

Climate change? The multiple trajectories of shared care law, policy and social practices

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Parental separation – shared care – social norms and practices – policy development

This article explores how shared care following parental separation or divorce has developed in law and policy over the past 25 years, identifying five phases of evolution. It traces the development of shared care as social norm and as social practice, and the interrelationship between the research evidence on shared care and case law and policy. It explores two of the drivers for these developments: the body of research evidence on shared care and the role played by different ideas or ‘frames’ surrounding shared care – ‘welfare’, ‘rights’, ‘risk’ and ‘resources’ – and concludes that current case-law is significantly more supportive of shared care than either the current policy framework or the existing research base.

Introduction

‘We created awareness and stimulated debate about the institutionalised discrimination against fathers in the legal system. But we didn’t get the law changed ... What we have done is climate change. The debate has started.’

Matt O’Connor (founder of Fathers 4 Justice)

This article¹ explores how shared care following parental separation or divorce has developed in law and policy in the 25 years since the foundation of the *Child and Family Law Quarterly* (CFLQ). It tracks the evolution of shared care across five phases or periods: from a period of *Rarity* (mid 80s to early 90s), through *Expansion* (mid 90s to 2000) and *Politicisation* (2000s) to *Internationalisation* (2010–2012) and ending in *Symbolism* (2012 onwards). It is a story of growth, with more public awareness, more court orders and ever more academic interest in shared care over time.² It is also a complex story befitting a highly contentious subject. Matt O’Connor cited above is probably correct when he notes that there is a disjunction between changes in public perceptions and changes in the law. The article therefore traces the varying development as well as the interrelationship between shared care as social norm and as social practice, and between the research evidence on shared care and case-law and policy. The overall conclusion is that current case-law is significantly more supportive of shared care than either the current policy framework or the existing research base; similarly social norms appear to have become more positive about shared care than is reflected in the increase in shared time arrangements amongst the separated population.

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² The *CFLQ*, in particular, has been a window on, and sometimes an active contributor to, debates and developments in shared care.

The second aim of the article is to explore two of the drivers for these developments: the body of research evidence on shared care and the role played by different ideas or ‘frames’ surrounding shared care. The concept of ‘frames’ is a widely used tool in recent interpretivist approaches to policy analysis.³ The basic premise of the approach is that social problems do not appear naturally on the policy agenda but are socially constructed or ‘framed’ by policy actors. In effect what policy actors do is select some social issues as significant, as ‘policy problems’, leaving other social issues aside. In doing so policy actors are also constructing how those issues should be understood. Typically that framing will include, or be predicated upon, a particular policy solution. Thus a frame defines what is (and is not) a problem and how those problems are defined, and presupposes policy solutions to the problem.

In relation to shared care there have been two dominant frames, both associated with different policy actors and policy networks. In the *welfare* frame the social problem is identified as the vulnerability of children following parental separation, particularly the impact of ongoing conflict and parental disputes on children’s wellbeing. The policy solution is to help parents to address those disputes effectively in a way that reduces children’s exposure to conflict. Thus courts should retain an important residual role but alternative dispute resolution plus information, advice and education should be made available to enable parents to focus on children’s needs. Associated with this frame is the need for individualised decision-making based on the needs of the individual child. In many respects the welfare frame is the default position of the family justice system frame (underpinned by the paramountcy principle), but was also strongly associated with the last Labour government.

In contrast, in the *rights* frame the social problem of divorce is identified as fathers denied any or full involvement in their children’s lives as a result of hostile/bitter resident mothers and/or weak or biased family courts. The policy solution is to treat mothers and fathers equally, to abolish the distinction between ‘resident’ and ‘contact’ parents and to move to shared or equal parenting after divorce and separation. In contrast to the individualised decision-making of the welfare frame, the rights frame is associated with a preference for presumptive or rule-based decision-making. A relatively wide group has deployed a rights frame, including numerous fathers groups,⁴ a significant number of tabloid and broadsheet journalists and the Conservative and (to a lesser extent) the Liberal Democrat parties both in Opposition and as Coalition government partners.

The welfare and rights frames have existed in tension throughout the last 25 years. Two other frames have been important, though are less central to the debates on shared care. In the *risk* frame the key policy problem is constructed as a powerful contact presumption putting the safety of mothers and children at risk in domestic violence cases, prompting a policy goal of a rebuttable presumption of no contact in risk cases. The risk frame was most visible in the early 2000s with a tight inter-professional network of Women’s Aid, NSPCC and Labour backbenchers /peers. A fourth *Resources* or *Diversion* frame

³ See, for example, C Bacchi, *Analysing Policy: What’s the Problem Represented to be?* (Pearson, 2009); M Hajer and H Wagenaar (eds), *Deliberative Policy Analysis: Understanding Governance in the Network Society* (Cambridge University Press, 2003).

⁴ For example, Fathers 4 Justice, Families Need Fathers and the Equal Parenting Council.

provides a wider backdrop for all three welfare, rights and risk frames. In this frame, subscribed to by all governments over the last 20 years or more, the social problem is framed as the family courts and family lawyers offering an expensive and ineffective method of resolving family disputes. The solution is to preserve public resources by containing/reducing the role of courts and lawyers primarily through settlement and alternative dispute resolution and (latterly) restricting the availability of legal aid in private law cases.

Before tracing the evolution of shared care and the influence of the four frames, it is important to clarify the scope of the term ‘shared care’. In this article shared care is used as an umbrella term to cover the involvement of both parents in a child’s life post-separation. It can be used variously to refer to a social construct or norm (that both parents should be involved in children’s lives), the actual division of a child’s time between parents on a more or less equal basis (shared time or alternating residence), a court order (for example, a shared residence order which may or may not reflect an equal division of time), involvement of both parents in decision-making albeit not necessarily as a joint process (parental responsibility, joint legal custody) and finally as co-parenting or working together as parents in a parental alliance. In this article I explore how certain definitions or understandings of shared care became prominent at different times among different constituencies, but focusing particularly on shared time or alternating residence.

Rarity – late 1980s to mid 1990s

The foundation of the *CFLQ* coincided with major reform of custody law initiated by the Law Commission in the mid 1980s and subsequently enacted in the Children Act 1989. The reforms to custody law in the late 80s introduced significant changes in relation to shared parenting, at least as regards shared decision-making, as well as providing a very modest impetus for shared time in appropriate cases.

The Law Commission working paper in 1986⁵ reflected a widespread opinion that the current regime of custody, care and control and access was unclear, inconsistent and unfair.⁶ Writing at the time, Julia Brophy⁷ noted that a diverse collection of voices, including the newly established Families Need Fathers and legal academics, had been pressing for a change in the law since the early 80s. The main demand was for a presumption of joint legal custody. At the time only 13% of divorce petitions ended with joint (legal) custody, with the great majority of orders made for sole custody to the wife.⁸

In its initial proposals, the Law Commission decided against recommending joint custody. Instead it proposed a new regime of parental responsibility to address decision-making. The Commission also floated the idea of a single order for care and control to both parents with the court simply to determine the ‘allocation of the child’s time

⁵ Law Commission, *Family law review of child law: custody law*, Com WP 96 (HMSO, 1986).

⁶ J Priest and J Whybrow, *Custody law in practice in the divorce and domestic courts*, Supplement to Law Commission WP No 96 (1986), at para 4.26.

⁷ J Brophy, ‘Custody Law, Child Care and Inequality in Britain’, in C Smart and S Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (Routledge, 1989).

⁸ Although there was considerable variation between courts. J Priest and J Whybrow, *Custody law in practice in the divorce and domestic courts*, Supplement to Law Commission WP No 96 (1986), at para 4.21.

between his parents'.⁹ One of the rationales for the proposal was based on an equality argument, that it avoided 'invidious allocations of power and responsibilities between parents ... that one parent is better or more fit than the other, simply the child is able to spend more time with one or the other'.¹⁰ Interestingly it took 25 years for this proposal to be adopted as part of amendment to the Children Act 1989 envisaged by the Children and Families Act 2014.¹¹

The Commission also thought that the single order might give some implicit encouragement towards a 'more equal distribution of time' and that such arrangements could be encouraged, albeit with the crucial proviso that both parents must agree.¹² The proposal was a clear shift from the position adopted by the Court of Appeal in the leading case at the time of *Riley v Riley* where May LJ thought that a child 'going backwards each week between mother and father, with no single settled home, is *prima facie* wrong',¹³ even though the arrangement had worked well for 5 years.¹⁴

Research for the Law Commission suggested in fact that shared time or shared physical custody was even less common than joint legal custody. In a detailed study of 10 courts Priest and Whybrow found only 0.4% orders for shared care and control (or joint physical custody) out of 612 joint (legal) custody orders.¹⁵ At least part of the reason for the low numbers is a degree of judicial disapproval of such arrangements. The Court of Appeal's concerns about stability and not having a single settled home appear to have been shared by judges in the lower courts. Interviews with judges revealed considerable caution about sharing, primarily related to children having no primary caretaker with whom they had a 'secure base camp' and concern that frequent moves would be disruptive to education, friendships and a sense of identity.¹⁶ Some judges were more positive and could identify particular circumstances where shared time could work, for example where parents were still co-resident, worked shift patterns or children were at boarding school.¹⁷

The working paper's suggestion that more equal allocations of time could be encouraged was therefore something of a departure from existing practice, but as Kaganas and Piper¹⁸ point out, the Commission was still ruling out any presumption of joint physical custody. Indeed the working paper did recognise that there were multiple potential problems with shared time, including the practicability of arrangements, the possible burden of constant

⁹ Law Commission, *Family law review of child law: custody law*, Com WP 96 (HMSO, 1986), at para 4.52.

¹⁰ *Ibid* at para 4.53.

¹¹ D Norgrove, *Family Justice Review: Final Report* (MoJ, 2011), at paras 4.55–4.68 and Children and Families Act 2014, s 12..

¹² Law Commission, *Family law review of child law: custody law*, Com WP 96 (HMSO, 1986), at para 4.53.

¹³ *Riley v Riley* [1986] 2 FLR 429 per May LJ.

¹⁴ C Bridge, 'Shared residence in England and New Zealand – a comparative analysis' [1996] *CFLQ* 12, at p 19.

¹⁵ J Priest and J Whybrow, *Custody law in practice in the divorce and domestic courts*, Supplement to Law Commission WP No 96 (1986), at Table 10. The great majority of orders (89%) gave care and control to the wife.

¹⁶ *Ibid*, at para 5.34–5.35.

¹⁷ *Ibid* at paras 5.34, 5.37.

¹⁸ F Kaganas and C Piper, 'Shared parenting – a 70% solution?' [2002] *CFLQ* 365.

moving on the child and the potential opposition of one parent and the child.¹⁹ The emphasis was therefore on the need for parental agreement and numbers were therefore always likely to be low.

In its final report in 1988 the Law Commission retained the proposal for 'equal parental responsibility'²⁰ but replaced the proposal for a single 'care and control' time share order with the familiar menu of residence, contact, specific issues and prohibited steps orders. The rationale for the change of position was that a single order would be impracticable, as it would require the court to make defined orders in every case when most cases resulted in reasonable access.²¹ However, it is also clear that the proposal had provoked much concern that it implied an equal division of time. The Commission noted that it was 'never our intention' to suggest an equal time division and indeed that such arrangements 'will rarely be practicable, let alone for the children's benefit'.²² However, the Commission also noted that US research had indicated that shared time could work well and so should not be 'actively discouraged'. It proposed, therefore that a residence order could be made to both parents (later termed a shared residence order) if that is a 'more realistic description of the responsibilities involved'.²³

The Law Commission's proposals for parental responsibility, the menu of residence and contact orders and shared residence order were all subsequently enacted in the Children Act 1989.²⁴ It was evident, however, that the area was something of a battlefield as one of the Law Commissioners later described the Commission's task of reconciling the competing views of parents, academics and legal professionals.²⁵ Some feminists writing at the time expressed concern about using custody law to achieve equal child care responsibilities without addressing prior structural inequalities within intact relationships.²⁶ Those concerns were to reappear later. It is also worth noting that concerns that 'joint parenting' would be misunderstood as equality/time-sharing were also to feature heavily during the passage of the Children and Families Act 2014.

The Children Act 1989 introduced a potentially more expansive regime on shared care than previously, although the intention or expectation was always that numbers would be limited by practicalities and the need for parental co-operation. Writing several years after implementation the former Law Commissioner Brenda Hoggett (as she then was)

¹⁹ Law Commission, *Family law review of child law: custody law*, Com WP 96 (HMSO, 1986), at para 8.4–8.12.

²⁰ Law Commission, *Family law. Review of child law. Guardianship and custody*, Law Com No 172 (HMSO, 1988), at para 4.6.

²¹ *Ibid*, at paras 4.9–4.11.

²² *Ibid*, at para 4.12. And see B Hoggett, 'Joint parenting systems: the English experiment' [1994] 6 *J Child L* 8, at p 10.

²³ Law Commission, *Family law. Review of child law. Guardianship and custody*, Law Com No 172 (HMSO, 1988), at para 4.12 and see Clause 9(5).

²⁴ The shared residence order is set out in s 11(4) 'Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned'.

²⁵ B Hoggett, 'Joint parenting systems: the English experiment' [1994] 6 *J Child L* 8, at p 8.

²⁶ J Brophy, 'Custody Law, Child Care and Inequality in Britain', in C Smart and S Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (Routledge, 1989), at p 234.

still thought that the Act would be unlikely to lead to a significant increase in father involvement.²⁷ Rather the focus was very much on shared parenting as (equal) parental responsibility rather than as shared time.²⁸

In fact the early years of the Children Act did not result in a great expansion of shared residence orders. Hoggett reported in 1994 that they might be increasing but were ‘still rare’.²⁹ She suggested that the Court of Appeal decision in *J v J*³⁰ where shared time was seen as ‘wholly exceptional’ had set the tone. Those ‘wholly exceptional’ features were an already established and successful pattern of shared time and parental agreement and co-operation.³¹ Stephen Gilmore³² also highlights the significance of Children Act Guidance which suggested that the ‘need the stability of a single home’ and the requirement for parental agreement meant that shared residence orders would not be common orders.³³

At the start of the 1990s, therefore, it could be argued that the changes introduced by the Children Act 1989 was beginning to recognise the changing roles of men and their increased role as caregivers.³⁴ However, shared parenting in the form of shared time remained rare given the emphasis placed on the need for parental co-operation and practical arrangements.

Expansion – mid 1990s to early 2000s

From the mid 1990s onward there were modest developments in shared care across several domains: social practice, research, statute and case law. There is some limited indication that the numbers of children in shared time arrangements were increasing slowly, albeit from a very small base. Fieldwork by Bradshaw³⁵ et al in the mid nineties found that 4.8% of non-resident fathers reported a shared time arrangement, most commonly a half week with each parent.

There was also the start of much greater academic interest in shared parenting and in the outcomes of shared time for children. Two articles published in *CFLQ* in the mid 1990s echoed judicial concerns about high conflict and hostility as contra-indications for shared time. A review of the limited body of psychosocial research by Jan Pryor and Fred

²⁷ B Hoggett, ‘Joint parenting systems: the English experiment’ [1994] 6 *J Child L* 8, at p 10.

²⁸ Ibid, at p 11, and see PG Harris and R George, ‘Parental responsibility and shared residence orders: parliamentary intentions and judicial interpretations’ [2010] *CFLQ* 151 for how the Court of Appeal subsequently focused on shared time rather than parental responsibility.

²⁹ Hoggett *ibid*.

³⁰ *J v J (A Minor) (Joint Care and Control)* [1991] 2 *FLR* 385.

³¹ Cf *Re H (A Minor) (Shared Residence)* [1994] 1 *FLR* 717 where those features were missing and a shared residence order was not made. See C Bridge ‘Shared residence in England and New Zealand – a comparative analysis’ [1996] *CFLQ* 12.

³² S Gilmore, ‘Court decision-making in shared residence order cases: a critical examination’ [2006] *CFLQ* 478, at p 481.

³³ *The Children Act 1989 Guidance and Regulations Vol 1: Court Orders* (HMSO, 1991), at para 2.28.

³⁴ B Walsh, ‘Contradictory trends in the application of the paramountcy principle?’ [1992] 4 *J Child L* 63.

³⁵ J Bradshaw, C Stimson, C Skinner and J Williams, *Absent Fathers?* (Routledge, 1999).

Seymour³⁶ concluded that joint (physical) custody could work and work better than sole custody, but was dependent upon low or contained conflict and parental willingness to co-operate.³⁷ Caroline Bridge³⁸ took a similar and possibly more cautious line in her comparison of New Zealand and UK case-law and court practice. She was very critical of the New Zealand courts for ordering shared residence in high conflict cases, noting that even with highly detailed court orders, separate representation for children and ongoing therapy there were still significant burdens placed on children. Bridge's article was the first of many in CFLQ that drew on the experiences of shared time in other jurisdictions.

A radically different position was taken by Arthur Baker and Peter Townsend.³⁹ Their position paper was probably the first UK academic paper making a strong case for shared care as time-sharing rather than joint legal custody, shared parental responsibility or the 'demeaning' concept of contact. They argued for 'substantial amounts of time living with each parent' from 30/70 to 50/50 splits.⁴⁰ They raised the possibility of a shared time presumption though stopped short of advocating it.⁴¹ Baker and Townsend suggested that there was growing enthusiasm for shared time with the primary obstacles being judicial conservatism, lack of social work enthusiasm, gendered cultural assumptions about men and women and feminism.⁴² Their paper is clearly positioned within a rights frame, in contrast to the welfare frames of Bridge and Pryor and Seymour. Their paper had very little impact within the academic community where the welfare frame has been dominant, but the sentiments were increasingly echoed in the public sphere.

As academics debated, there were further developments in the legal framework. It has recently been rather overlooked, but in the mid 1990s parliament did go further than the Children Act 1989 and enacted what was in effect a presumption of regular contact. Section 11(c) of the Family Law Act 1996 stated that in divorce proceedings:

- ‘the welfare of the child will be best served by—
- (i) his having regular contact with those who have parental responsibility for him and with other members of his family; and
 - (ii) the maintenance of as good a continuing relationship with his parents as is possible.’⁴³

Section 11(c) had its origins in an amendment put forward by the Conservative peer

³⁶ J Pryor and F Seymour, 'Making decisions about children after parental separation' [1996] CFLQ 229.

³⁷ *Ibid.*, at p 238.

³⁸ C Bridge, 'Shared residence in England and New Zealand – a comparative analysis' [1996] CFLQ 12.

³⁹ A Baker and P Townsend, 'Post-divorce parenting – rethinking shared residence' [1996] CFLQ 217.

⁴⁰ *Ibid.*, at p 217.

⁴¹ *Ibid.*, at p 227.

⁴² *Ibid.*, at pp 220–221.

⁴³ Similarly, s 1(c)(ii) sets out the general principle that where a marriage is to be brought to an end it should be done so 'in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances'. The wording for s 1 was introduced by the Lord Chancellor at third reading. *Hansard, Lords Debates*, vol 570, cc618 (11 March 1996).

Baroness Elles,⁴⁴ later accepted by the Conservative Lord Chancellor and without any apparent opposition in parliament.⁴⁵ That part of the Family Law Act 1996 was, of course, never implemented. The section would in any case fall short of a presumption of shared time but it did move significantly further than the Children Act 1989 and suggests that a shared parenting ethos in its widest sense was becoming the norm.

At the same time there were significant shifts in the rapidly developing case-law on shared residence orders. In an important article in CFLQ Peter Graham Harris and Robert George⁴⁶ critically assessed how the Court of Appeal in the mid 1990s spearheaded a move from making shared residence orders to reflect the reality of (broadly) equal arrangements to making symbolic shared residence orders to confer status or a sense of equal authority. The process they argue began with *Re H* where despite a very unequal division of time between the parents a shared residence order was seen as of ‘practical therapeutic importance’.⁴⁷ Harris and George argue that the use of shared residence orders as a symbol of equality was linked to the downgrading of parental responsibility by the Court of Appeal: ‘[a]s parental responsibility has been diluted, shared residence orders have arguably come to represent the new way of giving separated parents equal authority’.⁴⁸ This was in stark contrast to the Law Commission’s intentions for (equal) parental responsibility to be the cornerstone of shared parenting.⁴⁹

The Court of Appeal also led the way in expanding the circumstances where a shared residence order would be used. In *Re D Hale* LJ reiterated that a shared residence order should reflect the reality but that no further gloss on the Children Act 1989 (such as ‘unusual’ or ‘exceptional’) was required.⁵⁰ Both Gilmore⁵¹ and Harris-Short⁵² see the decision in *Re D* as a turning point, Harris-Short arguing that shared residence orders would subsequently be used in a wide range of circumstances, including those such as across long distances and amidst intense parental conflict, which had formerly operated as bars to shared residence orders.⁵³

Politicisation – 2000s

If the issue of shared parenting had been gradually building in the 1990s, from 2000 onward fathers’ rights and shared parenting suddenly gripped the public consciousness.

⁴⁴ *Hansard, Lords Debates*, vol 568, cc1129–78 (25 January 1996), amendment 158A.

⁴⁵ *Hansard, Lords Debates* vol 569, cc1178–9 (22 February 1996).

⁴⁶ PG Harris and R George, ‘Parental responsibility and shared residence orders: parliamentary intentions and judicial interpretations’ [2010] CFLQ 151.

⁴⁷ *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR 883.

⁴⁸ PG Harris and R George, ‘Parental responsibility and shared residence orders: parliamentary intentions and judicial interpretations’ [2010] CFLQ 151, at p 166.

⁴⁹ B Hoggett, ‘Joint parenting systems: the English experiment’ [1994] 6 J Child L 8, at p 11..

⁵⁰ *Re D (Children) (Shared residence orders)* [2001] 1 FCR 147.

⁵¹ S Gilmore, ‘Court decision-making in shared residence order cases: a critical examination’ [2006] CFLQ 478.

⁵² S Harris-Short, ‘Resisting the march towards 50/50 shared residence: rights, welfare and equality in post-separation families’ (2010) 32 *Journal of Social Welfare and Family Law* 257, at p 260.

⁵³ *Ibid.*

The issue became highly politicised with the major parties split over the issue as the Labour Government stuck to a welfare frame while the Conservative Party adopted a rights/equality frame. At the same time the terms of the debate switched from a focus on shared parenting and shared decision-making to the question of shared time and 50/50 splits. However, despite 10 years of continuous policy review, by the end of the decade there had been little change at policy level although significantly greater public awareness for the issue and the further advance of shared residence orders in the courts.

The decade opened with domestic violence and risk rather than rights dominating the policy agenda. A review led by Sir Nicholas Wall found that courts were putting women and children at risk by ordering unsupervised contact in domestic violence cases. The report proposed guidelines for the courts rather than the New Zealand style rebuttable presumption of no contact in risk cases proposed by domestic violence campaigners.⁵⁴ For the rest of the decade the policy debate was dominated by a rights rather than risk frame.⁵⁵

Following the Domestic Violence report, the Children Act Sub-Committee (CASC) turned their attention to the issues of contact raised by fathers' rights campaigners. As with risk, CASC rejected the presumption approach advocated by campaigners. The 2002 *Making Contact Work*⁵⁶ report instead reframed rights demands into welfare frame relationship problems, making recommendations for parent education to make contact work and some further enforcement powers.⁵⁷ At the same time, however, the report noted the 'fundamental assault' on the concept of 'contact' by fathers' rights groups and their demand for 'shared care'.⁵⁸ In Appendix 3 CASC suggested that the government might consider a pilot where a few courts could trial the (greater) use of shared residence orders.⁵⁹

It took 2 years for the government to produce its full response to *Making Contact Work*. In this policy vacuum debate rapidly became more polarised. Kaganas and Piper⁶⁰ raised concerns that the CASC report had resurrected debates about shared parenting that they argue that the Law Commission had previously rejected. The dominant story, however, was the rise of the fathers' rights lobby. The formation of Fathers 4 Justice (F4J) in early 2003 and a sequence of high profile publicity stunts throughout 2003–2004 immediately

⁵⁴ Advisory Board on Family Law Children Act Sub-Committee, *A Report to the Lord Chancellor on the question of parental contact in cases where there is domestic violence* (Lord Chancellor's Department, 2000). And see *Re L (A Child) (Contact: Domestic Violence)* [2000] 2 FLR 334, Court of Appeal.

⁵⁵ The domestic violence network continued to campaign with some policy successes. The main achievement was the expansion of the definition of 'harm' in s 31(9) of the Children Act 1989 to include witnessing of domestic violence achieved via s 120 of the Adoption and Children Act 2002.

⁵⁶ 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).

⁵⁷ *Ibid*, at para 1.5.

⁵⁸ *Ibid*, at para 8.

⁵⁹ Appendix C. Shared residence orders: shared or equal parenting: the responses by Families Need Fathers, the Equal Parenting Council, and the Association for Shared Parenting. The idea was taken up to become the Family Resolutions Pilot Project. See n 69, below.

⁶⁰ F Kaganas and C Piper, 'Shared parenting – a 70% solution?' [2002] CFLQ 365.

attracted extensive and largely favourable press coverage.⁶¹ Later in the year Bob Geldof's widely-publicised call for a 50/50 presumption signalled how far the debate had shifted.⁶²

In early 2004 the government response to *Making Contact Work* was finally published.⁶³ It was an attempt to build policy based on consensus and research evidence, and was very much within a welfare frame focused on addressing parental conflict and parental responsibilities rather than rights.⁶⁴ A further review of policy was announced.

The failure to accede to any of the fathers' groups demands generated an angry response, with the comments of a former editor of *The Guardian* capturing the tone of the period and the salience of a rights frame:

'So this week, vociferous fathers who want to share their children are bitterly disappointed. What do they demand? Their 50-50 rights, their designated half of their own kids. ... Climb more cranes, lads. This dads' army is getting desperate.'⁶⁵

Further F4J events occurred, including the flour bombing of the prime minister in parliament and scaling of Buckingham Palace, all resulting in worldwide press coverage.⁶⁶ Even sections of the traditionally Labour-supporting (and thus welfare frame-oriented) media were generally supportive of the fathers' rights message.⁶⁷ Richard Collier⁶⁸ astutely noted how the fathers' rights movement were shaping both 'the broader cultural context in which debates about family law' were taking place and creating pressure for reform.

The government nonetheless remained committed to a welfare frame based on retaining welfare paramountcy and individualised decision-making for children. In retrospect, it is apparent that the government adopted two different approaches to counter the increasing dominance of the rights frame. The first was to reframe rights initiatives into welfare. This was evident in the ill-fated Family Resolutions Pilot. Following the CASC suggestion for a shared residence order pilot, an ad hoc group of judges and fathers'

⁶¹ For example, A Craig, 'Fathers fight back' (2003) *Sunday Times*, 15 June. A Asthana and J Doward, 'Focus: fighting over custody: this far, but no father' (2003) *The Observer*, 26 October. For one of the few critical analyses see M Bunting, 'Poor, poor daddy. Nasty old mummy: the tactics now used by estranged fathers can only harm children' (2004) *The Guardian*, 6 February.

⁶² B Geldof, 'Family law is based on bias and prejudice' (2003) *The Independent*, 11 September, and B Geldof, 'The Real Love that Dare Not Speak its Name' in A Bainham, B Lindley, M Richardson and L Trinder (eds), *Children and their Families; Contact, Rights & Welfare* (Hart, 2003).

⁶³ Department for Constitutional Affairs and Department for Education and Skills, The Government's response to the Children Act Sub-Committee (CASC) Report: *Making Contact Work* (TSO, 2004).

⁶⁴ Including details of recently commissioned research on contact arrangements and parent satisfaction by ONS: A Blackwell and F Dawe, *Non-residential parental contact* (Lord Chancellors Department, 2003).

⁶⁵ P Preston, (2004) *The Guardian*, 22 March.

⁶⁶ The fathers' rights campaigner who scaled the Buckingham Palace balcony was shortlisted for the Channel 4 political impact awards for 2004.

⁶⁷ Y Roberts, 'Comment: listen to the children, Mrs Hodge: young lives will suffer from Britain's scandalous refusal to force mediation on parents' (2004) *The Observer*, 30 May.

⁶⁸ R Collier, 'Fathers 4 Justice, law and the new politics of fatherhood' [2005] CFLQ 511, at pp 532-533.

rights campaigners had developed a proposal for a 'Florida model' pilot that worked on the presumption of a default 30% time share, clearly within a rights frame. The pilot that was implemented by the government, however, was firmly located within a welfare-frame with no reference to time divisions and instead a focus on both parents attending a programme designed to facilitate co-operation. Supporters of the original project were dismayed.⁶⁹

The second approach was to embark on a protracted process of legislation on relatively minor or side issues. This process began with a Green Paper in July 2004 and resulted in the Children and Adoption Act 2006.⁷⁰ The Green Paper firmly rejected any statutory presumption of contact or 'equal rights to equal time', asserting the need for individualised decision-making,⁷¹ and arguing that any change was unnecessary as parents were already equal and the law ensured that children would have a meaningful or worthwhile relationship.⁷² The government proposed instead to use parenting plans to help parents cooperate, further use of court-based dispute resolution to tackle disputes and legislation to tackle enforcement.

While the government retained its opposition to any amendment to the paramountcy principle, the Justice Select Committee and the cross-party Joint Scrutiny Committee on the Draft Children (Contact) and Adoption Bill both recommended that the welfare checklist might be amended to include reference to the importance of sustaining a relationship with both parents.⁷³ Neither committee was in favour of a statutory division of time. In reply the government noted it was considering whether to codify the principle of the importance of a 'meaningful relationship' already existing in case-law into primary legislation.⁷⁴ The government reported eventually that it could not find 'a form of words that would send such a signal to the courts without moving the focus of legislation away from the fundamental principle that the welfare of the child is paramount'.⁷⁵

The question of a presumption split the parties. The Labour government, supported by an active lobby of children's charities, consistently adopted a welfare frame; the Conservative frontbench, supported by fathers' rights groups, consistently put forward a string of rights-oriented amendments to the Children and Adoption Bill. These included a presumption of 'substantial parenting time', of 'reasonable and substantial contact',⁷⁶ of

⁶⁹ See, for example, C Willbourne, 'Family resolutions v early initiatives' [2004] Fam Law 778. For the details of the executed pilot see L Trinder, J Kellett, J Connolly and C Notley, *Evaluation of the Family Resolutions Pilot Project* (DfES, 2006).

⁷⁰ M Maclean with J Kurczewski, *Making Family Law* (Hart, 2011) Chapter 4.

⁷¹ DCA, DfES and DTI, *Parental Separation: Children's Needs and Parents' Responsibilities*, Cm 6273 (TSO, 2004), at para 42.

⁷² *Ibid.*, at para 43.

⁷³ House of Commons Constitutional Affairs Committee, *Family justice: the operation of the family courts*, HC 116-1 (TSO, 2005), at para 153; *Report from the Joint Committee on the Draft Children (Contact) and Adoption Bill*, HC 400-I HL Paper 100-I (TSO, 2005), at para 121.

⁷⁴ Government Reply to the Report from the Joint Committee on the Draft Children (Contact) and Adoption Bill, Cm 6583 (TSO, 2005), at para 53.

⁷⁵ Parmjit Dhanda (Parliamentary under-secretary at DCSF) *Hansard*, HC Deb, vol 447, col 1237 (20 June 2006).

⁷⁶ *Hansard, Lords Debates*, vol 673, col 254-5HL (29 June 2005).

‘at least a third time’ or that each parent is ‘as fully and equally involved in his parenting as possible’.⁷⁷ All were defeated, as was a proposal to add ‘reasonable contact’ to both the welfare checklist⁷⁸ and to any official parenting plans.⁷⁹ Surprisingly little reference was made to the existing but not implemented ‘regular contact’ of section 11(4)(c) of the Family Law Act 1996.⁸⁰

The Children and Adoption Act 2006 introduced contact activities – parenting classes and information sessions on mediation – largely within a welfare frame designed to address co-parenting. In practice the Act offered little to the rights lobby except some limited (and little used) extra enforcement powers. The legislative process was therefore largely a process of non-decision-making designed to delay and contain.

Following the passage of the Bill press attention shifted away from fathers’ rights, partly as F4J imploded⁸¹ and partly as other issues, including transparency within the family justice system,⁸² rose up the policy agenda. One of the last acts of the Labour government was to establish another review of the family justice system under the chairmanship of David Norgrove. The primary motivation was not the concerns of the fathers’ groups, but to look at expanding mediation and reducing the use of courts against the backdrop of the financial crisis.⁸³

Internationalisation 2010–2012

The change of government in May 2010 signalled a significant policy shift away from Labour’s welfare to a rights frame. The two Coalition partners had both promised to address contact issues in their manifestoes. The Liberal Democrat manifesto promised a rights-based ‘Default Contact Arrangement which would divide the child’s time between their two parents’.⁸⁴ The less prescriptive Conservative Party manifesto item⁸⁵ was incorporated into the Coalition Agreement with a commitment to review family law ‘to look at how best to provide greater access rights to non-resident parents and grandparents’.⁸⁶

The obvious vehicle for addressing that commitment was the already existing Norgrove

⁷⁷ *Hansard*, HC Deb, vol 447, col 1214 (20 June 2006).

⁷⁸ *Hansard*, *Lords Debates*, vol 674, col GC43 (11 October 2005).

⁷⁹ *Hansard*, HC Deb, vol 443, col 68 (14 March 2006).

⁸⁰ It was raised briefly by a Liberal Democrat peer but rejected by the Labour Minister on the grounds that it ‘sets up a countervailing set of assumptions to those established in the Children Act 1989’ (*Hansard*, *Lords Debates*, vol 674, col GC155-6 (17 October 2005)).

⁸¹ The group was disbanded in early 2006 after press reports of a plot to kidnap the Prime Minister’s son.

⁸² Spring 2010 Children, Schools and Families Bill.

⁸³ <http://webarchive.nationalarchives.gov.uk/20100111120959/http://www.justice.gov.uk/news/docs/family-justice-review-terms-reference.pdf>.

⁸⁴ Liberal Democrat Party, *Our Manifesto 2010* (Liberal Democrat Party, 2010) http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf At p52.

⁸⁵ Conservative Party, *Invitation to Join the Government of Britain* (Conservative Party, 2010) http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf, at p42.

⁸⁶ Cabinet Office, *The Coalition: Our Programme for Government* (Cabinet Office, 2010), at p 20.

Family Justice Review (FJR). The Review's original terms of reference were retained with the addition of the principle that 'The positive involvement of both parents following separation should be promoted' and a new task 'to promote further contact rights for non-resident parents and grandparents'.⁸⁷ The FJR thus became the third major review of policy in ten years after CASC and the 2004 Green Paper. On this occasion the main struggles were not to be between political parties but between the rights lobbies and a welfare frame supported by a body of international research.

While the Labour government in the UK had largely followed a process of non-decision-making, in Australia a Liberal (Conservative) party Prime Minister had initiated major family law reforms, much to the delight of the Australian fathers' rights groups. The centrepiece of the 2006 reforms was a presumption of equal parental responsibility and the requirement that courts consider equal or substantial and significant time spent with each parent.⁸⁸ The Australian reforms proved to be an effective natural experiment to inform the subsequent English debates, not least as the reforms were accompanied by a comprehensive programme of research the results of which became available at a critical point in the UK policy process.

A sequence of academic articles and submissions was produced, drawing upon overseas experiences from Australia as well as from Sweden where similar shared parenting reforms had been introduced. In advance of the publication of the Australian evaluation data Helen Rhoades expressed serious concerns about the Australian reforms and the shared time presumption and proposed instead the approach adopted by the New Zealand Care of Children Act 2004 which directs decision makers to investigate the needs of the particular child within his or her particular family circumstances.⁸⁹

Trinder⁹⁰ was able to produce a rapid summary of the Australian evidence as it became available. The paper reviewed the evidence on the prevalence and durability of shared time arrangements, the satisfaction of parents and children, and the impact of shared residence on child wellbeing. The evidence reviewed, primarily from Australia, suggested that shared time could be a positive outcome where parents were able to cooperate and where arrangements were centred around children's needs but that shared time in higher conflict cases, typically following litigation, was associated with negative outcomes for children. Trinder noted particular concerns with the use of shared time in high conflict cases, where there were current safety concerns and with infants/young children under 4. Interestingly those Australian findings matched almost exactly the practice wisdom of the English judges in the 1980s and 1990s prior to expanded use of shared residence orders by the Court of Appeal. The review also noted a shared care paradox where the Australian reforms had led to a rapid expansion of the 'wrong type' of

⁸⁷ D Norgrove, *Family Justice Review: Interim Report* (MoJ, 2011) Annex A.

⁸⁸ Prime Minister Howard's motivation appeared primarily about increasing levels of fatherlessness in a context where a third of child lost contact following parental separation. See B Smyth and P Parkinson, 'Satisfaction and dissatisfaction with father-child contact arrangements in Australia' [2004] CFLQ 289. For an opposing view see H Rhoades, 'Child law reforms in Australia – a shifting landscape' [2000] CFLQ 117.

⁸⁹ H Rhoades, 'Revising Australia's parenting laws: a plea for a relational approach to children's best interests' [2010] CFLQ 172.

⁹⁰ L Trinder, 'Shared residence: a review of recent research evidence' [2010] CFLQ 475.

shared time, that is amongst the high conflict litigating cases least equipped to make it work for children. It also noted that many parents misunderstood the reforms to mean automatic 50/50 shared time.

The Norgrove team visited Sweden and Australia and also took submissions. The research evidence clearly made a difference. The Interim Report ruled out a shared time presumption or a ‘parental right to substantially shared or equal time for both parents’ but it did suggest that a legislative statement about the importance of a ‘meaningful relationship’ would be useful.⁹¹ The Review cited Trinder’s CFLQ summary of the Australian research that the co-operation required to make shared contact work in high conflict families could not be created by statute.⁹²

Over the summer 2011 the Australian research continued to resonate. A summary of the Australian and wider international findings was circulated to parliamentarians and later published by Fehlberg and Smyth.⁹³ The House of Commons Justice Committee took oral evidence from the lead researcher on the main Australian study.⁹⁴ The Justice Committee also ruled out introducing a shared care presumption, again based on the Australian experience.⁹⁵ It also queried the FJR’s interim proposal for a ‘meaningful relationship’ suggesting it would undermine the paramountcy principle.⁹⁶

Two other papers in 2011 also drew upon international experience of shared time, both focusing on Sweden. Newnham⁹⁷ examined the Swedish research on children’s experience of shared time, noting that sharing time does not make parents cooperate thus leaving children exposed in high conflict arrangements. Harris-Short⁹⁸ noted that despite equality-based arguments for shared time, there has been limited convergence in gender and parenting roles in the UK whereas the shared custody regime in Sweden reflected more equal patterns of care in intact families. Harris-Short argued that family policy should focus more on equalising pre-separation patterns of care.

The international research continued to impact upon English debates. In its final report the Norgrove panel reaffirmed its opposition to a time-based presumption.⁹⁹ It also stepped back from its earlier proposal to introduce a ‘meaningful relationship’ amendment for the Children Act 1989. It noted being ‘particularly struck by further evidence, received from Australia’,¹⁰⁰ that ‘meaningful’ had been misinterpreted as

⁹¹ D Norgrove, *Family Justice Review: Interim Report* (MoJ, 2011), at paras 5.76–77.

⁹² *Ibid.*, at para 5.73.

⁹³ B Fehlberg, B Smyth, M Maclean and C Roberts, ‘Legislating for shared time. Parenting after separation: a Research review’ (2011) 25 *International Journal of Law, Policy and the Family* 318.

⁹⁴ Dr Rae Kaspiew of the Australian Institute of Family Studies.

⁹⁵ Justice Committee, *Operation of the Family Courts*, HC518-I (TSO, 2011), at para 66.

⁹⁶ *Ibid.*, at paras 70–71.

⁹⁷ A Newnham, ‘Shared residence: lessons from Sweden’ [2011] CFLQ 251.

⁹⁸ S Harris-Short, ‘Building a house upon sand: post-separation parenting, shared residence and equality – lessons from Sweden’ [2011] CFLQ 344.

⁹⁹ D Norgrove, *Family Justice Review: Final Report* (MoJ, 2011), at paras 4.23, 4.27.

¹⁰⁰ The written submission by Professor Helen Rhoades was reproduced in full in Appendix G of the report.

shared time by parents and trial judges, requiring further legislation to ensure that safety trumped shared time presumptions. The FJR report concluded that amending the welfare principle would result in unnecessary risk for little gain.¹⁰¹ Instead, the Report returned to some of the core principles of the Law Commission working paper of 1986 arguing instead to educate parents about the meaning of parental responsibility (and presumably to restore its intended status). There was a single nod in the direction of a rights frame. The FJR proposed replacing contact and residence orders with a new child arrangements order as originally floated in the 1986 working paper. The rationale was the same as the Law Commission, that is, an equality argument.¹⁰²

While policy developments on shared time had stalled, in the courts the expansion of the use of shared residence orders had continued. Sonia Harris-Short¹⁰³ noted that while parliament had rejected any shared care presumption, the Court of Appeal was setting a clear lead on shared residence orders. Harris-Short noted the widening circumstances in which shared residence orders were being made to the point that she considered the shared residence order was becoming normative. Subsequently in *Re AR* Mostyn J asserted that shared residence orders were nowadays ‘the rule rather than the exception’.¹⁰⁴ Numerically, that is a wild overestimate of the prevalence of shared residence orders.¹⁰⁵ The Court of Appeal in *T v T*¹⁰⁶ also thought that it overstated the position and that instead the court should make the order that is in the best interests of the child.

Symbolism – 2012 onwards

The publication of the final report of the FJR ended more than a decade of policy review characterised by an ongoing tension between rights and welfare frames, ultimately resolved by reference to empirical research. That was not the end of the story. Besides the Coalition Agreement set within a rights frame, the new Children’s Minister was Tim Loughton, who had previously put forward (and lost) multiple amendments on shared care/shared time as Shadow Children’s Minister during the Children and Adoption Bill.¹⁰⁷ The government therefore announced immediately that it would legislate on a shared parenting presumption, despite the FJR’s recommendations.¹⁰⁸ It did accept the arguments set out against a time-based presumption based on the Australian research,¹⁰⁹ but stated that the continuing concerns of ‘many people ... about the proper recognition

¹⁰¹ Ibid, at para 4.40.

¹⁰² Ibid, at paras 4.55–4.68.

¹⁰³ S Harris-Short, ‘Resisting the march towards 50/50 shared residence: rights, welfare and equality in post-separation families’ (2010) 32 *Journal of Social Welfare and Family Law* 257.

¹⁰⁴ *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577.

¹⁰⁵ See n 137, below.

¹⁰⁶ *T v T (Shared and Joint Residence Orders)* [2010] EWCA Civ 1366, [2011] Fam Law 240.

¹⁰⁷ For example, *Hansard*, HC Deb, vol 447, col 1214 (20 June 2006).

¹⁰⁸ DfE and MoJ, *Government response to the Family Justice Review: a system with children and families at its heart*, Cm 8273 (TSO, 2012).

¹⁰⁹ Ibid, at para 62.

of the role of both parents by the courts'¹¹⁰ required a new presumption about the 'importance of ongoing relationship with both parents'.¹¹¹ The new presumption would be framed to avoid the problems in Australia and would be 'complementary to the paramountcy principle'.¹¹² This was despite Rhoades's prior submission about the additional interpretative workload for Australian judges in understanding 'meaningful' and the need for further clarifying legislation.¹¹³ Not surprisingly, the government endorsed the FJR's equality frame proposal for child arrangements orders.¹¹⁴

The government presented four options for a consultation on a new shared parenting clause in June 2012.¹¹⁵ Each of the four options was a variation on 'continuing parental involvement', whether as a principle, presumption or welfare checklist item. No change was not an option. The government's stated preference was for a presumption and indeed that was what the response to the consultation produced, albeit on a rather crude count of the responses, many of which were from (probably highly unrepresentative) individual separated fathers.¹¹⁶

The Justice Select Committee produced a highly critical Pre-Legislative Scrutiny report in response.¹¹⁷ It argued that the proposed child arrangements orders would be both difficult to understand and to operationalise.¹¹⁸ It was particularly critical of the draft clause on shared parenting which it concluded was purely symbolic: 'included not to effect any change in Court orders but to tackle a perception of bias within the Courts that we have previously concluded has no basis in fact'.¹¹⁹ It recommended first that 'involvement' be defined in legislation to prevent or limit any misunderstandings that it implied shared time, and secondly that the short title of the clause be renamed (from 'Shared Parenting' to 'Parental Involvement').¹²⁰

In its response the government accepted the proposal to amend the title of the clause from 'Shared parenting' to 'Welfare of the child: parental involvement'¹²¹ but refused to gloss

¹¹⁰ Ibid, at para 60.

¹¹¹ Ibid, at para 61.

¹¹² Ibid, at paras 62–63.

¹¹³ See n 100 above, and H Rhoades, 'Legislating to promote children's welfare and the quest for certainty' [2012] CFLQ 158.

¹¹⁴ DfE and MoJ, *Government response to the Family Justice Review: a system with children and families at its heart*, Cm 8273 (TSO, 2012) at paras 76–77.

¹¹⁵ DfE and MoJ, *Co-operative parenting following family separation: proposed legislation on the involvement of both parents in a child's life* (TSO, 2012).

¹¹⁶ DfE, *Co-operative parenting following family separation: proposed legislation on the involvement of parents in a child's life. Summary of consultation responses and the government's response* (TSO, 2012).

¹¹⁷ Justice Committee, *Fourth Report: Pre-Legislative Scrutiny of the Children and Families Bill* (TSO, 2012). <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/739/73902.htm> (last accessed 30 December 2013).

¹¹⁸ Ibid, at para 130.

¹¹⁹ Ibid, at para 153.

¹²⁰ Ibid, at paras 177–179.

¹²¹ DfE, *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Cm 8540 (TSO, 2013),

‘involvement’. They set out their reasoning thus:

‘In relation to shared parenting, the Government remains of the view that a legislative amendment will send an important message to parents about the valuable role which they both play in their child’s life. As well as helping to promote greater understanding about the way in which court decisions are made, we believe the amendment will, in time, encourage separated parents to adopt less rigid and confrontational positions with regard to arrangements for their children.’¹²²

No empirical evidence was offered to support those views.

The Children and Families Bill had its first reading in February 2013. The Bill proposed to amend section 1 of the Children Act 1989 by inserting that a court is:

‘to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child’s welfare ... if that parent can be involved in the child’s life in a way that does not put the child at risk of suffering harm.’¹²³

Further contact and residence orders (and shared residence orders) would be replaced by a child arrangements order, that is:

‘an order regulating arrangements relating to any of the following—

- (a) with whom a child is to live, spend time or otherwise have contact, and
- (b) when a child is to live, spend time or otherwise have contact with any person.’¹²⁴

While the Bill did not include any reference to time it still attracted highly critical commentary. Kaganas¹²⁵ saw the Bill as an attempt to use the expressive power of the law to reinforce a norm and criticised the failure to take account of the research evidence.¹²⁶

Throughout the progress of the Bill a coalition of children’s charities had lobbied against any new presumption.¹²⁷ The Labour and crossbench opposition focused on two types of amendments: to clarify that involvement does not mean any particular division of time,¹²⁸ and to replace the proposed involvement presumption with an additional welfare

<https://www.education.gov.uk/publications/eOrderingDownload/Children%20and%20Families%20Bill%202013.pdf> (last accessed 30 December 2013), at para 33.

¹²² At pp 30–31.

¹²³ Children and Families Bill (HL Bill 32) 2013 cl 11(2), (3).

¹²⁴ *Ibid*, cl 12(3).

¹²⁵ F Kaganas, ‘A presumption that “involvement” of both parents is best: deciphering law’s messages’ [2013] CFLQ 270.

¹²⁶ J Fortin, J Hunt and L Scanlan, *Taking a Longer View of Contact* (Sussex Law School, 2012), at p 15.

¹²⁷ Led by the Children’s Legal Centre. <http://www.childrenslegalcentre.com>.

¹²⁸ *Hansard*, Public Bill Committee Children and Families Bill, Eighth Sitting, col 270 (14 March 2013).

checklist item regarding the quality of relationships with both parents.¹²⁹ The Bill survived unscathed until the report stage in the House of Lords where an amendment by Dame Elizabeth Butler-Sloss (a former President of the Family Division), was passed by a narrow majority. Her amendment sought to minimise the potential for misinterpreting ‘involvement’ as shared time by inserting ‘[involvement] shall not be taken to mean any particular division of a child’s time’. The clause was a paraphrase of the government’s Explanatory Notes to the Bill.¹³⁰ Baroness Butler-Sloss in her speech noted she was not against the principle of involvement but was concerned to ensure clarity and help parents to put welfare first.¹³¹ The government subsequently accepted the amendment and the new definition survived the remainder of the parliamentary process.

Taking stock

What then has changed since the journal’s foundation in late 1988? What is clear is that there is considerable variation in the extent of change across the different domains of shared care. O’Connor was undoubtedly right that there has been a significant increase, or ‘climate change’, in public awareness and acceptance of shared time, although there is no empirical evidence as yet about public attitudes. The shift can be understood against a broader context of new norms about involved fatherhood and a significant increase in father involvement in intact families, even though convergence between the roles of mothers and fathers is still some way off.¹³² That said, for all the attitudinal changes, shared time remains relatively unusual amongst the general (non-court) population. Community studies suggest that 50/50 shared time has probably remained below 5% of the separated population since the mid 1990s.¹³³

O’Connor was also partially right about not changing the law. In terms of the statutory framework, there has been very little development since the implementation of the Children Act 1989 despite significant external pressure from various policy actors and an enormous amount of effort expended upon major policy reviews. The Children and Families Act does introduce a new statutory presumption of involvement, but the change is still a modest one, particularly given the gloss that involvement does not imply any particular time division. It is therefore a contact rather than a shared time presumption. It actually offers less to a rights frame than the ‘regular contact’ of section 11(4)(c) of the

¹²⁹ *Hansard*, Public Bill Committee Children and Families Bill, Eighth Sitting, col 270 (14 March 2013). *Hansard*, *Lords Debates*, vol 748, col GC268 (16 October 2013).

¹³⁰ ‘It is not the purpose of this amendment to promote the equal division of a child’s time between separated parents’. Bill 032 2013-14, Explanatory notes to the Bill, at para 99; <http://services.parliament.uk/bills/2013-14/childrenandfamilies/documents.html>.

¹³¹ *Hansard*, *Lords Debates*, col 1143-4 (17 December 2013).

¹³² For summaries of the social science research see S Harris-Short, ‘Resisting the march towards 50/50 shared residence: rights, welfare and equality in post-separation families’ (2010) 32 *Journal of Social Welfare and Family Law* 257, at pp 269–270; F Kaganas, ‘A presumption that “involvement” of both parents is best: deciphering law’s messages’ [2013] *CFLQ* 270, at p 282.

¹³³ Stephen Mackay reports figures for 50/50 shared care across two large-scale nationally representative cohort studies. The BHPS 2000 wave found 1% 50/50 shared care (resident parent report), 3% (non resident parent report); BHPS 2007 wave 1% (resident parent report) and 2% (non-resident parent report) and Understanding Society 2009 wave 3% (non-resident parent report). Source: S McKay, ‘Shared parenting: longitudinal and comparative perspectives’. Paper given to AHRC Research Network, University of Birmingham (5 January 2012).

Family Law Act 1996 and clearly much less than occurred in Australia. There has been no paradigm shift in this field and the welfare frame in its broadest sense is largely unquestioned. This is what Hogwood and Peters¹³⁴ term *policy maintenance* (adaptation or adjustment) rather than policy succession (replacement) or policy termination. The rights frame has thus achieved considerable impact on public and media perceptions but secured very few concrete policy changes. In contrast, the welfare frame has continued to have a significant impact, although principally as a means to block policy change, whether in the form of the symbolic policy-making of the Children and Adoption Act 2006 or as the principal basis to resist the rights frame during the Coalition government.

The two shared care domains where there have been very significant changes ironically run in tension. Over the last few years there has been a major expansion in the quality and sophistication of the evidence base relating to the outcomes of shared time for children. There are now clear messages about when shared care is most and least likely to work for children. The research messages largely affirm the earlier judicial caution about ordering shared time in high conflict cases. In contrast, the range of cases where the courts have ordered shared residence or shared time have changed out of all recognition since 1988, led by the Court of Appeal. The result is that the number of litigated cases with shared residence is, as in Australia, considerably higher than in the wider separated population. The best estimate from recent community studies is that fewer than 5% of children have shared time arrangements; in court populations the proportion with shared time appears to have increased fairly steadily from less than 1% in the mid 1980s,¹³⁵ to 7% in 2003¹³⁶ to 10% in 2013.¹³⁷ Neither the increase nor the greater preponderance of shared time among the litigating population fits with the messages from the research that children do best in shared time arrangements where parents are able to co-operate.

What accounts for these developments? At the policy level, a fit between government ideology and interest group proposals has clearly been important.¹³⁸ A Labour government with a strong orientation to a welfare frame was in power for most of the period when the campaigning of fathers' rights groups was at its height. There is a ready comparison with Australia where there were equally well-organised fathers groups, but with a Liberal (Conservative) rather than Labour-led government. The difference produced a shared care presumption in Australia rather than a defence of the welfare principle as in the UK. Kingdon's multiple streams analysis of policy-making¹³⁹ is relevant. The theory is that changes in policy are brought about when three process streams – problems, solutions and politics – coalesce thereby opening a policy window. In the UK, unlike Australia, the profile of fathers' rights groups peaked in the mid 2000s

¹³⁴ B Hogwood and B Peters, *Policy Dynamics* (Wheatsheaf, 1983).

¹³⁵ J Priest and J Whybrow, *Custody law in practice in the divorce and domestic courts*, Supplement to Law Commission WP No 96 (1986), at Table 10.

¹³⁶ Of 243 finalised residence cases: C Smart, V May, A Wade and C Furniss, *Residence and contact disputes in court* (Department for Constitutional Affairs, 2003), at pp 15–16.

¹³⁷ M Harding and A Newham, *Court ordered parenting arrangements in County Courts: preliminary findings* (University of Warwick and University of Portsmouth, January 2014).

¹³⁸ E Page, *How policy is really made* (Public Management and Policy Association, 2006).

¹³⁹ J Kingdon, *Agendas, Alternatives, and Public Policies* (Harper Collins, 2nd edn, 1995).

at a time when the political window was shut.

In theory, the Coalition government offered an opportunity for the policy window to be reopened fully. But although the Executive is powerful it must still take cognizance of other policy actors with different policy goals. The welfare frame remains dominant amongst key policy actors: the professional groups, the children's charities and amongst many parliamentarians, (including Conservative and Crossbench peers), as evinced by the negative or lukewarm responses to the proposals to legislate on shared parenting.

It is also vital to acknowledge the role that research evidence has played in the policy process. There have been concerns expressed in the past about empirical research having an inappropriate influence on law and policy-making.¹⁴⁰ This, however, was a policy area where empirical research evidence played a critical, and in my view, a wholly appropriate role.

The research utilisation literature provides useful insights into the relationship between research and policy. Carol Weiss¹⁴¹ distinguishes between instrumental use of research where a study has a direct impact on policy and conceptual (or enlightenment) use where studies subtly shape the thoughts/beliefs of policy-makers. The latter use is generally seen as more common. A third 'processual' use notes that research may or may not be used depending upon fit with broader policy objectives.¹⁴²

Two of these three uses are evident in relation to shared parenting. High quality evidence, primarily Australian, and consistent with a welfare frame, played a direct instrumental role in the rejection of a shared care presumption by the FJR. It also precluded the adoption by the Coalition government of a quantity or time-based presumption, despite prior Conservative and Liberal Democrat preferences.¹⁴³ There is also evidence of processual use, of evidence being used selected or ignored depending upon fit with existing policies. A notable example is the way in which the Coalition government distinguished the Australian evidence on public and judicial misinterpretation of shared care presumption when introducing its own presumption of involvement.

This is a field where there are a range of 'authorities' besides research evidence. The rights frame has been unable to rely on research evidence and instead has been sustained largely by the use of personal testimonies from individual fathers. These have typically been in the form of modern myths¹⁴⁴ or 'horror stories'¹⁴⁵ featuring a morally righteous victim and heartless ex-spouse. These types of individual stories can be very powerful.

¹⁴⁰ R Deech, 'Divorce law and empirical studies' (1990) 106 LQR 229. But see also M Maclean and J Eekelaar, 'Divorce law and empirical studies – a reply' (1990) 106 LQR 621.

¹⁴¹ C Weiss, *Using Social Research in Public Policy-making* (DC Heath, 1977); C Weiss, 'The Many Meanings of Research Utilisation', in M Bulmer (ed), *Social Science and Social Policy* (Allen Unwin, 1986).

¹⁴² M Monaghan, *Evidence Versus Politics: Exploiting Research in UK Drug Policy Making?* (Policy Press, 2011).

¹⁴³ See nn 76 and 77, above, for time-based Conservative proposals and Liberal Democrat Party, *Our Manifesto 2010* (Liberal Democrat Party, 2010), http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf, at p 52.

¹⁴⁴ M Kaye and J Tolmie, 'Discoursing dads: the rhetorical devices of fathers' rights groups' [1998] *Melb U L Rev* 162, at p 194.

¹⁴⁵ See J Gusfield, 'Constructing the ownership of social problems' (1989) 36 *Social Problems* 431, and S Coltrane and N Hickman, 'The rhetoric of rights and needs: moral discourse in the reform of child custody and child reform laws' (1992) 39 *Social Problems* 400.

As Kaye and Tolmie¹⁴⁶ found in Australia, individual stories, however partial or unrepresentative, can be used to make universal claims about fairness and justice that can have more traction with media and policy-makers than the most rigorous and systematic research study. A British example is the use of horror stories to suggest systematic bias against fathers in the family courts.¹⁴⁷ Systematic research has indicated that the claim is unfounded and that the great majority of fathers get most or all of what they have sought.¹⁴⁸ Nonetheless, the government's decision to legislate on shared care was justified solely on the basis of individual claims of bias.¹⁴⁹ As the Justice Committee pointed out, the government was planning to legislate to correct a perception that had no basis in fact.¹⁵⁰

Looking back over the last 25 years it is clear that empirical evidence has had variable impact across the various fora. It is interesting to note that independent reviews/commissions of inquiry such as the FJR and Justice Committee appear most amenable to research evidence. For governments receptivity to research appears to depend upon a fit between ideology and findings. The one area where research evidence is perhaps least likely to be used is by the judiciary. The focus on traditional legal authorities, perhaps supplemented by expert reports, appears to reduce the reliance upon empirical research by the senior judiciary. A wider shift within family law towards 'rule-based' procedures given the attraction of norms where rights are of increasing significance and the resources to manage large volumes of cases ever scarcer may also be important.¹⁵¹

Conclusion

The changes in relation to shared care over the last 25 years have been inconsistent. Shared care in its widest sense has achieved the status of a social norm but shared time is not that much more common as a social practice. In policy terms, there is little difference between the Law Commission's original proposals for equal parental responsibility and the possibility of shared time and the current statutory framework. Indeed the replacement of contact and residence orders with a child arrangements order takes us straight back to the Law Commission's original proposals from 1986.¹⁵² Where there has

¹⁴⁶ M Kaye and J Tolmie, 'Discoursing dads: the rhetorical devices of fathers' rights groups' [1998] *Melb U L Rev* 162, at p 194.

¹⁴⁷ Contrast the use of individual horror stories by Charlie Elphicke MP and systematic research findings by Lisa Nandy in the same Committee hearing (*Hansard*, HC Deb, vol 560, col 282-4 and 2712 (5 March 2013))

¹⁴⁸ J Hunt and A Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (MoJ, 2008).

¹⁴⁹ DfE and MoJ, *Government Response to the Family Justice Review: a system with children and families at its heart*, Cm 8273 (TSO, 2012), at para 60.

¹⁵⁰ Justice Committee, *Fourth Report: pre-legislative scrutiny of the Children and Families Bill* (TSO, 2012), <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/739/73902.htm> (last accessed 30 December 2013), at para 153..

¹⁵¹ J Dewar, 'The normal chaos of family law' (1998) 61 *Modern Law Review* 467.

¹⁵² Law Commission, *Family Law Review of child law: custody law*, Com WP 96 (HMSO, 1986), at para 4.52. There are other echoes. A concern that shared care proposals would be misinterpreted as shared time was evident in the late 1990s as well as during the passage of the Children and Families Bill as was a desire to remove labels that parents

been significant change over the last 25 years has been in the sophistication of the research evidence urging caution in the use of shared time in high conflict case. However, those research messages have not curbed the use of shared time in litigated cases, a phenomenon that has grown throughout the period and far beyond the Law Commission's original intentions.

The last 25 years have therefore been characterised by different trends, aptly though not comprehensively, described by O'Connor as climate change without policy change. Having such a gap between public and media perceptions and the law is, however, an unstable position and probably not sustainable in the long term. It is highly likely that there will be further pressure from the fathers' groups to strengthen the new presumption introduced by the Children and Families Act and the task will be easier in future given that the principle of an additional presumption alongside the welfare principle has been conceded.

The biggest changes are likely to be in practice, however. While the new presumption appears relatively innocuous the likelihood is that it will be interpreted by sections of the press and by some parents as implying equal time.¹⁵³ Somewhat paradoxically, the removal of shared residence orders and introduction of child arrangements orders may also increase the number of shared time arrangements. Previously, parents seeking to establish their equal status had the prospect of a symbolic shared residence order to fight for. Under the new regime the only outlet for that desire will be in terms of an equal time split rather than a label. It is worth noting also that the Law Commission had predicted in 1986 that the introduction of a single order would be likely to lead to more equal time shares.¹⁵⁴

The other major factor that may influence the development of shared care, especially shared time, is the change within the family justice system wrought by resource constraints. While the rights, welfare, and to a lesser extent, the risk frames have competed over the last 25 years, perhaps the one consistent frame embraced by all governments has been about resources. As noted above the resource frame posits litigation and lawyers as the problem and alternative dispute resolution as the solution.¹⁵⁵ The removal of legal aid from most private family law cases following LASPO,¹⁵⁶ however, means that more parents will self-represent. They will do so without advice

could fight over. On both occasions feminists have argued that policy-makers should focus on gender equality in intact families rather than beginning with post-separation arrangements: see J Brophy, 'Custody Law, Child Care and Inequality in Britain', in C Smart and S Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (Routledge, 1989), at p 234, and F Kaganas, 'A presumption that "involvement" of both parents is best: deciphering law's messages' [2013] CFLQ 270.

¹⁵³ The *Daily Mail* had previously implied that the government's proposals amounted to equal time. See *Hansard*, Public Bill Committee Children and Families Bill, Eighth Sitting, col 273 (14 March 2013).

¹⁵⁴ DfE and MoJ, *Government Response to the Family Justice Review: a system with children and families at its heart*, Cm 8273 (TSO, 2012).

¹⁵⁵ The belief that mediation will be cheaper than litigation has a long history: See Lord Chancellor's Department, *Looking to the future – mediation and the ground for divorce: the government's proposals*, Cm 2799 (HMSO, 1995). For the present day justification for funding mediation rather than legal aid for most private family law cases see Ministry of Justice, *Proposals for the reform of legal aid in England and Wales*, Cm 7967 (TSO, 2010), at paras 4.69–4.72.

¹⁵⁶ Legal Aid, Sentencing and Punishment of Offenders Act 2012.

from an experienced family lawyer whose orientation and professional code is firmly within a welfare frame and therefore likely to be cautious about the use of shared time.¹⁵⁷ Alternatively, parties may mediate. The evidence from Australia is that parents were far more likely to agree shared time arrangements in mediation than in the general population, most of whom did not use courts or mediation.¹⁵⁸ It is not clear whether a similar pattern will emerge in the UK. However, what is of concern is that unlike the court system where nearly half of children will be directly consulted, in the mediation sector very few children are involved in the process or have a neutral third party such as a Cafcass officer or guardian to advocate for their interests.¹⁵⁹ That is a significant concern for the future, especially given Baroness Hale's view that children's wishes and feelings 'ought to be particularly important in shared residence cases, because it is the children who will have to divide their time between two homes and it is all too easy for the parents' wishes and feelings to predominate'.¹⁶⁰

¹⁵⁷ See, for example, J Eekelaar, M Maclean and S Beinart, *Family Lawyers* (Hart, 2000).

¹⁵⁸ Twenty-four per cent of parents left mediation with a shared time agreement compared to 8–16% of shared time arrangements in the general population: see L Trinder, 'Shared residence: a review of recent research evidence' [2010] CFLQ 475, at p 479.

¹⁵⁹ L Trinder, C Jenks and A Firth 'Talking children into being *in absentia*? Children as a strategic and contingent resource in family court dispute resolution' [2010] CLFQ 234.

¹⁶⁰ *Holmes-Moorhouse v Richmond-Upon-Thames London Borough Council* [2009] UKHL 7, [2009] 1 FLR 904, at para [36].