

Supplementary evidence submitted by Celia Conrad, Freelance Legal Consultant

1. I make these supplementary submissions further to my original submissions dated 25 October 2004, and at the request of the Constitutional Affairs Committee. I confirm that these submissions should be read in conjunction with my original submissions and that although these supplementary submissions address other points in respect of the Family Courts there is inevitably a degree of overlap between the two.

2. My original submission focused on Early Interventions (as per the Early Interventions Pilot Project referred to at paragraph 8 of those submissions). I believe that early intervention in line with that project would enable the family court system to be run more effectively. Judges would be able to use the powers they already have to the full extent in a court led process, thereby reducing delays, and the number of cases proceeding through the courts, and the cases to be enforced. As a result families would be given a better service.

BASIC PRINCIPLES

3. The Children Act 1989 states that the welfare of the child shall be the paramount consideration of the court when an application is made to it. The Government confirms that it shall remain so in the Green Paper—Parental Separation: Children's Needs and Parent's Responsibilities and that it "firmly believes both parents should have responsibility for and a meaningful relationship with their children after parental separation—with the important proviso that it is safe" (Chapter 3, paragraph 40). This is further affirmed at Chapter 3 paragraph 41 in relation to the courts "that the general principle to be applied by the courts is that both parents have equal status as parents and that the courts expectation is that both parents should continue to have a meaningful relationship with the children following separation, as long as it is safe and in the child's best interest."

4. How is it proposed that this "meaningful relationship" between children and their parents post separation is to be achieved? It is generally accepted that the current family court process does not work for those cases where the parties cannot reach an amicable agreement between themselves. Resorting to the legal system to try to resolve what they cannot does not produce desired results. The law only works for parties who are able to act in the best interests of their children and reach an amicable agreement, because in that situation the law does not need to intervene at all! This is clearly demonstrated by the non-intervention and no-order policy under the Children Act, which assumes that parties will endeavour to make their own arrangements and do their best to resolve differences by negotiation and co-operation. The court will only intervene and make an order where it would be better for the child to make an order than no order at all. The problem is that obtaining a worthwhile order is in itself beset with numerous obstacles as referred to below.

ACHIEVING A "MEANINGFUL RELATIONSHIP"

5. In the Green Paper the Government has put forward a raft of proposals which are supposed to assist the facilitation of this "meaningful relationship" and to divert parties away from the adversarial court process and to help them to agree issues relating to contact and residence between themselves. These include proposals in relation to collaborative law, mediation, protection of children from harm, case management (earlier listing of hearings, reducing delay, judicial continuity etc), post order follow up, use of Family Assistance orders to facilitate contact and enforcement along the lines of the CASC

report Making Contact Work. Any proposals to divert parties away from an adversarial court process are to be welcomed and the intention of the Green Paper is meritorious. But the question is whether these proposals go far enough, and if their implementation will achieve the desired result. There already seem to be problems as demonstrated by the Family Resolutions Pilot Project (FRPP).

6. The FRPP aims to help separated/separating parents to reach agreement about contact and residence without the need for formal family court proceedings by providing information to parents at the start of proceedings about, inter alia, the negative impact of parental conflict on children, workshops on conflict management and a planning session with CAFCASS where they are given examples of parenting sessions that work. This is positive BUT the premise from which FRPP starts is to say that the welfare of the child is best promoted by quality of contact between the child and the non-resident parent rather than quantum. (I refer to the quality v quantity element at paragraph 17 of my original submissions). Since contact applications are about time I do not agree with this approach. Parents are given no guidance as to how much time equates to a 'meaningful relationship' in their particular case. It takes time to build a quality relationship.

CONTACT AND TIME

7. Contact applications are all about time, for example:

— How much time it takes to obtain an order and for a child's contact arrangements with the non-resident parent to hang in the balance.

— How much time the child spends with each parent.

— It should also be borne in mind that delay is time related.

8. The intention of the Children Act is to encourage both parents to continue to share in their children's upbringing, even after separation and divorce. How is this to be achieved unless the child has time with both parents? But how much time should that be? To be precise, what apportionment of the child's time with each parent represents the child's best interest? By infrequent visits lasting a couple of hours? By a 50/50 split or a 30/70 split of the child's time? By overnight stays? By alternate weekends and holidays with around 100 nights contact per year or more or less? The argument against any definition of time is that "every case is different" and so no generalisations may be made. I deal with this below.

9. The Government states at paragraph 42, Chapter 3 of the Green Paper that it does not believe "that an automatic 50:50 division of the child's time between the two parents would be in the best interests of most children" and that the "best arrangements for them will depend on a variety of issues particular to their circumstances: a one-size-fits-all formula will not work." Consequently introducing a legal presumption of contact to give parents equal rights to equal time with their children after parental separation is not appropriate. The problem is that currently there are no court backed time-linked guidelines as to what is appropriate and so the apportionment of time could be anything between 0% and 100%.

EXISTING APPROACH

10. The starting point is that the child has a right to know both parents and should have contact with the non-resident parent. The child has a right, where the parents are separated, to know the non-residential parent and his brothers or sisters. There is a

normal assumption that a child will benefit from continued contact with his parent, but that assumption can always be displaced if the child's interests indicate otherwise. The problem for a non-resident parent seeking contact is that the onus is always on him/her to prove that more contact would be in the best interest of the child, whereas the resident parent is not obliged to show why contact should not take place. Because of the "every case is different" approach and because CAFCASS do not have any guidelines on how much contact to recommend, it follows that any outcome can flow from any facts and contact can be stopped for any reason. A "fit" parent has no presumptive entitlement to any time with the children.

11. Further, where the contact has stopped and there has been a period of no contact the test to be applied is whether there are any cogent reasons why the child should be denied the opportunity of contact with the non-resident parent. Before ruling out the establishment or re-establishment of contact the court will wish to be satisfied that all avenues have been tested. So we venture into the realms of protracted litigation, delay, CAFCASS reports, investigation of allegations of abuse, violence etc.

REASONABLE CONTACT

12. There is no definition of reasonable contact. It is argued that it cannot be defined because "every case is different" and so we cannot legislate on it because we do not have a consensus on what it is. That makes for dissatisfaction all round so a less confrontational approach would be to develop Parenting plans for various categories of case, based upon the individual child's needs. What is key to this is that at the beginning of the case when an application is made to the court guidance is given to the parties on how much contact the court is likely to order if they cannot agree (it may be appropriate to have default guidelines which can only be departed from for very good reason), frequent and continuous contact is in the child's interests and that there is a clear presumption that the child is going to have parenting time with both parents.

EARLIER INTERVENTION AND PARENTING PLANS

13. If the Court's expectations can be conveyed in advance that creates predictability. Under the current process parties have no idea of what level of contact the court expects them to agree until they are well entrenched in the proceedings. I have dealt with cases where no amount of pleading from one party to the other to reach an agreement has worked, but where the judge has intervened and clearly directed that he will make a certain order if the parties do not agree by that direction he has promoted agreement. It is unfortunate that his intervention could not be earlier but that is down to the current process, not the judge. So if we had judicially led/backed time-linked guidelines setting out what sort of outcome is appropriate if the parties were to litigate which are communicated to the parties at the time the application to the court is made that will focus the parents' minds.

14. How would this be achieved in practice? There is a three stage non-court process:

— Court issued information is given to the parties at the moment proceedings are issued. They are provided with a video focusing on what is best for the child and a leaflet setting out the court's expectations and guidelines on proper parenting after separation. Early Interventions hinges upon giving parents guidance before the case, on how much contact there should be and leads to the development of parenting plans which would set out norms of contact as a framework for negotiation.

— Parent education. A parent orientation class for potential litigants is the next stage.

— Contact-focused mediation. One-off mediation for those still struggling to agree which is compulsory.

15. So what happens to ensure that the safety of the child is addressed? When an application is made the case is immediately assessed to ascertain whether there are any concerns. If there are it will be taken out of the non-court process and placed into the court process. Because many more cases are kept out of court, the court's time is freed up and valuable judicial input can be given to the more urgent cases. In Florida they have trained court managers to assess the cases when they come in to recognize a case that needs to be fast-tracked in this way.

16. Time-linked parenting plans are crucial. Without knowing what contact arrangement is likely to be in the child's interests for various categories of case, it is not possible to advise parents in advance of how much contact they should allow. Parenting plans are open to infinite variation depending upon the facts of the case, so deal with the problem that "every case is different." By reviewing the information given to them, attending the parent education and resorting to mediation if necessary, parents can design a parenting plan which in the best interests of the child.

17. The Early Interventions Pilot Project fulfils the intentions of the Children Act to encourage both parents to continue to share in their children's upbringing, even after separation or divorce. Frequent and continuous contact is in the child's interests and an affirmative obligation is to encourage and nurture a relationship with the other parent. With Family Resolutions reasonable contact is only an option.

CAFCASS

18. CAFCASS's role is very important as a CAFCASS officer acts as the court's expert in contact disputes. A Court reporter via a Welfare report makes a recommendation to the court on what level of contact is appropriate, so how these reports are produced is crucial. The problem is that CAFCASS does not have guidelines in relation to the amount of time a child should spend with a non-resident parent and what sort of contact should be recommended in what sort of circumstances.

19. CAFCASS state that every case is different so if there are no categories of case there can be no parenting plans outlining what should happen in the various case categories (Contact: Principles Practice and Procedures (CAFCASS 15 August 2004). Consequently CAFCASS does not keep records of how much contact it recommends or why because if every case is different then it is not necessary. Accordingly no training is given on what to do on any case as each case is different.

20. CAFCASS receives a great deal of criticism as it is alleged that some of the reports are based on idiosyncratic, highly personal and often outrageous personal opinions and since there are no guidelines for determining how much time children should spend with both parents after separation, it is not surprising that such criticism is made.

21. The power of CAFCASS is no more evident than when a party is publicly funded. If the CAFCASS officer produces an unfavourable report and states that the applicant has no reasonable chance of success in his/her application and that it is unmeritorious then it is possible for that party's legal aid certificate to be revoked. Essentially the Court reporter's

opinion, which may not be well-founded, is depriving that party of legal representation which may be desperately needed and essentially adjudicating on the case.

DOMESTIC VIOLENCE AND ABUSE

22. These are very serious issues and any allegations rightly need to be assessed by the court, including if the court considers, through a finding of fact. The problem we have currently is that there is nothing to secure the children's right to parenting time when it is being obstructed without there being any safety issue at all. Also the process is too slow and allegations which have to be investigated cause delay, which is why cases need to be streamed as referred to above.

23. Allegations made in affidavits are often unreliable and difficult to prove and if children are involved, courts invariably favour the mother. Judges have to err on the side of caution and grant injunctions. The problem is that making allegations is all too easy. There seems to be no redress against someone who has made false allegations. In other areas of the law this would be seen as perjury.

24. Where there has been a misdiagnosis of child abuse as per Angela Cannings, Sally Clark and Trupti Patel for it to be sufficient for one expert to claim on the balance of probabilities that the parent is guilty does not bode confidence in the legal system.

25. A review of the Munchausen cases has been carried out by social services scrutinising their own decisions. The Court of Appeal has affirmed that non-medical evidence is relevant and cogent and meets the threshold criteria. It is a cause of major concern that circumstantial rather than direct evidence will be sufficient to justify a decision that a parent has deliberately harmed his/her child.

BIAS

26. The law may be gender neutral in intent. However that is not the perception of many non-resident parents who have been through the current court process. They have no faith in it to produce an unbiased result.

27. Compared with the number of children involved, it is true to say that the number of cases that reach a final hearing are small because the majority of cases are compromised along the way. However, this does not mean the parties are satisfied with the compromise reached and that they feel they have been well served by the legal system. Many give up because they feel the system is too heavily weighted against them. The fact that a case is compromised is definitely not an indication of a positive outcome for either the non-resident parent or the children.

28. I believe that this is not so much gender issue but a parent issue. It is a balance between the "resident parent" and the "non-resident parent" irrespective of gender. This is because the non-resident parent is always on the back foot. The non-resident parent, usually the father has to show why contact which has been stopped should be restarted. The burden of proof is on the non-resident parent to show why reasonable contact should be ordered.

29. The term "non-resident parent" is seen as discriminatory. The Children Act provides for shared residence. If we had a presumption of shared residence that can only be departed from if there are strong and clear reasons for doing so, then at least the non-resident

parent would not be disadvantaged from the outset. The distinction between the non-resident and resident parent would disappear and so would a lot of the resentment and the applications to court.

SECURITY

30. I believe that there should be more openness in the courts. One argument put forward when the fathers' groups stated that the courts are biased to them is that this is because cases are held in private and full details are not released to the public, so decisions are being misinterpreted. The problem for parents is that they feel they have no "voice" if they are deemed in contempt of court by talking about their case.

31. Section 12 Administration of Justice Act 1960 stipulates that it will be a contempt of court to publish any information relating to the proceedings if the proceedings relate to children. (There is specific reference in that Act to proceedings issued under Children Act brought under High Court's inherent jurisdiction and generally where there is an issue relating "wholly or mainly to the maintenance or upbringing of a minor." In such cases no publication is allowed.) The reasoning behind the confidentiality of family court proceedings is that the child's welfare must come first and that the child must not be put at risk of being identified. Vital first judgments at first instance are made in private and they are unavailable for scrutiny. However, once the case goes to appeal, although anonymised, public reporting of judgments that reveal many identifying features is permitted.

ENFORCEMENT

32. The primary difficulty is not in enforcing orders but in obtaining an order worth enforcing in the first place. Currently it takes years to obtain an order for reasonable contact. There is no point in having a system that does not work coupled with punishments when contact orders are breached for whatever reason. What is crucial is a legal system which enables parents to obtain contact with their children in the first place.

33. Financial punishments are not always satisfactory as the resident parent, generally the mother, does not have the money to pay, although that is no compensation to a parent who has expended money on a holiday only to have that trip thwarted. Punishment in terms of giving more time to the other parent would work in line with the aim of the contact order in the first place.

GRANDPARENTS

34. Research repeatedly records the level of childcare provision by grandparents at a steady 60% plus. Under the current law before a grandparent can apply for a residence or contact order the Children Act 1989 requires them to obtain leave of the court. In deciding whether or not to grant leave the court must take into consideration the grandparents relationship with the child and the risks and disruption to the child's life.

35. Should grandparents require leave? Given that grandparents are currently providing the majority of non-parental childcare in this country, there should be much more discussion on the matter.

Celia Conrad
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