



The Law Society

Co-operative parenting following family separation

Response from the
Law Society of England and Wales

September 2012



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Reason for confidentiality:

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If your enquiry is related to the policy content on shared parenting described in the consultation, you can contact Richard Neville at the Department for Education by telephone: 0370 000 2288 or e-mail: sharedparenting.consultation@education.gsi.gov.uk

If your enquiry is related to the policy content on the enforcement of court-ordered contact, you can contact Jahanara Salihi at the Ministry of Justice by telephone: 0203 334 3555 or email: general.queries@justice.gsi.gov.uk

If you have a query relating to the consultation process you can contact the CYPFD Team by telephone: 0370 000 2288 or via the Department's ['Contact Us'](#) page.

Please select the category which best describes you as a respondent.

<input type="checkbox"/> Father	<input type="checkbox"/> Mother	<input type="checkbox"/> Grandparent/other family member
<input type="checkbox"/> Solicitor	<input type="checkbox"/> Barrister	<input type="checkbox"/> Judge/Magistrate
<input type="checkbox"/> Voluntary and Community Sector	<input type="checkbox"/> Academic/Researcher	<input type="checkbox"/> Mediator
<input checked="" type="checkbox"/> Other		

Please Specify:

The Law Society is the representative body for more than 145,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Family Law Committee and Children's Law Sub-Committee whose members are specialist family lawyers who practise in both public and private law.

Shared Parenting

1 Which legislative approach will be most effective in meeting the Government's stated objectives? Please explain your reasons, including any preference for / objection to particular phrases in the clauses (or possible variations described in the explanatory notes)?

☐ Option 1
(Presumption)

☐ Option 2
(Principle)

☐ Option 3
(Starting Point)

X Option 4 (Welfare
Checklist)

Comments:

The Law Society supports the Family Justice Review's conclusion that the welfare of children must always come before the rights of parents and that no legislation should be introduced that creates or risks creating the perception that there is an assumed parental right to substantially shared or equal time for both parents. We believe that the government's desire to promote cooperative parenting is admirable: the intention to do so through a legislative amendment to the Children Act 1989 is, however, seriously flawed. We do not accept the premise that legislation to promote shared parenting is needed. There is no need for legislation to address a perception 'that the law does not fully recognise the important role that both parents can play in a child's life' which has no evidential foundation.

Provided it is safe, children are more likely to thrive if they have a good quality relationship with both parents following separation. The welfare of the child must remain the paramount consideration in disputes over contact. With the exception of those who equate shared parenting with 'shared custody', there is a wide consensus that current legislation provides the right framework for securing a child's welfare and development post parental-separation, including a continuing relationship with both parents.

The fact is that research shows that children's time is shared between parents in most cases through shared residence or contact arrangements¹. Courts already operate on the basis that the welfare of the child is likely to be enhanced by the continued involvement of both parents, and there is no evidence of bias towards either fathers or mothers.

The judiciary's approach was clearly set out by Sir Thomas Bingham MR [*in Re O (A Minor) (Contact: imposition of conditions)* [1995] 2 FLR 124 at 128-130] when he said:

'It may perhaps be worth stating in a reasonably compendious way some very familiar but none the less fundamental principles. First of all, and overriding all else as provided in s 1(1) of the 1989 Act, the welfare of the child is the paramount consideration of any court concerned to make an order relating to the upbringing of a child. It cannot be emphasised too strongly that the court is concerned with the interests of the mother and the father only in so far as they bear on the welfare of the child.

Secondly, where parents of a child are separated and the child is in the day-to-day care of one of them, it is almost always in the interests of the child that he or she should have contact with the other parent. The reason for this

¹ 'Outcomes of applications to court for contact orders after parental separation or divorce' Oxford Centre for Family Law and Policy, September 2008

scarcely needs spelling out. It is, of course, that the separation of parents involves a loss to the child, and it is desirable that that loss should so far as possible be made good by contact with the non-custodial parent, that is the parent in whose day-to-day care the child is not.'

The judiciary's position and the case law are clear. It might therefore be argued that the introduction of a legislative change would simply be codifying existing practice. This is not a view we would support. Existing practice puts children's welfare above all other considerations, and the proposed amendments to the Children Act would depart from that principle.

Our concern is that, to the contrary, legislation will modify parents' behaviour in ways which will prove counterproductive. Although the Minister says that the proposal is categorically not about giving parents 'equal right to time with their children' that is not how it has been understood or portrayed in the media or by specific interest groups².

Our view, and that of many others who support the Family Justice Review's conclusions, was encapsulated by the Chair of the House of Commons Justice Committee when he wrote to the Prime Minister on 11 July 2012 to say:

'We remain of the view that the introduction of a statement will simply lead to confusion, and will risk undermining the central principle of the Children Act 1989 that the welfare of the child is paramount. It remains unclear to us how the Government intends that the two tests will work in tandem in the difficult cases that end up before the courts. The Consultation Paper and information we have received so far makes no effort to engage with the criticisms of shared parenting, or properly explain how the pitfalls of the Australian experience will be avoided, beyond stating that they will be.'

A number of organisations which work with parents and children wrote in similar terms to the Prime Minister on 6 January 2012³ to express their support for the Family Justice Review's conclusions and to oppose establishing any sort of legislative presumption which promotes one type of parenting arrangement as the default outcome.

We believe that the government understands perfectly well that the case against a legislative presumption is underpinned by experience, expertise and evidence which are absent from the case for legislative change. Nevertheless, political realities mean that this weight of evidence and opinion may be insufficient to head off legislation, as ministers wish to be seen to be responding to the concerns expressed by fathers' and other groups.

If the government is determined to introduce a legislative statement for cooperative parenting, the Law Society would accept that a statement such as

'the relationship that the child has with each of his parents'

could be incorporated in the welfare checklist and have equal weight with the rest of the checklist.

This must not be misinterpreted as creating rights or a presumption as to how a child's time should be divided, nor should it prejudice the principle that a child's welfare is paramount.

² D Norgrove (Chair), Family Justice Review, (2011), para [4.37]. See similarly the comments of Chief Justice Diana Bryant, the Chief Justice of the Family Court of Australia, in her International Family Justice Lecture in London on 1 May 2012, summarised in [2012] *Family Law* 765

³ Barnardo's, The Children's Society, Family & Parenting Institute, Family Lives, Gingerbread, NSPCC, One Plus One, Relate, Resolution, The Tavistock Centre for Couple Relationships

The advantage of using the welfare checklist is that there is clear guidance and experience as to its use. Conversely, the introduction of a new clause in Section 1 (2) of the Children Act 1989 could lead to uncertainty as to how different provisions interact with each other, a situation likely to be resolved only through litigation and case-law.

With regard to the wording of the options in the government consultation, the following words/phrases appear problematic:

'the fullest possible involvement of each parent' – this inevitably has connotations of time spent.

'the best relationship possible' – similarly, 'best' is an extremely subjective term, which, if measured, implies time spent.

'presumption' – presumptions invite rebuttals, which would therefore lead to an increase in satellite litigation. This could place victims of domestic violence and abuse in the uncomfortable position of having to rebut a presumption of cooperative parenting by proving domestic abuse.

A 'starting point' is no different from a presumption.

2 Will any of these options change the way that courts apply the principle that the welfare of the child is of paramount consideration? Please explain which one(s) you think might do this and why.

X Yes

☐

No

☐

Not Sure

Comments:

A legislative presumption or starting point is very likely to impact on the application of the paramouncy principle.

The intended effect of any of the proposed legislative changes is to ensure that one factor, the parent-child relationship post-separation, is given greater prominence by the courts when they make a welfare assessment. The courts already consider this, but it is one among many factors and judges are free to consider the facts of the case in deciding how to balance these factors against each other. Isolating or highlighting this particular factor through legislation to ensure that it is given greater relative consideration by the court can only dilute the application of other factors, such as protecting the child from harm, whether emotional or physical, direct or indirect.

3 Do you think that any of these options will change the court's final decision in certain cases? Please explain your answer.

☐ Yes

☐ No

X Not Sure

Comments:

Courts already operate on the basis that the welfare of the child is likely to be enhanced by the continued involvement of both parents.

It is difficult to predict, but the change in the law might lead judges to favour specific outcomes, or to seek more compelling reasons for departing from those outcomes than at present. In cases where the arguments are finely balanced between no contact and indirect contact, or between indirect and direct contact, some cases could be tilted a different way.

4 Do you think that any of the options proposed give rise to particular risks (other than any you have already mentioned)?

X Yes

☐ No

☐ Not Sure

Comments:

The early research post 2006 in Australia shows that changing the law to encourage greater involvement of both parents leads to new and unintended problems. There is as yet no research evidence of better outcomes for children. Different arrangements suit different children and their families and this is reflected in the welfare principle. Introducing such a presumption will create the risk that the welfare of the child will be subordinate to the rights of the parents.

As the Family Justice Review noted, the Australian experience shows that there can be a tension between promoting meaningful relationships and protecting children's safety. This tension is present in a significant number of separating families. It is therefore imperative that the protection of children from risk of physical and emotional abuse should take precedence over anything else in considering what is in the best interest of the child.

The main risk in introducing a legislative presumption of cooperative parenting is that it will come to be seen as a primary consideration in assessing a child's welfare, at the expense of protecting him from harm.

Other potential risks are:

- that it will create uncertainty, which will need to be resolved through case law
- that it will lead to increased litigation, as parents have raised expectations as to how much time they can spend with their children post-separation
- that it will place a burden on victims of domestic abuse or violence when they have to rebut a presumption of shared parenting. This could be aggravated by having to be cross-examined by a former partner.

5 How will this legislation impact on the numbers of separated parents applying for a court order to determine contact arrangements for their child? Please state whether you think there will be an increase in applications, decrease in applications or no change and explain your answer.

<input checked="" type="checkbox"/> Increase in applications	<input type="checkbox"/> Decrease in applications	<input type="checkbox"/> No change
<input type="checkbox"/> Not sure		

Comments:

We expect that applications will increase as parents seek to assert their newly created 'right' or to clarify the effect of the new legislative provisions.

6 Do you think this legislation will encourage parents to resolve disputes out of court, either of their own accord or through services such as family mediation?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	<input type="checkbox"/> Not Sure
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Comments:

Around 90% of separating couples reach agreements either on their own or with the help of experienced solicitors, barristers, and mediators. The remaining 10% are often the most conflicted, and it is unlikely that legislation will deter them from litigating in the courts.

The government's objective is to ensure that 'children benefit from the continued involvement of both their parents, where this is safe and in their best interests.' The legislative change is intended to 'send a clear signal to separated parents that courts will take account of the principle that both should continue to be actively involved in their children's lives', and to 'help to dispel the perception that there is an in-built legal bias towards fathers or mothers'. This, according to the consultation document, should 'encourage more separated parents to resolve their disputes out of court and agree care arrangements that fully involve both parents.'

Our view is that in attempting to dispel a 'perception' of bias amongst fathers by a legislative presumption of cooperative parenting, the government risks replacing this expectation with one of 'equal parenting'. This will create heightened and inaccurate expectations which will make mediation more difficult, and will encourage litigation based on what parties think they are entitled to. This will increase conflict (both real and legal), which in turn increases costs (both financial and emotional).

The introduction of a new provision will lead to asymmetrical expectations and understanding of the legal framework. This will place additional pressure on a

parent who has concerns about the other parent's parenting ability or propensity for violence or abuse to agree to arrangements which they would otherwise have not agreed – and with the forthcoming cuts in legal aid, this is likely to become increasingly common - or to take the case in front of a judge.

7 How can children's views be taken into account more fully in the court process in a way that is in keeping with the focus on the best interests of the child?

Comments:

Children's views are not being taken into account to any significant degree in the court process. Research has shown that only a quarter of children in private law proceedings are consulted by a family justice professional, most of them during the preparation of a welfare report. An even smaller proportion of children are being consulted during mediation.

There are different ways for the child's view to be taken into account more fully, would require someone's time and resource. Judges could take a more proactive role in meeting the child, but this would require additional training for judges. Cafcass could also take that role, but this would require additional funding which is currently unavailable.

8 What further non-legislative action should Government take to support the objective of encouraging both parents to remain involved in their child's life after separation?

Comments:

There is a strong correlation between the quality of the parent-child relationship pre-separation and the post-separation relationship. There is a strong inverse correlation between the emotional temperature of a separation and the ability to co-parent successfully. Those who part well often co-parent well. Those who part badly tend to struggle with co-parenting, if they can do it at all.

Efforts therefore should be focused on minimising the scope and potential for litigation, and helping couples to 'separate well', since once they have separated badly, the resources required to 'heal the wound' and assist bringing about effective co-parenting will be that much higher. Preventive medicine is better than A&E after the event.

Non-legislative action should focus on enabling couples to create a positive relationship following their child's birth. This could include enhancing parental leave provision, or running educational/public information campaigns on improving parental involvement in their children's lives pre-separation.

The recent case-law development on Parental Responsibility being shared equally should also contribute to creating a more balanced and safe environment pre-separation.

Enforcement

9 Do you agree that the courts should have stronger enforcement powers to enforce decisions they make about how much time a child should spend with a parent (contact)? Please explain your answer.

☐

Yes

☐

No

X Not Sure

Comments:

To some extent the debate around shared parenting is a proxy for the more difficult debate around enforcement of orders. Many members of parliament will be familiar with the position of distressed fathers who have had a court order made in their favour but where contact has been thwarted by the mother as resident parent.

The judiciary's position can be seen from *Re J (A Minor) (Contact)* [1994] 1 FLR 729 at p 736B-C, where Balcombe LJ said

'...the court has power to enforce orders for contact, which it should not hesitate to exercise where it judges that it will overall promote the welfare of the child to do so. I refer in this context to the judgement of the President of the Family Division in *Re W (A Minor) (Contact)* [1994] 2 FLR 441 where the President said:

"However, I am quite clear that a court cannot allow a mother, in such circumstances, simply to defy the order of the court which was, and is, in force, that is to say that there should be reasonable contact with the father. I wish to make it very clear to the mother that this is an order of the court. The court cannot be put in a position where it is told, "I shall not obey an order of the court".'

Nevertheless, there clearly is a problem with resident parents deciding not to obey court orders. We therefore welcome the second part of the consultation which seeks to tackle this intractable problem.

As the Family Justice Review observed, if parents share parental care fully before separation they are more likely to do so successfully after separation - but, where the converse applies, legislation will not change that fact. Early interventions to support mothers and fathers to increase their parenting skills are more likely to succeed.

In his latest report, the Lord Chief Justice noted the increase in the use of Parenting Information Programmes (PIPs) at an early stage of proceedings in disputes concerning residence and contact arrangements. Initially, there was slow take up of this power (950 in the first year). However, with experience there has been a marked increase in the use of PIPs. In the year to April 2011 13,000 parents attended a PIP. This number increased to 18,279 in 2011-12.

Research conducted in early 2011 with parents referred to PIPs found that despite initial reservations, most reported finding the experience of attending a parenting programme generally supportive. We would like to see the further development of PIPs to assist parents to resolve their differences away from the court, where it is safe to do so.

The problem of breached contact orders cannot be resolved solely through stronger enforcement powers. The current powers at the court's disposal are sufficiently robust: courts currently possess the general contempt of court powers and, in appropriate cases, it remains open to a court to consider imposing a custodial

sentence for any breach of a substantive contact order. Following the Children and Adoption Act (CAA) 2006, courts can impose unpaid work, warning notices, activity requirement and conditions, monitoring of compliance by a Cafcass officer, and fines on the party frustrating contact. The courts can even discharge a residence order or issue contempt of court proceedings against a party.

The fact remains that these powers, including those created by the CAA 2006 Act, are rarely used. Judges are reluctant to impose sanctions which could indirectly harm the welfare of the children involved in the case, or which could worsen the conflict between parents.

Creating a new set of sanctions, such as withdrawal of passport, driving licences, and the imposition of curfews might be useful in very specific circumstances, but they will not be sufficient on their own. The Law Society does not oppose the new sanctions proposed in the consultation document, but it remains doubtful as to whether these would be used more widely than the existing ones.

Sanctions for breaches of contact orders are only part of the solution, and usually come too late in a case to address the underlying problems which affect parents. The small minority of cases that result in contact orders are usually the most complex and intractable ones, and those cases where contact orders are breached even more so⁴.

Often, by the time contact orders have been breached, parents have been embroiled in the family courts for months, if not years. Patterns have already been established, routines have been created, and attitudes entrenched. The aim has to be to ensure that contact orders are not breached in the first place.

Stronger judicial case-management must play a key part in establishing healthy and positive patterns early on. Contact issues must be managed and addressed by the judges at the very beginning of a case. In 2010, a new set of rules dealing with procedure was introduced (Practice Direction 12b), which gave the judge the authority to make orders for contact or other matters at the first hearing, even if one party objected. This was a step in the right direction. Courts must also ensure that, where appropriate, there continues to be contact between both parents and children during court proceedings, as failure to do so often sets a pattern that the resident parent is then reluctant to break.

Ensuring judicial continuity is also critical in fostering better case-management. Parents might see ten different judges at ten different hearings. This situation creates a lack of cohesion, certainty, and clarity that some parents will exploit to frustrate the other party. Breaches of contact orders can sometimes take months before they reach court, and parents will be faced with a judge that has never examined the case before. It is crucial that breach cases should go back to the court as quickly as possible - in a matter of days rather than weeks - and that the case should go to the judge who made the order.

Parents should receive the support they need at the very beginning of the process, to ensure that the relationship does not deteriorate irrevocably, for example by being encouraged, or in some cases directed, to attend Parenting Information Programmes. Judges should also explain the sanctions that could be deployed if the resident parent fails to comply with contact orders.

Pilots should be set-up to examine whether targeted and specific mediation sessions, focused on the benefits of contact with both parents for the welfare of the child, should be set-up when contact issues first arise in a case.

⁴ There were 1,081 applications for enforcement orders in respect of contact orders, in the county courts during calendar year 2009 (<http://www.justice.gov.uk/publications/judicialandcourtstatistics.htm>)

10 Paragraph 7.3 of the consultation document discusses possible changes to courts' powers to enforce orders related to contact, to mirror powers already agreed by Parliament for enforcing child maintenance payments. Do you agree with this overall approach?

☒ Yes

☐ No

☐ Not Sure

Comments:

In principle, the Law Society welcomes possible additional powers, as judges should have a range of tools at their disposal when dealing with breaches of contact orders.

It does not believe, however, that these will be sufficient on their own. Contact issues need to be addressed and managed earlier on in the process. Judges already have sanctions at their disposal, but are reluctant to use them. This is partly because imposing sanctions on parents can be seen as inconsistent with the welfare of the child, and partly because sanctions and deterrents can only go so far in ensuring a long-term and sustainable arrangement between parties.

11 Which of the specific measures discussed do you think would be most effective in making sure that parents comply with court orders relating to how much time a child should spend with a parent?

Comments:

This is difficult to answer and depends on the specific circumstances of each party. Withholding passports, for example, might be an effective measure for some parents, but will be ineffective for others.

12 a) How do you think the various measures discussed would impact on the child? Please identify any positive and negative impacts.

Comments:

Withholding a driving licence is very likely to impact negatively upon the child, but it is difficult for us to assess the impact of other measures.

12 b) How do you think the various measures discussed would impact on parents? Please identify any positive and negative impacts.

Comments:

This is difficult to answer and depends on the specific circumstances of each party.

13 Do you think there are any other enforcement options that should be considered? Please explain your answer.

☐

Yes

☐

No

X Not Sure

Comments:

There should be a suite of options available to judges throughout the process. Circumstances will vary and evolve over time, and there are many different reasons why parties frustrate contact.

The key must be to establish healthy and positive patterns early on, and to emphasise to parents, through PIPs or mediation, that their children's welfare will only be improved through meaningful contact with both parties. Judges should manage this process actively, to ensure that the children involved have the best chance possible to maintain contact with both parents.

This should start with Parent Information Programmes, so that parents know what is expected of them, how the process will develop, and how they can best ensure their children aren't adversely affected by the separation. Once the case has started, judges should consider granting a contact order at the first hearing, if there are signs that the conflict is especially difficult.

Once contact is granted, judges should keep in mind that contact needs to be sufficient to enable the non-resident parent to play a substantial part in the child's life.

At the first sign of breach, the case should come back to the judge who made the order in a matter of days. The longer a breach is allowed to linger, the more likely it will become entrenched. Judges should also be able to direct parties to attend child-centred mediation, where contact will be the main focus of the mediation sessions.

Finally, if contact orders are still being breached, judges should have a suite of tools at their disposals to ensure compliance. These can be used as deterrents, as in warning notices, or as sanctions, as in passport withdrawal.

Judges will have a critical role in managing the circumstance of contact cases. Judicial continuity will be key in ensuring fairness and consistency. The previous situation where parties might be faced with ten different judges at the ten hearings they would attend is unacceptable and contributes to some of the problems parents are facing today.

A mixture of education, support, professional involvement, case-management, and ultimately sanctions will be necessary to ensure that the welfare of the child is sustained through contact with both parents, where appropriate.

14 Please use this space for any other comments you would like to make.

Comments:

15 Please let us have your views on responding to this consultation (e.g. the number and type of questions, whether it was easy to find, understand, complete etc.).

Comments:

Thank you for taking the time to let us have your views. We do not intend to acknowledge individual responses unless you place an 'X' in the box below.

Please acknowledge this reply ☐

Here at the Department for Education we carry out our research on many different topics and consultations. As your views are valuable to us, would it be alright if we were to contact you again from time to time either for research or to send through consultation documents?

X Yes ☐ No

All DfE public consultations are required to conform to the following criteria within the Government Code of Practice on Consultation:

Criterion 1: Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

If you have any comments on how DfE consultations are conducted, please contact Carole Edge, DfE Consultation Co-ordinator, tel: 0370 000 2288 / email: carole.edge@education.gsi.gov.uk

Thank you for taking time to respond to this consultation.

Completed questionnaires and other responses should be sent to the address shown below by 5 September 2012

Send by post to: CYPFD Team, Department for Education, Area 1C, Castle View House, East Lane, Runcorn, Cheshire WA7 2GJ.

Send by e-mail to: sharedparenting.consultation@education.gsi.gov.uk