

A Department of Education and Ministry of Justice Consultation: Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life

The following response has been submitted by CIRCY to the Department of Education and Ministry of Justice Consultation: Co-operative Parenting Following family separation; proposed legislation on the involvement of both parents in a child's life.

CIRCY welcomes the Government's interest in supporting families to achieve positive outcomes for children following parental separation, and recognises the intent of the Consultation paper which proposes amendments to the Children's Act 1989 in relation to the requirement of courts to consider effective on-going relationships with both parents when making orders in respect of children. The following response has been drafted from discussion within CIRCY and expresses our shared concern that children's opinions are not adequately represented in the rationale for change, and that the proposed amendments are not underpinned by appropriate research evidence. Our response considers two key principles: the best interests of the child and the quality of parental relationships.

Best interests of the child

The Children's Act 1989 assumes a child-centred, rather than a parent-focused, notion of post-separation arrangements which positions the interests of the child at the heart, rather than the emphasis being on parental wishes. This is consistent with common law developments, such as *Gillick (Gillick v West Norfolk and Wisbech Area Health Authority and another)* [1985] 3 All ER 4020 and the UN Convention on the Rights of the Child. As the law stands, there is no preference for either parent, and it is the duty of the court to consider the best interests of the child. Courts are currently aware that parental separation constitutes a significant change in a child's life and, as far as possible, will make decisions which maintain the status quo and apply the 'welfare principle' (*Re S (A child)* [2004] EWCA Civ 18, 20-21). The 'welfare checklist' presently utilised by the courts seeks to balance a non-exhaustive list of factors, each of which is carefully considered to ensure that the best interests of the child remains paramount. Research expertise and experience within CIRCY has shown that children's needs following parental separation are both diverse and complex. Moreover, children's needs may change as they grow older.

Children with separated parents are likely to show the same agency as those within non-separated families. For older children, this agency may result in their refusing scheduled contact, or putting the resident parent under pressure to do so. This is sometimes for serious reasons, but can also simply be because they wish to spend more time with friends. Research by Fortin (2012) with older children who had experienced parental separation early/ier in life, found that having their wishes closely attended to was vital. It is, therefore, imperative that children from separated families have their views respected for positive, long-term outcomes.

After considering current arrangements under the Children's Act 1989, CIRCY members are concerned that the proposed amendments in this Consultation do not improve the existing legislation. Rather, they shift the focus from the best interests of the child to the rights of the parents - particularly non-resident parents. This position does not sufficiently account for children's diverse needs in complex individual circumstances.

Parental relationships

The Consultation paper appears to work from the premise that, following separation, involvement with both parents is the ideal for children. Paragraph 3:2 argues that many non-resident parents - most commonly fathers - struggle to maintain 'a strong and influential relationship' with their child/ren and that this may result in a loss of contact over time. However, there is no reference to research into the extent of this problem, nor possible reasons for it.

Where violence is not a factor in the decision to separate, the relationship between the parents will inevitably have broken down sufficiently for the choice of separation to have been made. In our view, non-acrimonious decisions may be difficult to reach, particularly in the early stages of separation. It is, therefore, imperative that the child's relationship with each of his/her parents is kept as the focus, rather than that of the now-broken-down relationship of the parents. Whilst this was the determining principle of the Children's Act 1989, the Consultation paper places undue influence on the needs of the parents to the possible detriment of the child. In many cases, children and resident parents are exposed to threatening behaviour - even actual violence - by the non-resident parent. Domestic violence of this nature may be the

reason for the separation of the parents. The need to provide proof can become a focus for courts, causing further distress for children. This can be exacerbated by the mandatory requirement for families to attend mediation before court. Whilst the Consultation paper promises adequate safeguarding for those at risk from violence, more detail would be helpful in determining how these procedures will be implemented and assessed.

In pursuing its aim, the Consultation paper fails to recognise the extent to which, under current legislation, the courts already recognise the importance for children of an on-going relationship with both parents and, thus, whether the proposed amendments are actually necessary. Ministry of Justice statistics support this, showing that in 2009 91,890 contact orders were made of which only 310 were refused (MoJ Judicial and Court Statistics, 2009), whilst research by Hunt and MacLeod (2008) found that 71 per cent of children within separated families currently have contact with the non-custodial parent with access rarely restricted without genuine reason. Furthermore, parents do not generally resort to legal measures unless all alternatives have been exhausted. Most are committed to working together to promote their children's best interests against a backdrop of family breakdown. Whilst the proposed amendments appear to assume that contact with both parents is best for children, research evidence indicates that it is rather the nature and *quality* of the contact which matters (Gilmore, 2006). This research evidence renders the proposal that children will be removed from the custody of parents who consistently refuse contact, a very real concern. The proposal raises the possibility of further distress to children who have already experienced family breakdown and, at its most serious, may put children in danger through granting contact with parents who may pose a risk to them. Additionally, coercing children into relationships removes their agency and may prove extremely counter-productive.

Options for amendment of the Children's Act 1989

Our discussions uncovered reservations over the appropriateness of each of the proposed proposals for amendment. Options 1-3 all, in various ways, place the involvement of both parents above the interests of the child. Under current arrangements, application of the 'welfare principle' ensures 'when all relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into

account and weighed, the course to be followed will be that which is most in the interests of the child' (*J v C* [1970] AC 668, 710-11). Introduction of the proposed options would dilute this principle and, in our view, unnecessarily jeopardise the best interests of the child in favour of the needs of one parent.

Option 4 stresses the importance of having 'regard, in particular to enabling the child concerned to have the best possible relationship with each parent' (paragraph 3:1). In so doing, an additional factor is introduced into legal decisions regarding children's best interests. In addition, research by Fortin and Hunt (2012) shows that post-separation relationships are strongly dependent on that which preceded the separation. It is, therefore, spurious to claim that a change in the law can alter the quality of deeply personal, human relationships. This option also adds to the existing 'welfare checklist' an entirely parent-directed consideration, thus shifting the focus from the best interests of the child in post-separation parenting. In our view, this child-centred focus should not be diluted (Fortin and Hunt, 2012) which maintains that the wishes, needs and interests of the adults concerned only be considered as they pertain to the welfare of the child.

References

Fortin and Hunt (2012): Taking a longer view of contact: Forthcoming research. *Family Law*
Gilmore (2006): Contact/Shared Residence and Child Wellbeing: Research evidence and its implications for legal decision-making. *IJLPF* (20): 344
MacLeod and Hunt (2008): Outcomes of applications to court for contact orders after parental separation or divorce. *Ministry of Justice*.

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