

Policy Briefing Paper:  
**Parental Separation,  
Children  
and the Courts**

# Proposal by Mishcon de Reya<sup>1</sup> to promote alternative dispute resolution following family breakdown

## I FACTS

- Contact and Residence applications often take more than 12 months to resolve, involving 3 or more appearances at Court and requiring extensive enquiries by Children and Family Court Advisory Support Service (CAFCASS) and the attendance of CAFCASS officers at Court on at least 2 separate occasions (conciliation appointment and final hearing)<sup>2</sup>
- 50 per cent of children believe that their parents prioritised their own needs over their children's following separation<sup>3</sup>
- In half of cases parents admit they have dragged their heels, protracting the legal process. For a fifth of these people the motivation was to make the process more painful for their ex-partner<sup>4</sup>
- Litigation is a necessarily intrusive process for children in that there is a Statutory requirement for their wishes and feelings to be established. Despite this, research shows that only 5 per cent of children are kept fully informed about the separation or encouraged to ask questions by their parents<sup>5</sup>
- Children often need to be helped to make sense of changes in their family lives<sup>6</sup>. However in almost a quarter of cases (23 per cent) children are not told about the consequences of their parents' divorce or separation<sup>7</sup>
- Parental divorce or separation is shown to be more harmful to children, in terms of the stress they experience, than severe illness or the death of a family member<sup>8</sup>

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<sup>1</sup> Mishcon de Reya is a prominent London Law Firm offering a range of legal and advocacy services. Its Family Law department is recommended by leading Legal directories for the work it undertakes

<sup>2</sup> Rule 4.11B (3) Family Proceedings Rules 1991

<sup>3</sup> Research carried out on behalf of Mishcon de Reya by independent research house, OnePoll. (March 2009 - representative sample of 2,000 individuals who'd experienced a divorce as a child in the past 20 years)

<sup>4</sup> Research carried out on behalf of Mishcon de Reya by independent research house, OnePoll. (August 2009 - representative sample of 2,000 parents who'd been through a divorce or separation in the past 20 years)

<sup>5</sup> Children's views of their changing families. York: Joseph Rowntree Foundation Dunn, J., and Deater-Deckard, K. (2001)

<sup>6</sup> Working with Children and Parents through Separation and Divorce. Dowling, E. and Gorrell Barnes, G. (2000) London: Macmillan

<sup>7</sup> Children's views of their changing families (ibid)

<sup>8</sup> Relation between Stressful Life Events, Neuropeptides and Cytokines: Results from the Lisa Birth Cohort Study. Herberth, et al. 2008

## **I PROPOSAL TO REDUCE LITIGATION OVER THE CHILDREN OF SEPARATING COUPLES:**

- Establish National “Conflict Clinics” for separating families to provide them with therapeutic input to resolve disputes and enable successful co-parenting
- Divert public expenditure on Legal Aid and savings by HM Court Service and CAFCASS on administrative costs to part fund the establishment and running costs of Conflict Clinics
- Charge couples not otherwise eligible for public funding on a sliding scale according to means (with a ceiling cost of £500) for a course of Family Therapy
- Disincentivise applications to the Court by amending Schedule 1 of the Family Proceedings Fees Order 2008 to increase the issue fee for an application for contact or residence orders from (currently) £175 to £1,000
- Amend the Children Act 1989 to provide that no application can be made for a contact or residence order other than after providing a certificate of failure of Family Therapy or with prior permission of the Court (the Courts also having discretion to remit court fees)
- Amend the Children Act 1989 to provide the Court with power to order attendance at a course of Family Therapy enforceable by committal, fine or community service

## **I HOW ARE DISPUTES OVER CONTACT AND RESIDENCE CURRENTLY RESOLVED?**

The absence of any Statutory alternative to litigation for parents who cannot agree on the arrangements for their children following separation leaves parents with no alternative but to engage the Courts in their disputes.

The ethos of the Children Act 1989 is that any delay in determining questions concerning the upbringing of a child is likely to prejudice the welfare of that child.

The reality of an overstretched Family Justice system and under-resourced CAFCASS means that delay is experienced in every case concerning the upbringing of children.

## **I DOES THE SYSTEM SERVE THE BEST INTERESTS OF THE CHILD?**

No. Litigation should be the last, not the first, resort for the resolution of parental disagreements.

Despite the best intentions of the Judiciary, CAFCASS, specialist family law practitioners and experts, the process remains fundamentally adversarial and blame focussed. Court proceedings do not and can not address how couples can successfully co-parent their children post separation. Instead they impose a solution on families that may not suit their actual needs and do not address the day to day issues that face separated parents in successfully nurturing their children.

## **I HOW MUCH DOES THE CURRENT SYSTEM COST?**

The absence of any viable alternative mechanism for dispute resolution and therapeutic input means that the Courts are overburdened with cases which place a disproportionate burden on the Family Justice System and public expenditure.

The public cost of funding Private Law disputes in relation to children exceeded £150m in the financial year 2007/08. Of that sum £13m was spent by the Legal Services Commission in funding mediation. The balance, £137m, was incurred in the legal costs of contested Court proceedings.

In addition to the direct funding of legal expenses, cases of this nature also lead to the incidence of significant unquantified administrative costs incurred by the Legal Services Commission, CAFCASS and HM Courts Service.

## **I HOW CAN THE TRAUMA OF LITIGATION BE AVOIDED?**

By establishing National Conflict Clinics to work with separating couples and their children to identify post separation issues and find solutions to enable effective co-parenting that meet the needs of children and their parents.

These Clinics will offer separating couples and their children an environment in which to discuss disagreement and find resolution; whether through facilitated discussion or through ongoing re-education of parents as to their responsibilities towards their children.

Family Therapy offers less traumatic and quicker dispute resolution than intrusive Court proceedings. It helps parents to learn how to communicate post-separation so they have the tools to address any co-parenting issues that may arise in the future. Parents are engaged in focussing on their children's, rather than their own, needs and empirical evidence demonstrates that children whose parents engage in such a process are more likely to keep in touch with both of their parents throughout their childhood.

## **I HOW WOULD THE CLINICS BE FUNDED?**

The network of Clinics proposed would be funded through savings on publicly funded litigation, administrative savings in HM Courts Service and CAFCASS and through a levy of up to £500 payable by individuals using the service who are ineligible for Legal Aid.

To put the latter in perspective, solicitors' hourly rates commonly exceed £200, and often by a significant amount. Even with the levy, Family Therapy will be far less expensive than involving solicitors in a Court driven process.

In addition to the direct public savings of this approach, there will also be a secondary saving in relation to the costs associated with social exclusion that are prevalent amongst children from broken homes who lose contact with the non-residential parent.

## **I HOW WILL PARENTS BE INCENTIVISED TO USE THE CLINICS RATHER THAN THE COURTS?**

Those who are reluctant to submit to the process can be discouraged from issuing proceedings by significantly increasing the cost of issuing applications for residence and contact orders (i.e. twice the cost of attending Family Therapy). This will make attending Family Therapy an attractive option to privately paying individuals. It will also minimise the number of trivial applications made to the Courts, so that Judicial time is reserved for the more difficult cases.

An amendment to the Children Act 1989 will also be required to compel individuals to attend Family Therapy *before* they are allowed to commence proceedings for residence or contact. This would be subject to the overall discretion of the Court to accept applications where, for example, there is pressing need for Judicial intervention. In such circumstances, the Court should also have the discretion to remit the Court issue fee when it deems it appropriate to do so.

A further amendment will be required to the Act to compel recalcitrant parents to attend Conflict Clinics, backed up with the ability of the Court to properly and effectively enforce its orders.

## **I FOR FURTHER INFORMATION**

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