

5 Contact, Conflict and Risk

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Introduction - The Family Law Act 1996

Increasingly in recent years public debate, fuelled by concern about juvenile delinquency, by New Right theory, and by the fathers' rights and new fatherhood lobbies (Smart, 1989), has focused on the detrimental effects on children of relationship breakdown. Children are thought to sustain harm not only as a result of the trauma and upheaval of their parents' separation but, more importantly, they are thought to be damaged by losing contact with the non-resident parent. Father absence, in particular, has been blamed for educational and socio-economic underachievement, anti-social activity and delinquency, sexual promiscuity and confused sexual identity (see, for example Dennis and Erdos, 1992). In addition, it is thought that conflict between parents compounds the damage: both trauma and the risk of loss of a parent are thought to be exacerbated by parental hostility and inability to co-operate. The Family Law Act 1996 is framed, therefore, to address these most pressing problems of divorce. It is designed, through the promotion of mediation, to encourage conflict-free resolution of disputes about children. And it seeks, through stating explicitly how the welfare of the child will best be served (section 11(4)(c)), to ensure that those disputes are resolved in a way that enables links between children and both parents to be preserved.

The legislation not only re-enacts the paramountcy principle enshrined in section 1 of the Children Act 1989 (section 11(3) Family Law Act 1996), it also specifically provides for a presumption that contact is in children's best interests. The welfare of the child, it states, is best served by regular contact with those with parental responsibility and other family members and by the maintenance of as good a continuing relationship with his parents as possible (section 11(4)(c)). The legislation goes on to put in place procedures designed to implement its goals and, at every stage of the divorce process, to remind parents of the desirability of co-operation and contact. The priorities of the lawmakers are to be made clear to the parties early on at the information

meeting, projected to be the initial 'port of call'.

While the precise content of the information to be supplied in terms of section 8(9) awaits the outcomes of various pilot projects, sections 1' and 11 leave little room for doubt that the importance of avoiding conflict and the benefits of contact will be impressed on parents under subsections (b) and (c) of section 8(9). The function of the information meeting, it seems, is unlikely to be simply the neutral transmission of information. Indeed, unless the information is confined to giving a bald repetition of the words of the section or notification of the availability of legal advice and support services, it is difficult to imagine how it could be so. It appears that the information meeting may prove to be the forum in which norms are purveyed concerning what are considered appropriate ways of safeguarding children's welfare. Thus moral pressure may well be exerted on both fathers and mothers; they are likely to be left with the clear understanding that 'good' parents agree arrangements for children and that one of the things they agree on is contact. Further pressure may be applied by solicitors and mediators (section 1) and, finally, by the courts.

In most cases, it is likely that it will be mothers who will be the target of all these efforts. It is likely that it will be mainly mothers who attend information meetings; the majority of divorces are initiated by women' and, unless the other party makes or contests an application concerning children or finances, he need not attend (section 8(5)).³ Fathers who do not seek contact will not attend except in those cases where they make the statement of marital breakdown. The gender neutral language of the legislation does suggest that fathers may be apprised of its general principles by solicitors and mediators and that they may be instructed by the courts to see their children, but current practice makes this appear unlikely (see below).

The Background to the Family Law Act 1996

The legislation endorses what are already strong trends in family law. For a number of years now, the courts have placed greater and greater emphasis on contact between children and their absent fathers. By the 1970s, the judiciary was endorsing the 'immense value' (*M v M (Child: Access)* [1973] 2 All ER 81, 85) to children of access and, in a statement that has echoed down the years, Wrangham J in *M v M* declared it to be a right of the child:

I for my part would prefer to call it a basic right in the child rather than a basic right in the parent. That only means this, that no court should deprive a child of access to either parent unless it is wholly satisfied that it is in the interest of that child that access should cease, and that is a conclusion at which a court should be extremely slow to arrive (p.85).

This formulation of access or contact as a right of the child has often been reiterated' and, in *Re R (A Minor) (Contact)* [1993] 2 FLR 762, 767, the Court of Appeal said that the principle that contact is a right of the child is underlined by the UN Convention on the Rights of the Child' and confirmed in the parental responsibility provisions of the Children Act 1989. Recent decisions show an increasing readiness to 'enforce' this right by means of a court order. Judges have articulated what is in effect 'a very strong presumption in favour of maintaining contact between a child and both parents' (*Re M (Contact: Welfare Test)* [1995] 1 FLR 274, 281).⁶ Balcombe J said in *Re H (Minors) (Access)* [1992] 1 FLR 148, 152 that the question the court has to ask is whether there are 'any cogent reasons why ... children should be denied the opportunity of access to their natural father'. It is not necessary to ask whether there are any positive benefits to be gained by that contact. And in *Re F (Minors) (Denial of Contact)* [1993] 2 FLR 677, 684 the court referred to 'the normally compelling rule of law, and indeed of nature, that children should not be deprived, save for good reason and in exceptional circumstances, of the benefit of contact with a natural parent'.

So strong is the presumption that contact is in children's best interests that an attempt in one case to introduce a more individualised balancing exercise into the decision-making process has had no impact on subsequent decisions. In *Re M (Contact: Welfare Test)* [1995] 1 FLR 274, 278-9, Wilson J sought to apply the checklist in section 1(3) of the Children Act 1989 to the question of contact in order to determine whether the 'fundamental emotional need of every child to have an enduring relationship with both parents ... is outweighed by the depth of harm' which the child 'would be at the risk of suffering' if a contact order were made. However in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 128, Sir Thomas Bingham MR reasserted the presumption, saying that it is 'almost always in the interests of the child' to have contact with the non-resident parent.

The presumption has steadily increased in strength in recent years.' An examination of the case law reveals that courts are increasingly reluctant to refuse contact. The fact that the child has no recollection of the non-resident

parent and that there has been little contact in the past does not nowadays preclude an order (*Re F (Minors) (Contact: Mother's Anxiety)* [1993] 2 FLR 830; *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48, 52).^{*} The courts are also proving more and more reluctant to deny contact on the grounds of disruption to the child.¹ Children's opposition to contact is not decisive either and it has been said that courts should not be unduly perturbed by the prospect of distress being caused to children by contact;² 'upsets' resulting from contact are deemed to be 'usually minor and superficial' (*M v M*, 1973, p.88).³ Even in cases where the child has been abused by the father, contact, albeit normally supervised, may be ordered.⁴ Certainly resistance on the part of caretaking mothers too has largely been discounted as a reason for refusing contact orders.

The Implacably Hostile Parent

Mothers who have sought to oppose contact for any reason have, in recent years, felt that they have been placed under considerable pressure to withdraw their objections. This pressure emanates from solicitors, mediators, court welfare officers and courts. Bailey-Harris *et al* report that district judges, court welfare officers and solicitors all 'tend to be suspicious of mothers who oppose contact' (1998, p.35). Smart and Neale (1997, p.333) illustrate the 'robust' approach taken by solicitors who set out to 'lay down the law' to mothers⁵ while Piper (1993, p.118) observes that for mediators, 'contact was an overriding "good", regardless of its content and any drawbacks'.⁶ And although the courts make it clear that they expect parents to come to an agreed settlement, in those cases that do come before them, they will, as we have seen, normally order contact. The order is directed at the residential parent and the courts have not shied away from making orders that almost resemble mandatory injunctions in the steps it prescribes for those parents.⁷ Moreover, courts are increasingly prepared to threaten a change in the child's residence if contact is resisted⁸ and to imprison residential parents who disobey orders.⁹

If a caretaking mother opposes contact she is seen to be undermining the potential for the creation of a 'good' post-divorce family both because she is fomenting conflict and because she is 'robbing' her child of a relationship with the non-resident parent. She is described as 'implacably hostile' and is chastised by professionals and by courts alike (see *Re W (A Minor) (Contact)* [1994] 2 FLR 441). The court in *Re O* made it clear that [n]either parent should

be encouraged or permitted to think that the more intransigent, the more unreasonable, the more obdurate and the more unco-operative they are, the more likely they are to get their own way' (*Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 129-130). Even risks to the mother's health are not considered as sufficient reason to refuse contact." And in those cases where the court finds that the hostility is such that the child will be harmed if contact were ordered, the courts make it clear where the mother's duty lies. So, for example, in a case where the father had been violent to the mother, intimidated her, drank excessively and took drugs, the court, after indicating its belief that he was now a reformed character, expressed the hope that the mother would come to realise that it would be best for the child to be brought up in the knowledge of both parents (*Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1, 8).'

Indeed, until recently, the courts did not consider a history of violence as a legitimate reason for the mother to oppose contact. So, for example, in *Re P (Contact: Supervision)* [1996] 2 FLR 314,²⁰ the Court of Appeal made an order for supervised contact in favour of a father who had allegedly threatened to kill the children and who had been jailed after attempting to strangle the mother. The court concluded that the evidence before it did not support the 'proposition that the possible detriment to the children of not seeing their father is outweighed by the possible detriment to them through a threat to their mother's health caused by stress and anxiety' (p.325). The mother was not so affected that she was rendered incapable of caring for the children and there was no evidence that they were adversely affected by contact. There was also, said the court, the 'danger' that if it did not order contact, the intransigent parent would get her own way (p.330).

This approach appears to be changing with judicial awareness of the growing body of research into domestic violence and contact. In *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48,²¹ the Court of Appeal accepted that the father presented a risk of physical harm to the child, or of physical harm to the mother to the extent that the child would be indirectly harmed. The court declined to treat this as a case involving an implacably hostile mother, pointing out that the way the term is used is sometimes misleading. Hale J indicated that it should not be used to describe mothers whose fears 'are genuine and rationally held' (p.53) and dismissed an appeal against a refusal to order contact.

Similar views are expressed by another judge in an article published in

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1997. His Honour Judge Victor Hall (1997) suggests that the overriding importance accorded to contact by welfare officers, legal advisers and courts might be misplaced in cases involving a violent father; consideration should be given to the consequences to mothers and children of such orders. In addition, he points out, it should not necessarily be assumed, as courts often do, "that it is the mother who is to blame for her children's resistance to contact; it may be that children have witnessed 'inappropriate' behaviour on the part of their fathers (1997, p.814).²³

Nevertheless, although the 'legitimate complaints' (p.818) of women and the wishes of children should be treated seriously, Hall concludes:

Contact with the absent parent is and remains the norm that we should strive for. Obduracy without cause is still to be deprecated in the vast majority of cases. The interests of the child do, in most cases, require frequent contact with the other parent (p.818).

Explaining the Presumption

The designation of contact as a right, and the creation of what amounts to a presumption in favour of granting it, in effect largely removes the question of contact from the arena of contested fact into the realm of legal principle. This in turn largely removes any need for courts to justify their decisions to award contact other than by reference to legal principle. Nevertheless there are judicial pronouncements that provide some insight into the reasoning of the courts.

Hall (1997, p.813) explains that the basis of the assumption that contact is in a child's best interests is that 'the child would be harmed if contact with the absent parent is denied'. The transformation of contact into the right of the child did indeed take place within the framework of the welfare principle. In *M v M* (1973) Wrangham J cited with approval an earlier decision 'to the effect that to deprive a 'good parent' of access is to make a 'dreadful' and 'Draconian' order that could have 'lifelong consequences' for both parent and child (p.85). Latey J in turn stressed the advantages of keeping in touch so that the absent parent does not lose interest and, in consequence, fails to make the emotional and material contributions to the child's development that would otherwise be made (p.88).

In characterising contact as the right of the child rather than purely as the right of the parent, the judgments in *My Mclearly* seek to shift the focus of

the law's concern from the interests of parents to those of the child; they place the welfare of the child at the centre of judicial deliberations. However, the decision goes further than that. That contact is described as a right has the effect that the otherwise indeterminate concept of the welfare of the child is invested bylaw with a particular content: as a general rule contact is a desirable 'good' for children. Moreover, the court appears to be suggesting that not only is contact beneficial for children but that lack of it can be detrimental; implicit in the judgments are notions of harm and loss to the child. The 'right' of contact accorded to the child then may be seen as a legal device designed to ensure that courts faced with contact cases make decisions favouring contact, so benefiting children and averting loss or other forms of harm.

These notions of loss and harm are made explicit in later cases. For example, in *Re O* the court, after indicating the desirability of contact went on: 'The reason for this scarcely needs spelling out. It is, of course, that the separation of parents involves a loss to the child, and it is desirable that that loss should so far as possible be made good by contact with the non-custodial parent, that is the parent in whose day-to-day care the child is not' (*Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 128). In *Re P* the court referred to [t]he possible detriment to the children of not seeing their father' (*Re P (Contact • Supervision)* [1996] 2 FLR 314, 325). In *Re J (A Minor) (Contact)* [1994] 1 FLR 729, 736, Balcombe LJ noted that it was necessary 'to balance that harm [of making a contact order] against the harm . . . that will undoubtedly be caused to [the child] by being deprived of contact with his father'. In *A v N (Committal: Refusal of Contact)* [1997] 1 FLR 533, consideration was given to the risk of 'long-term damage' to the child if there were no contact with the father (pp.537, 540). And in *Re M* [1998] 1 FLR 727, 732, the court described as 'surprising' the finding of an assistant recorder that the child concerned would not suffer emotional harm if there were no contact with the father.

Conflict-free Contact as a Priority for the Legal System

The courts have long declared themselves in favour of access (see Maidment, 1984, pp.241-2; Bailey, 1994, pp.394-395),²⁸ but such statements were apparently not indicative of any great concern within law about contact between children and their absent parents (Maidment, 1984, p.242).²⁹ It seems that until

the 1980s, courts dealt with access in a 'perfunctory' manner and, in the 'overwhelming majority' of cases, access was left to the parents to arrange as they wished (Maclean and Eekelaar, 1997, p.50). Its elevation into a priority for law,²⁷ along with the goal of reducing conflict, has been coterminous with the growth of child welfare knowledge focusing on these matters and courts have turned to this body of knowledge in justifying their decisions. Even in 1973, Latey J in *My M*(p.88) invoked not only 'common sense' and 'human experience', but also referred to 'medical and other expert discovery' favouring contact. And after the publication of research studies such as that of Wallerstein and Kelly (1980), judicial recourse to child welfare discourse has increased. In *Re P*, for instance, Wall J warned that 'internecine warfare' between the parents over contact would damage the children: 'They will find it very difficult as they grow up to develop a normal relationship with a member of the opposite sex. Their own sense of self-worth will be damaged. The chances of their growing up to be normal and decent human beings will be seriously affected' (*Re F (Contact: Supervision)* [1996] 2 FLR 314, 332). And in *Re F (Minors) (Contact: Mother's Anxiety)*, Balcombe LJ referred to 'the risk, well documented by medical and legal literature and cases, that the children could be damaged by not having the right to know their own father' ([1993] 2 FLR 830, 834).

Those governmental bodies charged with devising legislation too refer extensively to the findings of research in the field of child welfare science. In a Consultation Paper, the Lord Chancellor's Department (LCD) sketched out the aims of what was to become the Family Law Act 1996. In relation to children, it stated:

4.4 A considerable amount of research has been carried out on the effects of divorce on children Conflict between parents has been linked to greater social and behavioural problems among children When parents separate the loss often results in low self-esteem in children who feel they are the cause of the parent leaving. When conflict continues through a separation and divorce, the effects on the children can be very damaging.

4.5 What is important about this research is not that it confirms what we must all already know - namely the awful trauma children suffer when their parents are in conflict or when they split up - it is that this trauma can be reduced in certain circumstances. A major factor is the reduction of conflict between their parents.

4.6 It is clear that most children will benefit from maintaining a good relationship with both their parents

4.7 Continuing and peaceful contact arrangements with which both parents and children are happy are essential and are likely to influence the child's wellbeing. Conversely, no contact or acrimonious contact will have a negative effect. (LCD, 1993)

Within pronouncements such as these, one can detect the influence of the work of researchers such as Wallerstein and Kelly (1980), Hetherington *et al* (1982) and Richards (1982). And, certainly, the Exeter Family Study (Cockett and Tripp, 1996) as well as other research findings coloured parliamentary debates during the passage of the Family Law Act 1996 (see Hansard HL, 22 Jan 1996, cols 805, 808, 825). Even solicitors' advice to clients is characterised by slippage between legal and child welfare discourse (King, 1999).

The version of the research studies that has shaped the dominant discourse about divorce and contact is clearly a simplified one. In this version, divorce damages children and, in order to limit that damage it is essential to ensure that conflict is reduced or eliminated and that contact is maintained. The more nuanced and complex features of the research are absent. For example, Wallerstein and Kelly reject the imposition of any 'presumptive pattern' of post-divorce parenting and remark that parents 'may have little interest in their children; they may demean or exploit their children; they may use the children to establish a permanent foothold in the divorced partner's life' (1980, pp.310-311). Richards refers not only to reduction of conflict and the benefits of contact but also to the need for affordable housing, the need to ensure an adequate income for post-divorce households with children, and the need to provide emotional and practical support for caretaking parents (1994, p.252). A recent review of research in the field confirms that it is characterised by greater complexity and greater uncertainty than the law allows. Rodgers and Pryor (1998, pp.4-5), observe that, '[t]here is no simple or direct relationship between parental separation and children's adjustment, and poor outcomes are far from inevitable'. Nor can it be assumed, they say, that the disadvantages to children identified by researchers are attributable to the separation (p.5). And although they ultimately favour contact (pp.7, 16, 46), they note that the loss or absence of a parent does not appear to have a very significant effect on children (pp.6, 40) and that it is the quality and not the frequency of contact that matters, (pp.6-7). Furthermore, they identify factors such as the ability of parents to

recover from the psychological distress as being important for children's ability to adjust (p.6).

Moreover, there is conflicting research in this field. Yet little credence is attached to studies that contradict what Maclean and Eekelaar (1997, p.50) term the 'new orthodoxy'. The most frequently cited of these, written by Goldstein, Freud and Solnit (1973, 1979), and which recommended that the question of contact be left to the caretaking parent, met with a hostile reception (see, for example, Freeman, 1983, p.218). Others, (for example, Furstenberg, Morgan and Allinson (1987)), which found that contact had no consistent influence on children's well-being, have attracted little attention.

In addition, the response within politics and law to research documenting the failure of fathers to exercise contact has been muted. Reasons postulated by researchers for the cessation of contact are not confined to maternal intransigence and focus also on fathers' voluntary withdrawal. This is attributed by Goode (1956, p.315) to, among other things, expense, travelling time and a loss of familiarity with the child's activities. Simpson *et al* (1995) point out that some fathers are unable to relate to their children without maternal mediation (pp.9, 62-63). In a more recent study, Wallerstein and Lewis (1998) found that relationships between non-resident fathers and their children were affected by factors unrelated to the fallout from marriage failure. Fathers became unavailable to their children because their psychological state and dominant mood led them to withdraw, because their new partners were hostile to contact, because they felt uneasy during visits as children grew to adolescence, and, simply, because they lost interest in their children (pp.374-375).

Wallerstein and Lewis's research is out of step with the conventional wisdom surrounding contact in other respects too. They found that regular contact did not prompt the majority of fathers in their study to support their children financially.' Moreover, where fathers insisted on contact, children found rigid adherence to arrangements distressing; none of these children had a good relationship with their fathers after reaching adulthood (pp.376-378, p.381). The authors conclude that their findings:

raise doubts about the policy expectations of recent years that the child of divorce can be expected to maintain a close relationship with both parents during the postdivorce years if the anger between the parents can be contained (p.374).

Child Welfare Knowledge and Law

Bailey-Harris *et al* comment that the body of knowledge forming the basis on which legal decision-making is made in the context of private family law is 'speculative and uncertain' (1998, p.41), 'ill-understood, and probably unsuited to such massive generalisation' (p.44). King, in turn, points to the contingency of child welfare knowledge (1997, p.55) and doubts, except in cases of extreme physical abuse, that it is ever possible to identify the 'right' causes of harm to children or to find the 'right' measures to combat it (1997, p.34). Nevertheless, as we have seen, the law has, by selectively invoking certain research findings, evolved a very definite and clear model of the 'good' post-separation family.

To some extent, this process of selection can be explained in terms of the necessity for law of reducing complexity. King and Piper (1995) argue that reductionism and the simplification of child welfare knowledge is an inevitable consequence of law's autopoietic nature. Law cannot incorporate external discourses, they say, without reconstructing them in a way that 'makes sense' within law (p.50), enabling it to codify events as lawful or unlawful. These legal reconstructions of the complex discourse of child welfare are 'necessarily simplistic because law by its very nature needs clear normative principles' (p. 51).

The process of reconstruction is unavoidable; the law cannot ignore child welfare science and still purport to be applying principles and making decisions that serve the best interests of children. Law as a system of communication has nothing to say about what is good or bad for children. In contemporary society this is the preserve of experts within child welfare science, whose expertise confers on their work a claim to truth. Child welfare science alone can claim authoritatively to tell us what will best serve children's interests and which events or choices will lead to which outcomes for children.

Yet the need for clear normative principles legitimated by science does not of itself explain the way in which the law has reconstructed child welfare science in the context of contact. It has had to make choices from a range of available principles. It could, for example, have chosen to adopt the principle that contact should not be ordered against the wishes of the resident parent but chose, instead, the opposite. The reason for this must be that a decision to give the resident parent a veto would run counter to a dominant discourse surrounding contact which has been informed by political as well as child welfare imperatives. Currently, government and professional groupings, as well

as popular culture reflected in the media, all espouse a particular understanding of the consequences of separation and divorce for children. This understanding has been accorded the status of taken-for-granted truth and cannot fail to impact on the legal system if it is to retain credibility. And the law, in making pronouncements consistent with the dominant discourse, confirms its 'rightness'. Within the dominant discourse and so, also, in the legally reconstituted version of child welfare science, children are damaged by divorce and, increasingly, it is thought that the damage or loss they suffer is exacerbated by conflict or lack of contact. The task for law, then, is to establish the rules and to make the decisions that will avoid or minimise this damage; the legal system must be able to retain public confidence by giving the impression that it can do what is right for children and avert the risks to which they might be exposed.

Risk Management

Contemporary society, says Niklas Luhmann, 'seeks to comprehend misfortune in the form of risk' (1993, p.viii) and embraces an 'ethic of ensuring the nonoccurrence of disaster' (p.xi). Rather than attributing calamity, as we might have done in the past, to witchcraft, magic, or the will of God (p.viii), we tend to think we are, to some extent, in control. The notion of risk, he comments, appears to promise that 'even if things do go wrong, one can have acted correctly' (p.13).

Luhmann draws a distinction between risks and dangers. Risks are those losses that are perceived as having been avoidable and that are attributed to decisions, to choices made between alternatives (p.16, pp.21-22). Dangers are those losses that are categorised as occurring other than as a result of decisions (p.22). Risks do not exist as objective truths awaiting discovery. Rather, Luhmann contends, they are produced (p.6). This refers to the 'process by which the factors that are seen as contributing to future loss become identifiable, as knowable, and once known, controllable through decisions' (King and Kaganas, 1998, p.238). From that point on, the loss is transformed from danger into risk and there arises an expectation that a right decision can be found.

As Douglas (1994) observes, science and expertise are central to the identification and quantification of risks. In the context of divorce, it is through child welfare science that the dangers to children have been recast as risk. That

children are harmed or turn out badly is not the result of chance or fate, it is because their parents decide to divorce and because the right decisions concerning their future upbringing are not made.

Of course, some risks are considered permissible or worth taking and, according to Luhmann, politics is implicated in making those evaluations (1993, p.30). Law's selection then, from the body of child welfare knowledge, of those risks deemed to be unacceptable, is, in part, informed by politics. A political decision has been made to discourage divorce but not to prohibit it. The period of reflection in the Family Law Act 1996 is intended to give pause to couples contemplating divorce and, perhaps, to prompt them to reconsider their decision. If this fails, however, other political priorities apply. First, the state has to calm public fears, prompted by the high divorce rate and the increased numbers of 'single mothers', about the consequences to society of what is perceived to be the undermining of the role of men (Collier, 1995, p.7) and the demise of the family. This it does by constructing the 'good' divorce, one that will minimise the risk of underachieving, disturbed and delinquent children or children whose only financial support comes from the state. The 'good' divorce is harmonious and leaves room for a unit closely analogous to the intact family, with both parents taking responsibility for and co-operatively involved in raising their children. Second, in the interests of promoting individual responsibility and also, supposedly, of securing more enduring arrangements for children, parents must be encouraged to take responsibility for decision-making on divorce. Finally, the costs to the taxpayer of divorce must be kept in check lest they escalate out of control.

These are clearly the priorities that underlie the provisions *in* the Family Law Act 1996 promoting contact and mediation. However they have for some time infused the dominant discourse, particularly since the advent of the Children Act 1989 with its emphasis on parental responsibility and the notion that 'parenthood is for life'. Risks that do not fall within the political agenda have either been downgraded in importance or ignored. So, for instance, little attention is paid by law to the quality of contact or to its adverse impact on the mother's or the child's psychological state. Children's distress at contact is largely dismissed as transitory (*Re O*, 1995, p.129; *Re H (Minors Access)* [1992] 1 FLR 148, 151) and mothers' objections are characterised as 'flimsy' (*A v N*, 1997, p.541) or as based on 'exaggerated' fears (*Re P*, 1996, p.320). In the past, the courts considered risky a decision to order contact where the parents were in conflict or where the child's family unit would be destabilised."

Now, it is a decision not to order contact that is considered risky. Little can be allowed to stand in the way of contact for, since it is designated as the principal remedy for what ails the children of divorced parents, to deny contact would be to leave them without a cure.

Interestingly, despite the importance ascribed to contact, the risks of paternal indifference or unreliability do not figure prominently in concerns about divorce.¹ The successful construction of problems depends in part on the availability of acceptable solutions (Manning, 1985, p.162) and it may be that **to compel** non-resident parents to see their children would be too politically unpopular. Or it may be seen as futile: 'the law is not good at enforcing personal relationships' (Hale, 1997, p.16). Certainly, the courts do not appear to be eager to take this course and have interpreted the legislation accordingly (Bailey-Harris *et al*, 1998, p.35). The risks of **paternal** abandonment are, it seems, not seen as controllable by coercion. **It** may be that they will be addressed in future through persuasion (s1 and s8(9) Family Law Act 1996). However, the signs are that, at present, neither solicitors nor mediators routinely advise non-resident parents to maintain contact. In relation to mediation, it has been said that mediation is geared towards achieving contact for fathers by persuading mothers to accede to it. Mediators only use arguments invoking joint parental responsibility in cases of dispute; 'where the father doesn't bother with access, no-one else bothers either' (Wegelin, 1984).² Solicitors also appear to direct their efforts primarily at defusing conflict and at overcoming mothers' resistance to contact. In the Brunel University study (n.13 above), 16 out of the 36 solicitors interviewed, when questioned about the advice they gave to clients concerning children's welfare, gave answers which stressed either the desirability of contact or the inevitability of an order in the event of a hearing. Out of those, only three mentioned advice pertaining to the father's exercise of contact.³

It appears, then, that certain risks, namely conflict and denial of contact to a father who wants it, are increasingly amplified, while others are largely discounted. And law is implicated in this process of amplification. Moreover, not only has there been a shift in the relative acceptability of different risks, the locus of responsibility for risk-taking has also changed. In the past, courts saw it as their responsibility not to expose a child to risk by, for example, ordering contact where there was conflict between the parents. Now, if the court is faced with such a case, it is no longer the contact order that is seen as the risky decision; it is the parents' decision to persist in maintaining hostile

relationships." More specifically, if the conflict centres around a mother's refusal to accede to contact, it is she who is placing her child at risk. In allocating responsibility for risky decision-making in this way, the law participates in the construction of images of 'good' fathers and 'good' mothers.

'Good' Fathers and 'Good' Mothers

The law does not appear to make any onerous demands on non-resident fathers in relation to contact. If a father seeks a contact order, the fact that he wishes to see his child suffices to place him in the category of 'good' fathers; contact is deemed to be beneficial unless there are cogent reasons to decide otherwise. 'Good' mothers, on the other hand, not only must refrain from obstructing contact, they must ensure that their children do not resist it and that it is 'peaceful' (LCD, 1993)."

Mothers are branded as 'irresponsible' (*Re H (Contact: Principles)* [1994] 2 FLR 969) if they oppose contact, and, more seriously, are said to be exposing their children to 'serious risk of emotional harm' (*Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1, 7). It has even been said that the harm sustained by a child as a result of a defiant mother's committal to prison flowed from her own decision rather than the court's:

For it to be submitted that the hardship to the child is the result of the court imposing the committal order is wholly to misunderstand the position. This little child suffers because the mother chooses to make her suffer If she goes to prison it is her fault, not the fault of the judge who did no more than his duty to the child (*A v N*, 1997, p.541).

'Good' mothers, lest they otherwise place their children at risk, are expected to be self-denying, to sacrifice their interests to those of their children and to cope with the vicissitudes that contact may bring them. So, for example, in *Re P*, while the Court of Appeal criticised both parents for their mutual hostility, it went on:

These observations apply to both parents, but the mother has a special burden in this respect, particularly given her mental state and the treatment the recorder found she received at the hands of the father. I remind her, and ask her to take on board, that what is ordered is contact of a very limited nature. She

should be able to cope. Whatever she does, these children will want to know their father as they grow up, and if she continues to obstruct contact she will in my judgment simply be storing up trouble for herself (*Re P (Contact: Supervision)* [1996] 2 FLR 314, 332).

Not only must mothers 'cope' with contact, they have a positive duty to facilitate it (*Re O*, n.15). In *F v F* (n.1 7) a suspended committal order was made against a mother who, it was found, indoctrinated the children against the idea of contact and failed to use her influence and authority to counter the children's refusal to see their father. There was, the court affirmed, 'a clear obligation upon the mother to assist the children to come to terms with having contact with their father' (at p.242).

Within law, therefore, mothers are constructed as powerful gatekeepers who hold the key to their children's destinies and, ultimately, to social order. For law has incorporated the image of fathers as the 'producers of heterosexual children, the stabilizing anti-delinquency agent, and the bringer of realistic values and the desire for achievement' (Smart, 1991, p.486). It has designated mothers as the primary decision-makers in relation to contact; it is mothers who determine whether their children will be deprived of the benefits of paternal influence. Fathers, in turn, as Collier points out in this volume, are constructed as powerless, as the victims, like their children, of the capricious and vengeful conduct of their former partners. Their role in deciding whether or not to sustain contact, and their part, in some cases, in deploying contact to perpetuate conflict, receive little acknowledgement. In effect, they are left free to decide whether they want contact and, apart from exceptional cases, they receive the full backing of the courts if they do. It is mothers who are constructed as a "problem" and it is mothers, therefore, who must be controlled. Those who resist are constructed as 'bad' and there are even suggestions that they should be seen by the courts as 'mad'.³⁷

Conclusion

Bailey-Harris *et al* describe as 'remarkable' the way in which the idea that contact must be maintained has permeated legal culture (1998, p.42). They go on to express concern that what may amount to no more than 'pseudo-knowledge' or 'beliefs' (p.41) have been transformed into legal principles (p.44). However the ascendancy, and their translation into principle, of theories

emphasising the importance of contact and the reduction of conflict is perhaps unsurprising.

It is imperative for law and for politics to heed child welfare science if they are to maintain legitimacy. And which theory from within that body of knowledge is invoked, which theory gains popular support and influences policy and practice, as King suggests, depends on whether that theory has 'the backing of powerful groups within society' and is 'consistent with the objectives of those groups' (1981, p.113). Research studies recommending conflict-reduction and contact have articulated objectives that have been consistent with those of government, those of professional groupings such as mediators and court welfare officers, and those of the New Right and fathers' lobbies; they fit neatly into the political and economic priorities that have dominated family policy since the 1980s. And the further simplification of the research so as to render conflict-free contact of overriding importance serves two purposes. First, as we have seen, reductionism is necessary for law. Secondly, it means that government, the legal system and the professionals can claim to be effective in the pursuit of children's welfare.

Divorce is considered to be a risky business. Government, law and the professionals are expected to act to eliminate those risks. In the simplified version of child welfare knowledge, it is those children who are exposed to conflict or who are cut loose from fathers who are deemed to be most at risk psychologically, emotionally and economically. These are the risks, then, that have to be controlled. In constructing resident parents, and more particularly mothers, as having the power and the responsibility for decisions surrounding contact, the law, and the professionals, have succeeded in characterising them as posing the main risk to children. This has meant that mothers must be persuaded to make the 'right' decisions and, if necessary, their power has to be wrested from them by the courts. To crack down on non-compliant mothers is not only justifiable, it is essential in order to safeguard the welfare of children.

Contact with non-resident fathers and the reduction of conflict have come to be constructed as the solutions to what are regarded as some of the most serious problems of divorce. By seeking to implement these solutions, and by minimising the significance of other problems, government, law and professional practice can give the impression of reducing the risks to children. In short, they can be said to be 'doing something' about the risks of divorce. It is unfortunate for mothers that 'doing something' about divorce has meant primarily 'doing something' about them.

Notes

1. Section 1(c)(ii) endorses the general principle that, on marriage breakdown, questions should be resolved in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible.
2. See, for example, Haskey, 1996, p.28.
3. The Act does, however, make provision for joint statements of marital breakdown, in the event of which both parties must attend a meeting (s8(4)).
4. See, for example, *Re S (Minors) (Access)* [1990] 2 FLR 166, 170; (*Re F; Minors) (Contact: Mother's Anxiety)* [1993] 2 FLR 830, 834.
5. For a critique of claims of this nature, see Fortin, 1998, pp.313-314, 327-328.
6. See also *Re A (Contact: Domestic Violence)* [1998] 2 FLR 171, 174.
7. Compare Weyland (1992) with Weyland (1995).
8. See also Bailey-Harris *et al*, 1998, p.35; *Re W (A Minor) (Contact)* [1994] 2 FLR 441. Compare *Re SM (A Minor) (Natural Father: Access)* [1991] 2 FLR 333. Compare, also *Re M (Contact: Welfare Test)* [1995] 1 FLR 274, 280, where the court regarded it as significant that the mother, on the advice of the court welfare officer, ceased for a time to press for contact and suggested that if she were insufficiently motivated to persevere through the initial difficulties, the value of restoring contact might be diminished.
9. See *Re R (A Minor) (Contact)* [1993] 2 FLR 762. Compare the earlier cases of *Re SM (A Minor) (Natural Father: Access)* [1991] 2 FLR 333; *Starling v Starling* (1983) 4 FLR 135; *Re W (A Minor) (Access)* [1989] 1 FLR 163. For cases where the risk of disruption was found to be so serious that contact was denied, see *Re H (A Minor) (Parental Responsibility)* [1993] 1 FLR 484; *Re B (Contact: Stepfather's Opposition)* [1997] 2 FLR 579.
10. *Re H (Minors) (Access)*[1992] 1 FLR 148.
11. However if there is a risk that forcing children to see their parents will lead to long term emotional damage, contact may be refused. See *Re M (Contact: Welfare Test)* [1995] 1 FLR 274; *Re F (Minors) (Denial of Contact)* [1993] 2 FLR 677.
12. See *Re H (Parental Responsibility)* [1998] 1 FLR 855; *L v L (Child Abuse: Access)* [1989] 2 FLR 16; *Re H (Minors) (Access: Appeals)* [1989] 2 FLR 174. Compare the earlier case of *S v S (Child Abuse: Access)* [1988] 1 FLR 213. It appears that there is a presumption, in cases where contact in some form or other is ordered, that if it goes well, it will be extended (Bailey-Harris *et al*, 1998, p.35).
13. See also Neale and Smart, 1997. A preference for a similarly persuasive style was discerned among solicitors interviewed in the course of a small research study conducted by the Centre for the Study of Law, the Child and the Family at Brunel University in the summer of 1996. For example, one solicitor said, 'If it's the mother I will say that unless there's an excellent or exceptional reason why the child should not have contact with the father, the court will generally order contact. He has a right to have contact with the child... It's in the interests of the child to have contact with both parents'. Further on this study, see King, 1999.
14. See also Roberts, 1997, p.84.

15. See *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124. Compare *Re D (Contact Orders: Conditions)* [1997] Fam Law 200 where the court held that it could not attach to a contact order conditions designed to protect the mother.
16. See *Re O*, n.15 above, at 130. But see also *Re B (Contact: Residence Order)* [1997] Fam Law 830.
17. See *A v N (Committal: Refusal Of Contact)* [1997] 1 FLR 533; *F v F (Contact: Committal)* [1998] 2 FLR 237.
18. See *Re F (Minors) (Contact: Mother's Anxiety)* [1993] 2 FLR 830, 834. The father, in this case, had been convicted of the assault of the mother and she suffered panic attacks, apparently triggered by the thought of the father's having contact with the children.
19. See also *Re J (A Minor) (Contact)* [1994] 1 FLR 729, 736.
20. See also *Re F*, n.18, above.
21. See, for the law in Scotland, *S v M (Access Order)* [1997] 1 FLR 980.
22. See for example *F v F*, n.17 above; Maidment, 1998.
23. Indeed, that children's recalcitrance is constructed as the result of maternal hostility is becoming increasingly apparent in the literature currently being produced by lawyers. There are growing calls for courts to be even more resolute in enforcing contact in cases of what is now termed 'parental alienation syndrome'. Psychologists, it is said, have found that mothers may appear to accede to contact while covertly influencing the child against it. This 'strategy of alienation' causes 'damage' to a child that is 'both insidious and long-term' and may even be 'tantamount to emotional abuse by the mother' (Willbourne and Cull, 1997, p.808).
24. *B v B* [1971] 1 WLR 1486, 1493.
25. Their reasons have changed over time. For instance Bailey (1994, p.394), reviewing judicial attitudes in the 18th century, says that it was considered ungentlemanly or immoral for fathers to refuse mothers access.
26. Writing in the first half of the 1980s, both Freeman (1983, p.215) and Maidment (1984, p.235) remark on the lack of interest within the legal system in the question of access.
27. Despite the non-intervention principle in section 1(5) of the Children Act 1989, Bailey-Harris *et al* (1998, pp.14-16) report a significant increase since implementation of the legislation in the number of contact disputes brought before the courts. They speculate on various explanations for this, including changes in the attitudes of fathers and changes in legal culture. One such change might be the prospect of almost certain success for fathers.
28. However, Maclean and Eekelaar, 1997, p.147 report that, in their study, they found a link between contact and the likelihood of financial support.
29. See *Starling v Starling* (1983) 4 FLR 135; *Re W (A Minor) (Access)* [1989] 1 FLR 163.
30. However, concern about paternal inconstancy has led the present government to consider introducing a 'child commitment ceremony' for unmarried fathers (The Observer, 5 April, 1998).
31. A Dutch writer cited by Davis and Roberts (1988) at p.114.
32. One said that he explained that contact should be regular and that its quality is more important than its frequency. A second said that she would gear the conversation towards pointing out that mum should allow contact and that 'dad should take it up'.

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- A third said that she 'might start counselling the absent parent ... about the importance of maintaining contact'.
33. In *Re P*, 1996, p.326, the court stressed that it was 'the conflict between the parents, not the contact, which causes the children's emotional suffering'. See also *Re C and V (Contact and Parental Responsibility)* [1998] 1 FLR 392, 399.
 34. It is notable that in *Re R (A Minor) (Contact)* [1993] 2 FLR 762, Butler-Sloss declared that the test in *Re H* (1992) is the starting point *where a non-resident parent wishes to maintain contact*.
 35. In a somewhat unusual case, a resident father was urged to 'put the hostility behind him' (*Re B (Residence Order: Status Quo)*) [1998] 1 FLR 368, 371. Nevertheless, it is the mother who is normally the resident parent and who bears this responsibility.
 36. Fathers are seen as a problem only in relation to child support (Piper, 1995, p.358).
 37. Willbourne and Cull (1997) report that [c]ases of severe alienation come from a personality disorder or psychopathy' and moot the possibility of removing children from an alienating parent while she undergoes treatment (p.808). See also Rosenblatt and Scragg (1995) who suggest that mothers who are distressed by contact might be prescribed Prozac.

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