

Law's Gendered Understandings of Parents' Responsibilities in relation to Shared Residence

Annika Newnham

Introduction

In the family courts, parents are increasingly lectured by judges and told to behave more responsibly; they must recognise how their conflicts harm their children and take responsibility for co-parenting without further recourse to the courts (see, for example, *D v D* [2001] 1 FLR 495, *Re J* [2004] EWCA Civ 1188; *Re T* [2009] EWCA Civ 20, *Re R* [2009] EWCA Civ 358). It is in this context that the judiciary have overcome their earlier dislike of the shared residence order; what was rejected as *prima facie* wrong in *Riley v Riley* [1986] 2 FLR 429 'is nowadays the rule rather than the exception', according to Mostyn J in *Re AR* [2010] EWHC 1346 (para. 52). This chapter argues that the case law has, during this decade, developed too fast in an undesirable direction (see also Cain in this volume). The available empirical evidence cannot prove shared residence to be superior to any other arrangement. Children's outcomes depend on such a diverse range of known and unknown factors that it is well nigh impossible to draw clear conclusions, but it seems that formal orders have little impact (Breivik and Olweus 2006: 70; Gilmore 2006: 493).

However, English courts have not justified their increased use of this order by reference to the direct benefits to children, but the supposed indirect benefits that flow from using shared residence to make parents behave in a more responsible manner. This is premised on an inadequate, partial understanding of how parents do or should share the responsibilities of post-separation parenting. Shared residence is increasingly considered primarily in terms of status, while caring is invisible. This has contributed to the current unrealistic expectation that shared residence can be imposed to improve cooperation, which is likely to leave many children exposed to unwarranted risks of harm through exposure to conflict (Johnston 1995). Furthermore, the allocation of responsibilities under a shared residence order is implicitly gendered. In the individual cases, and in the wider context where these decisions both inform and are informed by policy concerns, regulation of responsibilities occurs predominantly through what is not

being said. The assumption is that primary carers, most of whom are mothers, will continue to support familial relationships within a new, binuclear structure.

The idea that shared residence should be used this way originates within legal discourse rather than the child welfare sciences. It is unlikely to be a coincidence that the newly discovered supposed side effects of a shared residence order (encouraging paternal involvement and co-parenting) fit perfectly with the ideals and objectives underpinning both the Children Act 1989 and subsequent practice. Although s.8 cases are private law disputes, they are not wholly disconnected from the political debate where separated fatherhood has come to be seen as a problem to be ‘managed’ by law (Collier and Sheldon 2008: 176). Thus, the family courts continue to search for potential solutions, frequently applying them ‘with all the sensitivity of a sledgehammer’ (Smart and Neale 1999: 180).

The next section of this chapter examines the judicial reinterpretation of the shared residence order’s function, linking this not only to the insistence in the Children Act 1989 that parenthood is a permanent responsibility but also to law’s inherently patriarchal nature and the focus on the right to have a say rather than the responsibilities of actually caring for children. The following section criticises the use of shared residence to address the difficulties caused by contemporary family law’s insistence that parents must continue to cooperate over their children’s upbringing regardless of what it was that caused them to divorce or separate. The gap between the gender-neutral language of the legislation and implicit gendered understandings of parents’ responsibilities is examined next. In conclusion, it is argued that the shared residence order should be restored to being about where children live, and that orders should only be made after the court has realistically evaluated the parents’ ability to share the responsibilities of caring for their children in such a way that the latter are actually likely to benefit.

The Dual Purposes of Shared Residence

Family courts’ use of the shared residence order is determined to a large extent by legal understandings of what it is, that is to be shared, and how law is to be used in the regulation of these family responsibilities. In this respect, the cases have little to say; the only subject that is discussed in any detail is the identification of those minor

decisions that can be taken unilaterally (*A v A* [2004] EWHC 142: para. 133). It is argued here that the legal preoccupation with decision-making (as well as the financial responsibilities regulated separately under the Child Support legislation) is not only a reaction to complaints made by applicant fathers, but also indicative of gendered legal understandings of fatherhood and motherhood, rooted in the public/private dichotomy. There is no discussion of the regulation of caring responsibilities under a shared residence order because these are hidden within the private sphere, associated predominantly with women and thus not perceived to be important enough to warrant legal regulation (Olsen 1990: 207).

D v D [2001] 1 FLR 495, the case at the start of the current chain of cases reinterpreting shared residence, was a welcome decision. It was held that shared residence cases should be assessed the same way as any other applications under s.8 of the Children Act 1989: through a careful, contextualised application of the s.1(3) welfare test. The case concerned three girls, aged between nine and eleven, who spent 38% of their time with their father. The Court of Appeal, overturning earlier precedent, stated that an applicant should not have to prove exceptional circumstances. The application of the s.1(3) checklist led to the conclusion that since the order would reflect the practical realities it would not confuse the children.

However, a less desirable development was that the Court saw the order as having dual purposes: both practical and symbolic. In relation to the latter, the Court recognised that a shared residence order ‘removes any impression that one parent is good and responsible whereas the other parent is not’ (*per* Dame Elizabeth Butler-Sloss, para. 40). The six years since the parents’ separation had been marred by frequent disputes; the father had complained he felt like a second-class citizen and it was felt that the additional symbolic benefits of the shared residence order would enable him to ‘go away and make contact work’ (para. 43). Responsible behaviour was encouraged through the symbolic granting of greater responsibility, which also signalled to the mother that she must not see herself as having the upper hand. Instead, she must prove herself responsible by not obstructing the father’s involvement. Practical responsibilities are only mentioned briefly in an abstract observation that the capacity to make decisions while caring for children is ‘part of care and part of responsibility’ (*per* Hale LJ (as she then was) para. 23).

In subsequent cases, *D v D* [2001] is regarded as having significantly changed the law (See, for example, *Holmes-Moorhouse v Richmond LBC* [2009] UKHL 7: para.7). Since 2001, there have also been further developments. The judiciary initially emphasised that orders must reflect practical realities; fathers who seemed too preoccupied with their own rights or were unduly confrontational received robust responses from the judiciary (See, for example, *Re R* [2003] EWCA Civ 597). However, once the application was past this first hurdle, courts became increasingly prepared to be swayed by arguments about messages regarding equal status (See, for example, *Re A* [2002] EWCA Civ 1343, *Re C* [2002] 1 FLR 1136). Furthermore, the granting of orders in cases where the geographical distances were so great that one parent's contact time must necessarily be during school holidays altered perceptions of shared residence and weakened any implicit link between this order and practical day-to-day caring (*Re F* [2003] EWCA Civ 592, *CC v PC* [2006] EWHC 1794, *Re N* [2006] EWCA Civ 872).

A gradual loosening of the tie between allocations of time and the classification of orders means the distinction between shared residence and sole residence with generous staying contact is now a question of degree; this was acknowledged in *Re K* [2008] EWCA Civ 526. Wall LJ has described equal division as 'rare', suggesting that most cases now depart from what could previously have been presumed to be the standard arrangement of 50/50 with weekly changes (*Re T* [2009] EWCA Civ 20: para.35). In *Re W* [2009] Wilson LJ rejected the submission that shared residence orders should not normally be made in cases where there is a very unequal division of the child's time (in this case 75/25) (*Re W* [2009] EWCA Civ 370: para.13). This is difficult to reconcile with the stipulation in *D v D* [2001] that orders must reflect reality since they could otherwise confuse children, and is also contrary to the intention of the drafters of s.11(4) of the Children Act 1989 who clearly saw this as an order about where children actually live. Shared residence has developed 'a special meaning' that is 'far removed from the statute' (Spencer 2008: 24).

It is interesting to note that this reinterpretation is purely judge-made; shared residence has changed gradually as members of the judiciary have linked their own comments with observations from previous cases into a self-reinforcing chain that

associates shared residence primarily with the equal sharing of power or status. In *Re W* [2009] Wilson LJ quoted Sir Mark Potter P in *Re A* [2008]:

It is now recognised by the court that a shared residence order may be regarded as appropriate where it provides legal confirmation of the factual reality of a child's life or where, in a case where one party has the primary care of a child, it may be psychologically beneficial to the parents in emphasising the equality of their position and responsibilities (*Re W* [2009] EWCA Civ 370: para. 11).

It seems that the two purposes, the practical and the symbolic, identified in *D v D* [2001] have been separated; in the quote they are linked with 'or', rather than 'and'. It is no longer necessary for the order to reflect a practical arrangement close to equal sharing before the supposed benefits of emphasising parental equality can be considered. Instead, it appears that the symbolic side of the order has become the most important. Gilmore has justly criticised the suggestion that the order can be made purely for the benefits it offers parents (Gilmore 2010). Harris and George have complained that the shared residence order is currently undergoing a down-grading similar to the parental responsibility order's conversion from 'a thing to *do*' to 'a thing to *have*' (Harris and George 2010). They have rightly criticised the courts' move away 'from the scheme devised by the [Law] Commission and the legislative intentions of Parliament' (*Ibid*).

The current reinterpretation of shared residence is, however, consistent with the 1989 Act's underpinning objects, particularly the desire to convert legal fatherhood from something contingent upon marriage into an immutable status 'unaffected by the vicissitudes of adult life' (Roche 1991: 349). There are echoes of 1980's neo-liberal discourse in current debate, when links are drawn between father absence, a wider increase in irresponsible behaviour, and perceived social disintegration (Geldof 2003). Collier and Sheldon have observed that although legal constructions of fatherhood vary across different branches of family law, they are characterized by continuity more than change; the breadwinner paradigm has not been supplanted, but exists 'alongside, and in tension with', the 'hands-on' ideal (Collier and Sheldon 2010: 136). Furthermore, law has been central to 'attempts to entrench, promote and shape the role of fatherhood' (*Ibid*: 23). In this context, it is claimed that a shared residence presumption could help

fathers stay involved, and thus strengthen family relationships (but see also Masardo and Cain in this volume).

Law's societal role as arbiter and neutraliser of conflicts makes it inherently conservative, keen to diffuse or obfuscate challenges to existing power structures (Luhmann 1989: 144). Feminist commentators have highlighted law's support for marriage and argued that this is because patriarchy is dependent upon the *pater familias* as inculcator of patriarchal values and defender of the *status quo* (Dowd 1991: 41). Recent changes in familial patterns are said to have 'exposed the fragility' of the nuclear paradigm (Silva and Smart 1999: 3). Within this framework, the conjugal family is constructed as timeless and essential to a healthy society, yet fragile; demographic change is presented as a symptom of moral decline (Nicholson 1994: 28). Motherhood, although idealised, is truly valued only when practised within this patriarchal framework; it has been described as 'a colonised concept', used to tame 'unruly women' into responsibility and conformity (Pogrebin 1993: 130, see also Cain in this volume). Family breakdown is, consequently, perceived to be a threat to the prevailing order. Law has responded by constructing binuclear families, which expand the definition of family in order to conceal demographic change and thus contain 'the anxieties that it engenders' (Reece 2003: 156). Although this new family is presented as progressive, it has been suggested that is in fact both conservative and repressive (Vonèche and Bastard 2005; 100). The new family is expected to conform to the nuclear ideal not only in terms of membership but also in the gendered distribution of rights and responsibilities and, then, it occupies a similarly privileged position.

In shared residence cases, the risk of paternal disengagement is now an overt justification for the making of orders. In *Re W* [2009] Wilson LJ stated that 'the deliberate and sustained marginalisation of one parent by the other' constitutes a sufficient reason to make a shared residence order where what is being ordered is, in substance, contact (*Re W* [2009] EWCA Civ 370: para.15). The comparison has been made with an early 20th Century compromise technique, which sought to reconcile the competing demands of fathers and the best interests standard (at that time guided by maternal preference rules) by separating legal custody from practical care and control (van Krieken 2005: 30). Similarly, contemporary cases appear to only to demand of responsible fathers that they remain involved in decision-making. In both instances,

family law's preoccupation with preserving patriarchal pre-separation familial structures is evident, and shapes understandings of what it is to be a responsible parent.

Nevertheless, the Children Act 1989 stipulates in s.1 that an order can only be made where it is in the relevant child's best interests; the aim of encouraging paternal involvement must be justified using welfare rhetoric. Constructing the appeasement of fathers as important for children's welfare is not, however, too difficult, given the malleability of the welfare test (Rejmer 2003), and what feminists have identified as law's 'male' form of reasoning: objective, and universal, with a tendency to organise information along hierarchical dichotomies (Gilligan 1982, Finley 1989).

The most important of these is perhaps the public/private dichotomy, which places anything associated with the female within a private, unregulated familial sphere. Traditionally, the family has been said to be too precious and fragile to be subjected to the blunt tools of legal regulation. Consequently, practical caring is understood as a private responsibility, beyond law's regulatory net; it is obfuscated further by the social construction of motherhood as a 'natural outpouring' of instinctive love (Fineman 2001: 1042, Tronto 1993: 111). In contested shared residence cases, this means that decisions are made without adequate recognition of how children benefit from receiving proper care. In *Holmes-Moorhouse v Richmond LBC* [2009] UKHL 7 Baroness Hale was disappointed by how little the court at first instance had actually known about the family (para. 33). An order had been made for the equal division of time, primarily to support the father's claim for social housing. However, the outcome is likely to have been different if adequate consideration had been given to the fact that social workers had, during previous involvement with the family, not only investigated allegations of domestic violence but also concluded that the mother 'although working, did all the physical care of the children, running the house, collecting the two younger children after school, helping the children with their homework and preparing supper' (para. 35). It is encouraging to see the absence of a discussion on practical caring responsibilities noted, albeit in this oblique way. In cases such as *Holmes-Moorhouse*, courts should recognise that decisions are more likely to be in children's best interest if the parent who has the insight developed through a significantly greater and closer involvement in their care is allowed to have a greater input.

However, in recent shared residence cases the benefits of maintaining parents' equal involvement in decision-making appear to be viewed as so obvious that they require no further discussion. A parallel can be drawn with the strong presumption in favour of contact, which developed during the 1990's. In all but a small minority of cases children's and resident parents' objections were held to be less important than the supposed long-term benefits of maintaining the father-child link, stated in the general abstract terms characteristic of legal discourse. Although there has been some retreat from the strong contact presumption since *Re L* ([2000] 2 FCR 404), this is chiefly in relation to domestic violence, which is treated as an exception to the general rule. In other cases, law's preference for the abstract and generalised has moved family law from the observation that a good relationship with a father is very important to some children to the assertion that all children need relationships with their fathers (Barnett 2009a: 50). According to Piper, the contact case law shows that 'in private law a focus on future benefits can lead to inappropriate attention being given to particular aspects of the child's future welfare'. She has argued for 'more *now-centred* decision-making about children' (Piper 2010: 1, emphasis in original). In the shared residence cases, there are unfortunately signs that the focus has shifted towards consideration of the supposed risks of growing up fatherless.

In *Re A* [2008] EWCA Civ 867 Adam J had, at first instance, told the litigants that the six-year-old boy needed 'a rounded future', which he said was 'achievable only with a father figure as well as a mother figure', and this surprising re-interpretation of the welfare test was repeated without further comment by Sir Mark Potter when the case reached the Court of Appeal (para.35). The applicant had only discovered that he was not the biological father some time after separation. The mother resisted shared residence and the Court of Appeal found some merit in her argument that her former partner was likely to be controlling. He had admitted to installing CCTV cameras for the purpose of spying on her while she was still living in their joint home. The shared residence order was, nevertheless, made since it would give the step-father parental responsibility and would make it more difficult for the mother to exclude or marginalise him (*Re A* [2008] EWCA Civ 867, *per* Scott Baker LJ: para.100). It was said to be particularly important to maintain the link with the appellant because the latter was 'the only father figure known' to the boy (para.65). In the welfare balancing exercise, the

need for a male influence outweighed all other concerns, despite the lack of empirical evidence to support such a conclusion. This use of the shared residence order is not, it is submitted, in children's best interests.

Can Shared Residence help litigants take responsibility for co-parenting?

The shared residence order is used for a second reason that is equally misguided and likely to put children at risk: to teach parents to cooperate in a more responsible way. Qualitative research has shown that shared residence is much more difficult and demanding than coordinating the many aspects of childrearing within an intact family, and that young adults whose parents have not managed to make this transition describe the arrangement in very negative terms (Socialstyrelsen 2004). Yet, the continued relegation of care to the hidden, private sphere and the consequent construction of responsible parenting as joint decision-making means orders are now made without any consideration of this, but as a solution to a different problem.

Contemporary law's insistence that post-separation families must continue across two households has resulted in increasing numbers of antagonistic parents appearing before the courts to seek the latter's assistance. The problem of high conflict cases can no longer be managed by expecting the warring parents to execute a clean break and move on to new marriages. At the same time, there is an expectation that parents can and should negotiate their own arrangements and there is a well-documented 'settlement culture', where this message is conveyed by all professional groups (Bailey-Harris et al. 1999). It is against this background that shared residence has been identified as a tool for improving parental cooperation.

Shared residence is attractive because of its superficial fairness: if you give parents equal time, or at least equal status, they ought to have nothing left to fight over (See, for example *A v A* [2004] EWHC 142). Shared residence is also compatible with the dominant binuclear paradigm. As has been explained by Reece, post-liberal emphasis on reasoned decision-making has combined with communitarian influences; the result is a 'coercive slide' where the obligation to reflect is complemented by 'an additional duty to reach the right result' (2003: 171-172). Binary classifications of 'good' and 'bad' post-divorce behaviour have 'become entrenched through the cumulative effect of self-reinforcing professional received wisdom' (Bailey-Harris et al.

1999: 122). At the same time, the contemporary policy focus on investment in children to eliminate risks and ensure a future generation of healthy, productive citizens has increased expectations of parents; being a responsible parent now involves accepting that you need to be taught how to parent well (Piper 2010). Thus, in legal discourse, if a responsible parent always puts the child's need to know both parents over their own needs, and conflict *per se* is constructed as harmful, then parents who fight over residence are *prima facie* in the wrong. Consequently, their objections are often dismissed or trivialised. This has combined with private family law's current hazy understanding of what is involved in sharing the responsibilities of raising children to allow this order to be imposed in a dangerous attempt to instil responsibility.

In the case law before *D v D* [2001], good co-operation between parents had, quite correctly, been regarded as a prerequisite for shared residence, rather than a potential by-product of the order (See, for example, *A v A* [1994] 1 FLR 669, *H v H* [1997] 1 FCR 603). This limited courts ability to use this order. The solution has been an undesirable reversal of the causal relationship between conflict and shared residence. A number of cases have cited *D v D* [2001] as having established that shared residence orders can be used to reduce the stakes in high conflict cases. This reasoning featured prominently in *A v A* [2004], where the shared residence order appears to have been a measure of last resort to try to end what the children's guardian had described as a 'virtual state of war' (*A v A* [2004] EWHC 142).

Gilmore has expressed concern over the judicial tendency to refer only to other judgments and not engage with the existing research (2006: 497). The justifications for this use of shared residence do not withstand scrutiny. It is sometimes suggested that if shared residence is ordered the requirement for frequent communication will, '[i]n layman's terms', force parents to 'get their act together and keep it that way' (McIntosh 2009: 395). There may be some moral force in the common-sense assertion that since it was the parents who created the difficult situation through their decision to separate, 'they should be the ones who have to learn to cooperate for the best interests of their child' (Kipp 2003: 71). Nevertheless, there is no empirical evidence to support the idea that parents can be taught this way. McIntosh has concluded that while the assumption that parents will learn to communicate could possibly work in some instances, her research showed that '[t]his logic falters with complex, conflicted families' (2009: 395).

Studies in several jurisdictions have shown that shared residence is often a reluctant compromise seen as the only way out of a stalemate (Socialstyrelsen 2004, Smart and Neale 1999, McIntosh 2009, Maccoby and Mnookin 1994: 236). Parents in such instances cannot be assumed to possess the mutual respect, flexibility and willingness to compromise which are essential prerequisites for a real sharing of the duties of parenting.

Consequently, shared residence is markedly less stable than sole residence, particularly when parents have been coerced into trying it (Socialstyrelsen 2004: 8, McIntosh 2009: 395, Smart and Neale 1999: 76, Masardo in this volume). Abandoned schedules, renegotiations, and further litigation are likely to have a negative impact on children. Where the arrangement does last, the need for more frequent and detailed communication may increase children's exposure to, and involvement in, their parents' disputes - something which is known with reasonable certainty to be harmful (Johnston 1995, Melli and Brown 2008: 252). As noted, family law's failure to understand parenting responsibility primarily in terms of doing things for children means this is not taken into the s.1(3) welfare balancing exercise. In several qualitative studies, young people have also reported that the considerable practical inconveniences associated with shared residence can be exacerbated by inflexible parents whose hostility prevents the retrieval of homework, football kits or favourite toys (Smart and Neale 1999, Socialstyrelsen 2004). The fact that parents have 'exhausted the dispute resolution continuum' and appear before a judge should be seen as a strong contraindication of shared residence since such parents are extremely unlikely to be able reach joint decisions in the future (Freeman 2000: 460).

Yet, the family courts, intent on finding a solution to the problem of high-conflict families, have not been receptive where these kinds of arguments have been advanced by those with a child welfare science background. In *Re A* [2008] Adam J had taken note of the psychologist's concerns, but chose to rely on case authorities that held parental conflict not to be a bar, but rather a reason for granting the shared residence order (*Re A* [2008] EWCA Civ 867: para.58). In *Re R* [2009] the psychiatrist had opposed shared residence on the grounds that it would increase the child's exposure to the parents' severe conflict. Wall LJ, however, stated that the shared residence order under s.8 'is a legal, not a psychiatric concept, in relation to which; (a) there is now a

substantial jurisprudence; and (b) a psychiatric opinion, however distinguished its source, is not determinative' (*Re R* [2009] EWCA Civ 358: para.30). Shared residence continues to be constructed as a cure for entrenched disputes so that, paradoxically, the recent emphasis on the harmful nature of conflict has increased its appeal.

Although the judiciary insist that parents must learn to work together, no detailed guidance is provided for how this is to be achieved; an indication that this is regarded as a private matter beyond law's concern. It appears from the case law that the required levels of co-operation are low; it is sufficient that parents refrain from interfering with each other's day-to-day parenting and that the child's passage between homes is 'relatively fluid' (See, for example, *Re P* [2005] EWCA Civ 1639, *Re C* [2006] EWCA Civ 235). This undemanding interpretation of collaborative parenting is likely to have allowed courts to order shared residence in cases where they would otherwise have been reluctant to do so.

In *A v A* [2010] EWHC 1282 a fact-finding hearing had been held in relation to 89 allegations, some trivial but some of domestic violence serious enough to constitute criminal offences. Nevertheless, Mostyn J expressed no concern that a shared residence order for an equal division of time had been made a few weeks later, 'effectively by consent'; in fact, he praised this as a 'sensible' order and the most likely outcome regardless of the veracity of the allegations and counter-allegations (para. 30). There was, very worryingly, no consideration of how the frequent moves between two hostile households would impact on the three small children aged between six and three. This case is a striking illustration of the potential dangers should shared residence, like contact, come to be viewed by professionals as 'an unquestionable good' (Trinder 2010: 246).

Shared Residence and Gendered Expectations of Parenting

It is important to note that the recent use of the shared residence order to appease or encourage applicant fathers easily leads to an identification of mothers as the obstacle, or problem. Whilst no parent should be able to maliciously exclude the other, one lesson that should have been learned from the over-enthusiastic presumption in favour of contact is that mothers' objections should not always be dismissed as egotistical short-sightedness or implacable hostility.

In legal discourse, parents' rights and responsibilities in both intact and post-separation families are discussed in gender-neutral terms, creating an impression of equality and hiding the continued gendered nature of parenting (Barnett 2009b: 138). Empirical studies show that women's entry into employment has not been matched by anything like a commensurate change in the domestic sphere, where women continue to shoulder primary responsibility (Lader et al. 2006). The public/private dichotomy's classification of caring as a private matter beyond the reach of public regulation means that the law can remain 'habitually based' on an unequal allocation of parenting responsibilities, without any acknowledgement of 'the value of the [caring] work involved', since the latter is in law's self-created blind-spot (McKie et al. 2001: 237). Furthermore, the taken-for-granted nature of mothering combines with law's desire to preserve patriarchal power structures to focus the welfare test on children's supposed need for fathers. Lawler has explained how a false link is produced between what is expected of responsible mothers and children's supposed intrinsic needs, which are in fact constructed within a particular socio-political context (1999: 70).

Research has shown that in intact families fathers' involvement is largely mediated through mothers; thus, the transition to post-separation parenting is difficult given the demands for new levels of practical and emotional involvement (Simpson et al. 2003). However, this is not discussed; legal debate remains focused on the problems of father absence and encouraging male involvement on the implicit assumption that mothers, as the primary 'meeters' of children's needs, will remedy any paternal shortcomings (Lawler 1999: 67). As Piper has observed, 'mothers may be expected to do more and be held accountable for more' (2010: 6). In contrast, fathers' participation in parenting is rarely subjected to the same levels of legal scrutiny; 'virtually any involvement' has 'come to be considered good-enough fathering' (Eriksson and Hester 2001: 791). Case law has clearly established that mothers with residence must not merely, as the statute stipulates in s.8, 'allow' contact, but also actively support and facilitate post-divorce fathering. A mother of young children 'ought to be able to influence them' to look forward to contact (*Re H* [1998] 2 FLR 42). The current interpretation of the welfare test, with its focus on the perceived dangers of both fatherlessness and exposure to parental conflicts, has resulted in mothers being recommended counselling to learn how to 'assist in supporting contact' (*Re P* [2008]

EWCA Civ 1431, *per* Ward LJ: para. 36). In *Re M* [2003] the mother was justly criticised on several grounds. However, the suggestion that she had not pushed the issue of contact ‘as far as she properly might’, and had been giving in too easily to the 12-year-old boy’s protests, extended resident parents’ duties too far (*Re M* [2003] EWHC 1024). In the context of shared residence, it can be argued to be imperative that mothers are not made responsible for encouraging, manipulating or perhaps coercing children; according to Baroness Hale children’s views ‘ought to be particularly important in shared residence cases’ given the considerable sacrifices they are asked to make (*Holmes-Moorhouse v Richmond LBC* [2009] UKHL 7, para. 36).

As mentioned above, shared residence is known to be very demanding in practical, emotional and financial terms; any unequal allocation of the burdens of maintaining a binuclear family, therefore, becomes particularly significant. Spreading a child’s school life, healthcare, sport, hobbies and toys across two households requires a co-ordinated effort. If there is not that co-ordination, in reality what happens is that the mother continues the caring work she had primary responsibility for in the intact family, while her own freedom may be quite severely curtailed by a regimented schedule. In this context, the use of shared residence orders for arrangements which are really generous weekend and holiday contact also give cause for concern. It allows, or even pushes fathers to opt out of the demanding, but ultimately more rewarding, primary carer role to merely spend fun time with children. This construction of shared residence will disappoint fathers who sought the order to avoid being relegated to Sunday ‘McDads’ (Men’s Hour 2005; Kruk 1994; Trinder 2003; Simpson *et al.* 2003). It is also less likely to have the desired effects; empirical research suggests that it is day-to-day involvement that deepens relationships and is associated with better outcomes for children (Amato and Gilbreth 1999, Bauserman 2002).

Finally, this new legal understanding of shared residence, with its inequitable distribution of caring responsibilities *viz* decision-making capacity, is likely to be a source of resentment for mothers, particularly those who do not judge post-separation relationships to be good enough to justify the efforts necessary to maintain them (Smart and Neale 1999). Yet these efforts, like housework, go unnoticed until someone decides they are no longer prepared to perform them (Smart 1991: 496). In case reports, mothers are almost exclusively mentioned when they are lectured over their failures to

support contact or praised for their efforts in maintaining links with difficult fathers; references to single mothers' efforts in raising children are rare. It is, however, difficult for mothers to complain; 'good' motherhood is understood in terms of self-sacrifice (Lawler 1999: 67). Thus, mothers who reject the law's view of what their children need, and refuse to make the necessary adjustments, are condemned as selfish (Wallbank 1998: 361). In *Re C* [2007] EWHC 2312 the mother avoided a transfer of residence by explaining to the court that she now realised she had previously been wrong in thinking that maintaining the relationship between the father and child was 'up to the father': '[b]eing neutral', she conceded 'was not enough' (paras. 78 and 99). Mothers are likely to receive severe criticism for their perceived inflexibility if they continue to protest that co-parenting with their former partner is impossible or bad for their children even after a shared residence order has been made. Moreover, a change to sole residence in the father's favour may seem less drastic because residence is already shared. At the same time, the current use of the shared residence order is unlikely to satisfy increasing numbers of men, who wish to maintain their practical involvement from their intact families and do not conceptualise fathering primarily as a hands-off exercise of authority.

Conclusion

Shared residence orders are made in an attempt to instil a sense of responsibility into parents and thus improve their co-parenting. This can be described as a triumph of hope over experience. Mostyn J recently advocated the use of shared residence orders to avoid 'the psychological baggage of right, power and control that attends a sole residence order' (*Re AR (A Child: Relocation)* [2010] EWHC 1346: para. 52). It should be noted, of course, that the same arguments were made when custody was replaced by residence. These changes in legal formalities do not seem to affect the complex problems of entrenched conflict families. Nevertheless, as is noted in the introduction, the construction of law as a tool to manage supposedly dangerous social change such as the growth of non-resident and disengaged fatherhood leads law to search for different solutions to solve the perceived problem (Collier and Sheldon 2008: 176).

While the alleged future benefits of maintaining binuclear families are at the very least uncertain, research does show that shared residence can expose children to real risks of present harm, particularly in the kind of high conflict families that preponderate in the family courts. It is very challenging, and does not suit all parents, or children; courts should consequently be slow to impose this arrangement against family members' wishes (Socialstyrelsen 2004; Skjørten and Barlindhaug 2007: 383). If the order is to be made at all in contested cases, there must be, as stipulated in *D v D* [2001], a full and careful application of the s1(3) checklist. There should be a pragmatic assessment of the parents' ability to cooperate, compromise and change arrangements where children's wishes change. Moreover, adequate consideration must be given to children's present need to be properly cared for and the adults' joint responsibility to provide this care.

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