

Evidence submitted by Mavis Maclean CBE, Joint Director, Oxford Centre for Family Law and Family Policy

FAMILY JUSTICE AND THE CHALLENGE OF DISPUTED CONTACT; THE CONTRIBUTION OF EMPIRICAL RESEARCH

In an area where feelings run high, and individual cases have been the focus of media attention, it is important to make full use of the information produced by rigorous empirical research.

1. CHANGING FAMILIES

In the UK couple relationships have become more fragile, while the relationships between parents and children have become more enduring. Current estimates suggest 28% of children in England and Wales will experience parental divorce before the age of 16 and an increasing proportion of children are being affected by the separation of cohabiting parents, (Hunt 2004). Children living in lone parent families in England and Wales in nine cases out of 10 live with their mothers (Census 2001) and stay in contact with their non resident parents (Attwood et al 2003).

"Work Life Balance" is changing, as fathers are gradually becoming more involved with the care of their children, while mothers become more involved with paid work. But although changes in family relationships and parental separation are now numerically "normal," they are not anticipated nor sought by the children (Pryor and Rodgers, 2001).

2. WHO ARE THE FAMILIES WHO COME TO COURT OVER CONTACT?

Most parents (90% Blackwood and Dawe, 2003) who separate make their own arrangements for taking care of their children. This accords with the presumption in the Children Act that the court should not intervene by making an order about residence or contact unless it is in the best interests of the child to do so. We know little about how these private arrangements are made or how they affect the children. Research has concentrated on the difficult cases where parents are unable to reach agreement either by themselves, or with advice from family, friends, advisers, mediators, or solicitors. Recent research for DCA (Smart, May and Wade, 2003) found that parents who initiated court proceedings had done so often out of a sense of insecurity or a desire to have clear boundaries imposed on a problem they could no longer handle, and many found the courts helpful. Current research for DCA (Trinder, in press) has found a high incidence of multiple problems in these families, including debt, housing, employment and health. Only a small number of cases become drawn out and intractable, returning to court over a number of years. But even parents approaching court for the first time are highly conflicted and unable to communicate with each other (Trinder, in press) Children involved in these cases have been found to experience high levels of distress comparable with those found in children involved in public law care proceedings (Buchanan et al 2001).

Research carried out by the Court Service in New Zealand sought to identify at an early stage those contact cases which became highly conflicted, by looking back at completed cases. They found high conflict to be associated with untreated mental health problems, and lack of or changes in legal representation (Barwick et al 2003).

3. WHAT HAPPENS IN OTHER JURISDICTIONS?

There has been some confusion in popular debate in the UK about the legal position in other jurisdictions. For example in the Nordic countries joint legal custody is the norm, but this is different from either joint parental decision making or shared physical residence (Ryrstedt 2003). The "shared parenting" advocated by the Australian Parliamentary Commission in "Every Picture tells a Story" for cases where there is neither a history of entrenched conflict nor any risk to the child closely resembles our own formulation of parental responsibility under the Children Act 1989.

There is pressure from fathers' groups for reform of the law relating to contact to give fathers greater access to their children in a number of other jurisdictions, for example, Australia, Canada, France, Italy, and many parts of the United States. Canada and Australia have recently set up commissions to examine the question (Rhoades and Boyd 2004). Both commissions began their work with strong but often anecdotal representations from fathers groups. But as the objective empirical research data came into play, the commissions in both countries chose to reject the proposals for a contact formula, arguing that there should be respect for the diversity of family life, and that there can be no "one size fits all" solution if the interests of the children are to be given priority. This approach also underpins many of the Parenting Guidelines adopted in a number of American states which look to developmental criteria to suggest suitable contact patterns but emphasise that these are not prescriptive in individual cases (Kelly, Warshak, 2000, Gould 2001).

No other jurisdiction has yet found a comprehensive solution to the problem of conflict over parenting after separation

4. WHAT IS THE RESEARCH EVIDENCE ON THE VALUE OF CONTACT FOR CHILDREN?

Contact with both parents after separation is widely assumed to be in the best interests of the child. Few would argue with the assumption that loss of contact with a caring parent and experience of parental conflict are detrimental to a child's welfare and development. The difficulties arise when maintaining a relationship with a non resident parent is associated with parental conflict as in the cases which come before the courts. Research findings reflect the complexity of the situation (Hunt 2004). Parental conflict is clearly associated with poor outcomes for children (Pryor and Rodgers 2001, Reynolds 2001) But the association between contact and outcomes for children is more complex. In the UK Dunn (Dunn 2003) reported that more contact was unequivocally associated with fewer adjustment problems for children .But a recent study of step families found that the quality of relationships in the primary home was a stronger predictor of a child's well being than continuing contact with a non resident parent. (Smith 2001) .An American review of child well being in motherheaded households (Amato 1993) found the two elements consistently associated with child well being were the economic contribution of the father and the closeness of the mother-child relationship. Pryor and Rodgers in their overview of the research literature found that "the mere presence of fathers is not enough . . . it is the . . . aspects of parenting encompassing monitoring, encouragement, love and warmth that are consistently linked with well being" (Pryor and Rodgers 2001). The current Green Paper refers to the benefits to children of a "meaningful on going relationship with both parents".

IMPACT ON CHILDREN OF CONFLICTED CONTACT

The risks to children of contact in situations where domestic violence is an issue are well established. Recent research has raised concerns about the need for safeguards to deal with the risk of abuse or abduction in contact centres (Aris, Humphreys and Harrison,

2002).

Even where conflict is not acute, moving from one parent to another is stressful for children and needs to be carefully managed. While separation from a non resident parent impedes the development of a parent-child relationship, the negative effect of absence must be balanced against the stress for the child of experiencing frequent changeovers (Kelly, Warshak, 2004).

Research is not yet able to answer questions about the balance between the impact of short term stress for children and the long-term benefit of sustaining the parental relationship, or of how a stressful relationship may be helped to settle down.

5. WHAT DO PARENTS ARGUE ABOUT?

Trinder found that mothers and fathers raised different issues, with welfare issues being raised by mothers, and power or control issues being raised by fathers (Tinder 2004 in press).

The mothers were anxious about the children being upset by contact, and the quality of parenting provided by the father. Concerns included safety in traffic, in the home, exposure to risk related behaviour by the father or a new partner such as alcohol or substance abuse, and the provision of a suitable domestic routine. The fathers were anxious about contact being stopped or interrupted, and about being excluded especially where there was a new partner in the former family home.

6. WHAT DO CHILDREN WANT?

Most children want contact with their parents and continue to see both parents as part of their family (Dunn 2003). Frequency and regularity of contact are often important to younger children, while older children put greater value on flexibility as they have social activities of their own (Tinder 2002). Children usually enjoy contact, though it can be distressing. Problems include parents who fail to turn up as expected, being exposed to conflict and feeling torn loyalties, harassment or abuse, being used as a go between and managing relationships with a parent's new partner or children (O'Quigley 1999).

Shared physical residence (50/50 parenting) can be successful for some children. But a recent study of families who had chosen this arrangement found that although the children were reasonably satisfied when first interviewed at follow up three years later a number of the children were looking forward to a time when they could "stop living like nomads" (Neale, Flowerdexv and Smart 2003).

7. WHAT CAN RESEARCH TELL US ABOUT WHAT KINDS OF INTERVENTION HELP PARENTS TO MANAGE IF NOT RESOLVE THEIR CONFLICT, AND ACHIEVE COLLABORATIVE POST SEPARATION PARENTING?

EARLY INTERVENTION

Advice and support for parents with relationship problems is thought to be helpful as early as possible. In Australia this has resulted in the recent development of Family Relationship Centres, which are located in the high street and can be approached at any stage in a family problem. Access is not restricted to those using the justice system (Parkinson, 2004). These centres are very new, and have not yet been evaluated.

PATHWAYS TO ADVICE, SUPPORT AND CONFLICT RESOLUTION

When conflict goes beyond the stage of being resolvable by the parties themselves the parents may need help with mediation and negotiation. A recent survey of access to justice (Genn 1999) showed how often divorcing couples sought the help of solicitors for child related issues at divorce, and subsequently entered the legal system.

In Scandinavia and Germany contact is seen as a child welfare issue, not as an adult dispute, and routes to help come through mediation in a family welfare setting (Moxnes, Maclean and Mueller-Johnson 2003). In Denmark, for example, where divorce has long been an administrative procedure, a contact dispute cannot be taken to court.

In Australia there have been recent moves to make the family court procedures less adversarial, by restricting the use of expert witnesses and examination of past behaviour, and focussing on the future of the family. (Family Court of Australia, The Children's Cases Programm, Practice Direction 2004/227 February is sued by the Hon Chief Justice, Alistair Nicholson. Nicholson).

INTERVENTION PROGRAMMES FOR MANAGING PARENTAL CONFLICT

Finding ways to assist families who bring their disputes to court is a problem exercising many other jurisdictions, and some innovative approaches are being developed particularly in the United States, Canada and Australia (Hunt, forthcoming). Educational classes are the most widespread and are typically aimed at parents who have a dispute but are not yet in entrenched conflict. Evaluation of these projects, understandably at this stage in their development, is not yet conclusive. There is evidence that they can have an impact on parental behaviour and attitudes, and on children's exposure to conflict Some programmes report reduced litigation However there is little evidence as yet on their impact on the well being of the children

An overview of interventions including parent education programmes is being conducted by Joan Hunt for the Nuffield Foundation. This indicates that there are two key elements common to the well regarded programmes: firstly raising awareness of the child's point of view, and secondly teaching conflict management skills. This review has informed the development of the FRPP which it is hoped may address the issue arising in relation to In Court Conciliation schemes currently run by CAFCASS which are achieving high rates of out of court agreement but not as yet having any measurable impact on the levels of underlying conflict between the parents (Tinder, work in progress for DCA).

In Australia, when parent education was used as a mandatory remedy after breach of contact, the programmes used were not sufficient to deal with parents in entrenched conflict. Programmes targeting parents who breach orders have been developed, for example, Parents Without Conflict, a six week programme in Los Angeles. There are also alternative approaches which appear promising, such as the intensive group based therapeutic mediation practised in the Alameda project in California.

In Australia agencies involved in the government funded Contact Orders Pilot provide a range of services including mediation, children's groups, parent education, counselling, supervised contact, case management and telephone support during and after the programme.

Finally there are a number of programmes to assist parents after an order has been made.

In the United States a new initiative is that of Parenting Coordinators, who support contact, and to whom the parents turn to mediate or arbitrate when a difficulty arises rather than return to court. The parents agree to abide by the decision of the coordinator on entering the programme. There is some evidence that this results in reduced litigation.

8. CONCLUDING OBSERVATIONS

In my view, it is unhelpful to regard contact as either an object to be given or withheld, or a right to be claimed or exercised. The American term "Parenting Time" provides a more constructive formulation. Parenting is never easy, and "Contact" after separation is parenting in particularly difficult circumstances. There is a need for ongoing support and advice for parents who are committed to their children's welfare but have difficulty in working together while still coping with the ending of their own relationship as partners. We are unlikely to find a single solution, given the variation in families and their problems. The most constructive way forward in my view is to respect this diversity, and to look to a variety of forms of support and intervention. The Green Paper, in my view, offers a number of helpful proposals which will support families at different stages and with different issues to resolve in working out their parenting time, while maintaining a clear focus on Children's Needs and Parents' Responsibilities.

Mavis Maclean CBE

Joint Director, Oxford Centre for Family Law and Family Policy

Senior Research Fellow, Faculty of Law

University of Oxford

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