Why Can't They Agree? The Underlying Complexity of Contact and Residence Disputes

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Abstract: *The Children Act 1989 gave priority to the welfare of children when family courts make orders for residence and contact. As a consequence, other issues came to be viewed as less significant. In this article, we examine the court records of three County Courts to determine to what extent the disputes that parents bring to court are actually about children (seen as legitimate concerns) as opposed to other matters (seen as illegitimate concerns). Our findings indicate that underpinning legitimate concerns over children are a multitude of other 'illegitimate' issues such as quantum of child support and unresolved anger between the parents that remain central to parents' concerns. We conclude that, although a return to adjudicating 'blame' and 'guilt' would be a regressive step, it might be sensible to try to find a way of acknowledging these arguments as this may aid resolving conflicts between parents to the benefit of their children.*

Keywords: *Residence and contact disputes, Family law, Hostility, Conflict*

Introduction

There is, in England at least, a growing sense of frustration with parents who cannot agree over matters of contact and/or residence on divorce or separation (*A v A (Shared Residence and Contact)* [2004] 1 FLR 1195; *Re O (Contact: Withdrawal of Application)* [2004] 1 FLR 1258; *Re D (Intractable Contact Dispute: Publicity)* [2004] 1 FLR 1226). The Children Act 1989 was designed with the aspiration that conflict could be diffused by establishing that a parent's legal relationship with a child would be unaffected by divorce, and by abolishing the concepts of custody and access. The Act also placed emphasis on parental responsibility by legislating that both parents were to have parental responsibility, irrespective of whether they lived with their children or not. This was intended to encourage a sense of shared parenting amongst separated and divorced parents. In addition, the introduction of the Child Support Act 1991, which removed disputes over child support from the courts to the Child Support Agency, seemed another way of defusing disagreements over children, because the allocation of child support

payments would no longer be discretionary but based on a formula (Dewar and Parker, 2000). This was an important goal, but a decade after the actual implementation of the Children Act it would seem that it has not been achieved.

Measures incorporated in the Children Act and Child Support Act sought to disaggregate components of parental disputes. Issues of 'custody' were to be reduced to practical decisions on where a child should live, child support levels would be reduced to a standardised formula, and emotional issues such as jealousy, fear and emotional pain were to be deflected by the overarching issue of the paramountcy of the welfare of children. In this process, particular issues and aspirations became legitimate while others were redefined as atavistic and unhelpful. Indeed, the view has grown that to persist in adult-focussed arguments is to engage in behaviour that is harmful to children (e.g. Kaganas and Day Sclater, 2000).

These transformations in what might be called the 'moral etiquette' of post-divorce/separation parenting actually called for major cultural and normative transformations in quite a short time span (Day Sclater, 1999). A wide diversity of parents are now expected to agree over arrangements for their children, according to the new code, even if their adult relationships have been based on very different normative or emotional practices. In this difficult context, the intensification of emotional 'heat' over problematic contact generated by pressure groups such as Fathers4Justice and, to a lesser extent, Families Need Fathers has done little to throw 'light' on how parents can make the difficult adjustments that are required by modern divorce.

In this article, we examine a sample of court records on residence and contact disputes and focus on the reasons that parents give for their conflicts as recorded in the files. Our aim is to investigate to what extent the principles of the Children Act are reflected in how the disputes are constructed in the legal process. According to James (2003), people's expectations of the law are not met by the ways in which the courts actually go about addressing their problems. This is mainly because the legal framework is too narrow to solve the essentially non-legal problems associated with disputes over children. People also have a lay understanding of what the law does, and apply this to their own family problem, thus constructing their dispute in terms of 'fairness', 'rights' and 'justice' (cf. Ewick and Silbey, 1998).

One of the reasons why parents go to court, as identified by Pearce *et al.* (1999), is that they wish to allocate blame and achieve vindication. Parents may want the courts to consider their past relationship as relevant when deciding on contact and residence (Buchanan *et al.*, 2001: 39, 90). However, the court is not interested in the past and requires the dispute to be structured in terms of child welfare (cf. Davis, 1988: 126). Rhoades (2001) has found that conflicts over contact tend to be underpinned by several interacting reasons for dispute, many of them having little to do with contact *per se*. Previous research has thus highlighted that underpinning disputes over contact and residence are a host of issues not directly related to the question of children's welfare as interpreted by the courts. Our findings are similar to those detailed above, but also point to a higher degree of complexity between interlinked issues that earlier research has not highlighted.

The Study

Our evidence is based on a study, funded by the Department for Constitutional Affairs, of court records of Section 8 applications for contact and residence orders started in the year 2000 in three different County Courts (Smart *et al.*, 2003). These different locations ensured that we included diverse catchment areas. Hence one court was in a London borough, one was in a northern city (Northay) and one was in the Midlands, serving small urban and rural communities (Minster).

We gathered data from the court records in two stages. In the first stage, we analysed a representative sample ($N=430$) of cases in order to gain an understanding of the 'larger picture' of what goes on in the three courts. The analysis presented in this paper is based on the data from the second stage of the study, where we selected from these 430 cases a sub-sample for closer analysis. The 180 cases in this purposive sample were selected to fit one of five categories:

- cases involving protracted disputes and returns to court,
- cases involving domestic violence,
- cases in which children had been consulted,
- cases where indirect or supported/supervised contact had been ordered, and
- cases involving grandparents.

We created 'case narratives', plotting the development of the case and analysing any statements or reports filed. The aim was to gain an understanding of the process that each case went through and to focus on the issues that were raised by the parents or court welfare officers (as they were known in 2000).

We recognise that court records do not provide a totally adequate view of family disputes, because they often contain the worst accusations about the parties' characters with few mitigating virtues evident. Many of the documents are provided by the parties at the darkest time in their lives and the files are often metaphorically saturated with loathing, anger, fear and other uncomfortable emotions. But these emotions are a part of the reality of these disputes.

It is also important to recognise that court files do not provide 'direct' access to how the parties viewed their disputes. Any official reports in the files were constructed within a legal framework by professionals representing the Court Welfare Service, Social Services or the medical professions. Furthermore, statements provided by the parties to a dispute were usually constructed with the help of solicitors, who undoubtedly shaped them to a degree to fit with the legal framework and to address the issues that were relevant in the eyes of the law (cf. Bennett and Feldman, 1981; Davis, 1988). However, as we discuss below, this does not mean that all illegitimate arguments were banished from these statements because the parents themselves seemed to view certain issues as central to the dispute, no matter what the law or their advisors might say.

Although many cases were initially presented as apparently 'simple' disputes over contact or residence, as they unfolded other issues could be drawn in so that a much more complex picture of animosity and anger

became apparent (cf. Pearce *et al.*, 1999). In what follows, we organise the data around two broad themes: namely, underlying disputes over money and disputes over relationships. However, we emphasise that, in addition to these, domestic violence and child abuse were raised as issues in a quarter of the cases (Smart *et al.*, 2003). We do not examine violence in this article, because this is an issue that the courts do have to take into consideration when making decisions over residence and contact.

We also provide a number of short case studies to elaborate the points we make and in order to demonstrate succinctly the kaleidoscope of feelings and expectations that lie behind disputes over the welfare of children. In order to protect the identity of the individuals involved, we have anonymised the cases by not presenting every detail of the case and by changing minor details such as the age or gender of the children.

Underlying Disputes over Money

Residence and the financial settlement

The cases that involved an underlying dispute over issues to do with money can be divided into two sub-categories: disputes over the financial settlement and disputes over child support. For example we found that conflicts over residence could involve a dispute over the financial settlement of a divorce or over who should stay living in the matrimonial home. A typical case would involve cross-applications for residence, with both parties maintaining that it was in the children's best interests to reside with them. In most cases, both parties tried to discredit the other as a parent arguing that, in the other's care, the children would be at risk from harm. At the same time, each party would try to establish that they had been the children's main carer. Most of these cases were to be found in our London Court, which can probably be explained by the nature of the housing market in London. In such circumstances, it is understandable that the issue of who gets to stay in the former family home would lead to conflict.

London Court, Case no 28: The parents were married and living together at the time of the original residence application by the mother in respect of the daughter aged 6. The father then made a cross application for residence. Both parents claimed that the other was unable to care for the daughter properly. The mother wanted the father to vacate their property. The mother's claims that the father had been violent towards her were later admitted by him. The CWO concluded that the child loved both her mother and father and, while recognising that the father was an involved parent, concluded that the mother was the child's main carer. The CWO recommended that the mother be granted a residence order, but that the father must continue to be fully involved. The father withdrew his application for residence.

In cases such as these, it appears that the courts grant residence to the parent who can prove to have been the children's main carer, who does not work outside the home or who works the fewest number of hours. We found that this was usually the mother but there were a few instances where it was the father

(of the eighteen cases where the parents were still living together at the time of the application, two resulted in a residence order to the father and three in a joint residence order).

In suggesting that these disputes are as much about where the parents should live as about the welfare of children, we are not suggesting that these parents are selfish or simply materialistic. The matrimonial home (or sufficient finance to secure a new home) is both practically and emotionally a central feature of a divorce settlement. It can ensure a form of continuity for children and at least one parent, and it is hardly surprising that both parents may wish to remain in the home. In the cases where residence is virtually shared it might not matter greatly to the children which parent stays in the matrimonial home, yet it seems that the only way to resolve this sort of conflict is by linking it to the question of children's welfare. This in turn means that the parenting abilities of each parent are denigrated. We might want to consider whether issues of who should stay in the matrimonial home could be dealt with without artificially turning the dispute into one about who is the best parent.

Disputes over contact and child support

Disputes over child support were often enmeshed with arguments over contact. The willingness to provide financial support or to facilitate contact was used by the parents as an indicator of moral worth. Mothers used the issue to show the dubious commitment of fathers who did not provide for their children financially. Fathers used the issue of financial support to show that mothers were not behaving in the interests of the children if they linked the amount of money they received with the amount of contact they allowed. Finally, mothers argued that fathers' interest in children was often cynical and that their applications for contact were linked to their wish to reduce CSA payments.

It is interesting to note how often residential mothers would say that they knew that according to law they *should not* link the issue of contact with that of child support, but nonetheless they felt strongly that it should 'be known' when fathers did not support their children financially. It was as if the failure of the Child Support Agency, or of other means of ensuring payment for children, meant that mothers felt they had no other way to express their distress or anger over this abrogation of fatherly duty. Moreover, it seems that children, too, could feel aggrieved about this.

Northay Court, Case no 70: In this case, the father applied for a contact order for his two children aged 12 and 15. When interviewed by the CWO, the father admitted that he had not provided financial support for his children. The children told the CWO that they were angry with their father for applying for contact after he had shown no commitment to his family in the past. The CWO concluded that the father had not been able to put his children's needs before his own, either emotionally or financially, and it was unlikely that he would do so in future. The CWO recommended 'no order'. The father withdrew his application.

What the mothers in these cases were saying was that the fathers had little real commitment to their children, and therefore did not deserve to have contact with them (cf. Buchanan *et al.*, 2001: 90). As the example above shows, in some cases the court welfare officer could agree with the mother. Contributing to children's upbringing is regarded as proof of a father's love and commitment, without which he is seen to forfeit the benefits of fatherhood. This form of moral evaluation sits ill with the Children Act ethos, but it remains a deeply embedded cultural value.

The other side of this coin became apparent when fathers argued that mothers stopped contact in order to force them to pay more child support.

Minster Court, Case no 1: The father applied for contact in respect of his daughter aged 9. The parents had entered into a dispute over the amount of child support the father paid, and when he had refused to meet the mother's demands, the mother had stopped contact. The court granted the mother residence and ordered that there be weekly visiting contact and fortnightly staying contact between the father and daughter, in addition to which the mother was to encourage weekly telephone contact.

In these cases, mothers were often seen as unjustly wielding the power they had over contact and of using their children as bargaining tools. In other words, these fathers were implying that the mothers were not putting the welfare of their children first because the issue of child support *should be* a separate matter (cf. Davis *et al.*, 1998).

In one final twist to the argument, we found that mothers often pointed out that fathers began court proceedings for contact only *after* the matter of child support had been referred to the Child Support Agency (CSA). In this formulation, fathers were depicted as getting back at mothers because they were being forced to pay for their children or as trying to reduce the amount of child support they would be required by the CSA to provide.

Previous studies have also shown that parents link the issue of child support with contact, in that fathers who do not pay child support rarely see their children (Maclean and Eekelaar, 1997), and it is argued that active contact helps sustain a willingness to pay (Bradshaw *et al.*, 1999). There are differing findings on whether or not fathers who provide financially for their children want to have contact with them. Maclean and Eekelaar (1997) found that these fathers did not appear to demand contact as a form of 'repayment' for their money, whereas the fathers interviewed by Davis *et al.* (1998) and Bradshaw *et al.* (1999) did believe that if they paid for their children, they should be entitled to have a relationship with these children. Residential mothers can also use a similar logic, arguing that if a father wants to see his children, he should provide for them financially (Davis *et al.*, 1998). The parallel systems of dealing with child support and contact have also caused bitterness among contact parents, who resent the fact that a demand from the CSA for maintenance payments is not accompanied by leave to have contact with that child (Barton, 1998; Davis *et al.*, 1998). It is, however, important to keep in mind that fathers do not pay child support for purely 'mercenary' reasons, but also as an expression of their love and of wanting to ensure the material well-being of their children (Bradshaw *et al.*, 1999).

It should be recognised that, in contrast to the Children Act ethos on contact and support, the Child Support Agency does offset the amount of child support paid against the amount of contact a non-residential parent has (Pirrie, 2000). Furthermore, the father's financial contributions to the child can be taken into consideration when deciding over an unmarried father's application for parental responsibility (Bainham, 2003: 535). It would therefore seem that there are two normative codes of behaviour on this issue and they appear to be in conflict with one another. For many parents, this may seem illogical and morally dubious. The parents in our sample clearly had a different view of what is 'just' when compared with the Children Act position, and disaggregating financial obligations from other family obligations is not, in their view, a proper way of conducting family relationships.

There are arguments for both keeping child support and contact as separate issues and for linking them. Although some authors have suggested that the failure to link 'paying' and 'seeing' should be recognised as an injustice towards fathers (Barton, 1998: 669), we suggest that the ethics of this debate are less to do with the interests of mothers and fathers *per se* and more to do with the ethical perspective of parents of either gender. We found that both positions could be supported by both (residential) mothers and (contact) fathers. Mothers who seemed to feel that the issues of contact and child support should be linked argued that it was only just that a father who wanted to see his child(ren) should pay child support, while the fathers' stance was that if they were paying child support, they should be allowed to see their children. Conversely, mothers who apparently held the view that the two issues should not be linked did not want the payment of child support to automatically entitle a father to see his children, while the fathers who argued for the separation between paying and seeing said that they should have a right to contact despite a lack of payments. In this way we can see that the matter is more complex than it might appear on the surface. It is not a simple gender dichotomy but a matter of deeply held principles about how families should operate. More cynically of course, these positions may be seen as purely instrumental justifications for 'bad' behaviour. However, we felt that the ubiquitous nature of these conflicts over 'just desserts' suggests that there is a deeper ethical issue at stake for many of these families.

Underlying Disputes over Relationships

The significance of blame and recrimination

We have divided the cases that involved underlying disputes over relationships into three sub-categories: disputes revolving around blame and recriminations; disputes arising from new relationships; and disputes over normative expectations of family life. So far, we have shown that, in relation to financial issues, there appears to be an incongruence between what family law currently considers relevant to contact decisions and what the parties themselves consider fair. Davis *et al.* (1994: 51–56) found a similar discrepancy between legal and lay notions of fairness in relation to financial settlements on divorce. In this matter, they found that the courts did not take account of

the history of the parties' relationship when deciding the financial settlement. However, the parties themselves tended to view the issue of money as closely tied to how they had behaved towards each other. It was commonly felt that the 'guilty' party should not profit financially from the divorce. Similarly, the parents in Buchanan *et al.*'s (2001: 39, 90) study felt that they were not listened to because the court welfare officer's investigation did not take into account the history of their relationship.

We also found that past behaviour was a salient issue to many parents and often kept cropping up and disrupting parental relationships and hence arrangements over the children. For example, details of past behaviour such as infidelity were used against former spouses or partners. In these cases the dispute appeared to be more about blame and recrimination between the parents than about the child's welfare, but the acrimony tended to spill over into matters of contact and residence. For example, the parents may have agreed in principle about contact, but it kept breaking down because they could not tolerate each other or because there was a lack of communication between them. Rhoades (2001) has also found that conflicts over contact can involve unresolved relationship issues that are part of the separation process. However, under the Children Act 1989, these issues are no longer considered relevant (Bainham, 2003: 535–536).

It appeared to be important to many parents that it should be clearly stated who was to blame for the failure of their marriage or relationship. Thus, there were arguments about who had been unfaithful, who had failed to keep promises and who had behaved badly. Although the parents rarely stated explicitly that there was a connection between 'immoral' behaviour and suitability as a parent, the fact that these issues were raised so centrally in these disputes over children points towards this interpretation. It is almost as if one parent tried to lay the blame for the failure of their relationship squarely on the other party, saying the other was the one who had undermined the family. They seemed to hope that it would be the 'innocent' party who would be rewarded with residence or extensive contact with the children.

London Court, Case no 99: The father applied for residence of his two children aged 7 and 10, claiming that the mother had originally planned to leave the children with the father, which was also what the children wanted. The father explained that he believed that children need both parents in the home and it was therefore unfortunate that the mother was seeking a divorce, as this would harm the children. It then emerged that the father had assaulted the mother on several occasions and had received a sentence for domestic violence. The father decided not to pursue his application for residence because communication between the parents improved. The parents agreed that the children should live with the mother and have staying contact with the father each weekend, plus frequent telephone contact.

The underlying belief appears to be that the party who leaves a marriage/relationship has less of a right to lay claim to the children. This fits with the

old fault principle, which informed divorce law prior to the 1969 Divorce Reform Act (Smart, 1984).

In cases of recrimination and counter-recrimination, it would appear that the courts did not spend much energy on uncovering whose account was 'true'. Parents could accuse each other of all manner of bad behaviour during their marriage/relationship and try to prove that the other was responsible for the break-up. However, these elements of the disputes tended to carry little weight with the different agencies that the parents came into contact with. Indeed, because of a settlement ethos, the courts are seldom willing to hear evidence about past events and behaviour but prefer to focus on the future (e.g. Davis and Pearce, 1999a; Pearce *et al.*, 1999; Sawyer, 2000). Davis and Pearce (1999b) have noted that judges can become frustrated with parties who insist on bringing up issues from their past relationship or who focus on the other party's shortcomings. But it is also possible to see that in many of these cases there is so much anger and resentment that it is almost impossible to move the relationship onto new terrain.

It was, therefore, clear that the parents in our sample of cases were arguing over the *wrong* issues in the eyes of the court, for whom issues of fairness between parents – in these matters at least – were beyond their remit. One possible reason why parents often focus on 'irrelevant' issues is that they may want vindication, to be able allocate blame and to have their side of the story legitimised (Pearce *et al.*, 1999). However, because there is no avenue for this kind of emotional ventilation it almost inevitably becomes enmeshed in issues around children and, although this is experienced as extremely frustrating by family law professionals, it may be unhelpful just to blame parents for intransigence when there are no other means of channelling these deeply felt, negative emotions.

Disputes arising from new relationships

It is increasingly recognised that the fragile equilibrium that can be established between mothers and fathers after divorce or separation can be disrupted when one of them re-partners (Smart *et al.*, 1999). Sometimes the new partner is a problem from the start because a spouse may have left the marriage to live with him or her; but it is not uncommon for the formation of completely new relationships to disrupt arrangements and to cause a re-ignition of conflict. We found that it was quite typical for everything (apparently) to have been going well in terms of contact until one parent re-partnered. The other parent could then react badly and seemed to use the court case as a way of venting their concerns and/or jealousy. They were often depicted in return as vindictive and as putting their own needs before the welfare of their children. It is, however, not always clear whether the issue is one of jealousy over the fact that the ex-partner has a new relationship, or the more thorny issue of a reluctance to allow a 'stranger' to care for one's child. These feelings could be felt as intensely by men as by women. The case that follows seems to have been about anxiety over allowing a 'stranger' to become involved with the child rather than simple jealousy.

Minster Court, Case no 105: The father applied for contact with his son aged 5, stating that the mother had become increasingly difficult over contact since he had formed a new relationship. The parents agreed over a programme of contact. Four months later the mother was unhappy with the idea of staying contact because the father worked nights and she objected to his new partner caring for the child. The parents managed to resolve a number of their disagreements and agreed to weekly staying contact. Six months later, the father's solicitors informed the court that contact was progressing well.

As with issues of blame and recrimination, the courts and court welfare officers did not seem to be particularly concerned about the feelings of the residential parent unless the new partner posed a clear threat to the welfare of children. Otherwise, the issue was seen as a problem between the parents, which they should resolve without harming the best interests of the children. Unfortunately, it often takes time for trust to be established in these situations and parents who take time to adjust are often blamed for not quickly accepting the realities of post-divorce family living.

Disputes over normative expectations of the family

By 'normative expectations' of the family, we mean here instances where parties disagree over how the shape, structure and practices of 'normal' or 'ordinary' family life should be organised. Underlying the sorts of arguments put forward by parents were often clear expectations about how families *should* behave. For example, a mother who had married might argue that it was 'wrong' for the unmarried father of her child to want to have contact because she has formed a 'proper' family with a husband. Arguments like these give priority to the married family over biological or genetic links between kin. The counter normative argument to this case is the one in which it is argued that children should have the right to 'know' their genetic parents regardless of the circumstances. In this argument, biology trumps marriage and the married family by appealing to essentialist links. We also found arguments about what a 'proper' father (or husband) should do (i.e. he should be in paid work and supporting his children) and what a 'proper' mother (or wife) should do (i.e. she should stay at home to care for the children). We have touched on some of the latter points above and so, in the cases that follow, we concentrate more on the issue of contact and what constitutes a 'proper' family after divorce or separation.

Interwoven with the issue of whether 'marriage' or 'biological kinship' is more important is the thorny issue of who should be called 'dad' or 'mum' and whether it is confusing for children to have two 'fathers' or 'mothers'. Thus, we can witness a clear clash of values in some cases. It is, we would argue, important to understand these as conflicting norms rather than simply as self-serving or cynical arguments deployed to 'win' a case by a parent who is incapable of seeing where the best interests of the children may lie.

The following case captures many of the crucial elements of modern normative conflicts between separated parents:

Minster Court, Case no 47: This was a dispute over contact with an infant who was born after the parents separated. The father wanted to play an active role in his son's life, but felt obstructed by the mother. During the course of the proceedings, the mother gave birth to another child by her new partner. The mother stated that her son sees her new partner as a father figure, that they are a family unit, and she questioned the biological father's true commitment to his son. The mother also had concerns over the father's alcohol use. Contact was gradually extended from contact at the mother's home to contact outside her home. The contact dispute caused considerable stress and the mother's partner hinted to the CWO that the present situation could lead to family breakdown. The mother and her partner saw it as confusing for her son to have two fathers and felt that the child could end up feeling an outsider if he was continually removed from his family context to have contact with his biological father. There was a disagreement between the parents over the son calling his biological father 'dad' and he agreed not to encourage his son to call him that.

This sort of case centres on which model of family life is best in preserving the welfare of children. One claims that it is the married, nuclear family and the other claims that it is the preservation of biological links. In the above case, the issues are quite stark because the child never lived with his biological father and he, in turn, was never married to the mother. However, not all cases have all these elements. The parents might have been married and the father may have lived with his children. In such cases, the courts may be less willing to exclude or 'demote' the biological father. But where there is a risk that the new family unit may become unstable and the child might lose his or her current stability, the court has the difficult task of weighing the risks.

As we suggest above, often central to these cases is the question of who has the right to be called 'mum' and who 'dad'. These issues are powerful ones with parents and with children and they carry a great deal of symbolic meaning as well as often being signifiers of love. Because it is still unusual for children to have several adults in their lives that they would call 'mum' or 'dad', the right to have this title can create much conflict. In the 1990s, in England, there were a number of important legal cases over whether a mother had the right to change her children's surnames to that of her new partner (to create a family with one name) without the permission of the biological father (*Re B (Change of Surname)* [1996] 1 FLR 791; *Re PC (Change of Surname)* [1997] 2 FLR 730; and *Re F (Child: Surname)* [1993] 2 FLR 837). The courts refused to allow mothers to do this and this principle is now well established. But the use of affectionate titles like 'mum' and 'dad' would be much harder to enforce, not least because it would require a court to forbid a child to call a certain person 'mum' or 'dad' and this would undoubtedly seem an unwarranted use of legal powers. However, in some cases the courts do seem willing to go almost this far. In the case above, the biological father agreed not to encourage his son to call him 'dad' and this reveals how sensitive these everyday issues are.

Discussion

The Children Act 1989 is based on the aspiration that parents should agree over arrangements for their children irrespective of the quality of their relationship. Our findings show that although parents are now encouraged only to express their concerns about the welfare of their children, embedded in these 'legitimate' claims are a range of complex 'illegitimate' arguments which parents themselves continue to feel strongly about. Thus, in studying court files, we found that arguments over the residence of children which might be framed in terms of who could best provide care could be just as much (if not more) about the financial or property settlement on divorce; and arguments over contact were often enmeshed with arguments over child support. Similarly, contact and residence disputes could be overshadowed by conflicts over adult relationships. Even the benign idea of parental responsibility could be highly contentious in normative contexts where one parent was seen to be acting irresponsibly by trying to claim and assert parental responsibility through the courts.

We have sought to show how complex these disputes over residence and contact are. Although they are often seen as *simply* arising from spite or vindictiveness, we suggest that they encompass a variety of quite thorny ethical issues. Issues of proper parenting, appropriate financial support, fairness, responsibility and the welfare of children are stubbornly interwoven rather than forming discrete matters that can be conveniently shelved or deflected. It would seem that in the moral calculus of separating parents there is a balance made between 'guilt' or irresponsibility and entitlement. This should not surprise us, given that such calculations form the basis of so much social and legal interaction.

We agree with Day Sclater (1997, 1999) that it is important for policy to grasp that divorce is a more traumatic and complex process than current practices often allow. As our analysis shows, the cases brought to law are messy and contain issues that the courts do not wish to adjudicate. It seems highly likely therefore that the parties will come away from the experience feeling dissatisfied; but this also accounts for why policy-makers and the judiciary are increasingly frustrated that some parents cannot resolve their differences. We do not recommend a return to the old, damaging, 'fault based' system, but, equally, our contemporary desire to ignore or punish illegitimate conflict seems short-sighted. Acknowledging and dealing with the ethical and emotional conflicts between parents, rather than insisting that they are ignored for the sake of the children, might actually produce a system that will be more attentive to the long-term welfare of children.

Recent Government initiatives indicate that policy-makers are aware of, and willing to try to address, some of the problems identified in this study. The Green Paper *Parental separation: Children's needs and parents' responsibilities* (2004) proposes a range of initiatives aimed at reducing the number and severity of court cases. These plans to reform the family court system have prompted the setting up of a Constitutional Affairs Committee inquiry *Family Justice: The Family Courts*, which will investigate the way in which

family courts are run. These moves are partly aimed at considering whether parental conflict could be better managed by the courts; for example through the provision of improved information and advice to parents, the use of in-court conciliation, a change in the role of CAFCASS and the wider use of Family Assistance Orders. Our study would indicate that this approach is vital and we therefore welcome the tenor of the Government's proposals. However, the problem of how to enable the courts to defuse parental conflict sooner or more effectively than at present will not be easily solved, because parental disputes that end up in court tend to encompass a range of ethical and moral issues that cannot be easily deflected. It is to be hoped that the Government gives due attention to the complexity of these disputes rather than reacting to a powerful fathers' lobby whose arguments tend to hide how difficult and multi-faceted these conflicts can be.

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