

Parental Involvement –A Discretionary Presumption.

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1.Introduction

It is now more than three years since s11 of the Children and Families Act 2014 came into force. Since 22 October 2014¹ all new contested cases brought under s8 of the Children Act 1989 (the Act) have been decided in the light of an amendment to s1 of the Act which created a new statutory presumption. Where there is a dispute between separated or divorced parents about where their children should live or when and with whom they should spend time, the courts must presume that involvement of both parents in their child's life furthers that child's welfare.

At the time the proposed changes were being considered, the government explained what it sought to achieve through the enactment of the legislation. This article sets out to examine the accuracy of predictions I made in 2013 that those objectives would not be met:

[W]hile the government says that the reformed law will serve children's best interests, is intended to address the grievances of fathers' rights groups and is meant to deter parents from using the courts, it is unlikely that these objectives will be achieved in the way the government claims they will. ... [T]he change will have little impact in the courts, is unlikely to serve children's best interests, is unlikely to satisfy fathers' rights groups and is unlikely to reduce conflict between parents. Rather the reforms can be seen as part of a symbolic crusade to endorse the traditional importance of the father and to restore confidence in the family justice system. The new presumption is meant to affirm the status of fathers and of the separated but

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¹ Children and Families Act 2014 (Commencement No 5 and Transitional Provision) Order 2014/2749.

continuing family. As a result, the deviant nature of failing to abide by that norm is underscored. Although largely symbolic, this scapegoating may nevertheless have the effect of changing the balance of power in out-of-court settlements and so may prove damaging for some vulnerable mothers and children.²

In this article, I draw on a substantial documentary research project and, while it is still early days, I conclude that, on the basis of the empirical evidence that is available so far, the presumption has indeed probably had little impact on the way courts decide cases, and where it has, it has not been in children's best interests. There is anecdotal evidence that lower courts use it in cases of high conflict and even abuse, and it may be adding to pressure on mothers to agree to contact which is damaging to children. It appears that the aim of placating the fathers' rights groups whose public campaigns were damaging public confidence in the family justice system has not been achieved either. In addition, while the legislation was an attempt to use the expressive power of the law to deter parents from taking their battles over contact to court, to encourage them to agree or at least to be less adversarial, it does not appear to have had this effect. Finally, the legislation can also be seen as an attempt to reinstate the importance of fathers in the family and, in this respect, it can be seen as symbolic rather than instrumental, Yet this symbolic affirmation of the role of fathers as crucial to children's wellbeing may, in practice, be persuading mothers to agree to arrangements that are risky or detrimental to children..

2.An Unnecessary Amendment

² F Kaganas 'A presumption that "involvement" of both parents is best: deciphering law's messages' (2013) CFLQ 270 p 271

Section 1 of the Act states that in all decisions concerning a child's upbringing, the child's welfare 'shall be the court's paramount consideration.' This is interpreted to mean that the welfare of the child must be the determining factor in such cases, overriding all others.³ Section 1(3) contains what is referred to as the welfare checklist which provides the court with a list of factors to be considered when applying the welfare principle in contested s8 cases.

Section 8 of the Act empowers the courts to make child arrangements orders specifying with whom a child should live and when and with whom the child should spend time. Child arrangements orders replaced what were previously termed residence and contact orders but they serve the same purpose. The change, brought about by s11 of the Children and Families Act (CFA) 2014, was intended to remove any connotations of there being winners and losers as a result of decisions made by the courts to deal with disputes between parents about their children. This, it was thought, might remove a source of conflict and 'encourage parents to focus on their child's needs'.⁴

The new s1(2A), inserted into the 1989 Act as a result of the CFA 2014, creates the presumption that involvement of both parents is best for the child and introduces what is in effect a gloss on the welfare principle. However the paramountcy principle remains, at least in theory, unaffected by the change in terminology to 'child arrangements orders' and by the new presumption. In fact the presumption can be seen as enshrining in statute law an approach that was already informing the practice of judges, lawyers and welfare professionals such as Cafcass officers. Indeed, it was

³ See *J v C* [1970] AC 688, 710, interpreting the earlier incarnation of the welfare principle contained in the Guardianship of Minors Act 1971, s1.

⁴ E Timpson HC Public Bill Committee *Hansard* 14 March 2013 col 297.

argued during the debates surrounding the enactment of the presumption that it was unnecessary. It was said that it would not change the approach of the courts because the courts were already operating a de facto presumption in favour of contact for the non-resident parent and had been doing so for decades. For example, the Justice Committee's pre-legislative scrutiny concluded:

Such a statement [in favour of parental involvement] is not intended to change the current position as the law already acknowledges that a meaningful, engaged relationship with both parents is generally in a child's best interests. The [Family Justice Review] Panel has concluded that the family court system is allowing contact in the right cases; in our view nothing should be done that could undermine the paramount importance of the welfare of the child.⁵

Nevertheless, those supporting the enactment of a presumption were of the view that an explicit statutory endorsement of the importance of both parents was needed.

3. The Background

Most commonly, children live with their mothers after parents divorce or separate,⁶ either because the parents agree on that arrangement or because the mother has always been the primary carer. In these situations the courts have for many years prioritised contact between children and their non-resident parent. Nevertheless, pressure groups representing fathers have campaigned long and hard for a statutory presumption in favour of some form of shared parenting.

⁵ *Report: Pre-Legislative Scrutiny of the Children and Families Bill* (TSO, 2012), para 140.: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/pre-leg-sub/> (last accessed 13 December 2017)

⁶ The Office for National Statistics reported that 93% of resident parents were female whereas 89% of non-resident parents were male (A Blackwell and F Dawe *Non-resident parental contact* (London:ONS) para 1.3.

For example, the Equal Parenting Council and the Association for Shared Parenting - whose titles make clear their stance - made representations during the *Making Contact Work* consultation and Families Need Fathers is recorded as pressing for a presumption in favour of 'shared care' irrespective of the ability or willingness of the parents to co-operate. These groups did not necessarily want equal time but they did want, perhaps partly symbolic, 'recognition that both parents had important parts to play in their children's lives'.⁷ In addition, a high profile campaign was waged by Fathers4justice who asserted very publicly that the law and the courts were biased in favour of mothers. And the resulting consternation in the family courts is apparent from judgments such as that in *V v V (Contact: Implacable Hostility)*. There, Bracewell J referred to the need to deal with a 'perception among part of the media, and some members of the parents' groups, as well as members of the public, that the courts rubber-stamp cases awarding care of children to mothers almost automatically and marginalise fathers from the lives of their children'.⁸

The Government too was concerned about maintaining public confidence in the family courts. In explaining the reasons for the statutory presumption in favour of parental involvement, it openly acknowledged that the legislation was not being passed to remedy a defect in the law or the way in which it was being applied; it accepted that neither the law nor the courts were biased against fathers. Rather the

⁷ The Advisory Board on Family Law: Children Act sub-committee (2002) *Making Contact Work. A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-residential Parents and the Enforcement of Court Orders for Contact* Preface, para 8. See also para 6 and Appendix 3.
<http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/family/abfla/mcwrep.pdf> (accessed 7 November 2017)

⁸ [2004] EWHC Fam 1215 para 4. See also *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC Fam 727 para 4.

legislation was being enacted to reassure the public and to mollify those people, mainly from fathers' rights groups, who *perceived* the law and the courts to be biased and unfair:

The amendment would serve to reinforce by way of statute the expectation that both parents should be involved in a child's life, unless of course that is not safe or not consistent with the child's welfare. The Government recognises that courts already operate on this basis, but nevertheless there is a widespread perception among those who use the courts that this is not the case. The amendment will address this, and will provide greater clarity and transparency in relation to the court's decision-making process. In doing so, it will encourage the resolution of agreements outside court by making clear the basis on which courts' decisions are made and by ensuring that parents' expectations are realistic when deciding whether to bring a claim to court.⁹

The then Parliamentary Under-Secretary of State for Education, Edward Timpson, in his evidence before the Justice Committee, made it clear that the legislation might have little practical effect in the courts and that actual shared parenting was not the priority:

149....I don't think we can be prescriptive about the effect it will have on each individual case and the orders that the court will be making. The most important element of this is to ensure that there is real confidence in the family justice system

151. To suggest that this is going to create a huge sea change in the way that the judges come to their final decisions about what is in the child's best interests is not the intention. The intention, as I say, is to deal with the sense that there is an in-built bias

⁹ DfE, *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Cm 8540 (TSO, 2013), para. 63, Annex 1 of Annex B

towards one parent or another within the current system, to get more confidence into that system with those who come into contact with it, and that, ultimately, with that clear knowledge that that is the way the court's thinking and process works to come to a decision, parents will think more carefully about how they can resolve their differences before having to go to court and have it all played out in the way that we know it can be.¹⁰

It is clear, then, that although the presumption is worded as a direction to the courts, the intention was that parents would be its main audience. The presumption was meant to change parental attitudes and behaviour. Indeed the government had ambitions to change the way society generally thinks about parenting and about the family justice system.

The Government anticipates that over time, this change will contribute to a societal shift towards greater recognition of the value of both parents in a child's life, and to a reduction of the perception of bias within the court system.¹¹

Mr Timpson, speaking in the Public Bill Committee debating the amendment, explained the change in similar terms:¹²

¹⁰ Justice Committee, *Fourth Report. Pre-Legislative Scrutiny of the Children and Families Bill* (2012) <https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/739/739.pdf> (accessed 3 January 2018).

¹¹ DfE, above n9, para 63, Annex 1 of Annex B. <https://www.education.gov.uk/publications/eOrderingDownload/Children%20and%20Families%20Bill%202013.pdf> (last accessed 9 November 2017). See also DfE and MoJ Consultation, *Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life* (TSO, 2012), at para 2.1, para 4.3. See also J Djanogly, *Hansard HC Deb Col 165WH* (24 May 2012)

<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120524/halltext/120524h0001.htm> (last accessed 9 November 2017).

¹² *Hansard Col 289* 14 March 2013. See the *Pepper v Hart* Note provided in Westlaw.

The perception of bias in the family courts is an issue for parents, and it can lead to proceedings becoming more adversarial. Our aim is to keep more cases out of the courts.. . .

We recognise that the court should already take account of the importance of a child’s relationship with both parents, but there is currently no legislative statement to that effect. We want to reinforce by way of statute the expectation that both parents should be involved in a child’s life, unless the child is at risk of harm or it is not in the child’s best interests. We have been asked where our evidence is. We consulted on the provision, and 52% of respondents supported our plan to legislate. ¹³

So, the government recognised that the change was not necessary in that courts were already prioritising contact or ‘parental involvement’. However the legislation would, it said, introduce greater clarity and transparency but it did not elaborate on how this would be achieved; the courts have clearly been saying for years that contact is best for children, provided that it is safe. ¹⁴

4.The Courts, Welfare and Contact

By the early 1970s, the judiciary was already endorsing the ‘immense value’ to children of contact with the non-resident parent and declaring it to be the right of the

¹³ The way in which this calculation was done has been criticised. See A Bainham and S Gilmore ‘The English Children and Families Act 2014’ (2015) 46 *Victoria U. Wellington L Rev* 627 p636. The Justice Committee pointed out that a significant number of the responses came from men. In addition, the analysis did not distinguish between the responses of individuals and those of organisations and charities: Justice Committee, *Fourth Report: Pre-Legislative Scrutiny of the Children and Families Bill* (TSO, 2012), at paras 142–143: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/pre-leg-sub/> (last accessed 13 December 2017)

¹⁴ For a review of cases and literature, see F Kaganas ‘When it Comes to Contact Disputes, What are Family Courts For?’ (2010) 63 *CLP* 234, F Kaganas ‘Managing Emotion: Judging Contact Disputes’ (2011) *CFLQ* 63.

child.¹⁵ Later judgments abandoned the language of rights and referred instead to a ‘very strong presumption’ in favour of contact.¹⁶ So in *Re H (Minors)(Access)*¹⁷ the judge said that the relevant question for the court was, ‘Are there any cogent reasons why this father should be denied access to his children; or putting it another way: are there any cogent reasons why these two children should be denied the opportunity of access to their natural father?’. In *Re O (Contact: Imposition of Conditions)*,¹⁸ the court stated that it is ‘almost always’ in the interests of a child to have contact with the non-resident parent. In *Re L* the terminology, but not the substance, changed again. Thorpe LJ suggested that the existence of a presumption might be incompatible with the welfare principle¹⁹ and adopted the term ‘assumption’ instead. This assumption, the court said, could be ‘offset’ by factors such as domestic violence or substance abuse and only in those circumstances would it be necessary to apply the welfare checklist. This change, then, was of little significance; the courts continued to operate a de facto presumption.

Smart observed in 1991 that ‘the central and determining metaphors in family law have become the welfare of the child and the importances (sic) of the father as an instrument of welfare’.²⁰ She noted that ‘the father as constituted in legal discourse is no longer the paterfamilias, he is the producer of normal, heterosexual children, the stabilizing anti-delinquency agent, and the bringer of realistic values and the desire for achievement’.²¹ This confluence of welfare and the paternal presence meant that

¹⁵ *M v M (Child: Access)* [1973] 2 All ER 81, 85.

¹⁶ *Re M (Contact: Welfare Test)* [1995] 1 FLR 274, 281.

¹⁷ [1992] 1 FLR 148, 152.

¹⁸ [1995] 2 FLR 124, 128.

¹⁹ *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2002] 2 FLR 334, 364.

²⁰ C Smart ‘The Legal and Moral Ordering of Child Custody’ {1991} *J of Law and Society* 485 p 486.

²¹ *Ibid* pp 485-6.

there was no ‘legitimising language’²² for mothers to voice their position, particularly if they opposed contact.

Mothers who resist contact have come to be stigmatised as ‘implacably hostile’²³ and are accused of ‘alienating’ their children, turning them against their fathers.²⁴ Children are thought to be harmed if they do not have a relationship with the non-resident parent and, increasingly, residence is being transferred to that parent if contact is opposed by the resident parent.²⁵ Imprisonment of recalcitrant resident parents is becoming more acceptable to judges.²⁶ Most recently, Cafcass announced new guidelines recommending that parents (usually mothers) judged to be alienating their children from the other parent should not be allowed to have their children live with them and that they should be denied any contact with their children.²⁷

The general approach²⁸ of the courts is summed up in the recent case of *Re B (a 14 year old boy)*,²⁹ in a judgement by Wood J that, notably, makes no reference to the presumption.

²² Ibid p 486.

²³ See *Re D (A Minor)(Contact: Mother’s Hostility)* [1993] 2 FLR 1.

²⁴ *Re S (Transfer of Residence)* [2011] 1 FLR 1789.

²⁵ There were no instances of a change in residence in Hunt and Macleod’s sample of 308 cases and they suggested such a measure remained unusual (J Hunt and A Macleod *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (London: Ministry of Justice, 2008)) p196. This is also apparent from the tone of Ward LJ’s judgment in *Re C (Residence Order)* [2007] EWCA Civ 866 [26]. However these orders are becoming less unusual. See, eg, *S (A Child)* [2010] EWCA Civ 219; *D (Children)* [2010] EWCA Civ 496; *Re A (A Child)(Residence Order)* [2007] EWCA Civ 899. Compare *Re B (Residence Order: Status Quo)* [1998] 1 FLR 368.

²⁶ No judge in Hunt and Macleod’s sample had ever sent a resident parent to prison (above n 25 p 196) but see the more recent case of *Re L-W sub nom CPL v CH-W, ML-W, EL-W (by their guardian ad litem)* [2010] EWCA Civ 1253 [94]. The court was of the opinion that this measure should be used more often.

²⁷ A Hill ‘Divorcing parents could lose children if they try to turn them against partner’ *The Guardian* 17 November 2017. This is welcomed by FNF: ‘Cafcass taking parental alienation seriously at last’ <https://fnf.org.uk/news-events-2/press-releases/150-press-releases-2017-archive/437-cafcass-taking-parental-alienation-seriously-at-last> (accessed 24 November 2017)

²⁸ See also *Re J-M (A Child)*[2014] EWCA Civ 434 [25]

²⁹ [2017] EWFC B28 (Fam)

25.The principles are ... summarised ...by Lord Justice Munby ..in *Re: C (A Child)* [2011] EWCA Civ 521, whose language can readily be seen to have been adopted by the Court of Appeal in the case of *Re: R*.

26. What the judge in *Re: C* did was to reduce the fundamentals to the following bullet points:

(i) Contact between parent and a child is a fundamental element of family life and is almost always in the interests of the child;

(ii) Contact between parent and child is only to be terminated in exceptional circumstances where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it would be detrimental to the child's welfare;

(iii).... The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact....

(iv) The court should take a medium term and long term view and not accord excessive weight to what appear to be likely to be short term or transient problems;....

(vi) ...[T]he welfare of the child is paramount. The child's interests must have precedence over any other consideration.

5.Is Contact Almost Always Best?

So while the new presumption is ostensibly aimed at the courts, it is clear that even before the amendment most fathers who wanted it were already being awarded

contact.³⁰ Courts have also increasingly been prepared to order shared residence, even in cases where it might seem unworkable, such as where the parents are in conflict or where they do not live close to each other. Such orders have sometimes been used for symbolic effect to affirm the equal importance of both parents in cases where childcare was to be far from equally shared.³¹

And it is not only the courts that assume that contact is ‘almost always’³² in children's best interests. The assumption is also well-established in the thinking of professionals such as lawyers, mediators and Cafcass officers. So there was already considerable pressure on resident parents (and children), before the legislation was passed, to accede to contact between children and their non-resident parents.³³

Yet there is a significant body of research indicating that a presumption of shared care or contact does not necessarily promote children's welfare³⁴ and this brings into question the grounds for the assertion that it is in children's interests to ‘reinforce . . . the expectation that both parents should be involved in a child's life’.³⁵ While co-operative co-parenting may serve children's best interests, there are concerns about harm caused by conflict, exposure to domestic violence and

³⁰ See eg Hunt and Macleod above, n 25.

³¹ See Harris-Short, S ‘Resisting the March Towards 50/50 Shared Residence: Rights, Welfare and Equality in Post-separation Families’ (2010) *J of Social Welfare and Family Law* 257 for a review of the cases.

³² See *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 128.

³³ See eg Hunt and Macleod, above n 25; Kaganas (2011), above n 14; A Barnett ‘Contact at All Costs? Domestic Violence and Children's Welfare’ (2014) CFLQ 439.

³⁴ See eg A Diduck and F Kaganas *Family Law, Gender and the State* (Oxford: Hart Publishing, 2012) pp 318ff; J Fortin, J Hunt and L Scanlan *Taking a Longer View of Contact* (Sussex: University of Sussex 2012); B Fehlberg, B Smyth, M Maclean and C Roberts C ‘Legislating for Shared Time. Parenting After Separation: A Research Review’ (2011) *Int'l J of Law Policy and the Family* 318; Kaspiew, R, Gray M Weston, R Moloney, L, Hand, K and Qu, L *Evaluation of the 2006 family law reforms* (Melbourne: Australian Institute of Family Studies, 2009).

³⁵ See DfE above, n 9.

erratic visiting. Hunt and Macleod,³⁶ in a study commissioned by the Ministry of Justice, found that courts awarded contact even in cases where mothers expressed multiple concerns including serious objections based on domestic violence, child abuse, the father's poor parenting, the father's mental health problems and the father's substance misuse. They reported that:³⁷

of the 143 completed cases in which at least one serious welfare concern was raised 60% ended with staying or unsupervised visiting contact. There was no single concern in which the proportion of cases ending in unsupervised contact fell to less than half, nor did multiple concerns tip the balance.

Although the statutory presumption does not apply where there is proof of harm to the child, findings such as Hunt and Macleod's suggest that the courts have been interpreting the concept of harm narrowly. There are no indications that this approach has changed since s1(2A) came into force. Indeed, there are no indications that the provision has affected the way courts, or at least the upper courts, decide cases at all.

6. Interpreting the statutory presumption

The new wording of s1 is as follows:

(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

(2B) In subsection (2A) "*involvement*" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

³⁶ Above, n25.

³⁷ Above, n 25 Summary p 241

(6) In subsection (2A) “*parent*” means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned—

(a) is within this paragraph if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm; and

(b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.

Subsection 2A, then, requires a court to presume, unless there is evidence to the contrary, that, as long as a parent falls within ss 6(a), that parent’s involvement in the child’s life is best for the child. A parent qualifies under ss 6 and the presumption in favour of involvement applies unless there is evidence that the parent’s involvement would put the child at risk. It is presumed that a parent’s involvement will not put the child at risk of harm unless there is evidence to that effect. The presumption that the parent can be safely involved is only fully rebutted if all forms of involvement pose a risk of harm. So if direct contact poses a risk of harm but indirect contact (such as email or telephone calls) does not, it seems the court must presume that the parent should be involved through indirect contact. It is only if direct, indirect, supported and supervised contact would all present a risk of harm that the court would have a discretion to order no contact.

On this reading of the provisions the court would have to adopt the following pattern of reasoning if, say, a father applied for a child arrangements order in order to have contact. The court must presume the father’s involvement will present no risk of

harm. This means that it is up to the mother opposing contact, or the Cafcass officer, perhaps, to present evidence that contact does present a risk of harm. If there is no such evidence, or if there is evidence only that certain types of contact pose a risk of harm, the court will presume that a safe form of contact is in the child's best interests. Again, the onus is on the opposing mother, perhaps with the help of a report to the court written by a Cafcass officer, to produce evidence that even the safe form of contact is not in the child's best interests. If the opposing mother, perhaps with the help of the Cafcass report, cannot discharge the burden of proof at both stages, there will be an order for contact.

This approach interprets the concept of a presumption as something that sets the default position which applies unless there is evidence proven to the required standard to rebut it. This approach would produce a conflict with the principle set out in s1(1) that the child's welfare should be the court's paramount consideration. As Bainham and Gilmore³⁸ say, '[t]he provision is impossible to reconcile with the view of Munby J ... in *Re F (Relocation)*³⁹ that there "can be no presumptions in a case governed by s1 of the Children Act 1989"'.⁴⁰

The drafters of the legislation, however, appear to have understood the notion of a presumption differently and in a way that does not conflict with the welfare principle.

The Explanatory Notes to s11 of the Children and Families Act 2014 state:

109. In a case where the presumption stands,... the court will be required to presume that the child's welfare will be furthered by the involvement of that parent (or those

³⁸ 'The English Children and Families Act' (2015) 46 *Victoria U. Wellington L. Rev* 627 at p. 633.

³⁹ *Re F (Relocation)* [2012] EWCA Civ 1364 at [37].

⁴⁰ See also *Re L, M, V and H (Contact: domestic Violence)* [2000] 2 FLR 334 at 364

parents) in the child's life. This will be a consideration for the court to weigh in the balancesubject to the overriding requirement that the child's welfare remains the court's paramount consideration.

So despite the operation of a presumption that contact is best for the child, and despite a lack of evidence to rebut it in any particular case, the court is at liberty, by, for example, applying the s1(3) welfare checklist, to decide that contact is not in the child's best interests. And, at least in theory, if the presumption is rebutted by evidence of risk, the court can still decide that contact is best. This is apparent from the examples provided in Annex A to the Explanatory Notes:

Example 1

724. Parent A and Parent B are married and have one child together. Parent A left the marital home and Parent B refuses to let Parent A see their child. ...Parent A applies for a child arrangements order....

725. Each parent is treated by the court as being able to have safe involvement with the child as no concerns are raised that Parent A or Parent B pose a risk of harm to the child. The presumption therefore applies in respect of each parent....

726. Parent B ...feels that by leaving the home, Parent A has forsaken any "rights" to the child. Parent B, however, does not allege that it would not further the child's welfare for Parent A to have involvement in the child's life.

727. The court has evidence before it that the child had a very good relationship with Parent A before Parent A left the marital home. The court also has evidence relating to the child's wishes and feelings that the child wants to see and stay with Parent A.

728. The presumption stands in respect of both Parent A and Parent B. The court makes its decision, weighing the presumption alongside the other considerations in section 1 of the Children Act 1989, with the child's welfare remaining at all times the court's paramount consideration.

Example 3

734. Parent A and Parent B are married and have one child together. ...Parent B refuses to let Parent A see their child..... Parent A applies for a [child arrangements order]

735 .Parent B alleges that Parent A has a history of emotionally and physically abusing Parent B and the child. Parent B alleges that Parent A cannot be involved in any way in the child's life without posing a risk of harm to the child. The section 7 welfare report from Cafcass confirms that this is the caseThe court decides, after a consideration of all the evidence, that the prospect of any contact with Parent A would pose a risk of harm to the child and concludes that it is probable that even indirect contact in the form of letter writing would harm the child. The court therefore decides that the presumption does not apply. ...

737. The court makes its decision, weighing the fact that the presumption does not apply to Parent A alongside the other considerations in section 1 of the Children Act 1989, with the child's welfare remaining at all times the court's paramount consideration.

Paragraph 728 effectively says the court still has a discretion despite the operation of the presumption; it could order no contact. This would not be the case if the presumption were meant to operate as the default position if not rebutted. It is not

entirely clear how different in terms of discretion the position of the court is as described in paragraph 737 compared with 728.

The presumption, then, is different in its effect from other legal presumptions;⁴¹ It is just one of the factors that the court has to take into account when applying the principle that the child's welfare is paramount. Nevertheless, from the examples, it is clear that the court is expected to go through a process of reasoning requiring a decision on whether the presumption applies or not before going on to consider the child's best interests.

In his evidence before the Justice Committee engaged in pre-legislative scrutiny of what was then the Children and Families Bill, Ryder J was of the opinion that it would not change the practice of the courts.⁴² However HHJ John Mitchell said there is a 'danger that the presumption will be used by advocates and judges where they feel undecided or overwhelmed'.⁴³ Similarly, in a memorandum submitted to the House of Commons Public Bills Committee, Jane Fortin and Joan Hunt, both eminent researchers in the field, stated that the change would lead to a 'more simplistic and

⁴¹ See eg Woodley (ed) *Osborn's Concise Law Dictionary* (London: Sweet & Maxwell, 2005) which defines a rebuttable presumption as a 'conclusion or inference' which is 'conclusive until disproved by evidence to the contrary'.

⁴² Justice Committee *Fourth Report. Pre-legislative Scrutiny of the Children and Families Bill 2012* para 170 <https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/739/73907.htm> (accessed 9 November 2017)

⁴³ *Ibid* para 173.

broad-brush' approach to cases.⁴⁴ And Carolyn Hamilton testified that it would undermine the welfare principle and standardise decision-making.⁴⁵

That it was seen as potentially having some impact is evident from the concerns voiced about its operation in cases involving domestic violence. For example, in its report *Nineteen Child Homicides*,⁴⁶ Women's Aid, a charity that supports women subjected to domestic violence, suggested that the statutory presumption might 'have the effect of strengthening the courts' emphasis on enabling contact and minimising perceptions of risk'. The report argues that the 'contact at all costs'⁴⁷ approach of the courts is being strengthened by the legislation and, along with the constraints on legal aid provision,⁴⁸ it compounds the problems abused women face when trying to protect their children from unsafe contact.⁴⁹

7.Practice Direction 12J

There is an exception to the operation of the presumption in favour of parental involvement in cases where domestic violence is proved or admitted. Practice Direction 12J - *Child Arrangements and Contact Orders: Domestic Violence and*

⁴⁴ Memorandum submitted by Jane Fortin and Joan Hunt (CF14). Submission of views to the House of Commons Public Bills Committee on Clause 11 of the Children and Families Bill Session 2012-13 (March 2013), at para 8
<http://www.publications.parliament.uk/pa/cm201213/cmpublic/childrenandfamilies/memo/cf14.htm> (accessed 30 April 2013).

⁴⁵ Memorandum Submitted by Professor Hamilton (CF 17) Opening Statement of Professor Hamilton. Children and Families Bill Public Bill Committee Oral Evidence Session. Session 2012-13
<http://www.publications.parliament.uk/pa/cm201213/cmpublic/childrenandfamilies/memo/cf17.htm> (accessed 16 April 2013).

⁴⁶ Women's Aid *Nineteen Child Homicides* (Bristol: Women's Aid 2016) p12.

⁴⁷ See Barnett, above n33.

⁴⁸ See also F Kaganas and C Piper 'Michael Freeman and the Rights and Wrongs of Resolving Private Law Disputes' in A Diduck, N Peleg and H Reece *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Leiden: Brill Nijhoff, 2015) p 375.

⁴⁹ See Women's Aid, above n 46 p13. See also R Thiara and C Harrison *Safe Not Sorry: Supporting the campaign for safer child contact* (Bristol: Women's Aid, 2016)

Harm was amended in 2014 to provide that the court should not apply the presumption if its application would harm the child or the resident parent.⁵⁰

PD12J was further amended in September 2017. The new PD12J was intended to deal with the problem identified by Women’s Aid in a 2016 report: ‘The “pro-contact” approach taken by the family justice system has seemingly overtaken the need for any contact orders to put the child’s best interests first’.⁵¹ The report refers to research⁵² showing that ‘most professionals and judicial officers continued to endorse a message of “contact at all costs” after Practice Direction 12J was issued’.⁵³

Using examples from its report,⁵⁴ Women’s Aid was able to convince Parliament that PD12J should be revised and the *APPG report on Women's Aid's Child First campaign* called for a ‘re-think’ about the way the Family Justice system treats victims of violence and their children.⁵⁵ The Hon Mr Justice Cobb, charged with redrafting PD12J, set out to address the concerns of Women’s Aid and the All Party Parliamentary Group (APPG) on Domestic Violence that the ‘presumption contained in *section 1(2A) of the Children Act 1989* operates to require “contact at all costs” in all cases, without a proper evaluation of the risk of harm from domestic abuse’.⁵⁶

⁵⁰ Para 4.

⁵¹ Women’s Aid, above n 46 p11,

⁵² See Barnett, above n 33.

⁵³ Women’s Aid, above n 46 p23.

⁵⁴ *Ibid*

⁵⁵ C McCurley ‘Domestic Violence and the Impact on Contact Re-examined’ Family Law Week March 2017 -41 www.familylawweek (accessed 4 August 2017) p42.

⁵⁶ The Hon Mr Justice S Cobb Review of Practice Direction 12J. Child Arrangement and Contact Orders: Domestic Violence and Harm (2016) <https://www.judiciary.gov.uk/wp-content/uploads/2017/01/PD12J-child-arrangement-domestic-violence-and-harm-report-and-revision.pdf> (accessed 24 November 2017) para 12(a).

The new PD12J prioritises safety and makes specific reference to the risks posed by ‘domestic abuse’ to both children and the parent with whom they live:

5. The court must... ensure that where domestic abuse is admitted or proven, any child arrangements order in place protects the safety and wellbeing of the child and the parent with whom the child is living, and does not expose either of them to the risk of further harm;

In cases of disputed allegations of domestic violence, the court should consider holding a fact-finding hearing and is required to focus on safety where there are findings or admissions of abuse:

36.The court should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before during and after contact, and that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.

However the new version appears to qualify the need to secure safety. The reference to ‘harm’ to the child has been qualified by a reference to ‘unmanageable risk’:

35. When deciding the issue of child arrangements the court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.

This could mean that courts may be tempted to rely too heavily on supervised contact, believing, often wrongly, that this measure makes risk manageable. In fact it is no guarantee of safety, particularly as it often moves into unsupervised contact.

With its less unequivocal emphasis on safety, the final revised version differs from that drafted by Cobb J but it does make it clear that the presumption does not apply in cases where abuse has been established; the welfare checklist must be used instead. In such cases one might expect the court to exclude the operation of the presumption explicitly. And in others, one might expect the court to adopt the kind of reasoning in the examples provided in the Explanatory Notes, such as Example 1. It is perhaps this structured reasoning that the government thought would aid the clarity and transparency that would satisfy fathers' rights groups and deter litigation by parents. However an analysis of reported cases reveals that courts rarely employ this reasoning.

8.The Reported Cases

a)Methodology

The Westlaw database was searched for relevant cases reported between 1 June 2014 and 30 June 2017 using the search terms 's11 Children and Families Act 2014' and 'Section 1 Children Act 1989'. All the relevant cases reported in Family Law Week during the same period were also examined. Those cases considered relevant were all child arrangements cases dealing with disputes between parents about child contact and all cases dealing with disputes between parents about relocation. Child arrangements cases were selected because the presumption in favour of parental

involvement should have been applied to determine the outcomes of such disputes. Relocation cases were selected because these can be dealt with either under s8 or s13 of the Children Act 1989. The presumption applies to cases decided under s8 and, while it does not apply to s13, it was surmised by the author that it might affect the way the courts approached such cases.

This method of studying reported cases has limitations; the cases analysed are not necessarily representative of all cases, particularly those in the lower courts. However the judgments give some idea of how the presumption is being applied.

The time period selected was chosen because it covered a substantial period after s1(2A) came into force. Earlier cases were also included because it was surmised that cases decided between 1 June 2014 and 22 October 2014, before the statutory presumption came into force, might nevertheless refer to it. Cases involving local authority child protection and Hague Convention cases relating to child abduction were excluded because the presumption would not have been relevant.

b)The numbers: Child arrangements disputes concerning contact between children and parents

The research identified 49 child arrangements disputes between parents, including sperm donors, concerning contact. Cases involving transfer of residence because of contact problems are included in this total.

Six cases were decided prior to the coming into force of the amendments.⁵⁷ In three cases it appears that the proceedings were initiated before the amendment came into force but the judgment was delivered afterwards.⁵⁸ One case involved an application for contact initiated prior to the coming into force of the amendments but the final hearing was vacated several times and finally took place after the presumption came into force. Although the judge referred to the application as one for a child arrangements order, using the new terminology, no reference was made to s1(2A).⁵⁹

Nine cases involved appeals⁶⁰ from orders made prior to the coming into force of the provision. The judgments were all delivered after the amendments came into force. The fact that there is no reference to the presumption in the judgments in seven of these can be explained on the basis that the court had to determine the correctness of the decision of the court below on the law as it was then.

In 20 cases initiated and decided after the coming into force of the presumption, the court made no reference to it. In two cases, the decision about contact was made without any mention of case law or any explicit reference to the Children Act 1989 at all.⁶¹ In two others, the court referred only to the relevant case law and did not make

⁵⁷ *Re: F (Children; contact, name, parental responsibility)* [2014] EWFC 42; *Re K (Children)* [2016] EWCA Civ 99; *Re K (Children) (Contact: Interim Care Order)* [2014] EWCA Civ 1195; *Re A (A Child)* [2014] EWHC 4836 (Fam); *Re S (A Child)* 2014 WL 7255719; *P v D, X, Y, Z* [2014] EWHC 2355. In the latter case the judge remarked, incorrectly, that the amendment had come into force [86].

⁵⁸ *Re R (A Child)* 2015 WL 5437235; *Re X* 2015 WL 6510810; *F v M* 2014 WL 12546 262.

⁵⁹ *Q v Q* [2016] EWFC 5 at para 39.

⁶⁰ *Re T (A Child)(Suspension of Contact) (Section 91(14) CA 1989)* [2015] EWCA Civ 719; *Re M (A Child)* [2014] EWCA Civ 1775; *Re H-B (Contact)* [2015] EWCA Civ 389; *Re R (A Child)* [2014] EWCA Civ 1664; *Re Q (A Child)* [2015] EWCA Civ 991; *Re A (A Child)* [2015] EWCA Civ 910; *In the Matter of V (A Child)* [2015] EWCA Civ 274; *A-M (Children)* [2014] EWCA Civ 1489; *Re M (Children)* [2015] EWCA Civ 280. In the latter case, the court referred to the order under an appeal as a child arrangements order but the order was made in May 2014.

⁶¹ *Re S-B (Children)* [2015] EWCA Civ 705; *L and B (Children: Specific Issue; Temporary Leave to Remove from the Jurisdiction: Circumcision)* [2016] EWHC 849 (Fam).

any explicit reference to the Act.⁶² In another, the court relied on case law but made no reference to the Children Act 1989 except for a passing mention of the welfare checklist.⁶³ In a further judgment, which made no reference to the statute, the court was primarily concerned with the issue of what safeguards were needed so that contact could take place overseas. The focus in that case therefore was not on whether contact was in the child's best interests.⁶⁴ In yet another case, the court, while mentioning some provisions in the statute and PD12J, dealt with welfare and contact simply by speaking of the court's 'paramount concern' with the child's interests.⁶⁵ In the remainder,⁶⁶ the courts did not mention s1(2A) and referred, along with case law, only to other sections of the Children Act 1989, usually s1(1), s1(3) and s1(5). In a few of these, PD 12J and also Art 8 of the European Convention on Human Rights featured.

c)The numbers: relocation disputes

There were 27 decisions that dealt with relocation. There was one concerning an order to return a child to the jurisdiction.

⁶² *Re K (Children)* [2016] EWCA Civ 99; *Re B (a 14 year old boy)* [2017] EWFC B28 (Fam).

⁶³ *Re S (A Child)* [2015] EWCA 689.

⁶⁴ *Re C-W (A Child)* [2015] EWCA Civ 1272.

⁶⁵ *MS v MN* [2017] EWHC 324 (Fam) at para 14.

⁶⁶ *Re D (Children)* [2015] EWFC 85; *M (Children) no 3* [2016] EWHC 1998 (Fam); *Re K (Children)* 2016 WL 5202322; *JK v HS, KS, X By Her Children's Guardian* 2015 WL 6966239; *Q v R and S and T (through their guardian JO)* 2017 WL 02844309; *NA v ZA, A, K, Q, H (By Their Children's Guardian) v The London Borough of Croydon* [2015] EWHC 2188 (Fam); *Re P (A Child)* [2015] EWHC B9 (Fam); *NH v JH, SH, AH, HH* [2015] EWFC 43; *E v M, Y (A Child by her Guardian)* [2015] EWCA Civ 1313; *Re F (Children)* [2015] EWCA Civ 1315; *B v C* [2016] EWHC 1586 (Fam); *Re P (A Child)* [2015] EWCA Civ 1428; *Re H-W (A Child)* [2017] EWCA Civ 154.

In five cases the amendment was not yet in force at the time of the judgment.⁶⁷ In five other cases, the initial proceedings were commenced before s1(2A) came into force although the judgment in the case or, in three instances, on appeal, was given after.⁶⁸ A further case may also fall into this category.⁶⁹ Sixteen cases were initiated after the presumption came into force.

Five judgments contained no explicit reference to the Children Act or to the European Convention on Human Rights.⁷⁰ Instead the court merely mentioned the notion of welfare or relied on case law or both. The court made no reference to the new presumption but explicitly invoked sections 1, 1(a) and 1(3) of the Children Act and Art 8 of the ECHR in 16 cases.⁷¹ Some of these were cases decided or commenced before s1(2A) came into force⁷² but the majority were not.

d)S1(2A) – Child arrangements orders

The judgments in 17 cases contain references to a change in the law, to the Children and Families Act 2014 or, in some instances, to the presumption in favour of parental

⁶⁷ *DH v CL, A Local Authority ML, ET LL (by his Children's Guardian)* [2014] EWHC 1836 (Fam); *In the Matter of P (Children)* [2014] EWCA Civ 852; *Re C (Children)* [2014] EWCA Civ 705; *M v B* [2014] EWHC 2686 (Fam); *In the Matter of: Y (Children)* [2014] EWCA Civ 1287.

⁶⁸ *NJ v OV* [2014] EWHC 4130 (Fam); *S v G* [2015] EWFC 4; *Re: G (A Child)* 2015 WL 5437261; *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882; *Re B (Child) (Relocation: Sweden)* [2015] EWCA Civ 286.

⁶⁹ *Re R (A Child - Relocation)* [2015] EWHC 456 (Fam)

⁷⁰ *Re C (Children)* 2014 EWCA Civ 705; *NJ v OV* [2014] EWHC 4130 (Fam); *Re B (Child) (Relocation: Sweden)* [2015] EWCA Civ 286; *Re N-A (Children)* [2017] EWCA Civ 230; *Re M (Children)* [2016] EWCA Civ 1059.

⁷¹ *DH v CL, A Local Authority ML, ET LL (by his Children's Guardian)* [2014] EWHC 1836 (Fam); *In the Matter of P (Children)* [2014] EWCA Civ 852; *In the Matter of: Y (Children)* [2014] EWCA Civ 1287; *S v G* [2015] EWFC 4; *Re: G (A Child)* 2015 WL 5437261; *Re R (A Child- Relocation)* [2015] EWHC 456 (Fam); *F v M* [2015] WL 10382711; *M v F* [2016] EWHC 3194 (Fam); *Re E (Female Genital Mutilation and Permission to Remove)* [2016] EWHC 1052 (Fam); *SK v TKB* [2015] EWFC 86; *Mother M v Father F* [2015] WL 8131824; *RC (mother) v AB (father)* [2015] EWHC 1693 (Fam); *J (Mother) v P (Father)* [2015] EWFC 29; *K (A Child)* [2016] EWCA Civ 931; *SNM v TNM WL* 00219580; *OY v AY* [2015] EWHC 3434 (Fam);

⁷² *DH v CL, A Local Authority ML, ET LL (by his Children's Guardian)* [2014] EWHC 1836 (Fam); *In the Matter of P (Children)* [2014] EWCA Civ 852; *In the Matter of: Y (Children)* [2014] EWCA Civ 1287; *S v G* [2015] EWFC 4; *Re: G (A Child)* 2015 WL 5437261. Another case may fall into this category: *Re R (A Child - Relocation)* [2015] EWHC 456 (Fam).

involvement or, more specifically to s1(2A). None of the outcomes turned on the application of the subsection and the judges paid no attention to the issue of the burden of proof. In all, the outcome was in reality the result of a welfare analysis.

The court invoked s1(2A) in some cases even though it was not in force at the relevant time and they did so to make the point that involvement of both parents is the aim of the family justice system. In *Re K*⁷³ the judge said that the legislation emphasises that the relationship with each parent is of equivalent importance. And in *Re A*⁷⁴ the court observed that:

The fact that a parent should be involved in a child's life is also addressed by the recent amendments to s.1 of the Children Act 1989 (as effected by s.11 of the Children and Families Act 2014).

The fact that s1(2A) was not yet in force at the time of the original hearing enabled the appeal judge in *Re A*⁷⁵ to refuse to apply it. However the court did more than this.

The judge effectively dismissed the relevance of the subsection:

43. The starting point on any evaluation of issues relating to contact... is that B's welfare, both now and in the future, is to be the court's paramount consideration. Now that approach has to take into account the provisions of section 1(2A), but this is not a matter that turns on dry statute law, in particular given that the provision was not in force before the judge and was not, Mr Adler candidly says, raised before him. It is and should be a given that it will normally be in the best interests of a child to grow up having a full, real and entirely ordinary relationship with each of his or her parents...

⁷³ *Re K (Children) (Contact: Interim Care Order)* [2014] EWCA Civ 1195, [6].

⁷⁴ *Re A (A Child)* [2014] EWHC 4836 (Fam) [108]

⁷⁵ *Re A (A Child)* [2015] EWCA Civ 910.

What the court seems to be saying here is that the ‘dry statute law’ merely reiterates what was already axiomatic and that it changed nothing.

The reported cases decided after the provision came into force appear to bear out this assessment. In *FY v MY*⁷⁶ the father was granted only telephone contact because of his violence. Ms Justice Russell recorded that she was aware of s1(2A). However despite this, she proceeded with a simple application of the welfare test rather than adopting the reasoning demanded by s1(2A). Had she applied it, she would have had to consider whether contact between the father and the children would create a risk of harm, so having the effect of rebutting the presumption. Instead the judge proceeded straight to an exercise of discretion, relying primarily on earlier case law:

165 It is my conclusion that it is both in the children's best interests and proportionate for there to be an order for there to be no direct (face-face) contact between the children and their father. There have been repeated incidents of violence directed against the boys and the need for them to be physically safe is no small matter to be weighed in the balance.

In *J v B*,⁷⁷ the court observed that, ‘It is to be presumed, unless the contrary is shown, that an absent parent's involvement in a child's life will further the child's welfare: s1(2A) CA 1989’. However the decision to award a transgender father indirect contact only was reached through an acknowledgement of the presumption in favour of contact articulated in the earlier case law, as opposed to the statute, and then by weighing up the advantages and disadvantages of direct contact. The judge did not come to the explicit conclusion that the presumption was rebutted by the risk of harm.

⁷⁶ *FY v MY, KL and M (Children)(by their guardian)* [2016] EWFC 16

⁷⁷ *J v B (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4 [38].

Rather he simply found that direct contact would not be in the children's best interests.⁷⁸

187. So, weighing up the profound consequences for the children's welfare of ordering or not ordering direct contact with their father, I have reached the unwelcome conclusion that the likelihood of the children and their mother being marginalised or excluded by the ultra-Orthodox community is so real, and the consequences so great, that this one factor, despite its many disadvantages, must prevail over the many advantages of contact.

This approach is not unusual. In several cases the judgment mentions the statute or refers briefly to the presumption before abandoning it and going on to focus on the welfare analysis and s1(3).⁷⁹ In *Re A*, for example, the court, after noting the presumption, went on to say that, 'This does not, however, mean that contact will be ordered because s.1 of the Children Act requires the child's welfare to be the court's paramount consideration.'⁸⁰

In *Re P*,⁸¹ Lady Justice King's reasoning was somewhat closer to applying the presumption. She noted that, while there is a presumption in favour of parental involvement, 'contact can only be in the child's best interests if the child and their

⁷⁸ This decision was subsequently reversed on appeal to the Court of Appeal: *In the matter of M (Children)* [2017] EWCA Civ 2164, The appeal court's judgment made no reference to the presumption and focused on the standard by which the child's welfare should be judged: 'reasonable men and women in 2017' (para 44). The court below, it said, had failed to show why indirect contact was appropriate rather than direct contact and trial judge was criticised for failing to try to implement direct contact. Reference was also made to the Equality Act 2010 and to the European Convention of Human Rights. No reference was made to the presumption.

⁷⁹ *In the Matter of H (Children)* [2015] EWCA Civ 1216 [20]; *Re K (Children)* WL 5202322 [6]; *H, B v S, M (A Child) (by her Children's Guardian)* [2015] EWFC 36 [6]; *Re B (A Child by her Guardian)* [2017] EWHC 488 (Fam) [40]; *Re A (Private law proceedings - Litigant in person and protracted litigation)* [2015] WL 7259045 [6];

⁸⁰ *Re A (A Child)* [2015] EWCA Civ 910

⁸¹ *Re P (Children)* [2015] EWCA Civ 466 [30].

carers are safe in terms of both the physical safety; (that is to say, from violence) and in the physical care given to very young children during the course of contact’.

The report of *F v M.A.B*⁸² contains the only judgment in this sample to explicitly acknowledge the presumption and find it to have been rebutted:

132 In relation to all of the applications, section 1 CA 1989 (as amended by the CFA 2014) applies and each child's welfare is my paramount consideration. The court should presume, unless the contrary is shown, that the involvement of each parent in the life of the child concerned will further the child's welfare; but as submitted on behalf of the children the presumption only applies when any parent can be involved in the child's life in a way that does not put the child at risk of suffering harm. In this case, on the evidence before me, and on the findings I have made, I cannot treat F as if there is not a risk of A and B suffering harm because it is clear, from his past behaviour, the repeated breach of court orders, and his total lack of remorse, that his involvement in the children's lives would put them at risk of suffering significant harm whatever the level of that involvement.

And in a judgment that will be a source of disappointment for fathers’ groups, the judge made it clear that the changes in the law militate against rather than support the practice of making symbolic orders for shared care or orders for equal time.⁸³

57 There is no longer any need, because of the change in the legislation, to impose a “shared” order under section 8 . Both parents have equal status. So a division of time 50/50 will remain, in my view, a rare order ...

⁸² *F v M,A,B (Children by their guardian)* [2016] EWFC 40

⁸³ *In the Matter of M (A Child)* [2014] EWCA Civ 1755.

So it seems from the reported cases on child arrangements, that the courts are ignoring or paying lip service only to the statutory presumption. They are, in most instances, deciding cases on the basis of the welfare principle in the way that they have done in the past, while relying on case law to support their strong preference for contact. However, there is a possibility that the presumption is having a greater effect in the lower courts than the picture painted here.

In *F v L*,⁸⁴ despite allegations of coercive control on the part of the father, no fact finding hearing had been held and the court below had ordered shared care. Russell J, the judge in the Court of Appeal, was highly critical of what it considered to be unthinking application of the presumption:

11. ...[T]he judge was wrong not to have considered and made findings in respect of the complaints of abusive and controlling behaviour on the part of L as alleged by F. ...The judge simply split the child's time between two homes in what may seem to be an even-handed approach to a difficult and all too common problem. This is (sic) unsophisticated, over-simplistic approach, *all too often* taken by the Family Court when making child arrangements orders, to attempt to adhere to the amendments to the CA brought in by the Children and Families Act 2014 by making an order for shared care which is an even split of time and to compel parents to co-operate. Splitting a child between two homes which are antagonistic and unsupportive of each other is not consistent with the best interests of a child nor congruent with that child's welfare. (Emphasis added).

If this observation accurately reflects what is 'all too often' happening in the Family Courts (and it is of course only anecdotal evidence), then there is significant cause for

⁸⁴ *F v L* [2017] EWHC 1377 (Fam).

concern. It suggests that the predictions of Thorpe J, HHJ Mitchell, Fortin, Hunt and Hamilton were prescient. Judges appear to be relying on the presumption to resolve disputes mechanistically without fully considering the safety or welfare implications of their decisions. In cases such as *F v L* where there are allegations of abuse, this simplistic approach not only jeopardises the child's welfare, it puts mother and child at risk.

e)Section 1(2A) – Relocation

Relocation decisions can be made either under s8, in which case s1(2A) applies, or under s13, in which case it does not. However, the judgment in *Re F*⁸⁵ suggests that, nevertheless, s1(2A) should impact on both s8 and s13 proceedings:

34. For the avoidance of doubt the most recent amendments to the CA 1989 were not in force when the decision in these proceedings fell to be concluded.... The relevant substantive provisions are, however, important to section 8 applications in the future.
....

35. These provisions like section 1(3) are not directly applicable to section 13 CA 1989 applications but I have no doubt that they will in future heighten the court's scrutiny of the arrangements that are proposed by **each** parent.

Parents are now expected to 'exercise their autonomy and to respect the autonomy of their children by entering into arrangements that plan for their children's long term welfare by providing for a meaningful relationship between each adult and each child',⁸⁶

⁸⁵ *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882.

⁸⁶ *Re F (A Child) International Relocation Cases* [2015] EWCA Civ 882 [28].

*Re R*⁸⁷ involved an unsuccessful attempt to invoke the spirit of s1(2A). The father sought to prevent the mother's relocation by arguing for involvement on the part of both parents:

30... [T]he substance of the submission made on the father's behalf being, I think, that the child would benefit from both parents sharing his care and the court should promote this (as to which, see section 1(2)(A) of the Children Act 1989).

The court emphasised that internal relocation cases are decided on the basis of the welfare principle applying s1 and s1(3).⁸⁸ Far from treating s1(2A) as applicable or as imposing a presumption, the court rejected the father's argument, indicated that his relationship with the child would be preserved through contact visits and stressed the need to avoid interfering with the exercise by the trial judge of judicial discretion.⁸⁹

It seems that the relocation cases follow a similar pattern to child arrangement cases; the courts pay no more than passing attention to s1(2A).⁹⁰

9.Reducing Litigation

One of the aims behind the enactment of the statutory presumption was to reduce the numbers of parents turning to the courts to resolve their disputes. The then Parliamentary Under-Secretary of State for Justice, Jonathan Djanogly that it would lead to more parental agreements:

The proposed amendment will encourage more separated parents to resolve their disputes out of court and agree care arrangements that fully involve both parents.⁹¹

⁸⁷ *Re R (Child)* [2016] EWCA Civ 1016.

⁸⁸ *Ibid* [19].

⁸⁹ *Ibid* [31] – [32]

⁹⁰ See *Re C (Internal Relocation)* [2015] EWCA Civ 1305 [25]; *Re AB (A Child)* [2016] EWHC 3115 (Fam) [94]; *H (Mother) v C (Father), E (A child through his solicitor Anne-Marie Hutchinson)* [2015] EWCA Civ 1298 [48].

The accuracy of this claim is open to doubt – at least so far. Cafcass publishes figures for private law cases, defined as ‘applications made following a divorce or separation about the arrangements for children, such as where a child will live or with whom a child will spend time’.⁹² These figures do show a very significant drop in the number of cases received by Cafcass in 2014.

Between April 2013 and March 2014 there were 46,636 cases, a 2.3% (1,031 cases) increase on the 45,605 received during the previous year. However ‘[t]he rate of increase ... slowed down dramatically in the latter months compared to the increase seen in the first few months’.⁹³ In 2014-15: Cafcass received 34,119 new cases, a 26.8% (12,523 cases) decrease compared with the previous year and 25% (11,492 cases) lower when compared to 2012-13. Cafcass reports that ‘[a]ll individual months, bar April 2014, saw the lowest number of new cases ever recorded by Cafcass for those months’⁹⁴.

So, 2014 and early 2015 show a drop in the rate of litigation. However it is notable that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act), which made radical cuts to legal aid in private family law cases, came into force on 1 April 2013. It put legal representation outside the reach of many potential litigants

⁹¹ J Djanogly, *Hansard*, HC Deb, Col 165WH (24 May 2012) <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120524/halltext/120524h0001.htm> (last accessed 9 November 2017).

⁹² Cafcass ‘Private Law Demand’ <https://www.cafcass.gov.uk/leaflets-resources/organisational-material/care-and-private-law-demand-statistics/private-law-demand-statistics.aspx> (last accessed 9 November 2017).

⁹³ Cafcass ‘Private Law Case Demand – Latest figures for September 2017’ (accessed through a link found on <https://www.cafcass.gov.uk/leaflets-resources/organisational-material/care-and-private-law-demand-statistics/private-law-demand-statistics.aspx> (last accessed 9 November 2017).

⁹⁴ *Ibid.*

about contact.⁹⁵ The Children and Families Act 2014 only came into force on 22 October 2014. It is likely, therefore, that most of the reduction in numbers from late 2013/early 2014 onwards is attributable to the former rather than the latter. And it is now the case that numbers are beginning to rise again. Between April 2015 and March 2016, there were 37,415 new cases, an increase of 10%. In 2016-7 there were 40,580 new cases, a 9% increase on the previous year.⁹⁶

It seems that parents continue to litigate. It might be that they are having to represent themselves. But they are now turning to court in numbers not much lower than in 2013-4.

10.Changing Perceptions of the Family Justice System

Probably the most pressing reason for the change in the law was the perception, most vocally expressed by fathers' rights groups,⁹⁷ that the family justice system was biased, unfair and secretive. It was hoped that, by making a statement that both parents are equally important, the legislation would function as a corrective. Yet this hope does not appear to have been realised.

The Fathers4Justice website attests to undiminished anger.⁹⁸ In its 'Blueprint for Family Law' it demands a legal presumption of shared parenting with a 50/50 starting point.⁹⁹ Its 'Fact Sheet' quotes founder, Matt O'Connor, as saying: 'A generation of

⁹⁵ See further *The post-LASPO landscape: Challenges for family law*, J Mant and J Wallbank (eds) (2017) vol 39 *JSW&FL*.

⁹⁶ Cafcass, above n 93.

⁹⁷ See further on such groups F Kaganas 'Domestic Violence, Men's Groups and the Equivalence Argument' in A Diduck and K O'Donovan (eds) *Feminist Perspectives on Family Law* (Glasshouse: Cavendish 2006).

⁹⁸ <http://www.fathers-4-justice.org> (last accessed 9 November 2017)

⁹⁹ <http://www.fathers-4-justice.org/our-campaign/our-10-point-blueprint-for-family-law/>. See also the Manifesto for Men and Boys <http://www.fathers-4-justice.org/wp-content/uploads/2015/06/F4J-MANIFESTO-FOR-MEN-BOYS-2015.pdf>.

children have been denied their human right to a meaningful and loving relationship with their fathers'.¹⁰⁰ It asserts that, 'Successive governments have deliberately removed the need for a father legally, emotionally and biologically through legislation.' It also states: 'Fathers have no legal right in law to see their children'. It deplores the fact that 'Fathers have been denied a legal presumption to "shared" or "equal" parenting which would ensure they had the same rights as mothers'. It refers to the Government's proposals that preceded the amendment to s1 of the Children Act 1989 and dismisses them:

The Government's feeble cocktail of proposals is a charter for conflict and fatherlessness..... A Bill which cannot even mention the word 'father' has no serious value or meaning.

And

- The Government refuses even to consider the allocation of parenting time after separation, despite the fact that most family court disputes are about the allocation of parenting time. ..
- They will do nothing to reduce the likelihood of further litigation.

While it might be that some of the website has not been updated to refer to s1(2A), on 9 March 2015 a response to a letter from the Secretary of State for Health explaining the legislation was posted: 'The Children & Families Act is a cosmetic rebranding of the existing legislation that will only compound the misery of fathers and families being torn apart at the hands of an abusive and secretive family justice system.' And

¹⁰⁰ <http://www.fathers-4-justice.org/about-f4j/fact-sheet/>

on 18 March 2016, a piece in the Telegraph by Matt O’Conner contains this statement:

The primary problem is that there is no presumption of shared parenting in British family law.¹⁰¹

On 2 March 2017: ‘If the Nazis ruled Britain, would they have invented anything as unspeakable as our secret family courts?’¹⁰² On 2 October 2017: ‘F4J said a de-facto presumption of “no contact” already existed between children and fathers in family proceedings, but did not apply to violent mums or their boyfriends.’¹⁰³

Families Need Fathers appears to have more modest aims¹⁰⁴ and so was less disappointed by the law:

A presumption of Shared Parenting is when children are brought up with the love and guidance of both parents after separation. This does not have to mean fifty-fifty... but both parents must share responsibility for their children’s upbringing.¹⁰⁵

It was cautiously optimistic about the new presumption:

Section 11 of the Act does not provide an automatic ‘right’ to contact, or a guaranteed minimum time or form of contact. ...

¹⁰¹ Matt O’Connor ‘It’s time we recognised that a father’s love is just as important as a mother’s’ <http://www.fathers-4-justice.org/2016/03/the-telegraph-its-time-we-recognised-that-a-fathers-love-is-just-as-important-as-a-mothers/> (last accessed 9 November 2017).

¹⁰² <http://www.fathers-4-justice.org/2017/03/nazis-ruled-britain-invented-anything-unspeakable-secret-family-courts/> (last accessed 10 November 2017).

¹⁰³ ‘Fathers4Justice issues warning to dads over new dv measures’ <http://www.fathers-4-justice.org/2017/10/fathers4justice-issues-warning-dads-new-dv-measures/> (last accessed 9 November 2017)

¹⁰⁴ It seems to have been active in persuading Cafcass to act against ‘alienation’. See FNF above, n 27

¹⁰⁵ ‘Families Need Fathers. What We Believe’. Downloaded from <https://fnf.org.uk/component/phocadownload/file/120-briefing-doc-final> (last accessed 10 November 2017)

It is the first time that the rights of children to a relationship with both parents has (sic) been recognised in primary legislation. Time and members' experience will tell the extent to which these reforms will have an impact upon individual cases or alter the culture of family separation among lawyers, judges and other professionals. We will continue to monitor developments.¹⁰⁶

However dissatisfaction with the family justice system persists and the grievances of father's groups are not assuaged by the presumption. Here FNF focuses on the LASPO Act, parental alienation and the alleged prevalence of false allegations of domestic violence:

Chair of Families Need Fathers, Jerry Karlin says “..., *the issues ...point to a Family Justice System that is increasingly unfit for purpose. Without urgent action to take these factors into account, thousands of children every year will needlessly continue to lose a parent from their lives.*”¹⁰⁷ (italics in original)

In a similar vein:

Jerry Karlin ... commented: "The UK cannot continue to ignore the elephant in the room – the widespread unfairness of outcomes for children who are deprived of their involvement with (usually) their fathers”¹⁰⁸

Of research concluding that there is no bias in the family courts:

¹⁰⁶ ‘FNF McKenzie Briefing’ (2014) <https://fnf.org.uk/phocadownload/law-and-information/the-law/children-and-families-act-2014/briefing%20number%201.pdf> (last accessed 10 November 2017)

¹⁰⁷ ‘Sir James Munby Speaks Out Again’ (2017) <https://fnf.org.uk/news-events-2/press-releases/150-press-releases-2017-archive/430-press-release-pfd-aug-2017> (last accessed 10 November 2017). See also ‘Families Need Fathers Charter’ 2015 accessed from a link at <https://fnf.org.uk/component/phocadownload/file/195-families-need-fathers-charter-2015> (last accessed 10 November 2017).

¹⁰⁸ ‘More Fathers Protest by Climbing Buckingham Palace’ (2015) <https://fnf.org.uk/news-events-2/press-releases/98-press-releases-2015-archive?start=1> (last accessed 10 November 2017).

Whilst the wording of the law in itself is not biased against fathers, the effects of bias in the interpretation of the law runs much deeper than whether a court eventually orders some level of contact or not...Perceptions of the role of fathers, particularly relating to care of younger children, continue to influence some cases as much as the relevant facts of a case.¹⁰⁹

And of Cafcass:

Many fathers in difficult separation cases already have very low confidence in the result of interventions of CAF/CASS.¹¹⁰

11.Sending a message – symbolic legislation

On the basis of the available evidence, the presumption, then, appears to be having little effect on judicially decided outcomes in the upper courts, at least. And indeed, it was not intended to do so. This is a change in a statute that appears to have been motivated more by a concern with presentation rather than by an identified need to remedy a defect in the law or its application. It has been argued that the legislation was largely symbolic;¹¹¹ it was intended to send a ‘message’:

It is assumed that the messages that ‘radiate’ beyond law will lead parents to change their behaviour so that they resolve their disputes out of court and agree care arrangements that fully involve them both: ‘The legislation will become part of the

¹⁰⁹ ‘Statement on “How do County Courts share the care of children between parents?” report – bias in the family courts’ <https://fnf.org.uk/news-events-2/press-releases/98-press-releases-2015-archive/360-statement-on-how-do-county-courts-share-the-care-of-children-between-parents-report-bias-in-the-family-courts> (last accessed 10 November 2017).

¹¹⁰ ‘Cafcass Betrays the Trust of Father’s’ (2017) <https://fnf.org.uk/news-events-2/press-releases/150-press-releases-2017-archive/428-press-release-cafcass-betrays-trust-of-fathers> (last accessed 10 November 2017).

¹¹¹ On the symbolic functions of the law, see eg R Gusfield *Symbolic Crusade: Status politics and the American Temperance Movement* (University of Illinois Press, 1986), J R Gusfield, ‘On Legislating Morals: The Symbolic Process of Designating Deviance’ (1968) *California Law Review* 54,

consistent messaging that influences the starting point both for families undergoing separation, and the professionals who support them'. (References omitted)¹¹²

The legislation is intended to send a message to society that both parents must take responsibility for their children and also to individual parents that they must agree and that they must agree on parental involvement. That message is not necessarily heard by its intended recipients; the numbers of cases going to court and the continuing dissatisfaction of fathers' rights groups attest to this. However, the message is most likely to be heeded by the vulnerable:

[I]t seems that law's messages sometimes do have an impact where those hearing them are not in a position to resist them, particularly where these messages are used to 'reinforce popular sentiment or push popular sentiment'. In particular, they may influence out-of-court negotiations: parents bargain in 'the shadow of the law' and their agreements will, to some extent, be shaped by it. (references omitted)¹¹³

In Australia, a similar presumption was found to have the effect of silencing mothers' concerns; research¹¹⁴ revealed that parents describing ongoing safety concerns were as likely to have shared time arrangements as those who did not. Indeed, mothers tended not to report violence because they believed there was no point in doing so.

And the reach of the message goes beyond those who know the law; the shadow of the law overhangs the advice parents receive from diverse sources. For example, the

¹¹² Kaganas and Piper, above n4 at p 377.

¹¹³ Ibid at p. 378.

¹¹⁴ R Kaspiew, M Gray, R Weston, L Moloney, K Hand and L Qu, Evaluation of the 2006 family law reforms (Australian Institute of Family Studies 2009) Summary at p 12.

presumption informs the advice given on the website of Sorting out Separation, part of the Government's Help and Support for Separated Families initiative:¹¹⁵

- Accept that your ex-partner is still a parent and has an important role in your child's life and it's best to try shared parenting **as long as it is safe**.
- If you can't agree and end up going to court, the judge will look to try to involve both parents in the child's life, with a shared parenting arrangement that is best for the **child**.

Barnett points out that McKenzie Friends too might make use of the law to push an agenda favouring shared residence.¹¹⁶ And the potential for the presumption to be used by professionals such as mediators and welfare officers to put pressure on mothers was described approvingly by Baroness Butler-Sloss in an interview with Families Need Fathers:

However, I would like the parent ,, at least to be able to say that if I'm the non residential parent in terms of clause 11, I nonetheless have the responsibility to take an interest in my child. To that extent I have the right to see the child, unless you can show that there is a good reason why I cannot.

That's where I think judges and magistrates will continue to make orders, and the judges and magistrates will be given a greater degree of influence, because they will read out that this clause is actually intended to benefit the child from the involvement of both parents. ... So I think it gives a big tool to mediators, a tool to the welfare

¹¹⁵ <https://www.sortingoutseparation.org.uk/children-parenting/parenting-arrangements-children/> (last accessed 14 December 2017)

¹¹⁶ Barnett, above n 33 at p 459.

officer, if the child gets to a welfare officer, a tool to the judge and the magistrates, to beat the head of the custodial parent and say you can't just take the child yourself.¹¹⁷

Mothers, who are usually the main carers of their children, are being told that, to be good mothers, they must accept the involvement of fathers. They are also told that to be good mothers they should not litigate and, if they do, the court will rule against them. In any event, the LASPO Act prevents many parents from accessing the courts and, in the context of the advice they are given on information hubs and by mediators, some mothers will be agreeing to unsafe contact because it is the 'right' thing to do or because they believe they have no choice. Fathers, by contrast, can strengthen their negotiating position by pointing to the presumption as giving them rights or at least as establishing a norm to which mothers should conform.

12. Conclusion

The evidence that is available suggests that none of the government's aims in introducing the presumption in favour of parental involvement has been met.

The presumption has not changed the way courts decide cases. Admittedly, the presumption was not intended to constrain judicial discretion, but it was meant to structure decision-making in a way that would promote 'clarity and transparency'. The analysis of the sample of reported cases considered here suggests that the higher courts are largely ignoring the presumption and are in any event not adopting the reasoning set out in the examples provided. Most are continuing with business as usual.

¹¹⁷ Families Need Fathers (2014) 'McKenzie Briefing 2014 No 1' <https://fnf.org.uk/phocadownload/law-and-information/the-law/children-and-families-act-2014/briefing%20number%201.pdf> (accessed 10 January 2018).

Of course there is no way of knowing, without empirical research, how the lower courts are dealing with the presumption. However the comment of the appeal judge in *F v L*¹¹⁸ suggests that it is often being used as a blunt instrument, that it is applied without adequate consideration of risk and that it is having the effect of exposing mothers and children to harm. The judge's criticisms of the 'unsophisticated, over-simplistic approach' 'all too often' taken by the Family Courts suggests that these courts too are not following the reasoning set out in the Explanatory Notes.

The government's aim to improve 'clarity and transparency' was meant to help it realise its ambitions to effect social change; it wanted to change people's mindsets and sought to 'reinforce . . . the expectation that both parents should be involved in a child's life'.¹¹⁹ It seems that the government hoped the presumption would have the effect of educating parents to fulfil their responsibilities to their children irrespective of whether they live with the children. It was also the aim to educate the parent with whom the child lives to accept the involvement of the other parent to the extent that that parent wishes to be involved. And it was hoped that once parents learn that this is how the good post-separation family looks and behaves, they will agree such arrangements and refrain from becoming embroiled in conflict which they take to the courts.

Yet the presumption does not appear to have significantly reduced the number of cases going to court and, to the extent that the numbers have dropped, this may be attributable more to the LASPO Act than to the amendments to the Children Act 1989. So, the aim of reducing the numbers of parents litigating has failed to materialise. And, given the significant numbers of litigants, the aims of educating

¹¹⁸ [2017] EWHC 1377 (Fam).

¹¹⁹ See n 9 above.

mothers to accept paternal involvement and to persuade parents that agreement is best have probably, at least in many cases, also failed to materialise.

The government hoped to combat the perception of bias and unfairness in the courts and to restore public confidence in the family justice system. Yet the two most prominent fathers' rights groups are not satisfied by the legislation. While Families Need Fathers see it as a progressive step but inadequate, Fathers4Justice see it as an irrelevance.

So it may be that little has changed. From the point of view of mothers who have suffered abuse or have welfare concerns about their children having contact with fathers, this is a good thing if it means that courts are not strengthening the emphasis on contact and minimising risk, as Women's Aid feared they would.

However it is in the Family Courts and also in the informal dispute resolution arena that mothers and children may be at risk. There is no way of knowing how many parents have been persuaded by the existence of the presumption to agree on some form of shared care. And there is no way of knowing how many resident mothers have been persuaded by it to agree to unsafe or damaging contact against their better judgment.

It appears that the presumption in favour of parental involvement was intended to function on a symbolic level sending out a message affirming the importance of fathers when parents separate or divorce. However, at the same time it stigmatises as deviant those mothers who do not subscribe to this image of the ideal post-separation family. So, some mothers and children may be exposed to risk as a result of the pressure to agree without going to court. Some mothers, who do go to court, may find

that, to the extent that the presumption is being used, it is often used, at least in the Family Courts, in a way that is detrimental to them and their children.

On an instrumental level, it is hard to see what benefits have resulted from the statutory presumption. It is easier to see the possible disadvantages.

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