

Evidence submitted by John Eekelaar, Oxford Centre for Law, Policy and the Family

1. My interest is in the appropriateness of the use of law in regulating family relationships.
2. While people live together, legal mechanisms are generally considered unsuitable and ineffective for regulating the way people deal with one another in their personal relationships or organise their time with their children. This is because these matters involve intimacies of family living which are hard to assess by legal methods, are very fluid, raise deep emotions and very sensitive in their implications for children. (See the analogous case of regulating health and diet).
3. While the fact of separation creates a new situation which may require legal involvement, most of the reasons why legal mechanisms are inappropriate remain. It should be remembered that only a tiny proportion of separations lead to legal conflict.
4. Desirable patterns of post-separation parenting therefore need to be promoted through non-legal means (eg education, mediation, counselling). Government policy can appropriately promote recommended patterns.
5. Legal presumptions are likely to be of limited value, or even counter-productive, for the following reasons:
 - (a) How would they be framed? If: "the court should order contact unless satisfied this would not be in the child's interests", this presumes that contact in legally conflicted cases (which, by definition, these would be) is beneficial to children unless shown otherwise, whereas the research evidence shows that this is not so. If: "the court should order contact if beneficial to children", this is unnecessary, since the welfare principle requires the court to do what is best for children anyway.
 - (b) The degree of contact "presumed" might need to be specified (would the presumption be interpreted as referring to all types of contact from minimal to "equal sharing"?).
 - (c) It might be necessary to frame counter-presumptions, such as: "the court should not order contact in favour of a parent who has behaved in a violent way unless satisfied that this would be in the child's interests". Such conflicting presumptions would encourage forensic dispute and polarise attitudes. There is evidence from New Zealand (which has such a presumption) that it causes delay because judges will not hear the main issues until allegations of violence are resolved.
 - (d) In any event the courts operate on a number of "assumptions of fact" about where children's interests lie: eg that mothers can deal with very young babies better than fathers, that violent situations are bad for children, that children will normally benefit from contact. These are different from presumptions in that a presumption points to an outcome unless sufficient positive evidence to the contrary is accepted, whereas a fact which is assumed to benefit a child simply takes its place alongside other facts about the child's interests so the court can decide on the preponderance of evidence where the child's best interests lie.
6. Enforcement: whether or not the welfare principle technically applies to the enforcement of orders, the fundamental basis of the order would be subverted if enforcing it operated against the child's interests.

7. This dilemma influences my preferred solution. This is that, if non-legal interventions fail, coercive legal measures should only be taken where necessary to protect a child from clear harm.

8. Thus the procedure would be that, in a disputed case, the last non-coercive step would be a recommendation which could go to compulsory mediation. If that failed to produce an agreed outcome, or if an agreed outcome failed to work, a formal order would only be made if:

(a) investigation showed that the lack of contact is causing the child clear harm (eg by damaging a relationship which the child values); and

(b) the court considered that the prospective harm likely to be inflicted on the child by the legal conflict was less than the harm currently suffered by the child by the lack of contact.

9. If the child is not suffering clear harm, the court would not impose orders on unwilling parties, thus creating the known harms of legal conflict, in the hope of speculative benefits in the future. There is room, of course, for interpretation of "clear harm", in which I would include deliberate deception of the child about the absent parent.

10. This approach could mean that in some cases a parent (usually the father) would not be able to "build" a hoped-for relationship in the future with the child if this could not be established by agreement. However, this would be justified for the following reasons:

(a) The state will have fulfilled its duty under human rights law to support the fathers' legitimate interests by its efforts to procure an agreed arrangement.

(b) It would still be possible to intervene coercively if the child is shown to be suffering clear harm, either through deprivation of a valued relationship or deception about the father.

(c) If all this fails, it is necessary to face the fact that, although the father's legitimate interest may be frustrated, this is only so because preventing the harm likely to be inflicted on the child by coercive intervention in such a case is given priority over satisfying the father's wishes. This is acceptable under human rights law, and should be so in policy too, because no child should suffer preventable harms as a result of the failures of the adult world, of which the child is the innocent victim.

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Reader

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