CO-OPERATIVE PARENTING FOLLOWING FAMILY SEPARATION: PROPOSED LEGISLATION ON THE INVOLVEMENT OF BOTH PARENTS IN A CHILD’S LIFE

Response of the
Association of Lawyers for Children
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The Association of Lawyers for Children [“ALC”] is a national association of lawyers working in the field of children law. It has over 1200 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Its Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of the country. Several leading members are specialists with over 20 years experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children’s law, and several hold judicial office.

The ALC exists to promote access to justice for children and young people within the legal system in England and Wales in the following ways:

(i) lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;
(ii) lobbying against the diminution of such mechanisms;
(iii) providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the welfare, health and development of children;
(iv) providing a forum for the exchange of information and views involving the development of the law in relation to children and young people;
(v) being a reference point for members of the profession, Governmental organisations and pressure groups interested in children law and practice. The ALC is automatically a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law.
EXECUTIVE SUMMARY

A.1 Whilst we welcome, and support the Government’s commitment to providing encouragement to both parents to play a part in a child’s life following parental separation, we do not consider that amendment of the current Children Act 1989 legislation will achieve this. On the contrary, we believe it will have a highly detrimental effect for children. This detriment will not just apply to the children of the highly conflicted group of parents who currently litigate these issues. It will ripple out beyond those who start court proceedings and cause problems within the far larger group of parents who reach agreement between themselves.

A.2 In our response to the Family Justice Review’s interim report, question 17 (Do you agree there is a need for legislation to more formally recognise the importance of children having a meaningful relationship with both parents, post-separation?) we answered:

“17.1 We do not.

17.2 The importance of children having a meaningful relationship with both parents, post-separation is, as a broad general principle, perfectly well recognised by all those who work in the family justice system, in case law, and in relevant research.

17.3 However, it is just that – a broad general principle. It is not a statement of universal application. It is not necessarily in a child’s best interests to be required to have such a relationship with a parent who has, e.g. abused the other parent, committed abhorrent crimes, habitually abuses alcohol or drugs, is a sociopath, or currently suffers from particular mental health issues or personality disorder.”

This remains the view of our Association.

A.3 The Government’s consultation paper does not explain in what ways the current legislation is failing to work or why change is needed. The questionnaire does not directly invite comment as to whether any change needs to be made at all. We say that it does not. We are fortified in this view by the message coming out of research, shortly to be released by the Universities of Sussex and Oxford and funded by the Nuffield Foundation\(^1\), namely that “post-separation arrangements need to be constructed around the needs and wishes of the particular children involved, as the paramountcy principle of the Children Act 1989 already provides.”\(^2\)

A.4 Each of the four proposals put forward in the Consultation paper carries with it the risk that, if enacted, they will be interpreted by parents in conflict as providing them with a right to equal parenting time in circumstances where this may well be detrimental to their child. We note that the recent research carried out in this social policy field clearly flags up warnings as to movement in this direction\(^3\).

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\(^1\) Taking a longer view of contact: the perspectives of young adults who experienced parental separation in their youth
\(^2\) See the article by Jane Fortin and Joan Hunt Taking a longer view of contact: forthcoming research [2012] Fam Law 906.
B. SHARED PARENTING

1. WHICH LEGISLATIVE APPROACH WILL BE MOST EFFECTIVE IN MEETING THE GOVERNMENT’S STATED OBJECTIVES? PLEASE EXPLAIN YOUR REASONS, INCLUDING ANY PREFERENCES FOR/OBJECTION TO PARTICULAR PHRASES IN THE CLAUSES (OR POSSIBLE VARIATIONS DESCRIBED IN THE EXPLANATORY NOTES)?

1.1 We do not think any of the proposals will be effective. We endorsed the approach taken by the Family Justice Review, upon reflection, in its final report and its conclusion that “the focus should instead be on supporting and fostering a greater awareness of shared parental responsibility and on the duties and roles of both parents from birth onwards. Legislation is not the means through which to achieve this.”

1.2 We set out our particular concerns about each of the approaches put forward in this consultation in the paragraphs below.

2. WILL ANY OF THESE OPTIONS CHANGE THE WAYS 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.

2.1 They ought not to: the proposals do not amend the paramountcy principle, and courts ought to read such changes in the light of the welfare checklist and that principle.

2.2 However, there is a risk that courts may be swayed by the conflict between, on the one hand, the duty to give paramount consideration to the welfare of the child and, on the other hand, a perceived new duty to act in accordance with an adult focussed agenda (whether that is presented as a presumption, principle or otherwise).

3. DO YOU THINK THAT ANY OF THESE OPTIONS WILL CHANGE THE COURT’S FINAL DECISION IN CERTAIN CASES? PLEASE EXPLAIN YOUR ANSWER.

3.1 They ought not to: the proposals do not amend the paramountcy principle, and courts ought to read such changes in the light of the welfare checklist and that principle.

3.2 However, there is a risk that courts may be swayed by the conflict between, on the one hand, the duty to give paramount consideration to the welfare of the child and, on the other hand, a perceived new duty to act in accordance with an adult focussed agenda (whether that is presented as a presumption, principle or otherwise).

4. DO YOU THINK THAT ANY OF THE OPTIONS PROPOSED GIVE RISE TO PARTICULAR RISKS (OTHER THAN THOSE YOU HAVE ALREADY MENTIONED)?

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4 at paragraphs 4.22 onwards.
5 Paragraph 4.28.
4.1 We do. We comment on each option (and alternative wording) below as follows:

**Option 1**

4.2 We consider it inevitable that more parents will seek to litigate, with disputes around what constitutes “involvement in the child’s upbringing” and what ways of involvement are “not adverse to the child’s safety”. There will be a large number of cases which revolve around the question of whether or not the presumption can be rebutted. Parents will read the new statutory requirement, and will have great difficulty, in the turmoil they find themselves in, bringing any emotional intelligence to bear on the meaning of this phrase. Those parents who have the day to day care of the child risk being pressured into agreeing to arrangements which are not in their child’s best interests/not child centred/not what the particular child wants, because of this presumption. Those parents who do not have the day to day care of the child are correspondingly likely to press for such arrangements, irrespective of whether or not they are in the child’s interests, because of such a presumption.

4.3 There is no explanation or clear definition of what is meant by “the court is to presume unless the contrary is shown”. Is the court required to find as a fact that the child’s welfare will be so furthered?

4.4 Further, whilst the consultation makes a point of emphasizing that the presumption will not apply in cases where the parent poses risk, it is silent on the question of how that risk is, in practice, going to be measured, and how the court is to be clear that it has before it sufficient information to enable an assessment of risk to be made. This is of particular importance, given the current direction of travel in enabling such information to be put before the court. The current Cafcass operating framework states that a risk assessment under section 16 of the Children Act 1989 can be carried out by telephone, utilising a risk assessment script. This reduces risk assessment to a formulaic process in which the only information comes from the two parents. The position will be further undermined, in a substantial proportion of cases coming before the courts, after the coming into force in April 2013 of the relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Legal Help and Legal Funding will not be available (unless and until the gateway test is passed) to obtain police disclosure, medical reports or other objective evidence necessary to establish the existence of relevant risks.

4.5 The consultation is silent as to such currently available safeguards which are there to protect the child, e.g. the child’s UNCRC article 12 rights, the use of s.7 of the Children Act 1989 to require Cafcass to provide a welfare report, or the need to consider making the child a party to the proceedings under r16.4 of the Family Procedure Rules 2010.

**Option 2**

4.6 We consider it inevitable that more parents will seek to litigate, with disputes around what constitutes “the fullest possible involvement”. It is possible for example, to require the parent with day to day care:

- to advise the other parent every time a child misses a day’s school and the reasons for this;

- to advise the other parent every time a child is taken to a GP’s surgery (as opposed to more serious health matters, which is the norm);
• to supply copies of all photographs taken of the child;
• to supply copies of each and every school/parent/child communication;
• to consult the other parent about presents/ outings/ activities.

There is nothing in the definition to import any element of reasonableness or common sense. Against the background of recent legislation removing most of private law family work from the scope of legal aid funding, the common sense and objectivity provided in such situations by family lawyers will soon be lost. Parents will read the new statutory requirement, and will have great difficulty, in the turmoil they find themselves in, bringing any emotional intelligence to bear on the meaning of this phrase. Those parents who have the day to day care of the child risk being pressured into agreeing to arrangements which are not in their child’s best interests/not child centred/not what the particular child wants. Those parents who do not have the day to day care of the child are correspondingly likely to press for such arrangements. This is borne out by the misinterpretation by the Australian public of changes made to the legislation⁶. In May 2012 the Chief Justice, Family Court of Australia observed⁷ that “the real danger I think lies not in the judicial decisions where the best interest test remains a powerful imperative for judges, but in the arrangements the parties themselves were negotiating, as the subsequent reviews found.”

4.7 The phraseology used in Option 2 is not a principle (general or otherwise). It is an empirical claim, which is frequently true but is sometimes false. If this phraseology is imported into the legislation it is bound, in our view, to lead to large numbers of parents confusing quantity of parental relationship with quality of parental relationship, and seeking to litigate accordingly. There is overwhelming research evidence to demonstrate that the quality of parental relationship does not improve in proportion to the quantity of time spent with a child⁸, but this knowledge is not going to impinge on the consciousness of the current cohort of parents who use the courts to settle contact disputes, or on the consciousness of the many more who will use the courts for this purpose when they are no longer able to obtain legal assistance under the Legal Help and Legal Funding schemes.

4.8 In respect of the alternative wordings proposed in Option 2, then:
4.8.1 “the best relationship possible” is open to the same difficulties raised in paragraph 4.6;
4.8.2 “furthered” compounds these difficulties by elevating the general “principle” to what is almost a presumption.
4.8.3 “in the context of whatever contact there may be between a child and any parent” has the effect of creating the impression that the greatest amount possible contact should be facilitated and so is an invitation to litigate on that basis, as to which please see the observations at paragraph 4.7 above.
4.8.4 “without prejudging any issue as to the amount of time a child is to have with any parent” creates a vacuum into which unreasonable parental notions of “fullest possible involvement” will rush;
4.8.5 “the child’s upbringing” as opposed to “the child’s life” is not a distinction which most people will recognise.

⁶ as analysed in the University of Oxford’s Family Policy Briefing 7 (2011).
⁷ In her International Family Law Lecture, delivered in London on 1st May 2012.
⁸ See page 6 of the University of Oxford’s Family Policy Briefing 7 (2011) and the research studies cited there.
Option 3
4.9 The wording is unlikely to be interpreted by parents as being different from a presumption, so the difficulties referred to at paragraph 4.1 to 4.5 (Option 1) will apply.

Option 4
4.9 Adding to the welfare checklist, is in our view the “least worst” option, but the wording is likely to be interpreted, overoptimistically by parents who are not looking after children, as importing some objective element of what is possible, rather than the subjective question with which the court is concerned namely “what arrangements, in all the circumstances of the case, would best foster the appropriate relationship between the child and his parent or any other person in relation to whom the court considers the question to be relevant?”.

4.10 In any event, such an addition to the welfare checklist is unnecessary. The Consultation points to no evidence (and we are unaware of any such evidence) to suggest that courts do not already consider the needs of the individual child to have a meaningful relationship with both parents as part of the child’s best interests.

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 EXPLAIN WHETHER YOU THINK THERE WILL BE AN INCREASE IN APPLICATIONS, DECREASE IN APPLICATIONS OR NO CHANGE AND EXPLAIN YOUR ANSWER.

We have already made clear, in our responses above, our view that numbers of separated parents applying for such orders will rise, and the reasons for this (e.g. misunderstanding as to the effect of such changes, and lack of access to effective advice.)

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?

6.1 No, for the reasons stated above.

6.2 Of equal concern to us, however, is the likelihood based on e.g. the Australian experience, that parents will feel pressured to make what are essentially detrimental arrangements for children. Each such arrangement will count, for statistical purposes, as a dispute resolved out of court, but may be made in ignorance of current thinking about factors which should set alarm bells flashing in any discussion about such arrangements, e.g. safety concerns, high on-going parental conflict, or children under the age of four years. These cases will never even reach the limited safety net provided by parties commencing proceedings⁹.

⁹ The limitations of which are referred to at paragraph 4.4 above.
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?

7.1 By enabling Cafcass to provide sufficient human resources to carry out proper enquiries in all cases coming before the court (not just telephone calls to the parents). Proper enquiries necessarily involve spending sufficient time with the child, on more than one occasion, to establish a relationship which will enable the child to speak freely.

7.2 By courts utilising, where there is doubt as to the risks to a child, the provisions of s7, and s37 of the Children Act 1989.

7.3 By making the child a party to proceedings wherever there is a real concern that the child’s interests are not being properly taken into account or the child’s views adequately heard. Research and practice have consistently indicated that children need separate representation in more rather than in less cases. Parliament has twice passed legislation with a view to enabling these concerns to be met, yet neither piece of legislation has been implemented.

8. WHAT FURTHER NON-LEGISLATIVE ACTION SHOULD THE GOVERNMENT TAKE TO SUPPORT THE OBJECTIVE OF ENCOURAGING BOTH PARENTS TO REMAIN INVOLVED IN THEIR CHILD’S LIFE AFTER SEPARATION?

8.1 Reverse the effect of LASPO Act by bringing private family law back into scope. This will assist not only the small group of parents who are highly conflicted, but the far greater number who currently succeed in making agreements without commencing court proceedings, a large proportion of whom achieved that with the benefit of legal advice as to what was realistic, what was not, and how a court would approach the particular circumstances of the individual family.

8.2 Encourage, as the Government proposes, a better understanding of parental responsibility as from the birth of a child and more active involvement of both parents in a child’s life throughout the time that the family unit is intact.

8.3 Embark upon a consultation, evidence-based, on the development of a range of services and strategies which can support parents and children during and after separation.

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10 See paragraph 4.4 above.
11 A comparison of statistical information compiled by Cafcass shows that in the 2 years between 2008/9 and 2010/11 the numbers in fact fell (from 1,803 to 1,449).
C. 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.

9.1 We certainly agree that the message needs to be given “loud and clear” to parents that obeying contact orders is compulsory and not optional – the actions of the small minority of parents who deliberately breach or undermine court agreed or imposed contact orders are well known and deeply frustrating to all involved.

9.2 However, the problem which is not addressed at all in the Consultation paper, is how to evaluate the impact on the child of exercising such powers, and how indeed to ascertain the child’s views. It is all very well threatening to confiscate a mother’s driving licence. In some cases, the effect on a child might be minimal, but in the many cases it will have a direct and adverse effect on that child’s quality of life.

10. PARAGRAPH 7.3 OF THE CONSULTATION DOCUMENT DISCUSSES POSSIBLE CHANGES TO COURTS’ POWERS TO ENFORCE ORDERS RELATING TO CONTACT, TO MIRROR POWERS ALREADY AGREED BY PARLIAMENT FOR ENFORCING CHILD MAINTENANCE PAYMENTS. DO YOU AGREE WITH THIS OVERALL APPROACH?

10.1 We do not. The problem is, as referred to already in our answer to question 9 above, the potential effect on the child of an order imposing sanctions on the defaulting parent.

10.2 Child maintenance payments are generally paid by a parent who does not have the child living with them on a regular basis. To that extent, an order which imposes sanctions on them is unlikely to have a direct impact on the child’s quality of life, certainly in terms of their daily routine.

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?

11.1 We doubt whether the imposition of a curfew will impact at all. The parent of a child who has the child residing with them is likely to be at home during curfew hours in any event.

11.2 The withholding of passports and driving licences might well be effective, but the impact on the child might be serious, with the result that the situation would be made worse. The child will inevitably be told that the planned holiday in France cannot go ahead “because of your father”. That is hardly likely to assist resolution.

11.3 We would not object to a change in the warning notice to advise parents, from the outset, that the potential consequences of breaching orders can include a change in the child’s living arrangements, where that is in the child’s best interests and the court is of the view that the other parent is better able to meet the child’s needs.
12A.  HOW DO YOU THINK THE VARIOUS MEASURES DISCUSSED WOULD IMPACT ON THE CHILD? PLEASE IDENTIFY ANY POSITIVE AND NEGATIVE IMPACTS.
We have answered this question in dealing with questions 9-11 above.

12B.  HOW DO YOU THINK THE VARIOUS MEASURES DISCUSSED WOULD IMPACT ON PARENTS? PLEASE IDENTIFY ANY POSITIVE AND NEGATIVE IMPACTS.
We have answered this question in dealing with questions 9-11 above.

13.  DO YOU THINK THERE ARE ANY OTHER ENFORCEMENT OPTIONS THAT SHOULD BE CONSIDERED? PLEASE EXPLAIN YOUR ANSWER.
We have no suggestions to make for further enforcement options. We are of the view that the court already has the required powers, and that better and more rigorous case management of such cases represents the best way forward.