I lay down the law and I'm heavy handed is if I've got a mother who's not allowing contact ... I try to beat everybody into submission'.⁵⁶ They are putting across a message, then, that is consistent with the promotion of dual parenting: only those parents who co-operate with the other parent and agree contact are taking the sensible approach to divorce.⁵⁷

These ideas about parental responsibility and the benefits of contact in this context are shared by divorce court welfare officers (now children and family reporters).⁵⁸ Their practice guidelines give priority to encouraging an agreed outcome and there would seem to be an

⁴⁹ www.equalparentingcouncil.org/makingcontactwork.htm.

⁵⁰ *Re L (Contact: Domestic Violence)*, op cit, n 20, at p 367G.

⁵¹ [1997] 1 FLR 533.

⁵² See F. Kaganas, 'Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) – Contact and domestic violence' [2000] CFLQ 311.

⁵³ *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2000] 2 FLR 334.

⁵⁴ C. Piper, 'How do you define a family lawyer?' (1999) 19(1) *Legal Studies* 93.

⁵⁵ R. Bailey-Harris et al, op cit, n 11.

⁵⁶ B. Neale and C. Smart, "'Good" and "Bad" Lawyers? Struggling in the Shadow of the Law' (1997) 19(4) *Journal of Social Welfare and Family Law* 377, at p 392.

⁵⁷ M. King, "'Being Sensible", Images and Practices of the New Family Lawyer' (1999) 28(2) *Journal of Social Policy* 249.

⁵⁸ See C. Piper, 'The wishes and feelings of the child', in S. Day Sclater and C. Piper (eds), *Undercurrents of Divorce* (Ashgate, 1999), at pp 88–92.

unquestioning belief among some in the good of contact.⁵⁹ For example, a recent letter to *Family Law* from a team manager discusses the situation ‘where one parent is implacably hostile to contact and the child is suffering’. The author goes on to add ‘when wouldn’t the child suffer?’, a rhetorical assertion indicating an unquestioning assumption that children always suffer in these circumstances.⁶⁰ The court welfare officers (CWOs) in Sawyer’s study⁶¹ were a little more equivocal. They were ‘committed to the value of children having contact with both parents but believed that other factors could outweigh that presumption’.⁶² However, their reservations did not, it seems, affect their practices; even in cases where they thought contact inappropriate, they recommended it. They did so because they perceived a strong expectation of contact at all costs on the part of the courts. Interviewees thought that the courts put undue emphasis on the advantages of contact and ignored its possible detrimental aspects. But they did not question the appropriateness of operating a general presumption in favour of contact. Where this faith in the advisability of contact in the general run of cases stems from is obscure. Interviewees asserted that their recommendations were based on research, yet they were unable to specify which research they relied on. Bailey Harris et al report similar findings of conviction without any obvious basis. They observe that the tendency is for all the professionals to support one another in a ‘circular’ manner: ‘Contact is presumed to be for the good of the child, but often no evidence is produced to demonstrate this’.⁶³

There is, then, extensive evidence that all professionals involved with separating families sing from the same song sheet about the benefits of contact, parental co-operation and communication.⁶⁴ In that sense the scheme of parental responsibility, section 8 orders and the hurdle to the making of orders created by section 1(5) (the so-called no-order presumption) has influenced attitudes – certainly those of professionals and possibly those of the parents who are persuaded not to oppose contact.⁶⁵

A 70/30 PRESUMPTION

In this context, a presumption or assumption, particularly one that does not entail equal division of time, does not seem to be quite so radical. For example, the 70/30 split advocated by Cameron – effected, perhaps, by weekend contact each week⁶⁶ – might appear to reflect a relatively common arrangement and so seem unobjectionable.⁶⁷ However, we argue, the introduction of a presumption would, in fact, be fraught with both practical and doctrinal difficulty.

Parents who are able to co-operate have little need of a presumption. The proponents of shared parenting see its utility, rather, in the situation where non-resident parents face opposition from caregiving parents. In that situation a statutory presumption, whether for a 70/30 split or not, could be used by fathers and professionals to set the tone for negotiation and

⁵⁹ *National Standards for Probation Service Family Court Welfare Work* (HMSO, 1995), at p 2.

⁶⁰ A. Critchley, ‘When Will I See My Dad’ [2002] *Fam Law* 319, at p 320.

⁶¹ C. Sawyer, ‘An Inside Story. Ascertaining the Child’s Wishes and Feelings’ [2000] *Fam Law* 170.

⁶² *Ibid*, at p 172.

⁶³ *Op cit*, n 11, at p 35.

⁶⁴ See, also, C. Piper and S. Day Sclater, ‘Changing Divorce’, in S. Day Sclater and C. Piper (eds), *Undercurrents of Divorce* (Ashgate, 1999).

⁶⁵ J. Dewar, reporting on his research into the new Australian law, observed that the further parties were from the trial process, the greater the impact of the law. Solicitors reported ‘quite a few changes to practice’, whereas barristers and judges reported comparatively few, with the same questions being resolved in the same way (J. Dewar, *Reducing Discretion in Family Law*, Family Law Research Unit, Working Paper Series, Working Paper No 1 (Griffith University, 1997), at pp 21–22).

⁶⁶ Cameron himself refers to ‘Something like that, alternate weekends, half the holidays in a 70/30 split’ (Conference Report, *op cit*, n 22, at p 16).

⁶⁷ P. Henman and K. Mitchell, accounting presumably for shorter holidays than Cameron, assume an 80/20% split, based on ‘anecdotal evidence that the aforementioned pattern of contact – of half the school holidays and every second weekend – is a common arrangement between separated parents in Australia’ (P. Henman and K. Mitchell, ‘Estimating the Cost of Contact for Non-resident Parents: a Budget Standards Approach’ (2001) 30(3) *Journal of Social Policy* 495, at p 502).

so to put pressure on mothers in the same way that they use the court-operated presumption/assumption at present. Certainly the Australian research quoted above showed that there had been 'a shift in the balance of bargaining power between parties' in favour of the non-residential parent.⁶⁸ This may promote agreement and avoid litigation in some cases but may at the same time carry the risk of jeopardising the interests of mothers and children.⁶⁹

Many mothers might have very good reasons for opposing shared parenting and these may never come to light or may be minimised in the push for a consent order. Buchanan and Hunt, for example, found that, in their sample, at least one parent reported domestic violence, including harassment and intimidation in 78% of cases and, in 56%, there were reports of physical violence. The incidents referred to were rarely minor and in almost two-thirds of cases the violence and fear were present after separation.⁷⁰ By the time of the court proceedings, sometimes years after separation, the fear/violence persisted in half of the cases but only one-quarter of those interviewed cited violence as an issue in the case. So, even if conduct such as domestic violence might be allowed in law to rebut the proposed presumption, evidence of this may not, in practice, come before the court.

In any event, the likelihood that some mothers who oppose contact will be made to agree to it does not necessarily support the claims of the proponents of a presumption of shared parenting that it will be a solution to the problem of conflict over contact. As *Making Contact Work*⁷¹ points out, it is doubtful that the existence of a presumption will prevent acrimonious disagreement between parents who cannot co-operate.

First, it is doubtful whether it will significantly reduce litigation. Dewar, for example, contends that there is 'no hard evidence' that firmer rules reducing discretion make it easier to reach agreements.⁷² The Australian statistics for contact applications since the 1996 amendments seem to bear this out. While there is not a presumption of shared care in the Australian legislation, the perception that the legislation created new 'rights' encouraged parents to seek court orders, 'with applications to enforce contact orders more than doubling since 1996'.⁷³ Dewar and Parker remark on this increase in litigation and suggest that the new provisions have 'created opportunities for contact parents to harass and control residence parents through litigation'.⁷⁴ Certainly, research in the UK shows that 'there has been a remarkable rise both in the number of orders and the number of "disposals" in respect of private law applications under the Children Act'.⁷⁵ This would suggest that the existing presumption or assumption in favour of contact has done nothing to stem the tide of litigation and there is no reason to suppose that a statutory presumption of shared parenting will prove more effective in doing so. Mothers who are strongly opposed to any contact at all or who may wish to resist a statutorily mandated split will seek to rebut the presumption in much the same way as they do now.⁷⁶

Secondly, whatever arrangement is embodied in a court order, child care arrangements are unlikely to work or to take place in a conflict-free context, unless the parents espouse this as a goal and are willing and able to achieve it. A parent might be pressured into agreeing to shared

⁶⁸ J. Dewar and S. Parker, *op cit*, n 15, at p 74.

⁶⁹ See *Making Contact Work*, *op cit*, n 24, at para 14. See also J. Dewar, *op cit*, n 65, at p 18.

⁷⁰ A. Buchanan and J. Hunt, 'Disputed contact cases in the courts' (Cambridge Socio-legal Group seminar, 2002). See also A. Buchanan, J. Hunt, H. Bretherton and V. Bream, *Families in Conflict* (Policy Press, 2001).

⁷¹ *Op cit*, n 24, at para 14.

⁷² *Op cit*, n 65, at p 16.

⁷³ H. Rhoades, *op cit*, n 16, at p 72, noting 1,976 contravention applications filed with the Family Court of Australia in 1999–2000, an increase from 786 in 1995–1996.

⁷⁴ *Op cit*, n 15, executive summary, at p 4.

⁷⁵ R. Bailey-Harris et al, *op cit*, n 11, at p 13.

⁷⁶ Indeed, there is the potential for court battles between biological fathers and social fathers. A stepfather may have been active in raising his former partner's children and may wish to remain in contact after the relationship breaks down. In such a case the stepfather/social father may have had far more involvement in bringing up the children than the biological father and his relationship with them may be far closer. How the presumption would operate in such a case is not clear.

parenting but may resist implementing the arrangement. There is nothing to indicate that changing the nature of the presumption as proposed will increase compliance. Certainly the increased litigation in Australia following the 1996 amendments had in turn been followed by increased dissatisfaction and litigation about enforcement,⁷⁷ with further amendments passed in 2000 to broaden the court's compliance powers, notably by a requirement to attend a parent education programme, and the ability to make an order for compensation (for contact forgone), in addition to the existing penal sanctions.

The report to the Lord Chancellor in the UK recommends similar new measures to encourage compliance as well as various means of enforcing orders.⁷⁸ While punitive measures such as fines, imprisonment of mothers or transfer of residence are still regarded as a sanction of last resort for those obstructing contact,⁷⁹ the report's recommendations to expand the scope of the court's powers envisage a battery of other 'persuasive' measures. They include powers to refer defaulting parents to information meetings, meetings with counsellors, parenting programmes/classes, psychiatrists or psychologists. Courts should also, the document suggests, be able to place parents on probation or impose community service orders. The effect that these reforms might have in highly conflicted, no-contact cases (where domestic violence is not involved) is unknown, although research is being seen as supportive of the claim that parent education works for this group of parents. To quote a recent newspaper article: '[T]here is strong evidence that a well conceived, pre-emptive, multi-exit system cuts down the number of people who end up in court ... The key ingredient in a pre-emptive system is parent support and education'.⁸⁰ However, Eekelaar issues a timely warning: '[L]et there be no mistake: the recommendations of the report [*Making Contact Work*] signal a significant increase in legal coercion over family arrangements'.⁸¹ This expansion of the courts' repertoire has potentially damaging consequences for resident mothers. According to Rhoades, enforcement proceedings, or the threat of them, are used by abusive men to control and harass carers,⁸² and for mothers who are not open to persuasion or, perhaps, intimidation, there is the prospect of imprisonment, something the report acknowledges is not self-evidently in the best interests of the children concerned. A statutory presumption of shared parenting has, arguably, the potential for an increase in the use of such measures. There will be more court orders for contact and, so, more mothers will be exposed to the risk of imprisonment for defying such orders.

THE LIMITS OF LAW

Short of imposing punitive sanctions, the law, as Thorpe LJ observed in *Re L*,⁸³ can do little to resolve intractable disputes over children. It can neither engender harmony nor ensure that children have continuing relationships – and in particular beneficial relationships – with non-resident parents. It is not designed to and so cannot address the profound emotional forces that drive the parties. To quote Eekelaar again: '[I]t is important not to jump from the fact that an outcome is optimally desirable to the conclusion that it should, therefore, be legally enforceable'.⁸⁴ Such a jump ignores not only the quality of the child's relationships with her parents but also the complexity of parental motivations in seeking or refusing contact.

⁷⁷ H. Rhoades, *op cit*, n 16, at p 72.

⁷⁸ *Making Contact Work*, *op cit*, n 24, at para 14.55.

⁷⁹ See, *Making Contact Work*, *op cit*, n 24, chapter 14 and, for the attitude of the courts, *Churchard v Churchard* [1984] FLR 635; *Re M (Contact Order: Committal)* [1999] 1 FLR 810. See also *Re L (Contact: Domestic Violence)*, *op cit*, n 20, at p 367. Amendments to the Child Support Act 1991 introduce new or 'improved' penal options for those non-resident parents who refuse to provide financial support for their children and evidence an increasing punitiveness to parents considered irresponsible.

⁸⁰ M. Freely, *op cit*, n 34. More controversially, Cameron proposes that a 'contact facilitator', 'someone much more robust and directive' be appointed where a parent continues to oppose contact (Conference Report, *op cit*, n 22).

⁸¹ J. Eekelaar, 'Contact – Over the Limit?' [2002] Fam Law 271, at p 272.

⁸² *Op cit*, n 16, at p 77.

⁸³ *Op cit*, n 20.

⁸⁴ J. Eekelaar, *op cit*, n 81, at p 272.

In Rhoades' study, the most common reason for conflict was the resident parent's concern about the other parent's parenting capacities. Objections centred on factors such as inadequate supervision, substance abuse, mental health problems, domestic violence and child abuse.⁸⁵ Buchanan and Hunt⁸⁶ also found that child protection concerns were present in a relatively high proportion of cases, with parents voicing worries about substance abuse, mental illness and risks to the child.

Another recent study in the UK reveals similar findings. In this study, seeking to explore the dynamics of protracted contact disputes,⁸⁷ mothers and fathers who had been involved in a dispute for at least one year were interviewed with a view to gaining some understanding of their perceptions of the dispute. The mothers interviewed framed their resistance to contact in terms of their children's welfare. Some of them questioned the father's commitment or capacity to be a good parent. A few resisted contact because for them it signified the prolonging of negative relationships. Several recounted incidents of violence on the part of their former partners and maintained that contact would expose their children to risk.

In contrast, those fathers who admitted to violence or to being 'aggressive' still saw themselves as good parents. Some fathers cast doubt on their former partners' parenting capacities and maintained that their presence in the children's lives was necessary to counter maternal failings. Some framed mothers' opposition to contact as evidence of instability or unreasonableness and some accused mothers of turning their children against them.

Both mothers and fathers saw themselves as good parents. The interviewees all believed themselves to be acting in their children's best interests and perceived their continued engagement in the contest over contact as necessary to safeguard those interests. The fact that many of them, mothers and fathers, had been to court and had failed to get the outcomes they sought did not deter them from persevering with the conflict. They simply dismissed the law as unfair, gender biased and damaging to their children's best interests. For them, the battle had to go on irrespective of what the law declared; fighting on was part of their duty to be a 'good parent'.

Not only is the law ill-equipped to produce conflict-free relationships in the face of the profoundly-held convictions of parents who believe that what they are doing is right, it is also ill-equipped to inspire in unwilling parents a sense of the responsibility endorsed by the law. The law, as has often been noted, cannot address the problem that many non-resident parents either do not seek contact at all or fail to exercise it once it has been ordered or agreed. It has been said that such non-resident parents are not labelled as 'implacably irresponsible'⁸⁸ and 'are permitted a capacity for ambivalence in relation to their parenting that is not equally available to the primary caregiver'.⁸⁹ It does not appear to be envisaged that the proposals for further sanctions against the contact-denying resident parent should also be applied to the contact-refusing non-resident parent.

JOINT PARENTING?

A shared parenting presumption is, then, unlikely to encourage those fathers who do not want contact to maintain relationships with their children. It might, however, enable some fathers who do want contact to view the law less negatively. At the same time, it may have the opposite effect on mothers and increase feelings of resentment and hostility: in the light of their childcare duties, both in the intact and separated family, they might regard the label of 'shared parenting' as downgrading their efforts.⁹⁰

⁸⁵ Op cit, n 16, at p 75.

⁸⁶ Op cit, n 70.

⁸⁷ S. Day Sclater and F. Kaganas, 'Implacable Hostility?' (Paper presented at the Annual Conference of the Socio-Legal Studies Association, 2000).

⁸⁸ C. Smart and B. Neale, 'Arguments against virtue: must contact be enforced?' [1997] Fam Law 332, at p 336.

⁸⁹ H. Rhoades, op cit, n 16, at p 78.

⁹⁰ For an extensive review of relevant law and issues see C. Barton and G. Douglas, *Law and Parenthood* (Butterworths, 1995), chapter 7: 'Dual Parenting: Anticipation and Actuality' and chapter 8: 'Separated Parents (1): Caring'.

On the one hand, some research shows an increase in parenting by fathers⁹¹ and there is an assumption on the part of professionals that parental decision making in the intact family is joint.⁹² On the other hand, parenting for fathers, whether in intact families or separated, means something different than it does for mothers. The research of Maclean and Eekelaar, for example, found ‘little evidence of widespread “joint” parenting or joint decision making either while the parents were living together or afterwards’.⁹³ Fathers tend not to take on responsibility for the ‘burden of administering the endless minutiae of family life’,⁹⁴ and seem to focus more of their parenting on interaction and play than on physical care or discipline.⁹⁵ They typically spend less time with children and are rarely involved in responsibility for organising child care, decision making and being available for sick children.⁹⁶ The extent to which fathers maintain contact with their children after separation is variable and this is not attributable solely to obstructive mothers; Maclean and Eekelaar⁹⁷ found that the age of the children and, in some cases, re-partnering by either the mother or the father affected contact. It is not only new family commitments that might reduce contact; there is also research about the existence of, and pressure to engage in, a ‘long hours’ work culture⁹⁸ that highlights the difficulties facing fathers, whether separated or not, who do wish to be more involved. Certainly research in various jurisdictions has shown that children of intact, as well as separated, families wish to see their fathers more⁹⁹ and that, even in dual earner families, housework and child care is still primarily ‘women’s work’.¹⁰⁰

Smart, in her research, has drawn a distinction between the labour of ‘caring for’ children’s everyday needs and the more abstract concern embodied in the notion of ‘caring about’.¹⁰¹ The mothers in her study, while they accepted that their former partners ‘cared about’ their children, expressed ‘anger and bewilderment at a legal system that could give joint custody or unlimited access to a father who might “care about” but who had not done any of the “caring for”’.¹⁰² There is also evidence from mediation research that the process of constituting *as joint* what does not appear so to the two parents – to encourage the acceptance of shared parenting after separation – potentially increases feelings of injustice.¹⁰³

⁹¹ See S. Maushart, *Wifework* (Bloomsbury, 2001), at pp 129–134 and references therein.

⁹² C. Piper, *The Responsible Parent. A Study in Divorce Mediation* (Harvester Wheatsheaf, 1993), at pp 2–6.

⁹³ Op cit, n 9, at p 137.

⁹⁴ S. Maushart, op cit, n 91, at p 131.

⁹⁵ Ibid, at p 134. See also, for example, J. Pryor and B. Rodgers, *Children in Changing Families* (Blackwell, 2001), at pp 198–204 especially.

⁹⁶ See J. Pryor and B. Rodgers, op cit, n 95, at pp 201–202, citing J. Pleck, ‘Paternal Involvement: levels, sources and consequences’, in M. Lamb (ed), *The Role of the Father in Child Development* (Wiley and Sons, 3rd edn, 1997). See also, C. Piper, op cit, n 92, at pp 34–49 for a review of earlier empirical research.

⁹⁷ Op cit, n 9, at p 137.

⁹⁸ J. Pryor and B. Rodgers, for example, review research which suggests that employers are still inflexible and ‘Involved fathers are also likely to encounter work place hostility’ (op cit, n 95, at p 202). See also, R. Collier, ‘A Hard Time to be a Father?: Reassessing the Relationship Between Law, Policy and Family (Practices)’ (2001) 28(4) *Journal of Law and Society* 520, at p 531 (and references therein).

⁹⁹ J. Pryor, ‘Relationship with fathers – well-being in young adults from intact and divorced families’ (Paper presented to the Annual Conference of the SLSA, 2002).

¹⁰⁰ H-P. Blossfeld and S. Drobnic (eds), *Careers of Couples in Contemporary Societies* (Oxford University Press, 2001).

¹⁰¹ C. Smart, ‘The Legal and Moral Ordering of Child Custody’ (1991) 18 *Journal of Law and Society* 485.

¹⁰² Ibid, at pp 490–491.

¹⁰³ C. Piper, op cit, n 92, at p 192.

Where mediators used a technique of 'equalising' the contributions to child care of both parents, the main care-giving parent expressed a sense of grievance.¹⁰⁴ In particular, if the reasons for the breakdown of the inter-parental relationship included the anger of the care-giving parent at being unable to negotiate a more equitable division of child care duties, then such a strategy may heighten perceptions of unfairness and exacerbate conflict.¹⁰⁵

Resentment and conflict may also be fuelled by the current trend to equate 'care' with 'contact'.¹⁰⁶ The findings of the Australian enforcement study suggest that 'there remains a wide divergence between contact and parenting, and that some men continue to opt for the former'.¹⁰⁷ To designate what is essentially contact between many fathers and children as 'shared care' is unlikely to reflect the realities of the arrangements or, therefore, to acknowledge the greater responsibilities of mothers.

PRESUMPTIONS AND THE WELFARE PRINCIPLE

While a shared parenting presumption may be seen as prejudicial by mothers, it is justified by its proponents in terms of children's best interests. However, such a presumption would tend to obscure the particularity of the individual child's situation. It would also largely discount child welfare knowledge that denies or qualifies the advantages of shared parenting. There is a widely held view that children usually benefit from the active involvement of both parents after divorce, but there is also research that concludes that these benefits might be limited or absent in certain circumstances. Bridge maintains, for example, that a child's welfare is not promoted if he 'feels obliged to divide and compartmentalise his life in a stressful way'.¹⁰⁸ Similarly, a recent comparative review of joint custody has concluded that 'keeping the "child's family" together can sometimes actually turn out to be a serious risk for the welfare of the child' because of the 'real danger of serious parental conflict'.¹⁰⁹ Furthermore, given that the current pressure for shared parenting encompasses pressure for a greater quantity of contact time, it is also salient to mention literature challenging the assumption that contact is in itself (barring domestic violence) generally beneficial. Recent research suggests that: 'It is at least possible that the absence of contact could often have no adverse effects and that it [contact] could be detrimental to children'.¹¹⁰ Research also suggests that the nature of the contact may be more important for the child's well-being than frequency: 'Fathers who are able to have a nurturing

¹⁰⁴ Op cit, n 103, at pp 91–94. An unusual case, recently decided by the Court of Appeal, suggests judicial endorsement of 'unequal' parenting by fathers (2002) (unreported). A father who was primary caretaker of his children was refused a residence order when the relationship ended, with the mother promising to give up work. Thorpe LJ is reported as saying that his application 'seemed to ignore the realities involving the different roles and functions of men and women' (D. Rabinovich, 'Mothers matter more' (2002) *The Guardian*, April 20, at p 22). The decision 'triggered immediate controversy' and the father is reported as expressing his incredulity that the legal system should allow this. See 'I raised our children but the court gave custody to my wife' (2002) *Evening Standard*, April 22, at p 17. While D. Rabinovich hails this case as an acknowledgement of the importance of mothers, it could be seen as detrimental to them too. Its corollary is that fathers are not expected to engage in caretaking and that they fulfil their roles adequately without doing so.

¹⁰⁵ As suggested, for example, by S. Maushart's summary of research findings (S. Maushart, op cit, n 91, chapter 10). She concludes 'In the worst cases [fathers] may find themselves expelled from family life altogether, as resentments that have been allowed to simmer reach boiling point, and destroy the very basis of the marriage', at p 132.

¹⁰⁶ This conflation is apparent in the recent Court of Appeal judgment of *Re R (Litigant in Person: Judicial Intervention)* [2001] EWCA Civ 1880, [2002] 1 FLR 432, at p 433, per Thorpe LJ: '[The father] has always had a determined aim to share the children equally with their mother. His first application of 23 August 1999 was for contact. He stated: "I wish to share contact equally with the petitioner so that the children spend 50% of their time with me"' (emphasis added).

¹⁰⁷ H. Rhoades, op cit, n 16, at p 79.

¹⁰⁸ C. Bridge, 'Shared Residence in England and New Zealand – a comparative analysis' [1996] CFLQ 12, at p 26.

¹⁰⁹ K. Kurki-Suonio, 'Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective' (2000) 14(3) *International Journal of Law, Policy and the Family* 183, at pp 198–199.

¹¹⁰ J. Eekelaar, op cit, n 81, at p 272, citing G. Poussin and E. Martin-Lebrun, 'A French Study of Children's Self-esteem after Parental Separation' (2002) 16 *International Journal of Law, Policy and the Family* (forthcoming), and E. Hetherington and J. Kelly, *For Better or for Worse: Divorce Reconsidered* (W.W. Norton and Company, 2002), at pp 133–134. See also C. Sturge in consultation with D. Glaser, op cit, n 20.

and monitoring role have a positive impact on their children in a variety of ways ... Those fathers whose participation is confined to outings and having fun will, then, have little influence on their children's adjustment'.¹¹¹

It is, then, by no means self-evident that shared parenting and, in particular, something like a 70/30 arrangement, can be assumed to be in line with a consensus within child welfare knowledge. On the contrary, a general rule in the form of a presumption in favour of shared parenting would entrench in the law even further what is already a selective and simplified version of welfare.¹¹²

There are also doctrinal obstacles to a presumption of shared parenting stemming from the existence of the paramountcy principle. If it is accepted that there is no unequivocal evidence that shared parenting is in the best interests of children generally, it is hard to see how a presumption would be reconcilable with the notion of paramountcy: a blanket presumption could not take account of the particular child's welfare adequately. Whether a presumption would be equal to the task of safeguarding children's well-being has been doubted by, for example, a Canadian government adviser and sometime judge. He stresses the need for 'discretion and creativity' in this area.¹¹³ Indeed, this was the basis of the rejection by the Booth Committee of a joint custody presumption in 1985: 'It must remain a question for the court, in the exercise of its unfettered discretion, to decide in each case what order would best serve the child's interest'.¹¹⁴ Dewar goes so far as to suggest that a shift away from discretion towards a rule-based approach constitutes a move away from welfare; it can be characterised, he says, as a shift towards conceptualising family law as a 'means of giving effect to rights irrespective of consequences, or to specific *a priori* juridical models of family relations, rather than being concerned to search for the most beneficial or welfare-maximising outcome'.¹¹⁵ This shift, he suggests, can be seen as much as a response to fathers' claims for rights as it is the result of concern for children.¹¹⁶

Nor would a presumption, and especially one framed in terms of fixed proportions, leave room for proper consideration of children's wishes and feelings. A regional manager of CAFCASS has reported that, already, children who do not want to see the non-resident parent may have to 'work really hard' to be heard,¹¹⁷ a situation which the proposed presumption would hardly ameliorate. In the eyes of those commentators currently suggesting that children are treated as objects in the divorce process and arguing for their greater involvement, such a step might, then, be seen as positively detrimental.

On the other hand, the importance of the child's view has been explicitly acknowledged by the European Court of Human Rights. In a recent case it found a breach of the procedural rights inherent in Article 8 where the 5-year-old child had not been asked directly by the reporting psychologist about her relationship with her father.¹¹⁸ Furthermore, courts in the UK have exhibited reluctance to impose orders on older children against their wishes.

¹¹¹ J. Pryor and R. Daly Peoples, 'Adolescent Attitudes towards Living Arrangements After Divorce' [2001] CFLQ 197, at p 199. See also, P. Amato and J.G. Gilbreth, 'Non-resident fathers and children's well-being: A meta-analysis' (1999) 61 *Journal of Marriage and the Family* 557, and J. Pryor and B. Rodgers, *op cit*, n 95, at pp 202–204 and 214–217.

¹¹² See generally, A. Diduck and F. Kaganas, *Family Law, Gender and the State* (Hart Publishing, 1999), at pp 272–278.

¹¹³ G. Thomson, 'The Changing Family and the New Millennium' (2000) 38(1) *Family and Conciliation Courts Review* 10, at p 14.

¹¹⁴ Report of the Matrimonial Causes Committee, *op cit*, n 37, at para 4.132.

¹¹⁵ *Op cit*, n 65, at p 17.

¹¹⁶ *Ibid*, at p 18.

¹¹⁷ S. Adam, 'The Voice of the Child', in Conference Report, *op cit*, n 22, at p 31.

¹¹⁸ *Sahin v Germany; Sommerfeld v Germany; Hoffmann v Germany* [2002] 1 FLR 119; see case note by R. Bailey-Harris [2002] Fam Law 94.

In a recent reported decision,¹¹⁹ the Family Division refused to order the contact sought by a father of three adolescents aged 12, 14 and 16. The court made no order in respect of the eldest and in respect of the other two, any contact had to be subject to the agreement of the young person concerned and contact was ordered in terms that reflected their wishes. The judge, referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention) and applying the Children Act 1989 welfare checklist, considered it his duty to take cognisance of the children's wishes, taking into account their ages and understanding: '[C]hildren of this age ... are entitled to have respect for their views ... If young people are to be brought up to respect the law, then it seems to me that the law must respect them and their wishes, even to the extent of allowing them ... to make mistakes'.¹²⁰

The judge was also loath to make an order which would not be enforced by the father if it were disobeyed; orders should not be made in the expectation that they would not be obeyed, he said. In any case, how the courts would enforce a contact order resisted by the child is difficult to imagine.¹²¹

It appears likely that UK judges would find a presumption of any kind difficult to apply under the Children Act 1989 and would also see it as incompatible with the Human Rights Act 1998. Recent reported decisions reveal a clear trend in the courts to move away from talk of presumptions in children cases. In the case of *Payne v Payne* [2001] EWCA Civ 166,¹²² Thorpe LJ made his misgivings clear: 'I do not think that such concepts of presumption and burden of proof have any place in Children Act 1989 litigation where the judge exercises a function that is partly inquisitorial'.¹²³ He further observed that to create a presumption in favour of one parent would present a risk to the other parent's right to private and family life in terms of Article 8 of the European Convention as well as a right to a fair trial under Article 6.¹²⁴ In addition, European jurisprudence made it plain that decisions should be made in accordance with the paramountcy principle¹²⁵ and that this should be the context in which the balancing exercise weighing the parties' rights should be undertaken.¹²⁶ This interpretation of the Human Rights Act 1998 suggests that the court will always be obliged to consider the interests of all those concerned, weigh them in the balance and reach a conclusion that best protects the child's welfare. A blanket presumption would be inconsistent with this approach. The most the reformers could hope for would be the introduction into the law of an 'assumption' that shared parenting is in children's best interests.

CONCLUSION

It is not our purpose to argue that active, co-operative and conflict-free participation by both mothers and fathers in parenting their children is not desirable; it probably is. However, it is our contention that the introduction of a presumption in favour of shared parenting would not achieve this aim and might be detrimental. The proposals for defined 'time-shares' for parents post-separation are new in their specificity of contact/residence shares and in their entry into policy debate,¹²⁷ but their 'newness' should not blind us to the fact that the research done and

¹¹⁹ *Re S (Contact: Children's Views)* [2002] 1 FLR 1156. See also *M v M (Transfer of Custody: Appeal)* [1987] 2 FLR 146. Indeed, in *Re L* (op cit, n 20) the court quoted the Sturge Report (op cit, n 20) as saying it is important to listen to children's views on contact, especially older children (at p 340) and the judge invoked this approach when deciding to deny direct contact with a 9-year-old boy who was resisting it (at p 348).

¹²⁰ *Re S (Contact: Children's Views)*, op cit, n 119, at pp 1170–1171.

¹²¹ In addition, the arithmetical approach exemplified by the proposed 70/30 split is ill-suited to taking account of future changes in circumstances and children's wishes; children, as they grow older, may find such an arrangement constraining, limiting the time they spend on other interests. See J. Wallerstein and J. Lewis, 'The Long-term Impact of Divorce on Children. A First Report from a 25-Year Study' (1998) *Family and Conciliation Courts Review* 368, at pp 376–378.

¹²² [2001] 1 FLR 1052.

¹²³ *Ibid*, at para 24.

¹²⁴ *Ibid*, at para 40.

¹²⁵ *Ibid*, at para 38.

¹²⁶ *Ibid*, at para 37. See also para 57 and the judgment of Dame Elizabeth Butler-Sloss P, at para 82.

¹²⁷ But see A. Bainham, op cit, n 19.

the arguments made in the 1980s before the Children Act 1989 was finalised still have relevance. It is not a question of re-visiting ‘old’ feminist arguments but of ensuring that the current policy debate takes place with explicit reference to arguments that were accepted and acceptable in the recent past. By ignoring that context, there is the risk of instituting changes which lead to increased costs, financial and emotional.

There is, however, another context that the present emerging debate is in danger of ignoring and that is the research which has been undertaken in the last decade about family transitions. These are increasingly providing support for different, and infinitely more complex, ideas about ‘the separated family’. Smart and Wade’s research reveals at least four different categories of families which are not ‘intact’ nuclear families, and reveals children with both a capacity to cope positively with multiple change and a set of concerns that do not focus on the separation of their parents *per se*.¹²⁸ As Pryor and Rodgers comment: ‘Because the present rate of change in family structures is high, we cannot, and indeed must not, assume that most children spend their childhood in one house with two biological parents and their biological siblings’.¹²⁹ And yet the debate about shared parenting assumes precisely that, at least in relation to the situation prior to parental separation. In fact there may, in contrast, be various half-siblings, more than one step-parent, several houses and homosexual as well as heterosexual re-partnering.¹³⁰ A policy that may seem appropriate for the simplified image of pre-separation and post-separation families may not be so when the complexity of the forms these families take is better understood.

Furthermore, the doctrinal obstacles, particularly the tenaciousness of the paramountcy principle in all thinking about children cases, are likely to be considerable. But more significantly, the difficulty of showing any practical benefits could be as great. There is no evidence that non-resident fathers who do not want or seek contact will be imbued with a new sense of responsibility as a result of a change in the law. Nor is there any evidence that the goal of reducing conflict or even litigation would be met. While a presumption might change the balance of power in negotiations in some cases, it may also strengthen the hand of a non-resident parent wishing to control or harass the other parent. Apart from this, it remains the case that the law cannot change behaviour, and playing yet again with the symbols will not make bitterly conflicted parents into a harmonious post-separation ‘family’.

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¹²⁸ C. Smart and A. Wade, ‘Children as Makers of Meaning’ (Paper presented at the Annual Conference of the Socio-Legal Studies Association, 2002).

¹²⁹ J. Pryor and B. Rodgers, *op cit*, n 95, at p 2.

¹³⁰ C. Smart and A. Wade, *op cit*, n 128. See also J. Pryor and B. Rodgers, *op cit*, n 95, at chapter 6, ‘Stepfamilies and Multiple Transitions’, and G. Gorrell Barnes, G. Thompson, G. Daniel and N. Burchardt, *Growing Up in Stepfamilies* (Clarendon Press, 1998).