What is the role of law, lawyers and the courts in post-separation parenting?

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Introduction

‘Where family law disputes are involved, the limitations of the law, as much as its strengths, must be understood. Its ability to provide an appropriate and long-lasting solution in a frequently hostile and violent environment will be restricted as law is by nature a fairly blunt instrument and the family structures of separating adults and children are inevitably complex and diverse.’ Family Court of Australia (2003)

The purpose of this paper is to question the current and future role of the law, lawyers and the courts in post-separation parenting. It is written at a time when there is increasing focus on law and the role of the courts in dealing with relationships between parents and children after parental separation. These developments, outlined below, have their origins in the dissatisfaction with the current working of the court system. The judiciary and court users, particularly men, have complained about the failings of the court (CASC 2002; Geldof 2003; Fathers4Justice n.d; Constitutional Affairs Committee 2005). The government has also expressed concern because of the increasing numbers and costs of proceedings relating to arrangements for children. Although the government has expressed a desire to see a change in culture, so that it is ‘socially unacceptable’ for parents to absent themselves or impede the children’s relationship with their other parent (DCA et al. 2005, 6), it has focussed on reforms to the law and the court process. Rather than try to replace legal approaches to post separation parenting, it has sought to improve them. It has given no consideration to whether the desired changes can be achieved through law, or how else social change might be promoted. In doing so, it has focused on a small minority of highly conflicted cases where parents have engaged in litigation rather than seeking to learn from the majority who have not. This emphasis on the law does not reflect the success of court-based mechanisms in managing post-separation parenting. Indeed there is growing evidence of the limitations and negative impact of the courts (Trinder et al 2006; Smart et al. 2003, 2005; Blackwell and Dawe 2003; Kaye et al. 2003). Courts achieve a lasting resolution in only a minority of disputes; levels of satisfaction are lower where disputes are resolved through the courts; court processes do not improve parental relationships; and court decisions can be oppressive and unsafe.

Background

In 2004, the government published its green paper Parental Separation: Children’s Needs and Parental Responsibility (DCA et al. 2004) setting out its proposals to assist parents to resolve disputes and promote the continuation of meaningful relationships after parental separation. The President of the Family Division issued new guidance – the Family Law Programme - intended to improve the way the courts
handled private law disputes about children by placing more emphasis on early
dispute resolution and court control (President of the Family Division 2004). In 2005,
the Constitutional Affairs Committee undertook an Inquiry into the Family Courts
(Constitutional Affairs Committee 2005) and the government introduced the Children
and Adoption Bill to Parliament. The Bill, which was enacted at the end of June 2006
and is scheduled for implementation in late 2007, will introduces a new compliance
regime into the Children Act 1989, empowering the courts to order those applying for
contact to attend contact activities, information and training programmes intended to
improve their ability to deal with contact, to require CAFCASS to monitor contact, and
to impose a new penalty, community service, on those who breach contact orders.

There are many parallels between the developments in England and Wales and
those in Australia, where a compliance regime, similar to that in the 2006 Act has
already been implemented (Rhoades 2004). However, Australia presents a much
more confusing picture when it comes to issues around the juridification of post-
separation parenting. At one level, the legislation is exceptionally detailed and
complex, framing the discretion of the Family Court with lists of matters that must be
considered, but at another it is seeking to remove lawyer and court domination of
family issues. The House of Representatives report on custody after parental
separation, Every picture tells a story (House of Representatives Standing
Committee on Family and Community Affairs 2003) rejected the imposition of joint
custody and proposed a new process for dealing with parental disputes, based on a
Family Tribunal rather than the Family Court. The Tribunal was intended avoid the
need for lawyers and provide a more professional, therapeutic process for resolving
disputes. However, concerns about the constitutional position of the Tribunal led the
government to reject this idea; instead it has supported the development of a network
of Family Relationship Centres and other services (Government of Australia 2005;
Parkinson 2006). These will provide advice, support and counselling on the whole
range of matters which parents need to deal with at, and after, separation – housing,
money child care etc. Lawyers will no longer be the primary providers of advice at
separation, nor will it be necessary to engage the legal process in order to access
free counselling and mediation services. However, the courts have been given
additional powers to deal with breaches of contact orders, creating a framework
which looks adult rights-based and punitive whilst ostensibly being based on the
welfare of the child.

**The current role of law, lawyers and the courts in England and Wales – an outline**

**Family law**

Family law performs a number of inter-related roles – it sets out norms or standards
for behaviour but is only one way that beliefs and values becomes accepted by
society; it provides remedies where relationships breakdown; and it facilitates
adjustments when family relationships fail (Eekelaar 1984). It has an educative
function, it radiates messages (Galanter 1992) but these may be misunderstood or
re-interpreted by the public. Changes in society and in law have weakened family
law’s normative power; in many areas the state is less willing to tell people what to
do, or at least to enforce this (Dewar 1998). Individuals are less deferential and less
willing to comply where they perceive their interests lie elsewhere. In contrast, the
remedial aspect of family law has increased. Abuse within the family is seen as an
appropriate area for legal intervention through both the civil and the criminal law, and
not an issue of family privacy. The courts have been granted wide powers to reorder
financial relationships on the breakdown of marriage and have recently used these to
entrench the view that marriage is an equal financial partnership.

Most separated parents want their children to have more contact with their other
parent (Blackwell and Dawe 2003). These beliefs in the importance of continued
involvement of parents after separation originate in notions of kinship, responsibility
and identity and not in law. ‘Parenthood is for life’ but not because the law makes it
so. The courts have become involved in more disputes about parenting. Here the law
has disaggregated aspects of parenting, separating financial support for children
from maintaining relationships with them, and, until recently, worked on the basis that
someone could be a good parent irrespective of their behaviour towards the parent
with care (cf Re L, M, V, H. [2000] 2 FLR 334 CA). The relationship between the
family justice system and citizens has also changed. In the last 30 years, dispute
resolution processes have moved strongly away from court adjudication to private
ordering through negotiated arrangements, in response both to notions of party
control and to pressures on the courts.

The law is gradually developing a framework which does not discriminate between
mothers and fathers. Men becoming fathers after 2003 will generally have parental
responsibility even if they are not married to the mother. Social benefits and
employment rights, except maternity leave, are equally available to either parent.
However, parenting practices remain gendered. Fathers do more child care than in
earlier times but still much less than mothers, even where both are working full time.
Structured discrimination in the work place means that women are still likely to earn
less than their partners, and this reinforces decisions in the family as to who takes
the greater responsibility for caring.

Under English law, parental responsibility transcends both parental separation and
divorce. Neither has any impact on the legal relationship between parent and child;
either parent can exercise parental responsibility as before, without consulting the
other. In devising this scheme, which was introduced in the Children Act 1989, the
Law Commission sought to avoid the need for court orders which might create
conflict although it recognised that ‘in many, possibly most uncontested cases an
order is needed in the children’s own interests to confirm and give stability to existing
arrangements….’ (Law Commission 1988, para 3.2) The court determines questions
about children’s upbringing applying the paramountcy of welfare principle. The Act
also requires the court to be satisfied that it is better to make an order than not to do
so but this ‘no order’ principle is largely honoured in the breach (Bailey-Harris et al.
1999). The Court of Appeal has recently said that this does not create a presumption
against orders and that courts should be astute not to go behind carefully negotiated
agreements which parents want enshrined in consent orders (Re G. (Children) [2006]
1 FLR 771). Converting agreements into orders is a major activity for the family
courts.

Lawyers are the main professionals providing advice when parents separate. Their
role developed because of the need to make arrangements about property and
money, and extended to issues relating to children where parents sought to
challenge the conventional arrangements and later because divorce processes
required a court review of arrangements for children. The majority of married people
who separate consult a solicitor and there are high levels of satisfaction with these
services (Walker et al. 2001). The Law Society has a scheme for specialist
accreditation of family lawyers and there is an independent organisation of family
lawyers, Resolution, which promotes high standards and conciliatory approaches to
family disputes. Legal Aid is available, subject to means and merit testing, for those
on low incomes involved in court proceedings as a result of relationship breakdown
and on a more restricted basis to provide advice. But the number of lawyers providing such subsidised services is declining. In 2002, the Legal Services Commission began piloting Family Advice and Information Networks (FaINs) a scheme whereby qualified solicitors who had undergone some additional training could be paid for giving initial advice to direct clients in family cases to a wide range of services relevant to their particular situation. FaINs has reinforced lawyers’ role in family advice giving. However, it appears that lawyers are less likely to be involved in resolving arrangements for children than other issues which arise when relationships breakdown (Ingleby 1992; Trinder et al 2002). Most parents arrange issues about residence and contact between themselves; fewer than ten per cent of separating parents resort to the courts to formalise arrangements about their children (DfES 2004).

The courts

The traditional role of the courts – what litigants expect - is to adjudicate on disputes (applying substantive and procedural law) to produce a clear result which provides certainty for the future. Courts are expected to be just – the parties should be equal before the law. In practice, the courts rarely try cases brought to them instead they provide a framework within which parties negotiate and bargain (Cavanagh and Sarat 1980). Family disputes make further demands on court processes. The continuing relationships between the parties mean that the outcome is unlikely to bring closure. Family litigation is not simply about the past - capable of resolution by determining what happened - cases are dynamic and solutions have to be flexible and forward looking (Fricker 2000). Also, a simple two party adversarial process may not be adequate to ensure that issues relating to children’s rights and welfare are properly considered. Contact and residence disputes are about children, but children generally have only limited involvement in the process. These proceedings are seen as adults' disputes; concerns about adults’ roles, family privacy and child protection constrain children’s inclusion (James and James 2004). Children’s wishes and feelings are recognised as an important part of their welfare and CAFCASS (Children and Family Court Advisory and Support Service) officers generally seek to establish children’s views (Buchanan et al 2001). The law allows children to be parties to these disputes but paternalistic attitudes to children and pressure on resources mean that this action is taken infrequently (Douglas et al 2006) and is largely used to assist the court rather than empower children.

The Private Law Programme and CAFCASS dispute resolution schemes have formalised the role of court hearings in contact cases as opportunities for facilitating settlement though conciliation, negotiation or mediation (President of the Family Division 2004). This approach builds on and formalises earlier practices which moved the family courts away from adjudication. Although it does achieve settlement of many contact disputes so that children are able to see the non-resident parent, Trinder and colleagues have found that it does little to support post-separation parenting (Trinder et al 2006). Communication between the parents remains poor; a half of litigants return to court and a sixth become enmeshed in the legal process as perpetual litigants. The Jarndyce v Jarndyce of the Twenty-First century would not be about inheritance but child contact.

The limitations of the courts in contact disputes

Family justice professionals -judges, lawyers and CAFCASS officers - view the adjudication of residence and contact disputes negatively (Constitutional Affairs
Certainty is only achieved if orders or agreements are complied with or are enforced. In relation to contact, compliance is a recurring issue. Where agreements are achieved through pressure they may be swiftly regretted and ignored. Particularly, mothers who are fearful of the children’s father may find it easier to agree to arrangements at court than to accept them in practice (Buchanan et al. 2001; Kaye et al. 2003). Enforcement of these arrangements is recognised as problematic (CASC 2002). The mechanisms available to the courts – fines imprisonment and change of residence are rarely practical, unlikely to secure either better relationships between children and the contact parent or long-term resolution of the family conflict, and may be damaging to the child’s welfare. There is no evidence that the new measures introduced in the Children and Adoption Act 2006 are likely to be any more successful, and there are real practical problems in making them available (President of the Family Division 2006). Compliance may bring further problems for children where they are unable to have a say in the arrangements. Smart and colleagues identified children trapped for years in shared care arrangements where they move homes every few days because parents were unable or unwilling to renegotiate arrangements which fitted better with children’s lives as they grew up (Kinsella 2006)

Can the law promote post-separation parenting?

Writers on legal philosophy have long recognised the limitations of the law in shaping society and addressing societal problems. Democratic government is government by consent; laws must have the support of the public if they are to be obeyed. Controlling or changing behaviour requires much more than law – effective policing and enforcement mechanisms can stop people acting in particular ways which society condemns but can only be undertaken where the law itself is supported. There are limitations to the mechanisms law can use to achieve enforcement; it is possible for the state to take away property, money or liberty but not to make citizens behave in ways that they do not wish to or hold beliefs that they reject. Pound saw the limits of the law as rooted in problems of enforcement (Pound 1917). The law
could only effectively enforce property and contractual rights because it could secure eviction, possession and the payment of money. Money was an inadequate remedy for the loss of affection or the destruction of reputation because it could not right the wrong. Contract law did not enforce contracts for personal service – it recognised the impossibility of requiring a person to continue to serve another in this way. These points are highly relevant to post-separation parenting; the only action which the court can take is transfer of the child’s residence, but in the vast majority of cases this is impossible – the parent claiming enforcement of contact is unable or unwilling to provide full-time care for the child and such action would breach the requirement that court decisions about children must give paramount consideration to their welfare. The other mechanisms for the enforcement of contact are punitive and do not aim to redress the harm to the contact parent or the child but only to punish the parent with care. During the passage of the Children and Adoption Act 2006 the Conservatives repeatedly and unsuccessfully sought amendments which would allow ‘compensatory contact’ that is additional time to compensate a contact parent where arrangements had been broken. (Such provisions have been included in Australian law, s. 70 NDB). This commodifies the child’s time, effectively expropriating time from the child without consultation. No proposals have been made for requiring contact parents to forfeit their free time if they fail to turn up and exercise their contact.

Despite these limitations inherent in law, family policy makers have sought to use law to regulate post separation parenting. Contact is only the external demonstration of a relationship (Masson 2002), if a separated parent is going to continue to parent their child, simple contact is not enough. He or she must engage with the child during contact and at other times in ways which support the child’s social, educational and moral development. Although the courts can grant contact, they have no way of determining how contact time is used (or even whether it is used). An order may indicate the role the court expects the contact parent to have by specifying the amount of time, time of day (daytime or overnight contact) or the location (a contact centre) but this only sets the amount of contact and does not directly impact on its quality or other actions which support parenting such as maintaining the child and supporting parenting by the resident parent.

Promoting post separation parenting requires much more than increasing the length of contact. Contact parents who have little experience in child care, perhaps because they separated before the child was born, may need to acquire knowledge about child development and caring skills, those with only a limited relationship with the child, perhaps because they have not exercised contact for some years, may need help to develop a relationship with the child. Many non resident parents will need social support to encourage them to make and retain a commitment to their child, particularly where the child is resistant to being parented or to being parented by them. Positive parenting requires communication and co-operation between parents; both have to work on this. Although mediation may provide the foundation for this, court door negotiation does not. Trinder and colleagues found no improvement in empathy or communication in parents who resolved contact disputes through the courts (Trinder 2006 et al). Overall, it appears that the law can have little positive impact through its dispute resolution and enforcement systems. There could be legal rights to services to support post separation parenting – as provided by the Family Relationship Centres in Australia - but this raises more complex policy questions about the allocation of resources and the prioritization of different needs.

Limiting the involvement of the courts
Despite the emphasis given to law and the courts in maintaining relationships after separation, particularly through securing contact, there are clear examples which show that the limitations of courts are recognised. First, the courts focus on one type of contact problem – where the parent with care will not facilitate contact by the non-resident parent – failure on the part of the contact parent to exercise contact, even where he or she has obtained a contact order, is ignored (Bailey-Harris et al 1999; Masson 2002). Contact orders under the Children Act 1989 cannot be made requiring the non-resident parent to visit or otherwise indicate emotional commitment to a child. A parent can decide not to seek contact, and will generally be permitted to withdraw their application (Re O (withdrawal of application) [2004] 1 FLR 1258; Re F, (restrictions on application) [2005] 2 FLR 950). If an order is made, enforcement action can be taken if the contact parent fails to return the child on time (Re M (contact order) [2005] 2 FLR 1006) but courts understandably consider that there is little point seeking to make a parent attend if he or she is unwilling. If the matter is brought back to court, the most likely response is the discharge of the order.

This limitation on the enforcement of contact through the courts is being questioned – rather than retrenching legal mechanisms are being pushed to regulate post separation relationships further. The possibility of introducing provisions which allow bilateral enforcement, that is, enforcement against both parents with care and contact parents is being discussed. The Scrutiny Committee which looked at the draft Children (Contact) and Adoption Bill 2005 recommended that there should be powers to enforce against a parent who failed to exercise contact (paras 38 and 115) and the government undertook to make this clear in the Explanatory Notes to the Bill in relation to financial compensation for breach of contact orders (DFES 2005a para 51; EN para 51). Proposed reforms in Australia relating to parental relocation will also make contact an obligation as well as a right of the non-residential parent, opening up the possibility of enforcement of contact against him or her. This may just be a matter of form – a desire to make the law appear equal - although its controlling effects will only ever be used against parents with care, or a wish to stress the importance to contact parents of maintaining relationships. However, it raises the issue of the utility of trying to enforce relationships by legal means.

Secondly, the courts generally refuse to make orders in relation to older children. Parents with care are expected to instil positive views of the non resident parent in their children and make them available for contact, even when those children object (Re M [2006] 1 FLR 627). However, the courts are generally unwilling to force contact on teenage children against their wishes. They recognise that such pressure is unlikely to produce positive relationships and will therefore not contribute to the children’s well-being. Thirdly, restrictions are placed on applications for contact from people other than parents. The Supreme Court of the USA has recognised that allowing grandparents to apply to the courts for contact with their grand-children undermines the parents’ rights to privacy (Troxel v. Granville 530 U.S. 57 2000). In England and Wales, such applications are permitted but are subject to a requirement of obtaining the permission of the court. This is intended to protect the family against interference and also reflects uncertainty about the ability of contact orders to deliver positive relationships for children.

Fourthly, proposals for presumptions of shared parenting or joint residence which are predicated on equal sharing of the child’s time or for default contact arrangements based on specific time divisions are designed to avoid litigation over contact. These ideas have been promoted by fathers’ groups as a means of redressing the supposed bias of the courts. In England and Wales, they were (unsuccessfully) promoted by the Conservatives during the debates on the Children and Adoption Bill 2006. In Australia, they led to the Parliamentary Inquiry which resulted in Every
Picture Tells a Story (2003). This report did not support a presumption of time-equality but the new legislation, the Family Law Amendment (Shared Parental Responsibility) Act 2006 includes a provision which requires the court to consider whether an equal time arrangement would be practicable and in the child’s best interests (s.65DAA). However, despite greater emphasis to dispute resolution outside the court, the Act seems likely to engender litigation rather than prevent it. For example, in cases where joint parental responsibility is ordered, there must be consultation and ‘a genuine effort to come to a joint decision’ on major long-term issues (s.65DAC).

Is there a role for the courts in post separation parenting?

It is already clear that the courts are very limited in what they can achieve in relation to family disputes; they may be able to make contact happen but do not provide the foundations for the improved relationships which make contact work (Trinder et al 2006). They are unlikely to reduce conflict between parents and may make conflict worse; a substantial minority of parents become locked in repeated litigation which is costly, destabilizing for children and impacts negatively on parents (Buchanan et al 2001; Smart et al 2005). Enforcement is impracticable in many cases and is ineffective in securing contact, let alone improved relationships.

Removing the courts completely would take away three things – 1) adjudication: the court’s role to decide whether allegations about a parent’s can be proved in the few cases where there are findings of fact hearings, 2) the court process as a framework for negotiation with all the attendant pressure to settle and 3) the role of the court in imposing a decision on the quantum of contact where parents cannot agree. Lawyers, CAFCASS officers and mediators could still have a role in helping parents to adjust to parenting apart but this would occur on the basis that both parents recognised the need to do this, rather than because (as sometimes occurs) wanted to use the courts rather than to negotiate arrangements for their child’s future care. Removing the courts would change the dynamics of negotiation, continued involvement of both parents would continue to be emphasised but court orders would not be available force co-operation. Judges rely heavily on CAFCASS reports when imposing decisions; the effect of removing the courts would therefore be to free CAFCASS officers to work with parents on their future parenting arrangements, rather than to write reports to meet the demands of the courts. This is in keeping with the proposals for change to CAFCASS practices as outline in Every Day Matters (CAFCASS 2005).

Without adjudication any services working with the family would face the contested allegations of the parents about their former partner’s behaviour and parenting skills. Agencies would need to make their own assessment in order to establish whether it was likely that relationships would prove positive for children. Adjudication is clearly a function of the court. Limiting the court’s involvement in contact to determining the principle of contact would enable court resources to be focuses on the aspect of family disputes for which the courts are most suited - fact finding.

This approach has parallels with that in Australia, but instead of the courts retaining full power to deal with family disputes, allowing one parent to force the other into court in relation to any issue of post separation parenting and providing Family Relationship Centres as an alternative, the courts would be limited to determining the principle of contact, that is whether contact would be in the child’s interests. The actual arrangements for contact would be left to the parents who would be able to draw on support services. Clearly these would not be unlimited, at least where they
were subsidised by the state. Agencies would be likely to provide help according to priorities, perhaps providing support where children and carers wanted contact to be maintained in preference to cases where the non resident parent had lost contact and wanted to re-establish it.

Despite the general ineffectiveness of the courts, without the involvement of the court more parents and children might lose contact. The contact that is most vulnerable is that which is the least rewarding for each parent, such contact is unlikely to be very positive for the child. Vindictive parents with care would be able to act with impunity. This would be a concern if such behaviour was commonplace and easily tackled by the courts. Neither appears to be the case. The research suggests that parents with care generally want the other parent to be more not less involved with their children (Blackwell and Dawe 2003). The withdrawal of legal backing for contact would also mean that parents and their advisors had to focus on the parents’ relationships, their behaviour and their relationships with their children in order to make contact work. This should promote a more realistic approach where parents not courts would be responsible for parenting problems both before and after separation.

**Human rights and contact problems**

Under the European Convention on Human Rights, rights to family life have to be respected and protected. The proposed scheme which restricts the courts to making decisions on the principle of contact provides minimal protection when rights are terminated. The State also has an obligation to promote the right to family life. The provision of services to support contact allows family life to be respected in far more cases than under the current law. Although courts will not order non residential parents to have contact, services could seek to engage such absent parents to overcome their reluctance to be involved with their children. Similarly, services could provide more support for young people seeking to re-establish contact than the courts do.

**Conclusion**

The arguments in this paper are predicated on a particular understanding of the limits of court orders and the effects of legal process. If disputes about post separation parenting, about how children are cared for after parents separate were not already considered to be a matter for the courts, it seems unlikely from what is now known that the courts would be seen as the right place for dealing with them. Rather than question the role of the courts, their processes have been adapted and refocused from adjudication to dispute resolution to deal with the volume of work. This has minimised the court’s involvement with the area of work for which they are designed –adjudication - and used its power to impose settlements. These work for a minority of families but many children continue to experience high levels of parental conflict and/or unsafe contact.

Those who think that the courts should continue to have a role in making and enforcing contact arrangements need to consider what (if any) evidence would convince them that court involvement was ineffective, counter productive or damaging. If the answer is ‘none’ this amounts to an acceptance that court services should be provided for these cases regardless of their effectiveness.

Shifting resources from the courts to supporting families recognises that post separation parenting is difficult. It cannot simply be ordered; parents may require support and assistance to produce workable arrangements, and for some children
the loss of a childhood relationship with one parent may be better than the conflicted involvement of both who cannot co-operate. There is little hope of finding resources for imaginative new services whilst failing ones continue to absorb any available funding.

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