# In Practice

## Shared parenting: keeping welfare paramount by learning from mistakes

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In November 2012 the government announced in its explanatory note *Cooperative parenting following family separation: proposed legislation on the involvement of parents in a child's life* (DfE, 2012), at p 4) that it intended to amend the Children Act 1989 to 'promote shared parenting [as] part of a wider package of measures to help parents resolve disputes about their children following family separation' (see also Shared Parenting Legislation [2012] Fam Law 1539). The substance of what was proposed was presented at the First Reading of the Children and Families Bill (the Bill) on 4 February 2013. The Bill was debated at second reading on 25 February 2013 and the House of Commons voted for the Bill to be sent to a Public Bill Committee which will scrutinise the Bill line by line. The Committee is expected to report by 23 April 2013. This article will consider the Bill and provide an overview of the three criticisms of the proposed amendment:

- first, it is potentially inconsistent with the child's welfare being the court's paramount consideration;
- secondly, it may create issues regarding the standard of proof; and
- thirdly, it is does not remedy any mischief in the law or its application.

### The amendment

Clause 11 reads:

> '(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7) is, as respects each parent within subsection (6)(a) 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.'

The presumption will be rebutted as set out in new subsection (6):

> '(6) In subsection (2A) "parent" means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned:
>
> (a) is within this paragraph 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; and
>
> (b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.'

### Criticism one: the amendment is potentially inconsistent with the child's welfare being the court's paramount consideration

The amendment is potentially inconsistent with the court's obligation to treat the child's welfare as its paramount consideration in four ways in that it may:

- result in quantity, not quality orientated outcomes;
- fetter judicial discretion;
- narrow decision making onto 'harm'; and
- increase conflict inside and outside the court arena.

#### *Quantity not quality orientated outcomes*

Australia introduced a similar provision to the UK Government's draft through the Family Law Amendment (Shared Parental Responsibility) Act 2006. Research into the impact of the Australian reform usefully informs the discussion on the draft presumption, as does recent quantitative research into shared parenting in the UK by Fortin and others (*Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth* (University of Sussex Law School, 2012)).

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Australia's legislation has resulted in more shared care. In another academic analysis (Kaspiew and others, *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies, 2009), at p 132)) it was noted that, following the introduction of Australia's legislation, shared care increased from occurring in 4% of cases requiring judicial resolution to 34%. A quarter of those involved a history of violence. The next highest proportion of arrangements with shared time were in those reached purely by consent (26%) followed by those in which consent occurred after proceedings were initiated (19%) (Kaspiew and others, p 125). Kaspiew and others (p 132) concluded that after the reforms a higher proportion of arrangements which specified time were shared care arrangements (16%–32%).

This dramatic change may have arisen because Australia's reform has altered perceptions about the amount of time it is appropriate for a child to spend with its non-resident parent. It may have shifted thinking onto quantity of care time rather than the quality of the non-resident parent-child relationship. After Australia's reform the proportion of mothers who believed equal care time was 'totally appropriate' increased from 23%–45% (Kaspiew and others, p 115).

The central view expressed by Fortin and others (pp 323–324) discouraged that approach. They concluded that the structural aspects of contact (including frequency, divisions of time and overnight stays) were relatively unimportant to furthering the child's welfare, but that the pre-separation relationship, the continuity of contact and the quality of contact were of central importance. Fortin and others (p 338) also considered that no contact may be better than very poor quality contact because greater damage can be done to the non-resident parent-child relationship by the child having negative experiences in their parent's care than no contact at all.

The significance of the factors identified by Fortin and others has been diminished by Australia's reform and overlooked in the Children and Families Bill. In Australia it has resulted in adult focused care arrangements, which make frequency paramount. In those cases shared care often proved to be unsustainable (arrangements returned to mother-primary care in 31.6% of shared care arrangements), whereas mother-primary care arrangements were the most durable (remaining in place in 87.4% of cases) (Kaspiew and others, p 127). Sadly, it appears that there is a risk of repetition in England and Wales with the consequence that care arrangements may sacrifice welfare for adult quantity-focused considerations.

### *The presumption may fetter discretion*

Presumptions do not sit comfortably in cases concerning children's welfare. Each case, like each child, is unique. Each child is an individual, bringing before the Court their own experiences and needs, which the Court is required to consider holistically in the process of exercising a discretion about what will be in their best interests. Thorpe LJ's view of presumptions was set out in *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052 at 1060:

> 'In the language of litigation a presumption either casts a burden of proof upon the party challenging it or can be said to be decisive of outcome unless displaced. I do not think that such concepts of presumption and burden of proof have any place in Children Act 1989 litigation where the judge exercises a function that is partly inquisitorial.'

Presumptions have been more recently criticised by the newly appointed President of the Family Division, Munby LJ (as he was then), who observed that, 'There can be no presumptions in a case governed by section 1 of the Children Act 1989. From beginning to end the child's welfare is paramount, and the evaluation of where the child's best interests truly lie is to be determined having regard to the "welfare checklist" in section 1(3)' (*F (A Child)* [2012] EWCA Civ 1324, at para [37]).

The reason presumptions in the general sense have been deprecated is because nothing should be capable of being presumed about a child nor what will be best for him. Similarly the presumption that a child's welfare will be furthered by both parents being involved in its life should be disapproved, not because the subject matter of the presumption is irrelevant, but because it may not be relevant to every child in the same way

when their best interests are assessed within the 'welfare checklist'. The wisdom in s 1(3) of the 1989 Act is that it provides a broad umbrella under which each factor can be given weight so far as it is relevant to each individual child. The amendment in the Bill potentially interferes with how the Court weighs those factors and therefore fetters its discretion to decide what is best for the child.

*Focus of decision making on 'harm'*

The presumption contained in the amendment may narrowly focus the parties and the court on 'harm', notwithstanding there is no qualitative or quantitative evidence to support that as a welfare driven approach. The shift may arise because one parent will focus on rebutting the presumption, by arguing that the other parent's involvement in the child's life risks causing harm, and the other in maintaining it. They will do so hoping that it will provide them with an advantage – contending that the rebuttal or non-rebuttal of presumption renders the parent's involvement in the child's life more or less important than would otherwise be the case.

It is suggested there are four possible risks, which the court would need to be alert to. First, that the child's overall welfare as the court's paramount consideration is lost in adult arguments over 'harm'. Secondly, that prejudicial delay is increased by unnecessary attempts to resolve factual issues regarding 'harm'. Thirdly, that an analysis of relevant considerations of any harm the child has suffered or is at risk of suffering is neglected in the belief that the presumption is not rebutted. Fourthly, that the court descends into the arena in an effort to separate the central welfare issues from arguments regarding harm. The risk of each of these is heightened by increasing numbers of self-represented litigants who may not be able to assimilate the facts of their children's lives into cogent welfare arguments, but who may perceive there is merit in arguments over harm.

*Increase in conflict inside and outside the court arena*

The presumption contained in the amendment may increase conflict outside of the court in the following ways:

- There may be a perception that the law has been amended to promote greater care by the non-resident parent.
- Non-resident parents, typically fathers (in the study done by Fortin and others (p 15) children resided in their father's primary care post-separation in just 9% of cases), may increasingly argue for a greater quantity of time with their children and make that assertion stridently. Following Australia's reforms, the proportion of separated fathers of secondary school children who believed equal care time was 'totally appropriate' increased to 68% (Kaspiew and others, p 117).

As Fortin and others (p 343) identified, this may result in resident parents increasingly agreeing to greater equality in the division of the child's time in circumstances where it does not serve the child's interests (for example in cases of high conflict or where the non-resident parent's ability to meet the child's needs in contact are limited). Alternatively, parents may not agree and an increasing number of cases may proceed to court. Those cases which proceed to court may be subject to increasing conflict. In the research undertaken by Fortin and others (p 40), welfare concerns, domestic violence and fear of violence were more common in cases requiring court involvement – 47% of cases which used the court once or twice and 83% which used it repeatedly. Conflict may further arise in court because:

- allegations of harm may be raised increasingly regularly (both as a reflection of increasing conflict prior to arriving in the court arena as well as an attempt to rebut the presumption);
- factual issues may require resolution which will raise the prospects for heated confrontations between self-represented litigants; and
- more cases may be pursued to final hearings in a belief that an equal division of time is appropriate.

It is always contrary to the child's welfare for there to be parental conflict. The point scarcely needs spelling out that any increase in conflict will be to the detriment of the child's best interests.

## Criticism two: issues regarding the standard of proof

Unhappily, cl 11 of the Bill may create uncertainty in the standard of proof. Practitioners will know that the standard of proof in family proceedings is the simple balance of probabilities, no more and no less, and the court cannot proceed on the basis that an assertion is true unless it is proved to that standard (*Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 2 FLR 141, per Lord Hoffmann). The part of the amendment which may offend that rule can be found in subclause (6), namely:

> 'b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.'

It is potentially inconsistent with the approaches we are familiar with. First, it may result in the standard of proof being diluted. We expect that before the court concludes that a future risk of harm is likely it must be satisfied that the facts upon which it bases that conclusion are true on the balance of probabilities not simply that there is 'some evidence' (perhaps untested) to support the fact's truth (*Re SB (Children)* [2009] UKSC 17, [2010] 1 FLR 1161 and *Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] 1 FLR 80). Secondly, the court's predictions of future harm should not be based on 'suggestions' but a conclusion that there is a real possibility that the harm is likely (*Re H and R*, at 82).

Lowering these standards to 'some evidence' and a 'suggestion' may adversely affect a child's welfare because likely harm will be established more readily. This may lead to an unrealistic conclusion that the non-resident parent's prospective relationship with the child involves greater risks to the child than we presently expect.

## Criticism three: the amendment does not remedy any mischief in the law or its application

The government's central argument is that the amendment in cl 11 of the Bill 'will send a clear signal to separated parents' and will 'reinforce the principle that most children benefit from the ongoing involvement of both parents after separation'((DfE, 2012), at pp 3–4). There is some merit in that argument because even the most strident critic of what is proposed may recognise that there is a knowledge-deficit about family court decision-making in cases concerning children's welfare. That was demonstrated by some responses to the Norgrove Review's consultation (typically those from fathers and grandparents, *Family Justice Review Final Report* (2011), at pp 138–139). But is this reform necessary, in the sense that, are our courts failing to have proper regard to the principle the government wishes to reinforce? Surely legislation for perception's sake is to be deprecated and it is especially unnecessary in light of the approaches taken by the Family Division, the Court of Appeal and, in this author's anecdotal experiences, of every court seised with children's welfare.

It has been recognised by the court for a long time that a child's overall welfare is usually well served by a relationship with both his parents. In *Re P (Contact: Supervision)* [1996] 2 FLR 314 at 328, Wall J (as he then was) summarised Sir Thomas Bingham's MR (as he then was) view in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, that:

> 'It is almost always in the interests of a child whose parents are separated that he or she should have contact with the parent with whom the child is no longer living.'

The importance of contact to the child's overall best interests is familiar to all practitioners who have day-to-day dealings with cases concerning children's welfare and was well stated by Sir Thomas Bingham MR in *Re O (Contact: Imposition of Conditions)* at 128:

> '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.'

And more emphatically by Latey J:

> 'Where the parents have separated and one has the care of the child, access by the other often results in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long-term advantages to the child of keeping in touch with the parent concerned so that they do not become strangers, so that the child later in life does not resent the deprivation and turn against the parent who the child thinks, rightly or wrongly, has deprived him, and so that the deprived parent loses interest in the child and therefore does not make the material and emotional contribution to the child's development which that parent by its companionship and otherwise would make.' (*M v M (Child: Access)* [1973] 2 All ER 81, at 88; endorsed by Balcombe LJ in *Re H (Minors) (Access)* [1992] 1 FLR 148, at 151).

Courts have command over the principle the government seeks to 'reinforce'. Furthermore, courts have proved to be robust in using the tools at its disposal to give effect to the child's best interests, namely enforcement, conditional residence (*Re M (Contact)* [2012] EWHC 1948 (Fam), [2013] 1 FLR (forthcoming)) involvement of the local authority using care orders (*Re M (Intractable Contact Dispute: Interim Care Order)* [2003] EWHC 1024 (Fam), [2003] 2 FLR 636) and, ultimately, change of residence (*V v V (Contact: Implacable Hostility)* [2004] EWHC 1215 (Fam), [2004] 2 FLR 851).

In the absence of judicial failure to have regard to the principle as part of the child's overall welfare, the only mischief can be public perception. However, legislation to redress perceptions is unwieldy and may prove counterproductive. If the government intends to promote children's welfare and a well-informed public, would it not be better to do so by the provision of a properly funded family justice system? Withdrawing resources from our courts and limiting the availability of the quality legal advice which is delivered on high streets every day to those most in need of information is counterintuitive if what is intended is a knowledgeable society.

## Conclusion

The Australian experience informs that there are lessons to be learnt from shared parenting legislation and that the amendment in cl 11 of the Children and Families Bill risks being counterproductive. It is flawed in three ways; it is potentially inconsistent with the principle that the child's welfare is the court's paramount concern, it may create issues regarding the standard of proof and, it is does not remedy any mischief in the law or its application. These concerns will inevitably be compounded by diminishing family justice resources and increasing numbers of self-represented litigants. Judged by whether it advances the child's best interests, there is minimal merit in what is proposed and the need to keep the child's welfare paramount justifies the legislation being abandoned. The government's aim of building an informed society would be better achieved by providing a fully resourced family justice system to deal effectively with the needs of its users.



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