



'I'M NO-ONE'S POSSESSION'

Defending the rights of children post-separation

We propose a radical yet simple re-imagining of the post-separation arrangements for the care of children and young people. It respects the rights of children and moves away from the current system that too often treats them as some form of possession to be fought over and divided between parents – each of whom have responsibilities and rights.

Parliament's abolition of Residence and Contact Ordersⁱ was a brave attempt to remove the language and structure of possession. However the Courts have continued to perpetuate the ownership of children through the clumsy phrase 'the parent with whom the child will live' which has replaced 'Residence'

We know of no lawful basis for one parent to unilaterally control, restrict or prevent the right of children to maintain 'direct contact and a meaningful relationship'ⁱⁱ with both of their parents following divorce or separation **WITHOUT** an Order from the Family Court. We have posed this simple question to family lawyers up to and including the President of the Family Division. None have been able to provide the legal basis on which one parent can act in this way where both hold Parental Responsibility for the child.

We see all too often that fathers are required to make applications to the Court following unilateral action by mothers to prevent or restrict the right of the child. Research published in 2015 by the Nuffield Foundation shows that 94% of applications for contact were made by men.ⁱⁱⁱ MoJ data shows that around 70% of all applications to the Family Court are made by men.^{iv} Addressing that gender based reality is at the heart of resolving the problems in Private Law.

We propose that if any person wishes to interfere with the right of the child they MUST first make an application to the Family Court. In most cases this should be an application for a Prohibited Steps Order to prevent or restrict contact. Unless or until such an application results in an Order from the Court the child's right may not be restricted.

Where it is alleged that the child is in danger one parent may contact the Police asking them to undertake an inquiry using their powers under s46 of the Children Act 1989 to remove a child into 'protective custody'. In such cases Urgent applications to the Family Court should be made and scheduled promptly within the timescale set out in the above legislation (72 hours). Children's Services will also be notified and they may wish to undertake a s47 investigation to determine the safety and welfare of the child.

We are calling on the UK Government and the President of the Family Division to issue clear and helpful guidance to parents about the rights of children and the exercise of Parental Responsibility. Case law^v has some helpful guidance already in this area but that needs much greater clarity and much greater visibility. We are also deeply concerned by the unhelpful guidance currently available on the Gov.uk website which has no basis in legislation whatsoever and may be causing significant harm to children.^{vi}

'If you have parental responsibility for a child you don't live with, you don't necessarily have a right to contact with them - but the other parent still needs to keep you updated about their well-being and progress.'

We have listened to the evidence given by Women's Aid and Welsh Women's Aid^{vii} that women feel threatened and victimised by men using the Family Court to 'continue their abuse'. Requiring the parent who wishes to PREVENT contact to make an application to the Family Court would address this issue putting women in a controlling position to initiate legal proceedings should they wish.

The Family Courts are at breaking point trying to deal with the minutiae of the arrangements for the care of children. In the overwhelming majority of cases there are no child welfare issues proven – yet Courts are asked to make Orders that define in ever more precise terms the arrangements for the care of children. The President of the Family Division, sitting in the Family Court in Preston in 2016 was asked to make an Order about the length of a child's hair. Wisely he declined to do so. Where Courts do make very prescriptive Orders about the arrangements for the care of children they have neither the will nor the ability to enforce them. The MoJ revealed that just 2.1% of applications for enforcement resulted in an Order being made.^{viii}

Cafcass in England surveyed 143 parents six to nine months after proceedings concluded.^{ix} In almost half of cases Court ordered arrangements had changed. In 61% of cases this was NOT agreed by the parties. It is little wonder that so few people have any confidence in the ability of the Court to achieve lasting outcomes when its Orders are ignored.

WHAT WE ARE ASKING FROM THE UK GOVERNMENT

- Produce clear guidance for parents about the exercise of Parental Responsibility
- Issue clear and unequivocal guidance to families and professionals that contact can only be prevented following the issuing of an Order from the Family Court.

ⁱ Children and Families Act 2014

ⁱⁱ Article 9.3 UN Convention on the Rights of the Child

ⁱⁱⁱ Harding & Newman 2015 p11 <http://www.nuffieldfoundation.org/sites/default/files/files/Full%20report.pdf>

^{iv} Information shared with FNF Both Parents Matter Cymru – October 2016

^v A v A [2004] EWHC 142 (Fam)

^{vi} <https://www.gov.uk/parental-rights-responsibilities/what-is-parental-responsibility>

^{vii} 'Are you listening and am I being heard?' July 2016 <http://www.rhianbowendavies.com/wp-content/uploads/2016/09/Are-you-listening-and-am-I-being-heard-FINAL-July-2016.pdf>

^{viii} Data obtained via an FOI from MoJ – December 2014

^{ix} <https://www.cafcass.gov.uk/news/2016/may/cafcass-survey-shows-where-parents-are-at-after-family-proceedings.aspx>