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The Use of Shared Residence
Arrangements in English and Swedish
Family Law
In the Child's Best Interests or a Covert Resurrection of
Traditional Patriarchal Structures?

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April 2010

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

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THE USE OF SHARED RESIDENCE ARRANGEMENTS IN ENGLISH AND
SWEDISH FAMILY LAW: IN THE CHILD'S BEST INTERESTS OR A
COVERT RESURRECTION OF TRADITIONAL PATRIARCHAL
STRUCTURES?

SUMMARY

Shared residence was previously viewed with suspicion by the judiciary, but following *D v D* [2001] a line of cases has developed, where this order is said to benefit children, firstly, by helping them feel cherished, and, secondly, by improving parental cooperation and thus protect children from the harmful effects of exposure to their conflicts. This thesis reviews available research to conclude that shared residence is so unlikely to achieve either objective where it is ordered against a parent's wishes, that the order should be restricted to families where both parents agree. Autopoietic theory is combined with feminist critique to explain the self-referential nature of law, its tendency to prioritise children's abstract need for fathers and its inability to fully understand parents' complex disputes. The thesis compares the preconditions for, and use of, shared residence in England and in Sweden, concluding that despite better preconditions, Swedish court-imposed shared residence arrangements are unlikely to last, and can harm children by increasing their exposure to conflict. There is also, in contested cases, a worrying focus on equal rights for parents, with children who have grown up in these arrangements complaining of feeling objectified. This, combined with a growing emphasis in English case law on sending symbolic messages about status, is a strong argument against a shared residence presumption. It seems naïve to assume that new, collaborative co-parenting patterns can develop after separation merely because law coerces the adults into a particular kind of formal arrangement. The suspicion is therefore raised that law's agenda is in fact something very different: to mask familial and societal change by making post-separation families conform to a binuclear pattern which resembles the nuclear ideal not only in membership but also in its hierarchical structure.

The Use of Shared Residence Arrangements in English and Swedish Family Law

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I INTRODUCTION

I.1 SHARED RESIDENCE

This thesis argues against a presumption in favour of shared residence, an arrangement where children of separated couples spend significant periods of time in both parents' homes. Shared residence is also sometimes labelled joint physical custody, shared parenting, or joint residence; the Swedish term alternating residence has the advantage of describing the arrangement from a child's perspective. It is not only terminology which varies across jurisdictions, but also the amount of time required in each parent's home for the arrangement to qualify as shared; this allows for misuse of the legal label to achieve objectives unrelated to the welfare of the individual children involved. Therefore, shared residence should be understood to involve a substantial and equitable sharing of the responsibility for caring for the child.

Shared residence is a demanding arrangement, for all parties. Where parents choose to let their children remain in the matrimonial home and alternate themselves, the arrangement is almost invariably abandoned as too disruptive.¹ Yet many children are made to endure frequent moves for years, and research shows that they pay a high price "in order to have equal access to both parents".² One Swedish teenager suggested: "Parents who force their children into this ought to try it for themselves for a while so they could see the problems. Always lugging things around, forgetting your favourite jumper in one place and your mobile phone charger at the other house. Adapting to a new environment and a new set of rules every week. Wondering where your home is. Having the disappointment of hearing friends say: no, we didn't phone you because we didn't know which place you were at."³ It is only having two very capable, sensitive parents that makes this bearable. Thus, shared residence should be reserved for families where both parents choose and implement this arrangement without external involvement. Empirical research

¹ Socialstyrelsen (2004b) *Växelvís Boende (2a upplagan)*, Stockholm, Socialstyrelsen, p24.

² Singer, A (2008) "Active Parenting or Solomon's Justice?", *Utrecht Law Review*, 35-47, p41.

³ Letters page, *Svenska Dagbladet*, 6th November 2005.

shows that court-ordered shared residence is so unlikely to benefit children that such orders should not be made; children's need for relationships with both parents is better met through the making of sole residence and contact orders.

1.2 A DEVELOPING PRESUMPTION?

Since the thesis argues against a presumption in favour of shared residence, it must be asked why such a presumption is likely to develop. In previous decades, courts tended to start from a presumption *against* shared residence on the grounds that it denied children much-needed stability.⁴ Shared residence is still comparatively unusual, but is preferred by increasing numbers of parents, while courts have tended to overcome their misgivings.⁵ The Court of Appeal stated in the landmark case of *D v D* [2001] that courts should not require exceptional or unusual circumstances, but simply apply the paramountcy test. Shared residence orders were said to benefit children in two ways: by reflecting the realities of the situation and by signalling clearly that both parents are of equal importance and should cooperate rather than seek to undermine or exclude each other.⁶ In subsequent case law, greater emphasis has been put on the symbolic messages than on the need to ensure that the order reflects realities, and shared residence is used in high conflict cases.⁷ A presumption is developing through gradual judicial reinterpretation of existing precedent. Judicial views of when shared residence is in children's best interests are rightly said to lack a firm foundation in empirical research.⁸ Parallels have been drawn with the development of a *de facto* presumption in favour of contact, where it is now recognised that serious risks to children were wrongly ignored or held to be outweighed by the supposed general benefits of contact.⁹ Furthermore, critics have doubted that giving parents formal equality through a court order will make them more willing, or able, to co-parent effectively. Instead, it has been suggested that

4 *Riley v Riley* [1986] 2 FLR 429.

5 Peacey, V & Hunt, J (2008) *Problematic Contact after Separation and Divorce?*, London. One Parent Families/Gingerbread, p19; Gilmore, S (2006b) "Court Decision-Making in Shared Residence Order Cases", 18(4) *CFLQ*, 478-498, p485.

6 *D v D* [2001] [2001] 1 FLR 495.

7 *A v A* [2004] EWHC 142; *Re R* [2009] EWCA Civ 358 *per* Wall LJ at [30].

8 Gilmore (2006b) *op cit* n5, p487.

9 Gilmore, S (2008) "The Assumption that Contact is Beneficial: Challenging the 'Secure Foundation'", *Fam Law* 1226-1229, p1227.

shared residence orders will in many cases only provide fathers with an opportunity to control or harass mothers and children.¹⁰

1.3 THEORETICAL PERSPECTIVES

This thesis uses autopoietic theory and combines this with a feminist perspective to examine the legal frameworks and case law developments of the chosen jurisdictions. Autopoietic theory is helpful in several ways. Its description of society as one large, primary system, which contains a number of closed, self-referring specialised subsystems can explain why interaction between law and other subsystems such as politics, the different sciences, or litigants, is so difficult, and why law reforms often prove ineffective or counterproductive.¹¹ Autopoietic theory can be used to provide a realistic assessment of what can be achieved through law; this is particularly important since English courts are currently making a number of optimistic assumptions regarding the benefits of shared residence.

Furthermore, autopoietic theory can be employed to explain why presumptions develop and particular points of view become entrenched within subsystems since information cannot move across subsystems' borders; instead, new versions of the information are created within the recipient subsystem. These simplified versions are structured to achieve a better fit with the subsystem's existing cognitive framework. They are then refined; definitions, assessments and recommendations become increasingly rigid as they circle the closed chains of communication. Thus, the "complexities and ambiguities" of scientific knowledge about what is good for children are converted into legal certainties, with no need to make further reference to external authorities.¹² Law has also imperfectly translated into its binary codes recommendations from mediation as well as post-liberal and communitarian ideas of individual responsibility. The result is an inflexible insistence that separating parents must be rational and conciliatory regardless of the emotional, financial or

¹⁰ Kaganas, F & Piper, C (2002) "Shared Parenting – a 70% Solution?" 14(4) *CFLQ*, 365-379.

¹¹ Teubner, G, Schiff, D & Nobles, R (2003) "The Autonomy of Law: Introduction to Legal Autopoiesis", in Schiff, D & Nobles, R (Eds) *Jurisprudence*, London, Butterworths, p10.

¹² Barnett, A (2009a) "The Welfare of the Child Re-Visited: In Whose Best Interests? Part I" *Fam Law*, 50, p51; Teubner, G (1993) *Law as an Autopoietic System*, London, Blackwell, p56.

other stresses they are experiencing. This places wholly unrealistic expectations on parents who are ordered to share residence.

Autopoietic theorists have asserted that law retains epistemic authority not only through reinterpreting knowledge but also by rejecting much external information as irrelevant. Similar observations have been made from a feminist perspective. Law has been described as inherently male, preoccupied with formal, abstract rights, while ignoring arguments based on individual needs, relationships or contexts.¹³ Feminist critique has also exposed the supposedly natural division into public and private spheres as a social construct, and has been useful in identifying law's role in maintaining this dichotomy. According to autopoietic theory, separate subsystems have developed from the general system of communications that is sometimes referred to as society. Subsystems therefore start with an inherently patriarchal basic framework of communications. The thesis examines feminist law reform strategies, concluding that successes have been limited because law, as an autopoietic subsystem, 'thinks' in a male way and therefore excludes from its considerations much of what it characterises as 'female'. This classification has significant consequences for law's understanding of disputes between parents over children in general, and shared residence cases in particular. Law's inability to recognise the value of care has led to a focus on status and decision-making, a legal preoccupation with encouraging fatherhood and a greater readiness to use coercive measures against mothers. According to autopoietic theory, law is not only unaware that its vision is partial; it also maintains epistemic authority by refusing to adjust its standards when litigants fail to meet them. Autopoietic theory can, therefore, be utilised to explain the current insistence that parents can be taught to cooperate through the imposition of a shared residence order. It also explains why such attempts to influence behaviour are unlikely to succeed and why law is unable to recognise how this harms children whose exposure to parental conflicts is increased by the frequent changes between households. Finally, autopoietic theory can be combined with feminist theory to give an account of why law, which exists to dissolve conflicts and preserve existing power structures, wants all families to conform as far as possible to its existing, patriarchal, nuclear standard.

13 Abrams, K (2001) "The Second Coming of Care", 76(3) *Chicago-Kent Law Review*, 1605-1617, p1607.

1.4 THE COMPARATIVE APPROACH

This thesis focuses on two jurisdictions: England and Wales; and Sweden. Comparative studies typically involve a comparison of two systems where similarities and differences are identified, and the solutions utilized in different legal systems are evaluated.¹⁴ Comparisons can also be used to test theoretical assertions, identify different variables, and expose underlying norms which would otherwise be taken for granted.¹⁵ This thesis compares the approaches to shared residence in the two jurisdictions in order to draw conclusions regarding best practice. The English case law on shared residence has developed rapidly in uncharted directions. Smart has correctly cautioned against the greater use of shared residence since not enough is known about how children experience such arrangements, and are affected by them.¹⁶ Bogdan has suggested: “Instead of guessing and risking less appropriate results, it would be better to use the enormous wealth of experience that is found in foreign legal systems”.¹⁷ This thesis argues that the experience from Sweden, research evidence and observations of English developments, combine to present a strong argument against a presumption.

These jurisdictions have been chosen since they are both similar and significantly different. These are two Western democracies where the last half century has seen dramatic changes in the patterns of family life (a decline in marriages, high but now stable divorce rates, and increases in cohabitation).¹⁸ Demographic changes have resulted in debates about the changing nature of families.¹⁹ However, there have been marked differences in these debates, possibly because of different understandings of desirable family forms and of law’s role in their regulation.²⁰ In England, the family is conceptualised as an institution under threat, and it has been

¹⁴ De Cruz, P (2007) *Comparative Law in a Changing World* (3rd Ed), Abingdon, Routledge-Cavendish, p19; Bogdan, M (1994) *Comparative Law*, Deventer, Netherlands, Kluwer, p18.

¹⁵ De Cruz (2007) *op cit*, n14, p11; Hantrais, L (2009) *International Comparative Research: Theory, Methods and Practice*, London, Palgrave, pp10-11

¹⁶ Smart, C (2004) “Equal Shares: Rights for Fathers or Recognition for Children?” 24(4) *Critical Social Policy*, 484-503, p485.

¹⁷ Bogdan (1994) *op cit* n14, p29.

¹⁸ Eurostat (2009) *Europe in Figures*, Luxembourg, Office for Official Publications of the European Communities, pp153-157.

¹⁹ Angelin, A (1999) “Faderskap efter Separation”, 8 *Socionomen*, 37-40, p40.

²⁰ Ryrstedt, E (2007) “Tvistlösning mellan Separerade Föräldrar – för Barnets Bästa”, 0708(4) *Svensk JuristTidning*, 398-414, p398; Bradley, D (1990) “Children, Family and the State in Sweden”, 17(4) *Journal of Law and Society* 17, 427-444, p427.

observed that the “assumed naturalness” of the nuclear family has helped it retain its normative influence even though fewer women are now full-time housewives.²¹ Mothers are implicitly expected to structure their involvement in the public sphere around their private caring responsibilities, which are conceptualised as matters of private choice.²²

Sweden has gained a reputation for innovative and often highly interventionist legislation.²³ The dual-earner model, combined with generous parental leave, means mothers have a stronger attachment to the labour market and fathers have more opportunities for hands-on parenting.²⁴ Swedish separated couples thus appear to have better preconditions for shared care; shared residence is not only more likely to benefit children but also to distribute the burdens of parenting fairly between the adults. It is also more common in Sweden; and the courts encouraged its use at least a decade before the English Court of Appeal observed in *D v D* [2001] that shared residence did not require exceptional circumstances.²⁵ The comparison of the two jurisdictions can, consequently, inform English debate.

It is recognised that comparative study requires an awareness of the methodological pitfalls.²⁶ Statistics are often either not available, or not comparable, but analysis of quantitative research is not a central part of this thesis. There are sometimes no directly corresponding translations for legal terms; rules of interpretation may vary, as may the relative importance accorded to different sources of law.²⁷ For example, *travaux préparatoires* play a much more significant part in the interpretation and development of Swedish family law, while the converse is true of case law.²⁸ Appellate judgments are brief and focus exclusively on statutory interpretation.²⁹ The author is bilingual and has lived in both jurisdictions; although these difficulties

21 Diduck, A (1995) “The Unmodified Family: The Child Support Act and the Construction of Legal Subjects”, 22(4) *Journal of Law and Society*, 527-548, p527.

22 Land, H (2002) “Spheres of Care in the UK: Separate and Unequal”, 22(1) *Critical Social Policy*, 13-31.

23 Ryrstedt (2007) *op cit* n20, p398; Pylkkänen, A (2007) “Liberal Family Law in the Making: Nordic and European Harmonisation”, 15(3) *Feminist Legal Studies*, 289-306, p294.

24 De Los Reyes, P (2000) “Folkhemmets Paradoxer”, *Kvinnovetenskaplig Tidskrift*, 27-47, p44.

25 *D v D* [2001] 1 FLR 495, *per* Dame Elizabeth Butler-Sloss P at p503.

26 Bogdan (1994) *op cit*, n14, p18.

27 *Ibid*, pp46-47.

28 *Ibid*, pp45-46.

29 De Cruz (2007) *op cit* n14, p266.

cannot be assumed to have been completely eliminated, every care has been taken to avoid significant inaccuracies.

Moreover, a legal system cannot be understood in isolation.³⁰ Autopoietic theory can be used to assert that systems are essentially closed; they change in response to external pressures, but in unpredictable ways. It can be difficult to ascertain the relative importance of economic, political, religious, geographical, demographic and other “accidental or unknown factors”, which all influence the development of a legal system.³¹ Consequently, a solution which is successful in one jurisdiction can be ineffective or even counterproductive elsewhere.³² This thesis examines shared residence law in a wider context. Academic critique of the law, not only from feminist but also from practitioners’ perspectives, is used to gain a fuller picture of shared residence law in both jurisdictions. Close attention is paid to comparative work by Swedish academics, which is used to ensure comparisons are contextualised. This not only makes it possible to see the comparison from the alternative viewpoint, exposing implicit assumptions, but also helps to inform this evaluation of how different factors interact, and how the two legal systems differ in their understandings of the public/private dichotomy and the gendering of parenthood, yet are both inherently patriarchal.

1.5 THE THESIS

The first chapter of the thesis develops the theoretical framework that is used in later chapters. After explaining autopoietic theory, it identifies the three main themes which can be found in the family law discourse of both jurisdictions. The first is the inherently patriarchal nature of law which causes it to equate parenting with decision-making and focus on encouraging paternal involvement (often constructed in terms of decision-making), while ignoring the practical caring performed in the private sphere. Secondly, it is argued that, although welfare discourse has now become so dominant that it is impossible to articulate arguments any other way, the welfare test has also developed a uniquely legal meaning. Law, as a closed system, often fails to identify what is actually best for individual children;

³⁰ Hantrais (2009) *op cit* n15, p72; Bogdan (1994) *op cit* n14, p54.

³¹ De Cruz (2007) *op cit* n14, p244. Bogdan (1994) *op cit* n14, pp70-77.

³² Bogdan (1994) *op cit* n14, p70.

this should caution against a shared residence presumption. The final theme is family law's increasingly dogmatic insistence that the parents involved in these disputes must behave reasonably, i.e. must seek compromise, must act in a conciliatory manner rather than dwell on past hurts, and must prioritise the child's interest in relationships with both parents over their own needs. This ostensibly gender-neutral standard in fact demands a disproportionate contribution from women; post-separation families should, as far as possible, resemble the nuclear paradigm, and mothers should maintain the bonds of the binuclear unit. The three-themed framework is employed in the subsequent chapter to structure discussion on available research in this area. The conclusion is drawn that there is no evidence to support a shared residence presumption; studies instead show that shared residence is unlikely to last, or benefit children, where parents have not themselves managed to reach an agreement on contact and residence.

The chapter analysing the private law framework in England uses the three-themed structure to conclude that law's patriarchal perspective means that (outside of a narrowly construed exceptional category of domestic violence), children's need for a father is held to outweigh the other factors listed in the welfare checklist. At the same time, post-liberal insistence that parents must be forward-looking makes it difficult for mothers to raise objections without being labelled bitter, selfish and unreasonable. The following chapter focuses on shared residence. It uses the three themes to examine how English family law has developed a view of shared residence as benefitting children through symbolic messages about parental status rather than the actual arrangement of children's time. It is highly critical of the reversal of the causal relationship between good cooperation and shared residence: the former is now seen as a by-product rather than an essential prerequisite. Autopoietic theory is used to explain this development and, furthermore, it is argued that the shared residence order is becoming an increasingly important part of law's strategy of making post-separation dual household families conform to the new binuclear mould despite the fact that this use of the order is contrary to the instructions in s.1 of the Children Act 1989.

The chapter analysing the legal framework in Sweden observes that the very different socio-political context has produced different, but nevertheless gendered, understandings of parenthood. Women have entered into the public sphere, but the change from an exclusionary to a segregationist welfare state has restricted them to inferior positions in both spheres. There is also a curious contradiction in Swedish family law; it is both ostensibly gender neutral, with an insistence on formal equality, and simultaneously highly gendered, as its implicit normative expectations for mothers and fathers remain cast in a traditional mould. Primary sources, including the codes, *travaux préparatoires* and official guidance, have been used extensively, and secondary sources have provided not only useful background knowledge, but also insightful critical analyses of how the law is being applied in practice.

Swedish family law, like its English counterpart, is characterised by a narrow focus. The welfare enquiry typically balances the child's abstract need for contact against any potential risks of harm conceptualised predominantly in terms of exposure to domestic violence or inter-parental conflict rather than the parent's dependability and actual ability to care for the child. It is, moreover, noted that law's autopoietic tendency to focus on what ought to be, rather than what is, has allowed the legal system to ignore the very real difficulties faced by most families involved in these disputes. Fathers are presumed to be equally capable of meeting children's needs, but it is very rare for questions to be asked on how these needs are actually met. As in England, orders are not always in children's interests, and are often made on the implicit assumption that mothers will make considerable sacrifices to make them work.

The chapter on shared residence in Sweden observes that this arrangement is more common in Sweden, yet still involves a near-equal sharing of the child's time, confirming the prediction that better preconditions exist for successful sharing of residence. The picture is not, however, wholly positive. Although shared residence is used to regulate practical arrangements rather than send symbolic messages, studies have reported complaints from practitioners that many applications are motivated by a desire for justice and equal rights. The available research suggests

that district courts generally follow the recommendations of a National Board of Health and Welfare Report and are slow to order shared residence against one parent's wishes. There is some evidence that a presumption is developing; that the perceived, abstract benefits of shared residence are held to outweigh risks highlighted by objecting parents. However, where shared residence is ordered, it is envisaged that fathers' involvement will be hands-on. The third section of this chapter observes that family law's insistence on conciliatory behaviour and promotion of out of court settlement has led to shared residence being used to suppress rather than solve disputes. In the short-term, cases are kept out of court, but there is no viable long-term solution. More recently there has been greater recognition of the harm children suffer when exposed to parents' conflicts; since shared residence involves frequent and detailed communication the view has developed that it should only be ordered where parents' post-separation relationships are "particularly good".³³ Nevertheless, mothers often do not dare resist fathers' requests for equal time, for fear of otherwise being labelled selfish and unreasonable; and many mothers complain that the responsibility for caring for their children rests disproportionately on them. It is argued that if these complaints are expressed in Sweden, where the preconditions are so much better, widespread use of shared residence in England will lead to a highly unequal distribution of rights and responsibilities between fathers and mothers, and will fail to benefit children.

The final, concluding chapter identifies the similarities and differences in the two jurisdictions' approach to the shared residence order. It also contrasts judicial comments with researchers' conclusions, and makes use of this material to argue against the development of a shared residence presumption in England. It argues that empirical research confirms the conclusion that follows from the use of autopoietic theory: that shared residence cannot be used to teach parents to cooperate, and that the Swedish courts' pragmatic approach is to be preferred. It is known that coerced or court-ordered shared residence is likely to be abandoned, leading to the stress of further litigation. Shared residence is a very demanding arrangement; the benefits have to outweigh the substantial emotional, practical, financial costs. Parents must be sensitive to children's reactions, and able to

33 Proposition 2005/06:99, p53.

renegotiate arrangements in response; it, moreover, appears that shared residence suits some children but not others. Courts' inability to really listen to children or fully assess whether individual parents will cope, as explained through the use of autopoietic theory, means they cannot be trusted to filter out the families where shared residence is likely to harm children. The solution is, therefore, to restrict shared residence to cases where both parents agree to this. Although it cannot be guaranteed that these parents have listened to their children, empirical research shows that they are far more likely to be able to put their children's interests first than parents involved in high conflict disputes. Finally, the conclusion combines autopoieticists' observations about law's self-imposed blind-spots with feminist critique of the public/private dichotomy. It suggests that law's current claim that children will benefit when parents learn to cooperate through a shared residence order is implicitly built on the assumption that mothers will continue to provide the majority of care for children whilst also maintaining emotional bonds across the new, binuclear family. The perceived benefit, according to autopoietic theory, is that the imposition of the patriarchal, nuclear structure on binuclear post-separation families masks social change and preserves existing power structures; law as a system is inherently conservative since its role in society is to maintain stability and diffuse challenges to power relationships which are likely to cause further conflict. A shared residence presumption would thus exist primarily as an obfuscatory device for the preservation of patriarchal power structures.

2 THEORETICAL PERSPECTIVES

2.1 INTRODUCTION

This chapter provides a theoretical framework which is used in later chapters. It begins by setting out the origins of autopoietic theory and its development in relation to law as a social autopoietic system, and then combines this with feminist theory to explain law's inherently closed, inflexible and patriarchal nature. It explores how knowledge from child welfare science as well as communitarian and post-liberal thinking has been recreated within law. In later chapters, this thesis uses these conclusions drawn here to examine the law in the two chosen jurisdictions and argue against greater use of shared residence.

2.2 AUTOPOIESIS

Autopoietic theory can be used to explain van Krieken's observation that "[f]or every observer arguing for the significance of the law in 'radiating messages' and changing behaviour, there will be another expressing scepticism about its impact".¹ Autopoiesis is formed from two Greek words: *auto*, which means 'self' and *poiesis*, which means 'creation'.² Autopoietic theory was initially developed by biologists Varela and Maturana to describe the self-creating functions of biological cells.³ Cells are closed units and, although they operate in concert, cell reproduction is controlled by internal structures and processes, rather than being determined by what comes in

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- ¹ van Krieken, R (2005) "The 'Best Interests of the Child' and Parental Separation: On the 'Civilizing of Parents'", 68(1) *MLR*, 25-48, p25.
 - ² Rejmer, A (2003) *Vårdnadstvister: En Rättssociologisk Studie av Tingsrätts Funktion vid Handläggning av Vårdnadskonflikter med Utgångspunkt från Barnets Bästa*, Lund, Sweden, Lund Studies in the Sociology of Law, p30.
 - ³ Varela, F (1979) *Principles of Biological Autonomy*, New York, Elsevier; Maturana, H (1982) *Erkennen: Die Organisation und Verkörperung von Wirklichkeit*, Braunschweig, Vieweg; both cited in Teubner, G (1993) *Law as an Autopoietic System*, London, Blackwell, p27.

from the outside.⁴ Consequently, the effects of external influences are difficult to predict.⁵

2.2.1 Social Autopoietic Theory

These central observations have been used in the social sciences, notably by Luhmann and Teubner, to depict society as one large, primary system, which contains a number of closed, self-referring subsystems of communications, including law, medicine, politics etc.⁶ In social autopoietic theory, communications, rather than individuals, are the basic constituent units of these discourses or social subsystems; just as a cell is made from its own elements, social subsystems are re-created exclusively by use of their existing communications.⁷ Participants in a discourse are conceptualised as individual, psychic autopoietic systems, which are unable to communicate directly with the social subsystem. Social subsystems are different from, and more than, the combined thought-processes of the members;⁸ the meaning which a statement gains as it becomes part of the system's communications is more important than the meaning intended by the original actor.⁹

Despite this, society in itself is not classified as a complete autopoietic system. Instead, it is labelled a first-order autopoietic system. Law, and other specialised systems, have developed one step further. The first factor which defines a subsystem is the emergence of communications that are specific to that subsystem. Moreover, these communications are articulated and processed in the same way as earlier communications, so that past, present and future communications are linked together in a recursive chain; the system becomes self-referential.¹⁰ The validity of a new communication is assessed solely by reference to internal criteria from the system's earlier communications. Each system develops its own specific binary code or codes which are used to describe the environment and guide decision-making: e.g.

4 Varela, F (1981) "Autonomy and Autopoiesis" in Roth, G & Schwegler, H (Eds) *Self-Organizing Systems*, Frankfurt, Camps, pp17-18, as cited in Teubner (1993) *op cit* n3, p15.

5 Teubner, G, Schiff, D & Nobles, R (2003) "The Autonomy of Law: Introduction to Legal Autopoiesis", in Schiff, D & Nobles, R (Eds) *Jurisprudence*, London, Butterworths, p1, obtained from http://www.jura.uni-frankfurt.de/ifawzi/teubner/dokumente/autonomy_of_law.pdf accessed 18th April 2007.

6 Luhmann, N (1995) *Social Systems*, cited in Smith, C (2004) "Autopoietic Law and the 'Epistemic Trap': A Case Study of Adoption and Contact", 31(3) *Journal of Law and Society*, 318-44.

7 Luhmann, N (1989) "Law as a Social System", 83(1) *Northwestern University Law Review*, 136-150, p136.

8 Teubner (1993) *op cit* n3, p45.

9 Teubner *et al* (2003) *op cit* n5, p4, p18; King, M & Piper, C (1995) *How the Law Thinks About Children* (2nd Ed), Aldershot, Arena, p22.

10 Teubner *et al* (2003) *op cit* n5, p11.

healthy/unhealthy within medicine; profit/loss in relation to the economy and legal/illegal, or relevant/irrelevant, reasonable/unreasonable within law.¹¹ Social systems' internal realities determine how they see the world, just as individuals' conceptions of reality are coloured by their earlier experiences.¹² This description of discourses as closed and self-referential is particularly apt in relation to law. Luhmann has observed that "[o]nly the law can say what is lawful and what is unlawful", and can only decide this by looking within itself.¹³ According to Teubner, theorists in jurisprudence had needlessly struggled with the inherent circularity in their accounts of law, erroneously seeing this as a weakness in their theoretical model rather than an inescapable feature of law.¹⁴ A subsystem's communication is linked to earlier communications and triggers further communications.¹⁵ This linking together of communications into a closed chain, described by Teubner as primary closure, makes law increasingly divorced from the general discourse of society.¹⁶ Law, like other subsystems, compensates for this not by seeking to reverse the processes, but by closing itself off further, complementing the primary cycle of communications with a second-order "hypercycle" of communications which observe, evaluate and regulate the subsystem.¹⁷ Developing its own specialised way of commenting on its workings thus insulates law from external pressures, allowing it to self-generate its identity undisturbed.¹⁸ Circularity guarantees autonomy.¹⁹

Within autopoietic theory, there are divergent opinions about the level of communication possible between subsystems.²⁰ Luhmann has argued that a system is either autopoietic or not, just like a woman "cannot be a little pregnant",²¹ while Teubner has contended that closure and autonomy are questions of degree.²²

¹¹ *Ibid*, p1.

¹² Carlsson, B & Rejmer, A (1998) "The Swedish Way of Dealing with Custody Disputes: Juridification and Professionalisation of the Private and Social Spheres" in Carlsson, B (Ed) *Social Steerage and Communicative Action: Essays in Sociology*, Lund Studies in Sociology of Law, 104-142, p119.

¹³ Luhmann (1989) *op cit* n7, p143.

¹⁴ Teubner (1993) *op cit* n3, p9.

¹⁵ James, A (1992) "An Open or Shut Case? Law as an Autopoietic System" 19(2) *Journal of Law and Society*, 271-283, p274; Teubner *et al* (2003) *op cit* n5, p4.

¹⁶ Teubner, G (2001) "Alienating Justice: On the Surplus Value of the Twelfth Camel", in Nelken, D & Pribán, J (Eds) *Law's New Boundaries: Consequences of Legal Autopoiesis*, Aldershot, Ashgate, 21-44, p24.

¹⁷ Teubner (1993) *op cit* n3, p20, p31.

¹⁸ *Ibid*, p33.

¹⁹ *Ibid*, p75.

²⁰ Smith (2004) *op cit* n6, p323.

²¹ Luhmann, N (1990) *Essays on Self-Reference*, New York, Columbia University Press, p12, cited in Smith (2004) *op cit* n6, p324.

²² Teubner (1993) *op cit* n3, p27.

Teubner's approach appears more realistic; closed subsystems do not exist in a vacuum but are "necessarily" influenced by external social, economic and political influences.²³ In the main, however, there is agreement that once a system is autopoietic, information can no longer come in; instead it is recreated within the system itself on the basis of what it understands of the outside world.²⁴ Thus, change within a system such as law can occur in indirect and unpredictable ways, and only where the external pressures are "powerful enough to be perceived on the screens of the legal system itself".²⁵

Where external information is created within a system this is as simplified, "self-produced fictions" known as semantic artefacts.²⁶ Within society, the autopoietic subsystems construct incompatible versions of reality: there is no overarching conceptual framework and no shared language, and thus no real communication between subsystems.²⁷ There is also no true communication between an autopoietic subsystem and its participants; the individual autopoietic systems. Litigants, witnesses and lawyers reappear within law as semantic artefacts expressed in binary codes.²⁸ Although the artificiality of some constructs is more readily recognisable than others - a reasonable man on his Clapham omnibus or a *Gillick* competent adolescent - Teubner has asserted that this process is applied to all who seek to have their communications admitted as legal.²⁹ Indeed, law is often accused of not listening to, or not understanding, those who appear before it.³⁰

2.2.2 Interaction between Systems

Nonetheless, the assertion that law is closed off from other systems does not fit well with positivist or critical legal theory accounts of law, and appears to be contradicted by simple empirical observation. Legislation requires law to import a variety of political, economic or social values, while law's role as arbiter of disputes requires it

²³ *Ibid*, p21.

²⁴ *Ibid*, p41.

²⁵ *Ibid*, p59.

²⁶ Teubner (2001) *op cit* n16, pp22-23.

²⁷ King & Piper (1995) *op cit* n9, p26.

²⁸ *Ibid*, p27.

²⁹ Teubner *et al* (2003) *op cit* n5, p14.

³⁰ Geldof, B (2003) "The Real Love that Dare Not Speak its Name: A Sometimes Coherent Rant" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 171-200, p176.

to acknowledge external information and communicate its normative pronouncements to the outside world.³¹ The increasing functional differentiation in society has resulted in the legal subsystem attempting to balance its understandings of the diverse and sometimes incompatible demands emanating from other specialised systems against the need for internal consistency within law as well as the requirements of political regulation.³² The result has been specialisation within, and fragmentation of, law.³³ Separate terminology developed within corporate, criminal, family or property law indicate differing normative expectations. “[T]endencies to autarchy” within different branches of law help mask inconsistencies in the way law responds to different kinds of turbulence or interference.³⁴

Family law is particularly dependant on external information, since decisions involving children need to be based on external expertise on what harms or helps children.³⁵ Subsystems are closed, but do not function in isolation; external actions trigger internal reactions.³⁶ Separate systems are sometimes required to act in concert, e.g. where the signing of a contract has legal or economic consequences, or where the decision to take a child into care is discussed by lawyers, doctors and social workers.

Interaction between systems is described as “structural coupling” rather than true communication.³⁷ Human agents are recreated within a system as semantic constructs, but exist in an external environment as “independent autopoietic (psychic) systems”.³⁸ They decide whether or not to comply with legal rules using pre-existing normative frameworks shaped by previous turbulence from religious, cultural, political and other subsystems. If the costs of obeying a rule are felt to outweigh the benefits, the rule will be disregarded. Law interprets this as “norms being disobeyed and flouted”; its response is the introduction of further norms, since

31 Smith (2004) *op cit* n6, p334.

32 Teubner (1993) *op cit* n3, pp113-114.

33 *Ibid.*

34 *Ibid.*, p114.

35 *Ibid.*, p319.

36 Teubner *et al* (2003) *op cit* n5, p10.

37 *Ibid.*, p4.

38 Teubner (1993) *op cit* n3, p21.

“disobedience and circumvention of norms is forbidden”.³⁹ Consequently, the success of legal measures to modify behaviour (such as the current use of shared residence orders to improve interparental communication) can never be guaranteed, nor predicted with anything approaching certainty.

According to Teubner, however, some direct contact between social subsystems is possible. Subsystems such as law, politics and the economy have all developed from the first-order system of society (through a process of internal differentiation) and occupy the same “phenomenological domain” since they all use communications as their basic units in order to create “meaning” and all such internal communications are simultaneously also forms of general societal communication.⁴⁰ Consequently, interference can become a bridging mechanism, where different systems are linked through one communicative event; although information is still “created anew in every social system” this happens simultaneously in two systems; the event is likely to have greater impact.⁴¹ Although the mechanisms for the variation, selection and retention of information are entirely internal,⁴² a subsystem can detect external pressures as noise or disturbance, and respond by making “minor modifications in its internal order until relative peace is restored”.⁴³ Autopoieticists do not deny the relevance of power;⁴⁴ some systems or discourses appear more powerful than others, and this is likely to result in greater adjustments within the system that perceives itself to be less powerful.

Although different subsystems use the same terminology, meanings differ. Communications can be defined as information, utterance, and understanding; the act of utterance is the same within different systems, whereas the elements of understanding and information differ.⁴⁵ A contract will be evaluated in terms of profit/loss within the economic subsystem, while law will only look at its legality.⁴⁶ What a particular child needs is understood and evaluated very differently within law, medicine or social work, and it is a common observation among lawyers,

³⁹ *Ibid*, p72.

⁴⁰ Teubner (1993) *op cit* n3, p81, p87.

⁴¹ *Ibid*, p87.

⁴² *Ibid*, p56.

⁴³ *Ibid*, p81.

⁴⁴ *Ibid*, p73.

⁴⁵ *Ibid*, p88.

⁴⁶ Teubner *et al* (2003) *op cit* n5, p15.

psychiatrists, and social workers that the resolution of interparental disputes is hampered by lack of mutual understanding.⁴⁷

Teubner has argued that subsystems such as law resolve the tension between the safeguarding of subsystem autonomy through autopoietic closure and the external demands placed upon it by being “cognitively open” to external information, while nevertheless remaining “normatively closed”.⁴⁸ Where information does appear to be admitted into law, this is termed re-entry: terminology from other systems is reinterpreted into law’s binary codes in such a way as to fit as neatly as possible within law’s pre-existing normative framework.⁴⁹ An obvious example is the way expert witnesses are asked to translate their opinions into language which has little meaning within their own discourses; for instance, no psychiatrist today gives a diagnosis of insanity.⁵⁰ Autopoietic subsystems also maintain their closure by being selective in terms of what information they admit. This process, termed “redundancy”, is particularly important in law, since the *modus operandi* of legal communication is linked to law’s functions. Law, by its very nature, seeks to bring structure and order to society.⁵¹ It excludes from consideration some factors that it cannot control, while legal rules classify facts so as to find similarities where none may be thought to exist. In this way complex and diverse disputes are reduced to generalisations or repetitions, which mask tensions and create an impression of internal consistency.⁵²

These new, and peculiarly legal, ways of communicating about conflicts or problems are then further refined and entrenched as they travel around law’s circular chain of communications. One expert may, in a court, give an opinion which he is forced to re-structure in order for it to be understood by law. The judge will, in summing up, repeat this understanding of the issue, perhaps narrowing it slightly further to ensure a better fit with law’s previous communications. The same process may be repeated by a practitioner who writes a case comment, a judge who subsequently

47 Carlsson & Rejmer (1998) *op cit* n8.

48 Teubner, G (1989) “How the Law Thinks: Towards a Constructivist Epistemology of Law”, 23 *Law and Society Review*, 727-757, p743, as cited in King & Piper (1995) *op cit* n9, p30.

49 Teubner (2001) *op cit* n16, p24.

50 Teubner *et al* (2003) *op cit* n5, p3; King & Piper (1995) *op cit* n9, p31.

51 King & Piper (1995) *op cit* n9, p26.

52 Teubner (1993) *op cit* n3, p57.

refers to the case, or an academic who summarises case law development in a text book. The chain of communications serves to confirm the veracity of what is said, without further need to refer to external authorities. Left to develop in this way, legal translations of information from other discourses can become unrecognisable, very far removed from the understandings that pervade the first-order autopoietic system of society itself.⁵³ There is an element of self-fulfilling prophecy about the circular structure of law's communications. It could be likened to a Chinese whispers procedure that returns the original statement in a highly modified form; but unlike Chinese whispers the transformation is not completely random, but also determined by law's existing discursive framework. However, law hides these processes from itself.⁵⁴ According to Luhmann "the system does not see that it does not see what it doesn't see".⁵⁵ Law is sometimes described as no more than an instrument of power for those in political control. While adherents of autopoietic theory would acknowledge that law does play an important role in the regulation of relationships and the allocation of resources, they nevertheless deny such a simple correlation between input and output.⁵⁶ Instead, the processes of re-entry and redundancy are identified as the involuntary and largely unplottable responses to interference that result from second-order autopoiesis.⁵⁷

The combination of cognitive openness and normative closure allows law to deal with its environment without having to depart from its own internal normative expectations. If an act, such as breaking a speed limit, ought to be illegal then it remains so despite the fact that many people drive too fast.⁵⁸ If parents ought to cooperate over post-divorce contact, then conflict remains wrong despite the fact that most cases which arrive in the appeal courts involve entrenched disputes. In this way, law can absorb social conflicts, and create the appearance of resolution.⁵⁹ Thus, although family law, in particular, appears more open to its social environment due to the subject matter of the disputes, it simply uses selective, internally reconstructed versions of outside information about what is in a child's

⁵³ *Ibid*, p56.

⁵⁴ Luhmann (1989) *op cit* n7, p145.

⁵⁵ *Ibid*.

⁵⁶ Teubner (1993) *op cit* n3, p26.

⁵⁷ Luhmann (1989) *op cit* n7, p145; King & Piper (1995) *op cit* n9, p50.

⁵⁸ King & Piper (1995) *op cit* n9, p29.

⁵⁹ *Ibid*, p29.

best interests.⁶⁰ This way law both ensures that competing claims can be compared, and safeguards its normative closure.⁶¹ Accordingly, complaints from disappointed litigants often include the assertion that “the experience had nothing to do with what they were seeking to achieve”.⁶²

Autopoietic theory can be used to show why it is that despite increasing “juridification” of society through a proliferation of legal rules, changes are often insufficient or temporary, with some reform even proving counterproductive.⁶³ When one subsystem thinks it is studying another system, what it is in fact observing is its own semantic artefact, its internally constructed version of what it thinks the other system looks like.⁶⁴ Moreover, information cannot travel across systems’ boundaries, but is, instead, re-invented within the target system; much is lost in translation. It is, therefore, not surprising that family law reforms, which have to be translated into law from the political second-order autopoietic system and then out of law to the target families, often appear to have substantially unexpected effects. Moreover, all systems evaluate the potential benefits of the proposed change according to their own internal code. The economy assesses legislation using its “cost-benefit calculations” so that new laws will only be obeyed if compliance proves financially efficient.⁶⁵ Similarly, research shows that parents in contact and residence cases perform similar cost/benefit analyses, and feel justified in disobeying legal pronouncements where these conflict with their internal moral codes.⁶⁶ Finally, new developments in autopoietic subsystems have to be constructed using the subsystem’s existing cognitive framework and processes. Thus, a subsystem cannot be made to suddenly depart from its existing *modus operandi*. For example, when law, which usually finds similarities in cases and evaluates competing claims according to set criteria, is asked to use a discretionary approach, it is common for initial guidance to develop into fixed lists and presumptions.

⁶⁰ *Ibid*, p27.

⁶¹ Teubner, G (1997) “Altera pars Audiatur : Law in the Collision of Discourses”, in Rawlings, R (Ed) *Law, Society and Economy*, Oxford, Oxford University Press, 149-176 as cited in Teubner *et al* (2003) *op cit* n5, p39.

⁶² Teubner *et al* (2003) *op cit* n5, p4.

⁶³ *Ibid*, p19.

⁶⁴ Teubner (1993) *op cit* n3, p79.

⁶⁵ *Ibid*.

⁶⁶ Laing, K (2006) “Doing the Right Thing: Cohabiting Parents, Separation and Child Contact”, 20(2) *IJLPF*, 169-179, p173; Kaganas, F & Day Sclater, S (2004) “Contact Disputes: Narrative Constructions of ‘Good’ Parents”, *Feminist Legal Studies*, 1-27, p22; Smart, C (1999) “The ‘New’ Parenthood: Fathers and Mothers after Divorce”, in Silva, E & Smart, C (Ed) *The New Family?*, London, Sage Publications, 101-114.

Having examined autopoietic theory, the remainder of this chapter now analyses three aspects of contemporary family law: the construction of parenthood as a permanent status, which is essentially patriarchal in character; the reliance on re-interpreted information from the child welfare sciences to decide what is in children's best interests; and the law's increasing insistence that parents must learn to behave reasonably rather than rely on the courts.

2.3 PARENTHOOD AS A PERMANENT STATUS

Current family law is often criticised from a feminist perspective, with the claim being made that law is, as an instrument of male power, protecting fathers' interests at the expense of both mothers and children.⁶⁷ This can be reconciled with the above-made explanation of law's autopoietic nature. Law, and other subsystems, were initially constituent parts of a greater first-order autopoietic system, general social communications, but separated themselves from this system through increasingly specialised jargon.⁶⁸ These subsystems thus adopted the basic values and ways of reasoning which were at that time used within the first-order system (society). A patriarchal strand can be identified as part of this initial set of values, and this patriarchal strand has remained and developed into patriarchy-within-law through law's circular and self-referential chain of communications. Luhmann has also observed that "it is only realistic to assume that the law accommodates dominant interests; it could not conduct itself otherwise and still be accepted".⁶⁹

The term patriarchy is constructed from two Greek words: *pater* (father) and *arche* (to rule); in its wider meaning, it connotes a system of society in which men hold most or all of the power in public life as well as within individual families.⁷⁰ The possible causes or origins of the patriarchal social order have been investigated from many different academic perspectives without any definite answers having been

67 DuBois, E, Dunlap, M, Gilligan, C, MacKinnon, C & Menkel-Meadow, C (1985) "Feminist Discourse, Moral Values and the Law - A Conversation", 34 *Buffalo Law Review*, 11-88; Nordborg, G (1999) "Kärlek och Ekonomi - Juridiskt Undantagstillstånd?" *Kvinnovetenskaplig Tidskrift*, 49-61, p50.

68 Teubner (1993) *op cit* n3, p81.

69 Luhmann (1989) *op cit* n7, p145.

70 Hearn, J (2002) "Men, Fathers and the State: National and Global Relations" in Hobson, B (Ed) *Making Men Into Fathers: Men, Masculinities and the Social Politics of Fatherhood*, Cambridge, Cambridge University Press, 245-272, p247; Rejmer (2003) *op cit* n2, p93.

found.⁷¹ A biological explanation can be found in women's unique reproductive role, which can be seen as rendering them weaker and thus in need of male protection.⁷² Some, writing from a perspective on the political left, have built on Engel's ideas of an initial, gendered division of labour to identify male control over women's reproduction as the first expropriation of labour.⁷³ Thus, biological differences can be said to have formed the basis for socially determined, unequal gender roles.⁷⁴ Historically, women have at times been viewed as little more than property and although many of these severe restrictions have now been removed, feminist scholars tend to take a wider view of patriarchy as a continuing imbalance of power in favour of males throughout society, while patriarchal constructions of gender relations are reproduced through communications within politics, education, religion and the arts.⁷⁵

Patriarchy has also granted men the power to define, and the male prerogative in defining women's roles has been identified as crucial in the maintenance of patriarchy.⁷⁶ Men have predominantly defined women as 'different from' and inferior to themselves, through a series of dichotomies which have become both descriptive and normative: analytical/intuitive, strong/weak, cultured/natural, principled/personalised, and enterprising/nurturing.⁷⁷ The consequent identification of men with civic life and women as more suited to the domestic sphere has been termed the public/private dichotomy. The origins of this dichotomy are likely to lie so far back in time that they are impossible to pinpoint; its influence is discernable, for example, in the writings of classical scholars such as Aristotle, who did not see women as able to meet the demands of citizenship.⁷⁸ Laws dealing with families have relied heavily on the dichotomy as a binary code of public/private to guide or justify decisions. Feminists have sought to expose the supposed natural dichotomy as socially constructed, highlighting the way law's

71 Rifkin, J (1980) "Toward a Theory of Law and Patriarchy", 3 *Harvard Women's Law Journal*, 83-95, p83.

72 *Ibid*, p89.

73 Firestone, S (1970) *The Dialectic of Sex*, New York, Bantam Books, as cited in O'Donovan, K (1985) *Sexual Divisions in Law*, London, Weidenfield & Nicholson, pp11-20.

74 O'Donovan, K (1985) *Sexual Divisions in Law*, London, Weidenfield & Nicholson, p62.

75 Fineman, M (1995) "Images of Mothers in Poverty Discourse" in Fineman, M & Karpin, I (Eds) *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*, New York, Columbia University Press, 205-223, pp217-218.

76 Rifkin (1980) *op cit* n74, p83.

77 Olsen, F (1990) "Feminism and Critical Legal Theory: An American Perspective", 18(3) *International Journal of the Sociology of Law*, 199-215, p199.

78 Rifkin (1980) *op cit* n74, pp91-92.

image as impartial has concealed its role in the entrenchment of patriarchy.⁷⁹ This section charts how law's understandings of public/private have altered in response to external interference, but still exert a significant influence over the development of family law.

2.3.1 Patriarchy and the Nuclear Family

The feudal society, where limited geographical and economic mobility made women's secondary status less controversial, was challenged by the changes wrought by the industrial revolution.⁸⁰ Liberalism, the dominant school of thought, espoused freedom from state interference for *laissez-faire* capitalism and freedom from unwarranted state intervention within the private, family domain.⁸¹ Despite this emphasis on freedom, the confinement and subordination of women was made more explicit through the removal of production from the domestic sphere.⁸² Additionally, there was a tension between the democratic values of the public sphere (where freedom was seen as best promoted by assigning ostensible equal bargaining power to all participants, allowing them free reign to fashion their agreements), and the strict hierarchy of the traditional family.⁸³ The law played an important part in "maintaining a boundary between private and public".⁸⁴ It also preserved the patriarchal family by presenting it as natural and benign.⁸⁵ Luhmann and Teubner have suggested that law, as a subsystem, is inherently conservative. Its role in society is to impose order and absorb tension; it dislikes changes in power relationships which are likely to cause further conflicts.⁸⁶ In response to interference, its semantic artefacts were changed slightly, so as to preserve the overarching normative framework.⁸⁷ The 19th century idealisation of the family extolled the very characteristics of nurture, care and sensitivity that were

79 Slaughter, M (1995) "The Legal Construction of 'Mother'" in Fineman, M & Karpin, I (Eds) *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*, New York, Columbia University Press, 73-100, p75; Okin, S (1994) "Families and Feminist Theory: Some Past and Present Issues" in Nelson, H (Ed) *Feminism and Families*, 13-26, p18.

80 Rejmer (2003) *op cit* n2, p93.

81 Rhode, D (1991) "Feminist Critical Theories", in Bartlett, K & Kennedy, R (Eds) *Feminist Legal Theory: Readings in Law and Gender*, Boulder, Westview Press, 333-350, p339.

82 Olsen, F (1983) "The Family and the Market: A Study of Ideology and Legal Reform", 96(7) *Harvard Law Review*, 1497-1528, p1524.

83 *Ibid*, p1505.

84 Rifkin (1980) *op cit* n74, p84; O'Donovan (1985) *op cit* n77, p2.

85 Olsen (1983) *op cit* n85, p1524; Rifkin, (1980) *op cit* n74, p86.

86 Luhmann (1989) *op cit* n7, p144.

87 Teubner (1993) *op cit* n3, p81.

simultaneously said to make women unable to cope with the harsh realities of public life.⁸⁸ Moreover, law portrayed the family as both crucially important and fragile; any disturbing of “the delicate quality of family relations” could have unforeseen negative consequences.⁸⁹ State intervention into families, even to correct palpable abuses of patriarchal power, was not in anyone’s long term interests.⁹⁰ Law could be overtly “based on male authority and patriarchal social order”,⁹¹ while “marriage was the chief means by which families were linked to law”.⁹²

Thus, the importance of the traditional conjugal family has always been located primarily in its normative power.⁹³ It was constructed as natural, timeless, and essential to a stable, healthy society.⁹⁴ Consequently, change (which is a historical fact) came to be perceived as an undesirable symptom of moral decline, while the normative value given to the label “traditional” legitimised treating other family types less favourably.⁹⁵ Motherhood, although idealised, was truly valued only when practised within the patriarchal framework of the conjugal family.⁹⁶ Furthermore, mothers who did not conform to the gendered pattern of self-sacrifice and gentleness risked being labelled unfit and losing their children.⁹⁷ Motherhood is thus “a colonised concept”, used to tame “unruly women” into responsibility and conformity.⁹⁸ This thesis argues that a presumption in favour of shared residence built on the ideal of the reconstituted binuclear traditional family would strengthen this construction of motherhood and unduly restrict individual women’s freedom.

The ideal of the private family continues to exert considerable influence on the regulation of families; non-intervention remains the norm, and public action the

88 Olsen, F (1993) “The Politics of Family Law” in Minow, M (Ed) *Family Matters: Readings on Family Lives and the Law*, New York, The New Press, 336-343, p341.

89 Olsen (1983) *op cit* n85, p1506-7.

90 *Ibid.*

91 Rifkin, (1980) *op cit* n74, p92.

92 Dewar, J (2000) “Family Law and its Discontents”, 14(1) *IJLPF*, pp. 59-85, p61.

93 Sevenhuijsen, S (2002) “An Approach through the Ethic of Care” in Carling, A, Duncan, S & Edwards, R (Eds) *Analysing Families: Morality and Rationality in Policy and Practice*, London, Routledge, 129-144, p129.

94 Morgan, P (1998) “An Endangered Species?” in Kiernan, K, Land, H & Lewis, J (Eds) *Lone Mother Families in Twentieth Century Britain*, Oxford, OUP, pp65-82, p80; Popenoe, D (1992) “Family Decline in the Swedish Welfare State” 109 *Public Interest (USA)*, p114.

95 Nicholson, L (1994) “The Myth of the Traditional Family” in Nelson, H (Ed) *Feminism and Families*, 27-42, p28; Dowd, N (1995) “Stigmatizing Single Parents”, 18(1) *Harvard Women's Law Journal*, 19-82, p20.

96 Roberts, D (1993) “Racism and Patriarchy in the Meaning of Motherhood”, *Journal of Gender and the Law*, 1-38, as cited in Olsen (1995) Olsen, F (1995) *Feminist Legal Theory: Volume 1*, Aldershot, Dartmouth, p539.

97 Frug, M (1992) *Postmodern Legal Feminism*, New York, Routledge, p138.

98 Pogrebin, L (1993) “The New Father” in Minow, M (Ed) *Family Matters*, New York, The New Press, 130-141, p130.

exception which has to be justified.⁹⁹ Feminism has, however, challenged both the desirability and the actual existence of the public/private dichotomy.¹⁰⁰ On an ideological level, it devalues women and the tasks traditionally associated with them; law's stance is an implicit recognition that "women simply are not sufficiently important to merit legal regulation".¹⁰¹ In practical terms, public authorities have always intervened in poor or otherwise "failing" families; regulation in a number of areas such as taxation and social security impacts on families; and, on other occasions, ostensible non-intervention hides a passing of control to less formal mechanisms.¹⁰² Thus, it is, according to Olsen, "nonsense" to discuss state non-intervention in families as though it were an achievable ideal.¹⁰³ She has argued that no civilized society can maintain a consistent stance to the point of refusing to investigate homicides or to remove seriously maltreated children. Therefore, the question becomes one of degrees of intervention.¹⁰⁴ The decision not to intervene is itself a political, regulatory decision, which helps the state shape families by ratifying the *status quo* and thus defining acceptable behaviour.¹⁰⁵ The non-intervention ideal is a normative rather than analytical tool; a simple reference to non-intervention can be used to obscure genuine conflicts.¹⁰⁶ Legislatures and judiciaries have used the policy of non-intervention to consolidate male authority and "to prevent women and children from using state power to improve the conditions of their lives".¹⁰⁷ In the 19th and early 20th centuries, law refused to intervene into the nuclear family, yet actively policed its boundaries; sanctions and stigmatisation discouraged independent motherhood.¹⁰⁸ One result of the non-intervention strategy, which is particularly relevant to this thesis, is law's inability to recognise the value of care. When caring is relegated to the private sphere, it becomes the responsibility of individual women and, because it takes place in private, it is invisible to those who think and communicate in the public sphere.

99 Olsen, F (1985) "The Myth of State Intervention in the Family" 18(4) *University of Michigan Journal of Law Reform*, 835-864, p835, p841.

100 Rhode (1991) *op cit* n84, p339.

101 Taub, N & Schneider, E (1982) "Perspectives on Women's Subordination and the Role of Law" in Kairys, D (Ed) *The Politics of Law*, Pantheon, New York, p117, as cited in Olsen, F (1990) "Feminism and Critical Legal Theory: An American Perspective", 18(3) *International Journal of the Sociology of Law*, 199-215, p207.

102 O'Donovan (1985) *op cit* n77, pp11-20; Rhode (1991) *op cit* n84, p340.

103 Olsen (1985) *op cit* n102, p837.

104 Olsen (1983) *op cit* n85, p1509.

105 Olsen (1985) *op cit* n102, pp841-843; O'Donovan, K (1985) *op cit* n77, pp2-4.

106 Olsen (1985) *op cit* n102, p863.

107 Rhode (1991) *op cit* n84, p340; Olsen (1983) *op cit* n85, p1510.

108 Smart, C (1982) "Regulating Families or Legitimizing Patriarchy" 10(1) *International Journal of the Sociology of Law*, 1-18, pp4-5

Additionally, the construction of the practical work of caring as a “natural outpouring” of instinctive love has meant women’s substantial investments in domestic labour have been taken for granted.¹⁰⁹ Thus, a societal structure premised on the liberal autonomous individual is in fact supported and subsidised by unrecognised caring.¹¹⁰ As is argued in subsequent chapters, the result is that decisions in contested shared residence are made without adequate recognition of how children benefit from receiving proper care.

2.3.2 Public Patriarchy

The second part of this narrative focuses on the latter half of the 20th century, when industrialised society changed so dramatically that law’s adherence to the traditional, nuclear model could not be maintained. This created tension within the first-order autopoietic system that is society itself, and law responded by modifying its meaning-making procedures in such a way as to protect existing power structures.¹¹¹ Indeed, it has been observed from a feminist perspective that the gender system was adjusted to these new conditions in such a way as to ensure “women’s continued relegation to the margins”.¹¹² Feminists had made substantial achievements by demonstrating that women could do as well as men in public life. The advantage of this “sameness” strategy was its compatibility with the liberal worldview; law could admit this external interference without too much being lost in translation.¹¹³ The disadvantages were, however, the implicit valorisation of supposedly male characteristics, and reliance on formal equality. Women who were perceived to be like men were entitled to be treated the same as men; but women who were classified as different could not complain when they were treated less favourably.¹¹⁴ Law thus remained uninterested in the private sphere, and unable to value domestic labour. Consequently, women’s entry into public life, and the employment market in particular, proceeded on the unspoken understanding that

109 Fineman, M (2001) “Fatherhood, Feminism and Family Law”, 32(4) *McGeorge Law Review*, 1031-1049, p1042; Tronto, J (1993) *Moral Boundaries: A Political Argument for an Ethic of Care*, London, Routledge, p111.

110 Pogrebin (1993) *op cit* n101, p131.

111 Luhmann (1989) *op cit* n7, p144; Teubner (1993) *op cit* n3, p81.

112 Williams, J (1991) “Deconstructing Gender” in Bartlett, K & Kennedy, R (Eds) *Feminist Legal Theory: Readings in Law and Gender*, Boulder, Westview Press, 95-123, p109.

113 Teubner (1993) *op cit* n3, p26.

114 Frug (1992) *op cit* n100, p33.

this must not lead them to neglect their private responsibilities.¹¹⁵ This has preserved the public/private dichotomy, disadvantaged women in the employment market, and left individual women with poor earning capacities dependant on breadwinner men.¹¹⁶ However, the formal equality approach allows law to dismiss this wider context as redundant and ignore the empirically documented fact that an equal sharing of family responsibilities between women and men “is the great revolution that has not happened”.¹¹⁷ Thus, in this 20th century “reinvention”, patriarchy can be described as public rather than private and as “segregationist” rather than “exclusionary”: women have gained access to the public as well as the private sphere, but remain subordinated within both.¹¹⁸ Law’s role in the reproduction of patriarchal order has become more complex, “increasingly obscured and difficult to identify”.¹¹⁹ Yet, it can be argued that women are worse off; law’s pursuit of gender-neutrality has, in fact, made law more discriminatory by de-emphasising children’s need for the “stereotypical motherly characteristic of nurturing and caring”.¹²⁰

Feminism can in one way thus be said to have become a victim of its own success, and consequently, alternative strategies were pursued in the last decades of the 20th century. Rather than questioning the gendering of the liberal dichotomies, difference feminists rejected their “hierarchization” (e.g. the view of abstract reason as superior to contextualised and needs-based caring).¹²¹ In her research, Gilligan found that many of her female subjects, including eleven-year-old Amy, used very sophisticated reasoning, which rejected the binary right/wrong approach to hypothetical scenarios and instead emphasised compromise and the need to sustain relationships. Yet, this “ethic of care” was not recognised by the standard scoring model.¹²² Difference feminists used this “pathbreaking” empirical work to argue for

¹¹⁵ McKie, L, Bowlby, S & Gregory, S (2001) “Gender, Caring and Employment in Britain”, 30(2) *Journal of Social Policy*, 233-258, p234.

¹¹⁶ Olsen (1983) *op cit* n85, p1498; Oláh, L (1998) “‘Sweden: The Middle Way’ A Feminist Approach”, 5(1) *European Journal of Women's Studies*, pp47-67, p57.

¹¹⁷ Okin, S (1993) “Justice, Gender and the Family” in Minow, M (Ed) *Family Matters: Readings on Family Lives and the Law*, New York, The New Press, 125-129, p125.

¹¹⁸ Williams (1991) *op cit* n115, p109.

¹¹⁹ Smart (1982) *op cit* n111, p8.

¹²⁰ Fineman, M & Opie, A (1987) “The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce”, *Wisconsin Law Review*, 107-158, pp119-120.

¹²¹ Abrams, K (2001) “The Second Coming of Care”, 76(3) *Chicago-Kent Law Review*, 1605-1617, p1607; Olsen (1990) *op cit* n80, p203.

¹²² Gilligan, C (1982) *In a Different Voice*, Harvard, Harvard University Press, pp31-32.

greater recognition of traditionally female characteristics.¹²³ They also harboured a deep mistrust of law, arguing that it, like Gilligan's eleven-year-old interviewee Jake, spoke with the "male" voice and used a "male" form of reasoning: objective, abstract, universal, with a tendency to organise information along hierarchical dichotomies.¹²⁴ Law was found to be inherently patriarchal: "a paradigm of maleness".¹²⁵ This can be reconciled with autopoieticists' description of discourses as impersonal systems of communication. Furthermore, since legal communications were initially generated almost exclusively by men, for men, it is not surprising that the tendency towards objectivity, abstraction and logic was reinforced within law's chains of communications. The process of "redundancy", information selection, explains law's tendency to ignore or reject as unintelligible arguments based on context, relationships or feelings.¹²⁶ It can also explain the limited success of difference feminists' attempts at legal reform; law, as a closed system, is unable to process such very different information.¹²⁷ The celebration of traditionally female characteristics, and the consequent tendency towards essentialism, have been criticised for inadvertently reinforcing gendered stereotypes.¹²⁸ Thus, although the sameness/difference debate at one point "threatened to engulf" feminist debate with its "interminable irreconcilability", the two approaches never really challenged the public/private dichotomy.¹²⁹ Accordingly, more radical feminists like MacKinnon asserted that feminism had been asking the wrong questions: rather than dividing the world into dichotomies the dominance model saw a repeated pattern of women's subordination.¹³⁰ According to MacKinnon, "[p]ower is socially constructed such that if Jake simply chooses not to listen to Amy, he wins; but if Amy simply chooses not to listen to Jake, she loses. In other words, Jake still wins because that is the system".¹³¹ Dominance feminism made a valuable contribution to feminist debate,

¹²³ Abrams (2001) *op cit* n124, p1607.

¹²⁴ Gilligan (1982) *op cit* n125, pp26-27; Finley, L (1989) "Breaking Women's Silence in Law" *Notre Dame Law Review*, 886, as cited in Barnett, H (1997) *Sourcebook on Feminist Jurisprudence*, London, Cavendish Publishing, p177.

¹²⁵ Barnett (1997) *op cit* n127, pp78-79.

¹²⁶ Teubner *et al* (2003) *op cit* n5, p21; Olsen (1990) *op cit* n80, p201.

¹²⁷ Teubner (1993) *op cit* n3, p43.

¹²⁸ Frug (1992) *op cit* n100, p44; Abrams (2001) *op cit* n124, p1607.

¹²⁹ Jackson, E (1997) "Book Review: Frances Olsen, *Feminist Legal Theory*", 5(2) *Feminist Legal Studies*, 121-125, p121.

¹³⁰ MacKinnon, C (1991) "Difference and Dominance: On Sex Discrimination", in Bartlett, K & Kennedy, R (Eds) *Feminist Legal Theory: Readings in Law and Gender*, Boulder, Westview Press, 81-94, p81; Rhode (1991) *op cit* n84, p336.

¹³¹ MacKinnon speaking in DuBois, E, Dunlap, M, Gilligan, C, MacKinnon, C & Menkel-Meadow, C (1985) "Feminist Discourse, Moral Values and the Law - A Conversation", 34 *Buffalo Law Review*, 11-88, p74.

but did not successfully translate into law reform since it demanded too dramatic a departure from law's existing *modus operandi*.¹³² According to autopoietic theory, minor modifications may occur, but complete reorientations of closed autopoietic subsystems are impossible: the system is what it is.¹³³

2.3.3 The Binuclear Family

This narrative now examines how law has absorbed the tension created by recent demographic changes. Marriage was for centuries the primary institution used by law to organise familial life, and feminists have argued that this is because patriarchal structures depend for their survival on husbands and fathers as inculcators of patriarchal values and defenders of the *status quo*.¹³⁴ However, the statistically documented decrease in conjugal families and the increased prevalence of divorce, single parenthood and unmarried cohabitation have “exposed the fragility” of the nuclear paradigm.¹³⁵ Family breakdown thus becomes a threat to prevailing patriarchal order. When law responds to political turbulence by adjusting its own processes it is, according to Teubner, “making order from noise”.¹³⁶ The legal system is “driven by the disorder outside” and forced to adjust its cognitive framework in minor ways “until relative peace is restored”.¹³⁷ Family law's response has thus been to construct bi-nuclear families, which expand the definition of family in order to hide the reality of demographic change and thus contain “the anxieties that it engenders”.¹³⁸ Law has reconstructed parenthood into a relationship with “a reassuring irrevocable permanence”, which can have a stabilising influence on individuals, families and society.¹³⁹ Since the public/private dichotomy hides maternal caring, law's new emphasis on biological (rather than social) parenthood is focused almost exclusively on the encouragement of fathers through the allocation

¹³² Abrams (2001) *op cit* n124, p1609.

¹³³ Teubner (1993) *op cit* n3, pp84-85.

¹³⁴ Dowd (1995) *op cit* n98, p41.

¹³⁵ Silva, E & Smart, C (1999) “Introduction” in Silva, E & Smart, C (Ed) *The New Family?*, London, Sage Publications, p3; Simpson, B, Jessop, J & McCarthy, P (2003) “Fathers after Divorce” in Bainham *et al* (Eds) *op cit* n32, 201-219, p201.

¹³⁶ Teubner (1993) *op cit* n3, pp78-79.

¹³⁷ *Ibid*, p81.

¹³⁸ Reece, H (2003) *Divorcing Responsibly*, Oxford, Hart Publishing, p156; Kurki-Suonio, K (2000) “Joint Custody as an Interpretation of the Best Interests of the Child in a Critical and Comparative Perspective”, 14(3) *IJLPF*, 183-205, p188.

¹³⁹ Beck, U & Beck-Gernsheim, E (1995) *The Normal Chaos of Love*, Cambridge, Polity Press, as cited in Smart, C & Neale, B (1999) *Family Fragments?* Cambridge, Polity Press, p14.

of rights.¹⁴⁰ Fatherhood has been transformed through circulation in law's chains of communications from a secondary link established through marriage, to a primary, direct relationship, which should endure "unaffected by the vicissitudes of adult life".¹⁴¹

This new dual-household post-separation family is expected to conform to the nuclear ideal not only in terms of membership but also the gendered and hierarchical distribution of rights and responsibilities. It, then, occupies a similarly privileged position. Although this 'new' family is presented as progressive, it is in fact both conservative and repressive. In France, Vonèche and Bastard have suggested that legislation enacted in 2002, which emphasises the continued involvement of the "parental couple" after separation, is not the "modern vision" of family life it purports to be, but instead an attempt to preserve traditional, Catholic family structures.¹⁴² At the same time, those who wish to argue against the imposition of the new binuclear template on their own families are finding this increasingly difficult. One of the reasons (two others are explored in later sections of this chapter) is law's continued disregard for the "different voice". Although it is unnecessarily essentialist to equate motherhood with "caring for" in practical terms and fatherhood with "caring about" in an abstract sense, it remains the case that the former activity is still disproportionately performed by mothers, who are also more likely to ground their arguments in disputes over children on the ethic of care.¹⁴³ Yet, law is unable to understand arguments based on the closeness and expertise developed by primary carers.¹⁴⁴

In conclusion, it can be seen that a pre-existing patriarchal element in law's understanding of society has been preserved through the adaptation of the public/private dichotomy and law's ideal family. Different feminist strategies to combat the exclusion, relegation or silencing of women have had only limited

¹⁴⁰ Collier, R (2005) "Fathers 4 Justice, Law and the New Politics of Fatherhood", 17(4) *CFLQ*, 511; Smart & Neale (1999) *op cit* n142, pp34-35.

¹⁴¹ Roche, J (1991) "The Children Act 1989: Once a Parent Always a Parent", 13(5) *JSWFL*, 345-361, p349.

¹⁴² Vonèche, L & Bastard, B (2005) "Can Co-Parenting be Enforced? Family Law Reform and Family Life in France" in Maclean, M (Ed) *Family Law and Family Values*, Oxford, Hart Publishing, 94-106, p100

¹⁴³ Eekelaar, J (2005) "Personal Obligations" in Maclean, M (Ed) *Family Law and Family Values*, Oxford, Hart Publishing, 9-26, p15; Smart & Neale (1999) *op cit* n142, p126; Day Sclater, S & Kaganas, F (2003) "Contact: Mothers, Welfare and Rights" in Bainham *et al* (Ed) *op cit* n32, 155-169, p162; Buchanan, A & Hunt, J (2003) "Disputed Contact Cases in the Courts" in Bainham *et al* (Eds) *op cit* n32, 365-386, p317.

¹⁴⁴ Smart & Neale (1999) *op cit* n142, p129.

success since they have not managed to challenge the dominant liberal “male” standard which is used to assess legal claims. This makes it very difficult for resident mothers to resist fathers’ shared residence applications. Moreover, it should be noted that any admittance of an ethic of care into family law faces a significant obstacle. There is already another discursive framework which has become dominant, prevailing even over law’s traditional ethic of justice; indeed, Geldof has complained of family law’s failure to recognise his “rights as a man”.¹⁴⁵

2.4 THE PARAMOUNTCY PRINCIPLE

The resolution of disputes between family members is most effectively achieved by finding workable solutions for all; there has consequently been a greater concern with promoting the wellbeing of those involved than in other branches of law.¹⁴⁶ In previous centuries this concern was fitted within law’s patriarchal framework. The best interests of a child were presumed to be aligned with the father’s interests, “the maintenance of his authority, and the stability of marriage”.¹⁴⁷ Consistent with the public/private dichotomy, a father was understood to be better placed to know what was best for his child than any external agency. However, this view has had to be adjusted in response to the 20th century understanding of children as precious and vulnerable.¹⁴⁸ In recent decades, the paramountcy principle “has become increasingly and more firmly entrenched” in the family law of most Western jurisdictions.¹⁴⁹ In the two jurisdictions studied, as in many other countries, the principle is interpreted to mean that the child’s welfare should be the court’s only relevant consideration; other factors should only be considered to the extent that they may impact on the child.¹⁵⁰ The popularity of the welfare principle is demonstrated by the large number of jurisdictions that employ it, its durability, and its strong symbolic appeal.¹⁵¹ It is difficult to argue with the proposition that children are vulnerable, and

¹⁴⁵ Geldof (2003) *op cit* n32, p180; Smart, C (2006) “The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood” in Diduck, A & O’Donovan, K (Eds) *Feminist Perspectives on Family Law*, Abingdon, Routledge-Cavendish, 123-138, p125.

¹⁴⁶ Reece (2003) *op cit* n141, p195.

¹⁴⁷ van Krieken (2005) *op cit* n1, p28.

¹⁴⁸ Rejmer (2003) *op cit* n2, p121.

¹⁴⁹ van Krieken (2005) *op cit* n1, p25.

¹⁵⁰ The Children Act 1989 s.1; FB6§2a; *J v C* [1970] AC 668; Proposition 1997/98:7, pp47-48.

¹⁵¹ Kurki-Suoni, K (1995) “Gemensam Vårdnad – Vad Döljer Man med Barnets Bästa?” in Nordborg, G (Ed) *13 Kvinnoperspektiv på Rätten*, Uppsala, Iustus Förlag, 169-196, p171; Sandberg, K (1989) “Best Interests and

that law's focus should be on helping them mature into well-adjusted adults (rather than on state or parental rights).¹⁵² However, the flexibility that is the principle's greatest strength is also its greatest weakness.¹⁵³ Whilst it is easy to endorse the general principle, it is considerably more difficult to give it content; to agree on how children's interests are best promoted.¹⁵⁴ As a standard it is "indeterminate and unpredictable".¹⁵⁵ Consequently, the law has come to rely on expertise from other social autopoietic subsystems, to provide these decisions with a more authoritative knowledge base than either judicial opinion or traditional fault- or gender-based rules of thumb, which are now perceived to be outmoded.¹⁵⁶

2.4.1 Law and Child Welfare Science

King and Piper have asserted that, as a result, a separate autopoietic subsystem has developed, which they have labelled child welfare science. Although initially an amalgam of predictions from medicine, psychology, psychiatry and social work about what is good for children, it has developed its own discursive identity, with its own meaning-making procedures and personnel, and with a binary code of "bad for children" or "good for children".¹⁵⁷ This system appears increasingly self-referential and self-reinforcing.¹⁵⁸

Researchers have found the participants in this new welfare discourse to be well-versed in structuring their communications to be heard by law.¹⁵⁹ However, it is too simplistic to assume that there has been a complete merger of these two discourses.¹⁶⁰ As has been seen, adherents to autopoietic theory assert that true communication between closed subsystems is impossible. What may look like genuine sharing of

Justice" in Smart, C & Sevenhuijsen, S (Eds) *Child Custody and the Politics of Gender*, London, Routledge, 100-126, p105.

152 Herring, J (2001) "Parents and Children" in Herring, J (Ed) *Family Law: Issues, Debates, Policy*, Cullompton, Devon, Willan Publishing, p165; Bartlett, K (1999) "Child Custody in the 21st Century", 35(3) *Willamette Law Review*, 467-482, p470.

153 Harris-Short, S & Miles, J (2007) *Family Law: Text, Cases and Materials*, Oxford, OUP, p595.

154 Rejmer (2003) *op cit* n2, p124.

155 Elrod, L & Dale, M (2008) "Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance", 42(3) *Family Law Quarterly*, 381-418, p392.

156 *Ibid*, p384; Smith (2004) *op cit* n6, p323; Kurki-Suonio (2000) *op cit* n141, p183.

157 King & Piper (1995) *op cit* n9, pxiii, p43.

158 Rejmer (2003) *op cit* n2, pp83-84, pp89-90; James, A, James, A & McNamee, S (2003) "Constructing Children's Welfare in Family Proceedings" *Family Law*, 889-895, p899.

159 Rejmer (2003) *op cit* n2, p134.

160 Smith (2004) *op cit* n6, p325; Rejmer (2003) *op cit* n2, pp111-112; King & Piper (1995) *op cit* n9, p34.

information is instead termed interference, where one subsystem creates “turbulence”, which forces the other subsystem to recreate this information and adjust its processes in a way largely pre-determined by its own existing structures.¹⁶¹ In the case of law and child welfare science, the two systems’ objectives and understandings of children remain incompatible.¹⁶² Moreover, commentators have detected signs of “growing legal imperialism or colonisation”: law is imposing its discursive frameworks where the languages of medicine or mediation were previously used, and since law enslaves other discourses, it reserves the right to reinterpret or reject child welfare science evidence.¹⁶³ It can be argued that law is, within both subsystems, perceived to be the more powerful; it is, therefore, the child welfare science subsystem that has to make changes to redress the contradictions created by interference.¹⁶⁴ Family law reforms, like individual court decisions, must be justified by reference to child welfare science findings. Data is used and presented as neutral, objective and scientific. Yet, in both these situations, law “hijacks” or enslaves child welfare knowledge by recreating it internally in a way that fits its existing cognitive framework and its purposes.¹⁶⁵ There are numerous examples of re-entry in law’s adoption of empirical work from the welfare sciences. There is, for instance, a large body of research on divorce, paternal involvement and child welfare; but recent overviews have reached agreement only on the impossibility of drawing any clear conclusions.¹⁶⁶ However, King and Piper have traced how influential research findings and theories from Bowlby in the 1960’s, Goldstein *et al* in the 1970’s, and Wallerstein and Kelly in the 1980’s have all been imported into law as simplified “quasi-legal principles”.¹⁶⁷ Social science *caveats* against the generalisation of study findings (expressed, for example, by Wallerstein and Kelly) are not heard by law since it is part of law’s *modus operandi* to generalise

¹⁶¹ Teubner (1993) *op cit* n3, p65, p81; King, M (1999) “Being Sensible: Images and Practices of the New Family Lawyer”, 28(2) *Journal of Social Policy* 249-273, p252.

¹⁶² King & Piper (1995) *op cit* n9, p70.

¹⁶³ Teubner (2001) *op cit* n16, pp33-34; Singer, J (2009) “Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift”, 47(3) *Family Court Review*, 363-370, p367; James, A (2003) “Squaring the Circle - the Social, Legal and Welfare Organisation of Contact” in Bainham *et al* (Eds) *op cit* n32, 133-151, pp141-142.

¹⁶⁴ Teubner (1993) *op cit* n3, p73, p81.

¹⁶⁵ Fineman & Opie (1987) *op cit* n123, p107; Teubner *et al* (2003) *op cit* n5, p37.

¹⁶⁶ Gilmore, S (2006a) “Contact/Shared Residence and Child Well-Being: Research Evidence and its Implications for Legal Decision-Making”, 20(3) *IJLPF*, 344-365, p346; Wilson, G (2006) “The Non-Resident Parental Role for Separated Fathers: A Review”, 20(3) *IJLPF*, 286-316, p290.

¹⁶⁷ Bowlby, J (1951) *Maternal Care and Maternal Health*, Geneva, Geneva World Health Organisation; Goldstein, J, Freud, A & Solnits, A (1973) *Beyond the Best Interests of the Child*, New York, Simon & Schuster; Wallerstein, J & Kelly, J (1980) *Surviving the Breakup: How Children and Parents Cope with Divorce*, London, Grant McIntyre; King & Piper (1995) *op cit* n9, p51.

and detect common patterns in order to deliver consistent judgments.¹⁶⁸ It should, moreover, be noted that not all findings from child welfare sciences are adopted; selections appear to be made.¹⁶⁹ Research from the early 1980's stressing the harm children suffer when their parents divorce was admitted into legal knowledge, but later research painting a more complex picture has been largely ignored.¹⁷⁰ Contemporary child welfare science is misunderstood as stipulating that children need both their parents. The section on permanent parenthood traced how law's definitions of family have changed to maintain links between fathers and children and thus obfuscate social change. Furthermore, the public/private dichotomy was identified as the cause of law's inability to value the unregulated (and thus invisible) care that is still provided primarily by mothers. As a closed, self-evaluating subsystem, law is unaware of this self-imposed blind spot.¹⁷¹ Thus, when the welfare principle mentions the child's need for continuing ties with both parents, this seemingly gender-neutral insistence is in fact gendered. The continuation of the mother's care is implicitly assumed so that the welfare test comes to focus almost exclusively on the child's need for a father, or the risk of harm if the father-child relationship is damaged.¹⁷²

In conclusion, law has enslaved child welfare science information to create "a selective and simplified version of welfare" with a rigid and patriarchal insistence on continuing father-child relationships.¹⁷³ Since children are thought to be unlikely to grow into healthy adulthood without fathers, fatherless families are dysfunctional, and legal intervention is consistent with the public/private dichotomy. As is discussed in later chapters, there is a very real risk that the shared residence order will come to be seen as a tool to fix these supposedly broken families, without any real consideration of whether this will, in fact, improve individual children's circumstances.

168 Wallerstein & Kelly (1980) *op cit* n170; Fineman & Opie (1987) *op cit* n123, p140; Teubner (1993) *op cit* n3, p65.

169 Diduck, A & Kaganas, F (1999) *Family Law, Gender and the State: Text, Cases and Materials*, Oxford, Hart Publishing, p276.

170 Barnett, A (2009) "The Welfare of the Child Re-Visited: In Whose Best Interests? Part I" *Family Law*, 50, p50; Kurki-Suonio (2000) *op cit* n141, p197.

171 Luhmann (1989) *op cit* n7, p145.

172 Okin (1994) *op cit* n82, p14; Tronto (1993) *op cit* n112, p111; Wallbank, J (1998) "Castigating Mothers: The Judicial Response to 'Willful' Women in Disputes over Paternal Contact in English Law", 20 *JSWFL*, 357-376, p367; Eriksson, M & Hester, M (2001) "Violent Men as Good Enough Fathers? A Look at England and Sweden" 7(7) *Violence Against Women*, 779-798, p780.

173 Kaganas, F & Piper, C (2002) "Shared Parenting - a 70% Solution?" 14(4) *CFLQ*, 365-379, p377.

2.5 REASONABLENESS

2.5.1 Introduction

The final section of this chapter focuses on the third important strand in contemporary family law; the insistence on ‘reasonableness’: conciliatory, responsible behaviour on the part of parents. The promotion of non-adversarial means of dispute resolution has been a long-term objective of family law in most Western jurisdictions.¹⁷⁴ This is not only because the welfare principle prohibits consideration of which parent deserves to win, but also due to a realisation that the results that can be achieved through the use of law are limited.¹⁷⁵ The adversarial process has been proven to be a largely ineffective or even counterproductive use of both individual and public resources, as “high-conflict parents” have kept their families “in perpetual turmoil” through hearings, appeals and new cases.¹⁷⁶ Consequently, the past two decades have seen “a paradigm shift” in how legal systems process disputes involving children.¹⁷⁷ Legislation is based on the assumption that parents can and should negotiate their own arrangements for their children and there is a well-documented “settlement culture”, where this message is conveyed by all professional groups.¹⁷⁸ This emphasis on private ordering, and on giving parents the freedom to negotiate their own agreements, could be seen as consistent with the traditional liberal public/private dichotomy. However, the focus on parental autonomy does not amount to a *carte blanche*. The law not only expects parents to take private responsibility for their children but also to exercise this in a

¹⁷⁴ Dewar (2000) *op cit* n75, p68, p75; Kurki-Suonio (2000) *op cit* n141, p188; Neale, B & Smart, C (1997b) “‘Good’ and ‘Bad’ Lawyers?: Struggling in the Shadow of the New Law”, 19(4) *JSWFL*, 377-402, pp379-381.

¹⁷⁵ James (2003) *op cit* n161, p134.

¹⁷⁶ Elrod & Dale (2008) *op cit* n158, p384.

¹⁷⁷ Singer (2009) *op cit* n161, p363.

¹⁷⁸ Bailey-Harris, R, Barron, J & Pearce, J (1999) “Settlement Culture and the Use of the ‘No Order’ Principle under the Children Act 1989”, 11(1) *CFLQ*, 53-62, p54, p61; Maclean, M & Mueller-Johnson, K (2003) “Supporting Cross-Household Parenting: Ideas about ‘the Family’, Policy Formation and Service Development across Jurisdictions” in Bainham *et al* (Ed) *op cit* n32, 117-132, p120; Bradley, D (1996) *Family Law and Political Culture*, London, Sweet & Maxwell p246; Saldeen, Å (2001) *Barn och Föräldrar (4:e upplagan)*, Uppsala, Iustus Förlag, p89.

responsible way.¹⁷⁹ Family lawyers are expected to encourage clients to settle, and also to steer them towards preferred solutions and get them to “act sensibly”.¹⁸⁰

2.5.2 A Paradigm Shift?

In 1995, King and Piper, writing from an autopoietic perspective, were pessimistic about law’s capacity for fundamental change in its approach to disputes over children.¹⁸¹ They contrasted the traditional retrospective adversarial approach with a more forward-looking, conciliatory “welfarist” approach as typified by mediation. The latter was described as involving a rewriting of parents’ stories which sought to focus attention away from past events, constructed both parents as having the capacity to be sensible and responsible, and facilitated compromise in order to avoid adversarial litigation.¹⁸² It is impossible to read these comments without noticing the striking changes that have occurred since they were made. The terminology used by mediators and child psychologists has replaced the adversarial language of taking sides, blame and fault.¹⁸³ It should be noted, however, that this change stops short of “shared normativity”;¹⁸⁴ what has been incorporated into law is the legal system’s own versions of “psychology-within-law” or “mediation-within-law”.¹⁸⁵ The legal subsystems can never fundamentally alter its character, since new components have to be created from existing components in compliance with existing internal structures and to suit existing purposes.¹⁸⁶ Thus, these new versions of welfare-related discourses differ markedly from the originals; they are, for example, more rigid in their hierarchies. The limited effect of this structural coupling can be seen *inter alia* in relation to mediation. Alternative forms of dispute resolution developed within different subsystems, but have increasingly been “colonised” by law.¹⁸⁷ Separating parents are encouraged, coerced or ordered into attending at all stages in

179 Eekelaar, J (1991) “Parental Responsibility: State of Nature or Nature of the State?”, 13(1) *JSWFL*, 37-50, p38.

180 Piper, C (1999) “How Do You Define a Family Lawyer?” 19(1) *Legal Studies* 93-111, p106; King, (1999) *op cit* n164, p37; Neale & Smart (1997b) *op cit* n177, p387.

181 King & Piper (1995) *op cit* n9, p138.

182 *Ibid*, p91, p94.

183 Singer (2009) *op cit* n161, p364; James (2003) *op cit* n161, p137; Piper (1999) *op cit* n183, pp100-101; Smart & Neale (1999) *op cit* n142, p156; King (1999) *op cit* n164, p271.

184 Teubner (1993) *op cit* n3, p65.

185 James (1992) *op cit* n161, p273; King & Piper (1995) *op cit* n9, p59.

186 Teubner (2001) *op cit* n16, p23; King & Piper (1995) *op cit* n9, p39.

187 James (2003) *op cit* n161, p141.

the legal process.¹⁸⁸ As mediation has been accommodated into the legal framework, the focus has been narrowed to agreement on the immediate issues rather than long term resolution of conflicts.¹⁸⁹ Mediation is often considered to be working well; but success is assessed solely in terms of quantity rather than the quality of the agreements reached.¹⁹⁰ Although the same terminology is used, words have been given slightly different meanings, and the objectives have been adjusted to suit law's purposes; it would not be an unreasonable observation to speak of law's enslavement of mediation.¹⁹¹

Secondly, family law's current emphasis on compromise and 'reasonableness' is the result of incorporation into law reform debate of external arguments (or interference) of a political nature. If law appears more powerful than child welfare science, and, thus, able to dismiss some child welfare communications as redundant "noise",¹⁹² the opposite is true in relation to law and politics.¹⁹³ Law is, according to Teubner, "determined to a considerable extent by political influences, economic structures, and social factors".¹⁹⁴ For the purposes of this thesis, it is useful to explore the influence of post-liberalism and communitarianism. It should be borne in mind, however, that the post-liberal and communitarian ideas explored within the politics autopoietic subsystem become something very different once admitted into law.¹⁹⁵ Communitarianism, as espoused by Etzioni, emphasises communities as counterbalances to both personal selfishness and excessive state power or bureaucracy.¹⁹⁶ The critique of liberalism's autonomous individual resonates well with contemporary fears about societal disintegration, as does the assertion that "state responsibility should be matched by individual responsibility".¹⁹⁷ Post-liberalist perspectives, moreover, reject the liberal reliance on individual autonomy

188 Ryrstedt, E (2009b) "Samarbetssamtal" *Svensk Juristtidning*, 821-842, p821; Carlsson & Rejmer (1998) *op cit* n12, p108.

189 Ryrstedt (2009b) *op cit* n191, p821.

190 Rejmer (2003) *op cit* n2, p118.

191 *Ibid*, pp94-95.

192 Teubner (1993) *op cit* n3, p103.

193 *Ibid*, pp70-71.

194 *Ibid*, p21.

195 *Ibid*, p23.

196 Etzioni, A (1995) *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda*, London, Fontana Press, p88 and Etzioni, A (1996) *The New Golden Rule: Community and Morality in a Democratic Society*, London, Profile Books, p7, both cited in Eekelaar, J (2001) "Family Law: The Communitarian", 21(1) *OJLS*, 181-190, p181; Fredman, S (2006) "Human Rights Transformed: Positive Duties and Positive Rights", *Public Law*, 498-520, p508; Gillies, V (2005) "Meeting Parents' Needs? Discourses of 'Support' and 'Inclusion' in Family Policy, 25(1) *Critical Social Policy*, 70-90, p74.

197 Reece (2003) *op cit* n141, p26; Gillies (2005) *op cit* n199, p74.

and freedom of choice as artificial. There is, instead, a more realistic recognition that individual characters are shaped by social experiences and relationships to such an extent that their choices cannot be regarded as truly autonomous.¹⁹⁸ The conclusion that choice is not really free has led to reinterpretation of autonomy and responsibility where decisions are appraised purely on how they are made; the emphasis is on reflection and self-discovery.¹⁹⁹ There is, however, a further strand to communitarianism. It has justly been criticised for its simplistic view of communities as essentially benign repositories of community norms, and the belief that these values can be acquired through participation in civic life.²⁰⁰ It is also seen as legitimate to use law to send normative messages expressing these shared values, and academic commentators in a number of disparate areas have identified the coercive potential of communitarianism's conclusion that "the state is better equipped to identify the common good than those selfishly interested in advancing their own private goals".²⁰¹ Etzioni saw a clear role for family law in halting family disintegration since "[l]aw in a good society is first and foremost the continuation of morality by other means".²⁰² The insistence on inclusion, as defined by subscribing to a shared set of norms and morals, means that policy on supporting parents "shades into authoritarian control".²⁰³ According to Reece, this leads to a "coercive slide" where the obligation to reflect is complemented by "an additional duty to reach the right result".²⁰⁴

These interferences from politics and mediation have had to be recreated within the legal subsystem using existing components: context-dependent ideals, recommendations and probabilities have been translated into abstract prescriptions and certainties. The good divorce, "the 'idealised' pole of a binary divide" is forward-looking, conciliatory and child-focused, preserving good links between all family members. Conversely, it is "bad" to focus on past behaviour, or to take an

198 Barlow A & Duncan S (2000) "Supporting Families? New Labour's Communitarianism And The 'Rationality Mistake': Part I" 22(1) *JSWFL*, 23-42, p25; Reece (2003) *op cit* n141, pp22-23.

199 Reece (2003) *op cit* n141, p46, pp209-210, p234.

200 Fredman (2006) *op cit* n199, p508; Eekelaar (2001) *op cit* n199, p190; Barlow & Duncan (2000) *op cit* n174, p25.

201 Hough, B (2001) "A Material Change of Use: The Rise and Rise of the Communitarian Model", *Journal of Planning & Environment Law*, 632-644, p632; Ramsa, P (2004) "What is Anti-social Behaviour?", *Criminal Law Review*, 908-925; Eekelaar (2001) *op cit* n199, p181.

202 Etzioni, A (1996) *The New Golden Rule*, London, Profile Books, p139, cited in Eekelaar (2001) *op cit* n199, p185.

203 Gillies (2005) *op cit* n199, p83.

204 Reece (2003) *op cit* n141, pp171-172, p79.

aggressive or adversarial stance.²⁰⁵ These classifications have “become entrenched through the cumulative effect of self-reinforcing professional received wisdom”.²⁰⁶ Thus, in legal discourse, if a responsible parent always puts the child first, recognising the child’s paramount need to know the other parent, and conflict *per se* is constructed as harmful, then parents who fight over matters such as contact or residence are *prima facie* in the wrong.²⁰⁷ Consequently, their objections are often dismissed or trivialised.²⁰⁸ As is argued in subsequent chapters, a presumption in favour of court-ordered shared residence should, therefore, be resisted on the grounds that it could expose parents and children to unjustifiable risks.

2.5.3 The Gendered Dimension

The insistence on reasonable, conciliatory parenting appears *prima facie* to apply equally to both sexes, but normative expectations are, in fact, highly gendered. Law, as a closed subsystem, is unable to interact directly with the parents who appear before it. Instead, individuals are reconstructed as semantic artefacts and the “role bundles” ascribed to fathers and mothers differ markedly.²⁰⁹ Constructions of fatherhood are characterised by flux or ambivalence, resulting from a tension between the breadwinner model and the new “hands-on” father.²¹⁰ Law seeks to encourage fathers to maintain an involvement with their children without any real consideration of what fathers ought to do and is reluctant to categorise litigants as “bad” fathers.²¹¹ Thus, a “powerful and culturally hegemonic representation of good, benign fatherhood in law” has emerged, but it is vague and hazy.²¹² Fathers’ active participation in parenting is neither expected nor subjected to any particular legal

205 Day Sclater, S (1999) *Divorce: A Psychosocial Study*, Aldershot, Ashgate, pp176-177 as cited in Reece (2003) *op cit* n141, p158.

206 Bailey-Harris *et al* (1999) *op cit* n181, p122.

207 Roche (1991) *op cit* n144, p347; Rejmer (2003) *op cit* n2, p56.

208 HMICA (2005) *Domestic Violence, Safety and Family Proceedings: A Thematic Review*, [2.27] – [2.29] as cited in Fortin, J, Ritchie, C & Buchanan, A (2006) “Young Adults’ Perceptions of Court-ordered Contact” 18(2) *CFLQ*, 211-230, p223; SOU 2005:43, p722, (report of a Swedish Commission of Inquiry, *Statens Offentliga Utredningar*, cited by the year and number of the report).

209 King & Piper (1995) *op cit* n9, p27; Rejmer (2003) *op cit* n2, p135.

210 Collier, R (2001) “A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices)” 28(4) *Journal of Law and Society*, 520-545, pp529-530; Burghes, L, Clarke, L and Cronin, N (1997) *Fathers and Fatherhood in Britain*, London, Family Policy Studies Centre/Joseph Rowntree Foundation, p11.

211 Day Sclater & Kaganas (2003) *op cit* n146, pp168-169.

212 Collier (2005) *op cit* n143, p514.

scrutiny; “virtually any involvement” has “come to be considered good-enough fathering”.²¹³

The contemporary construction of motherhood is also shaped by the tension between the Victorian domestic paradigm and the contemporary expectation that women can be successful in a variety of roles. However, the modern emphasis on child welfare, together with the construction of mothers as the primary “meeters” of children’s needs, has made the semantic artefact of mother more demanding.²¹⁴ At the same time, law’s relegation of typically female tasks such as caring for children into the private sphere allows it to ignore the gap between gender-neutral legislation and the gendered organisation of most families. Empirical research has suggested that fathers in particular find it very difficult to adapt to post-separation parenting because in their intact families their interaction with their children was predominantly mediated by the mothers.²¹⁵ Legal debate, however, remains focused on the problems of parent absence; the understanding of maternal care as a “natural outpouring of love” allows law to assume that mothers will remedy any paternal shortcomings.²¹⁶ The “idealised image of the separated family” obscures gendered inequalities, since mothers continue to shoulder the practical responsibilities, while decision-making must be shared with fathers.²¹⁷ This unequal distribution of rights and duties is particularly disappointing for women who do not judge post-separation relationships to be good enough to justify the efforts necessary to maintain them.²¹⁸ It is, however, difficult for mothers to complain. This is partly because “good” motherhood is understood in terms of self-sacrifice.²¹⁹ 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 need for fathers.²²⁰ Mothers

213 Eriksson & Hester (2001) *op cit* n175, p791; Lawler, S (1999) “Children Need but Mothers only Want: the Power of ‘Needs Talk in the Constitution of Childhood”, in Seymour, J & Bagguley, P (Ed) *Relating Intimacies: Power and Resistance*, Basingstoke, Macmillan Press Ltd, 64-88, p70.

214 Lawler (1999) *op cit* n216, p67.

215 Simpson *et al* (2003) *op cit* n138, p210; Smart & Neale (1999) *op cit* n142, p66.

216 Smart & Neale (1999) *op cit* n142, p67; McKie *et al* (2001) *op cit* n22, p236; Okin (1994) *op cit* n82, p14; O’Donovan, K (1993) *Family Law Matters*, Pluto Press, London, p76.

217 Ryrstedt in Larsson, C (2004) ”Samförstånd Till Varje Pris?”, 2 *rfv.se Tidning om Socialförsäkring*, 8-11, p8; Nordborg (1995) *op cit* n154, p140.

218 Smart & Neale (1999) *op cit* n142, p61; Maccoby & Mnookin (1994) *Dividing the Child: Social and Legal Dilemmas of Custody*, Harvard University Press.

219 Lawler (1999) *op cit* n216, p67.

220 Day Sclater & Kaganas (2003) *op cit* n146, p159; Smart & Neale (1999) *op cit* n142, p143.

who reject the dominant welfare rhetoric are condemned as “bad” and “selfish”.²²¹ Wallbank has suggested that the law’s strong reaction can be attributed to these women’s “twofold” treachery against the patriarchal norm: they are not only renouncing the stereotype of meek and selfless motherhood but are also rejecting the emotional and economic authority of a man inherent in the binuclear family.²²²

In conclusion, law has attempted to fit mediation’s construction of parents’ disputes as well as post-liberal and communitarian understandings of responsible behaviour into its pre-existing normative framework where child welfare is best promoted through continuing father-child ties within a binuclear, patriarchal family. The result is that law has altered its normative expectations, and has begun to judge mothers according to a binary code where those who fail to support the father-child relationship are “bad” mothers. Law’s coercive power is, however, hidden behind ostensible gender neutral and laudable exhortations to behave reasonably.

2.6 CONCLUSION

The closed nature of the legal autopoietic system has preserved a patriarchal cognitive framework, which still determines how law processes family disputes. The current stress on the permanent nature of parenthood is an attempt to protect patriarchal power structures, but this is hidden by the welfare discourse, where the child’s welfare is first stated to be paramount, and then interpreted primarily as the child’s need for a legal relationship with his or her father. The importation into law’s binary code of the language of mediation and post-liberal understandings of responsible behaviour have led to a rigid proscription of good post-separation parenting which law enforces by coercing parents, and mothers in particular. Thus, family law becomes another means of discouraging autonomous motherhood through the rhetoric of child welfare.²²³ This thesis argues that it is, in this discursive climate, undesirable and even dangerous to use the shared residence order in contested cases; it will develop this point further in subsequent chapters.

²²¹ Bailey-Harris *et al* (1999) *op cit* n181, p116; Smart & Neale (1999) *op cit* n142, p143.

²²² Wallbank (1998) *op cit* n175, p361.

²²³ Diduck, A (1995) “The Unmodified Family: The Child Support Act and the Construction of Legal Subjects”, 22(4) *Journal of Law and Society*, 527-548, p538.

3 WHAT IS KNOWN ABOUT SHARED RESIDENCE

3.1 INTRODUCTION

This thesis argues against a shared residence presumption and it is, therefore, important to examine what is currently known about the benefits or disadvantages of shared residence, and to consider in particular how these differ when the arrangement is imposed against the wishes of parents. The chapter is not confined to the two jurisdictions which are the subject of this thesis, but also includes material from the US, where the arrangement first gained popularity, as well as Commonwealth and other Scandinavian jurisdictions. The thesis argues that the implementation of a shared residence presumption would be shaped predominantly by the three dominant strands in contemporary family law and would, therefore, develop in an undesirable way. This chapter, thus, discusses available knowledge in relation to these themes: law's inherently patriarchal character; its rigid interpretation of what is in a child's best interests; and its insistence that parents must be reasonable. It concludes that shared residence should not be forced upon reluctant parents or children.

3.2 PERMANENT PATRIARCHAL PARENTHOOD

It may be thought that it is unnecessary to consider arguments based on patriarchy or fathers' rights given the dominance of the paramountcy principle; all arguments in residence disputes now have to be expressed in the dominant welfare language. The previous chapter traced how welfare has come to be understood primarily as the child's need for a father. Moreover, the welfare discourse is also often successfully used to clothe rights-based arguments with a veneer of respectability.¹

¹ Ryrstedt, E (2009b) "Samarbetssamtal" *Svensk Juristtidning*, 821-842, p839.

3.2.1 Shared Residence and Anxieties about Fatherlessness

These arguments can draw on a wealth of research which asserts that children living with separated single mothers are at greater risks than their counterparts from nuclear families, in terms both of external behaviours such as truancy or alcohol abuse, and internalising problems such as depression.² US studies have, moreover, claimed to link high father involvement to better outcomes for children in terms of development and adjustment; a large Norwegian study has suggested this cannot be attributed solely to the economic deprivation of single parent families.³ It has consequently been argued that shared residence, which is the post-separation arrangement which most closely mimics the intact family, can diminish the negative effects of parental separation.⁴

There is also research that claims to identify reasons why shared residence helps fathers have a positive impact in a child's life. Law's autopoietic nature means that research findings are more likely to be taken up by the legal system where they focus on the characteristics law conservatively associates with fatherhood. Amato and Gilbreth have suggested that shared residence helps fathers exert the kind of positive influence they identify as "authoritative parenting" and link to better outcomes for children.⁵ Other academics have also cited these findings to support shared residence on the grounds that this sort of involvement is more likely where parents are implementing children's everyday routines.⁶

Since father absence has been associated with negative outcomes, research has also focused on identifying factors which cause or prevent it. Kruk interviewed 80 US non-custodial fathers for his study on paternal disengagement and found that the

2 Amato, P (2000) "The Consequences of Divorce for Adults and Children" 62(4) *Journal of Marriage and the Family*, 1269-1287; Breivik, K & Olweus, D (2006b) "Children of Divorce in a Scandinavian Welfare State: Are they Less Affected than US Children?" 47(1) *Scandinavian Journal of Psychology*, 61-74.

3 Scott, E & Derdeyn, A (1984) "Rethinking Joint Custody", 45(2) *Ohio State Law Journal* 455-498, p487; Breivik, K & Olweus, D (2006a) "Adolescents' Adjustment in Four Post-Divorce Family Structures", 44(3) *Journal of Divorce and Remarriage*, 99-124, p112.

4 Scott & Derdeyn (1984) *op cit* n3, p458.

5 Amato, P & Gilbreth, J (1999) "Nonresident Fathers and Children's Well-Being: A Meta-Analysis", 61(3) *Journal of Marriage and the Family*, 557-573, pp558-559.

6 Bauserman, R (2002) "Child Adjustment in Joint-Custody versus Sole-Custody Arrangements", 16(1) *Journal of Family Psychology*, 91-102, p98; Buchanan, A & Hunt, J (2003) "Disputed Contact Cases in the Courts" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, 365-386, p367; Singer, A (2008) "Active Parenting or Solomon's Justice? Alternating Residence in Sweden for Children with Separated Parents", 4(2) *Utrecht Law Review*, 35-47, p44.

majority “indicated a feeling of exclusion in relation to the postdivorce family”.⁷ He saw fathers’ consequent disengagement as a direct consequence of the stilted nature of the traditional model.⁸ Similar claims have been made by fathers who complain of being relegated to the secondary status of a Sunday “McDad”.⁹ In Trinder’s sample, non-resident fathers complained that the loss of daily dealings with their children had caused a “sense of role insecurity”.¹⁰ Children interviewed for the same project reported that the artificial circumstances of contact visits stood in the way of meaningful relationships.¹¹ In a study by Simpson *et al*, many fathers “alluded to the sense of emotional distance” in their relationships with their children, and linked this to the loss of daily routines of child care and home-making.¹² Consequently, shared residence appears to provide the solution to father absence that law has been seeking. However, less appealing reasons why fathers want shared residence have also been identified in the research.

3.2.2 The Wrong Motives: Justice

There is evidence that shared residence is sometimes seen as a question of parental entitlement; a simple, formal interpretation of equality is employed to claim that a 50/50 split eliminates discrimination.¹³ Although this cannot be argued at court, where only welfare-related submissions are heard, it has been asserted sufficiently frequently and vociferously elsewhere to create what Teubner has termed turbulence; external interference which results in the closed system making internal changes to adjust.¹⁴ Empirical research also shows that some litigants do not subscribe to law’s dominant welfare discourse, but instead think in terms of justice and entitlement. Smart *et al* worryingly noted that for a significant minority of divorced fathers in their study, a rhetoric of legal rights had become a substitute for

7 Kruk, E (1994) “The Disengaged non-custodial Father: Implications for Social Work Practice with the Divorced Family”, 39(1) *Social Work*, 15-25, pp21-22.

8 *Ibid*, p23.

9 http://men.typepad.com/mens_hour/mcdad_day_demo_17_jun_2005/ accessed 12th August 2009.

10 Trinder, L (2003) “Working and Not Working Contact After Divorce” in Bainham *et al* (Eds) *op cit* n6, 387-406, pp390-391.

11 *Ibid*, pp390-391.

12 Simpson, B, Jessop, J & McCarthy, P (2003) “Fathers after Divorce” in Bainham *et al* (Eds) *op cit* n6, 201-219, pp212-213.

13 Fineman, M (2001) “Fatherhood, Feminism and Family Law”, 32(4) *McGeorge Law Review*, 1031-1049, pp1039-1040.

14 Teubner, G, Schiff, D & Nobles, R (2003) “The Autonomy of Law: Introduction to Legal Autopoiesis”, in Schiff, D & Nobles, R (Eds) *Jurisprudence*, London, Butterworths, 897-954.

bonds of affection.¹⁵ The authors warned that shared residence, as a modern version of Solomon's famous judgment, "might actually become a detrimental splitting of the child's time to provide equal parts to competing parents".¹⁶ Two studies conducted for the Swedish National Board of Health and Welfare (NBHW) and a Swedish Legislative Review Committee respectively also found substantial numbers of court cases where the focus had shifted away from the child onto the parents' needs and wishes.¹⁷

3.2.3 Shared Residence and Gender Equality

Fathers' rights campaigners tend, however, to have moved away from simple rights rhetoric and often promote shared residence as a route to greater equality between men and women: "[f]atherhood is now the key to feminism".¹⁸ It is said that a greater use of shared residence could help remould societal understandings of fathering, while also encouraging individual men away from traditional gendered patterns.¹⁹ The autopoietic perspective necessarily renders any response to such arguments pessimistic, following Teubner's assertions regarding the impossibility of true communication between systems, and the often unpredictable effects that result when one system attempts to influence another.²⁰ Indeed, law reform has repeatedly been shown to be an inefficient tool for changing individuals' behaviour, particularly in the area of familial organisation where cultural norms play a significant part, and a variety of other factors are known to influence decisions.²¹ Studies show that women continue to perform a disproportionate amount of caring/domestic tasks in intact families, leaving fathers underequipped for their post-divorce role.²² At present research suggests that many post-separation fathers continue to delegate

¹⁵ In contrast, fathers who had formed strong emotional links with their children tended to see the question of rights as superfluous. Smart, C & Neale, B (1999) *Family Fragments?*, Cambridge, Polity Press, p130, p165.

¹⁶ Neale, B, Smart, C & Wade, A (2001) *The Changing Experience of Childhood: Families and Divorce*, Cambridge, Polity Press, p126.

¹⁷ Socialstyrelsen (2004b) *Växelvis Boende. Att Bo Hos både Pappa och Mamma Fast De Inte Bor Tillsammans*, Stockholm, Socialstyrelsen, p37.

¹⁸ Geldof, B, "You Sit Outside and Wait and Sob", *The Times*, 5th December 2003.

¹⁹ *Ibid.*

²⁰ Teubner, G (1993) *Law as an Autopoietic System*, London, Blackwell, p14, p95.

²¹ Statistiska Centralbyrån (2004) *Barn of deras Föräldrar 2003*, Stockholm, SCB; Lundqvist, Å & Roman, C (2003) "Önska, Välja och Vilja", *Sociologisk Forskning*, 12-33, p26.

²² McKie, L, Bowlby, S & Gregory, S (2001) "Gender, Caring and Employment in Britain", 30(2) *Journal of Social Policy*, 233-258, p242; SOU 2004:70, p113 (Swedish Official Enquiry); Barry, M (1997) "The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions", 46(3) *Catholic University Law Review*, 767-834, p819.

practical caring responsibilities to female members of their extended families.²³ This can suggest not only unfamiliarity with the new role but perhaps also a reluctance to assume it.²⁴

Presumptions in favour of 50/50 have been criticised for granting fathers a stronger position “than their efforts in the care-taking of children should fairly allow”.²⁵ There are reasons justifying the courts’ current perceived preferential treatment of mothers; to disregard these reasons amounts to discrimination.²⁶ Mothers have, in several studies, expressed disappointment regarding gender neutral legislation that renders their parenting efforts during the relationship largely immaterial.²⁷ Sandberg has asserted: “the result of treating people equally when their situation is in fact different is a *de facto* inequality”.²⁸ This point is revisited towards the end of the chapter.

3.2.4 The Wrong Motives: Power and Financial Considerations

Similarly, greater use of court-ordered shared residence through the introduction of a presumption should be resisted on the grounds that it may perpetuate or exacerbate imbalances of power. In theory, disparities should disappear, since both parents are given equal responsibility and authority. However, family law has previously justifiably been criticised for ignoring hidden power relationships within families.²⁹ This could be attributed to law’s autopoietic nature, and the continuing influence of the public/private dichotomy, which allows law to dismiss information about the domestic sphere as redundant. There is ample evidence from England and Sweden of abusive men using court orders to harass their former partners and frustrate the

23 Smart & Neale (1999) *op cit*; Altman, S (1996) “Should Child Custody Rules be Fair?” 35(2) *University of Louisville Journal of Family Law*, 325-354, pp340-341.

24 Scott, E (1992) “Pluralism, Parental Preference and Child Custody”, 80(3) *California Law Review*, 615-672, pp635-636; Fineman, M & Opie, A (1987) “The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce”, *Wisconsin Law Review*, 107-158, p124.

25 Sandberg, K (1989) “Best Interests and Justice” in Smart, C & Sevenhuijsen, S (Eds) *Child Custody and the Politics of Gender*, London, Routledge, 100-125, p109; Scott (1992) *op cit* n24, p627.

26 Altman (1996) *op cit* n23, p340.

27 Laing, K (2006) “Doing the Right Thing: Cohabiting Parents, Separation and Child Contact”, 20(2) *IJLPF*, 169-179.

28 Sandberg (1989) *op cit* n25, p109.

29 Smart, C (1989b) “Power and the Politics of Child Custody” in Smart, C & Sevenhuijsen, S (Eds) *Child Custody and the Politics of Gender*, London, Routledge, 1-26, p25; Pearce, J, Davis, G & Barron, J (1999) “Love in a Cold Climate - Section 8 Applications under the Children Act 1989”, *Family Law*, 22-28, p25.

latter's efforts to rebuild self-esteem and parenting skills.³⁰ Since shared residence is known to require more frequent and more detailed negotiations between parents, it provides ample opportunities for this sort of harmful behaviour.³¹ In addition, research suggests that a larger proportion of fathers feel unhappy about a perceived loss of control to sole-residence mothers; they may seek shared residence primarily in the hope of avoiding negotiations they perceive as unnecessary, burdensome or demeaning.³²

There is so much anecdotal evidence from a number of jurisdictions that it seems clear that parents either request or resist shared residence for reasons related to child support and the allocation of state benefits.³³ In Sweden, surges in the popularity of shared residence in 1997 and 2000 coincided with changes in the child support calculations.³⁴ Two research projects interviewing National Insurance Bureaux (NIB) administrators have shown that the latter think all but a small minority of contact or residence disputes involve financial considerations, and that as many as a quarter of shared residence applications are motivated primarily by a wish to stop paying child support.³⁵ There are English reported cases where it would seem fathers have made shared residence applications chiefly or solely to escape child support or secure social housing.³⁶

Finally, interviews with family lawyers have suggested that fathers with these kinds of motives pose a double threat to children. Firstly, a parent who has sought shared

30 Hale, B (1999) "The View from Court 45", 11(4) *CFLQ*, 377-386; Eriksson, M & Hester, M (2001) "Violent Men as Good Enough Fathers?: A Look at England and Sweden" 7(7) *Violence Against Women*, 779-798, p792; Nilsson, E (1998) *Att Dela Ett Barn – Tvistiga Vårdnadsmål*, Stockholm, Stiftelsen Allmänna Barnhuset & Socialstyrelsen, p50.

31 Johnson, J (1994) "High Conflict Divorce" 4 *The Future of Children* 165-182 as cited in Cossman, B & Mykitiuk, R (1998) "Reforming Child Custody and Access Law in Canada: A Discussion Paper", 15 *Canadian Journal of Family Law*, 13-78, p53.

32 Socialstyrelsen (2004b) *op cit* n17, p21; Smart & Neale (1999) *op cit* n15, p145; Rhoades, H (2002) "The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New Father'", 16(1) *IJLPF*, 71-94, p72.

33 Singer, A (2008) "Active Parenting or Solomon's Justice? Alternating Residence in Sweden for Children with Separated Parents", 4(2) *Utrecht Law Review*, 35-47, p46; Socialstyrelsen (2004b) *op cit* n17, p30; Elrod, L & Dale, M (2008) "Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance", 42(3) *Family Law Quarterly*, 381-418, p399.

34 Saldeen, Å (2001) *Barn och Föräldrar (4:e upplagan)*, Uppsala, Iustus Förlag, p192; Socialstyrelsen (2004b) *op cit* n17, p38.

35 Singer (2008) *op cit* p45; Interview with Eva Ryrstedt in Larsson, C (2004) "Samförstånd Till Varje Pris?", 2 *rfo.se Tidning om Socialförsäkring*, 8-11, p9.

36 *Child-Villiers v Secretary for Work and Pensions* [2002] EWCA Civ 1854; *Holmes-Moorhouse v Richmond LBC* [2009] UKHL 7. The House of Lords, however, upheld the council's decision that under the Housing Act 1996 s.198(1)(b) it did not have to house the father, as he was not someone with whom children could reasonably be expected to reside.

residence for financial reasons, for example, may actually use that time to improve the relationship, but it would be overly optimistic to assume this will always be the case.³⁷ Secondly, the experience of many legal personnel is that where parents seek orders with the wrong objectives, children are often disappointed by fathers' subsequent lack of interest.³⁸ One solicitor interviewed by Bailey-Harris *et al* commented that he had "a filing cabinet full" of contact cases where fathers had used the legal process "as a way of control", but had subsequently taken so little interest in the children that contact was eventually abandoned.³⁹ The story was by no means unique.⁴⁰ Shared residence is known to be a practically and financially demanding arrangement, which is particularly likely to be abandoned.⁴¹ Parents who seek it for selfish reasons are, thus, unlikely to continue making the necessary sacrifices over long periods of time. In these circumstances, shared residence harms children. Family law is unlikely to be able to identify these cases, due to its self-imposed inability to see the domestic as well as its documented reluctance to question fathers' motives. There is now widespread agreement, at least in principle, that shared residence should only be ordered where it is in children's best interests, and this chapter, therefore, continues by exploring the relationship between shared residence and the welfare test.

3.3 THE PARAMOUNTCY PRINCIPLE

Courts deciding residence and contact disputes have increasingly come to depend on child welfare science expertise, but since an autopoietic subsystem can only admit information that is compatible with its own cognitive framework, law's understanding of this information is only partial.⁴² It is, therefore, important to examine what the research evidence can contribute to this debate.

³⁷ Ryrstedt, E (2006) "Family Law and Social Law: Reciprocal Dependency in a Comparative Perspective", 20(1) *IJLPF*, 44-52, pp47-48.

³⁸ Extra-judicial observations by Hall J, based on the experience of hearing contact cases. Hall, V (1997) "Domestic Violence and Contact", *Family Law*, 813-818, p817; King, M (1987) "Playing the Symbols – Custody and the Law Commission", *Family Law* 186-191, p188.

³⁹ Bailey-Harris, R, Barron, J & Pearce, J (1999a) "From Utility to Rights? The Presumption of Contact in Practice", 13(2) *Journal of Law, Policy and the Family*, 111-131, p122.

⁴⁰ *Ibid.*

⁴¹ Smart & Neale (1999) *op cit* n15, p23; Socialstyrelsen (2004b) *op cit* n17, p12.

⁴² Rejmer, A (2003) *Vårdnadstvister: En Rättssociologisk Studie av Tingsrätts Funktion vid Handläggning av Vårdnadskonflikter med Utgångspunkt från Barnets Bästa*, Lund, Sweden, Lund Studies in the Sociology of Law, p46.

3.3.1 Shared Residence and Empirical Research

Within legal discourse, selectively admitted and reinterpreted child welfare knowledge is used by proponents of shared residence to assert that its merits have been proven through empirical research. Benefits in terms of children's adjustments have been found by some studies; such findings must, however, be treated with caution.⁴³ The samples of many early studies were comprised exclusively of volunteers; the results cannot be used to support court-imposed shared residence. Furthermore, most of the studies usually cited in support of shared residence have subsequently been shown to suffer "serious methodological shortcomings".⁴⁴ There is a lack of reliable findings from longitudinal or large-scale studies; samples are often comprised of self-selecting, or homogenous groups, and there are no attempts to consider the impact of other, unidentified, variables.⁴⁵ Finally, there is a tendency of "mixing correlation with cause".⁴⁶ Since the research is "necessarily relational rather than experimental in nature" there can be no firm evidence of a causal effect between shared residence and improved outcomes for children.⁴⁷ More recent work has acknowledged the importance of self-selection: parents who get along tolerably well are more likely to choose shared residence; and that this is probably the main explanation for better relationships within shared residence families.⁴⁸ It cannot, therefore, be said as a general assertion that shared residence has been proven to benefit children. A comprehensive review of existing research carried out for the Washington State Supreme Court concluded that no particular post-separation custody arrangement could be proven to be the best.⁴⁹ The same conclusion was drawn by the Swedish National Board of Health and Welfare as well as two overviews of research published in UK journals.⁵⁰ According to Gilmore, "[t]he most consistent finding across research studies is that child outcome is largely

43 Gilmore, S (2006a) "Contact/Shared Residence and Child Well-Being: Research Evidence and its Implications for Legal Decision-Making", 20(3) *IJLPF*, 344-365, p346.

44 Singer, J & Reynolds, W (1988) "A Dissent on Joint Custody", 47(2) *Maryland Law Review*, 497-523, p507.

45 Bauserman (2002) *op cit* n6, p99; Socialstyrelsen (2004b) *op cit* n17, p16; Gustavsson, T (1999) "Barn- och Ungdomspsykiatriska Synpunkter på Vårdnad, Boende och Umgänge" in Ds1999:57, Appendix 1, p126; Amato & Gilbreth (1999) *op cit* n5, p561.

46 Barlow A & Duncan S (2000b) "New Labour's Communitarianism, Supporting Families And The 'Rationality Mistake': Part II" 22(2) *JSWFL*, 129-143, p134.

47 Bauserman (2002) *op cit* n6, p92; Gilmore (2006a) *op cit* n43, p344.

48 Breivik & Olweus (2006a) *op cit* n3, p119; Bauserman (2002) *op cit* n6, p98.

49 Lye, D (1999) *What the Experts Say: Scholarly Research on Post-Divorce Parenting and Child Wellbeing* 4-2, as cited in *In Re Marriage of Hansen* (2007) 733 N.W.2d 63 per Appel J at p19.

50 Gilmore (2006a) *op cit* n43, p346; Wilson, G (2006) "The Non-Resident Parental Role for Separated Fathers: A Review", 20(3) *IJLPF*, 286-316, p290.

independent of custody type”.⁵¹ There is, thus, no child welfare science support for a presumption.

3.3.2 Is Shared Residence too Disruptive?

It can now be considered to have been reliably proven through empirical study that successfully implemented and long-lasting shared residence arrangements are not *per se* harmful to children.⁵² There is no need for law to stop parents where both agree to have the children alternating between their homes. Reservations have, nonetheless, been expressed that shared residence can prove too disruptive. In Sweden there is a general professional consensus that children under the age of three should not be subjected to shared residence, since they have a different sense of time, and need stability to establish developmentally vital parent-child bonds.⁵³ There are US studies which suggest that school-age children can also find the different sets of rules about bedtimes, television or mealtimes a source of confusion.⁵⁴ For older children, developmental psychologists increasingly emphasise children’s need to create their own social matrixes and diverse relationships.⁵⁵ Shared residence is known to disrupt interaction with siblings, peer groups and the child’s school; it can make children feel different and detached.⁵⁶ Some children cope well with the frequent transitions; they see them as a price worth paying for the advantages of living with both parents, or even describe them as “an exciting expansion of their horizons”.⁵⁷ Modern technology has made it easier for older children to maintain contact with friends and set up social activities, despite geographical distances. Others, however, find the frequent changes a strain. One of the teenagers interviewed for the Swedish National Board of Health and Welfare Report complained: “There have been times when I’ve thrown myself on the bed and shouted ‘I can’t do this again!’. It just feels like too much to pack everything up and

51 Gilmore, S (2006b) “Court Decision-making in Shared Residence Order Cases: A Critical Examination”, 18(4) *CFLQ*, 478-498, p493.

52 Gilmore (2006a) *op cit* n43, p355.

53 Broberg, A & Bohlin, G (2001) ”Växelvis Boende för Små Barn: Utvecklingspsykologiska Aspekter” in Socialstyrelsen (2004b) *op cit* n17, pp55-56; Barnombudsmannen (2000) *Barndom Pågår*, BO, Stockholm, pp113-114. Melli, M & Brown, P (2008) “Exploring a new Family Form – the Shared Time Family”, 22(2) *IJLPF*, 231-269, p240.

54 Kipp, M (2003) “Maximizing Custody Options”, 79(1) *North Dakota Law Review*, 59-82, p72.

55 Socialstyrelsen (2004b) *op cit* n17, p9; Broberg & Bohlin (2001) *op cit* n53, 49-63; SOU 2005:43, p161.

56 Neale *et al* (2001) *op cit* n16, p128, p132; Barry (1997) *op cit* n22, p787.

57 Neale *et al* (2001) *op cit* n16, p128.

re-adjust to another place one more time”.⁵⁸ Two-thirds of the children in Rothberg’s shared residence sample expressed negative feelings about the frequent moves.⁵⁹ Smart *et al* noted that adapting to two different regimes “could require an astonishing amount of flexibility”; one interviewee said: “I find that I’m a different person at different houses”.⁶⁰ Although children quickly learn to adapt to different environments such as school, childminders’ or relatives’ homes, “what one ‘is’ at home is often experienced as a ‘core’ identity”, and where this is unclear it can upset a child’s “sense of ontological security”.⁶¹ It is interesting to note that in McIntosh’s sample shared residence was a less likely outcome in families where children were consulted, suggesting that children are less likely than adults to favour this arrangement, since they are the ones who have to make the greatest sacrifices.⁶²

3.3.3 Shared Residence and Parent-Child Relationships

Research evidence provides no clear conclusion on whether this is a price worth paying. It has been argued that shared residence can improve the quality of parent-child relationships by providing better opportunities for parents to act as confidants and role models.⁶³ It is known that it can limit the actual loss of emotional and material resources otherwise experienced by children; and can also offer children a sense of continuity of relationships.⁶⁴ If loyalty conflicts are removed and children can maintain their relationships with each parent without upsetting the other, this not only removes one source of stress, but can also provide the emotional security needed to cope with other pressures.⁶⁵ However, children who struggle with the frequent transitions, or find their parents less accommodating, may feel “left out of both households” rather than welcome in two homes.⁶⁶

58 Teenager quoted in Socialstyrelsen (2004b) *op cit* n17, p32.

59 Rothberg, (1983) “Joint Custody: Parental Problems and Satisfaction”, 22(1) *Family Process*, 43, quoted in Scott & Derdeyn (1984) *op cit* n3, pp485-486.

60 Rachel, aged 16, quoted in Neale *et al* (2001) *op cit* n16, pp129-130.

61 *Ibid*, p129.

62 McIntosh, J (2009) “Legislating for Shared Parenting: Exploring some Underlying Assumptions”, 47(3) *Family Court Review*, 389-400, p396.

63 Melli & Brown (2008) *op cit* n53, p250; Singer (2008) *op cit* n6, p42; Gustavsson (1999) *op cit* n45, p126.

64 Wallerstein, J & Blakeslee, S (1989) *Second Chances: Men, Women and Children a Decade after Divorce*, New York, Tickner & Fields, p257 as cited in Kipp (2003) *op cit* n54, p75; Breivik, K & Olweus, D (2006a) “Adolescents’ Adjustment in Four Post-Divorce Family Structures”, 44(3) *Journal of Divorce and Remarriage*, 99-124, p103; Bauserman (2002) *op cit* n6, p92.

65 Amato & Gilbreth (1999) *op cit* n5, p559; Socialstyrelsen (2004b) *op cit* n17, p42; Nilsson (1998) *op cit* n30, p40.

66 Harty, M & Wood, J (1991) “From Shared Care to Shared Residence”, *Family Law*, 430-433, p431; Neale, B, Flowerdew, J & Smart, C (2003) “Drifting Towards Shared Residence?”, *Family Law*, 904-908, p905.

Shared arrangements allow for the considerable burdens of childcare to be shared; children should consequently benefit from better parenting from both adults.⁶⁷ In Maccoby and Mnookin's study, adults whose children were in dual residence reported fewer difficulties in finding quality time for their children.⁶⁸ However, it cannot be assumed that all parents will use their time this way. The increasing popularity of shared residence may be partly because this time-sharing arrangement allows mothers, as well as fathers, to fit their parenting around their careers, social lives and new relationships.⁶⁹ The creation in Sweden of the specific new term of *barnbollning* – child juggling – suggests there is some truth to this.⁷⁰ If the child, too, forms this view of the arrangement it cannot bring the benefits of emotional security detailed above. It is acknowledged that where both parents agree, there is very little the law can do to prevent this misuse of shared residence, but attributing greater weight to one parent's objections should go a considerable way towards eliminating this risk.

The available research suggests that the success of shared residence depends on a variety of variables. For example, several studies have shown that siblings can report markedly different levels of satisfaction with shared residence.⁷¹ It is reasonable to presume that children's individual characteristics are important, and that children must be consulted in order to ensure that the decision to share residence is in their best interests. In McIntosh's study, shared residence arrangements were more likely to last in families where the children had been consulted prior to their implementation.⁷² Moreover, children who are consulted by their parents and feel they can influence arrangements tend to report higher levels of

67 Breivik & Olweus (2006a) *op cit* n3, p103; SOU 2005:43, p160; Socialstyrelsen (2004b) *op cit* n17, p40.

68 Maccoby, E & Mnookin, H (1994) *Dividing the Child: Social and Legal Dilemmas of Custody*, Harvard, Harvard University Press, p209.

69 McIntosh (2009) *op cit* n62, p391; *Svenska Dagbladet*, 24th October 2005, 3rd November 2005, 6th November 2005.

70 *Svenska Dagbladet* 3rd November 2005.

71 Buchanan, C, Maccoby, E & Dornbusch, S (1996) *Adolescents after Divorce*, Cambridge MA, Harvard, Harvard University Press and Skørten, K, Barlindhaug, R & Lidén, H (2007) *Delt Bosted for Barn*, Oslo, Gyllendal, as cited in Skjørten, K & Barlindhaug, R (2007) "The Involvement of Children in Decisions about Shared Residence", 21(3) *International Journal of Law Policy and the Family*, 373-385, p383.

72 McIntosh (2009) *op cit* n62, p396.

satisfaction with shared residence.⁷³ Again, this weighs against court-ordered shared residence since, as will be explored in subsequent chapters, children's individual views are often lost in contested proceedings.

One variable that appears very important is the quality of the relationship between the child and the parent who would otherwise not have had residence. US research has shown contradictory results on the relationship between frequent contact and children's outcomes; something which suggests that certain aspects of this contact are likely to be significant in determining its value to children.⁷⁴ Research in intact families has shown that what fathers do with children is more important than how much time they spend with them.⁷⁵ The meta-analysis of shared residence-related studies carried out by Amato and Gilbreth suggested strongly that the same applies to non-resident fathers.⁷⁶ "[A]uthoritative parenting", defined as a combination of a high level of involvement and support and a moderate level of discipline and guidance, could be associated with better outcomes for children in terms of academic achievement as well as internalizing and externalizing problem behaviours.⁷⁷ It is true that this sort of involvement is more likely to occur if parents can participate in children's daily lives "without worrying about making every minute fun".⁷⁸ However, whether it does in fact occur depends to a large extent on the adults involved. Competent fathers need to be both committed and capable; they must have developed the skills which enable them to parent in a child-focused and effective way.⁷⁹ Where fathers neither possess nor actively seek these skills, but are content to leave the relationship at the superficial level, shared residence cannot be presumed to benefit their children.⁸⁰

73 Cashmore, J (2003) "Children's Participation in Family Law Matters" in Hallet, C & Prout, A (Eds) *Hearing the Voices of Children: Social Policy for a New Century*, London, Routledge, 158-176 as cited in Skjærten & Barlindhaug (2007) *op cit* n71, p383.

74 Amato & Gilbreth (1999) *op cit* n5, p564.

75 Young, M, Miller, B Norton, M & Hill, E (1995) "The Effect of Parental Supportive Behaviors on Life Satisfaction of Adolescent Offspring", *Journal of Marriage and the Family*, 813-822, as cited in Amato & Gilbreth (1999) *op cit* n5, p559.

76 Amato & Gilbreth (1999) *op cit* n5, p569.

77 The usual caveats were, however, expressed: "the direction of causal influence may run the other way" or the association may be "caused by a third variable", Amato & Gilbreth (1999) *op cit* n5, p568, pp558-559.

78 Kipp (2003) *op cit* n54, p70.

79 Lamb, M (1997) *The Role of the Father in Child Development (3rd Ed)*, New York, Wiley as cited in Amato & Gilbreth (1999) *op cit* n5, p569.

80 Amato & Gilbreth (1999) *op cit* n5, p569; Hunt, J, Masson, J & Trinder, L (2009) "Shared Parenting: the Law, the Evidence and Guidance from Families Need Fathers", *Family Law*, 831-836, p834.

This section has reviewed the available research to conclude that shared residence cannot be said to be uniformly good or bad; whether it benefits any particular child can only be determined by looking at the particular circumstances of that case. The limited extent to which such enquiries are currently conducted is used in subsequent chapters to argue against shared residence.

3.4 REASONABLENESS

The final section of this chapter revisits family law's insistence on "reasonableness": sensible, responsible behaviour on the part of parents. It was explained in the second chapter that family law tends to favour compromise; has become increasingly reluctant to intervene; and prefers to equip parents to litigate "in the shadow of the law" by communicating its normative expectations through legal personnel.⁸¹ Parents must understand the need to promote their children's long-term interests by toning down their own conflicts and learning to co-parent in a sensible way.⁸²

3.4.1 The Potential for Conflict Reduction

It has been suggested that shared residence will reduce hostility because it introduces new, less adversarial language, but experience from several jurisdictions shows that new terminology becomes just as contentious and value-laden as the previous terminology once it is used in parents' conflicts.⁸³ Shared residence is said to reduce conflict, since the equal distribution of rights and responsibilities means there is neither winner nor loser.⁸⁴ It may be thought that the requirement for frequent communication will increase the opportunities for parents to disagree. However, it has been said that shared residence can help parents learn vital co-parenting skills, that the closer collaboration will, "[i]n layman's terms", force parents to "get their act together and keep it that way".⁸⁵ There may be some moral force in the

81 Maccoby & Mnookin (1994) *op cit* n68; King, M (1999) "Being Sensible: Images and Practices of the New Family Lawyer", 28(2) *Journal of Social Policy* 249-273; Neale, B & Smart, C (1997b) "'Good' and 'Bad' Lawyers? Struggling in the Shadow of the New Law", 19(4) *JSWFL*, 377-402, pp379-381.

82 van Krieken, R (2005) "The 'Best Interests of the Child' and Parental Separation: On the 'Civilizing of Parents'", 68(1) *MLR*, 25-48, p37.

83 Elrod & Dale (2008) *op cit* n33, p398; Rejmer, A(2002) "Barnperspektiv och Barnet Bästa i Tingsrätts Handläggning av Vårdnadstvister", *Svensk JuristTidning*, 139-156, p147.

84 Harty & Wood (1991) *op cit* n66, p430; Altman (1996) *op cit* n23, p334.

85 McIntosh (2009) *op cit* n62, p395; Statistics Sweden, cited in *Svenska Dagbladet*, 20th October 2005.

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”.⁸⁶ Nevertheless, there is no empirical evidence to support the idea that parents can learn this way; the available studies suggest the opposite.⁸⁷ Smart *et al* found that families with traditional sole-residence-and-contact arrangements contained conflict better than their shared residence counterparts.⁸⁸ Clearer roles, less negotiation and greater individual freedom for both parents were identified as possible reasons, as were the comparatively lighter financial and emotional costs involved.⁸⁹ This study also echoed findings by Maccoby and Mnookin that degrees of parental collaboration tended to diminish over time, even where practical care was still shared on an approximately equal basis.⁹⁰

McIntosh has concluded that while the assumption that parents will ‘learn to get their act together’ may work in some instances, “[t]his logic falters with complex, conflicted families”, i.e. the sort of families who are most likely to resort to adjudication to resolve their disputes.⁹¹ Parents with shared parenting have been shown, in several studies, to be just as likely to feel negatively about each other as other parents.⁹² Shared residence “is not necessarily the product of a shared commitment to its ethos” but may instead, according to Smart and Neale, represent “an uneasy compromise” or a temporary stalemate.⁹³ One Swedish parent described shared residence as “a balance of terror” rather than peace: negotiations had broken down and a 50/50 split was seized upon to put the conflict on hold.⁹⁴ Such truces are unlikely to last, and several studies have shown shared residence to be less stable than sole residence alternatives.⁹⁵ This is particularly so where parents have not freely agreed; in McIntosh’s sample, families who had voluntarily chosen shared residence were more than twice as likely to remain committed to it than the families

86 Kipp (2003) *op cit* n54, p71.

87 SOU 2005:43, p161; Singer (2008) *op cit* n6, p42; Gilmore (2006a) *op cit* n43, p350; Rhoades (2002) *op cit* n32, p87; Maccoby & Mnookin (1994) *op cit* n68, p236.

88 Smart & Neale (1999) *op cit* n15, p63.

89 *Ibid*, p59, p63.

90 Maccoby & Mnookin (1994) *op cit* n68.

91 McIntosh (2009) *op cit* n62, p395.

92 Smart & Neale (1999) *op cit* n15, p60; Maccoby & Mnookin (1994) *op cit* n68, p51.

93 Smart & Neale (1999) *op cit* n15, p60.

94 “Med Barnen som Vapen: Vi Ville ha Stöd inte Världskrig”, *Dagens Nyheter*, 27th November 2001.

95 Singer, J (2009) “Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift”, 47(3) *Family Court Review*, 363-370, p367; McIntosh (2009) *op cit* n62, p395; Smart & Neale (1999) *op cit* n15, p76.

who had been coerced into trying shared residence.⁹⁶ In the entire sample, only one-third of all shared residence arrangements were still in place after one year; after four years, that figure had fallen to 17%.⁹⁷ A qualitative study carried out for the Swedish NBHW report found that half of the court-ordered shared residence arrangements in the sample had been abandoned after one year, with parents reporting that shared residence had failed to remedy their previous inability to communicate.⁹⁸ These research findings must constitute a strong argument against a shared residence presumption, which would be likely to make the judiciary more willing to impose shared residence despite one parent's objections. It can be argued to be contrary to the no-order principle's stipulation that orders should only be made where children are shown to benefit.⁹⁹ Abandoned shared residence schedules, consequent renegotiations, and further litigation are likely to impact negatively upon children.

3.4.2 Shared Residence can be Counterproductive

There is also evidence that suggests that shared residence can be bad for children in cases where it does last, and that this is particularly likely to be the case when parents have been coerced or ordered to share residence. Research for a Norwegian commission of inquiry found that forcing shared residence on reluctant parents did nothing except expose children to harmful conflict. As a result of its recommendation, the legislation was amended to prohibit shared residence where one parent objects.¹⁰⁰ Similarly, the NBHW report concluded from its small study that the imposition of a shared residence arrangement often amplified existing conflicts.¹⁰¹ Melli and Brown found that the frequent contact needed for shared parenting meant those parents were more likely to report disagreements.¹⁰² This is an important aspect of the general evaluation of shared residence, since there is "a substantial body of research" which has identified a link between interparental

⁹⁶ McIntosh (2009) *op cit* n62, p394.

⁹⁷ *Ibid.*

⁹⁸ Socialstyrelsen (2004b) *op cit* n17, p8.

⁹⁹ The Children Act 1989 s.1(5).

¹⁰⁰ NOU 1998:17 p80, [12.4.1].

¹⁰¹ Socialstyrelsen (2004b) *op cit* n17, p8, p36.

¹⁰² Melli & Brown (2008) *op cit* n53, p252.

conflict and poor outcomes for children.¹⁰³ It may explain why frequent contact with both parents seems to benefit children in harmonious families, yet the same amount of contact in highly conflicted families appears to have the opposite effect.¹⁰⁴ Buchanan *et al* found links between family conflicts and depression, anxiety and “deviant behaviour” in adolescents. They also noted that among teenagers in hostile families, shared residence increased the incidence of these negative feelings.¹⁰⁵

Johnston *et al*, whose sample consisted exclusively of high-conflict families, found no benefits associated with joint custody.¹⁰⁶ The authors in fact cautioned against shared parenting in such families since children are likely to be harmed by exposure to “toxic inter-personal dynamics” and the parents’ decreased ability to respond to the children.¹⁰⁷ The findings are consistent with other empirical work that has shown that the parents with the worst conflicts are also the ones most likely to lack the resources to improve their situations.¹⁰⁸ In Johnston’s sample, two-thirds of parents could be identified as having personality disorders.¹⁰⁹ There is also research which suggests that a small (but not insignificant) minority of parents actively seek to perpetuate their conflict regardless of any legal measures taken to resolve disagreements over particular issues.¹¹⁰ The fact that parents have “exhausted the dispute resolution continuum” of private negotiation, mediation and pre-trial discussions without being able to reach agreement should be seen as a contraindication of shared residence since such parents are “unlikely to be good candidates for future joint decision making”.¹¹¹

The demanding nature of shared residence means that the young people subjected to it need to feel like active participants, but young people have in several studies

¹⁰³ Gilmore (2006a) *op cit* n43, p350.

¹⁰⁴ Amato & Gilbreth (1999) *op cit* n5, p560.

¹⁰⁵ Buchanan, C, Maccoby, E & Dornbusch, S (1996) *Adolescents After Divorce*, Cambridge, Harvard University Press, p79, as cited in Gilmore (2006a) *op cit* n43, p356.

¹⁰⁶ Johnston, J, Kline, M & Tschann, J (1989) “Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access”, *American Journal of Orthopsychiatry*, 576-592 as cited in Bauserman (2002) *op cit* n6, p92.

¹⁰⁷ Johnston, J (1995) “Research Update” *Family and Conciliation Courts Review*, 415-425.

¹⁰⁸ Johnston (1994) *op cit* n31, p176; Ekbom, I & Landberg Å (2007) *Innerst Inne var man Rädd*, Stockholm, Rädda Barnen & Socialstyrelsen, p29; Rejmer (2003) *op cit* n42, pp78-79, p342.

¹⁰⁹ Johnston (1994) *op cit* n31, p176.

¹¹⁰ Special Joint Committee of the Parliament of Canada (1998) *For the Sake of the Children: Report on Child Custody and Child Access*, p73 as cited in Elrod & Dale (2008) *op cit* n33, p388.

¹¹¹ Singer (2009) *op cit* n95, p368. A similar decision was taken by Appel J after a careful review of existing research in *In Re Marriage of Hansen* (2007) 733 N.W.2d 63.

complained of being treated like objects and feeling like “pawns in an ongoing war”.¹¹² The practical inconveniences of frequent changeovers were exacerbated by inflexible parents whose hostility prevented the retrieval of football kits or favourite toys.¹¹³ The above points form a strong argument against forcing resistant parents into closer contact, on the grounds that it is unlikely to work but, instead, actually harm children.

3.4.3 Shared Residence, Practicalities and Gendered Practices

This section will now continue by exploring financial and practical issues; these not only provide opportunities for parental disagreement, but are also relevant when examining the assertion that a shared residence presumption could help improve gender equality through a fairer distribution of the burdens associated with raising children. The practical and financial obstacles associated with providing two permanent homes, adjusting parents’ working hours and coordinating transport are considerable *per se*, and are, furthermore, exacerbated by the novelty of shared residence, which means that most jurisdictions’ benefits systems are not designed to accommodate it.¹¹⁴ Whilst the long-term solution lies in changes to state measures, the difficulties experienced by parents must be acknowledged, as must the risk that children’s living arrangements are determined by factors unrelated to their best interests. Moreover, mothers are disproportionately affected. Many are “doubly disadvantaged” by the contradiction between the clean-break principle and permanent parenthood. Mothers often bear the negative consequences of the resolution of the economic partnership, while also being disproportionately restricted by the demands of continuing joint decision-making about the children.¹¹⁵ Smart *et al* found that shared residence constituted a substantial limitation of the individual parents’ freedom and capacity for self-determination.¹¹⁶ Yet, as second chapter argued, law’s partial blindness to the private sphere leads it to expect mothers to provide the emotional and practical caring necessary to sustain the binuclear family.

¹¹² Neale *et al* (2003) *op cit* n66, p906; Buchanan & Hunt (2003) *op cit* n42, p380.

¹¹³ Neale *et al* (2003) *op cit* n66, p906.

¹¹⁴ Ryrstedt, E (2009a) “Familjerätt och Folkbokföring” *Juridisk Tidskrift*, 564-575, p573 ; Singer (2008) *op cit* n6, pp45-46; Mitchell, J (2003) “Shared Care – Shared Benefits?” *Family Law*, 321-326, p321

¹¹⁵ Singer (2009) *op cit* n95, pp365-366.

¹¹⁶ Smart & Neale (1999) *op cit* n15, pp58-63.

Shared residence cannot be said to advance gender equality if the financial, material and emotional burdens continue to be borne disproportionately by single mothers, a group which is already known to be economically vulnerable.¹¹⁷ A switch from sole to shared residence is likely to result in reduced child support or benefit payments although the fixed costs of keeping a family home will not be reduced.¹¹⁸ Furthermore, any re-allocation of expenditure will depend on how much time the child actually spends in each household; studies suggest that where the shared residence order turns out to be a matter of form rather than substance, this may impact so negatively on the primary caretaker's economy that it will inevitably affect the children.¹¹⁹ It should also be borne in mind that empirical research has found a link between how the primary carer is coping, and the child's adjustment.¹²⁰ Where shared residence is sought for the wrong motives, it may not only force children into an arrangement they find objectionable, but may also deprive them of crucial support from their primary carer parent.

In conclusion, the available empirical research shows a clear difference between voluntary and coerced/court-ordered shared residence. In the former category, parents can be presumed to have chosen to share residence because they get on reasonably well and have the financial or emotional resources necessary to cope. Children report high levels of satisfaction; practical inconveniences are outweighed by the close relationships, particularly where the parents are flexible and sensitive to children's changing needs. These are, however, families, where good communication, cooperation and a responsible attitude to parenting precede the decision to share residence. Studies which have either included or focused exclusively on high-conflict families who have tried shared residence against at least one parent's wishes show that this arrangement is likely to exacerbate rather than reduce conflicts, impact negatively on children, and disproportionately affect mothers who remain *de facto* primary carers despite the shared residence order.

¹¹⁷ Singer (2008) *op cit* n6, p45; Ryrstedt (2006) *op cit* n37, pp44-45.

¹¹⁸ Harty & Wood (1991) *op cit* n66, p431.

¹¹⁹ Singer (2008) *op cit* n6, p45; Elrod & Dale (2008) *op cit* n33, p399; Barry (1997) *op cit* n22, p789.

¹²⁰ Johnston (1994) *op cit* n31, p174.

3.5 CONCLUSION

This chapter has sought to demonstrate that some parents pursue shared residence for their own reasons: to assert authority, secure practical or financial advantages, or as a means of perpetuating conflicts. Family law, which is focused on encouraging fathers to maintain the patriarchal father-child link, is already slow to critically examine men's motives. Therefore, court-ordered shared residence should be resisted on the grounds that parents need to be required to justify their applications to show that they genuinely wish to benefit the child and are capable of caring for him or her.

Secondly, research from the child welfare sciences has shown that although shared residence is not *per se* dangerous, considerable caution must be exercised when recommending it. It seems only to suit certain families, and can be harmful; because it does not suit the individual child; because the arrangement breaks down, or because it leaves a child locked into an inflexible arrangement with poor rewards. The success of shared residence depends on too many different factors for it to be possible to draw up a comprehensive checklist of when it should be ordered. The detailed enquiries necessary to evaluate the arrangement's prospects for success also lie beyond the scope of an already overstretched family law system. Therefore, it seems more sensible to restrict shared residence to families where both parents have freely chosen it; they can be assumed to have consulted and considered their children and to have the skills needed to make the arrangement work.

Finally, available studies provide a comprehensive argument against the assertion that shared residence can teach parents to co-operate; they show that children are, instead, likely to be harmed by continued exposure to conflict. Moreover, shared residence seems an ineffective or even counterproductive tool for improving gender equality; it appears to give fathers the formal benefits of equal status while it lies beyond law's role to supervise whether the economic and practical burdens are actually distributed equitably across both households. The result for many families could well be a covert resurrection of patriarchal structures.

4 ANALYSING THE PRIVATE LAW FRAMEWORK IN ENGLAND

4.1 INTRODUCTION

This chapter begins with an overview of the relevant domestic family law before exploring the three influences identified in the second chapter to ascertain the role they play in shaping statute, policy and case law, while acknowledging that interference between closed systems is not a simple relationship of cause and effect.¹ The English jurisdiction is often cited as an archetypal liberal one, law's refusal to intervene in the private sphere has supported patriarchal power structures and the hierarchical nuclear family. More recently, concern about the falling popularity of marriage has created turbulence within the political discourse, which in turn has led law to promote a new form of permanent, patriarchal parenthood. This has affected law's view on what is in a child's best interests, since new information from the child welfare sciences has had to be recreated and fitted within the existing normative framework.² The contemporary focus on party negotiation and sensible, responsible parenting is also shaped by patriarchal understandings of parenthood.

4.1.1 The Family Courts and the Children Act 1989

There is no single family court; parents' disputes over children are heard in specialised courts which are spread across the three tiers of High, County, and Magistrates' Courts, with approximately 80% of private law cases heard in the County Courts.³ Children and Family Reporters from Cafcass are responsible for writing reports for contested cases, and help parties identify common ground.⁴ The less formal setting is a result of a wish to avoid intimidating litigants and avoid adversarial posturing. Family law has always preferred compromises to court

¹ Teubner, G (1993) *Law as an Autopoietic System*, London, Blackwell, p97.

² Teubner (1993) *op cit* n1, p87.

³ Ministry of Justice (2009) *Judicial and Court Statistics 2008*, London, TSO, p85, p92.

⁴ Cafcass (2008) *Putting your Children First: a Guide for Separating Parents*, London, DCSF, pp21-33.

hearings and now strongly promotes mediation and other alternative methods of dispute resolution.⁵

The Children Act 1989 is the main piece of legislation for the regulation of disputes between parents. It was a response to concerns that family law had become fragmented, complex and confusing, and, moreover, that the clean break model was flawed.⁶ Changes in terminology and classification were used to set out a new blueprint for the organisation of post-divorce family life.⁷ Custody and access orders, which had polarised parents by creating winners and losers, were replaced with a scheme of orders which separated the regulation of practical arrangements from the allocation of status.⁸

Parental responsibility replaced the custody order; the Children Act also introduced the residence orders which will be the focus of the next chapter. Parental responsibility is defined in s.3(1) of the 1989 Act as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”. Parental responsibility is granted automatically to mothers, married fathers, and holders of a residence order.⁹ Although arguments for the extension of automatic parental responsibility to all unmarried fathers have yet to be successful, they can now acquire it through the comparatively simple administrative procedure of birth registration as well as through an agreement with the mother or a court order; proposals have also been made to extend further both joint birth registration and parental responsibility.¹⁰

5 Hunt, J & Macleod, A (2008) *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce*, London, TSO, p168.

6 Diduck, A & Kaganas, F (1999) *Family Law, Gender and the State: Text, Cases and Materials*, Oxford, Hart Publishing, p244; van Krieken, R (2005) “The ‘Best Interests of the Child’ and Parental Separation: On the ‘Civilizing of Parents’”, 68(1) *MLR*, 25-48, p33.

7 van Krieken (2005) *op cit* n6, p33.

8 Law Commission (1986) *Family Law Review of Child Law: Custody*, Working Paper No 96, London, HMSO, [7.18]; Department of Health (1991) *The Children Act 1989: Guidance and Regulations, Vol 1, Court Orders*, London, HMSO, [2.25].

9 The Children Act 1989 s.2(1), s.2(2)(a) & s.12(1).

10 Section 4(1) of the Children Act 1989 as amended by the Children and Adoption Act 2002, s.111; Bainham, A (2003) “Contact as a Right and Obligation” in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, 61-88, p84; DWP (2008) *Joint Birth Registration: Recording Responsibility*, Cm 7293 as cited in Reece, H (2009) “The Degradation of Parental Responsibility” in Probert, R, Gilmore, S & Herring, J (Eds) *Responsible Parents and Parental Responsibility*, Oxford, Hart Publishing, 85-102, pp90-91.

When contact orders replaced access orders the change was one of terminology rather than substance. The most common form of contact is direct, face-to-face contact, which can involve overnight stays. Orders are sometimes made for reasonable contact, leaving parents to negotiate the details, but courts also have “wide powers” to make directions for contact or attach conditions to an order.¹¹ Where contact needs to be commenced or re-introduced supported contact can be ordered, while orders for supervised contact can be used to ensure children’s physical safety or emotional well-being.¹² In cases where direct contact is not possible, orders for indirect contact are often made instead; this can range from Christmas and birthday cards screened by a third party to frequent email or telephone contact.¹³

4.2 PERMANENT, PATRIARCHAL PARENTHOOD

4.2.1 Introduction

It was argued in the second chapter that when law initially distinguished itself from society’s first-order system of communications it inherited a patriarchal analytical framework, seen, *inter alia*, in the classification into dichotomies with the female as the inferior, and the clear division between public and private spheres. Subsequent developments, including those induced by interference from political and other discourses, have been translated to fit the existing framework; thus, this form of patriarchy-within-law has remained.

4.2.2 Patriarchy and the Nuclear Family

England is often cited as a prime example of the traditional liberal state where it was widely agreed that the “road to equality and prosperity should be paved with a maximum of free markets and a minimum of state interference” but where the gendered and hierarchical middle-class nuclear family was, nevertheless, purposely

¹¹ Harris-Short, S & Miles, J (2007) *Family Law: Text, Cases and Materials*, Oxford, OUP, p864; The Children Act 1989 s.11(7).

¹² *Re P* [2008] EWCA Civ 1431.

¹³ *Ibid*; *Re P* [2003] EWCA Civ 1797 *per* Thorpe LJ at [9]; National Association of Child Contact Centres, “Definitions of Levels of Contact”, <http://www.nacc.org.uk/cms2/dmdocuments/Definitions%20of%20contact.pdf> accessed 28th June 2009.

exported to the working classes to provide society with stability.¹⁴ Blackstone explained in 1775 that “the main end and design of marriage” was “to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of children should belong”.¹⁵ The law consequently granted the patriarch extensive rights and refused to “interfere with the natural order and course of family life, the very basis of which is the authority of the father”.¹⁶ Mothers’ vital role in raising future generations was recognised; but only where individual women conformed to the normative ideal of a good wife.¹⁷ Although significant proportions of the population were living in arrangements other than conjugal families, they were treated as deviant.¹⁸ The promotion of the nuclear family as the main *locus* of care also fitted well with liberal theorists’ condemnation of public welfare as causing rather than remedying the problems of thriftlessness and moral corruption.¹⁹

When the welfare state was developed after the Second World War, its ambit was limited by liberal theory, and it was based on the breadwinner model.²⁰ The law’s stance towards non-conjugal families became less overtly penal, yet law reform was hampered by a continuing concern not to do anything that might be seen as undermining the institution of marriage.²¹ Consequently, single mothers were problematised in moral as well as socio-economic terms and provoked “[a] degree of political concern ... unique within western European countries”.²² This provides an example of how autopoietic subsystems may be closed, but are not immune to the concerns expressed by other systems, particularly where the latter are perceived to be more powerful.²³

¹⁴ Creighton, C (1999) “The Rise and Decline of the Male Breadwinner Family in Britain”, 23(5) *Cambridge Journal of Economics*, 519-541, p519.

¹⁵ Blackstone, quoted in Morgan, P (1998) “An Endangered Species?” in Kiernan, K, Land, H & Lewis, J (Eds) *Lone Mother Families in Twentieth Century Britain*, Oxford, Open University Press, 65-82, p71

¹⁶ *Re Agar-Ellis v Lascelles* (1883) 24 ChD 317 per Brett MR; O’Donovan, K (1985) *Sexual Divisions in Law*, London, Weidenfield & Nicholson, p2.

¹⁷ Smart, C (1982) “Regulating Families or Legitimizing Patriarchy” 10(1) *International Journal of the Sociology of Law*, 1-18, p7.

¹⁸ *Ibid.*

¹⁹ Esping-Andersen, G (1990) *The Three Worlds of Welfare Capitalism*, Cambridge, Polity Press, pp41-42.

²⁰ *Ibid.*, p159.

²¹ Hasson, E (2003) “Setting a Standard or Reflecting Reality? The ‘Role’ of Divorce Law, and the Case of the Family Law Act 1996”, 17(3) *IJLPF*, 338-365, p340.

²² Lewis, J (1997) *Lone Mothers in European Welfare Regimes*, London, Jessica Kingsley, p50; Pascall, G (1999) “UK Family Policy in the 1990s: the case of New Labour and Lone Parents” 13(3) *IJLPF*, pp258-273, p266.

²³ Teubner (1993) *op cit* n1, p35, p73.

4.2.3 Public Patriarchy

As in most industrialised nations, patriarchal strategies have shifted from exclusion to segregation: women have been allowed access to both spheres but continue to occupy inferior positions.²⁴ Women's entry into employment followed the pattern explained in the second chapter: part-time posts allowed mothers to tailor work around their domestic responsibilities so that business, law and other autopoietic subsystems were not forced to reconsider their understandings of families.²⁵ If anything, the public/private dichotomy was fortified by the Conservative governments of 1979 – 1997. In this Neo-Liberal discourse the falling popularity of marriage was again identified as the root cause of an emerging permanent underclass where single mothers raised their children into a culture of anti-social behaviour and welfare dependency.²⁶ However, the liberal construction of poverty as the result of autonomous choices rather than social factors combined with ambivalent political attitudes towards women's employment and the resistance to public intervention to hamper legal reform.²⁷ These arguments remain influential, usually made in response to the latest release of demographic statistics.²⁸ Although the divorce rate is falling and is now at its lowest level since 1979, marriage is in numerical decline, with a corresponding increase in cohabitation and births outside marriage.²⁹ Single motherhood is also more common; the proportion of dependent children living in lone parent families (of which 90% are estimated to have a female adult) increased from 7% in 1972 to 24% in 2006.³⁰ The debate about the perceived undesirability of these changes within the political subsystem generates “noise” or “interference” which exerts considerable influence on the legal system.³¹

24 Fox Harding, L (1996) “Parental Responsibility: The Reassertion of Private Patriarchy?” in Silva, E B (Ed) *Good Enough Mothering?* London, Routledge, 131-147, p139.

25 Moffat, G (2007) “Work-life Balance and Employment Law: Cultural Change or Mission Impossible?” in Probert, R (Ed) *Family Life and the Law: Under One Roof*, Farnham, Ashgate Publishing, 135-158, p138; Barnett, H (1997) *Sourcebook on Feminist Jurisprudence*, p83.

26 Murray, C (1996) “The Emerging British Underclass” in Lister, R (Ed) *Charles Murray and the Underclass: the Developing Debate*, London, Institute of Economic Affairs, 27-53, p31.

27 Walker, A (1996) “Blaming the Victims” in Lister, R (Ed) *Charles Murray and the Underclass: the Developing Debate*, London, Institute of Economic Affairs, 66-74, p66.

28 “Married Couples to be Minority within 20 Years”, *The Daily Telegraph*, 1st April 2009.

29 Office for National Statistics, “Divorce: England and Wales rate at 29 year low”, <http://www.statistics.gov.uk/cci/nugget.asp?id=170>, published on 28th January 2010; Office of National Statistics, “Population Estimates by Marital Status”, <http://www.statistics.gov.uk/cci/nugget.asp?id=2312>, published on 25th November 2009.

30 Office for National Statistics (2007) *Social Trends 37*, London, ONS, p16.

31 Teubner (1993) *op cit* n1, p103.

The gendered employment pattern has remained. Approximately half of women with dependent children work in part-time posts; this statistic has been used to explain why the gender pay gap widened in 2008 to 12.8%, and is now one of the largest in the EU.³² As would be expected of a liberal model, there is comparatively little assistance provided to help with the reconciliation of work and family responsibilities.³³ Although maternity leave is available for a generous 52 weeks, limited financial compensation is thought to prevent as many as three-quarters of eligible mothers from taking full advantage of this entitlement.³⁴ Planned improvements have been postponed indefinitely, most probably due to the economic climate.³⁵ The implicit assumption appears to be that each mother will have a breadwinner partner. Since childcare has been conceptualised as a purely private matter to be regulated through market forces, Britain also has one of the lowest levels of publicly funded childcare in the European Union.³⁶ Women who find their labour undervalued and their opportunities limited cannot be condemned for deciding to shoulder familial responsibilities, freeing their male partners to pursue a potentially more profitable career. What has to be criticised, however, is the way liberal rhetoric presents this as a matter of individual choice, with the caring contribution to the family's wealth and well-being hidden by the public/private dichotomy.³⁷ It is explained in later chapters why this criticism can be used to argue against an increased use of the shared residence order.

Although New Labour initiatives, influenced by post-liberalism and communitarianism, have to some extent "repositioned the family as a public

32 Office of National Statistics, *Annual Survey of Hours and Earnings*, as reported at <http://www.statistics.gov.uk/cci/nugget.asp?id=167> accessed on 7th October 2009; European Commission: Employment, Social Affairs and Equal Opportunities Website: <http://ec.europa.eu/social/main.jsp?catId=685&langId=en>, accessed 7th October 2009; McKie, L, Bowlby, S & Gregory, S (2001) "Gender, Caring and Employment in Britain", 30(2) *Journal of Social Policy*, 233-258, p242; Moffat (2007) *op cit* n25, p137.

33 Land, H (2002) "Spheres of Care in the UK: Separate and Unequal", 22(1) *Critical Social Policy*, 13-31, p26.

34 Six weeks are paid at 90% of earnings, 33 at a flat rate of £123.06 per week, and the rest is unpaid. James, G (2006) "The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?" 35(3) *Industrial Law Journal*, 272, p272.

35 Upcraft, K (2009) "Work and Families Act 2006 Phase Two – Will They or Won't They?" 18(3) *Tolley's Practical NIC Newsletter*, 21.

36 Ferri, E & Smith, K (1996) *Parenting in the 1990s*, London, Family Policy Studies Centre, p9; Land (2002) *op cit* n33, p19; Equal Opportunities Commission (2007) *Completing the Revolution: The Leading Indicators*, EOC, London. Available at: www.gender-agenda.co.uk/downloads/GenderEqualityIndex.pdf accessed 29th July 2009.

37 Frug, M (1992) *Postmodern Legal Feminism*, New York, Routledge p140.

space”,³⁸ there is no clear consensus (neither within the political subsystem nor in law) that this is a legitimate use of law, perhaps due to the continuing influence of liberal theory, the public/private dichotomy and the conjugal ideal.³⁹ For example, the decisions to pay EU-originated paternity leave at a low flat rate and make parental leave unpaid are likely to severely limit the number of parents who use these entitlements.⁴⁰ Furthermore, parents have no more than a right to request flexible working (a reduction or change of their hours), and employers need only provide clear business reasons for a refusal.⁴¹ Reforms are restricted by the focus on maintaining economic efficiency.⁴² Interestingly, the right to request flexible working is to be extended from parents to all workers with caring responsibilities; in an aging society, the objective is to reduce strain on the welfare state and maintain productivity by allowing individuals with dependent family members to continue in paid work.⁴³ Care is again seen as a matter of private choice and responsibility. If anything, this is strengthened by political interest in communitarianism; the welfare state is to be a springboard rather than a safety net.⁴⁴ Participation in the labour market is seen as vitally important in educating responsible citizens.⁴⁵ Communitarianism’s belief in benign community values results in a greater readiness to use law to send normative messages, and commentators have argued that measures encouraging single mothers into employment shade from persuasion into coercion.⁴⁶ Thus, reforms are not intended to erode gender stereotypes, but to combat social exclusion. Communitarian influences have not led to the complete abandonment of liberal thinking; the public/private dichotomy retains its normative power, as does the paradigm nuclear family.

38 Gillies, V (2005) “Meeting Parents’ Needs? Discourses of ‘Support’ and ‘Inclusion’ in Family Policy”, 25(1) *Critical Social Policy*, 70-90, p79.

39 Moffat (2007) *op cit* n25, p156; Creighton (1999) *op cit* n14, p528.

40 Moffat (2007) *op cit* n25, p153.

41 James (2006) *op cit* n34, p274.

42 Land (2002) *op cit* n33, p26; Mahon, R (2002) “Gender and Welfare State Restructuring: Through the Lens of Child Care” in Michel, S & Mahon, R (Eds) *Child Care Policy at the Crossroads: Gender and Welfare State Restructuring*, London, Routledge, 1-27, p7.

43 James (2006) *op cit* n34, p272.

44 Brown, G (1994) “The Politics of Potential: A New Agenda for Labour” in Miliband, D (Ed) *Reinventing the Left*, Cambridge, Polity Press, pp120-122, as cited in Fredman, S (2006) “Human Rights Transformed: Positive Duties and Positive Rights”, *Public Law*, 498-520, pp508-509.

45 Etzioni, A (1996) *The New Golden Rule: Community and Morality in a Democratic Society*, London, Profile Books, pp36-37, cited in Eekelaar, J (2001) “Family Law: The Communitarian”, 21(1) *Oxford Journal of Legal Studies*, 181-190, p183.

46 Reece, H (2003) *Divorcing Responsibly*, Oxford, Hart Publishing, p79; Spencer-Dawe, E (2005) “Lone Mothers in Employment: Seeking Rational Solutions to Role Strain”, 27(3-4) *JSWFL*, 251-264, p252.

4.2.4 The Binuclear Family and Gendered Constructions of Parenting

Family law's essentially patriarchal character has been confirmed by this "interference" from politics as much as it has been challenged; it continues to influence new law. This can be seen, for example, in family law's preoccupation with surnames. It is, according to Herring, "striking" that there is a sizeable body of case law on this, when there are numerous, arguably more substantial, issues that are important to separated parents, but are not disputed in the courts.⁴⁷ The conceptualisation of a surname as an immutable part of identity is essentially male; the insistence on its symbolic value patriarchal.⁴⁸ Women change surnames, are more likely to see them as contingent, and to "depend on more substantial things" to feel close to their children.⁴⁹ Family law's patriarchal character has also resulted in law's insistence that separated parents must retain links across a binuclear family. Collier and Sheldon have linked family law's current focus on ensuring fathers' continued attachment to a reconstituted binuclear family unit to "wider policy agendas".⁵⁰ In terms of autopoietic theory, the noise or pressure from the political subsystems has been sensed within law, and has led to a perception that law, the stabiliser of conflicts, should provide a solution.⁵¹ Unmarried and separated fathers have come to be viewed as a "problem" to be "managed" by law; it is felt more must be done either to instil a greater sense of responsibility in men or to help them "develop the relationships with their children that they want, deserve and are currently unfairly denied".⁵²

Parental responsibility, which remains unaffected by changes in practical circumstances, was an important part of the legislator's objective of turning parenthood from something dependant on marriage to an immutable status; it ensures "that men are firmly tied to families".⁵³ Approximately 90% of all applicants

47 Herring, J (2009) "The Shaming of Naming" in Probert, R, Gilmore, S & Herring, J (Eds) *Responsible Parents and Parental Responsibility*, Oxford, Hart Publishing, 105-122, p111.

48 *Ibid*, pp120-121.

49 *Re R* [2001] EWCA Civ 1344 *per* Hale LJ at [13].

50 Collier, R & Sheldon, S (2008) *Fragmenting Fatherhood: A Socio-Legal Study*, Oxford, Hart Publishing, p218.

51 Teubner (1993) *op cit* n1, p70.

52 Collier & Sheldon (2008) *op cit* n50, p176.

53 Wallbank, J (2009) "Parental Responsibility and the Responsible Parent: Managing the 'Problem' of Contact" in Probert, R, Gilmore, S & Herring, J (Eds) *Responsible Parents and Parental Responsibility*,

are successful; most are likely to be unmarried fathers.⁵⁴ Judicial observations that a father ought to be “entitled to play the natural role which fatherhood ordains for him”,⁵⁵ suggest that despite the draftsmen’s deliberate choice of the term responsibility, law as a closed subsystem has gradually come to understand parental responsibility as yet another of the rights it is accustomed to adjudicate on. Yet, it has been acknowledged that although a non-resident parent with parental responsibility has the same legal rights, he or she will “inevitably have less opportunity” to exercise them, particularly since there is no legal requirement of consultation on most decisions.⁵⁶ It has been recognised judicially that this order is “mainly a matter of status”; it is frequently granted where it is not contemplated that the applicant will be actively involved.⁵⁷ Reece has observed that the order sometimes appears to have been made on the basis that it does not really entitle the father to do very much.⁵⁸ Consequently, fathers’ organisations have accused the current law of giving parents with residence a license to exclude the other parent.⁵⁹ Parental responsibility, they argue, is not powerful enough. This argument has had considerable influence on political debate, adding to the pressure on law to find a solution to this perceived problem.⁶⁰ It is very worrying that arguments for a shared residence presumption are made in this context; this point is explored in more detail in the next chapter.

The description of the contact order in s.8(1) of the Children Act 1989 deliberately avoided phrasing this as the adult’s entitlement; part of a shift in terminology which was to signal that parental rights should be regarded as a thing of the past.⁶¹ Yet, children’s refusals are often dismissed as a sign of immaturity, and the fact that orders cannot be enforced against non-resident parents’ wishes provides further

Oxford, Hart Publishing, 295-313, p30; Roche, J (1991) “The Children Act 1989: Once a Parent Always a Parent”, 13(5) *JSWFL*, 345-361, p357.

54 Ministry of Justice (2009) *Judicial and Court Statistics 2008*, London, TSO, p95.

55 *Re J-S* [2003] 1 FLR 399 per Ward LJ at [50].

56 Bainham, A (1998) *Children: The Modern Law* (2nd Ed), Bristol, Jordan Publishing, p113.

57 *Re C* [2004] EWCA Civ 513; *Re H* [2002] EWCA Civ 542; *Re C and V* [1998] 1 FLR 392.

58 Reece (2009) *op cit* n10, p95.

59 Coe, T, *Shared Parenting: The Right Starting Point?* Equal Parenting Council website <http://www.equalparenting.org/shared-parenting/index.php> accessed 30th September 2007; Press Release: Society is Still Failing our Children, Children’s Rights to both Parents are still not being Supported”, <http://fnf.org.uk.uk3.clientproof.co.uk/news-events/press-releases/2006-archive/060614> accessed on 30th September 2007.

60 Teubner (1993) *op cit* n1, p71; Collier & Sheldon (2008) *op cit* n50, p141.

61 Eekelaar, J (1991a) “Parental Responsibility: State of Nature or Nature of the State?” 13(1) *JSWFL*, 37-50, p37.

evidence of the hollow nature of what is sometimes referred to as the child's right to contact.⁶² The Act's objective was not to empower children, but to persuade courts to prioritise the link between children and biological fathers. The granting of contact was to give substance to the principle of immutable parenthood expressed with parental responsibility.⁶³ Thus, "[n]on-resident parents are usually successful in getting the type of contact sought".⁶⁴ The 2008 court statistics, which do not differentiate between types of applicants, showed that courts refused to order any contact in only 1,166 of 80,168 cases.⁶⁵ In the sample analysed by Hunt and Macleod, fathers' applications for direct or indirect contact led to orders being made in 86% of cases; a further 13% of fathers' applications were abandoned.⁶⁶ Furthermore, judges regularly enunciate that terminating contact is "a matter of last resort".⁶⁷ In *Re P* [2003] a father had applied for contact upon his release from a prison sentence served partly as a result of an earlier abduction of his son. The Court of Appeal, allowing his appeal, held that although direct contact was not possible, limited indirect contact would give the four-year-old boy an opportunity "to focus on the existence of a father, whose role in his past, although open to the severest criticism, does not remove the reality that he is [the boy's] biological father".⁶⁸ This focus on biological fact to justify the making of orders further obscures the important issue of caring and constitutes another strong reason against court-ordered shared residence.

The binuclear family is discussed in gender neutral terms, which obfuscate its essentially patriarchal character. Empirical studies show that women's entry into employment has not been matched by anything like a commensurate change in the division of domestic tasks.⁶⁹ Men's involvement is increasing, but is seen as

62 *Re P* [2006] EWCA Civ 964 *per* Wilson LJ at [21]; *Re W* [2001] EWCA Civ 1830 *per* Butler-Sloss P at [6]; James, A, James, A, & McNamee, S (2004) "Turn Down the Volume – Not Hearing Children in Family Proceedings", 16(2) *CFLQ*, 189-202, p201; Bainham (2003) *op cit* n10, pp74-75; Trinder, L (2003) "Working and Not Working Contact After Divorce" in Bainham *et al* (Ed) *op cit* n10, 387-406, p39.

63 *Family Law Today*, January 1993, p5.

64 Collier, R (2009) "Rethinking Fathers' Rights" *Family Law*, 45, p45.

65 Ministry of Justice (2009) *Judicial and Court Statistics 2008*, London, TSO, p95.

66 Hunt & Macleod (2008) *op cit* n5, p240, p256.

67 *The Father v The Mother* [2003] All ER 226 *per* Wall J at [6]; *Re W* [2007] EWCA Civ 786; *Re O* [2003] EWHC 3031.

68 *Re P* [2003] EWCA Civ 1797 *per* Thorpe LJ at [10].

69 James (2006) *op cit* n34, p272; Lader, D, Short, S & Gershuny, J (2006) *The Time Use Survey 2005*, London, ONS; Pryor, J & Rodgers, B (2001) *Children in Changing Families*, London, Blackwell.

complementing women's; the latter continue to shoulder primary responsibility.⁷⁰ Since the allocation of caring responsibilities is conceptualised as a private matter beyond the reach of public regulation, there is little focus on encouraging good practices.⁷¹ Instead, the continued gendered nature of parenting practices is hidden by the neutral language of the legislation.⁷² Law's role as maker of normative pronouncements has led to a focus on expectations and abstract general assertions.⁷³ Legal reform and implementation remains "habitually based" on an unequal gendered allocation of parenting duties, without any acknowledgement of "the value of the [caring] work involved", since the latter is in law's self-created blind-spot.⁷⁴

This divergence between discourse and reality has made it possible to assert two diametrically opposed arguments, which are, nevertheless, both used to support legal recognition of the post-separation binuclear family. The first of these two arguments centres on a crisis in fatherhood; marriage is said to have been robbed of any significance "beyond the dress, the cake, the speech and the drunk uncle".⁷⁵ It is alleged that men are either abandoning fatherhood due to role confusion or are being marginalised by mothers who prefer the welfare state safety net. Communications about families are underpinned by assumptions concerning the superiority of the nuclear family, which they also serve to reinforce.⁷⁶ This largely negative discourse has been complemented with a more recent and more positive strand. This asserts that the majority have become 'hands-on'; over-optimistic assumptions about fathers' roles are made on the implicit understanding that the gender neutrality written into legislation has been achieved in practice.⁷⁷ As is seen in this and the

70 Barnett, A (2009b) "The Welfare of the Child Re-Visited: In Whose Best Interests? Part II", *Family Law*, 135-141, p139; Burghes, L, Clarke, L and Cronin, N (1997) *Fathers and Fatherhood in Britain*, Family Policy Studies Centre/Joseph Rowntree Foundation, London, p85.

71 Land (2002) *op cit* n33, p26; Lawler, S (1999) "Children Need but Mothers only Want: the Power of 'Needs Talk' in the Constitution of Childhood", in Seymour, J & Bagguley, P (Eds) *Relating Intimacies: Power and Resistance*, Basingstoke, Macmillan Press Ltd, 64-88, p70; Smart, C (1999) "The 'New' Parenthood" in Silva, E & Smart, C (Ed) *The New Family?*, London, Sage Publications, 100-114, p100.

72 Barnett (2009b) *op cit* n71, p138.

73 King, M & Piper, C (1995) *How the Law Thinks About Children*, Gower Publishing, Aldershot, p26.

74 McKie *et al* (2001) *op cit* n32, p237; Luhmann, N (1989) "Law as a Social System", 83(1) *Northwestern University Law Review*, 136-150p145.

75 Geldof, B (2003) "The Real Love that Dare Not Speak its Name: A Sometimes Coherent Rant" in Bainham *et al* (Ed) *op cit* n10, 171-200, p176; Pryor & Rodgers (2001) *op cit* n70, p201.

76 Morgan (1998) *op cit* n15, p71; Diduck & Kaganas (1999) *op cit* n6, p17.

77 Pryor & Rodgers (2001) *op cit* n70 p200; Collier, R (2001) "A Hard Time to Be a Father? Reassessing the Relationship between Law, Policy, and Family (Practices)" 28(4) *Journal of Law and Society*, pp. 520-545, p521.

subsequent chapter, both arguments have successfully been used to shape the legal regulation of parents' disputes over children.

4.3 THE PARAMOUNTCY PRINCIPLE

A version of the welfare principle was first introduced in the Guardianship of Infants Act 1886. According to Maidment, this test enabled the law to respond to complaints about paternal abuses of power without having to grant mothers a new, independent legal status.⁷⁸ During the late 19th and early 20th century children's needs for continuing relationships with their primary care-giver mothers were prioritised, unless the latter deviated too far from the semantic artefact of a good mother.⁷⁹ Yet, by the 1980's concerns were expressed that the law was biased within the political as well as legal subsystems; the pendulum was said to have swung too far away from the absolute legal rights granted to the Victorian *pater familias* towards maternal preference rules that demoted or even excluded fathers.⁸⁰ There was an element of truth to this; case law precedents had come to be based on the assumption that couples would want a "clean break" so that both parents could go on to remarry and form new, reconstituted nuclear families unencumbered by past failures.⁸¹

4.3.1 The Children Act 1989 and Interpretations of the Welfare Test

The Children Act 1989 confirmed that courts determining questions relating to a child's upbringing or property must have that child's welfare as its paramount consideration.⁸² The term 'paramount' has been interpreted to mean first and only;⁸³ and despite academic arguments to the contrary, this has been stated to be

78 The Guardianship of Infants Act 1886; Maidment, S (1984) *Child Custody and Divorce: the Law in Social Context*, London, Croom Helm, pp107-108.

79 Maidment (1984) *op cit* n79, p131.

80 Richards, M (1986) "Behind the Best Interests of the Child", *Journal of Social Welfare Law*, 77-95, p92.

81 Baker, A & Townsend, P (1996) "Post-divorce Parenting: Rethinking Shared Residence", 8(3) *CFLQ*, 217-227, p219; Neale, B & Smart, C (1997c) "Experiments with Parenthood?" *Sociology*, 201-219, p203.

82 The Children Act 1989, s.1(1)

83 *J v C* [1970] AC 668.

compatible with the Human Rights Act 1998.⁸⁴ The welfare discourse has now become dominant; parents' prospects of success in making or defending applications can depend greatly on their ability to translate their arguments into the dominant welfare discourse.⁸⁵

In an attempt to avoid the idiosyncrasies that had often marred court decisions, s.1(3) of the 1989 Act provided a non-hierarchical and non-exhaustive checklist of factors, which was largely based on case law.⁸⁶ The use of this checklist is only obligatory in relation to certain orders (including contact and residence orders), but the checklist has come to be influential also in relation to other applications, e.g. for parental responsibility, despite divergent views as to whether this is indeed an issue relating to the upbringing of the child. The list begins in s.1(3)(a) by requiring courts to consider the relevant child's wishes and feelings, making clear that the weight given to these will depend on the child's maturity.⁸⁷ S.1(3)(b) mentions the child's needs, while s.1(3)(c) requires a court to consider "the likely effect of any change in circumstances". S.1(3)(e) focuses on whether the child is at risk of harm, and linked to this issue is the question in s.1(3)(f) of how capable each parent is of meeting the child's needs. Although the list was introduced to bring clarity and consistency, it has been described as "law at its most discretionary".⁸⁸ Indeed, it has been suggested that s.1(3) was in fact deliberately kept vague in order not to unduly restrict judicial discretion in an area of law where each case must be judged on its own merits.⁸⁹

The flexibility of the welfare test is not only a strength but also a weakness: there is great divergence of views as to what exactly is in a child's best interests and courts have come to rely on welfare science expertise to both guide and justify decisions.⁹⁰ A specialised and self-referential child welfare autopoietic subsystem has developed

84 Any interference with parents' rights is seen as justified to promote the child's welfare, Gilmore, S (2007) "Re B (*Contact: Child Support*) – Horses and Carts", 19(3) *CFLQ*, 357, p360. For the opposite argument see Bainham (2003) *op cit* n10, p74.

85 See e.g. *Re C* [2007] *EWHC* 2312 *per* Sumner J at 148; *Re B* [2006] *EWCA* Civ 1574 *per* Wilson J at [19].

86 Roche (1991) *op cit* n53, pp347-348.

87 *Re P* [2006] *EWCA* Civ 964.

88 Pearce, J, Davis, G & Barron, J (1999) "Love in a Cold Climate - Section 8 Applications under the Children Act 1989", *Family Law*, 22-28, p26.

89 Bradley, D (1996) *Family Law and Political Culture*, London, Sweet & Maxwell, p249.

90 Doughty, J (2008) "From Court Missionaries to Conflict Resolution: A Century of Family Court Welfare", 20(2) *CFLQ*, 131-154, p131; Clarkson, H & Clarkson, D (2007) "Confusion and Controversy in Parental Alienation", 29(3-4) *JSWFL*, 265-275, p273.

in response to this. While its objectives appear to have been adopted by family law, they are understood differently and there is a distinct hierarchy: courts seek advice from child welfare experts, but are not obliged to accept it.⁹¹ The processes of re-entry and redundancy are used to convert the “complexities, ambiguities and differing theoretical perspectives” of the child welfare discourses into abstract, generalised legal certainties that fit with its inherently patriarchal cognitive framework.⁹²

Although the use of the welfare test is not mandatory for applications for parental responsibility, it is often used, and when it is applied the benefits to the child are stated in a general, abstract way, and are based on law’s patriarchal understanding of fatherhood. The child’s self-esteem is said to be enhanced by the knowledge that he or she has a father who wants parental responsibility.⁹³ The making of the order is said to show that a child “has two parents, both of whom, in very differing ways, have a manifest responsibility for her continuing well-being”.⁹⁴ This demonstrates law’s concern with continuing the father’s responsibility for, and authority over, the child; and the conceptualisation of this role as very different from the mother’s caring one. It appears that what a child needs from a father is often symbolic rather than practical; fatherhood is about caring “about”, rather than caring “for”.⁹⁵

The processes of redundancy and re-entry are also used to reduce individuals’ characteristics and circumstances down to family law’s limited set of semantic artefacts such as the vulnerable child, the supportive or implacably hostile mothers and the sincere or dangerous fathers who are described in the case reports.⁹⁶ Yet, in this setting, s.1(3)(a) of the Children Act 1989 requires that a child’s wishes must be heard and must be given appropriate weight in the light of his or her maturity. The understandable desire to protect children from parents’ conflicts means they are rarely heard in court; evidence is instead gathered by Cafcass. According to its own

91 King & Piper (1995) *op cit* n74, p70; Clarkson & Clarkson (2007) *op cit* n91, p273; Davis, G & Pearce, J (1999) “The Hybrid Practitioner”, *Family Law*, 547-555, pp547-548.

92 Barnett, A (2009a) “The Welfare of the Child Re-Visited: In Whose Best Interests? Part I” *Family Law*, 50, p51.

93 *Re S* [1995] 2 FLR 648; *Re C and V* [1998] 1 FLR 392.

94 *Re H* [2002] EWCA Civ 542 *per* Thorpe LJ at [16].

95 Tronto, J (1993) *Moral Boundaries: A Political Argument for an Ethic of Care*, London, Routledge, p158; Smart, C & Neale, B (1999) *Family Fragments?*, Cambridge, Polity Press, p126.

96 Barnett (2009b) *op cit* n712, p138; Kaganas, F & Day Sclater, S (2004) “Contact Disputes: Narrative Constructions of Good Parents”, 12(1) *Feminist Legal Studies*, 1-27, p22.

literature, “Cafcass is now taking strides to engage with its younger users”.⁹⁷ James *et al* have suggested, however, that law’s theoretical framework combines with cultural understandings of childhood to “turn down the volume” so that children’s views can neither be heard nor adequately represented.⁹⁸ Their research found that reports and recommendations were based on an idealised model of childhood; children’s statements were interpreted through this filter and were moreover translated “into a legalistic code” that was thought to be easier for the court to use.⁹⁹ This child welfare science was again reinterpreted by the court using the two semantic artefacts of the child as a family member and the abstract child of a particular age so that children’s agency became “conceptually obscured”.¹⁰⁰ S.1(3)(a) is consequently interpreted in a highly paternalistic way; the child’s needs as identified under s.1(3)(b) often outweigh his stated preferences.¹⁰¹ A child’s primary need is now understood to be the need for both parents, and in law’s self-restricted, simplified view the child welfare sciences can prove this to be true.¹⁰² Since mothering is hidden in the private sphere and taken for granted, and law is inherently patriarchal, law’s focus has been on encouraging fathers. The second chapter asserted that law can be said to process information in the way associated with the “male” side of the dichotomies: its 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.¹⁰³ Case law interpreting and applying the Children Act 1989 to disputes over parental responsibility and contact provides ample evidence of the successful use of child welfare rhetoric to emphasise the importance of fatherhood.¹⁰⁴ Nevertheless, dissatisfaction with family courts has remained within the political subsystem; because previous reforms have had no measurable success in relation to the underlying goal of reversing the decline of the traditional nuclear family. Since previous legal solutions are perceived to have been

97 Little, M (2009) “The Child’s View Counts” in Cafcass *Children in Family Conflict*, published as a supplement in *Young People Now*, January 2009. Accessed via <http://www.cafcass.co.uk/> on 27th March 2009.

98 James *et al* (2004) *op cit* n63, p192.

99 *Ibid*, p193.

100 *Ibid*.

101 *Ibid*, p191.

102 Barnett (2009a) *op cit* n84, p50.

103 *Ibid*, p51.

104 *Ibid*; Smart & Neale (1999) *op cit* n96, p177.

ineffective law is encouraged, through interference, to continue its search for a remedy.

4.3.2 From Broad Discretion to Binary Codes

In contested contact cases, law's simplistic understanding of child welfare science, its preoccupation with encouraging fathers and its selective blindness to mothers' efforts resulted in a prioritisation of the child's abstract need to know both parents. Consequently, the welfare test was replaced in *Re H* [1992] with the question: "are there any cogent reasons why these ... children should be denied the opportunity of access to their natural father?"¹⁰⁵ Drug or alcohol addictions, psychiatric illness, domestic violence and allegations of child abuse were held to be outweighed, and an unwavering belief in the natural benefits of contact led to a judicial optimism which frequently failed to address the potential problems posed by inexperienced, incompetent or untrustworthy applicants.¹⁰⁶ A similar interpretation of a presumption in favour of shared residence would undoubtedly expose children to unwarranted risks.

Although courts have become more prepared to find the *de facto* presumption in favour of contact rebutted, particularly where there has been domestic violence, Smart and Neale have observed that cases where contact is denied are "not allowed to interfere with the general principle".¹⁰⁷ Thorpe LJ in *Re L* [2000] said domestic violence cases should not be isolated as an exceptional category, but this is how the case has come to be interpreted.¹⁰⁸ *F v R* [2007], for example, was an exceptional case where the father had not only pleaded guilty to harassing the mother, but had also aimed "an unparalleled tide of abuse and aggression" at various professionals involved in the case, and had been overheard by the Cafcass reporter threatening to abduct the children.¹⁰⁹ It could be argued that fathers like these are excluded in order

¹⁰⁵ *Re H* [1992] 1 FLR 148 per Balcombe LJ at p152.

¹⁰⁶ *H v H* [1989] 1 FLR 212; *Re P* [1996] 2 FLR 314, at p335; *Re H* [1998] 2 FLR 42; Barnett (2009b) *op cit* n71, p139; Hathaway, S (1997) "Committal for no Contact", *Family Law*, 355-356, p356; Piper, C (1995) "In *Re O*: Comment", 17(3) *JSWFL*, 355-359, p358.

¹⁰⁷ Eriksson, M & Hester, M (2001) "Violent Men as Good Enough Fathers?: A Look at England and Sweden" 7(7) *Violence Against Women*, 779-798, p785; Hale, B & Hunter, R (2008) "A Conversation with Baroness Hale", 16(2) *Feminist Legal Studies*, 237-248, p240; Smart & Neale (1999) *op cit* n96, p180.

¹⁰⁸ *Re L*, *Re V*, *Re M*, *Re H* [2000] 2 FCR 404; Kaganas & Day Sclater (2004) *op cit* n97, p9.

¹⁰⁹ *F v R*, *D*, *N* [2007] EWHC 64, [16]-[17], [51] & [147].

to dispel doubts about law's general pro-father stance.¹¹⁰ A parallel can be drawn with Smart's suggestion that "[t]he popularity of marriage has been preserved ... because the grossest abuses of patriarchal authority are no longer condoned".¹¹¹ The identification of an exception has, if anything, served to strengthen the general rule. In addition, empirical research shows that although this new approach works well where adopted, some lower courts have continued to trivialise or ignore allegations of domestic violence "to the increasing frustration of the Court of Appeal".¹¹² From an autopoietic perspective, several comments can be made. Firstly, an important explanation can be found in the House of Lord's recent discussions on the 'significant harm' threshold for public law care proceedings.¹¹³ In *Re B* [2008] Lord Hoffman explained that in law "there is no room for a finding that [something] might have happened".¹¹⁴ "The law", he stated, "operates a binary system in which the only values are 0 and 1".¹¹⁵ Keating has commented that "it is fascinating to see such an illustration of autopoietic theory in the language employed by Lord Hoffman".¹¹⁶ In private law cases, too, allegations of violence that are not proven are treated as having been unsubstantiated.¹¹⁷ Ryder J is quite correct to have observed, extra-judicially, that this reasoning is "legal fiction".¹¹⁸ Indeed, Lord Hoffman's observations fit well with Teubner's assertions that regardless of pressure from external sources or even internal aspirations, law can only process information using its own language.¹¹⁹

Secondly, it is possible to observe a further dichotomy in the courts' classification of allegations in contact cases. Violence is either interpreted as serious, in which case it will affect the outcome of the case, or not serious, in which case it can be dismissed as irrelevant. In *Re P* [2008] Ward LJ observed: "Domestic violence, of course, is a term that covers a multitude of sins. Some of it is hideous, some of it is less serious, and it is probably into the latter category that this case fits." This case was not

¹¹⁰ Smart (1982) *op cit* n17, p17.

¹¹¹ *Ibid.*

¹¹² Barnett (2009b) *op cit* n71, p138.

¹¹³ The Children Act 1989, s.31; *Re B* [2008] UKHL 35.

¹¹⁴ *Re B* [2008] UKHL 35 *per* Lord Hoffman at [2].

¹¹⁵ *Ibid.*

¹¹⁶ Keating, H (2009) "Case Commentary: Suspicions, Sitting on the Fence and Standards of Proof" *CFLQ*, 230-241, pp237-238.

¹¹⁷ Edwards, J (2006) "Enforcement of Contact Orders: A New Era?" *Family Law*, 125.

¹¹⁸ Ryder, J (2008) "A Tale of Two Thresholds" *Family Law*, 29-37, p30.

¹¹⁹ Teubner, G, Schiff, D & Nobles, R (2003) "The Autonomy of Law: Introduction to Legal Autopoiesis", in Schiff, D & Nobles, R (Eds) *Jurisprudence*, London, Butterworths, 897-954, p1.

categorised as a domestic violence case and, thus, there could be “no doubt of the secure foundation for the assumption that contact benefits children”.¹²⁰ As Gilmore has convincingly demonstrated, no such firm foundation can be found in the child welfare sciences.¹²¹ There is still insufficient consideration of whether the benefits of court-enforced contact will actually outweigh the stresses of conflict and litigation.¹²² Hunt and Macleod found that where parents with residence voiced what they labelled “serious welfare concerns” unsupervised or staying contact was granted in approximately half of cases.¹²³ They warned that the fact that courts in some cases fail to award or ensure the successful implementation of contact “should not tempt us into accusing the system of favouring resident parents” since “it would be easier to make the opposite argument.”¹²⁴

In conclusion, it can be seen that despite the aspirations of the draftsmen behind section 1 of the Children Act 1989, the welfare test has developed into a narrow enquiry. In this instance, the tension between external influence from child welfare science and internal information within law has been resolved in law’s favour; the more powerful system has refused to adjust to resolve this tension, just as Jake can refuse to listen to Amy in MacKinnon’s adaptation of Gilligan’s interviews.¹²⁵ In all but a small minority of cases, both children’s objections and risks identified by resident parents are held to be outweighed by the supposed natural, abstract benefits of maintaining the father-child link. A similar interpretation of section 1 in the implementation of a shared residence presumption would have similarly undesirable results, and this point is revisited in the conclusion.

4.4 REASONABLENESS

4.4.1 Non Intervention: not a *Carte Blanche*

¹²⁰ *Re P* [2008] EWCA Civ 1431 *per* Ward LJ at [38].

¹²¹ Gilmore, S (2008) “The Assumption that Contact is Beneficial: Challenging the ‘Secure Foundation’”, *Family Law* 1226-1229, p1227.

¹²² Fortin, J, Ritchie, C & Buchanan, A (2006) “Young Adults’ Perceptions of Court-ordered Contact” 18(2) *CFLQ*, 211-230, p226.

¹²³ Hunt & Macleod (2008) *op cit* n5, p241.

¹²⁴ *Ibid*, p251.

¹²⁵ Teubner (1993) *op cit* n1, p103; MacKinnon speaking in DuBois, E, Dunlap, M, Gilligan, C, MacKinnon, C & Menkel-Meadow, C (1985) “Feminist Discourse, Moral Values and the Law - A Conversation”, 34 *Buffalo Law Review*, 11-88, p74.

The realisation that in this type of dispute, litigation often achieves little except to “entrench opposing viewpoints”,¹²⁶ led to an explicit caution against unnecessary legal intervention in s.1(5) of the Children Act 1989 (often, somewhat misleadingly, referred to as the no order principle). The “general tenor” of subsequent implementation has been “to direct as many cases as possible away from the court system”.¹²⁷ Hunt and Macleod found that only one in ten cases in their sample proceeded to a final hearing; and a third of that limited number settled in the course of the hearing.¹²⁸ The advantages are said to be that parents alone have the detailed knowledge of their own circumstances which will enable them to draw up a suitable agreement, which they can not only implement but also renegotiate.¹²⁹ Consequently, the apparent primacy accorded to the welfare principle in the Children Act 1989 is deceiving, as it is “in reality subordinated to the new principle of non-intervention”.¹³⁰ Private ordering is seen as an end in itself regardless of the substance of parents’ agreements.¹³¹ Although some have suggested cost-cutting as a primary motivation for this approach, it can also be seen as typically liberal and patriarchal in its insistence on non-intervention in the private sphere.¹³² The strategy has not been without its critics, who have warned that unscrupulous parents can abuse power imbalances to their own advantage and that children are likely to “become sidelined”.¹³³ However, as second chapter noted, this emphasis on party autonomy stops short of giving parents free rein to settle their own terms. The Family Law Act 1996 s.1(c), for example, stipulates that marriages should be brought to an end in such a way as to minimise distress to adults and children, “with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances”.¹³⁴ These statements are consistent with law’s role as maker of

¹²⁶ *Holmes-Moorhouse v Richmond LBC* [2009] UKHL 7, per Baroness Hale at [31]; King & Piper (1995) *op cit* n74, pp85-86. Section 1(5) states that a court shall not make an order “unless it considers that doing so would be better for the child than making no order at all”; a party making an application must show this on the balance of probabilities.

¹²⁷ Buchanan, A & Hunt, J (2003) “Disputed Contact Cases in the Courts” in Bainham *et al* (Eds) *op cit* n10, 365-386, p382.

¹²⁸ Hunt & Macleod (2008) *op cit* n5, p240.

¹²⁹ *Holmes-Moorhouse v Richmond LBC* [2009] UKHL 7, per Baroness Hale at [31].

¹³⁰ Bainham, A (1990) “The Privatization of the Public Interest in Children”, 53(2)*MLR*, 206, p208.

¹³¹ *Ibid*, p214.

¹³² Wright, K (2007) “The Role of Solicitors in Divorce: A Note of Caution”, 19(4) *CFLQ*, 481, p492; Esping-Andersen (1990) *op cit* n19, p14; Olsen, F (1985) “The Myth of State Intervention in the Family” 18(4) *University of Michigan Journal of Law Reform*, 835-864, p837.

¹³³ Fortin *et al* (2006) *op cit* n123, pp224-226; Wright (2007) *op cit* n134, p488.

¹³⁴ The Family Law Act 1996, s.1(c)(ii).

normative pronouncements and, furthermore, characteristic of law's focus on how things ought to be, rather on how things are.

However, it is extremely doubtful that changes in formal orders and statutory aspirations have an impact on litigating parents. When the Children Act 1989 was introduced it was hoped that since the new orders would leave fundamental parental rights/responsibilities unaffected, conflict would be reduced and children would benefit.¹³⁵ However, it is now generally accepted that this reform failed to reduce parental conflicts.¹³⁶ Instead, applications for section 8 orders have increased steadily since the Act's implementation.¹³⁷ Parental responsibility, in particular, was introduced to give both parents equal status; non-resident fathers would be reassured, mothers would be more willing to acknowledge fathers' input, and there would be "less to fight over".¹³⁸ Thus, parental responsibility is often granted despite hostility between the parties.¹³⁹ However, Diduck and Kaganas have reviewed research on parental responsibility and concluded that it is unlikely in practice to facilitate co-operative parenting.¹⁴⁰ According to autopoietic theory, law's normative expectations are filtered through parents' cognitive frameworks as the latter reinterpret legal communications to fit their own moral values and versions of events. When a relationship comes to an end, it is common for the partners to experience this as failure; the next logical step becomes to assign blame, and to construct a narrative of events consistent with this objective.¹⁴¹ Legal exhortations to behave reasonably are then rejected as incompatible. However, law, which exists to restore order, cannot abandon its search for a solution where a problem has been referred to it by another subsystem.

¹³⁵ Law Commission (1988) *Family Law Review of Guardianship and Custody*, Law Com No 172, London, HMSO, para 3.18, quoted in Roche, J (1991) "The Children Act 1989: Once a Parent Always a Parent" *Journal of Social Welfare and Family Law*, 345-361, p349.

¹³⁶ Robinson, N (2006a) "Resolving Entrenched Child Litigation Part One: The Child's Solicitor's Role in Resolving Conflict in Rule 9.5 Cases", *Family Law*, 48-56, p49.

¹³⁷ Trinder, L (2003) "Working and Not Working Contact After Divorce" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, 387-406, p386.

¹³⁸ Diduck & Kaganas (1999) *op cit* n6, p251, p257.

¹³⁹ *Re F* [2006] EWCA Civ 1426; *Re D* [1995] 3 FCR 783.

¹⁴⁰ Diduck & Kaganas (1999) *op cit* n6, p251.

¹⁴¹ James, A (2003) "Squaring the Circle - the Social, Legal and Welfare Organisation of Contact" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, 133-151, p135.

4.4.2 Interference from Child Welfare, Mediation and Post-Liberal Communitarianism

The second chapter argued that law appears, superficially, to have absorbed the language and ethos of mediation and the child welfare sciences. The task of finding the best solution for the child is undertaken as a joint venture by both parties' legal representatives.¹⁴² Traditionally adversarial, adjudicatory processes have become conciliatory and forward-looking, while parents' evidence is re-written to lessen the impact of past incidents and present both parents as "good enough".¹⁴³ Similarly, the influence of post-liberal and communitarian political thought can be seen in the Family Law Act 1996 as well as subsequent initiatives.¹⁴⁴ Barnett has pointed to a mutually reinforcing relationship between the dominant construction of children's best interests and the New Labour "ideologies and policies" which emphasise personal responsibility and citizenship.¹⁴⁵ It was noted in the second chapter that post-liberalism's welcome rejection of liberal autonomy is combined with Etzioni's view that law can act as a transmitter of good community values; the result is a "coercive slide" where the initial value-neutral insistence that decisions must be made only after careful reflection is gradually complemented by a requirement that the right choices must be made.¹⁴⁶

The limitations of law's cognitive framework have, as the second chapter explained, shaped its understanding of these external influences. Child welfare science is seen to say not only that children need both parents, but also that conflict is always bad for children; mediation-within-law is recreated as a narrow focus on settlement on the immediate issues; and the post-liberal emphasis on responsible behaviour is used to insist that "[g]ood parents cooperate and do not litigate".¹⁴⁷ The result is the dichotomous classification of the "good" and "bad" divorce, which was first observed by Day Sclater in the late 1990's and has subsequently become entrenched as the theme has been taken up and developed within law's chains of

¹⁴² Wright (2007) *op cit* n134, p481.

¹⁴³ King & Piper (1995) *op cit* n74, p91, p94; van Krieken (2005) *op cit* n6, p37.

¹⁴⁴ Reece (2003) *op cit* n46, p7.

¹⁴⁵ Barnett (2009b) *op cit* n71, p138.

¹⁴⁶ Reece (2003) *op cit* n46, pp171-172, p79.

¹⁴⁷ Kaganas & Day Sclater (2004) *op cit* n97, p13.

communication.¹⁴⁸ The responsible parent is “self-regulatory, self-monitoring, facilitative, accommodating, flexible, self-sacrificing, conciliatory and giving”.¹⁴⁹ The observation made in the section on the welfare principle about law’s inability to “take full account of the complexities of human behaviour” applies with equal force to the new insistence on reasonable behaviour.¹⁵⁰ Litigants are recreated as standard semantic artefacts: they are either good and cooperative or bad and unreasonable. Similarly, several studies by Piper, King, and Neale and Smart, have shown that specialist family solicitors structure their information to clients so as to convey dominant messages about bi-nuclear post-divorce families and to persuade their clients to “act sensibly”.¹⁵¹ A degree of manipulation was thought justified in persuading clients into settlements which were perceived to be in the long-term best interests of parents and children as understood in generalised abstract terms.¹⁵²

It has been noted that the new co-parenting model “makes emotional, cognitive and structural demands of both parents and children which they may not be able or prepared to meet”.¹⁵³ However, law combines limited cognitive openness (managed through the processes of redundancy and re-entry) with normative closure.¹⁵⁴ Since parents ought to cooperate over post-divorce contact, conflict is “bad” regardless of the increasing volume of cases involving entrenched inter-parental disputes. Thus, law remains unaware of the misfit between its insistence on maintaining relationships and minimising conflict and the powerful, complex and contradictory emotions experienced by separating parents.¹⁵⁵

Contact cases tend to be “amongst the most bitter, protracted, and difficult encountered in family law”.¹⁵⁶ The filtering mechanisms of restricted legal aid and

¹⁴⁸ Day Sclater, S (1999) *Divorce: A Psychosocial Study*, Aldershot, Ashgate, pp176-177 as cited in Reece (2003) *op cit* n46, p158.

¹⁴⁹ Wallbank, J (2009) “Parental Responsibility and the Responsible Parent: Managing the ‘Problem’ of Contact” in Probert, R, Gilmore, S & Herring, J (Eds) *Responsible Parents and Parental Responsibility*, Oxford, Hart Publishing, 295-313, p307.

¹⁵⁰ Kaganas & Day Sclater (2004) *op cit* n97, p5; Teubner *et al* (2003) *op cit* n120, p21.

¹⁵¹ Neale, B & Smart, C (1997b) “‘Good’ and ‘Bad’ Lawyers?: Struggling in the Shadow of the New Law”, 19(4) *JSWFL*, 377-402, p387; Piper, C (1999) “How Do You Define a Family Lawyer?” 19(1) *Legal Studies* 93-111, p106; King, M (1999) “Being Sensible: Images and Practices of the New Family Lawyer”, 28(2) *Journal of Social Policy* 249-273, p272.

¹⁵² Davis & Pearce (1999) *op cit* n92, p550.

¹⁵³ van Krieken (2005) *op cit* n6, p37.

¹⁵⁴ Teubner *et al* (2003) *op cit* n120, p39; King & Piper (1995) *op cit* n74, p29.

¹⁵⁵ Teubner (1993) *op cit* n1, p79; Collier (2009) *op cit* n65, p48.

¹⁵⁶ Harris-Short & Miles (2007) *op cit* n11, p864.

coercively conciliatory solicitors have meant that only the most entrenched disputes now reach the adjudication stage; but achieving lasting agreement is particularly difficult, since arrangements must be implemented over the long-term and often renegotiated in response to changes in circumstances.¹⁵⁷ Happy endings are rare, and law's refusal to consider whether its standards need to be adjusted casts parents who insist on a court hearing as the bad, litigious parties. They have, thus, become the principal targets for judicial expressions of disapproval. Sir Thomas Bingham MR in the oft-cited case of *Re O* [1996] warned lower courts not to give undue weight to short-term problems, or allow themselves to be "dictated to by obdurate parents".¹⁵⁸ The occasionally executed threats of committal for contempt or a transfer of residence have been used to secure parents' compliance with contact arrangements.¹⁵⁹ The label "implacable hostility" was initially used to describe resident parents whose objections were seen as having no reasonable foundation. However, during the 1990's, probably due to law's tendency to communicate using rigid semantic artefacts, it developed into an "umbrella term" attached to all uncooperative mothers, who were "pigeonholed" as selfish, bitter and unreasonable.¹⁶⁰ Fears have been expressed that if Parental Alienation Syndrome is given legal recognition it will be similarly misused, as the "predictions and fluid definitions" of psychiatry are converted into legal "oversimplifications, obfuscations and overstatements".¹⁶¹ Furthermore, the new post-liberal "etiquette" is likely to make professionals reticent to focus on anything which makes a compromise less likely.¹⁶² The domestic violence findings of fact hearings stipulated by *Re L* [2000] can, for example, be cancelled where the substantive issue is settled through party negotiation.¹⁶³ In *Re W-C* [2005] Wall LJ observed that since the parties had "very sensibly" managed to reach a compromise, the judge had not needed to resolve the issue of violence, with no reflection on whether there had been violence and how this might have affected the judge's decision in relation to contact.¹⁶⁴

¹⁵⁷ Doughty (2008) *op cit* n91, p151; Wasoff, F (2005) "Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce" 27(3-4) *JSWFL*, 237-250, p246.

¹⁵⁸ *Re O* [1995] 2 FLR 124.

¹⁵⁹ Bailey-Harris, R (1997) "*A v N (Committal: Refusal of Contact)*", *Family Law*, 232-233, p233. *V-P v V-P* (1980) FLR 336; *K v K* [2003] All ER 388, *Re M* [2003] FLR 636.

¹⁶⁰ *Re D* [1997] 2 FLR 48 per Hale J at p53; Smart & Neale (1997) p333.

¹⁶¹ Clarkson & Clarkson (2007) *op cit* n91, p267.

¹⁶² Smart, C & May, V (2004) "Why Can't They Agree? The Underlying Complexity of Contact and Residence Disputes", 26(4) *JSWFL*, 347-360, p348; Reece (2003) *op cit* n46, p194-197.

¹⁶³ *Re L*, *Re V*, *Re M*, *Re H* [2000] 2 FCR 404.

¹⁶⁴ *Re W-C* [2005] EWCA Civ 575 at [10].

Since good parents do not litigate, parents paradoxically find themselves reprimanded by judges just for requesting their help.¹⁶⁵ In *Re J* [2004] Wall LJ began his judgment by delivering what he himself described as a “lecture” to the parents; in *Re T* [2009] and *Re J* [2009] he reminded both parties that parents who continue “at loggerheads” cause their children “serious emotional harm”.¹⁶⁶ Since law maintains its normative standards, debate around the “intractable problem” of how to teach parents to communicate is conducted on the assumption that this is not only possible, but would also provide a panacea for contact and residence disputes.¹⁶⁷ The maintenance of social stability is such a vital part of law’s societal role that it is impossible for law to abdicate authority; law sees itself as existing to be obeyed and to impose order on an otherwise chaotic society (a perception which is perhaps also shared by a political system that turns to law to solve its problems).¹⁶⁸ Law’s lack of success has led to a search for alternative ways of educating parents: counselling, therapeutic intervention, and particularly mediation. Many courts now adopt what is described as a robust approach, which comes very close to ordering parents to attend mediation.¹⁶⁹

Contact with both parents has come to be constructed, within law’s circular chains of communication, as essential for child development; parental cooperation, or at least the absence of conflict, appears increasingly to be constructed in the same way. Furthermore, use of the reasonableness discourse is increasingly becoming as important as formulating claims within the welfare discourse.¹⁷⁰

4.4.3 The Gendered Dimension

This bifurcation into good and bad parents is applied to both sexes; in recent years the focus on compromise has made the judiciary more ready to condemn vengeful

¹⁶⁵ Kaganas & Day Sclater (2004) *op cit* n97, p13; Johnson, S (2009) “Shared Residence Orders: For and Against” *Family Law* 131, p131

¹⁶⁶ *Re J* [2004] EWCA Civ 1188 at [5-6]; *Re T* [2009] EWCA Civ 20 at [66] & *Re R* [2009] EWCA Civ 358 at [123].

¹⁶⁷ Johnson (2009) *op cit*, n152, p131.

¹⁶⁸ Teubner (1993) *op cit* n1, p70.

¹⁶⁹ Roberts, M (2006) “Voluntary Participation in Family Mediation”, *Family Law*, 57-60, p57; Robinson, N (2006) “A New Model of Court-Directed Mediation”, *Family Law*, 2006, 139-144, p140.

¹⁷⁰ Collier (2009) *op cit* n65, p45.

fathers.¹⁷¹ There is, however, a clear gender dimension to the new insistence on reasonableness. The construction of motherhood as responding to children's needs has made it difficult for women to mention their own needs or rights without being labelled selfish.¹⁷² Moreover, a false link is produced between what is expected of mothers and children's supposed intrinsic needs, which are constructed within a particular socio-political context.¹⁷³ Since the semantic artefact of the child is now constructed as needing both parents, and a conflict-free environment, counselling is recommended to mothers, who must learn how to "assist in supporting contact".¹⁷⁴ In contact cases, the identification of resident parents as the prime obstacle has resulted in a preoccupation with enforcement and consistent with the post-liberal emphasis on reasonableness, the Adoption and Children Act 2006 contains provisions, which aim to educate these parents.¹⁷⁵ Being responsible has acquired a new meaning of recognising that you need this support to parent responsibly.¹⁷⁶ Thus, mothers who cannot bring their cases within the narrow domestic violence exception still find it extremely difficult to refuse contact. At the same time, law does not seek to regulate and is uninterested in the apportionment of caring responsibilities within the private sphere. It concerns itself with abstract aspirations; the ideal is now the 'new' involved man and law consequently assumes family chores are shared equally.¹⁷⁷ Thus, mothers cannot now rely on their caring efforts and experience to argue for more time with their children. Furthermore, where children raise objections based on what would previously have been recognised as the maternal preference rule, their views are often disregarded as the results of manipulation by bitter resident parents.¹⁷⁸

The normative expectations placed on mothers and fathers in relation to contact are markedly different. The language of the statute is passive: under s.8(1) a parent with residence must "allow" contact to take place.¹⁷⁹ Case law has, however, clearly

171 Vallance-Webb, G (2008) "Child Contact: Vengeful Mothers, Good Fathers and Vice Versa", *Family Law*, 678, p678.

172 Lawler (1999) *op cit* n72, p65; Smart, C (1989b) "Power and the Politics of Child Custody" in Smart, C & Sevenhuijsen, S (Eds) *Child Custody and the Politics of Gender*, London, Routledge, 1-26, p23.

173 Lawler (1999) *op cit* n72, p70.

174 *Re P* [2008] EWCA Civ 1431 *per* Ward LJ at [36].

175 Kaganas & Day Sclater (2004) *op cit* n97, p9; Vallance-Webb (2008) *op cit* n173, p679.

176 Reece (2009) *op cit* n10, p102.

177 Barnett (2009b) *op cit* n71, p138.

178 *Ibid*, p139.

179 Smart & Neale (1999) *op cit* n96, p123.

established that mothers must actively facilitate post-divorce fathering.¹⁸⁰ Mothers may be called upon to give active assistance, e.g. in sending and in reading out letters.¹⁸¹ They must conceal their misgivings and are expected to “assist the children to come to terms with having contact”.¹⁸² As noted, the law has a clear objective of promoting father-child relationships, but a significantly hazier understanding of the substance of such relationships. Consequently, law does not demand much in terms of parenting ability. Instead, the law expects mothers to accept the additional burden of helping these fathers maintain relationships with their children.¹⁸³ The efforts involved in sustaining intra-familial relationships, however, remain hidden from law within the private sphere. Smart has observed that “the work of sustaining access is like housework: it is only visible when it is not done”.¹⁸⁴

This restriction of one parent’s freedom may be a price worth paying for the other parent’s positive impact on the children’s lives; provided, of course, that the latter will have a positive impact. This can no longer be assumed given the strength of the pro-contact presumption.¹⁸⁵ However, the voicing of complaints is a high-risk strategy which is likely to result in the mother being identified as obstructive.¹⁸⁶ Although the benefits of contact are sometimes weighed against the child’s need for stability there is very rarely recognition in this balancing exercise of the value of the care provided by the resident parent. Instead, the highest accolades are reserved for mothers who support contact in difficult circumstances or despite fathers’ severe shortcomings.¹⁸⁷ Consequently, it is not surprising that mothers seek to emulate the semantic artefact of the supportive mother. In *Re C* [2007] the mother, who faced threats of a transfer of residence, explained to the court that she had now realised that she had previously been wrong in thinking that maintaining the relationship

180 Kaganas & Day Sclater (2004) *op cit* n97, p13.

181 Jolly, S (1995) “Implacable Hostility, Contact and the Limits of Law”, 7(3) *CFLQ*, 228-235, p233.

182 *F v F* [1998] 2 FLR 237 *per* Sir Stephen Brown P at p242.

183 Wallbank, J (1998) “Castigating Mothers: The Judicial Response to ‘Wilful’ Women in Disputes over Paternal Contact in English Law”, 20(4) *JSWFL*, 357-376, p358.

184 Smart, C (1991) “The Legal and Moral Ordering of Child Custody” 18(4) *Journal of Law and Society*, 485-500, p496.

185 Collier, R (1995a) *Masculinity, Law and the Family*, Routledge, London, p283; Eriksson & Hester (2001) *op cit* n108, p780.

186 Barnett (2009b) *op cit* n71, p138; Eriksson & Hester (2001) *op cit* n108, p787; Wallbank (1998) *op cit* n185, p367.

187 *Re W* [2007] EWCA Civ 786 *per* Wall LJ at [4]; *F v R, D, N* [2007] EWHC 64 *per* Sumner J at [152]-[153].

between the father and child was “up to the father”.¹⁸⁸ “Being neutral”, she conceded “was not enough”.¹⁸⁹ Even though suspicions were voiced regarding the genuineness of her change of heart, the mother in *Re C* [2007] successfully retained residence; but only as long as she continued to conform to the normative expectations of reasonable post-liberal co-parenting. It will be argued subsequently, that in relation to shared residence, this is an even higher price to pay.

In conclusion, it can therefore be seen that although the non-intervention principle in s.1(5) and the current reluctance of the courts to adjudicate disputes over children appear to give parents greater freedom, in reality the latter’s autonomy is greatly limited by a proscriptive and coercive legal discourse which, through its own rigid translations of child welfare, mediation and post-liberal arguments, insists that parents should only use their freedom of choice to make the ‘right’ decision to continue the family across two households. Mothers, in particular, are implicitly expected to make considerable sacrifices in order for children to grow up in the supposedly essential collaborative bi-nuclear post-separation family. Yet, high-conflict cases continue to put an over-stretched family court system under pressure, and there is a perception within the political subsystem that the law is not working.

4.5 CONCLUSION

This chapter has examined how the three strands identified in the second chapter have influenced English law in relation to disputes between parents over children. The autopoietic and inherently patriarchal nature of family law can be seen in the conceptualisation of parental responsibility as a right and status bestowed merely by reason of biological fatherhood. Law’s simplistic understanding of child welfare science has combined with its susceptibility to pressure or interference from the more powerful political subsystem and has led law to prioritise the child’s need for both parents, and to understand it in a general, “male” way, as can be seen in the understanding of parental responsibility as bringing great symbolic benefits to children. The traditional nuclear family retains a strong normative influence, bolstered by law’s responses to concerns around demographic change expressed in

¹⁸⁸ *Re C* [2007] EWHC 2312 at [78].

¹⁸⁹ *Ibid*, per Sumner J at [99].

political discourse, but law's tendency to focus on abstract aspirations allows it to ignore the gap between gender-neutral legislation and gendered familial practices. Thus, ostensibly gender-neutral exhortations to parents to behave reasonably and responsibly coerce mothers into sustaining father-child relationships within a new binuclear framework and allows non-resident fathers to provide what is seen by law as a stabilising influence, with little practical involvement: a "reconstruction of patriarchy".¹⁹⁰ It is argued in the next chapter that a greater use of court-ordered shared residence would constitute a further, undesirable, step in this direction.

¹⁹⁰ Smart, C (1989) *Feminism and the Power of Law*, Routledge, London, p19.

5 THE LAW ON SHARED RESIDENCE IN ENGLAND

5.1 INTRODUCTION

This chapter first considers the residence order *per se*, and court decisions on sole residence. It then focuses on shared residence, using the analytical framework from previous chapters to examine this order in relation to the ideal of permanent parenthood, the welfare test, and the emerging powerful ‘reasonableness’ discourse. English family law has moved from an earlier dislike of shared residence to a neutral stance in s.11(4) of the Children Act 1989 which expressly envisages, but does not encourage, the use of this order, and now to a view of it as benefitting children not only through the practical arrangements but also the symbolic messages the order can send. It is contended that this order is becoming an increasingly important part of law’s strategy of making post-separation dual household families conform to a binuclear blueprint. This use of the order is, in principle, contrary to s.1 of the Children Act 1989. In practice, it is likely to expose both children and their mothers to risks of harm and unjustifiable emotional and practical difficulties. It is submitted that these are decisive arguments against a shared residence presumption.

5.2 RESIDENCE ORDERS

A residence order is defined in s.8(1) as “an order settling the arrangements to be made as to the person with whom a child is to live”. Although there were almost as many applications for residence as for contact in 2008, residence is a less contested issue and a significant number of residence orders are likely to have been sought merely as a confirmation of existing arrangements.¹ The residence order was designed to fit with the 1989 Act’s objective of impressing upon fathers the

¹ Ministry of Justice (2009) *Judicial and Court Statistics 2008*, London, TSO, p93.

permanent nature of their commitment to their children.² One assumption behind the Act was that replacing the custody order with residence would allow the non-resident parent to retain equal status and provide an incentive for continued involvement with the child.³ The order does, however, bring some additional legal benefits. Where it is made in favour of a father who does not have parental responsibility, the order must also grant the latter, and this parental responsibility will continue even if the residence order is subsequently terminated.⁴ Section 13 of the Act provides that where a residence order is in force neither parent can cause the child to be known by a new surname or leave the jurisdiction for more than a month. Fathers have attacked sole residence orders as an unjustified unequal treatment of two fit parents, and have complained of being made to feel like second-class citizens.⁵

When family law moved away from the view that fathers had absolute rights over children, judicial “rules of thumb” developed whereby young children would be sent to live with their mothers.⁶ Mothers are still significantly more likely than fathers to be holders of residence orders and accusations of bias have consequently been made against the legal system.⁷ Empirical studies confirm judicial assertions that this is not gender bias but in fact a reflection of parents’ own preferences as well as a result of the judicial preference for continuity.⁸ Although there is no express *status quo* presumption, the likely effects of change are explicitly mentioned in s.1(3), and

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- 2 Herring, J (2001) “Parents and Children” in Herring, J (Ed) *Family Law: Issues, Debates, Policy*, Cullompton, Devon, Willan Publishing, pp150-151; Bailey-Harris, R, Barron, J & Pearce, J (1999) “Settlement Culture and the Use of the ‘No Order’ Principle under the Children Act 1989”, 11(1) *CFLQ*, 53-62, p53.
 - 3 Law Commission (1988) *Family Law Review of Guardianship and Custody*, No 172, London, HMSO, [4.5]; Bainham, A (1990) “The Privatization of the Public Interest in Children”, 53(2) *MLR*, 206, p210; Smart, C & Neale, B (1999) *Family Fragments?*, Cambridge, Polity Press, pp37-38
 - 4 The Children Act 1989, s.12 and s.4.
 - 5 *D v D* [2001] 1 FLR 495 at p496; *A v A* [2004] EWHC 142 [3]; Geldof, B (2003) “The Real Love that Dare Not Speak its Name: A Sometimes Coherent Rant” in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 171-200, p184; Matt O’Connor, founder of Fathers4Justice, interviewed in Hill, D, *The Guardian*, 11th June 2003; Coe, T, *Shared Parenting: The Right Starting Point?* Equal Parenting Council website <http://www.equalparenting.org/shared-parenting/index.php> accessed 30th September 2007.
 - 6 Diduck, A & Kaganas, F (1999) *Family Law, Gender and the State: Text, Cases and Materials*, Oxford, Hart Publishing, p468.
 - 7 Hunt, J & Macleod, A (2008) *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce*, London, TSO, p8; *The Times*, 9th December 2003; *The Sun* 19th December 2003.
 - 8 *Re O* [2003] EWCA Civ 915 per Thorpe LJ [12]; Smart, C, May, V, Wade, A & Furniss, C (2003) *Residence and Contact Disputes in Court: Volume 1*, Department for Constitutional Affairs, <http://www.dca.gov.uk/research/2003/6-03es.htm>.

very often there is felt to be such a considerable risk of harm that this determines the outcome of contested residence cases.⁹

The residence order was also introduced to facilitate compromise and co-parenting. It, and the parental responsibility order, replaced the custody order as part of the 1989 Act's strategy to "lower the stakes" in inter-parental disputes.¹⁰ However, fathers' groups have repeatedly complained that mothers are using sole residence orders to exclude fathers and that parental responsibility orders are useless in preventing this.¹¹ In conclusion, there is no firm evidence that the introduction of residence orders has encouraged paternal involvement, benefited children or reduced parental hostility. This is not surprising, given the difficulties the closed legal subsystem has in transmitting messages outside its own boundaries, where they are reinterpreted or rejected according to individuals' cultural, religious or personal moral constructions of truth. A "simple model of cause and effect"¹² is unrealistic, and law cannot be used to make parents nicer to each other. However, within political debate, this lack of success has amplified voices that insist that family law is failing. Current practice is increasingly criticised as an overly simplistic "first past the post" system, which discards the vital role previously played by the "secondary" parent.¹³ While this criticism may be justified, it is far from clear that a shared residence presumption constitutes the solution.

5.3 SHARED RESIDENCE: DEFINITION

Shared residence is a comparatively recent and rare arrangement although its popularity is increasing; a recent survey estimated that between 9% and 12% of separated couples' children now alternate between two households.¹⁴ There is no firm definition of shared residence in English law, no formalised requirements, and

⁹ *Re F* [2009] EWCA Civ 313; *Re C* [2007] EWHC 2312; *Re M* [2008] EWCA Civ 225.

¹⁰ Roche, J (1991) "The Children Act 1989: Once a Parent Always a Parent", 13(5) *JSWFL*, 345-361, p349; Law Commission (1988) *op cit* n3, [4].

¹¹ Reece, H (2009) "The Degradation of Parental Responsibility" in Probert, R, Gilmore, S & Herring, J (Eds) *Responsible Parents and Parental Responsibility*, Oxford, Hart Publishing, 85-102, p95; Diduck & Kaganas (1999) *op cit* n6, p442; Coe, T, *Shared Parenting: The Right Starting Point?* Equal Parenting Council website <http://www.equalparenting.org/shared-parenting/index.php> accessed 30th September 2007.

¹² Teubner, G (1993) *Law as an Autopoietic System*, London, Blackwell, p82.

¹³ Families Need Fathers' Policy Paper on Shared Residence. <http://fnf.org.uk.uk3.clientproof.co.uk/law-policy/shared-residence>, accessed 30th September 2007; Geldof (2003) *op cit* n5.

¹⁴ Peacey, V & Hunt, J (2008) *Problematic Contact after Separation and Divorce? A National Survey of Parents*, London. One Parent Families/Gingerbread, p19.

no uniform agreement on terminology.¹⁵ S.11(4) of the Children Act 1989 merely states that where a residence order is made in favour of adults who do not live together, it “may specify the periods during which the child is to live in the different households concerned”. Although there now seems to be judicial agreement that this arrangement should be described as shared, rather than joint, the courts at times use the terms shared care or shared parenting which could also mean sole residence with contact.¹⁶ The distinction between shared residence and sole residence with generous contact is essentially a question of degree, particularly as contact orders will now more often than not involve quite generous staying contact. The Court of Appeal has confirmed that the two questions should be considered separately: a judge should first consider the optimum division of time and then weigh up whether to label the arrangement using a contact or a shared residence order.¹⁷ Unlike joint legal custody, however, shared residence does imply physical care of the child, which is significant in terms of quantity as well as quality.¹⁸ An order can contain detailed schedules, but courts may also leave the parties to agree: “the object of the exercise should be to maintain flexible and practical arrangements whenever possible”.¹⁹

5.4 SHARED RESIDENCE AND PERMANENT, PATRIARCHAL PARENTHOOD

The custody order was seen as an “all or nothing”, “winner takes all” order, and the change of terminology to residence was intended to remedy this problem.²⁰ Yet, shared residence is now increasingly sought by fathers due to its connotations of equal status.²¹ District Judge Spencer has observed, extra-judicially, that many fathers are now aggrieved to have their time with the children labelled contact, which is seen as signalling that they are less important.²² They seek shared

¹⁵ Gilmore, S (2006b) “Court Decision-Making in Shared Residence Order Cases: a Critical Examination”, 18(4) *CFLQ*, 478-498, p480.

¹⁶ The first point has been made by Wilson LJ in *Re W* [2009] EWCA Civ 370 and *Re K* [2008] EWCA Civ 526; a less clear approach can be found in *Re W* [2005] EWCA Civ 1276; *Re P* [2006] EWCA Civ 964; *Re C-P* [2006] EWCA Civ 120.

¹⁷ *Re K* [2008] EWCA Civ 526

¹⁸ Edwards, J (2006) “Presumption of Shared Residence - a Conundrum for the Government or the Judiciary?” *Family Law*, 30-35, p34.

¹⁹ *A v A* [2004] EWHC 142 at [118]. In that case the schedules were, in fact, extremely rigid and detailed.

²⁰ As is the case now, a perception had developed within the political subsystem that families faced problems that law ought to solve.

²¹ Spencer, S (2008) “Benchmarks: Family Residence”, 39 *Law Society Gazette*, 24; *Re P* [2006] EWCA Civ 964; *Re W* [2005] EWCA Civ 1276; *A v A* [2004] EWHC 142; *Re C-P* [2006] EWCA Civ 120

²² Spencer (2008) *op cit* n21, p24.

residence in the erroneous belief that it will give them “more legal power in the child’s life”.²³ Indeed, Ward LJ was prompted to observe in *Re G* [2008]: “A residence order gives the mother no added right over and above the father. That is the lesson that has not yet been fully learned in the 19 years that the Act has been on the statute book”.²⁴ This may seem to contradict what is stated above in relation to the residence order, parental responsibility and the rules against surname change and removal from the jurisdiction, but Ward LJ was substantially correct. These legal consequences are not particularly significant; the same outcomes can be achieved just as easily through different procedural routes; and it has always been clear that a residence order does not grant greater parental status.²⁵

5.4.1 Case Law after the Children Act 1989

Initially, courts adhered firmly to the understanding of shared residence that was implicit in the Children Act 1989; residence orders were, “as their words indicate, practical orders”.²⁶ The very important case of *D v D* [2001], which signalled a significant warming of judicial attitudes towards shared residence, was, nonetheless, decided on the basis of a near-equal division of the children’s time.²⁷ Courts subsequently remained reluctant to grant shared residence to fathers who sought it solely for its symbolic benefits.²⁸ In *Re A* [2001] Hale LJ observed that the law already grants parents equal, shared parental responsibility, while shared residence orders “are about where a child is to live”.²⁹ In *Re S* [2002] the father’s appeal was denied; the court acknowledged that the categorisation of the order mattered greatly to the applicant, but observed that he “was asking for a label to be applied to the arrangements which belied their reality”.³⁰ Similar comments were made by Thorpe LJ in *Re W* [2003].³¹ In *Child-Villiers* [2002] and *P v BW* [2003] the courts relied on s.1(3)(e) to reject applications made primarily to adjust child support liability.³²

²³ *Ibid.*

²⁴ *Re G* [2008] EWCA Civ 1468 at [17].

²⁵ *Re M* [1999] 2 FLR 334.

²⁶ *Re H* [1995] 2 FLR 883 *per* Ward LJ at p889.

²⁷ *D v D* [2001] 1 FLR 495.

²⁸ *K v K* [2003] All ER 388; *Re A* [2002] EWCA Civ 1343.

²⁹ *Re A* [2001] EWCA Civ 1795 *per* Hale LJ at [17].

³⁰ *Re S* [2002] EWCA Civ 179 *per* Wilson J at [4].

³¹ *Re W* [2003] EWCA Civ 116 at [7].

³² *Child-Villiers v Secretary for Work and Pensions* [2002] EWCA Civ 1854; *P v BW* [2003] EWHC 1541.

However, there has also been a parallel line of cases like *Re N* [1994], where a shared residence order may have been made primarily to ease the father's sense of loss when the two young daughters were moved to live with their mother.³³ Similarly in *Re R* [1995] a mother who only spent three-quarters of weekends and some holidays with her children was given shared residence.³⁴ This use of shared residence can be seen as consistent with the Children Act approach of avoiding any legal steps which may discourage a parent from maintaining a relationship with a child.

5.4.2 *D v D* [2001] and the Dual Purposes of Shared Residence

Further evidence of this approach can also be found in the leading case of *D v D* [2001] and subsequent cases. It can be seen as law's attempt to "silence the noise" it registers from the political subsystem, which insists that law must find new solutions to the perceived problems of discouraged or disengaged post-separation fatherhood.³⁵ This powerful interference has led to a new use of shared residence orders to combat a problem that parental responsibility and contact orders are judged not to have solved. An understanding of the autopoietic nature of the political and legal subsystems, and the difficulties of law reforms where these conflict with parents' own motivations or understandings of right and wrong, leads to the conclusion that this use of the shared residence order is no more likely to be successful than previous strategies; this is not a productive use of the law.

In *D v D* [2001] the applicant father argued that he was being treated "as a second-class parent" and had cited this as a main source of his grievances.³⁶ At first instance, Connor J had found that the mother was using the sole residence order as a "weapon" in the "war" with the father.³⁷ The Court of Appeal cited two reasons for upholding the shared residence order. Firstly, they applied the s.1(3) checklist and concluded that, since the order would reflect the practical realities, it would not confuse the children. Secondly, the Court recognised that a shared residence order "removes any impression that one parent is good and responsible whereas the other

³³ *Re N*, unreported, Court of Appeal, 2nd September 1994.

³⁴ *Re R* [1995] 2 FLR 612.

³⁵ Teubner (1993) *op cit* n12, p71; p141.

³⁶ *D v D* [2001] 1 FLR 495, at p495.

³⁷ *Ibid*, *per* Connor J at p497.

parent is not”.³⁸ It was felt that the additional, largely symbolic, benefits this would bring to the father would allow him to “go away and make contact work”.³⁹

Applying *D v D* [2001], the judiciary continued to emphasise that a shared residence order must reflect practical realities, but, once this was established, became increasingly prepared to be swayed by arguments about symbolic messages regarding status.⁴⁰ These dual purposes were again stressed in *A v A* [2004] where the father had initially applied for both contact and shared residence, admitting that his application for the latter was to counter the mother’s habit of making unilateral decisions.⁴¹ The shared residence order was said to signal that the parents were “equal in the eyes of the law”.⁴² According to autopoieticists, law is making successive minor modifications to its cognitive framework until the tension created by the clashing expectations of other subsystems has been resolved.⁴³ Changes can only occur in ways which are compatible with the existing meaning-making machinery, and in this instance, adjustments to law’s truths about fatherhood have occurred in ways which are compatible with the normative influence of the public/private dichotomy. In *Re F* [2003] a shared residence order was used to achieve an interesting solution in a case where both parents had sought sole residence and the father had abandoned his naval career to improve his prospects of success.⁴⁴ It was held that, despite the mother’s shortcomings, a change of residence away from the primary carer mother would be too traumatic. However, it was also found that the mother had attempted to exclude the father, and to prevent this from reoccurring, the court chose to make an order for shared residence, rather than contact (the two primary-school age daughters were to spend three out of four weekends and the larger share of school holidays with the father). At first instance, Bonvin J also advised the father to reconsider his decision to leave the Navy, suggesting a judicial reluctance to let him abandon his traditional breadwinner role.⁴⁵ She opined that the recognition of equal status was important in this instance to ensure that the father remained “sufficiently closely involved in [the children’s]

³⁸ *Ibid*, per Dame Elizabeth Butler-Sloss at p503.

³⁹ *Ibid*.

⁴⁰ *Re C* [2002] 1 FLR 1136; *Re A* [2002] EWCA Civ 1343.

⁴¹ *A v A* [2004] EWHC 142 at [3].

⁴² *Ibid*, at [124].

⁴³ Teubner (1993) *op cit* n12, pp78-79.

⁴⁴ *Re F* [2003] EWCA Civ 592.

⁴⁵ *Ibid*, at [13].

lives to provide a suitable example of good behaviour, appropriate guidance on moral issues, as well as to counteract any tendency of the part of the mother to be overly critical of [the older daughter]”.⁴⁶ Her decision was upheld by the Court of Appeal. This compromise may have failed to satisfy either parent but suited law’s purposes (and success is evaluated internally) As an autopoietic subsystem, the law assigned to its semantic artefacts of mother and father the gendered roles of the patriarchal nuclear family; the mother was to continue providing care, while fatherhood was understood in terms of authority, guidance and discipline.

The perception of shared residence as a ‘status symbol’ may have been bolstered by cases involving a non-biological parent, like *Re G* [2006], where there has been explicit use of shared residence to grant parental responsibility and equal status.⁴⁷ *Re A* [2008] was described by Bridge as “an elegant illustration of the expansion of the concept underlying shared residence orders”.⁴⁸ The case granted shared residence to a man who had brought the child up thinking he was the father, but had subsequently discovered this not to be the case.⁴⁹ The purpose of the order was to grant the step-father parental responsibility and also to signal that he was an important, permanent part of the child’s life.⁵⁰ In this case, the order was indeed needed if the parties were to have equal status, but it is submitted that the question of status should not have been divorced from the issue of practical involvement. The case is considered further in later sections.

It appears that the message about status originally enunciated in *D v D* [2001] has changed; the order was initially to be simply about practicalities, and then came to be seen as equally about confirming concrete arrangements and conveying symbolic messages. In subsequent cases, however, the first purpose is no longer mentioned, and shared residence can be granted purely to achieve the latter; the judiciary, for example, have endorsed the making of shared residence orders where one parent is

⁴⁶ *Ibid* at [13].

⁴⁷ *Re G* [2006] 2 FLR 629; Geekie, C (2008) “Relocation and Shared Residence: One Route or Two?” *Family Law*, 446-448, p446. See also *Re H* [1995] 2 FLR 883.

⁴⁸ Bridge, C (2008f) “Case Reports: Shared Residence: *Re A* (Shared Residence: Parental Responsibility)” *Family Law*, 1006.

⁴⁹ *Re G* [2006] UKHL 43; *Re A* [2008] EWCA Civ 867.

⁵⁰ Bridge (2008f) *op cit* n50, p1006; Bridge, C (2008e) “Case Reports: Residence: *Re K* (Shared Residence Order)” *Family Law*, 849.

emigrating to North America.⁵¹ In *Re K* [2008] the benefits of the shared residence order were seen to be largely symbolic; the district judge had been wrong to see the application for shared residence as irrelevant once he had denied the application for increases in contact since the two “do not stand or fall together”.⁵² In *Re G* [2008] Ward LJ had some sympathy for the first instance judge’s conclusions that the reality of the arrangement was quite obviously sole residence, and that a shared residence order was no more than “a little piece of paper”.⁵³ He noted, however, that this was “an emotive matter for the father”, and said the matter ought to have been adjourned for full consideration.⁵⁴

It is true that fathers who seem to preoccupied with their own rights, are unduly confrontational or make unsubstantiated accusations of bias, receive robust responses from the judiciary.⁵⁵ Yet, overall, shared residence has developed “a special meaning” that is far removed from the statute”.⁵⁶ Case commentaries and practitioners’ articles have observed that there are “psychological” benefits to children and parents in stamping the court’s official seal of approval on arrangements and “emphasising the equality” of parents.⁵⁷ Shared residence orders are often combined with contact orders for one parent; a “contradiction in terms” justifiably criticised by Wilson LJ in *Re W* [2009].⁵⁸ In *Re T* [2009] Wall LJ described equal division as “rare”, suggesting that most cases now depart from what had previously been presumed to be the standard shared residence arrangement of 50/50 sharing.⁵⁹

It is interesting to note that this reinterpretation has occurred as members of the judiciary have linked their own comments with observations from previous cases into a self-reinforcing chain of communications that constructs shared residence as less about time and more about something that has always been a prominent feature of the legal cognitive framework: the sharing of power or status. An autopoietic

51 *CC v PC* [2006] EWHC 1794; *Re N* [2006] EWCA Civ 872

52 *Re K* [2008] EWCA Civ 526 *per* Wilson LJ at [6].

53 *Re G* [2008] EWCA Civ 1468 at [5].

54 *Ibid.*

55 See e.g. *Re R* [2003] EWCA Civ 597.

56 Spencer (2008) *op cit* n21, p24.

57 *Ibid.*, p25; Bridge (2008f) *op cit* n50, p1006.

58 *Re W* [2009] EWCA Civ 370 at [21]. See e.g. *Re A* [2008] EWCA Civ 867; *Re G* [2007] EWCA Civ 1497; *V v V* [2006] EWHC 2546; *Re H* [2004] EWHC 2064 *per* Baron J at [1].

59 *Re T* [2009] EWCA Civ 20 at [35].

system constructs new meanings from old ones. 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.”⁶⁰ The two purposes 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 most important. 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.⁶¹ The Children Act’s focus on practical arrangements, and the earlier insistence that orders must not confuse children, appear to have gone, perhaps forgone in the search for a solution that can silence the complaints from the political subsystem that more must be done to address the problem of disengaged fathers and disintegrating families. Counsel’s arguments based on the precise allocation of the daughter’s time (25/75) were rejected by the Court of Appeal.⁶² Comparisons can be made with an early 20th Century compromise technique, which sought to reconcile the competing demands of aggrieved fathers and the ‘best interests’ standard by separating legal custody from practical ‘care and control’.⁶³ This would give fathers the desired status and authority, without unduly disturbing the mother-child bond. In both instances, family law’s preoccupation with preserving existing patriarchal structures is evident.

Pro-fathers campaigners have warned that the current, supposedly biased, law risks creating “an unstable society of children and feckless adolescents”, and that, rather than addressing the symptoms of social disintegration, governments should seek to

⁶⁰ *Re W* [2009] EWCA Civ 370 at [11].

⁶¹ *Re W* [2009] EWCA Civ 370 at [15]

⁶² *Ibid* at [17].

⁶³ van Krieken, R (2005) “The ‘Best Interests of the Child’ and Parental Separation: On the ‘Civilizing of Parents’”, 68(1) *MLR*, 25-48, p30; Law Commission (1986) *Family Law Review of Child Law: Custody*, Working Paper No 96, London, HMSO, [2.35]; *B v B* [1978] 1 FLR 87.

reverse the fatherlessness that is its underlying cause.⁶⁴ The arguments are almost identical to the warnings issued by the New Right in the 1980's, examined in the previous chapter, and are easy to dismiss as exaggerated doom mongering. However, the autopoietic legal subsystem is inherently both patriarchal and conservative, ensuring a stable society by deflecting challenges to the current allocation of power.⁶⁵ Consequently, these types of messages about fathers' vital role in maintaining the stable families that are the basic building blocks of society fit comfortably into law's chains of communications. Fathers 4 Justice has said: "Whilst the traditional nuclear family may be an anomaly in today's contemporary society, children still need the love and care of both parents".⁶⁶ Similar statements are made by legal personnel. In *Re A* [2008] Adam J had told the litigants that their son needed "a rounded future", which he said was "achievable only with a father figure as well as a mother figure". It is not clear whether this prescription for healthy development applied solely to this boy; it is more likely to have been an observation of general application. It is quoted, without further comment, by Sir Mark Potter in the subsequent appeal to the Court of Appeal.⁶⁷ In this particular case the courts appeared especially concerned to maintain the six-year-old boy's link with the appellant step-father because the latter was "the only father figure known" to the boy.⁶⁸

In conclusion, this use of shared residence can be compared with the contact presumption, which has been described as resulting from law's desire to make post-separation families conform to the hierarchical structure of the traditional, nuclear family.⁶⁹ Fathers are encouraged to provide a stabilising influence over children in mother-headed families, as part of a "reconstruction of patriarchy".⁷⁰ Contested shared residence cases almost all feature cross-allegations from parents where mothers allege that non-residents fathers are controlling and fathers respond that

64 Geldof (2003) *op cit* n5, p182; Fathers 4 Justice: "Your Family Matters", http://fathers-4-justice.org/f4j//index.php?option=com_content&task=view&id=16&Itemid=40 accessed 22nd March 2009.

65 Luhmann (1989) *op cit* n53, p144.

66 Fathers 4 Justice: "Your Family Matters", http://fathers-4-justice.org/f4j//index.php?option=com_content&task=view&id=16&Itemid=40 accessed 22nd March 2009.

67 *Re A* [2008] EWCA Civ 867 at [35].

68 *Ibid* at [65].

69 Neale, B & Smart, C (1997b) "Arguments Against Virtue - Must Contact be Enforced?", *Family Law* 332-336, p336

70 Smart, C (1989) *Feminism and the Power of Law*, Routledge, London, p19.

mothers are maliciously trying to marginalise them.⁷¹ It is impossible to speculate on how many of these accusations are groundless and/or tactical, but in *Re G* [2008] Shawcross J had, at trial, been “troubled” by “the father’s seemingly entrenched belief that he ought to have 50% of his child’s time” and his unwillingness to listen to arguments to the contrary.⁷² This father was by no means atypical of fathers who make repeated applications, and the fact that law’s definition of shared residence has altered significantly to focus on symbolic benefits leads to a real worry that fathers will, with judicial assistance, gain shared residence solely or primarily to enhance their status and assert their authority over their former partners and children. This is a very poor starting point for a shared residence presumption; it will lead to a routine ordering of shared residence in circumstances where children are likely to be harmed by the arrangement. It is also unlikely to provide solutions to any real or perceived problems in relation to fatherhood, as will be explored in the section on reasonableness. In many cases, where fathers are genuinely interested in spending more time with their children, shared residence orders that merely bring symbolic benefits will disappoint fathers, cause mothers to feel resentful, have no impact on children’s situations, and will only be evaluated as a successful solution within the legal system itself.

5.5 SHARED RESIDENCE AND THE PARAMOUNTCY PRINCIPLE

Prior to the enactment of the Children Act 1989 orders were often made for joint legal custody, but practical arrangements where children alternated between both parents’ homes were extremely rare.⁷³ In a 1985 survey for the Law Commission orders for “shared care and control” had been made in only 0.4% of cases in the sample.⁷⁴ The greatest obstacle to shared residence is likely to have been judicial disapproval.⁷⁵ Case law precedents had come to be based on the assumption that couples would want a ‘clean break’ and very little was done to encourage post-

⁷¹ *Re G* [2008] EWCA Civ 1468 at [6]; *Re K* [2008] EWCA Civ 526 at [6]; *Re A* [2008] EWCA Civ 867 at [6]; *Re C* [2007] EWHC 2312.

⁷² *Re G* [2008] EWCA Civ 1468 at [10].

⁷³ Harty, M & Wood, J (1991) “From Shared Care to Shared Residence”, *Family Law*, 430-433, p430.

⁷⁴ *Ibid.*

⁷⁵ Baker, A & Townsend, P (1996) “Post-divorce Parenting: Rethinking Shared Residence”, 8(3) *CFLQ*, 217-227, p221.

divorce collaboration.⁷⁶ In *Riley v Riley* [1986] the nine-year-old daughter had been alternating between her parents' homes for five years, but the Court of Appeal allowed the mother sole residence, commenting that it was "prima facie wrong" to deprive a child of the security of a fixed home.⁷⁷

5.5.1 The Children Act 1989 & Subsequent Cases

The 1989 Act's preference for giving parents freedom to negotiate their own arrangements meant that s.11(4) of the Act explicitly allowed shared residence and overruled the *de facto* prohibition in *Riley v Riley*.⁷⁸ However, the Law Commission thought shared residence orders would remain unusual and the Department of Health guidelines confirmed that "most children will still need the stability of a single home".⁷⁹ Joint parenting was, instead, conceptualised in terms of increasing contact and co-operation.⁸⁰ Judicial scepticism initially remained post-implementation.⁸¹ Shared residence was seen as "an order which would rarely be made and would depend upon exceptional circumstances" since it risked subjecting the child to "stress and confusion".⁸² The 1990's saw a gradual lessening of judicial resistance, possibly partly because courts increasingly had to consider the issue of shared residence in cases where the arrangement was already being successfully implemented.⁸³

In *A v A* [1994], which at the time came to be seen as the leading case, the court was slightly less hostile, labelling shared residence orders "unusual" rather than exceptional.⁸⁴ Nevertheless, Butler-Sloss LJ insisted firstly, that some "positive benefit" to the child must be demonstrated and secondly, that the risk of unsettling the child must have been eliminated.⁸⁵ In *G v G* [1993] this "unusual order" was made, because the circumstances were unusual, but it was still more common for

⁷⁶ *Ibid*, p219; Neale, B & Smart, C (1997c) "Experiments with Parenthood?" 31(2) *Sociology*, 201-219, p203.

⁷⁷ *Riley v Riley* [1986] 2 FLR 429 *per* May LJ at p431.

⁷⁸ Department of Health (1991) *The Children Act 1989: Guidance and Regulations, Vol 1, Court Orders*, London, HMSO, [2.23], [2.28].

⁷⁹ *Ibid*, [2.28]; Law Commission (1988) *op cit* n3, [4.12].

⁸⁰ Neale, B, Smart, C & Wade, A (2001) *The Changing Experience of Childhood: Families and Divorce*, Cambridge, Polity Press, p126.

⁸¹ Johnson, S (2009) "Shared Residence Orders: For and Against" *Family Law* 131, p131

⁸² *Re H* [1994] 1 FLR 717 *per* Purchas LJ at p722.

⁸³ Baker & Townsend (1996) *op cit* n78, p227; Mitchell, J (2004) "Shared Residence: Panacea or Problem?" *New Law Journal*, 1642-1644, p1643

⁸⁴ Douglas, G (1994) "A v A (Minors) (Shared Residence Order)" *Family Law*, 431-432.

⁸⁵ *A v A* [1994] 1 FLR 669 at pp677-678.

fathers' applications to be rejected on the grounds that shared residence would be too worrying and confusing for the children.⁸⁶ Shared residence remained the preserve of parents who were enthusiastic and committed enough to voluntarily draw up such agreements and persuade the court to approve them. This may have been under-inclusive but had the firm advantage of not subjecting children to arrangements that might harm them. The available research, explained in the second chapter, suggests that shared residence is more likely to last, and to be seen as beneficial, in families where the parents have themselves agreed to this arrangement.

5.5.2 *D v D* [2001] & Subsequent Case Law

D v D [2001] has been described as confirming an earlier softening of judicial attitudes towards shared residence and “taking the law further”.⁸⁷ The dispute concerned three girls, aged between eleven and nine, who had during the six years following their parents' separation spent 38% of their time with their father.⁸⁸ At first instance, the father had been successful in obtaining shared residence. This was confirmed by the Court of Appeal, who, overturning earlier precedent, stated that an applicant should not have to prove unusual or exceptional circumstances; courts should simply apply the s.1(3) welfare test to the “individual facts of each case”.⁸⁹ Here, the order reflected the reality of the children's lives and would eliminate, rather than cause, confusion, while the positive benefit to the children lay in the court's official recognition of their actual living arrangements.⁹⁰ Nevertheless, Butler-Sloss P reiterated that “[a] shared residence order is not the standard order”.⁹¹ Hale LJ appeared to sound a note of caution to other applicant parents, reminding them that under s.1(3)(c), which requires the court to take into account the likely effect of any change in the child's circumstances, “any application to change an existing order must be supported by good reasons”.⁹² According to Gilmore, shared residence orders continued to be made predominantly to parents whose children were already spending substantial amounts of time in each parent's home.⁹³ Courts

86 *G v G* (1993) Fam Law 615; *Re M* (Unreported) Court of Appeal, 6th December 1996; *Re WB*[1995] 2 FLR 1023; Neale *et al* (2001) *op cit* n83, p126.

87 *Butterworths Family Law Service* (Version 6), London, LexisNexis UK, [1706].

88 *D v D* [2001] 1 FLR 495 at p496.

89 *Ibid*, per Dame Elizabeth Butler-Sloss P at p503.

90 *Ibid*, per Hale LJ at p501.

91 *Ibid*, per Butler-Sloss P at p502.

92 *Ibid*, per Hale LJ at p502.

93 Gilmore (2006b) *op cit* n15, pp495-496.

may have been erring on the side of caution, but, as shown in the third chapter, the research evidence is that this is a highly demanding arrangement which does not suit everyone. A series of gradual increases in contact, followed by evaluation of how the child is coping, are more likely to be in children's best interests than a sudden, dramatic change to shared residence.

In subsequent cases, *D v D* [2001] is regarded as having significantly changed the law by removing any "gloss" from the welfare principle.⁹⁴ Interpretations of communications, or constructions of meaning, are adjusted as communications are fitted within a subsystem's discursive chains, and it is these new meanings that shape future legal discourse, rather than what was meant when the communication was originally produced.⁹⁵ In *Re A* [2002] the Court of Appeal criticised the first instance judge for having failed to recognise how much the law had changed.⁹⁶ In *Re S* [2003] the case similarly had to be sent back to the County Court for reconsideration.⁹⁷ Considerable judicial emphasis was initially placed on the fact that, to avoid confusion and keep with the legislators' intentions, shared residence orders must accord with the children's own experiences and involve a substantial sharing of the child's time.⁹⁸ In *Re S* [2002] Wilson J felt that any symbolic benefit to the father of shared residence status would be outweighed by the uncertainty visited upon the young children by a label which did not reflect practicalities.⁹⁹ This appears to be striking a sensible compromise which maintains a focus on how the order will directly affect the relevant child.

However, law's understanding of shared residence has, as outlined in the previous section, gradually altered from the paradigm of 50/50 sharing towards an arrangement which may just as comfortably be described as generous staying contact. In *D v S* [2008] Charles J made the general observation that shared residence orders promote the child's welfare by recognising that the child has two

94 *Re S* [2003] EWCA Civ 387, per Dame Butler-Sloss P; Geekie (2008) *op cit* n49, p446

95 Teubner, G, Schiff, D & Nobles, R (2003) "The Autonomy of Law: Introduction to Legal Autopoiesis", in Schiff, D & Nobles, R (Eds) *Jurisprudence*, London, Butterworths, 897-954.

96 *Re A* [2002] EWCA Civ 1343.

97 *Re S* [2003] EWCA Civ 387.

98 *Re A* [2002] EWCA Civ 1343.

99 *Re S* [2002] EWCA Civ 179.

homes, regardless of the periods of time spent in each household.¹⁰⁰ In *Re W* [2009] Wilson LJ stated that case law had changed substantially over the last eight years and that no gloss should be added to the welfare test. He used this to reject 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.¹⁰¹ This is difficult to reconcile with earlier judicial demands that orders must reflect practicalities since they could otherwise confuse children; and is also contrary to the intention of those who drafted s.11(4) of the Children Act 1989 and clearly saw this as an order about where children actually live.

5.5.3 Towards a Presumption?

It is as yet unclear whether a presumption in favour of shared residence is developing. Changes within autopoietic systems can be predicted, but never with absolute certainty.¹⁰² Although these orders “are not nowadays unusual”, shared residence is a long way from becoming the norm.¹⁰³ Some empirical research suggests that since this is a comparatively new phenomenon, a clear professional consensus has yet to develop.¹⁰⁴ However, two practitioners have commented that shared residence “has become the new vogue in parental disputes”.¹⁰⁵ Applications for residence saw a greater increase than contact applications in 2008;¹⁰⁶ although statistics say nothing about why these applications were made, it is not unlikely that a growing interest in shared residence is a contributory factor. Campaigners are also working hard to hasten these developments, and their attempts to move their communications from the periphery towards the centre of political debate have had considerable success. Families Need Fathers (FNF) has an EHRC-funded campaign for shared parenting, a concept seen as “wider” than shared residence and described in terms of a substantial sharing of time as well as both parents' involvement in all important decisions.¹⁰⁷ FNF has developed new shared parenting guidance, *inter alia* for Cafcass reporters; and although the precise status of these documents remains

¹⁰⁰ *D v S* [2008] EWHC 363 at [129].

¹⁰¹ *Re W* [2009] EWCA Civ 370 at [13].

¹⁰² Teubner (1993) *op cit* n12, p97.

¹⁰³ *Holmes-Moorhouse v Richmond LBC* [2009] UKHL 7 at [7]; Edwards (2006) *op cit* n18, p34.

¹⁰⁴ George, R (2007) “Joint Residence: Practitioners' Perspectives in England and France”, *International Family Law Journal*, 28-32.

¹⁰⁵ Wormwood, A & Floyd, E (2009) “Family: The New Vogue?” 159(7358) *New Law Journal* 298.

¹⁰⁶ Ministry of Justice (2009) *Judicial and Court Statistics 2008*, London, TSO, p84.

¹⁰⁷ Families Need Fathers (2009a) *op cit* n13, p1.

unclear, Cafcass has, according to its Chief Executive, “greatly valued the chance to work closely with Families Need Fathers”.¹⁰⁸ The Guidance states that Cafcass Reporters should encourage “maximum interaction with both parents”, and ideally view an equal sharing of time as the default starting position.¹⁰⁹ The FNF guidance has been criticised by Hunt *et al* with regard to the paucity of references to the s.1 welfare test, the selective use of research evidence, and the misstatement of current law as incorporating a presumption of equal parenting time.¹¹⁰ It was removed from the Cafcass website in response to these concerns; but must still be seen as an influential contribution to the debate.¹¹¹ The previous chapter discussed the way complaints by fathers’ groups have, through the process of interference when several subsystems participate in the same communicative event, been taken up into political and legal discourse and contributed to a modification of those subsystems’ understandings of their external environments.¹¹² Although the FNF guidance has been removed, a new truth has been constructed within the legal system: law must do more to assist men’s efforts to parent and the shared residence order is a suitable tool to achieve this.

Evidence of a developing presumption can also be found in case reports. In *Re P* [2005] Wall LJ considered that where the child’s time is shared “more or less” equally, there must be good reasons *against* making an order of shared residence; this has been described by Douglas as “a presumption or assumption”.¹¹³ In what could be seen as a confirmation of autopoietic theory, Gilmore has commented that this *dictum* “is likely to be seized on by advocates” and may play an important role in shaping future law.¹¹⁴ In *Re C* [2006] the judge at first instance had (in a typically legal, rigid interpretation) understood recent case law as allowing for a shared residence order only where it *either* reflected the reality of caring arrangements *or*

¹⁰⁸ Anthony Douglas, Cafcass Chief Executive, interviewed in Samuel, M, “Families Need Fathers urges Cafcass to back shared parenting”, CommunityCare.co.uk, posted 19th June 2009. <http://www.communitycare.co.uk/Articles/2009/06/19/111879/families-need-fathers-urges-cafcass-to-back-shared-parenting.html>; Hunt, J, Masson, J & Trinder, L (2009) “Shared Parenting: the Law, the Evidence and Guidance from Families Need Fathers”, *Family Law*, 831-836.

¹⁰⁹ Families Need Fathers (2009a) *op cit* n13, pp11-12.

¹¹⁰ Hunt *et al* (2009) *op cit* n112, pp832-833.

¹¹¹ *Ibid*, p833.

¹¹² Teubner (1993) *op cit* n12, p35.

¹¹³ Douglas, G (2006) “Residence: *Re P* (Shared Residence Order)” *Family Law*, 447.

¹¹⁴ Gilmore (2006b) *op cit* n15, p489.

where the parents were incapable of cooperating.¹¹⁵ These rigid categories were correctly rejected by Thorpe LJ.¹¹⁶ However, his judgment also cited, with approval, a list of eight “highly relevant circumstances” in favour of shared residence drawn up by the father’s counsel. These were: “(1) This is a child with a strong attachment to both parents who was happy and confident in both homes; (2) There is a real proximity between the two homes; (3) There is a real proximity of the homes and ... [the child]’s school; (4) [The child] has a real familiarity with both homes and a sense of belonging in each; (5) [The child] has a clearly expressed perception that he has two homes; (6) There is a relatively fluid passage of [the child] between the two homes; (7) There is a relatively fluid passage of [the child] to and from school from each home; (8) There is some post-separation history of [the child]’s care being shared between his parents”.¹¹⁷

Thorpe LJ opined that the “cumulative effect” of those circumstances made this a “classic case” for shared residence.¹¹⁸ Law, as any closed system, adapts new developments to its *modus operandi*; since law’s cognitive framework relies on lists, categorisations and binary determinations, these factors are likely to be raised and relied on by the legal representatives for other shared residence applicants, who will, by demonstrating that they can ‘tick the right boxes’, argue that this raises something akin to a presumption in favour of shared residence. Comparing this list with the research evidence, the focus in (5) on how the child perceives the situation is welcome, and it may well be that the child’s subjective sense of belonging is much more important than the precise allocation of his or her time. However, the specifications in (6) and (7) that there need only be “a relatively fluid passage” between the different homes are worrying. The combination of the courts’ tendency to trivialise parents’ conflicts discussed in the previous chapter, and the inherent vagueness of the term “relatively”, creates a real risk that courts could order shared residence where parents are unable to sustain the kind of close cooperation that the research suggests is necessary to successfully share residence.

¹¹⁵ *Re C* [2006] EWCA Civ 235.

¹¹⁶ *Ibid*, at [19].

¹¹⁷ *Ibid*, at [21].

¹¹⁸ *Ibid*.

The previous section expressed concern that the benefits of shared residence are now seen primarily as lying in the symbolic messages transmitted rather than the division of the child's time. There is some evidence that this use of the order is now accepted as commonplace by judges and others involved in the family courts.¹¹⁹ For example, in *Re A* [2008], an application by a step-father, the Cafcass reporter observed: "Had Mr A been H's biological father, it would have been reasonable for the Court to order shared residence, as a reflection of the equal status and the responsibilities of the mother and Mr A".¹²⁰ The logic, expressed in law's binary code of certainties, is that if children need fathers, and shared residence helps to realise that goal by removing the artificiality of contact arrangements, then shared residence must be better than sole residence. In relation to contact, Gilmore has justifiably criticised the way contemporary law uses the general assertion that most children benefit from contact to justify its starting preference for contact in contested cases, without any consideration of what may be different about the small proportion of cases, which proceed to a final hearing.¹²¹ This is a typical of this subsystem's focus on the abstract and desirable. There is a very real danger that, in shared residence cases too, the generalised need for a father under s.1(3)(b) is allowed to outweigh all other concerns.

One example of where this seems already to have occurred is *Re A* [2008].¹²² The step-father had been led to believe the child was his until some time after the separation. On appeal, the mother argued, unsuccessfully, that he was likely to use the shared residence order to try to "interfere in an officious and controlling manner" and furthermore that this could not be in her six-year-old son's best interests since shared residence would therefore be "productive of strife rather than harmony".¹²³ The court, quite rightly, acknowledged that there was considerable force to her arguments; he had, *inter alia*, admitted installing hidden CCTV cameras in the part of their house that was occupied by the mother.¹²⁴ The shared residence order was, nevertheless, made since it would give the step-father parental

¹¹⁹ Edwards (2006) *op cit* n18, p34.

¹²⁰ *Re A* [2008] EWCA Civ 867 at [49].

¹²¹ Gilmore, S (2008) "The Assumption that Contact is Beneficial: Challenging the 'Secure Foundation'", *Family Law* 1226-1229, p1227.

¹²² *Re A* [2008] EWCA Civ 867.

¹²³ *Ibid* at [5].

¹²⁴ *Ibid* at [11], [45].

responsibility and would make it more difficult for the mother to exclude or marginalise him.¹²⁵ In the welfare balancing exercise, the need for a father (or at least a father-figure), was accorded such great weight that it outweighed other concerns, such as the potential negative impact of attempts to undermine or control the primary carer. It was in this case that Sir Mark Potter P uncritically repeated the trial judge's assertion that healthy development hinges on a child having two parents.¹²⁶

A further parallel with contact can be drawn concerning the new dichotomous classification between good and bad (i.e. violent) fathers, which has occurred in contact cases. *Re M* [2004] was an unusual shared residence case since the first instance judge gave the mother sole residence in order to end the parents' power struggles, and this was confirmed by the Court of Appeal.¹²⁷ It is important, however, as Wall LJ observed, to "bear in mind that the background to this case was one of domestic violence"¹²⁸; the father had also been obstructive and had denigrated the mother in discussions with the children. He had failed to comply with the expectations of the welfare discourse and was, in law's binary language, found to be a bad father. Excluding such bad fathers from shared residence can be said to strengthen, rather than undermine, any developing presumption. It is worth noting that in this case Wall LJ also praised the mother for still realising how important it was that her children should "sustain a proper relationship" with their father.¹²⁹ This exceptional case did not lead to any questioning of the general rule. As law applies its binary codes in its internal reconstruction of external information, fathers who cannot be proven to be this bad are likely to be judged good, i.e. good enough to deserve the law's support. In *Re K* [2008] the mother argued that the father, whom she described as controlling, would "feel empowered" by the shared residence order.¹³⁰ Wilson LJ acknowledged that some parents could react this way, but did not think this father fell into that category.¹³¹ Autopoietic subsystem cannot deal directly with their environment; litigants and their children have to be recreated as

¹²⁵ *Re A* [2008] EWCA Civ 867 per Scott Baker LJ at para 100.

¹²⁶ *Ibid*, at [35].

¹²⁷ *Re M* [2004] EWCA Civ 1413.

¹²⁸ *Ibid*, per Wall LJ at [23].

¹²⁹ *Ibid* at [23].

¹³⁰ *Re K* [2008] EWCA Civ 526 at [20].

¹³¹ *Ibid*, at [21].

stereotypical semantic artefacts. This leaves law unable to evaluate with sufficient sensitivity whether shared residence will benefit the children of a particular family. In relation to contact, fathers have to be obviously dangerous before they are judged to be bad, and the same assessments will be made in relation to shared residence. This, again, is a dangerous basis for a presumption; it is likely to leave children in situations where they are frightened, neglected or physically hurt.

5.6 SHARED RESIDENCE AND REASONABLENESS

5.6.1 Non-Intervention: but not a *Carte Blanche*

As has been mentioned, it difficult to overstate the emphasis currently placed on parental agreement, co-operation and compromise, understood in the narrow legal sense of parents reaching agreement on the immediate issues.¹³² Baroness Hale has commented extra-judicially on family judges' understandable, but problematic, "unwillingness to decide cases which could be agreed between the parties".¹³³ The imperative of moving on from a present impasse may override consideration into the suitability and viability of future arrangements. In this environment, the attraction of shared residence is its superficial fairness: if you divide children's time in half then both parents are equal, and they have nothing left to fight over.¹³⁴ At the same time, this solution is compatible with the new paradigm of the binuclear family.

Case reports increasingly refer to shared residence being the result of mediated compromises between parents, and the parties are usually back in court because the arrangement has broken down.¹³⁵ In *Holmes-Moorhouse v Richmond LBC* [2009] Baroness Hale appeared to criticise family courts' current tendency to prefer consent orders and to accept these without adequate investigation.¹³⁶ She noted that a "striking feature" of the case was "how little the family court appears to have known

¹³² Neale, B, Flowerdew, J & Smart, C (2003) "Drifting Towards Shared Residence?", *Family Law*, 904-908, p905; Davis, G & Pearce, J (1999) "The Hybrid Practitioner", *Family Law*, 547-555, p553.

¹³³ Hale, B & Hunter, R (2008) "A Conversation with Baroness Hale", 16(2) *Feminist Legal Studies*, 237-248, p243.

¹³⁴ *A v A* [2004] EWHC 142.

¹³⁵ *Re B* [2006] EWCA Civ 1906; *CC v PC* [2006] EWHC 1794; *Re H* [2004] EWHC 2064

¹³⁶ *Holmes-Moorhouse v Richmond LBC* [2009] UKHL 7, per Baroness Hale at [31]-[33].

about the family”.¹³⁷ The Holmes-Moorhouses were, however, known to the local social services following allegations of domestic violence; the older children had at one point been placed on the child protection register and social workers had concluded that the mother not only worked but also met all the children’s material, physical and emotional needs. Yet, there is no evidence of how this was considered prior to the shared residence order being made, predominantly to give the father a better chance of obtaining social housing.¹³⁸ It appears that the paramountcy test is subordinated to the principle of non-intervention,¹³⁹ and the pursuit of a solution that can remove the case from the court’s list without the risk of attracting further criticism from the political system regarding law’s inadequate treatment of separated fathers.

5.6.2 A Reversal of the Causal Relationship

There has always been a link between shared residence and good cooperation. In the early case law good relations between parents were regarded as a pre-requisite; it was only parents who could agree well enough to design a shared residence schedule who were able to persuade a court to grant such an order.¹⁴⁰ *A v A* [1994] provided judges in subsequent cases with authority for the view that shared residence is inappropriate where parents are yet to agree on significant matters.¹⁴¹ This sensible stance served to limit shared residence to parents who appeared able to implement it for their children’s benefit. There is no doubt that shared residence can work well, but studies suggest that success is dependent on a variety of individual characteristics and circumstances; the best way to ensure that families are suitable is to restrict shared residence to families where neither parent objects.

However, in *D v D* [2001] the Court of Appeal perceived shared residence as able to produce better parental co-operation rather than requiring it; the relationship between cause and effect was reversed.¹⁴² In this now highly influential case, the

¹³⁷ *Ibid*, at [33].

¹³⁸ *Ibid*, at [35].

¹³⁹ Bainham (1990) *op cit* n3, p208.

¹⁴⁰ Harty & Wood (1991) *op cit* n76, p431; Weyland, I (1995) “Judicial Attitudes to Contact and Shared Residence since the Children Act 1989”, 17(4) *JSWFL*, 445-459, p454.

¹⁴¹ *H v H* [1997] 1 FCR 603.

¹⁴² Hunt *et al* (2009) *op cit* n112, p833.

case history was marked by a high degree of animosity, with judicial intervention required for every renegotiation of schedules, to ensure the return of passports and to help the father obtain information about the children's health and education. Both parents were criticised for allowing conflicts to escalate where they ought to put their personal feelings behind them.¹⁴³ According to Douglas, it is significant that the order was made partly to "lessen the parents' animosity and apparent inability to resolve their differences outside the courtroom".¹⁴⁴ It was hoped the parties could use the shared residence framework to avoid further returns to court.¹⁴⁵ Empirical research suggests shared residence is unlikely to work this way. Law is attempting to transmit normative communications to individual psychic systems, but can only create turbulence and the previous chapter's section on reasonableness explained why changes in behaviour are unlikely to result. Kaganas and Piper have noted that arguments for a lowering of the stakes in parental disputes which preceded the Children Act 1989 have been resurrected and used to argue for shared residence; yet this new use of formal orders is as unlikely to have an actual impact on parents' conflicts.¹⁴⁶ Where parents want to fight, new legal labels quickly become the latest weapons in those conflicts.¹⁴⁷

D v D [2001] is now commonly cited in judgments and articles as having established that shared residence, by emphasising equality of status, is likely to diminish conflict.¹⁴⁸ In *Re D* [2004] Munby J, in a classification which he himself admitted was oversimplified, divided contact disputes into three categories: where mothers; fathers; or both parents are at fault. He saw shared residence as the solution for the third category.¹⁴⁹ If this kind of stereotypical thinking develops, it should be a cause for concern; autopoietic theory can be used to suggest this is likely, since these kinds of classifications are typical of law. Within law's circular chains of communications, the "binary system in which the only values are 0 and 1",¹⁵⁰ predictions and possibilities are turned into certainties, and gradual changes in a

¹⁴³ *D v D* [2001] 1 FLR 495, per Connor J at p497.

¹⁴⁴ Douglas, G (2001) "*D v D* (Shared Residence Order)", *Family Law* 183, p184.

¹⁴⁵ *Ibid*; *D v D* [2001] 1 FLR 495, per Dame Elizabeth Butler-Sloss P at p504.

¹⁴⁶ Kaganas, F & Piper, C (2002) "Shared Parenting – a 70% Solution?" 14(4) *CFLQ*, 365-379, pp368-369.

¹⁴⁷ King, M (1987) "Playing the Symbols – Custody and the Law Commission", *Family Law* 186-191, p186. This suggestion was made relation to the joint care and control orders that were sometimes made prior to the Children Act 1989 but is equally valid in relation to s.8 orders.

¹⁴⁸ Hunt *et al* (2009) *op cit* n112, p833; Geekie (2008) *op cit* n49, p446.

¹⁴⁹ *Re D* [2004] EWHC 727 at [7].

¹⁵⁰ *Re B* [2008] UKHL 35 per Lord Hoffman at [2].

series of communications lead to refined, rigid definitions. In *A v A* [2004] Wall LJ described the parents' severe dispute as having "been about control" throughout court proceedings, and saw the shared residence order as the court making the point that the family needed co-operation rather than control.¹⁵¹ Repeating a phrase from *D v D*, it was hoped that an equal division of the children's time would give the parents "nothing left to fight about" and could thus bring to an end the five years' litigation, which had been described in the Guardian's report as a "virtual state of war".¹⁵² In *Re R* [2005] the Court of Appeal interpreted *A v A* [2004] as stipulating that a "harmonious relationship" between the parents was no longer a prerequisite for shared residence.¹⁵³

Family law increasingly identifies exposure to conflict, alongside father absence, as a major risk of harm. This should have resulted in a more cautious use of shared residence, particularly since, as the third chapter demonstrated, research has shown that high conflict families usually fail to implement shared residence; arrangements are abandoned or left to deteriorate to inflexible stalemates. Indeed, in some contested cases child welfare science professionals have made recommendations against this order, on the grounds that it can exacerbate conflict.¹⁵⁴ However, law has "enslaved" child welfare science information to suit its own purposes.¹⁵⁵ Law reinterprets and reuses child welfare science communications but the fact that it is perceived within both subsystems as the system with more authority means law can also choose not to listen. Gilmore has expressed concern over the judicial tendency to refer only to other judgments and not engage specifically with the issue of how parental conflict is known to affect children.¹⁵⁶ In *Re A* [2008] Adam J had taken note of the psychologist's concerns, but chose to rely on case authorities which explained that parental conflict was not a bar, but rather a reason for granting the shared residence order.¹⁵⁷ 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

¹⁵¹ *A v A* [2004] EWHC 142.

¹⁵² *Ibid*, at [20] & [23].

¹⁵³ *Re R* [2005] EWCA Civ 542 *per* Thorpe LJ at [11].

¹⁵⁴ See e.g. opinion of the psychologist in *Re A* [2008] EWCA Civ 867 at [51]; Cafcass Report in *Re P* [2006] EWCA Civ 1793 [15].

¹⁵⁵ King, M & Piper, C (1995) *How the Law Thinks About Children* (2nd Ed), Aldershot, Arena, pp50-55.

¹⁵⁶ Gilmore (2006b) *op cit* n15, p497.

¹⁵⁷ *Re A* [2008] EWCA Civ 867 at [58].

“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”.¹⁵⁸ This fits well with Luhmann’s assertion that law asserts its power by deciding what it regards as relevant or irrelevant purely by reference to its internal criteria.¹⁵⁹ Shared residence continues to be constructed as a cure for high-conflict cases so that, paradoxically, the recent emphasis on the harmful nature of conflict has increased its appeal. Shared residence has also gained popularity because it is seen as a vehicle for teaching parents to cooperate.¹⁶⁰

5.6.3 Conflict and Co-operation as Semantic Artefacts

Since law, as a closed subsystem, evaluates the success of its measures purely according to its own criteria, the assessment of whether shared residence helps parents cooperate will depend on law’s understanding of parental cooperation. It appears that, consistent with autopoietic theory, the concept has taken on a narrow and limited legal meaning. It is defined in negative, rather than positive, terms: one parent must not interfere with the other’s exercise of parental responsibility in relation to day-to-day matters.¹⁶¹ There is no additional requirement of co-parenting where parents share residence. This understanding of cooperation is likely to be used to order shared residence for parents who are either unwilling or incapable of working together to the degree that empirical research suggests is necessary to make this arrangement benefit children. Parents, who have to reinterpret legal communications through the filter of their own normative frameworks, often reject the paradigm cooperative post-separation model as bad for their particular child.

Law maintains epistemic authority, *inter alia*, by refusing to learn from its disappointed expectations.¹⁶² Although some parents repeatedly return to court, family law continues to insist on what has been described as “the New Labour dream of the responsible parent”: conciliatory, cooperative and committed to the

¹⁵⁸ *Re R* [2009] EWCA Civ 358 at [30].

¹⁵⁹ Luhmann (1989) *op cit* n53, p141.

¹⁶⁰ Johnson (2009) *op cit* n84, p131.

¹⁶¹ *A v A* [2004] EWHC 142 *per* Wall LJ at [118]; Douglas, G (2006) “Residence: *Re P* (Shared Residence Order)” *Family Law*, 447.

¹⁶² Nelken, D (1988) “Social Work Contracts and Social Control” in Matthews, R (Ed) *Information Justice*, London, Sage, p203 as cited in King & Piper (1995) *op cit* n163, p29.

binuclear family.¹⁶³ Teubner does not deny that law is, “to a considerable extent”, shaped by external influences.¹⁶⁴ Thus, the pressure from the political subsystem to find a legal solution to the problems of disengaging fathers has led to several readjustments. Just as the link between shared residence and a substantial sharing of time has been removed to facilitate its use, the previous insistence that parents must be able to get on has also been removed. According to Teubner, subsystems’ self-perceptions shape their development.¹⁶⁵ Historically, law has existed to be obeyed, and this normative expectation (rather than empirically obtainable information regarding observance) continues to shape law’s responses to interference. An acknowledgement that law is unable to help these families is, therefore, not an option. Law’s search for a solution to the supposed problem of disappointed or disengaged parenthood must continue, and the attempt to use shared residence to teach parents to cooperate is the latest scheme. The law is also, as a closed system, unable to take into account individuals’ diverse characteristics and circumstances; and since it is self-regulating it remains unaware that it recreates parents using its own stereotyped semantic artefacts. The result is that all parents (except a small minority who are judged to be violent, implacably hostile or otherwise “bad”), are presumed to be unencumbered by past life failures and perfectly able to meet the high post-liberal standards of parenting. Consequently, any divergence from the norm is conceptualised as wilful refusal. Judicial warnings to parents regarding the harmful effects of exposure to parental conflict are now becoming commonplace.¹⁶⁶ In *Re R* [2009] Wall LJ went so far as to read to the parents the first four lines of Philip Larkin’s poem *This be the Verse*.¹⁶⁷ He then cautioned them that unless they could protect their son from their fighting they might well lose him.¹⁶⁸

5.6.4 The Gender Dimension

This prescriptive approach applies to both sexes, but law’s expectations of sensible parenting are, at the same time, also distinctly gendered. It appears that separated

¹⁶³ Smart, C (2006) “The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood” in Diduck, A & O’Donovan, K (Eds) *Feminist Perspectives on Family Law*, Abingdon, Routledge-Cavendish, 123-138, p129.

¹⁶⁴ Teubner (1993) *op cit* n12, p21.

¹⁶⁵ *Ibid*, p17.

¹⁶⁶ *Re T* [2009] EWCA Civ 20.

¹⁶⁷ *Re R* [2009] EWCA Civ 358 at [124].

¹⁶⁸ *Ibid* at [128].

fathers, in particular, fall far short of the reasonable parent ideal. 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.¹⁶⁹ However, there is no discussion of this issue in legal discourse.¹⁷⁰ Several reasons for this can be suggested. Firstly, the emphasis on encouraging fathers means "virtually any involvement" by fathers, which is not violent or in other ways obviously dangerous, has come to be seen as "good enough".¹⁷¹ Secondly, since mothering is constructed as a "natural outpouring" of love that is hidden within the private sphere, it is assumed that most aspects of parenting can in any event safely be left to mothers.¹⁷² In this context, the use of shared residence orders for arrangements which are really generous weekend and holiday contact gives further cause for concern, since it allows fathers to opt out of the demanding primary carer role to merely spend fun time with children. A restriction of shared residence to families where both parents agree could not rule out the extension of gendered inequalities, since law does not enquire into the private sphere; but a presumption, which would encourage the imposition of shared residence on reluctant primary carers, could result in an increase in such inequitable familial arrangements. It should, therefore, be resisted.

Where there is divergence between formal orders and real arrangements, the negative financial and practical costs are, as explained in the second chapter, likely to fall disproportionately on women. Research by Smart *et al* has also highlighted the emotional costs of maintaining relationships across binuclear post-separation families.¹⁷³ Yet these efforts, like housework, are not noticed until someone decides they are no longer prepared to perform them.¹⁷⁴ In case reports, mothers are almost exclusively mentioned when they are lectured over their failures to support contact

¹⁶⁹ Simpson, B, Jessop, J & McCarthy, P (2003) "Fathers after Divorce" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, 201-219, p210; Smart & Neale (1999) *op cit* n3, p66.

¹⁷⁰ Smart & Neale (1999) *op cit* n3, p67.

¹⁷¹ Eriksson, M & Hester, M (2001) "Violent Men as Good Enough Fathers?: A Look at England and Sweden" 7(7) *Violence Against Women*, 779-798, p791; Lawler, S (1999) "Children Need but Mothers only Want: the Power of 'Needs Talk in the Constitution of Childhood", in Seymour, J & Bagguley, P (Eds) *Relating Intimacies: Power and Resistance*, Basingstoke, Macmillan Press Ltd, 64-88, p70.

¹⁷² Fineman, M (2001) "Fatherhood, Feminism and Family Law", 32(4) *McGeorge Law Review*, 1031-1049, p1042; Smart & Neale (1999) *op cit* n3, pp34-35.

¹⁷³ Smart & Neale (1999) *op cit* n3.

¹⁷⁴ Smart, C (1991) "The Legal and Moral Ordering of Child Custody" 18(4) *Journal of Law and Society*, 485-500, p496.

or praised for their efforts in maintaining links with difficult fathers; references to single mothers' efforts in raising children are rare. Law, as a subsystem, prioritises normative expectations, judges according to how things ought to be, rather than how they actually are, and thus ignores the gap between the modern, dual-carer ideal and reality. This combines with the post-liberal emphasis on conciliatory behaviour and the much older construction of mothers as those who are responsible for meeting children's needs, so that it is very difficult for mothers to voice objections.¹⁷⁵ Those who do, attract the binary labels of implacably hostile, selfish and bad.

Shared residence disputes are likely to provide another example where, as Luhmann has stated, "the system does not see that it does not see what it doesn't see".¹⁷⁶ In *Puxty v Moore* [2005] Wall LJ sought to impress upon the mother that "the phrase 'primary carer' has no meaning in this context"; parents have joint responsibilities, therefore, "[n]either is the primary carer."¹⁷⁷ It is interesting to note here that law's understanding has been limited by its existing cognitive framework; its understanding of 'primary carer' focuses on the allocation of rights and duties, while the practical aspects have been lost. Previous sections have posited that the family courts' new use of shared residence is law's response to political demands that something is done to address the issue of fatherhood. Unable to abdicate its duty to resolve conflicts, law has searched for a new solution. The recent reversal of the causal relationship between good cooperation and shared residence has been necessary to impose shared residence orders on the difficult, high-conflict cases where fathers are complaining of marginalisation or exclusion. This latest attempt at a solution is implemented at mothers' expense, since the latter are expected to provide emotional, practical and sometimes financial support for the new binuclear families, regardless of whether they perceive this to be a price worth paying. Where mothers, as individual autopoietic systems, reject this, law's response is to restate the normative expectations, often with added threats of sanctions.

5.7 CONCLUSION

¹⁷⁵ Gillies, V (2005) "Meeting Parents' Needs? Discourses of 'Support' and 'Inclusion' in Family Policy, 25(1) *Critical Social Policy*, 70-90, p70; Lawler (1999) *op cit* n179, p78.

¹⁷⁶ Luhmann (1989) *op cit* n53, p21.

¹⁷⁷ *Puxty v Moore* [2005] EWCA Civ 1386 at [23].

In conclusion, law's focus on permanent, patriarchal parenthood has shaped the definition of the shared residence order to reflect pre-existing notions of fatherhood as predominantly about status and authority. The process of redefinition is being hastened by law's adjustments to interference from the political subsystem. In order to preserve its self-image as authoritative, law must be seen to be doing something to address the problems of separated fatherhood. Initially, courts refused to see shared residence as anything other than a practical issue; the order then came to be seen as having dual purposes, and recently it has been described as worth ordering merely for the symbolic messages it sends, which are aimed to stop mothers from excluding or marginalising fathers. Use of autopoietic theory casts doubt on this strategy; parents use the processes of re-entry and redundancy to reinterpret or reject these messages. Moreover, it is submitted that this development is not only contrary to the provisions of the Children Act 1989, but is also an unwelcome attempt by law to preserve patriarchal power structures.

There has been an equally striking change in family law's application of the welfare test to shared residence applications. From an initial view of shared residence as "*prima facie* harmful", the Children Act's ambitions of an unfettered discretionary test appeared briefly to have been realised around the time of *D v D* [2001], but there is worrying evidence that a new understanding of shared residence has developed, which is as rigid as the outright rejection in *Riley*. Consistent with law's enslavement of child welfare science, courts have not taken adequate note of relevant research evidence.¹⁷⁸ Instead, it is reasoned in law's binary logic that children need fathers, that shared residence leads to greater involvement by fathers, and that shared residence is, therefore, better for children. It is very probable that once a presumption develops, as occurred in relation to contact in the 1990's, the perceived abstract benefits of the order will be held to outweigh all other factors, so that shared residence is ordered in situations where it has not been proven to benefit the particular child, and may even be dangerous.

Contemporary law's emphasis on settlement and compromise has increased the popularity of shared residence, but concern must be expressed over the use of shared

¹⁷⁸ Gilmore (2006b) *op cit* n15, pp479-480.

residence orders to reduce bitterness and improve co-parenting. This fits with the post-liberal emphasis on education and reflection, and is also an example of law's intrinsic tendency to prioritise abstract ideals over concrete reality. It is not, unfortunately, supported by the research evidence. However, family law, under pressure from the political subsystem, appears to have chosen to ignore the empirical evidence, just as it ignores the tension between the modern, dual-earner/dual-carer paradigm and gendered realities. Thus, a shared residence presumption could not only place an unfair and disproportionate burden on one parent, it would also discourage mothers from raising objections based on their unique knowledge of their child. Law, as a closed autopoietic system with an inherently conservative and patriarchal nature, may consider these sacrifices the price worth paying for maintaining a stabilising male authority over women and children. This is, of course, incompatible with the statutory welfare test and should, therefore, be resisted.

This chapter has not argued that shared residence is *per se* harmful. It has, however, criticised contemporary law's inability to engage with child welfare science, and the available body of empirical research which suggests that the successful implementation of shared residence depends on a large number of variables, including the characteristics of the individual child. The closed subsystem of law, with its rigid ways of communication, is not equipped to carry out the multifactorial examination of the circumstances necessary to identify the families where this difficult arrangement is likely to benefit children. It is better to restrict the order to cases where parents can agree on this arrangement.

6 ANALYSING THE LEGAL FRAMEWORK IN SWEDEN

6.1 INTRODUCTION

Swedish family law and policy has in many ways been considered groundbreaking, and has attracted much international attention.¹ It is often praised for its social democratic reform programmes, and for policies which have deliberately sought to erode unequal gendered practices.² It could, therefore, be thought that the preconditions for shared residence are better in Sweden, since separating couples should be better able to share the burdens of parenting. An autopoietic perspective may lead to a less optimistic view, since separate subsystems of law, child welfare science, politics etc can be observed in Sweden as in England.³ While the next chapter considers this argument in relation to shared residence, this chapter examines the description of Sweden as gender-equal and child-focused, and finds a more complex picture, confirming Teubner's assertion that while interactions between politics and law shape both subsystems, this cannot be predicted using "the simple logic of cause and effect"⁴ External influences are inevitably contradicted by internal information, so that change is resisted or reconfigured within the system.⁵ After an overview of the Swedish family law regulating disputes between parents, this chapter focuses on the three themes identified in the second chapter: law's patriarchal construction of permanent parenthood; its formulaic interpretation of the best interests test, which focuses on children's needs for both parents, and for protection from conflict; and the contemporary emphasis on reasonable behaviour

¹ Ryrstedt, E (2007) "Tvistlösning mellan Separerade Föräldrar – för Barnets Bästa", *Svensk JuristTidning*, 398-414, p398; Pascall, G (1999) "UK Family Policy in the 1990s: the Case of New Labour and Lone Parents" 13(3) *IJLPF*, pp258-273, p270

² Ellingsæter, A (1998) "Dual Breadwinner Societies: Provider Models in the Scandinavian Welfare States", 41(1) *Acta Sociologica*, 59-73, p60; Esping-Andersen, G (1990) *The Three Worlds of Welfare Capitalism*, Cambridge, Polity Press.

³ Rejmer, A (2003) *Vårdnadstvister: En Rättssociologisk Studie av Tingsrätts Funktion vid Handläggning av Vårdnadskonflikter med Utgångspunkt från Barnets Bästa*, Lund, Sweden, Lund Studies in the Sociology of Law, p8.

⁴ Teubner, G (1993) *Law as an Autopoietic System*, London, Blackwell., p35.

⁵ *Ibid*, p103.

from parents. This framework is also used to examine custody and contact orders, which are the two most important orders in the regulation of legal disputes between parents about children.

6.1.1 The Courts, the Code, the Enquiries and the Case Law

There are no specialised family courts; instead, family litigation is heard by the ordinary public courts: the District Courts (*tingsrätt*), the Appeal Courts (*hovrätt*) and the Supreme Court (*Högsta Domstolen*).⁶ At first instance cases are generally heard by three lay judges and one professional judge, who has a varied caseload and no specialist knowledge.⁷ Courts tend to rely heavily on welfare reports from Social Welfare Investigators (social workers from the local social services known as Social Welfare Boards). District courts can also ask for expert evidence, although how this is weighted is a matter for the judge (this can be seen as part of law's assertion of authority over other subsystems).⁸ Family court procedure is structured so as to make it less adversarial, compromise is promoted, and it is estimated that nine out of ten disputes are settled before a final hearing.⁹ An increasing number of cases are now dealt with through cooperation talks: a form of mediation led by two social workers and provided free of charge by local Social Welfare Boards (SWBs).¹⁰ Agreements reached through talks can be granted the same legal status as judgments through registration with the SWB, and successive governments have successfully promoted this form of dispute resolution.¹¹

The private law in relation to children is contained in the Parents Code (*Föräldrabalken*, *FB*), which was first enacted in 1949, and which has since been frequently amended. Sweden has a civil law system; case law is less important but the Supreme Court often interprets terms in statutes in such a way as to *de facto* alter the course of the law. Government-appointed Commissions of Inquiry (*Statens*

6 Proposition 1997/98:7, p93.

7 Ärendelagen §3; FB2081; SOU 2005:43, p602; Ryrstedt, E (2009c) "Separate Representation and Family Courts – do we need them in the Nordic Countries?" 21(2) CFLQ, 185-196, p187.

8 Carlsson, B & Rejmer, A (1998) "The Swedish Way of Dealing with Custody Disputes: Juridification and Professionalisation of the Private and Social Spheres" in Carlsson, B (Ed) *Social Steerage and Communicative Action*, Lund, Sweden, Lund Studies in Sociology of Law, 104-142, p112; Proposition 2005/06:99 p36.

9 NJA2008 s.34, cases are cited by case report pages rather than parties' names.

10 Socialtjänstlagen 583(1).

11 Proposition 1997/98:7, p37; Schiratzki, J (2006) *Barnrättens Grunder* (3rd Ed), Lund, Sweden, Studentlitteratur, p1108.

Offentliga Utredningar, SOU) also have a very important role to play in law reform; parallels can be drawn with the Law Commission's work, but enquiries are appointed *ad hoc* and their focus tends to be less exclusively legal, with expert opinion being sought from a variety of disciplines.¹² This information is then recast within the legal framework, translated into legal discourse, to formulate proposed amendments to the Parents Code. These enquiries have had a unique role to play in shaping the direction of family policy and legislative reform.¹³

Swedish law retains the concept of legal custody, which must be distinguished from physical custody and can be exercised independently of the latter.¹⁴ Although custody is now seen predominantly as a responsibility, rather than a right, it does have important legal consequences; parents without custody do not, for example, get parental leave, and they cannot demand information from public bodies.¹⁵ Custody decisions also tend to determine the outcome of residence cases.¹⁶ Legal custody can be either sole or joint, and is automatically awarded to married couples and unmarried mothers.¹⁷ Unmarried fathers who cohabit with the mother automatically gain joint custody three months' after the child's birth, unless the mother has registered an objection.¹⁸ They can also obtain custody through a court order, a registered agreement, or a "simple" administrative procedure.¹⁹

The Parents Code stipulates that a child has a right to contact with a non-resident parent and that both parents share a responsibility to see that the child's need for contact is met.²⁰ Swedish law's emphasis on specificity means that detailed schedules must be provided, and although these are supposed to be tailored to individual children's needs, in practice, certain standard models have developed.²¹ These usually involve weekday contact, which is thought to give non-resident

12 Lundqvist, Å (2008) "Familjens Kris", *Tidning för Genusvetenskap*, 79-93, p80.

13 *Ibid*, p81.

14 FB6§11.

15 FB6§2; FB6§11; Sekretesslag (1980:100); Föräldraledighetslag (1995:584); Schiratzki (2006) *op cit* n11, p90; Sandström, L & Wetter, I (1999) *Barnet och Lagen: Lagtexter med Kommentarer Rörande Barn*, Stockholm, Kommentus Förlag, p74.

16 Socialstyrelsen (2004a) *Glimtar av Barn från Vårdnads-, Boende- och Umgängedomar 1999 respektive 2002*, Stockholm, Socialstyrelsen, p17.

17 FB6§3

18 Ds 1999:57, p61.

19 Ds 1999:30, p20; FB6§4.

20 FB6§15.

21 Ryrstedt (2007) *op cit* n1, p404.

parents a better insight into their children's lives and thus enable them to play a greater part.²² This suggests that there is, in Swedish law, as a result of interference from the political subsystem, a welcome recognition of caring as an indispensable component of parenting. Where contact needs to be supervised, this responsibility is given to one particular individual, known as a facilitator, who can be a relative or family friend, but is usually recruited through the SWB's.²³ Facilitators are often used during hand-overs, but sometimes also to reassure a child when contact is re-established.²⁴ Until comparatively recently, Swedish law did not provide for indirect contact, largely due to the general reluctance to legislate on matters which cannot be adequately specified and supervised.²⁵ Courts are now able to order indirect contact, but this is to be used only in the most exceptional cases.²⁶

6.2 PERMANENT, PATRIARCHAL PARENTHOOD

In the second chapter, autopoietic theory was used to suggest that law is patriarchal, since patriarchal norms formed one of the original components law brought with it as it separated from the first order social autopoietic system, and that law's stabilising role in society makes it inherently conservative and likely to support existing power structures. This section will consider whether this patriarchal framework has been eroded by decades of interference from social democratic legal reforms which have targeted traditional gendered patterns.²⁷

6.2.1 Patriarchy and the Nuclear Family

First, it can be argued that family law has sought to preserve the patriarchal public/private dichotomy despite the interference from the political system. Indeed, Swedish commentators have noted that in private family law interventionist

²² Sandström & Wetter (1999) *op cit* n15, p95; SOU 2005:43, p167; NJA1988 s.559.

²³ SOU 2007:52, p208, p172; Andersson, G & Bangura Arvidsson, M (2008) 13(2) "Contact Person as a Court-Ordered Solution in Child Visitation Disputes in Sweden" *Child and Family Social Work*, 197-206, p198; Ekbom, I & Landberg Å (2007) *Innerst Inne var man Rädd*, Stockholm, Rädda Barnen & Socialstyrelsen, p13.

²⁴ Schiratzki (2006) *op cit* n11, p120; ; Socialstyrelsen (2003b) *Socialnämndens Handläggning av vissa Frågor om Vårdnad, Boende och Umgänge*, Socialstyrelsens Författningssamling SOSFS 2003:14, Regeringskansliet, Stockholm, p52.

²⁵ SOU 2005:43, p186.

²⁶ FB6§15; Proposition 2005/06:99, p55; Schiratzki (2006) *op cit* n11, p118.

²⁷ Ryrstedt (2007) *op cit* n1, p398; Bradley, D (1990) "Children, Family and the State in Sweden", 17(4) *Journal of Law and Society* 17, 427-444, p427.

regulation is often resisted.²⁸ Successive governments have rejected proposals to introduce an equivalent to the prohibited steps or specific issue orders²⁹, on the grounds that state interference would be counterproductive.³⁰ This is reminiscent of 19th century law's construction of the nuclear family as a fragile yet vital institution. The construction of rights-bearing fathers' as essential to healthy families can be seen in relation to contact. The Parents Code defines contact as the right of the child³¹, but the statutory formulation has been attacked as little more than window dressing.³² Swedish law does place the responsibility to meet the child's need for contact on both parents (rather than just the parent with residence), and although there are no punitive sanctions, SWBs increasingly often contact non-resident parents, encouraging them to respect their children's right to see them.³³ However, children have no right to apply for a contact order, and very few manage to refuse contact which has been deemed to be in their best interests.³⁴ In practice, the supposed right has become a duty.³⁵ Eriksson and Näsman found many of the children in their study spoke about the SWI investigation process in contested contact cases "as approximating a process of manipulation and of breaking down the child's resistance".³⁶ Children interviewed by Ekbom and Landberg described their supervised contact as something which had to be endured regardless of how they felt; some had been told by SWI's that their fathers needed to see them.³⁷

It has to be acknowledged, however, that this patriarchal construction of the family has waned in influence in Swedish legal discourse. Although developments can only be slow and incremental, autopoietic systems are not fixed and unchanging; systems

28 Ryrstedt, E (2006) "Family Law and Social Law: Reciprocal Dependency in a Comparative Perspective", 20(1) *IJLPF*, 44-52, p45.

29 The Children Act 1989 s.8.

30 Ryrstedt (2006) *op cit* n27, p45; Proposition 1997/98:7, p53.

31 FB6§15.

32 Ryrstedt, E & Mattson, T (2008) "Children's Rights to Representation: A Comparison between Sweden and England", 22(1) *IJLPF*, 135-147, p137; Ekbom & Landberg (2007) *op cit* n23, p66.

33 FB6§15b; Proposition 1997/98:7, pp60-62, p115; Schiratzki, J (2004) "Högsta Domstolen Meddelar Dom om Umgänge med Barn – Kränks Europakonventionen?" 15(3) *Juridisk Tidskrift*, 642-652, p646; Proposition 1997/98:7; Wickström, A (1998) 1998 Års Vårdnadsreform och Socialtjänsten, Stockholm, Norstedts Förlag, p143; Socialstyrelsen (2003b) *op cit* n24, p62.

34 Schiratzki (2006) *op cit* n11, p118; Socialstyrelsen (2003b) *op cit* n24, p45

35 SOU 2005:43, p514.

36 Eriksson, M & Näsman, E (2008) "Participation in Family Law Proceedings for Children Whose Father is Violent to their Mother", 15(2) *Childhood*, 259-275, p261.

37 Ekbom & Landberg (2007) *op cit* n23, p43, pp47-48.

are moulded by their internal understandings of external expectations.³⁸ Sustained interference from the political and cultural spheres mean that arguments premised on the superiority of the conjugal family can no longer be expressed. They may, nonetheless, implicitly underpin other arguments within family law, and, as is explored later, remain influential in setting gendered standards for parenting.³⁹

6.2.2 Public Patriarchy

In the second chapter it was asserted that patriarchal power is now predominantly expressed through segregation rather than exclusion; closed subsystems are said to have adapted to women's entry into the public sphere in such a way as to allow the basic dichotomous, hierarchical frameworks to continue. This observation is particularly apposite in relation to Sweden. Sweden is frequently identified as the archetypal model of a social democratic welfare state negotiating a "middle way" between liberal *laissez-faire* capitalism and centrally planned socialism.⁴⁰ The Social Democratic Party governed Sweden continuously from 1932 to 1976, with an explicit agenda of eradicating poverty and replacing the class society with *folkhemmet* (the folk home); a concept with connotations of nurture and equality that remains a source of national pride.⁴¹ It was a deliberate move away from traditional liberalism; rather than conceptualising the autonomous individual and the collective as conflicting interests, public involvement was seen as essential in securing personal welfare.⁴² This approach can be seen *inter alia* in the legal regulation of family formation; in the construction of children as a public concern; in the employment market; and in legislative measures deliberately designed to erode traditional male gender roles. These communicative events are located within both political and legal discussions; consequently the interference, and its effects on law, have been significant.

38 Teubner (1993) *op cit* n4, p56.

39 Ryrstedt, E (2009b) "Samarbetssamtal" *Svensk Juristtidning*, 821-842, p823.

40 Ellingsæter (1998) *op cit* n2, p60.

41 Kliman, J & Forsberg, G (1998) "American Welfare Reform and the Swedish Welfare State", 10(1) *Journal of Feminist Family Therapy*, 47-68, p59; Bradley, D (1996) *Family Law and Political Culture*, London, Sweet & Maxwell p35.

42 Bradley (1996) *op cit* n41, p259.

The social engineers of the 1930's saw the traditional bourgeois nuclear family as an outmoded and potentially oppressive institution which stood in the way of the new welfare state. Thus, they had no compunction about crossing the public/private boundary.⁴³ Yet, simultaneously, family law has been characterised by an increasing tolerance towards different family forms and lifestyles, born out of the desire to eliminate discrimination and include all citizens within the regulatory net of the welfare state.⁴⁴ Abortion was redefined as a woman's right in 1975.⁴⁵ Homosexuality was legalised comparatively early in 1944; and the introduction of a legal status of cohabitant in 1987 included same-sex couples.⁴⁶ Registered partnerships were introduced in 1994; from May 2009 marriage is open to same-sex couples and in October the same year the Church of Sweden voted to allow gay marriages.⁴⁷ Marriage has become a matter of private contract, with divorce available as a right.⁴⁸ The divorce rate is comparatively high, but stable, and studies have shown that divorce has now become so prevalent that it has been normalised.⁴⁹ Although external critics have announced the death of the Swedish family, domestic commentators have cited official statistics to assert that it is instead "alive and well – but partly in a different form".⁵⁰ While cohabitation is as common as marriage, the percentage of children living with lone mothers has remained relatively stable for decades, belying neo-conservative predictions about cumulative family disintegration.⁵¹ In contrast to the position in the UK and the United States, "a discourse on the decline of the traditional family has little resonance in Sweden".⁵² A 1999 Government Commission of Inquiry noted, quite correctly, that "the factual

43 Pylkkänen, A (2007) "Liberal Family Law in the Making: Nordic and European Harmonisation", 15(3) *Feminist Legal Studies*, 289-306, p294.

44 Oláh, L (2001) "Policy Changes and Family Stability: The Swedish Case", *IJLPF*, 118-134, p127.

45 Abortlag (1974:595).

46 Proposition 1944:13 *Förslag till lag om ändring i 18 och 25 kap. Strafflagen*; *Strafflagen* 18§10; Lag om Sambors Gemensamma Hem (1987:232); Lag om homosexuella sambor (1987:813); Sambolag (2003:376).

47 ; Lag om Registrerat Partnerskap (1994:1117); SOU 2007:17, p227; Proposition 2009/09:80 p11; *Dagens Nyheter*, 22nd October 2009.

48 Äktenskapsbalken 5§1.

49 Schyberg, D (1998) "Barn med Skilda Föräldrar" in *Rädda Barnen* (Ed) *Barnets Rätt till Båda Föräldrarna*, *Rädda Barnen*, Stockholm, 91-101; Nilsson, E (1998) *Att Dela Ett Barn – Tvistiga Vårdnadsmål*, Stockholm, Stiftelsen Allmänna Barnhuset & Socialstyrelsen p47.

50 Meisaari-Polsa, T (1997) "Sweden: A Case of Solidarity and Equality" in Kaufmann, F-X, Kuijsten, A, Schulze, H-J and Strohmeier, K (Eds) *Family Life and Family Policies in Europe Volume 1*, 302-347, p319; Popenoe, D (1992) "Family Decline in the Swedish Welfare State" 109 *Public Interest* (USA), p114.

51 SOU 2007:52, p35; Ds 1999:57, p42; Saldeen, Å (2001) *Barn och Föräldrar (4:e upplagan)*, Uppsala, Iustus Förlag p28; Meisaari-Polsa (1997) *op cit* n5045, p321.

52 Hobson, B & Takahashi, M (1997) "The Parent/worker Model: Lone Mothers in Sweden", in Lewis, J (Ed) *Lone Mothers in European Welfare Regimes*, London, Jessica Kingsley, 121-139, p131.

realities of family life are not determined by marital status”.⁵³ Legal reform should, according to a 2008 cross-party Parliamentary committee, “provide practical solutions for family formation without making normative pronouncements”.⁵⁴ Successive governments from across the political spectrum have responded to societal changes predominantly by adapting law to fit, there being a broad political consensus that the law is an inappropriate tool for influencing adult private morality.⁵⁵

However, the approach taken to children within families has been diametrically opposed.⁵⁶ In the creation of the welfare state, children were seen not only as equal rights-bearing citizens, but also as a vulnerable group who deserved protection through public intervention.⁵⁷ Thus, in marked contrast to the liberal understanding of private families, child welfare was “treated as a communal responsibility”.⁵⁸ Successive Social Democratic governments, motivated initially by concerns over falling birth rates as well as class divisions, have aimed to redistribute the economic costs of childrearing across society.⁵⁹ Sweden allocates a larger share of its social expenditure to families and children than other European countries, but (unlike some other welfare state measures) this redistribution has remained relatively uncontroversial; there is widespread agreement on this construction of children as a shared, public responsibility.⁶⁰ This, too, has weakened the public/private dichotomy in political and consequently in legal discourse; it suggests that Swedish courts should be more prepared to enquire into and adjust the allocation of responsibilities under a shared residence order.

Swedish women’s increased participation in the labour market, and the consequent relocation of much of the caring for children into the public sphere, is also rarely

53 Ds 1999:57, p60.

54 Civilutskottets Betänkande Könsneutrala äktenskap och vigselfrågor, 2008/09:CU19, p10.

55 Proposition 2008/09:80, p17; Kurki-Suoni, K (1995) ”Gemensam Vårdnad – Vad Döljer Man med Barnets Bästa?” in Nordborg, G (Ed) *13 Kvinnoperspektiv på Rätten*, Uppsala, Iustus Förlag, 169-196, p185.

56 Bradley (1996) *op cit* n41, pp71-72, p111.

57 Tauberman, A-C (1999) “Swedish Family Policy – Main Steps and Present Concerns” in Socialdepartementet (1996) *Slutbetänkande från Kommittén för FN:s Familjeår*, SOU1996:37, Fritzes Offentliga Publikationer, Stockholm, Appendix 3, 23-26, p23.

58 Bradley (1996) *op cit* n41, pp71-72, p111.

59 Ryrstedt (2006) *op cit* n27, p48; Bradley (1996) *op cit* n41, pp249-250.

60 Svallfors, S, Halvorsen, K & Andersen, J (2001) “Work Orientation in Scandinavia: Employment Commitment and Organizational Commitment in Denmark, Norway and Sweden”, 44 *Acta Sociologica*, 139-156, p141.

criticised. The need for a strong economy to fund welfare reform, the traditional Lutheran work ethic and concerns about dwindling nativity rates have all combined with political emancipation objectives to result in policies aimed to help working mothers.⁶¹ Reconciliation, the successful combination of work and home commitments, is a comparatively new concept in EU debate; in Sweden it has been a policy aim since the 1930's.⁶² Swedish rights to maternity and parental leave compare extremely favourably on the international scale, in terms of time,⁶³ wage replacement⁶⁴ and flexibility in the way leave can be taken.⁶⁵ Parents of young children also have a right to reduce their working hours to 30 per week,⁶⁶ and can claim up to a maximum of 120 days *per annum*, paid at 80% of salary, to stay at home and care for a sick child.⁶⁷ The dual earner family has undoubtedly become the norm, due both to financial necessity and a perception of housewifery as outmoded, isolated and non-productive.⁶⁸ Single mothers have been discussed in terms of poverty rather than moral laxity and constructed primarily as working parents rather than women without men. They have thus benefited from successive measures aimed to improve child welfare or encourage female employment without specifically being identified as a target problem group.⁶⁹ This suggests that the Swedish political subsystem, and consequently the Swedish legal subsystem, ought to be less concerned about independent motherhood, particularly since Swedish women also find it easier to be economically self-sufficient. A 2009 international comparison showed Sweden to have one of the narrowest gender pay gaps in the study's sample of industrialised nations.⁷⁰ While UK women were limited to part-time and temporary positions, Swedish female employees have benefited from interventionist legislation, collective trade union agreements and subsidised state

61 Pyllkänen (2007) *op cit* n43, p294.

62 *Working and Caring: a Guide to Implementing the Council of Ministers' Recommendation on Childcare*, quoted in Caracciolo di Torella, E (2001) "A Critical Assessment of the EC Legislation aimed at Reconciling Work and Family Life: Lessons from the Scandinavian Model?" in Collins, H, Davies, P & Rideout, R (Eds) *Legal Regulation of the Employment Relation*, Amsterdam, Kluwer, 441-458, p443.

63 480 days.

64 The majority of leave is paid at 80% of income up to an index-linked ceiling.

65 The leave can be taken until the child's eighth birthday, and parents can take it in portions as small as one-eighth of a day. *Föräldraledighetslagen*.

66 With a *pro-rata* salary deduction.

67 Aged 11 or younger. *Föräldraledighetslag* (1995:584) §3 as amended.

68 Oláh (2001) *op cit* n44, p126; Ellingsæter (1998) *op cit* n2, pp65-66.

69 Gähler, M (2001) "Bara en Mor – Ensamstående Mödrars Ekonomiska Livsvillkor i 1990-talets Sverige" in SOU 2001:54, 15-99, p91.

70 International Trade Union Confederation (2009) *Gender (In)Equality in the Labour Market: An Overview of Global Trends and Developments*, ITUC, London, pp16-17.

childcare.⁷¹ Although supply of the latter has never increased fast enough to actually meet demand, Sweden compares very favourably internationally.⁷² Most important is the comprehensive network of state-run, state-subsidised nurseries; in 2005, 89% of two-year-old children were registered users of public day care.⁷³ Previously private caring has become paid employment carried out by women in the public sphere, and this, too, has eroded the public/private dichotomy.⁷⁴ Although autopoietic subsystems are closed, and rely on their internally reconstructed versions of outside reality, change can be a response to turbulence in the form of communications from individual psychic systems.⁷⁵ US feminist academics still debate the idea of care occurring in a public setting in terms of utopian abstractions.⁷⁶ In Sweden, it is a well-established reality.⁷⁷

Debate on fatherhood has tended not to centre on a perceived crisis of fathering but has instead focused on removing structural obstacles and challenging restrictive traditional stereotypes.⁷⁸ In an appendix to a 1996 report for the UN Year of the Family, a junior minister wrote: “[W]hen confronted with the evidence that the double burden of work and parental responsibilities still falls heavily on women alone, the state has now undertaken to intrude in the internal negotiations of the family, instituting incentives to induce men to take their share of caring responsibilities...”⁷⁹ Since the 1970’s, parental leave, the right to reduce working hours and leave to care for sick children have all been gender neutral.⁸⁰

71 De Los Reyes, P (2000) “Folkhemmets Paradoxer”, *Kvinnovetenskaplig Tidskrift*, 27-47, p28; Ellingsæter (1998) *op cit* n2, p59; Bradley (1996) *op cit* n41, p82.

72 Mahon, R (2002) “Gender and Welfare State Restructuring: Through the Lens of Child Care” in Michel, S & Mahon, R (Eds) *Child Care Policy at the Crossroads: Gender and Welfare State Restructuring*, London, Routledge, 1-27, p17.

73 Local municipalities also employ childminders; provide breakfast/after-school clubs and pre-school playgroups. Statistiska Centralbyrån (2005) *Barn och Deras Familjer*, pp98-100.

74 Esping-Andersen (1990) *op cit* n2, p159; Björnberg, U (2002) “Ideology and choice between work and care: Swedish family policy for working parents” 22(1) *Critical Social Policy*, 33-52, p35

75 Teubner (1993) *op cit* n4, p65.

76 Abrams, K (2001) “The Second Coming of Care”, 76(3) *Chicago-Kent Law Review*, 1605-1617, p1606.

77 Lewis, J (2005) “The Changing Context for the Obligation to Care and to Earn” in Maclean, M (Ed) *Family Law and Family Values*, Oxford, Hart Publishing, 59-77, p71.

78 Parbring, B (2004) “Mjukismän och Velourpappor”, *Genus*, 10-12, p11; Kurki-Suonio, K (2000) “Joint Custody as an Interpretation of the Best Interests of the Child in a Critical and Comparative Perspective”, 14(3) *IJLPF*, 183-205, p189.

79 Tauberman (1999) *op cit* n57, p23.

80 Bradley, D (1990a) “Perspectives on Sexual Equality in Sweden”, 53(3) *MLR*, 283-303, p296.

Where UK governments have seen childcare responsibilities as a private matter, their Swedish counterparts have prioritised high wage compensation levels as a crucial part of the strategy to restructure gendered familial patterns.⁸¹ It does, indeed, seem to be a model worth emulating. The best known and most successful measure has probably been the ‘daddy month’: one month’s paid parental leave reserved for fathers. It was introduced in 1995 to give fathers a period of sole responsibility to encourage continued involvement.⁸² In 2002 this non-transferable portion of the leave was doubled, and there is a continuing strategy to increase fathers’ use of leave.⁸³ According to Bergman and Hobson, this “construction of explicit norms for fathering” is not surprising “[i]n a society with a history of social engineering”.⁸⁴ Sweden’s generous reconciliation policies have, according to di Torella, shown that “legislation can, if not change, then at least challenge stereotypes and influence attitudes in society”.⁸⁵ If autopoietic closure is “a question of degree”, then this is true.⁸⁶ It could, therefore, be deduced that the preconditions for shared residence are indeed better in Sweden; the transition from the dual-earner, dual-carer intact family to its post-separation binuclear counterpart should be smoother. These suppositions are examined in the next chapter. At this stage, it is important to note that while external observers have generally commented positively, internal commentators have presented a more nuanced view.

6.2.3 Gendered Constructions of Parenting & the Binuclear Family

Although Swedish feminists are generally positive about the Social Democratic model, they have drawn attention to its inherent dilemma. The welfare state has encouraged women into employment in the expanding and comparatively family-friendly public sector; women have also tended to take advantage of work/home harmonisation measures more often than men. The result is a labour market with “an extremely high degree of gender segregation” where women have poorer career

⁸¹ Pyllkkänen (2007) *op cit* n43, p303; Ryrstedt (2006) *op cit* n27, p49; SOU 2001:24, p113, p316.

⁸² Bergman, H & Hobson, B (2002) “Compulsory Fatherhood” in Hobson (Ed) *Making Men into Fathers*, Cambridge, Cambridge University Press, 92-124, p110.

⁸³ Socialdepartementet (2004a) *Föräldrapenning, Pappornas Uttag av Dagar, Fakta och Analys*, Stockholm, Regeringskansliet, p7; *Lag om Jämställdhetsbonus* (2008:313) §1, §8.

⁸⁴ Bergman & Hobson (2002) *op cit* n82, pp106-107.

⁸⁵ Caracciolo di Torella (2001) *op cit* n62, p443.

⁸⁶ Teubner (1993) *op cit* n4, p27.

prospects.⁸⁷ While the welfare state has undoubtedly empowered women it has also reproduced patriarchal power relationships in a new form which serves to preserve traditional gender roles. There is a gap between the rhetoric of gender neutrality and a gendered, unequal labour market.⁸⁸ Moreover, while care is no longer invisible, it remains neglected and undervalued, practised predominantly by women either in the home or in a comparatively poorly paid public sector. The second chapter asserted that the power to label is an important aspect of patriarchy; men have categorised anything identified as female as different, inferior, or of lesser importance. This gendered pattern of classification, entrenched in the meaning-making structures of the political and legal subsystems, may not be as important as it once was, but it has not been eradicated by the welfare state.

There are a number of empirical studies, which have identified a parallel gap in the private sphere.⁸⁹ Men's contributions in the home have increased, but not sufficiently to match women's increased working hours.⁹⁰ Women consequently continue to adapt their work to the needs of their families, and retain their primary carer roles, with some studies suggesting that men use their superior earning power to their strategic advantage.⁹¹ Although statistics show sustained increases in men's use of parental leave, leave is often taken to create long weekends and family vacations, and is conceptualised as a matter of choice, shaped by employment and individual preferences.⁹² Thus, when a father exercises choice in relation to parental leave, the needs remain, and the mother's choice whether or not to stay at home to care for the baby is effectively removed.⁹³

Yet, in legal communications, gendered inequalities are obfuscated by the dominant gender neutrality rhetoric.⁹⁴ This 20th century "segregationist" form of patriarchy is

87 Ellingsæter (1998) *op cit* n2, p59.

88 Lewis (2005) *op cit* n77, p72; Björnberg (2002) *op cit* n74, p33.

89 SOU 2004:70, p116; Bäck-Wiklund, M & Bergsten, B (1997) *Det Moderna Föräldraskapet*, Stockholm, Natur och Kultur, pp164-165.

90 Lundqvist, Å & Roman, C (2003) "Önska, Välja och Vilja", *Sociologisk Forskning*, 12-33, p26.

91 SOU 2004:70, p113; Rejmer (2003) *op cit* n3, p179; Björnberg (2002) *op cit* n74, p44; Roman, C (1999a) "Inte av Kärlek Allena: Makt I Hemarbetets Fördelning", 1 *Sociologisk Forskning*, 33-51p45.

92 Bergman & Hobson (2002) *op cit* n82, p112.

93 Bekkengen, L (1999) "Män som 'pappor' och kvinnor som 'föräldrar'", *Kvinnovetenskaplig Tidskrift*, p42.

94 Pyllkänen (2007) *op cit* n43, p298.

more complex and more difficult to challenge.⁹⁵ Moreover, the modern, emancipated family has become such a dominant paradigm that there is no room in legal (or political) discourse for arguments against it.⁹⁶ Anything which is not based on equal sharing (such as the automatic allocation of child benefit to mothers) is attacked as outmoded and discriminatory.⁹⁷ Mothers cannot attempt to assert themselves as better than fathers in interpreting and responding to children's needs, even where this is based on experience rather than biology.⁹⁸ This casts doubt on the assertion that there is, in Sweden, a greater recognition of the value of care, which should lead to a fairer sharing of residence. At the same time, economic instability since the 1990's has led to a re-evaluation and a contraction of the welfare state; and a renewed, perhaps post-liberal, emphasis on individual responsibility visible, *inter alia*, in changes to child support.⁹⁹ Constructions of single parents as an irresponsible problem group who lack the will or ability to discipline their children have begun to appear on the margins of political discourse.¹⁰⁰ Although international comparisons show Swedish single mothers to be in a better position than most, they remain socio-economically vulnerable, and gaps have widened in recent decades.¹⁰¹ Yet, this is obscured by the insistence on gender neutrality in legal discourse.¹⁰²

The second chapter asserted that law's efforts to construct post-separation dual-household nuclear families are its attempt to diffuse conflicts of power brought about by social change, as is consistent with its societal role and its autopoietic cognitive framework. In England, this is done largely by relying on the enduring normative power of the conjugal family, but the changes wrought by the construction of the Swedish welfare state makes this strategy impossible. Instead, arguments against single motherhood are framed using the construct of the modern hands-on father; since fathers now (supposedly) play an equal role in intact families,

95 Smart, C (1982) "Regulating Families or Legitimizing Patriarchy" 10(1) *International Journal of the Sociology of Law*, 1-18, p8

96 Bergman & Hobson (2002) *op cit* n82, p117; Eriksson, M & Hester, M (2001) "Violent Men as Good Enough Fathers? A Look at England and Sweden" 7(7) *Violence Against Women*, 779-798, p789.

97 Andersson & Bangura Arvidsson (2008) *op cit* n23, p198; Proposition 2005/06:20, pp15-16; Open Letter from Senior Union Officials and the Minister for Social Security, *Dagens Nyheter* 31st January 2006.

98 Eriksson & Hester (2001) *op cit* n96, p789.

99 Mahon (2002) *op cit* n72, p16; Kliman & Forsberg (1998) *op cit* n41, p53, p56.

100 Feministiskt Initiativ (2006) *Enastående och Makalösa Mammor*, Stockholm, Feministiskt Initiativ, p4. <http://www.feministisktinitiativ.se/downloads/grasrot/enastående.pdf> accessed 15th December 2009.

101 Lewis (2005) *op cit* n77, p71; Gähler (2001) *op cit* n69, p43.

102 Wennberg, L (2001) "Ensamstående Mödrar – Försörjda av Män eller Rätt till Vålfärd?" in Burman, M & Gunnarson Å (Eds) *Familjeföreställningar*, Uppsala, Sweden, Iustus Förlag, 231-249, p247.

it should not be taken away from them at divorce. Swedish law achieves the same result of promoting permanent fatherhood, albeit in a slightly different way.

As in England, parenthood has replaced marriage as the primary status relationship, and the legislator has sought to remove legal obstacles to co-parenting while also sending clear symbolic messages about the immutability of parenthood.¹⁰³ The custody order has played a significant part in this strategy. In 1977 separating couples were given the option of continuing to share custody and successive subsequent amendments have turned joint legal custody into the default position; since 1998 it can even be ordered where one parent objects.¹⁰⁴ In a typical example of the dominant discourse, a 2007 commission of inquiry reiterated that “divorce brings the marriage to an end, but leaves the parent-child relationships unaffected”.¹⁰⁵ In 2005, 94% of parents who separated continued to share custody, making sole custody “very unusual”.¹⁰⁶ There are a number of similarities with parental responsibility. Joint custody is used to encourage fathers and reassure them of their continued importance.¹⁰⁷ It is undergoing a process of re-conceptualisation from a voluntary mechanism for co-operation to a universal right and badge of legal status,¹⁰⁸ and it may well be that, as in England, this process is the subsystems’ response to interference from the political system regarding paternal disengagement. Its content has also changed. The legal term, *vårdnad*, is an abbreviation of *omvårdnad*, which means care in the sense of caring for, but successive reforms have resulted in a reconceptualisation of *vårdnad* and a separation of legal custody from the practical work of caring.¹⁰⁹ Custody was traditionally understood to involve physical possession as well as authority, but as the availability of joint custody has been expanded, it is primarily conceptualised in terms of decision making.¹¹⁰ *Travaux préparatoires* stress that custody is primarily a responsibility, but since it is difficult to see how this could be enforced against a disinterested parent, custody *de facto*

103 Agell, A (2002) “Sweden” in Hamilton, C & Perry, A (Eds) *Family Law In Europe*, London, Butterworths, 619-660, p633; Eriksson & Hester (2001) *op cit* n96, p38; Bradley (1996) *op cit* n41, p3.

104 FB6§3; Nilsson (1998) *op cit* n49, p13.

105 SOU 2007:52, p29.

106 Schiratzki (2006) *op cit* n11, p91; Barnombudsmannen (2007) *Upp till 18*, Barnombudsmannen, Stockholm, p57.

107 SOU 2005:43, p112; Proposition 2005/06:99, p49.

108 Schiratzki, J (1999) “Vad Betyder det att ha Gemensam Vårdnad?” 10(4) *Juridisk Tidskrift*, 1049-1055, p1055.

109 Rejmer (2003) *op cit* n3, p141, p190.

110 *Ibid*, p143, pp148-152.

becomes “a right, rather than an obligation”.¹¹¹ Here, the laws of the two jurisdictions appear to start from opposite points: whereas the law in England takes independent decision making as the implicit norm, excepting only certain important decisions, Swedish law has joint decision making as the default position and generally permits derogation only in relation to very mundane or trivial decisions.¹¹² This leaves parents very limited room to act in response to fears that the other parent is abducting or harming the children.¹¹³ Women’s organisations have, accordingly, condemned joint custody as an extension of patriarchal power.¹¹⁴

The problems caused by this non-resident parent veto have become particularly acute since 1998 when joint custody became the default position even where one parent objects. Most controversially, non-resident fathers have successfully blocked treatment recommended to help children recover from abuse the former are alleged to have perpetrated.¹¹⁵ In response, a commission of inquiry has recommended reform which will allow courts to grant one parent unilateral powers of decision-making within the limited areas of education, healthcare and assistance offered by social services.¹¹⁶ This was felt to be the best way of resolving particular impasses without unduly undermining the principle of parental cooperation or marginalising non-resident parents, and it was stressed that unilateral decision-making must be a rare exception.¹¹⁷ It can be argued that the underlying motivation is to safeguard the current patriarchal use of joint custody to maintain father-child links.¹¹⁸

Empirical studies have also found a preoccupation with fairness towards fathers, which could explain why, in the samples, fathers’ applications for contact were refused in less than 10% of cases. Law is also concerned not to discourage or alienate fathers, thus, refusals were predominantly justified by reference to older children’s

¹¹¹ Ryrstedt & Mattson (2008) *op cit* 132, p137.

¹¹² FB6§13; Schiratzki (2006) *op cit* 111, p93.

¹¹³ The only option is to seek sole custody, but applications are dismissed in all but extreme circumstances: NJA2006 s.708; NJA2007 s.326; RH1999:129; RH1996:144; Schiratzki (2006) *op cit* 111, p97.

¹¹⁴ Eriksson, M (2004) “Socialsekreterares Syn på Mäns Våld i Vårdnadsärenden”, 2 *Kvinnotryck*, http://roks.se/kvinnotryck/2004/kt2_04_rep_maria_eriksson.html.

¹¹⁵ Barnombudsmannen (2005) *När Tryggheten står på Spel*, Barnombudsmannen Rapporterar 2005:02, p58; SOU 2007:52, pp72-74; Pihl, A & Thunander, T (2003) *Rätten till ett Barn*, Stockholm, Prisma, p177.

¹¹⁶ SOU 2007:52, pp12-13. Proposed change to FB6§14a and FB6§13a.

¹¹⁷ *Ibid*, pp103-104, p122.

¹¹⁸ *Ibid*, p109.

objections and paternal shortcomings were euphemised.¹¹⁹ This legal reinterpretation of case facts to fit the normative expectations of enduring fatherhood and the creation of binuclear families has been sharply criticised.¹²⁰ It appears that, as in England, the legal subsystem is attempting to ameliorate the anxieties engendered by demographic changes which challenge patriarchal components of its normative framework. Swedish family law is not overtly patriarchal, but the hidden gap between the aspirational, gender-neutral legislation and continuing gendered practices makes it more difficult for mothers to challenge fathers' attempt to use the law to reassert control across the binuclear family.

6.3 THE PARAMOUNTCY PRINCIPLE

Swedish law includes a paramountcy principle very similar to section 1(1) of the Children Act 1989; and it appears to have similar problems in its application. The child's best interests were established as an important consideration in 1920, although there was no overarching paramountcy principle in the Parents Code until 1998.¹²¹ A precise definition of the child's best interests is thought impossible since the concept varies over time, and according to circumstances; a point reiterated by the Supreme Court.¹²² Consequently, as in most other jurisdictions, the best interests concept has been criticised for being easy to endorse, but more difficult to describe.¹²³ Some further guidance is provided in the Parents Code: children have "a right to care, security and a good upbringing", must be treated with respect, and are not to be subjected to corporal punishment or other humiliating or degrading treatment.¹²⁴ There is a list of factors similar to s.1(3) of the 1989 Children Act, but it is considerably briefer: FB6§2a instructs courts to consider particularly the risks of abuse, abduction or other harm, the child's need for close and good contact with both parents, and the child's wishes in accordance with his or her age and maturity. The

¹¹⁹ Socialstyrelsen (2004a) *op cit* n16, p7; Eriksson (2004) *op cit* n115; Barnombudsmannen (2005) *op cit* n116, p32, p41; Gumbel, I (2003) "Språket i Vårdnadsutredningen påverkar Domen", 3 *Kvinnotryck*, http://www.roks.se/kvinnotryck/kt3_03_rep.html; SOU 2005:43, p118.

¹²⁰ Andersson & Bangura Arvidsson (2008) *op cit* n23, p203; SOU 2005:43, p200.

¹²¹ Rejmer, A (2002) Barnperspektiv och Barnets Bästa i Tingsrätts Handledning av Vårdnadstvister", 0203(2) *Svensk JuristTidning*, 138-156, p139; Kurki-Suoni (1995) *op cit* n55, p185; Proposition 1997/98:7, pp47-48

¹²² NJA2007 s.382, p393; Proposition 1997/98:7, p104; Ds 1999:57, p88.

¹²³ Ryrstedt (2007) *op cit* n1, p409; Rejmer (2003) *op cit* n3, p124.

¹²⁴ FB§1.

list is, like s.1(3), neither exhaustive nor hierarchical, and was not intended to limit discretion.¹²⁵

6.3.1 A Narrow Legal Construction of Welfare

The conceptualisation of children as a public concern has combined with the emphasis on “welfarism and social engineering” so that, from a global perspective, Swedish children are prioritised to an enviable extent.¹²⁶ While this construction of children within policy discourse has clearly influenced family law, it has only done so as interference, outside disturbance, which has had to be translated to fit law’s pre-existing framework.¹²⁷ Within family law, the focus is narrowed to individual family members, who are recreated as stereotyped semantic artefacts, and child welfare science knowledge has been enslaved, translated into binary codes determined by law’s cognitive domain.¹²⁸

Although there has been no overt restatement of the welfare test as occurred in English family law in *Re H* (1992),¹²⁹ the Parents Code’s broad discretionary welfare test has, in both custody and contact cases, come to be reinterpreted so that courts weigh any identified risks against the child’s need for contact with both parents.¹³⁰ Law has, moreover, created a hierarchy of these factors where the child’s need for contact usually prevails.¹³¹ A 2005 National Insurance Board study on child support concluded its introduction by stating that “it is not possible to exaggerate the importance of a child having regular contact with both its parents”.¹³² It is submitted, however, that this is precisely what has occurred in current practice.¹³³ This fits well with Teubner’s observation that the meaning which a statement gains as it becomes part of the subsystem’s communications is more important than the

¹²⁵ SOU 2005:43, p105 ; Proposition 1997/98:7, p105 ; Schiratzki (2006) *op cit* n11, p34.

¹²⁶ Dahlin, M, Kaldal, A & Leviner, P (2006) “JO och Barnperspektivet – de Rättsliga Förutsättningarna för Socialtjänsten att Samtala med Barn”, 0607(1) *Juridisk Tidskrift*, 3-10, p4.

¹²⁷ Teubner, G (2001) “Alienating Justice: On the Surplus Value of the Twelfth Camel”, in Nelken, D & Pribán, J (Eds) *Law’s New Boundaries: Consequences of Legal Autopoiesis*, Aldershot, Ashgate, 21-44, p24; Schiratzki (2006) *op cit* n11, p34.

¹²⁸ Rejmer (2003) *op cit* n3, pp30-32.

¹²⁹ *Re H* [1992] 1 FLR 148.

¹³⁰ FB6§2a as amended by Lag 2006:458; Proposition 1997/98:7, p104.

¹³¹ Ewerlöf, G & Sverne, T (1999) *Barnets Bästa* (4th Ed), Stockholm, Norstedts Juridik AB, p58.

¹³² Riksförsäkringsverket (2005) *Råd att Umgås – en Analys av Umgängesavdrag inom Underhållsstödet*, RFV Analyserar 2005:1, Stockholm, Försäkringskassan, p8.

¹³³ SOU 2005:43, p166; Barnombudsmannen (2005) *op cit* n116, p41.

meaning intended by the original actor.¹³⁴ Indeed, it has been repeatedly observed that there is a discrepancy between the rhetoric expressed in official documents, and district court practice.¹³⁵ As in England, there is little discussion of the concrete potential benefits of contact; courts' handling of disputes has been described as "mechanical", and risk assessments are not only rare but also often inadequate.¹³⁶ This approach can also be found in appeal court decisions, notably NJA2003 s.372.¹³⁷ Ryrstedt and Schiratzki have both criticised the way the Supreme Court began by setting out the arguments against further contact rooted in the child's specific situation, but then performed a "u-turn" and ordered further contact on the basis of general observations that a child should benefit from a close relationship with a father who "genuinely cared about her".¹³⁸

A further example of family law's autopoietic nature is provided by Swedish law's increasing emphasis on *barnperspektiv* or child focus.¹³⁹ According to the legislation and *travaux préparatoires*, the child's best interests must be assessed both objectively (by looking at scientific and other expert knowledge), and subjectively, by attempting to ascertain how the child sees the situation and then interpreting what has been said.¹⁴⁰ Ryrstedt has complained that in current practice, neither goal is met. She analysed transcripts of cooperation talks and found the child was rarely at the centre of discussions; instead, agreements reached through cooperation talks were often the result of the parents' desire to win, or to achieve a fair sharing of the child.¹⁴¹ At court, children are very rarely granted party status, since their interests are assumed to converge with their parents; and the same reasoning explains why children's views are often never sought at all.¹⁴² Where children's wishes are recorded, courts often depart from them without further explanation since, as in

¹³⁴ Teubner, G, Schiff, D & Nobles, R (2003) "The Autonomy of Law: Introduction to Legal Autopoiesis", in Schiff, D & Nobles, R (Eds) *Jurisprudence*, London, Butterworths, 897-954.

¹³⁵ SOU 2005:43, p514; Socialstyrelsen (2003b) *op cit* n24, p47; Barnombudsmannen (2005) *op cit* n116, p43.

¹³⁶ Andersson, G & Bangura Arvidsson, M (2006) *Barnet mellan två Föräldrar – Insatsen Kontaktperson i Umgångstvister*, Stockholm, Stiftelsen Allmänna Barnhuset, as cited in Ekblom & Landberg (2007) *op cit* n23, p19; SOU 2005:43, p736; Barnombudsmannen (2005) *op cit* n116, p40, p43; Schiratzki (2006) *op cit* n11, p121; Rejmer (2003) *op cit* n3, p104.

¹³⁷ Ryrstedt (2007) *op cit* n1, p407.

¹³⁸ Schiratzki (2004) *op cit* n33, p646.

¹³⁹ FB6§2b; Proposition 2005/06:99, p46; Ryrstedt (2009b) *op cit* n39, p827; Eriksson & Näsman (2008) *op cit* n36, p261.

¹⁴⁰ Proposition 2005/06:99 p39 ; SOU 1997:116, p134; Schiratzki (2006) *op cit* n11, p29.

¹⁴¹ Ryrstedt (2009b) *op cit* n39, p821, pp832-834.

¹⁴² Ryrstedt (2007) *op cit* n1, p411; Ekblom & Landberg (2007) *op cit* n23, p32.

England, “[t]he whole process relies on adult discretion to judge children’s developing competences”, and children are often said to be too young to fully appreciate the consequences of their decisions.¹⁴³ The SWI interview with the child is not seen as an independent contribution but, rather, responses are converted into “results of measurement to be used as data in adults’ distanced evaluation of the child”.¹⁴⁴ This data is then enslaved, re-created to fit the pigeonholes of law’s normative structure. Rejmer has argued that despite the child focus rhetoric, law converts children into semantic artefacts.¹⁴⁵ As a closed self-regulating system law is, however, unaware of its limited focus.¹⁴⁶ In Rejmer’s sample of cases, only 6% of SWI reports were found to be adequately child focused, yet the professionals who responded to her questionnaire were overwhelmingly satisfied with this aspect of the legal process.¹⁴⁷ Thus, a standardised, abstract understanding of welfare has developed within family law’s chains of communication; and, as in England, this has come to focus on the child’s need for a father, while mothering is taken for granted.¹⁴⁸

6.3.2 From Broad Discretion to Binary Codes

The dominant construction of the welfare principle has resulted in a *de facto* presumption in favour of joint custody as the best way of keeping parents involved.¹⁴⁹ This can be seen in the statutory stipulation that courts and social welfare boards should accept parents’ agreements to share custody unless “obviously incompatible with the child’s best interests”, whereas agreements for sole custody require positive proof that this arrangement will in fact be better for the child.¹⁵⁰ Although it is stressed in *travaux préparatoires* that courts must not override parents’ objections as a matter of routine, practice has departed substantially from these

¹⁴³ Neale, B (2002) “Dialogues with Children: Children, Divorce and Citizenship”, 9(4) *Childhood*, 445-475, p456, as cited in Eriksson & Näsman (2008) *op cit* n36, p262; Ekblom & Landberg (2007) *op cit* n23, p33; Svea Hovrätt, Case No T4863-08, 20th February 2009, p4.

¹⁴⁴ Eriksson & Näsman (2008) *op cit* n36, p268; Barnombudsmannen (2005) *op cit* n116; Ryrstedt & Mattson (2008) *op cit* n32, p139, p141.

¹⁴⁵ Rejmer (2003) *op cit* n3, p188.

¹⁴⁶ Luhmann (1989) “Law as a Social System”, 83(1) *Northwestern University Law Review*, 136-150, p145.

¹⁴⁷ Rejmer (2003) *op cit* n3, p111.

¹⁴⁸ Eriksson & Hester (2001) *op cit* n96, p780.

¹⁴⁹ Schiratzki, J (2005) “Litigation in the Shadow of Mediation: Supporting Children in Sweden” in Maclean, M (Ed) *Family Law and Family Values*, Oxford, Hart Publishing, 123-135, p133; Singer, A (2007) “Samarbetsförmåga och Gemensam Vårdnad” 0708(1) *Juridisk Tidskrift*, 148-155, p148.

¹⁵⁰ FB6§4, FB6§6.

guidelines and judicial applications of the welfare test are often at best perfunctory.¹⁵¹ The emphasis on the child's need for a father, moreover, means that risks are minimised and found to have been outweighed by the abstract benefits of continuing legal ties.¹⁵² In 2005, the Children's Ombudsman warned that "fears regarding the child's safety and well-being have become obscured".¹⁵³ Similar observations have been made about the strong *de facto* presumption in favour of contact. Gumbel found that graphic accounts of systematic violence were translated in SWI reports and judgments into incidents of disagreement.¹⁵⁴ This process hid and normalised the violence; disagreement is common and not a valid reason to terminate contact.¹⁵⁵

However, increased awareness of the harmful effects on children suffering or witnessing domestic violence, and resulting concerns about contemporary law, led to a 2006 amendment to the Parents Code.¹⁵⁶ This was intended to "tighten up" practice; there is no presumption against unsupervised contact or joint custody in cases involving domestic abuse but courts are instructed to investigate thoroughly and apply the welfare test carefully.¹⁵⁷ The subsequent Supreme Court case NJA2006 s.26 has confirmed the change of direction and the reform has been praised as a welcome acknowledgement that not all parents are good for their children.¹⁵⁸ It should be noted, however, that harm in the 2006 reform appears to have been understood predominantly in terms of domestic violence.¹⁵⁹ As in England, aggressive and abusive men are seen as a small, exceptional category, who should not be allowed to undermine the general principle. Domestic violence, too, is defined narrowly. Concerns have been voiced that district court judges and SWI's wrongly apply the criminal standard of proven beyond reasonable doubt. Law's use of binary codes means that if only allegations that have resulted in a conviction can be labelled

¹⁵¹ Proposition 1997/98:7, p1, p52; Ryrstedt & Mattson (2008) *op cit* n32, p135; SOU 2005:43, p753; Socialstyrelsen (2004a) *op cit* n16, p7.

¹⁵² SOU 2005:43, p754.

¹⁵³ Barnombudsmannen (2005) *op cit* n116, p37.

¹⁵⁴ Gumbel (2003) *op cit* n120.

¹⁵⁵ Gumbel (2003) *op cit* n120; Eriksson (2004) *op cit* n115; Åkerman, I & Fagerlind, S (1998) *Familjerätt i Besparingstider*, Socialstyrelsen, Stockholm, p5.

¹⁵⁶ Eriksson & Näsman (2008) *op cit* n36, p261; Ekblom & Landberg (2007) *op cit* n23, p23; Schiratzki (2006) *op cit* n11, p110; Barnombudsmannen (2005) *op cit* n116; Proposition 2005/06:99, 51.

¹⁵⁷ FB6§5(2); Proposition 2005/06:99, p87 ; SOU 2007:52, p30; Schiratzki (2006) *op cit* n11, p103, p110.

¹⁵⁸ Schiratzki (2006) *op cit* n11, p109. See also Sundsvalls Tingsrätt, Case No T2862-08, 9th July 2009, pp14-15; Ryrstedt (2007) *op cit* n1, p389.

¹⁵⁹ Proposition 2005/06:99, p41, p56; SOU 2007:52, pp221-222; Ekblom & Landberg (2007) *op cit* n23, p19.

proven or true then all other allegations are unsubstantiated or false.¹⁶⁰ This reasoning was, for example, employed in NJA2007 s.272, where the Supreme Court also made the slightly worrying observation that allegations of domestic violence should be treated with caution where the parties are involved in a custody dispute.¹⁶¹ Secondly, violence may also be dismissed as “isolated heat-of-the-moment incidents”.¹⁶² Sjösten, a prominent judge and commission of inquiry chairman, has suggested in his family law textbook that what he terms “mild violence” can be a father’s understandable and excusable reaction to a stressful time and should not disqualify a parent from having joint custody.¹⁶³ Thus, the effects of the 2006 reform have been limited.¹⁶⁴

Interestingly, something very similar can be observed in Swedish legal discourse in relation to the construction of immigrant fathers, although it is rarely expressed as overtly. Sweden was ethnically and culturally homogenous for millennia, and the last five decades’ assimilation of migrant labour and refugees has not always been easy, particularly where there is divergence from the democratic, emancipated ideals of the welfare state.¹⁶⁵ In legal discourse, fathers with immigrant backgrounds are constructed as another atypical problem group: their inability to understand the dominant welfare discourse is said to lead to disputes becoming entrenched or even violent.¹⁶⁶ In this dichotomous construction, characteristic of law’s tendency to recreate information in its own binary code, immigrant fathers are aggressive, chauvinist, reactionary and unreasonable, while Swedish men are emancipated, reasonable and able to put their children’s interests first.

In conclusion, a patriarchal element remains within family law despite seven decades of welfare state policies. It is, however, less pronounced, and possibly

¹⁶⁰ Schiratzki (2006) *op cit* n11, pp109-110; Barnombudsmannen (2005) *op cit* n116, p38, p53; Pihl & Thunander (2003) *op cit* n116, p178; Eriksson (2004) *op cit* n115.

¹⁶¹ NJA2007 s.272.

¹⁶² Proposition 2005/06:99, pp41-43; Schiratzki (2006) *op cit* n11, p110.

¹⁶³ Sjösten, M (1998) *Vårdnad, Boende och Umgänge: Bestämmelserna i Föräldrabalken och Närliggande Regler*, Stockholm, Norstedts Juridik, p52.

¹⁶⁴ Schiratzki (2006) *op cit* n11, p110; Socialstyrelsen (2007) *Hur gör Socialtjänstens Familjerätt Riskbedömningar i Utredningar om Vårdnad, Boende och Umgänge?*, Stockholm, Socialstyrelsen, pp21-22.

¹⁶⁵ Rejmer (2003) *op cit* n3, p77; Schiratzki, J (2003) “Barnets Vilja Avgörande för Svensk Domsrätt”, 14(3) *Juridisk Tidskrift*, 657-664, p661.

¹⁶⁶ Proposition 1997/98:7, p41; SOU 2005:43, p725; Mats Sjösten, Chefsrådman vid Göteborgs Tingsrätt, interviewed by Pihl & Thunander (2003) *op cit* n116, pp169-170; Andersson & Bangura Arvidsson (2008) *op cit* n23, p203.

slightly less influential. Presumptions in favour of joint legal custody and contact are justified by references to new, hands-on fathers, rather than the Victorian *pater familias*, and there is some recognition of the value of care. Nevertheless, presumptions that are presented as benefitting children are *de facto* protecting men's interests.¹⁶⁷ A single mothers' organisation has asserted that the paramountcy principle is never allowed to be drawn to a conclusion where it limits men's freedom of choice in relation to parenting.¹⁶⁸ Bradley has warned that, as in other jurisdictions, the emphasis placed on the continuing involvement of two parents "may operate as an alibi for dominant ideology and a means of regulation after divorce".¹⁶⁹

6.4 REASONABLENESS

Internationally, Swedish law is seen as a striking example of "an interventionist approach in family matters", particularly when compared to the traditional liberal reluctance to regulate.¹⁷⁰ Nevertheless, a preference for party negotiation is as pronounced a component of Swedish private family law as is the case in England.

6.4.1 Non-Intervention, but not a *Carte Blanche*

The Parents Code has no equivalent to s.1(5) of the Children Act 1989. However, the legislation is written with the underpinning assumption that "parents will be able to agree on virtually everything".¹⁷¹ The perception that party negotiated settlement is better than costly, stressful or even counterproductive litigation has resulted in successive law reforms and an energetic promotion of alternative dispute resolution in the shape of cooperation talks, SWB registered agreements and, most recently, court-ordered mediation.¹⁷² Cooperation talks were first introduced by local Social Services in the 1970's primarily to explore reconciliation and resolve conflicts, but as these talks were "enslaved" or accommodated into the legal

¹⁶⁷ Pihl & Thunander (2003) *op cit* n116, p168.

¹⁶⁸ Feministiskt Initiativ (2006) *Enastående och Makalösa Mammor*, Stockholm, Feministiskt Initiativ, p7. <http://www.feministisktinitiativ.se/downloads/grasrot/enastående.pdf>

¹⁶⁹ Bradley (1996) *op cit* n41, p268.

¹⁷⁰ *Ibid*, p246.

¹⁷¹ Ryrstedt (2006) *op cit* n27, p45; Schiratzki (2005) *op cit* n150, p134.

¹⁷² Proposition 2005/06:99, p84; Ryrstedt (2007) *op cit* n1, p399; Schiratzki (2006) *op cit* n11, p100; Rejmer (2003) *op cit* n3, p87.

framework, the focus was narrowed to agreement on the immediate issue.¹⁷³ Parents are now encouraged, coerced or ordered into attending them at all stages in the legal process.¹⁷⁴ As in England, the observation has been made that this preference for non-intervention has overridden the welfare principle.¹⁷⁵ According to Singer, the legal system has abdicated its responsibility for solving parents' disputes.¹⁷⁶ That task has been delegated to parents, but not with a *carte blanche*; the search for settlement is very much a case of bargaining in the shadow of the law.¹⁷⁷ Dominant messages contained in "largely pedagogical" legislative provisions are transmitted by all professionals.¹⁷⁸ The reinterpretation of child welfare science as requiring children to have relationships with both parents, whilst also being protected from conflict, has led to a highly prescriptive approach to party-negotiated settlement: both parents should feel as involved as possible to minimise discord.¹⁷⁹ It is noted in relation to the welfare test that the law tends to follow its abstract presumptions while ignoring the context of a particular case; families who appear before law are reduced to mere semantic artefacts. Thus, the favoured model of amicable post-separation is imposed on parents who are unwilling or unable to reach that ideal.¹⁸⁰ Furthermore, Rejmer has argued that this focus on compromise as "best for children" has led family law to adjust its internal understanding of custody, residence and contact cases. She has asserted that any dispute can either be understood as a conflict of interests, a relatively superficial struggle over a scarce resource; or as a conflict of values, a deeper or more fundamental disagreement around norms and morals. While the former can be resolved through a mediated compromise, the latter requires an external body to prefer one party's position over the other's. A meeting in the middle is impossible both in principle and practice.¹⁸¹ Rejmer's own analysis of District Court cases found that while both types of conflicts were present in the sample, conflicts of values were markedly more

173 Ryrstedt (2009b) *op cit* n39, p821; Rejmer (2003) *op cit* n3, pp94-95.

174 FB6§18; FB21§2; Socialtjänstlagen 5§3(1); Proposition 1997/98:7, p40, p109; Ryrstedt (2009b) *op cit* n39, p821; Carlsson & Rejmer (1998) *op cit* n8, p108.

175 Bainham, A (1990) "The Privatization of the Public Interest in Children", 53(2)MLR, 206, 212-217, p208; SOU 2005:43, p48; Rejmer (2003) *op cit* n3, p100, p147.

176 Singer (2007) *op cit* n150, p155.

177 *Ibid*; Maccoby & Mnookin (1994) *Dividing the Child: Social and Legal Dilemmas of Custody*, Harvard University Press.

178 Schiratzki (2006) *op cit* n11, p101.

179 SOU 2007:52, p105.

180 Kurki-Suoni (1995) *op cit* n55, pp189-191.

181 Rejmer (2003) *op cit* n3, p175.

common. Yet, the courts treated all cases as conflicts of interests. In accordance with received wisdom about avoiding the adversarial approach, both parents were described as good enough parents, who ought to be able to meet in the middle. Rejmer has asserted that the better starting point in relation to a conflict of values is that while one parent is right, the other is not.¹⁸² She has suggested that this provides an explanation for widespread parental dissatisfaction with the judicial process, and also for the 50% failure rate for compromise solutions reached at court.¹⁸³ Law's unwillingness to adjudicate leaves children and adults exposed to continuing conflicts.¹⁸⁴ Law, a subsystem that is founded on the delivery of judgments to ensure compliance, cannot abdicate authority. Moreover, since law is cognitively open, but normatively closed, it does not adjust in response to external interference but repeats the same admonishments to parents who repeatedly return to court.¹⁸⁵ A similar use of shared residence in the English courts is likely to have equally disappointing results.

Moreover, Schiratzki has noted that law's use of abstract presumptions and binary codes means that the parent who is arguing for the outcome currently preferred within legal discourse is 'right', while the other is 'wrong'.¹⁸⁶ There is no recognition of the fact that a refusal to reach a compromise can be the more child-focused stance, if the other parent is dangerous or inadequate.¹⁸⁷ Parents who appear 'on message' are commended for their sensible approach. Parents who "hold grudges and are determined to fight" selfishly disrupt courts' efforts to improve the situation for their children.¹⁸⁸ Indeed, parents who insist on a full District Court hearing are often reprimanded in relation to this apparent failure in parental responsibility.¹⁸⁹ Rejmer found this to be a significant reason for parents' dissatisfaction with the legal system, illustrating the problems of communication across the boundaries of several autopoietic systems. Parents expected a genuine resolution of their conflicts and when this was not the outcome their disappointment often led to a rejection of

182 *Ibid*, p106, p175.

183 *Ibid*, p177.

184 *Ibid*, p183.

185 Rejmer (2003) *op cit* n3, p179.

186 Schiratzki (2006) *op cit* n11, pp36-37.

187 Ryrstedt (2009b) *op cit* n39, p840.

188 Mats Sjösten, Senior District Judge at Gothenburg District Court, interviewed by Pihl & Thunander (2003) *op cit* n116, p170.

189 Rejmer (2003) *op cit* n3, p176.

formal judgments or, more commonly, judicial exhortations to stop fighting or behave more reasonably. Thus, judgments had little practical impact.¹⁹⁰

6.4.2 The Gendered Dimension

There are a number of reasons why this *prima facie* neutral insistence on reasonable behaviour becomes gendered. Firstly, it is predominantly fathers who rely on the co-parenting paradigm to win cases, while it is predominantly mothers who find it difficult to express their view that it is better for their particular child to grow up in a stable one-parent family. Secondly, law's preoccupation with maintaining the father-child bond makes it reluctant to criticise or discourage all but the most dangerous or inadequate fathers.¹⁹¹ The final, and possibly most significant factor, is the "profound change" which the construction of fatherhood has undergone in Swedish legal discourse.¹⁹² The gender neutral rhetoric of legislation and *travaux préparatoires* combines with law's construction of intact families along the dual worker/carer model to hide a gendered, unequal labour market and a gendered, unequal allocation of caring responsibilities.¹⁹³ Although empirical works shows that gender roles may be changing, but "are still fairly rigid", family law has adopted the construction of the new, involved father and gender equality is understood as a goal that has been reached.¹⁹⁴ Thus gender is often dismissed as irrelevant. Law's gender-blindness combines with its inability to see the real individuals behind the semantic artefacts, so that law ignores all arguments based on mothers' caring experience or paternal inadequacy.

A 2007 commission of inquiry observed that mothers are statistically significantly more likely than fathers to be granted sole custody.¹⁹⁵ It noted, in three sentences, that since the proposals it made were aimed at improving the conditions for joint custody, this ought to allow more men to retain custody, and thus the proposals

¹⁹⁰ Rejmer (2003) *op cit* n3, p182.

¹⁹¹ Eriksson & Hester (2001) *op cit* n96, p792.

¹⁹² Andersson & Bangura Arvidsson (2008) *op cit* n23, p198.

¹⁹³ Bäck-Wiklund & Bergsten (1997) *op cit* n89, pp164-165.

¹⁹⁴ Ryrstedt, E (2009c) "Separate Representation and Family Courts – do we need them in the Nordic Countries?", 21(2) *CFLQ*, 185-196, p191.

¹⁹⁵ SOU 2007:52, p244.

should improve gender equality.¹⁹⁶ This is a formal and very simplistic understanding of gender equality as equal rights over the child, with no consideration of why it may be that women are currently more likely to gain sole custody, and how changed rules may impact disproportionately on one sex. Yet, despite law's self-imposed gender-blindness, gendered expectations continue to influence law. Law is inherently patriarchal and conservative, and since a subsystems' existing components continue to shape and limit new components autopoietic system have a tendency to revert to type. Ryrstedt has suggested, for example, that professional intervention into parties' negotiations is likely to be influenced by traditional understandings of motherhood and fatherhood.¹⁹⁷ Eriksson's study found considerable disparity between the statute's ostensible gender neutrality and constructions of "mothering" and "fathering" implicit within the SWI discourse.¹⁹⁸ "Mothering" means shouldering the responsibility for meeting the children's material and emotional needs; "fathering" is a back-up role which also involves providing a male role-model and doing 'fun things' with the children.¹⁹⁹ At the same time, a combination of the employment law measures aimed to encourage gender equality and private family law's pre-occupation with encouraging father-child links had made law reluctant to discourage men; fathers should be allowed to "make their own mistakes".²⁰⁰ In terms of responsible parenting, law's expectations on fathers are, therefore, low.²⁰¹ It is possible for a man to be described simultaneously both as a "good father" and a "bad parent", while the same is not true for mothers.²⁰²

6.4.3 Custody and 'Reasonableness'

Joint custody has been extended to almost all separated parents in order to remove a source of dissatisfaction and "aid a harmonious relationship between parents".²⁰³ It is said to allow parents to share their parenting role on equal terms, and to provide a

¹⁹⁶ SOU 2007:52, p201.

¹⁹⁷ Ryrstedt (2009b) *op cit* n39, p823.

¹⁹⁸ Eriksson (2004) *op cit* n115.

¹⁹⁹ *Ibid.*

²⁰⁰ Singer (2007) *op cit* n150, pp153-154.

²⁰¹ Svenberg, J (2002c) "Domstolarna har inte en Susning om Problematiken kring Utsatta Kvinnor och Barn", 8 *Kvinnotryck*, accessed online, http://roks.se/kvinnotryck/kt8_o2_rep_feuk.html

²⁰² Eriksson (2004) *op cit* n115.

²⁰³ Proposition 1975/76:170, p142, as cited in SOU 2007:52, p77.

helpful framework for collaboration.²⁰⁴ It is often hoped joint custody will bolster parental co-operation by either “mollifying” non-resident parents, or persuading resident parents not to ignore their former partners.²⁰⁵ A parallel can be drawn with English courts’ use of the shared residence order. The law’s recent, more cautious attitude towards violent fathers has combined with a post-liberal insistence on reasonable, child-focused behavior; the result is a partial re-assessment of the court’s power to order joint custody in the face of one parent’s opposition.²⁰⁶ In RH2005:38, the father, who was a second-generation immigrant, was portrayed in the case report as unyielding; recreated within legal discourse as the semantic artefact of the unreasonable, potentially harmful parent. The mother, on the other hand, had told the court that she understood the children’s need for counselling, and would help meet their need for a relationship with their father. She said she had recognised that at the time of the separation she had been going through a difficult time, and had been unable to put the children’s welfare first. She had, however, reflected on this, and adjusted her life-style. She thus presented herself as a reasonable parent, in the post-liberal sense, and was awarded sole custody. In NJA2007 s.382 both the Appeal Court and the Supreme Court noted that legislative amendments required courts to evaluate, carefully and realistically, the prospects for good co-parenting under a joint custody order.²⁰⁷ The father’s appeal was on both occasions dismissed. The parents had been embroiled in legal disputes almost continuously since the birth of their now three-year-old daughter and this, coupled with the lack of mutual trust and the father’s somewhat inflexible approach, were strong indicators against joint custody.²⁰⁸ This more realistic approach should be praised, and it is encouraging that lower courts in subsequent cases followed it. Fathers who have shown disregard for previous judgments, exhibited controlling behaviour, or denigrated their former partners in front of their children have lost custody because of their perceived unreasonableness.²⁰⁹ However, , this more demanding judicial stance is only adopted towards a narrowly defined minority of fathers who are seen as violent, aggressive or otherwise intransigent in their refusal to accept the dominant welfare

204 SOU 2005:43, p484; Bradley (1996) *op cit* n41, p117.

205 SOU 2005:43, p112; Svea Hovrätt, case T455-98, 3rd November 1998; Barnombudsmannen (2005) *op cit* n116, p77.

206 SOU 2005:43, p114.

207 NJA2007 s.382, p390.

208 NJA2007 s.382, p391, 394, citing Proposition 2005/06:99, p51 and SOU 2007:52, p81.

209 Case Reports, *Dagens Juridik*, 15th November 2007 & 1st May 2007.

rhetoric.²¹⁰ Recent law reform and precedent have confirmed that, in all other cases, joint custody remains the ideal.²¹¹ Moreover, the departure from the general rule does not mean a complete rejection of the dominant paradigm. In NJA2006 s.26 the mother's attempt to kill the father during a psychotic episode and his consequent anxiety had led to a sole custody order. The father was, however, praised for his positive approach to contact. The judgment contained the standard statements about how children benefit from close and frequent contact with both parents, with no real consideration about how these children, who had been in the flat during the attempted murder, might be affected.²¹²

The fact that divorce has now become so prevalent that it has become normalised has decreased interest in how this 'ordinary' event actually affects children and adults.²¹³ Instead, the dominant rhetoric asserts that both divorce and custody disputes are life events which could happen to anyone and Rejmer found that custody investigations in her study were begun from this perspective.²¹⁴ Yet, her analysis revealed these parents to be economically and socially disadvantaged, often "subject to at least two parallel crises".²¹⁵ However, courts often remained unaware of this; "the right questions" were "never asked" because law's enslavement of welfare discourse meant that SWI's had structured their information-gathering to suit law's purposes.²¹⁶ Moreover, it has been explained above how Rejmer's research revealed law's reinterpretation of parents' disputes as mere conflicts of interests between two *prima facie* good parents.²¹⁷ The result was ineffective legal intervention.

Schiratzki has complained that joint legal custody is based on a presumption of cooperation, which was valid in 1977 when joint custody was voluntary, but is now

210 RH1999:100; NJA2000 s.345; SOU 2005:43, p865.

211 SOU 2007:52, p126; Proposition 2005/06:99, p62; NJA2007 s.382; Singer (2007) *op cit* n150, p151.

212 NJA2006 s.26, pp27-28, p30.

213 Pihl & Thunander (2003) *op cit* n116, p182.

214 *Ibid*, pp167-168; Rejmer (2003) *op cit* n3, p206.

215 Parents with problems in terms of physical or mental illness, unemployment, poverty, addiction or crime were all over-represented in Rejmer's sample, as were adults with previous traumatic events in their life history, Rejmer (2003) *op cit* n3, p206, pp73-76.

216 *Ibid*, p187.

217 *Ibid*, p177.

dangerously outdated.²¹⁸ Yet, law's narrow definition of conflict has led to a correspondingly wide definition of adequate parental cooperation; in a 2005 commission of inquiry's sample of custody cases, parents who refused to talk to each other, had threatened each other or regularly became abusive in front of their children were all told that their conflicts were not substantial enough to justify a termination of joint custody.²¹⁹ Rejmer concluded from her study that the concept of custody had been reduced to a semantic artefact, a purely judicial concept.²²⁰ One father in Gustafsson's study described joint custody as "a smokescreen" which creates an illusion of co-parenting and hides "the reality of most cases".²²¹ As is the case with the English parental responsibility order, the joint custody order appears not to have been successful in reducing conflicts by giving parents "less to fight over".²²² Legislative change seems only to have transferred conflicts; although there are no central statistics available, studies suggest that where the numbers of custody disputes have fallen, there have been corresponding increases in applications for contact or residence.²²³

Joint custody is now underpinned by law's unrealistic assumption of gender equality.²²⁴ A 1996 commission of inquiry was, for example, expressly directed to consider the impact of any proposed reform on gender equality. The commission members explicitly chose to ignore this.²²⁵ Gender equality arguments were said to be counterproductive in "turning the issue into an emancipation battle" where legislation should seek to promote co-parenting.²²⁶ The commission, and the government that subsequently accepted its decision, have been criticised for ignoring gendered power structures in a way which *de facto* supported the very discrimination which had been dismissed as irrelevant.²²⁷

218 Schiratzki (1999) *op cit* n109, p1051.

219 Rejmer (2003) *op cit* n3, p131; SOU 2005:43, p754.

220 Rejmer (2003) *op cit* n3, p153.

221 Adam, one of the separated fathers interviewed in Gustafsson, M (2002) *Vad som kan Dölja sig bakom Gemensam Vårdnad och Barnets Bästa*, Mälardalens Högskola, Västerås, p44.

222 Diduck, A & Kaganas, F (1999) *Family Law, Gender and the State: Text, Cases and Materials*, Oxford, Hart Publishing, p257; Proposition 1975/76:170, p142, as cited in SOU 2007:52, p77.

223 Schiratzki (2006) *op cit* n11, p111.

224 Ryrstedt (2007) *op cit* n1, p412; Kurki-Suoni (1995) *op cit* n55, p189; Lundqvist & Roman (2003) *op cit* n90, p26.

225 Pihl & Thunander (2003) *op cit* n116, p173.

226 Mats Sjösten, Chefsrådmann vid Göteborgs Tingsrätt, interviewed by Phil & Thunander (2003) *op cit* n116, pp173-174.

227 Kurki-Suoni (1995) *op cit* n55, pp169-170; Svenberg (2000b) *op cit* n202.

As in England, the pro-contact presumption has been accompanied by efforts to educate disinterested, hostile or recalcitrant parents.²²⁸ The comments made by Rejmer in relation to custody about the gap between family law's abstract norms based on 'ordinary', 'responsible' parents and the reality of socio-economically or emotionally vulnerable parents, are equally valid in relation to contact.²²⁹ In a study of supervised contact by Ekbom and Landberg, the authors found that overambitious goals of establishing long-term contact were met in less than 15% of cases.²³⁰ These, too, were families with complex histories: one case report would often mention several interlinked problems, for example, violence, addiction or mental illness, as well as unemployment or social exclusion.²³¹ Yet, judges failed to give these factors adequate weight and instead relied on non-resident parents' statements of good intentions and generalised assertions that supervised contact can develop to greatly benefit children. Resident parents often complained that official gullibility had exposed their children to false hopes and further disappointments.²³² Yet, Ekbom and Landberg found widespread support for supervised contact among lawyers and social workers. Current law was perceived to be working very well, but this assessment appeared to be based largely on abstract assertions of children's best interests rather than experience from particular cases.²³³ Since law "doesn't see that it doesn't see what it doesn't see" it can impose its normative expectations of gender equality and co-parenting on families, ignoring the evidence of gendered power imbalances, violence, or other problems.²³⁴ Ekbom and Landberg, writing from a child welfare science standpoint, were extremely critical of the way "[c]hildren were expected to react as though they were living in law's ideal family, rather than their own".²³⁵ The autopoietic system can, however, close itself off from a full understanding of the impact of its communications. Consequently, continued insistence on adherence to its normative model can be preferred to an abdication of authority.

²²⁸ Schiratzki (2004) *op cit* n33, p216.

²²⁹ Rejmer (2003) *op cit* n3, pp78-79, p342.

²³⁰ Ekbom & Landberg (2007) *op cit* n23, pp34-35.

²³¹ *Ibid*, p29.

²³² *Ibid*, pp36-37, p55.

²³³ Andersson & Bangura Arvidsson (2006) *op cit* n23, p201.

²³⁴ Luhmann, N (1989) "Law as a Social System", 83(1) *Northwestern University Law Review*, 136-150, p145; Ekbom & Landberg (2007) *op cit* n23, p25

²³⁵ Ekbom & Landberg (2007) *op cit* n23, p58.

Contact, too, is discussed in gender neutral language while in practice the expectations placed on parents in contact disputes are highly gendered.²³⁶ Since contact fathers are departing from the traditional male stereotype, standards are relaxed and the comment is frequently made by professionals that “he is doing the best he can”.²³⁷ In NJA2003 s.382 the court said it did not matter that the father was at times erratic and unable to focus on his daughter, since he genuinely loved her.²³⁸ This generous approach, based on the historical marginalisation of care within the private sphere, is based on the assumption that resident mothers will compensate for paternal shortcomings. As in England, mothers have a duty to support contact. They must provide their non-resident counterparts with any information necessary to enable the latter to play an active part in their children’s lives and are, in practice, expected to give their children the emotional support necessary to implement contact in problematic circumstances.²³⁹ Those who refuse, risk being accused of ‘*umgängessabotage*’, contact-sabotage, the Swedish equivalent to English family law’s semantic artefact of the implacably hostile mother.²⁴⁰ Echoing English commentators, Nordborg has observed: “When the best interests principle comes to be interpreted as contact with both parents, a mother who questions the father’s contact application automatically becomes a bad mother”.²⁴¹ Research has also shown significant numbers of mothers feel caught in a ‘no-win’ situation. If they agree to contact with a dangerous ex-partner they are taken to guarantee the child’s safety, and thus provide proof that their allegations are groundless; if they say no, they risk being labelled a contact saboteur, losing custody, residence and the ability to protect their children.²⁴²

6.5 CONCLUSION

Swedish family law can be seen to be inherently patriarchal and conservative. However, the imposition of the new binuclear pattern on separated couples cannot,

²³⁶ *Ibid*, p25.

²³⁷ Ryrstedt (2007) *op cit* n1, p414; Eriksson (2004) *op cit* n115.

²³⁸ NJA2003 s.382, p376 & p378.

²³⁹ SOU 2005:43, p166; Ds 1989:52, p62, pp94-95 ; Proposition 1997/98:7, p33; Ekbom & Landberg (2007) *op cit* n23, p10, p53

²⁴⁰ Ewerlöf & Sverne (1999) *op cit* n132, p52 ; SOU 2005:43, p517; Socialstyrelsen (2003b) *op cit* n24, p61.

²⁴¹ Nordborg, G (2003) “Barn ska ha Rätt till Samma Skydd som Vuxna”, 5 *Kvinnotryck*, http://www.roks.se/kvinnotryck/KT5_03_kronika.html.

²⁴² SOU 2005:43, p846; Nordborg, G (2003) *op cit*; Gumbel (2001) *op cit*.

like in England, be justified by arguments built on the superiority of the conjugal family. The normative paradigm has been weakened by decades of sustained interference from the political subsystem, and consequent changes in behaviour. Marriage has been transformed to a private contract, no “better” than cohabitation, and single motherhood does not quite carry the same negative connotations. , Instead, Swedish family law uses the semantic artefact of the new dual-worker, dual-carer family to justify its insistence that fathers’ legal ties to children must be maintained. Legal custody has been transformed into an almost automatic confirmation of parental status with an accompanying right to participate in decision making.²⁴³ Contact has, similarly, become a *de facto* right for fathers. Although it is expressed in the Parents Code as the child’s right, law has enslaved communications from the child welfare subsystem to develop a rigid understanding of contact as being essential for a child’s healthy development into a well-adjusted adult. Law has also created its own internal version of parents’ disputes, which empirical research has revealed differs substantially from real families. As a closed subsystem, law has made itself unable to see parents’ deep-seated conflicts, often made more difficult because of their additional problems, such as addiction or ill health. Law also ignores the gap between gender neutral rhetoric and gendered reality. As a result, unrealistic expectations of compromise and cooperation are placed on parents, and mothers, in particular, are obliged to support and sustain father–child relationships. It can also be argued that children’s welfare has been demoted below law’s desire to contain social change in a way that is unlikely to work, clearly contrary to the paramountcy principle, and also in practice likely to harm children through exposure to adult violence, resentment and inflexibility. These observations suggest that the implementation of shared residence in Sweden may not be as unproblematic as was suggested in the introduction; this will be examined in the chapter on shared residence in Sweden.

243 Schiratzki (1999) *op cit* n109, p1055.

7 SHARED RESIDENCE IN SWEDEN

7.1 INTRODUCTION

This chapter begins with a brief consideration of the residence order, before examining the law on shared residence, which is known in Sweden as *växelvís boende*, alternating residence. Having explored how the order is defined in Swedish family law and practice, it will then use the framework from previous chapters to analyse shared residence and the concept of permanent parenthood; the welfare test; and the emerging powerful ‘reasonableness’ discourse. It is noted that Swedish law seems to rely to a lesser extent on shared residence to send symbolic messages and that the majority of orders involve a substantial sharing of children’s time, but that concerns similar to those raised in England have, nevertheless, been voiced in Sweden. Commentators with a feminist perspective have criticised law’s use of the shared residence order to mould post-separation dual household families into the binuclear form.

7.2 BOENDE – RESIDENCE

The custody order has been retained in Sweden; it has been the primary means of resolving the issue of who should be the child’s primary carer. Residence orders were introduced relatively recently, as part of a 1998 family law reform which extended joint legal custody to cases where one parent opposed this, and where the parents could not be assumed to agree on where children should live.¹ As in England, the statute stipulates that residence is a question of fact.² The overwhelming majority of parents reach agreement on residence, and guidance from the National Board of Health and Welfare (NBHW) states that there is then no need for any investigation from outside agencies.³ It is only where the question of residence is disputed that a court will request a Social Welfare Investigator’s report, and then apply the welfare

¹ Previously, disputes over residence would have been resolved by awarding one parent sole custody, Ds 1999:57, p75; Proposition 1997/98:7, p57.

² FB6§14a; Proposition 1997/98:7, p58.

³ Socialstyrelsen (2003b) *Socialnämndens Handläggning av vissa Frågor om Vårdnad, Boende och Umgänge*, Socialstyrelsens Författningssamling SOSFS 2003:14, Regeringskansliet, Stockholm, pp38-39.

principle.⁴ Research has shown that the most important factor for courts forced to choose between two parents is, as with custody, the status quo or continuity principle.⁵ Since mothers remain the primary carers in most families, it is judicial reluctance to unsettle a child, rather than gender bias, that has resulted in more residence orders being made in favour of mothers.⁶ Unlike in the UK, this does not appear to have resulted in widespread complaints that the system is biased against fathers, complaints that were shown in the fifth chapter to have influenced UK political discourse and forced the legal subsystem to respond to this powerful interference. Swedish equal parenting organisations tend to focus their attention on shortcomings in the system for the enforcement of contact orders, and Swedish courts' reluctance to recognise parental alienation syndrome.⁷ It is possible to speculate that this is because the courts' decisions on residence are not a major source of dissatisfaction; and this may well be because of the greater availability of shared residence.

7.3 SHARED RESIDENCE: A DEFINITION

When the formal shared residence order was introduced in 1998, courts were given authority to make the order where one parent objects.⁸ Swedish law places considerable emphasis on specificity, and it is, therefore, surprising that there is no statutory definition of shared residence.⁹ The difficulties in drawing a line between shared residence and generous staying contact have been noted in *travaux préparatoires*.¹⁰ Nevertheless, an order for shared residence has to be detailed enough to be judicially enforceable, and the starting point is an equal division of the child's time.¹¹ The leading Supreme Court case, NJA1998 s.267¹², stipulates that

4 Socialstyrelsen (2003b) *op cit* n3, p39; Ewerlöf, G & Sverne, T (1999) *Barnets Bästa* (4th Ed), Stockholm, Norstedts Juridik AB, p55.

5 Schiratzki, J (2006) *Barnrättens Grunder* (3rd Ed), Lund, Sweden, Studentlitteratur, p107; Sjösten, M (1998) *Vårdnad, Boende och Umgänge*, Stockholm, Norstedts Juridik, p56.

6 SOU 2005:43, pp757-758; SOU 1997:139, p151, cited in Gustafsson, M (2002) *Vad som kan Dölja sig bakom Gemensam Vårdnad och Barnets Bästa*, Mälardalens Högskola, Västerås p9.

7 Föreningen Pappaliv: <http://www.pappaliv.se>; Umgängesrätts Föräldrarnas Riksförening: <http://www.ufr.org/> accessed 13th October 2009.

8 FB6§14a, introduced through Lag 1998:319; Proposition 1997/98:7, p113.

9 Riksförsäkringsverket (2003a) *Underhållsstöd: Ett Urval av Kammarrättsdomar*, RFV Anser 2003:3, Stockholm, Riksförsäkringsverket, p13.

10 DS1999:30, p31; Proposition 1997/98:7, p68.

11 SOU2007:52, p60; Socialstyrelsen (2004b) *Växelvis Boende: Att Bo Hos både Pappa och Mamma Fast De Inte Bor Tillsammans* (2a upplagan), Stockholm, Socialstyrelsen, p36; Riksförsäkringsverket (2003b) *Underhållsstöd vid Växelvis Boende: Utvärdering av Reformen*, RFV Analyserar 2003:1, Stockholm, Riksförsäkringsverket, p11.

arrangements with a less than equal split must generally be regarded as contact, “unless there are special factors pointing in the opposite direction”.¹³ Although the children in this case spent approximately a third of their time with the father, and this might have been sufficient, the Supreme Court could find no additional indicators leading to a conclusion of shared residence and thus the father’s appeal failed. The court gave as examples of these factors whether accommodation has been adapted for the child, where the child keeps his or her possessions, and how the child is provided for financially.¹⁴

As in England, shared residence is a comparatively new arrangement, and also one that appears to be gaining in popularity.¹⁵ In 1992/93 the official estimate was that only 4% of children with separated parents were alternating between two homes; the corresponding figure for 2007 was 21%.¹⁶ This figure is significantly larger than any English estimates. In Ryrstedt’s study 7 out of 16 couples ended the cooperation talks by agreeing to share residence.¹⁷ Statistics, moreover, show that four out of five move on a weekly basis, and that most spend something close to half of their time with each parent.¹⁸ A number of reasons for this increase have been suggested. The extension of joint custody to almost all separating parents and the strong presumption have undoubtedly been important, particularly as courts can order shared residence against one parent’s wishes.¹⁹ Parental attitudes may have been influenced by the attention shared residence has received both in official documents and in the media. The increase may also be attributable to the *status quo* principle. Although Sweden has not yet reached the goal of a completely equal distribution of private and public responsibilities, Swedish fathers have become more involved. They, their former partners, their lawyers and the judges, may thus perceive it as natural for this ‘hands-on’ involvement to continue after separation.²⁰ Financial

12 Cases are known by reference to the pages of the main reports rather than parties’ names.

13 NJA1998 s.267, p274.

14 *Ibid.* See also Riksförsäkringsverket (2003a) *op cit* n9, p20.

15 SOU2005:43, p507.

16 Barnombudsmannen (2007) *Upp til 18 – Fakta om Barn och Ungdom: Barnombudsmannen Rapporterar 2007:04*, Stockholm, Barnombudsmannen, p57.

17 Although this is a small sample, it does show the arrangement’s increasing popularity, Ryrstedt, E (2009b) “Samarbetssamtal” *Svensk Juristtidning*, 821-842, p839.

18 Barnombudsmannen (2007) *op cit* n11, p57.

19 Pihl, A & Thunander, T (2003) *Rätten till ett Barn*, Stockholm, Prisma, p168; Schiratzki, J (2006) *Barnrättens Grunder (3rd Ed)*, Lund, Sweden, Studentlitteratur, p111; SOU 2005:43, p725.

20 Socialstyrelsen (2004b) *op cit* n11, p38; Emtestam, G (2001a) “Barn Lider i Onödan”, 3 *Socionomen*, 29-33, pp29-30.

factors may also influence decisions. Child support rules were changed, for example, in 1997 and 2001, with the express objective of removing economic obstacles by extending the means-tested element to parents with shared residence.²¹ On both occasions, the number of children with shared residence receiving child support more than doubled in less than two years.²² These statistics do not show whether the total number of children sharing residence has changed, or whether a larger proportion of existing shared residence parents have become eligible for child support; nor can it shed any light on parents' motivations.²³ They can, however, be seen as confirming the general trend of an increasing use of shared residence.

7.4 SHARED RESIDENCE AND PERMANENT PARENTHOOD

The chapter on shared residence in England described how some fathers apply for shared residence because of its connotations of equal status and how courts have placed increasing emphasis on its symbolic value. This was linked to law's autopoietic and inherently patriarchal nature (amplified by pressure from the political subsystem); law hears fathers' claims for equal authority, but is uninterested in mothers' objections based on the unequal distribution of caring responsibilities. In Sweden, however, the social engineers of the welfare state actively sought to reduce the influence of the public/private dichotomy and the nuclear family ideal; mothers were encouraged into the workplace, while alternative family types were recognised and brought within the regulatory net of the welfare state. There is, consequently, little discursive room for arguments that link the decline of marriage to social disintegration; and fatherhood is conceptualised in terms of hands-on involvement rather than the imposition of discipline. Although political reform can be no more than external turbulence, the level of interference has been such that Swedish family law has been forced to adjust. As a result, the law is less sympathetic to another form of turbulence: fathers' arguments that they need shared residence to correct power imbalances and prevent mothers from excluding them. It may be that independent motherhood is more acceptable in a

²¹ Ds1999:30, p51; Riksförsäkringsverket (2003b) *op cit* n11, p19; Riksförsäkringsverket (2003a) *op cit* n9, p8.

²² Riksförsäkringsverket (2003b) *op cit* n11, p11.

²³ *Ibid*, p37.

jurisdiction where the traditional breadwinner model has deliberately been discarded.²⁴ It is also likely that joint legal custody is perceived to be an adequate safeguard against this type of marginalisation.²⁵ Furthermore, fatherhood is understood within political communications in terms of practical participation as well as discipline and financial provision. Thus, the problem, as constructed within the closed political subsystem, is how to increase men's hands-on involvement, not simply how to maintain men's authority.

Swedish courts have, thus, not had to adapt this order the way their English counterparts have, and are much less easily persuaded that an unequal split can be classed as shared residence. This makes it more difficult for those who seek the order for symbolic or other reasons. Emtestam, a vociferous Swedish campaigner on the importance of fathering, has sought to relax the definition of shared residence down to 10 nights per month, and has suggested that all children who have contact with both their separated parents should be seen as having two homes.²⁶ However, these types of arguments have not attracted any media or academic attention (beyond a few articles on fathers' groups websites), and do not appear to be particularly influential in legal discourse.²⁷ In NJA1998 s.267, the Supreme Court insisted on significant additional factors to justify shared residence in a case with a 30/70 split, and this approach has been endorsed by the government and has not been subjected to subsequent challenges.²⁸ The construction of shared residence as equal division appears to have been firmly established through circulation in family law's chains of communications. Moreover, shared residence in Sweden does not, as in England, cover arrangements where one parent has the child during the school week, and the other's time falls during weekends and holidays; four out of five children

24 Pyllkkänen, A (2007) "Liberal Family Law in the Making: Nordic and European Harmonisation", 15(3) *Feminist Legal Studies*, 289-306, p294; Bradley, D (1990) "Children, Family and the State in Sweden", 17(4) *Journal of Law and Society* 17, 427-444, p429.

25 Kurki-Suoni, K (1995) "Gemensam Vårdnad – Vad Döljer Man med Barnets Bästa?" in Nordborg, G (Ed) *13 Kvinnoperspektiv på Rätten*, Uppsala, Iustus Förlag, 169-196, p171.

26 Emtestam, G (2001b) *16 Barn med Separerade Föräldrar*, Stockholm, Socialstyrelsen, p32; Emtestam, G (2002) "Barn Flyttar Gärna mellan Två Hem", 6 *Socionomen*, 20-21.

27 See e.g. Föreningen Pappa-barn: <http://www.pappa-barn.se/> accessed on 15th March 2008.

28 Proposition 1999/2000:118.

who share residence alternate on a weekly basis, and some more frequently than that.²⁹

It may, therefore, be thought that shared residence in Sweden is not about fathers' rights or status, but must involve a substantial sharing of the practical responsibility of caring for the child. This may not, however, be the result of a greater recognition of the importance of care. It is also likely to be due to the context in which these disputes have been decided. The leading Supreme Court case, NJA1998 s.267, like the majority of cases on this point, was a dispute over child support payments rather than the allocation of a child's time or definitions of residence *per se*. These cases are appealed through the administrative court structure, and the strict definition of shared residence may be a result of fiscal considerations.³⁰ In a 2000 Gothenburg case, where the Administrative Appeal Court determined that residence was shared, it highlighted the fact that both parents contributed equally to the children's upkeep.³¹

There are also contested shared residence applications in the district courts where disputes over contact or residence are heard. In some cases schedules have been agreed and the dispute is over classification; in RH1998:85 and RH1999:13, the children spent just over a third of their time with their fathers, and in both cases the orders labelled this contact.³² However, these cases are now a decade old, and it has been suggested that judicial attitudes are changing. Within legal discourse, the argument is often repeated that children need good and continuing contact with both parents, and that shared residence can help to ensure this as it allows both parents to participate in the child's life on equal terms.³³ This constructs granting equal status to parents as good for children, brings the equality argument within the dominant child welfare discourse, and allows fathers to rely on this to support their shared residence applications. Social Welfare Investigators (SWI's) reported to a 2005 commission of inquiry that they were increasingly asked to investigate cases where

29 Statistiska Centralbyrån (2002) *Statistiska Centralbyråns Undersökningar av Levnadsförhållanden*, Stockholm, SCB, cited in SOU2005:43, p507; Statistiska Centralbyrån (2007) *Statistiska Centralbyråns Undersökningar av Levnadsförhållanden*, Stockholm, SCB, cited in Barnombudsmannen (2007) *op cit* n11, p57.

30 Widlund, H (2003) *Barnets Bästa i Boendefrågan*, Stockholm, Juridicum, p18.

31 Gothenburg Administrative Appeal Court case 732-2000, cited in Riksförsäkringsverket (2003a) *op cit* n9, p19

32 Wickström, A (2001) "Nyare Rättspraxis om Vårdnad om Barn", *Svensk Juristtidning*, 666-675, p669.

33 Socialstyrelsen (2004b) *op cit* n11, p7.

one parent had applied for shared residence against the other's wishes and expressed concern that many such applications appeared to be motivated predominantly by a quest for justice.³⁴ The National Board of Health and Welfare (NBHW) carried out an analysis of sample cases from 1999 and 2002 and found that some district courts were far too willing to order shared residence, possibly to placate fathers and ensure their continued involvement in their children's lives.³⁵ In one such case, a two-year-old girl was required to alternate between her father and mother on a fortnightly basis, although the distance was such that the journey had to be made by air. The court reasoned that the girl appeared robust enough to cope with such frequent upheaval.³⁶ The question that has to be asked is: for whose benefit? In an unreported case from February 2009, the Svea Appeal Court decided that shared residence ought to continue although the children (who were at school) had to commute approximately 70 km between Stockholm and Uppsala every day in the week when they were living with the mother.³⁷ This could be seen as a sign that Swedish courts are moving in the same direction as their English counterparts. It is more likely, however, that these are anomalous cases; the outcome in the 2009 case was largely a result of the members of the appeal court being split three ways.³⁸

Joint custody has been transformed from a mechanism to enable the sharing of legal and practical duties to an indicator of parental status, bestowed almost automatically. In the chapter on shared residence in England, concern was expressed that this order is undergoing a similar change. In Sweden, however, shared residence is still conceptualised as a practical matter. There may be an emerging construction of shared residence as the only real indicator of equal parental worth, but it is not universally accepted. Although autopoieticists warn against relying on simple causal models of input and output,³⁹ it can be concluded that political interference, focused on increasing paternal involvement in caring for children, has strengthened the legal construction of shared residence as being about practicalities.

34 SOU 2005:43, p725.

35 Socialstyrelsen (2004b) *op cit* n11, p33.

36 *Ibid.*

37 Svea Appeal Court, Case No T4863-08, 20th February 2009. *Dagens Juridik*, 27th February 2009. <http://www.dagensjuridik.se/sv/Artiklar/Oenig-hovratt-faststaller-vaxelvis-boende/>

38 Shared residence, residence with the mother, or with the father.

39 Teubner, G (1993) *Law as an Autopoietic System*, London, Blackwell, p35.

7.5 SHARED RESIDENCE AND THE PARAMOUNTCY PRINCIPLE

The Parents Code expressly stipulates that the child's welfare is to be the paramount question for any court or public body deciding a question of where the child is to live.⁴⁰ The observation is also made that family courts have developed their own narrow and rigid interpretation of what is good and bad for children: the need for close relationships with both parents is balanced against risks of harm. The majority of shared residence orders are made with both parents' consent, and research shows that courts and social welfare boards in such cases are content to assume that the parents' themselves know what is best for their child, although more recent research has cast doubt on that assumption.⁴¹ The extension of joint custody to parents who object has, however, meant that courts are increasingly called upon to decide whether shared or sole residence is best for a child.⁴² As is the case generally, district court judges, who have no specialist expertise, rely heavily on external evidence, particular social welfare investigator reports.⁴³

7.5.1 Child Welfare Science – A Cautious Approach

Shared residence is a comparatively new phenomenon also in Sweden, and in the 1990's there was public and parliamentary debate around allegations that parents were using shared residence selfishly in ways which harmed children. Since communications within the first order subsystem are often also simultaneously "involved in a variety of different systems" such as politics and law,⁴⁴ the government responded in 2001 by asking the department responsible for health and social services (including court welfare officers), the NBHW, to prepare a report on shared residence to guide legal developments. The aim of the NBHW report, produced as an overview of knowledge, was to help improve practice for courts and

⁴⁰ FB6§2a.

⁴¹ Rejmer, A (2003) *Vårdnadstvister: En Rättssociologisk Studie av Tingsrätts Funktion vid Handläggning av Vårdnadskonflikter med Utgångspunkt från Barnets Bästa*, Lund, Sweden, Lund Studies in the Sociology of Law, p100, p147 ; Ryrstedt (2009b) *op cit* n17, pp822-823.

⁴² SOU 2005:43, p761.

⁴³ Carlsson, B & Rejmer, A (1998) "The Swedish Way of Dealing with Custody Disputes: Juridification and Professionalisation of the Private and Social Spheres" in Carlsson, B (Ed) *Social Steerage and Communicative Action: Essays in Sociology*, Lund Studies in Sociology of Law, 104-142, p112.

⁴⁴ Teubner (1993) *op cit* n39, pp61-62.

social services involved in post-separation disputes.⁴⁵ The report concluded: “Shared residence is neither good nor bad; it becomes what the parents make it. There are no ideal solutions”.⁴⁶ Similar observations were made by the 2005 commission of inquiry appointed to review practice in relation to custody, contact and residence.⁴⁷ These types of enquiries and overviews of expert knowledge have a significant influence both on Swedish law reform and practice.⁴⁸ Although these documents were written using child welfare science discourse, they were composed with a legal audience in mind and have been readily received by family law, particularly when compared to English law’s recent reluctance to engage with new child welfare science findings.

The NBHW report is referred to extensively in SWI’s reports and as judges, too, have become aware of its findings it has played a significant part in shaping practice. Although the reports’ authors neither endorsed nor dismissed shared residence, they did identify a number of factors, which they felt would have a significant bearing on whether or not shared residence could be presumed to be in children’s best interests. These have been repeated in government documents and court judgments.⁴⁹ The NBHW report commented that many of the children interviewed for this report had found shared residence to be a very demanding arrangement. The authors, therefore, stressed the importance of consulting children. Furthermore, children’s need for stability and a good range of relationships with both adults and other children was cited to support the recommendation against shared residence where there are substantial geographical distances which not only cause practical inconvenience but also make it difficult for children to maintain friendships.⁵⁰ The report’s authors also stressed that parents must be able to contain their own conflicts and keep them away from their children.⁵¹ This reasoning was echoed by the 2005 commission of inquiry; parental disputes were found to be likely to “colour, or even poison, the shared residence arrangement for the child”.⁵² In both documents, the

45 Socialstyrelsen (2004b) *op cit* n11, p3.

46 *Ibid*, p42-44.

47 SOU 2005:43, p158.

48 Lundqvist, Å (2008) ”Familjens Kris: Fem Decennier av Svensk Familjepolitik”, *Tidning för Genusvetenskap*, 79-93, p80.

49 SOU2005:43, p507; RH2005:38.

50 Socialstyrelsen (2004b) *op cit* n11, pp41-43.

51 *Ibid*, p8.

52 SOU 2005:43, p160.

harm was identified as lying not only in the exposure to conflict, but also in the inflexibility of arrangements. As noted, Swedish family law insists on scheduled arrangements that are precise enough to be enforceable.⁵³ This may reduce parental interaction in conflicted cases, but also allows for obdurate insistence on adherence to rigid schedules. Indeed, both the NBHW Report and the 2005 commission's report emphasised that since a child's needs must, under statute, be paramount, and those needs change as children develop, shared residence arrangements must be child-focused and flexible.⁵⁴ Consequently, parents must be able to negotiate and make concessions without one party exerting undue pressure on the other.⁵⁵ The report listed allegations of violence, abuse or parental unsuitability due, *inter alia*, to addiction as contra indicators in shared residence cases.⁵⁶ In its conclusions, the report also warned that parents should not be allowed to use shared residence as a means of achieving justice *inter pares*.⁵⁷ When compared to the list of relevant circumstances prepared by counsel in *Re C* [2006], the NBHW and 2005 commission's reports' lists of important factors are more demanding, more compatible with current empirical evidence, and more likely to ensure that shared residence actually benefits children.

It is difficult to assess the extent to which these guidelines are adhered to in practice. Although the NBHW report was written with a legal audience in mind, ensuring a better fit with existing legal chains of communications, a subsystem's closed nature makes change slow.⁵⁸ Moreover, Swedish family court statistics are generally considered to be poor, and shared residence is a topic which has received comparatively little academic attention.⁵⁹ Nevertheless, it appears that, in the main, this advice is being followed. Although there is no research specifically on shared residence, there are a number of studies on custody, contact and cooperation talks, which have shown that children are rarely given a chance to express their opinions.⁶⁰ Thus, it is unlikely that the report's recommendation regarding the consultation of

53 Proposition 1997/98:7, p113.

54 Socialstyrelsen (2004b) *op cit* n11, p9; SOU 2005:43, p160.

55 Socialstyrelsen (2004b) *op cit* n11, p41.

56 *Ibid*, pp41-43.

57 *Ibid*, p43.

58 Teubner (1993) *op cit* n39, p35.

59 Pihl & Thunander (2003) *op cit* n19, p169.

60 Ekbohm, I & Landberg Å (2007) *Innerst Inne var man Rädd*, Stockholm, Rädda Barnen & Socialstyrelsen; Ryrstedt, (2009b) *op cit* n17.

children is being followed. On the other hand, courts' general reluctance to upset the *status quo* means that the judiciary are slow to order shared residence against one party's wishes in cases where the children have previously been living permanently with that parent.⁶¹ Only one of the 31 interviewees in a 2002 study was implementing court-imposed shared residence.⁶² In RH1999:85 the father had applied to the district court for 50/50 shared residence, but his appeal was dismissed, and the order for extended staying contact upheld instead. The Appeal Court agreed with the expert's opinion that the children, who were already experiencing stress from exposure to the parents' fighting, needed a permanent base. This reasoning has been followed *inter alia* in RH2005:38 and in an unreported Svea Appeal Court case from October 2008.⁶³

In practice, the requirement of an almost equal split, including weekdays in term-time, has led to an insistence on geographical proximity.⁶⁴ This is to be welcomed since it avoids one of the dangers which have been discussed in England in relation to shared residence; the removal of an insistence on a substantial element of practical caring for the child as an essential part of the parenting role. However, as is mentioned in the section on permanent, patriarchal parenthood, the Svea Appeal Court, in February 2009, made an order for the continuation of weekly change-overs despite the fact that the two parents lived 70 kilometres apart, and the children had a long commute in the weeks they spent with their mother.⁶⁵ In the short judgment, the children's need for good and close contact with both parents, stated in abstract terms, was held to outweigh the specific "disadvantages" in relation to the time-consuming travel.⁶⁶ Three of the members of the court dissented, citing a 2005 White Paper on the need for geographical proximity and preferring the district court's view that one parent ought to be given sole residence. The children's need for continuity, security and "respect for their personal integrity" were said to be more important than the need for close contact with both parents. It is submitted that this view is to be preferred; it sees the two children as individuals rather than

61 SOU 2005:43, p760; Ryrstedt, E (2003) "Kravet På Konsensus – Till Barnets Bästa?" 88(3) *Sveriges Jurist Tidning*, 340-344, p341; Eriksson, M (2003) *I Skuggan av Pappa*, Stehag, Sweden, Förlags AB Gondolin, p22.

62 Riksförsäkringsverket (2003b) *op cit* n11, p56.

63 Svea Appeal Court, Case No T483-08, 28th October 2008.

64 Proposition 2005/06:99, pp52-53; SOU 2005:43, p45.

65 Svea Appeal Court, Case No T4863-08, 20th February 2009.

66 *Ibid*, p4.

objects to be shared between the two adults. This way of speaking about children as rights-holding agents can, as noted in the previous chapter, be found in Swedish political discourse. State intervention is consequently justified where parents abuse their responsibilities by treating children as chattels. However, empirical research has found that this construction of the child is not prevalent in legal discourse. The child is usually constructed as a vulnerable family member rather than an independent individual with agency. It is encouraging to see the child portrayed this way in a case report (albeit by the minority), particularly since the available research shows that it is crucial that older children are consulted prior to any implementation of shared residence. As noted, this case is the latest available reported case on shared residence. It may turn out to have set a worrying trend in its insistence that the abstract benefits of equal time with both parents outweighed the travelling, a very concrete cause of stress. As mentioned, it is an unusual case and, thus, less likely to be followed. The outcome was the result of a three-way split in the appeal court;⁶⁷ it may also be that the majority were hoping that this order would make the mother move from Stockholm back to Uppsala, where the children's school was and where she was still working.

In the sample examined by the 2005 commission of inquiry, three-quarters of all contested applications for shared residence were dismissed, with district courts citing children's objections and children's need for continuity and stability as well as parents' communication problems.⁶⁸ The commission's report concluded that the judiciary have adopted a cautious approach to contested shared residence applications, and was positive about this.⁶⁹ However, a comparison of 1999 and 2002 case samples carried out for the NBHW indicated that judges are increasingly comfortable with making shared residence orders against one parent's objections. In 1999, shared residence orders were made in 3% of all custody cases that went to a full hearing, and against one parent's wishes in only 1% of cases. In the 2002 sample, shared residence orders were made in 7% of cases; a marked increase.⁷⁰ It may be that district court judges are becoming more familiar with the shared residence order

⁶⁷ Shared residence, residence with the mother, or with the father.

⁶⁸ SOU 2005:43, pp158-159.

⁶⁹ *Ibid*, p159.

⁷⁰ Riksförsäkringsverket (2003b) *op cit* n11, p9.

and thus more willing to make it in contested cases. If this is the case, the linking of judicial communications into the subsystem's chain of communications could entrench this understanding and lead to further orders against one parent's wishes.

Current practice has not been without its critics; the increased use of shared residence since the 1998 reforms has led to public and political debate.⁷¹ Calls have been made for a legislative amendment that would prevent courts from ordering shared residence where parents have failed to agree on either custody or residence, since this is a strong indication that the necessary enthusiasm and flexibility are likely to be lacking.⁷² Swedish academics have also drawn attention to a Norwegian commission of inquiry which concluded that forcing shared residence on reluctant parents exposed children to harmful conflict.⁷³ It is submitted that these are all sound arguments; the research set out in the second chapter demonstrates that voluntary arrangements are more likely to last, and to be appreciated by children. The government has, however, rejected these suggestions on the grounds that each case must be judged on its own merits and that any restriction of the courts' options would be undesirable.⁷⁴ Although this statement is correct in principle, since the paramountcy principle is enshrined in the statute, the previous chapter showed that Swedish family law, too, has reverted to its preferred way of processing disputes: through the autopoietic processes of re-entry and redundancy generalisations are made, complex details ignored, and presumptions heavily relied on, while adequate investigations into children's views and circumstances are usually lacking. These observations were also made by the consultees who responded to the 2005 commission of inquiry, but the Justice Department did not explicitly address any of them in its response. Law, as a closed subsystem, is unaware that its own interpretations of the outside world are simplified and selective. This, *per se*, is a very strong argument against any presumption in disputes involving children. Yet,

71 See e.g. 2008 Private Member's Bill submitted by Liberal Party MP: Motion 2008/09:So394 *Barns bästa vid växelvis boende*.

72 Proposition 2005/06:99, pp48-49; Juridiska fakultetsnämnden (2005) Yttrande angående Justitiedepartementets Remiss: Vårdnad, boende, umgänge – Barnets bästa, föräldrars ansvar (SOU 2005:43), Diarienummer SU 302-1311-05, dated 18th July 2005, accessed online. <http://www.juridicum.su.se/jurweb/dokument/remisser/Barnets.pdf>

73 NOU 1998:17 p80, pp125-126.

74 Proposition 2005/06:99, p53.

as in England, there is some evidence Swedish shared residence law is moving in this direction.

7.5.2 Towards a Presumption?

The NBHW study which concluded against a shared residence presumption also warned that joint legal custody should not lead to an assumption that the child ought to share its time equally between both parents.⁷⁵ Nevertheless, there is evidence to suggest that the law is developing in this way. Swedish family law, as a closed subsystem, creates the impression of order by treating very different cases as alike through the use of “rather blunt criteria”.⁷⁶ Shared residence is said to be most like an intact family, thus minimising change and offering children maximum support.⁷⁷ In NJA1999 s.457 the Supreme Court observed: “Children can gain a lot from a more practically involved and participating father”.⁷⁸ It is interesting to note that Swedish family law’s semantic artefact of father is defined in terms of practical involvement, probably because of interference from other subsystems, notably politics. In contrast, in the English case *Re F* [2003], Bonvin J defined the father’s contribution in terms of moral guidance and the setting of a good example. It seems that in England it is sufficient to care about, rather than for, the child.⁷⁹ The Swedish construction appears to have a better balance of caring for and caring about. However, this quote (phrased in the language of abstract generalisation so typical to law) has been used by a men’s organisation to argue that shared residence should be the general rule and an entitlement for all fathers who have not been found to be unfit.⁸⁰ Law’s binary classification of good and bad fathers sees the latter category as a small minority, so that most fathers are seen as good for their children.

In RÅ2004:138 the father, who had obtained an interim order for joint custody and five nights’ staying contact per fortnight (36% of the child’s time), applied to have his child support repayment obligation terminated on the grounds that he was now

75 Socialstyrelsen (2004b) *op cit* n11, p10, pp42-44.

76 Singer, A (2007) ”Samarbetsförmåga och Gemensam Vårdnad” 0708(1) *Juridisk Tidskrift*, 148-155, p155; Rejmer (2003) *op cit* n41, p188.

77 SOU 2005:43, p45; Socialstyrelsen (2003b) *op cit* n3, p41; Ds1999:30, p20

78 NJA1999 s.457, p460.

79 *Re F* [2003] EWCA Civ 592 *per* Bonvin J as quoted by Thorpe LJ at [13].

80 Mansjouren Website: <http://www.mansjouren.nu/Domar>, accessed online 20th September 2005.

sharing residence. Although his initial application was refused, his appeal was successful, with the Jönköping Administrative Appeal Court (AAC), applying the Supreme Court's definition of shared residence.⁸¹ More controversially, the AAC also held that where custody is joint, "the intention is that the parents should help each other raise and care for the child", and that joint custody should consequently be taken as an indication towards shared rather than sole residence.⁸² This new rule of thumb is problematic, since it ignores the fact that joint custody has now become so prevalent that it is held by many parents who find it difficult to communicate, let alone to help each other. It can be seen as another example of the law being more concerned with normative expectations than reality; with how things ought to be rather than how things are. The Supreme Administrative Court did not explicitly contradict these remarks, although it should be noted that it disagreed with the AAC on the finding of fact. As has been mentioned, there is relatively little case law in Sweden; it is a smaller jurisdiction with fewer cases, and a civil system which places less emphasis on the application and analysis of case law. However, it is worth noting that the statements made by the AAC in RÅ2004:138 have yet to be repeated in other cases.

A men's organisation has heralded this case as an important victory, not surprisingly preferring to employ child welfare rhetoric rather than discuss the financial implications: "[t]his judgment should not be seen as a father being let off his responsibility to pay child support, but as a victory for the child who has a right to be looked after by her daddy".⁸³ It is difficult to agree, since other material on the webpage suggests a pre-occupation with equal status and financial equality rather than with the child's best interests. Nevertheless, this language fits well with dominant child welfare discourse's preoccupation with the father-child link; there is still a risk that its simplistic linkage of shared residence, joint custody and good father-child relationships could be taken up into legal discourse and become widely accepted through repetition within law's circular chains of communications. Widlund examined the Svea Appeal Court's 29 residence decisions from 2002 in

⁸¹ NJA1998 s.267.

⁸² Jönköping Administrative Appeal Court, Case No 1201-2002

⁸³ Letter from the father in RÅ2004:138 quoted at Mansjouren Website: <http://www.mansjouren.nu/Domar>, accessed 20th September 2005.

order to test Rejmer's assertion that law uses its own narrow, autopoietic understanding of child welfare.⁸⁴ She found that SWI's adapted their reports to fit law's expectations, so that recommendations were based less on current knowledge from behavioural sciences and more on abstract legal presumptions.⁸⁵ The law did not see the individual child, but merely its own version of a generalised child, its semantic artefact. Law is likely to be content to assume that if shared residence is generally good for children, then it will be good for any particular child, particularly since several empirical studies have warned of a lack of child-focus in SWI reports.⁸⁶ Social Welfare Boards' responses to the 2005 commission argued that many parents now equate joint custody with equal division of children's time and complained that the legislation is "lagging behind" practice.⁸⁷ It was argued in the previous chapter that law ignores the gap between gender-neutral law reform and reality; if law thinks families are now based on equal sharing then the *status quo* principle will, if anything, point in favour of shared residence.

Alternating residence on a weekly basis has become the most widespread or even default shared residence arrangement and the criticism has been made that it is recommended by social workers and courts, with no consideration as to individual children's needs.⁸⁸ As is currently the case with joint legal custody, this shared residence standard model could come to be exported to larger numbers who differ markedly from the model's paradigm cooperative parents. In the third chapter, it was concluded that children's experiences of shared residence appear to depend greatly on their own personalities, experiences and resources, and that shared residence is a demanding arrangement, which should not be imposed without regard for the individual child's views. It is, indeed, a little worrying that 80% of children who share residence move every week; these frequent transitions may place too great a strain on many. If family lawyers, judges and SWI's view this as the norm, and recommend it on that basis, recent research by Ryrstedt suggests that parents caught

84 Widlund (2003) *op cit* n30, p3; Rejmer (2003) *op cit* n41, p134.

85 Widlund (2003) *op cit* n30, p26.

86 Rejmer (2003) *op cit* n41, p146; Åkerman, I & Fagerlind, S (1998) *Familjerätt i Besparingstider*, Socialstyrelsen, Stockholm, p5; Eriksson, M (2004) "Socialsekreterares Syn på Mäns Våld i Vårdnadsärenden", 2 *Kvinnotryck*, http://roks.se/kvinnotryck/2004/kt2_04_rep_maria_eriksson.html.

87 SOU 2005:43, p735.

88 Nordström Å (2004) "Växelvis boende ökar". 2004(3) *Välfärd: SCB:s Tidning om Arbetsliv, Demografi och Välfärd*, 4-5, p4; Jonsson, M, "Varannan Vecka Stressar Barnen", *Expressen*, 19th January 2006.

up in distressing separations will be unable to fully consider whether this arrangement is, in fact, the best for their child.⁸⁹ This suggests that a shared residence presumption should not be introduced; parents should not be encouraged to choose this arrangement without having first considered how it will actually affect their children.

In current Swedish district court practice, the benefit afforded by natural everyday contact must, however, be balanced against the risks of harm, either through the inconvenience and disruption or through exposure to the parents' conflict.⁹⁰ The NBHW report advised against shared residence in cases where one parent has been violent or abusive.⁹¹ Current NBHW guidance to social workers (who *inter alia* write SWI reports, hold cooperation talks and scrutinise parental agreements) cautions that shared residence may exacerbate the harmful effects of domestic violence or parental disagreements because of the high level of co-operation required.⁹² This is sound advice. However, as observed in the previous chapter, district courts have created their own legal understanding of severe conflict, which has become entrenched into legal discourse. The tendency to ignore or trivialise violence has been empirically documented in relation to both custody and contact.⁹³ In law's binary coding, conflicts are either severe or not severe enough, and if they fall in the latter category they can be ignored.

There is evidence that suggests the same re-conceptualisation process takes place in relation to shared residence applications. The Appeal Court in RH1999:85, for example, discounted the mother's argument that the parents' conflict was too severe for shared residence to be appropriate, although it eventually declined to make the order for other reasons. In one district court case examined by Widlund, the mother and SWI objected to the father's application to continue shared residence on the grounds that the arrangement had left the child caught in the middle of the parents'

89 Ryrstedt (2009b) *op cit* n17, p831.

90 RH1999:85.

91 Socialstyrelsen (2004b) *op cit* n11, p41.

92 Socialstyrelsen (2003b) *op cit* n3, pp40-41.

93 Barnombudsmannen (2005) *När Tryggheten står på Spel*: Barnombudsmannen Rapporterar BR2005:02, Stockholm Barnombudsmannen, p36, p44, p50; Eriksson (2004) *op cit* n86; Gumbel, I (2003) "Språket i Vårdnadsutredningen påverkar Domen", 3 *Kvinnotryck*, http://www.roks.se/kvinnotryck/kt3_03_rep.html; Åkerman & Fagerlind (1998) *op cit* n83, p5.

dispute. The district court did not feel these arguments weighed heavily enough to deny the father's application, but changed the schedule from weekly to fortnightly hand-overs in order to reduce parental interaction.⁹⁴ Shared residence was said to have been working well. This is another example of how law asserts its epistemic authority by choosing to reject external information, or refusing to adjust its normative expectations in response; law's evaluation of the situation determines the outcome. Similarly, the Northern Norrland Appeal Court dismissed a mother's objections to shared residence by stating that the conflict was not as severe as she asserted, since contact had been successfully implemented.⁹⁵ A mother's appeal against shared residence on the ground of the order's disruptive effects on her son was dismissed by the Svea Appeal Court, which merely repeated the district court's generalised assertion that the boy needed close contact with both parents.⁹⁶ A parallel can be drawn with a contested contact case, NJA2003 s.372, where the Supreme Court began by acknowledging the fears expressed by the child welfare experts, which were based on the girl's specific situation; but then appeared to ignore these as contact was ordered on the basis of generalised statements.⁹⁷ The lack of references, in this part of the judgment, to the individual characteristics of this father and child, provided a clear illustration of how law recreates litigants and children as stereotypical semantic artefacts.

Although the 2005 commission of inquiry found that judges were generally cautious in their approach to shared residence, they also found that where the order was made against a parent's wishes, this was justified both by abstract references to the need for good and close contact listed in FB6§2a, and by a finding that the parents' conflicts were not as severe as the opposing parent had alleged.⁹⁸ In the Children's Ombudsman's 2002 sample of contested cases involving domestic violence, shared residence was ordered against mothers' wishes in four cases.⁹⁹ In all four instances, it must be doubted that the necessary conditions for child-focused, flexible arrangements would be present.

94 Falun district court, 2003-11-27, T2607-02, pp3-5.

95 Appeal Court for Northern Norrland, 1998-12-08, T87-98, cited in Widlund (2003) *op cit* n30, p27.

96 Case T5912-02, cited in Widlund (2003) *op cit* n30, p24.

97 Ryrstedt, E (2007) "Tvistlösning mellan Separerade Föräldrar – för Barnets Bästa", 0708(4) *Svensk JuristTidning*, 389-414, p407; Schiratzki, J (2004) "Högsta Domstolen Meddelar Dom om Umgänge med Barn – Kräns Europakonventionen?" 15(3) *Juridisk Tidskrift*, 642-652, p646.

98 SOU 2005:43, p761.

99 Barnombudsmannen (2005) *op cit* n93, p31.

In conclusion, there are some signs of a reinterpretation of the welfare test in contested shared residence cases, where the courts will presume that shared residence will best meet children's need for relationships with their fathers and accordingly minimise risks that weigh against it. The next section explores how the post-liberal emphasis on collaborative parenting has influenced judicial attitudes to shared residence.

7.6 SHARED RESIDENCE & REASONABLENESS

The previous chapter observed that Swedish, like English family law, has come to place great emphasis on compromise, negotiation and out-of-court dispute resolution.¹⁰⁰ There is a general perception of compromise solutions as more likely to be adhered to, and thus better for children.¹⁰¹ The law does not, however, give parents complete freedom to reach their own agreements. Instead, law's rigid understanding of good reasonable behaviour has become entrenched as its messages have circled the chains of legal communications; parents are placed under considerable pressure to reach the 'right' agreement; one which is compatible with the dominant paradigm of the binuclear family.¹⁰² Previous chapters have used autopoietic theory to question the effectiveness of law's attempts to transmit its normative expectations and affect individuals' behaviour, and, furthermore, to explain family law's continued insistence that its advice must be followed and its standards must be met.

In England, Hale *et al* suggested ten years ago that there could be a connection between the use of shared residence orders and the non-intervention principle; the imperative of moving on from a present impasse may override investigation into the viability of future arrangements.¹⁰³ Similar observations have been made in Sweden. The 2005 commission of inquiry noted that shared residence can seem to provide an instant 'everybody wins' solution: it is presumed to benefit children; offers an

¹⁰⁰ Åkerman, I (1998) "Förändrad Lagstiftning" in Rädde Barnen (Ed) *Barnets Rätt till Båda Föräldrarna*, Stockholm, Rädde Barnen, 23-25, p23.

¹⁰¹ SOU 2005:43, p226.

¹⁰² Björnberg, U (2001) "Cohabitation and Marriage in Sweden – Does Family Form Matter?" 15(3) *IJLPF*, 350-362, p354; Kurki-Suoni (1995) *op cit* n25, p191.

¹⁰³ Hale, B, Pearl, D, Cooke, E & Bates, P (2002) *The Family, Law and Society*, London, Butterworths, p597. See also *Holmes-Moorhouse v Richmond LBC* [2009] UKHL 7, *per* Baroness Hale at paras 31-33.

ostensibly fair compromise for parents; and district courts avoid the full hearing.¹⁰⁴ Shared residence can, thus, be used as a way of suppressing or postponing rather than resolving disputes, often in circumstances where it must be presumed not to be in children's best interests. The 2005 commission, for example, found cases where shared residence had been agreed despite distances of more than 1000 kilometres, with handovers taking place at motorway service stations.¹⁰⁵ The commission's report warned that compromise had, in some district courts, become not the means to an end but a goal in itself.¹⁰⁶ Yet, it is a goal that appears to be slipping ever further away. Parents, as individual psychic autopoietic systems, have no direct access to legal communications, but reinterpret and modify these on the basis of what they already know, the problems they are already struggling with, and what they believe to be the best for their children. This often leads to a belief that their own case is an exception to the general rule that parents should not fight.¹⁰⁷ As in England, changes to the framework of formal orders appear to have little or no affect on litigation; there are indications that the greater use of joint custody may only have transferred, rather than resolved, conflicts. Where parents can no longer disagree over custody, due to the strong joint custody presumption, they elect instead to fight over residence.¹⁰⁸ Statistics show that the courts' caseload on custody, residence and contact increased by 35% between 2004 and 2007.¹⁰⁹ Within this context it is clear that shared residence can become another way to promote compromise; a way out of an impasse.

7.6.1 A Framework for Co-Operation?

In the English leading case on shared residence, *D v D* [2001], the shared residence order was made partly to "lessen the parents' animosity" and the order has subsequently come to be seen as a useful way of improving co-parenting.¹¹⁰ In Sweden, the role of providing a framework for parental cooperation which will remove the need for further recourse to the courts is ascribed primarily to the joint

¹⁰⁴ SOU 2005:43, p735, p163.

¹⁰⁵ *Ibid*, p735.

¹⁰⁶ *Ibid*, p259.

¹⁰⁷ Rejmer (2003) *op cit* n41, p43.

¹⁰⁸ Schiratzki (2006) *op cit* n19, p111.

¹⁰⁹ Domstolsverket (2007) *Domstolsstatistik 2007*, Jönköping, Domstolsverket.
http://www.domstol.se/templates/DV_InfoPage___868.aspx

¹¹⁰ Douglas, G (2001) "D v D (Shared Residence Order)" *Family Law* 183-184, p184; *Butterworths Family Law Service* (Version 6), London, LexisNexis UK, §1707.

custody order (which has not undergone the devaluing process criticised in the case of the Parental Responsibility order). In relation to shared residence, several influential, large academic and government studies have confirmed the NBHW study's description of good parental cooperation as an essential prerequisite for shared residence rather than as a possible consequence.¹¹¹ It seems that some parents are persuaded into sharing residence even though they do not have a particularly good post-separation relationship. A small qualitative study carried out for the NBHW report found that parents who had been persuaded to try shared residence during co-operation talks did not generally feel the arrangement had worked well for them; in fact, half of this group had abandoned the order within its first year.¹¹² A Green Party member's Parliamentary Bill succinctly observed that while the arrangement does last: "There is ... a very real risk that the children end up living with a balance of terror: cold war rather than peace."¹¹³ It is clear that in such circumstances the sharing of residence can neither help parents learn to cooperate nor benefit children; this is another weighty reason against greater use of court-ordered residence.

As noted in relation to both English and Swedish law, warnings from child welfare science and other discourses on the potentially harmful nature of coerced or court-imposed arrangements for children have been imperfectly translated into law, as law has created its own internal narrow understanding of conflict, and often does not enquire sufficiently into the actual levels of parental cooperation in individual cases.¹¹⁴ Case T307-01 from the Göta Appeal Court provides an illustration. The Appeal Court overturned the district court's finding that the parents' conflict was too severe for shared residence. It observed that the core of the dispute was financial, and that this should not cause problems, since both parents have a duty to contribute to the child's upkeep, regardless of living arrangements.¹¹⁵ The bare assertion that these parents ought not to quarrel was not rooted in the real

111 SOU2007:52, p99; Socialstyrelsen (2004b) *op cit* 111, p41; SOU 2005:43, p157; Riksförsäkringsverket (2003b) *op cit* 111, p9, p57.

112 Socialstyrelsen (2004b) *op cit* 111, p8.

113 Ångström (Green Party), Motion till Riksdagen 2002/03:mp833, accessed online, http://www.mp.se/files/39200-39299/file_39293.pdf

114 NJA1999 s.451; Schiratzki (2006) *op cit* 119, p109; Rejmer (2003) *op cit* 141, p153; Wickström (2001) *op cit* 132, p666.

115 Göta Appeal Court, Case T307-01 of 14th March 2002, accessed online. [http://www.nj.se/NJAB/Nyhets/dokdb.nsf/byadjmalnummer/GHRT307_01/\\$file/GHRT307_01.pdf?OpenElement](http://www.nj.se/NJAB/Nyhets/dokdb.nsf/byadjmalnummer/GHRT307_01/$file/GHRT307_01.pdf?OpenElement)

circumstances of the case and their impact on the child. The autopoietic legal subsystem sees the families who appear before it as mere semantic artefacts, and is unaware that it has restricted its own vision so that it cannot see the reasons why this particular family may not fit its normative pattern.¹¹⁶ The section on shared residence and the welfare test noted that the Administrative Appeal Court in RÅ2004:138 saw joint custody as a legislative statement of intent that parents should work together in raising the child; the court held that joint custody should consequently be taken as an indicator towards shared, rather than sole, residence.¹¹⁷ An alternative starting point could have been that the parents' extensive involvement in two law suits indicated that they were actually not cooperating; indeed, the father's interim joint custody order was later terminated for that reason.¹¹⁸ The AAC's stance is, however, consistent with law's tendency to focus on how law thinks things ought to be rather than on how things actually are. Since the legal subsystem's self-image is founded on its position as neutraliser of conflicts and source of authority it cannot depart from its insistence that parents must cooperate. Instead, it searches for further methods to achieve its desired result. Indeed, in the case discussed immediately above, Case T307-01 from the Göta Appeal Court, the Court not only made the shared residence order against the mother's wishes but also observed that shared residence would force the parents to learn to cooperate in order to make their everyday lives workable.¹¹⁹ The similarity with the English Court of Appeal's reasoning in *D v D* [2001] is both striking and alarming.¹²⁰ Law, prioritising its normative expectations, reverses the causal relationship between good cooperation and shared residence, setting a very dangerous precedent. Case T307-01 may fortunately be another anomaly; in other reported cases judges have insisted on the appropriate causal relationship between cooperation and shared residence.

¹¹⁶ Rejmer (2003) *op cit* n41, p135.

¹¹⁷ Jönköping Administrative Appeal Court, Case No 1201-2002. Although the Supreme Administrative Court disagreed with the AAC on the finding of fact, it did not discuss the AAC's linkage of joint custody and shared residence.

¹¹⁸ Mansjouren Website: <http://www.mansjouren.nu/Domar/>. Sole custody was granted to the mother by the district court. The change of custody status is not discussed in this way on the website, but merely admitted as an irrelevance, since custody was indisputably joint at the material time.

¹¹⁹ Göta Appeal Court, Case T307-01 of 14th March 2002, accessed online. [http://www.nj.se/NJAB/Nyhets/dokdb.nsf/byadjmalnummer/GHRT307_01/\\$file/GHRT307_01.pdf?OpenElement](http://www.nj.se/NJAB/Nyhets/dokdb.nsf/byadjmalnummer/GHRT307_01/$file/GHRT307_01.pdf?OpenElement)

¹²⁰ *D v D* [2001] 1 FLR 495 at p496.

A 2005 White Paper stipulated that parents must be able to renegotiate arrangements with flexibility rather than insist on what is rather aptly referred to as “millimetre justice”.¹²¹ Furthermore, it was stipulated that since shared residence places particular burdens on the adults, parents’ post-separation relationships must be “particularly good”.¹²² This communication, within a document that can be seen as a structural coupling of politics and law, is founded on an understanding of parenting (and fathering in particular) as involving a considerable level of practical involvement and frequent communication over the minutiae of caring for a child. It leads to a more realistic use of shared residence within the legal system. The phrase “particularly good” has often been repeated in judgments, and appears to have resulted in a new semantic artefact, the particularly good interparental cooperation necessary before a shared residence order can be made.¹²³ The Övre Norrland Appeal Court in Case T146-00, for instance, dismissed the father’s shared residence application on the grounds that this arrangement requires frequent face-to-face contact; something these parents had in the recent past been unable to manage without the conversations descending into confrontations or even physical fights.¹²⁴

Furthermore, it should be noted that shared residence orders can only be made where the parents both have custody.¹²⁵ Thus, the recent re-evaluation of joint custody explained in the previous chapter has also served to restrict the availability of the shared residence order; fathers who are inflexible, obstinate or controlling are denied both custody and residence even where law’s emphasis on the promotion of father-child links leads to a very generous contact order. In another unreported 2008 case, the Svea Appeal court made an order for contact, rather than for shared residence, despite the fact that the daughter was likely to spend 40% of her time with her father.¹²⁶ This was because the court had also made an order for sole legal custody in the mother’s favour, on the grounds that the parties’ conflict was so longstanding and severe that there was no realistic prospect of co-parenting; it was not envisaged

¹²¹ Proposition 2005/06:99, p53.

¹²² Proposition 2005/06:99, p53.

¹²³ Svea Appeal Court, Case No T483-08, 28th October 2008; RH2005:38.

¹²⁴ The Court instead extended the father’s fortnightly contact from two to four days. Hovrätten för Övre Norrland, Case No T146-00 of 1st June 2001.

¹²⁵ Proposition 2005/06:99, p53.

¹²⁶ Svea Appeal Court, Case No T483-08, 28th October 2008.

that the parents would be able to communicate other than through text messages.¹²⁷ This case can be seen as an example of what Ryrstedt has praised as the new, pragmatic approach: formal orders can no longer be used to teach parents to cooperate.¹²⁸ This appears to be a lesson that has been learnt through the over-optimistic extension of joint custody, which was implemented in 1998 but revised in 2006 in response to the media attention generated by the very real problems it had created, *inter alia*, where abusive fathers used custody to veto their children's treatment (a good example of the interference that results when several autopoietic subsystems share the same basic units of communications to create meaning and "make order" from the "noise" of external turbulence).¹²⁹

This more cautious approach to joint custody resulted in an award of sole custody in RH2005:38, and this, in turn, meant a shared residence order could not be made. What is noteworthy about this case, however, is that the appeal court also refused to make a consent order to approve the parents' compromise on contact. The levels of contact were so high that this was *de facto* shared residence, with handovers taking place at school to avoid confrontations. Although the mother had agreed, the appeal court held that the required particularly high levels of cooperation and mutual trust were lacking; the order would not be in the three children's best interests. Contact was instead limited to one long weekend per fortnight. This father was seen by the legal subsystem through the semantic artefact of an unreasonable, bad father, and the welfare principle appears to have been prioritised over non-intervention. Implicit in the judgment is that the children would benefit not only through lessened exposure to conflict, but also by having a primary carer who could focus on meeting their needs without harassment from her controlling former husband. It is submitted that this is a better approach to take in high conflict cases. It is, of course, far from perfect: the law is still recreating the family members as semantic artefacts and assumptions are made about what the children need. Furthermore, it appears from the judgment that this father was from a different ethnic background, something which might have contributed to the court stereotyping him as

¹²⁷ *Ibid*, p5.

¹²⁸ Ryrstedt (2009b) *op cit* n17, p822.

¹²⁹ Teubner (1993) *op cit* n39, pp61-62, p103.

unreasonable. This approach is still, however, to be preferred to an unquestioning belief that shared residence can be used to teach this type of parent to become more cooperative and reasonable. In the fourth and sixth chapters, autopoietic theory was used to describe how parents reject or reinterpret legal communications so that changes in behaviour are unlikely to result, and how the legal subsystem's combination of cognitive openness and normative closure leaves it unaware of this. This theoretical perspective, therefore, leads to the conclusion that the shared residence order should not be used in this way.

7.6.2 The Gendered Dimension

Shared residence is more common in Sweden than in England, despite a relatively strict definition of the arrangement. This can be praised as a genuine increase in involvement on the part of fathers. Indeed, it was contended in the previous chapter that although the situation is far from perfect, men and women in Sweden are more equal than in many other countries. For many, who willingly choose it, shared residence is a welcome sharing of domestic duties, particularly since all Swedish women are now expected to combine motherhood with employment. A small study by Carlsson and Öhrn showed that shared residence mothers, in particular, described it as empowering to have more time available to pursue their own interests.¹³⁰

However, complaints have also been voiced that shared residence orders obfuscate and exacerbate existing gendered inequities. It has already been noted that the Parents Code and associated rules are gender neutral. Law's focus on the abstract and the desirable renders it blind to the particular and the real and allows it to treat gendered imbalances as irrelevant.¹³¹ There is a widespread perception, particularly within legal discourse, that Sweden has now achieved gender equality.¹³² This serves to obfuscate the older patriarchal expectations that cast fathers as a stabilising influence over unruly youth and mothers as the primary "meeters" of children's

¹³⁰ Carlsson, L & Öhrn, M (2004) "Med tiden i fokus", C-Uppsats, Luleå, Luleå Tekniska Universitet. <http://epubl.ltu.se/1402-1773/2004/001/index-en.html>

¹³¹ Luhmann, N (1989) "Law as a Social System", 83(1) *Northwestern University Law Review*, 136-150, p145.

¹³² Eriksson, M & Hester, M (2001) "Violent Men as Good Enough Fathers?: A Look at England and Sweden" 7(7) *Violence Against Women*, 779-798, p789.

needs.¹³³ Although these constructions of parenthood are perceived to be outmoded and can no longer be expressed without the speaker being labelled unreasonable, they form the hidden basis of many legal communications, particularly as law is an inherently conservative autopoietic system. Caring remains associated with the feminine, and thus undervalued and often invisible, while contemporary law's preoccupation with maintaining the father-child bond renders it reluctant to discourage fathers.¹³⁴ Studies on contact have found that legal professionals place lower expectations on fathers, in terms of their ability to care for the children, and there is no reason to suggest that the same does not also occur in shared residence cases, placing a disproportionate burden on mothers.

In England, the construction of shared residence orders as pronouncements about decision-making and the privilege of having access to your child, rather than the responsibility of meeting children's needs on a daily basis, has been criticised as patriarchal. The same academic criticisms have been detailed in the previous chapter in relation to the Swedish joint custody order.¹³⁵ Very similar arguments have also been made by shared residence mothers. It is asserted that while mothers in shared residence arrangements are expected to put their children's needs first at all times, fathers are praised for doing a small fraction of what the mother does.¹³⁶ In order to fit their gendered stereotype, the semantic artefact of the good post-separation mother, women must become more accommodating, "picking up the slack" where fathers fall short.¹³⁷ This may not only involve arranging all medical appointments, liaising with schools or coordinating sports activities, but also often involves paying for everything the child needs. While contemporary Swedish law seems more able to recognise the caring involved in parenting, it is also based on the assumption that parents with joint custody and/or shared residence are able to negotiate financial and practical issues on an informal basis. This assumption, originally correct when these arrangements were voluntary, has not been adjusted

¹³³ Lawler, S (1999) "Children Need but Mothers only Want: the Power of 'Needs Talk in the Constitution of Childhood", in Seymour, J & Bagguley, P (Eds) *Relating Intimacies: Power and Resistance*, Basingstoke, Macmillan Press Ltd, 64-88; Ryrstedt (2009b) *op cit* n17, p825.

¹³⁴ Eriksson & Hester (2001) *op cit* n132, p792.

¹³⁵ Rejmer (2003) *op cit* n41, p190.

¹³⁶ Brors, H (2003) "Kvinnan får Alltid Anpassa Sig", 530 *Offensiv, Rättvisepartiet Socialisternas Veckotidning*, 3rd January 2003 available at <http://www.socialisterna.org/offensiv/arkiv/530/varnadvist.html> accessed on 17th November 2009.

¹³⁷ *Ibid*; Bekkengen, L (1999) "Män som 'pappor' och kvinnor som 'föräldrar'" *Kvinnovetenskaplig Tidskrift*.

despite the increased availability of both joint custody and shared residence.¹³⁸ Law, however, sees only its ideal family; it ignores that shared residence can be both sought and resisted for financial reasons and can also be a source of conflict and injustice where the financial burdens are not shared in an equitable way.¹³⁹ The third chapter detailed how empirical studies have found that discrepancies between formal orders and practical arrangements tend to impact negatively, and disproportionately, on mothers and children. Although Swedish single mothers may have fared well, from an international perspective, they are still an economically vulnerable group. They have been among those worst affected by economic downturns, have lower average incomes, and are almost twice as likely to be unemployed or depend on state benefits.¹⁴⁰ It can therefore be surmised that where, as in Case T307-01 discussed above, the district court merely instructs parents that costs must be shared equally, gendered power inequalities and gendered expectations mean that mothers will bear a disproportionate burden. Law's rigid insistence on conciliatory and child-focused behaviour (understood as adherence to the new binuclear family norm) means that criticising these inequalities carries a serious risk of being labelled selfish with the consequent threats of losing custody and residence.¹⁴¹

It is true that Swedish courts demand more from parents before an order imposing shared residence is made, and that recent reforms have been based on a more pragmatic view of parents' abilities to learn cooperate. There is, nevertheless, evidence that shared residence orders are being made with reference to law's aspirations for the cooperative, and implicitly gendered, binuclear family rather than a real enquiry as to whether sharing residence will work for this family and benefit this particular child. It is submitted that if this happens in Sweden, where the law takes a more balanced approach and the preconditions for shared parenting are better

¹³⁸ Ds1999:30, p30.

¹³⁹ Mothers who have sole residence are unwilling to halve their child support by sharing residence, and some fathers apply for shared residence predominantly as a way of escaping their child support repayment obligations. Socialdepartementet (2004b) Promemoria om Slopät Underhållsstöd vid Växelvis Boende, Stockholm, Regeringskansliet; Emtestam (2001b) *op cit* n26, pp29-30; Socialstyrelsen (2003b) *op cit* n3, p42.

¹⁴⁰ Jämställhetsombudsmannen, Remissyttrande angående Promemoria om slopat underhållsstöd vid växelvis boende S2004/4656/SF, Ärendenr 525/2004, accessed online <http://www.jamombud.se/dokument/yttrandeoverpro.asp>; Gähler, M (2001) "Bara en Mor – Ensamstående Mödrars Ekonomiska Livsvillkor i 1990-talets Sverige" in SOU2001:54, 15-99, p15; Wennberg, L (2001) "Ensamstående Mödrar – Försörjda av Män eller Rätt till Välfärd?" in Burman, M & Gunnarson Å (Eds) *Familjeföreställningar*, Uppsala, Sweden, Iustus Förlag, 231-249, p231.

¹⁴¹ SOU 2005:43, p205.

(in terms, *inter alia*, of fathers' acquisition of the requisite skills within intact families), then it will certainly happen in England, and to a far greater extent. Shared residence orders should not be made against one parent's wishes.

7.7 CONCLUSION

Interference from a political subsystem affected by decades of welfare state reform has led to a legal system that constructs parenting in terms of caring for as well as caring about or decision-making. Swedish courts are stricter in their insistence on a near equal division of the child's time than their English counterparts. This makes the question of who is to care for the child more visible, and is also likely to discourage fathers who seek the order purely for its symbolic benefits. Shared residence is, nevertheless, more common than in England. This could be because decades of interventionist policies have left Swedish fathers better prepared for a substantial sharing of the child's care. If so, the fact that these preconditions are lacking in this jurisdiction must caution against the increased use of shared residence.

The NBHW report recommended a cautious approach to court-ordered shared residence and this appears to have significantly influenced district courts. Shared residence is relatively rarely ordered where one parent objects, although there are signs that suggest a shared residence presumption may be developing. The Parents Code's paramountcy test has come to be interpreted in a very narrow way; in most cases the child's need for contact with his or her father is often prioritised over trivialised risks of harm. However, recent law reform has stressed the importance of adequately investigating allegations of violence, and this is likely to have made courts more reticent to order shared residence against the wishes of a mother who has established that the father has harassed or abused her.

The Swedish family law subsystem is on a par with its English counterpart when it comes to the vigorous promotion of compromise and settlement; parents must be reasonable and able to prioritise the child's need for the other parent above their own wishes. In both jurisdictions, statistics and empirical studies confirm

autopoieticists' assertion that so much is lost in translations across several systems' boundaries that social regulation through law is only possible in "extremely indirect and rather uncertain ways".¹⁴² Family law reforms have not decreased parental propensities to litigation. Within this context shared residence becomes a very attractive compromise, and this can lead to a tendency to order it where it is hoped it will work without any real investigation, particularly since Swedish family law has been criticised for being marred by an unquestioning belief in abstract principles. It is encouraging, however, that most recent appeal cases do not endorse this approach. Instead, there is a sensible insistence that parents must be able to cooperate before shared residence is imposed through a court order. Unlike in England, shared residence has not been transmuted by family law in an attempt to solve the perceived problem of increasing fatherlessness.

As in England, the demand for reasonable, conciliatory parenting is applied to both sexes, but is, nevertheless, gendered. The imposition of the binuclear blueprint is justified by references to new, hands-on fathers, but family law has no interest in investigating whether this is actually what happens in binuclear families. There is a curious contradiction in Swedish family law in that it is both ostensibly gender neutral, with an insistence on formal equality, and simultaneously highly gendered, as its normative expectations for mothers and fathers remain cast in a traditional mould. As in England, "virtually any involvement by fathers with their children has increasingly come to be considered good-enough fathering".¹⁴³ In an intact family, mothers are expected to take primary responsibility for caring. Yet, at the point of divorce, this comes to be perceived as an unfair advantage.¹⁴⁴ Swedish mothers find it as difficult as their UK counterparts to use their unique experiences of caring for the child to argue against shared residence. Since Britain is moving, albeit more slowly, towards a dual-earner model, it is submitted that if a shared residence presumption is introduced, primary carer mothers will face dual obstacles: the obfuscation of caring that results from the public/private dichotomy as well as law's tendency to focus on its aspirations of gender neutrality and to assert its

¹⁴² Teubner (1993) *op cit* n39, p97.

¹⁴³ Eriksson & Hester (2001) *op cit* n132, p791.

¹⁴⁴ Eriksson (2003) *op cit* n61, p70; Feministiskt Initiativ (2006) *Enastående och Makalösa Mammor*, Stockholm, Feministiskt Initiativ, p13. <http://www.feministisktinitiativ.se/downloads/grasrot/enastående.pdf>.

epistemic authority by imposing this aspiration on real families. This not only denies children agency, but also ignores something that is likely to be very important to them; the care they receive. A presumption cannot, thus, be seen to be in children's best interests.

8 CONCLUSION

8.1 INTRODUCTION

In previous chapters, it was argued that law's autopoietic nature, its self-imposed inability to see the value of care, and its consequent patriarchal preoccupation with parenthood as power and authority, had caused the law regulating disputes between parents to develop in undesirable directions. The chapters on Sweden confirmed common trends in legal discourse, such as law's tendency to focus on how things ought to be rather than how they actually are in individual families. They also highlighted some differences between the two jurisdictions in general (such as Swedish family law's greater ability to see parenting in terms of practical care), and between shared residence case law in particular (notably the absence in Sweden of political pressure to use shared residence to solve perceived problems unrelated to the allocation of a child's time between parents). These differences point against greater use of shared residence in England.

This chapter asserts that the arguments made in support of a shared residence presumption have no foundation in fact. Shared residence can in many cases help committed parents do the best for their children, but a presumption would not affect such cases, since parents are already free to choose to share residence. The first two sections assert that court-ordered shared residence neither helps parents cooperate nor impacts positively on children. The final section of this chapter, therefore, considers what a greater use of the shared residence order against resident parents' wishes is likely to achieve: to reassert male authority over mother-headed families.

8.2 CAN SHARED RESIDENCE HELP PARENTS COOPERATE?

8.2.1 Introduction

Although a shared residence presumption appears to fit very well with the current emphasis on compromise, the settlement culture is in fact a strong reason against a presumption. Family law's preference for party-negotiated compromise over adjudication has been noted in the chapters on both jurisdictions. "[T]he aspiration" is that the child should be "the only winner".¹ The reality is, however, that the search for the best solution for the child is often "subordinated to the new principle of non-intervention".² One mother interviewed for the NBHW study said: "It felt like we could have made whatever decision we wanted, as long as we came to an agreement".³ However, earlier chapters have shown that this is unlikely to be true. Law, as a closed and inherently patriarchal autopoietic system, has selected and manipulated external information so that the private family law of both jurisdictions is built on a strong assumption of on-going involvement by both parents. Parents, psychic autopoietic systems, can be said, like law, to be cognitively open but normatively closed. They admit new information (albeit reinterpreted through the filters of re-entry and redundancy) but rarely let this challenge their existing normative frameworks.⁴ Lectures from judges cannot prevent parents from repeatedly returning to the courts. Yet, does not lead law to abandon its expectation of obedience. Instead, the focus has shifted from punishment to education, and all professionals are involved in the transmission of law's normative messages to a degree where persuasion shades into coercion. Parents who do not conform to the "norm of the responsible and collaborative parent" are labelled bad and selfish.⁵

8.2.2 Parents' Experiences

¹ *London Borough of Sutton v Davis* [1994] 2 FLR 569 per Wilson J at pp570-571.

² Bainham, A (1990) "The Privatization of the Public Interest in Children", 53(2) MLR, 206-217, p208.

³ Socialstyrelsen (2004b) *Växelvis Boende: Att Bo Hos både Pappa och Mamma Fast De Inte Bor Tillsammans* (2a upplagan), Stockholm, Socialstyrelsen, p27.

⁴ Teubner, G (1993) *Law as an Autopoietic System*, London, Blackwell,, p65.

⁵ Wallbank, J (2009) "Parental Responsibility and the Responsible Parent: Managing the 'Problem' of Contact" in Probert, R, Gilmore, S & Herring, J (Eds) *Responsible Parents and Parental Responsibility*, Oxford, Hart Publishing, 295-313, p311.

Shared residence not only seems to provide an ostensibly fair solution and an attractive way out of a stalemate; it is also said to be a useful framework to teach parents to cooperate and thus maintain the binuclear family.⁶ The current settlement culture makes more attractive the argument that shared residence could reduce the number of entrenched disputes that are placing the overstretched family court system under stress.⁷

This thesis argues that the current focus on consensus and settlement is, if anything, a reason against a shared residence presumption. English and Swedish parents are now given a great deal of encouragement to compromise by lawyers, social workers or mediators. Yet, as autopoietic theory has been employed to explain, many parents involved in entrenched disputes reinterpret the welfare discourse to justify their decisions to continue litigation.⁸ Moreover, those parents who have still failed to agree, in the current climate, are likely either to have valid objections or such problems in cooperating that they should not be considered for shared residence.⁹ Shared residence, according to parents who have chosen it, involves constant communication about school, sports, music lessons, friendship problems, and “the difficult task of getting a teenage son out of bed in the morning”.¹⁰ Even committed parents with excellent post-separation relationships admit that there have been times when their patience and cooperation skills have been stretched to the limit.¹¹ Thus, mutual respect, frequent communication, flexibility and good cooperation are essential prerequisites.¹² Where these are lacking, shared residence will either be abandoned or deteriorate to a point where direct communication stops and the arrangement becomes split, rather than shared. Gähler, a Swedish researcher, has observed that there are reasons why parents separate and that consequently

6 Coe, T, *Shared Parenting: The Right Starting Point?* Equal Parenting Council website <http://www.equalparenting.org/shared-parenting/index.php> accessed 30th September 2007.

7 *Ibid.*

8 Wallbank (2009) *op cit* n5, pp310; Laing, K (2006) “Doing the Right Thing: Cohabiting Parents, Separation and Child Contact”, 20(2) *International Journal of Law, Policy and the Family*, 169-179, p173; Kaganas, F & Day Sclater, S (2004) “Contact Disputes: Narrative Constructions of ‘Good’ Parents”, *Feminist Legal Studies*, 1-27, p22.

9 Freeman, M (2000) “Disputing Children” in Katz, S, Eekelaar, J & Maclean, M (Eds) *Cross Currents: Family Law and Policy in the US and England*, Oxford, OUP, 441-470, p460; NOU 1998:17 §12.4.1.

10 Interview with Marre Ahlsén and Ulf Lindberg, shared residence parents, in Carling, M, “Flyttcirkus med barnen i fokus”, *Svenska Dagbladet*, 19th October 2005.

11 *Ibid.*

12 Socialstyrelsen (2004b) *op cit* n3, p9.

“sometimes no detail is too trivial to prompt another argument”.¹³ NBHW personnel interviewed for his study told *inter alia* of angry telephone calls from parents who wanted to know who was to pay for the second pair of swimming trunks that were needed when their child started to share residence.¹⁴ In the NBHW Report sample of parents with court-ordered shared residence many reported that the order had had no effect on their poor cooperation.¹⁵ One mother commented: “The way it is now, this has dragged on and cost us money, but things are the same as they were before the court case: we can’t talk to each other”.¹⁶

Within a year, half of the NBHW study families with court-ordered shared residence had abandoned the arrangement. The researchers found that the persisting parents had had the better relationships prior to the order.¹⁷ In the second chapter, it was shown that the research evidence does not support the use of shared residence to improve co-parenting. If anything, the frequent communication required is likely to exacerbate existing disputes; and the one result reliably confirmed by most studies is that exposure to parental conflict impacts negatively on children’s educational attainment and emotional well-being. Furthermore, shared residence is less stable than other orders; a shared residence presumption is likely to prove counterproductive in actually increasing litigation.

8.2.3 Law’s Response

English family law has maintained epistemic authority over child welfare science by prioritising its normative expectations over empirical evidence from experts. According to Wall LJ in *Re R* [2009] the shared residence order “is a legal, not a psychiatric concept”; consequently decisions should be guided by the now “substantial jurisprudence” and judges are free to reject inconsistent psychiatric opinion, “however distinguished its source”.¹⁸ This is law’s response to interference from the political subsystem, where separated fatherhood is understood as a problem

¹³ Interview in Asker, A, “Allt fler barn flyttar varje vecka”, *Svenska Dagbladet*, 20th October 2005.

¹⁴ *Ibid.*

¹⁵ Socialstyrelsen (2004b) *op cit* n3, p8.

¹⁶ *Ibid*, p33.

¹⁷ *Ibid*, p32.

¹⁸ *Re R* [2009] EWCA Civ 358 at [30].

that requires a legal solution.¹⁹ Law “senses” this conflict in its social environment, understands it as dictated by its own cognitive framework (with law’s historic focus on the maintenance of social order through the distribution of rights), and responds to political expectations through normative legal communications addressed to parents: shared residence is now primarily about equal status.²⁰ According to Teubner, the closure of autopoietic systems does not render the issue of power irrelevant.²¹ The extent to which one social subsystem can enslave another or, conversely, ignore interference from another system, depends on subsystems’ internal perceptions of other systems’ relative power and authority.²² Law constructs itself as less powerful than politics and more powerful than both child welfare science and individual parents. The result is that shared residence has become law’s latest attempt to impose a binuclear post-separation family blueprint on reluctant litigants. The ultimate aim is to restore the popularity of the nuclear family and halt demographic and attitudinal changes within the wider population. This overambitious use of the blunt tool of law is indubitably futile. It is unlikely even to persuade individual parents to conform to the binuclear paradigm, due to parents’ resistance to this turbulence (explored in previous chapters in relation to law’s insistence on reasonableness).

Swedish studies of custody and contact disputes have very usefully explored how law, first, ignored the multiple problems these families usually face and, secondly, reinterpreted serious conflicts of values into mere conflicts of interests. Courts avoided adjudicating or investigating allegations by stereotypically describing both adults as capable and committed parents who ought to be able to meet in the middle. In consequence, resident parents and children complained of the wasted efforts, risks and disappointments caused by law’s failure to see how their actual families differed from its ideal.²³ This shows how law, as an autopoietic system, is unable to make a sufficiently detailed and sensitive evaluation of individual cases to separate those

19 Collier, R & Sheldon, S (2008) *Fragmenting Fatherhood: A Socio-Legal Study*, Oxford, Hart Publishing, p141.

20 Teubner (1993) *op cit* n4, p70.

21 *Ibid*, p73.

22 *Ibid*, p103.

23 Rejmer, A (2003) *Vårdnadstvister: En Rättssociologisk Studie av Tingsrätts Funktion vid Handläggning av Vårdnadskonflikter med Utgångspunkt från Barnets Bästa*, Lund, Sweden, Lund Studies in the Sociology of Law, p106, p175; Ekbohm, I & Landberg Å (2007) *Innerst Inne var man Rädd*, Stockholm, Rädda Barnen & Socialstyrelsen, p29.

families that can benefit from shared residence from those that will not. It is, therefore, encouraging that Swedish courts are more cautious when ordering shared residence in contested cases. Recent developments suggest that Swedish family law has taken note of the difficulties caused by the over-optimistic use of joint custody after the 1997 amendments which made it the preferred solution.²⁴ According to Ryrstedt, formal orders can no longer be used to teach parents to cooperate.²⁵ Shared residence is only ordered where cooperation is already particularly good.²⁶

English family law has yet to learn this lesson in relation to shared residence; and the combination of law's normative closure and powerful pressure from the political subsystem to solve the perceived problem of paternal disengagement means this is likely to take a long time. The legal subsystem, founded on the pronouncement and enforcement of rules, cannot depart so far from its existing "programme" that it abdicates authority and admits an inability to solve these families' problems.²⁷ "Compromise", according to Wall LJ, "is an art that every separated parent ought to master".²⁸ The fifth chapter traced how, since *D v D* [2001], the initial suggestion that shared residence orders can be used as a remedy in high conflict cases has solidified into a certainty as successive cases have emphasised the symbolic granting of equal status and perceived consequent reduction of bitterness over the practical benefits to children. The question of why exactly shared residence orders are being used in this way will be considered further in the third section of this chapter; at present it will only be observed that problems with contact are currently conceptualised as caused by uncooperative mothers (recreated through the semantic artefact of the implacably hostile resident parent) and that law is likely to attribute blame for failed shared residence arrangements the same way.

In conclusion, a shared residence presumption would not be effective in reducing litigation, reducing conflicts or teaching separated couples how to parent together. Instead, as the next section asserts, it could be harmful to children.

24 Law, as an autopoietic system, is known to react to external interference; in this instance the cases where abused children was denied medical treatment by fathers who were also the suspected perpetrators caused media outrage and political responses which led to the appointment of an official enquiry, SOU 2007:52, pp12-13.

25 Ryrstedt, E (2009b) "Samarbetssamtal" *Svensk Juristtidning*, 821-842, p822.

26 RH2005:38.

27 Teubner (1993) *op cit* n4, p59, p102.

28 *Re G* [2008] EWCA Civ 1468 at [7].

8.3 IS SHARED RESIDENCE THE BEST ARRANGEMENT FOR CHILDREN?

8.3.1 Introduction

The second chapter used autopoietic theory to explain why family law has developed its own, narrow understanding of the welfare test, also reconciling this with feminist assertions that law's refusal to listen to more complex or nuanced languages is "part of its power".²⁹ This explanation is confirmed in later chapters' analyses of both jurisdictions. The supposedly broad and discretionary welfare tests provided in section 1 of the Children Act 1989 and FB62§a of the Parents Code are applied as exhaustive, hierarchical lists. Law's focus on the general and desirable, its concern not to discourage fathers, and its self-imposed blindness in relation to the private sphere, combine so that the assumed benefits of relationships with a father are generally held to outweigh any risks.³⁰ There is also no recognition of how the child benefits from the care provided by the parent with residence, who is usually the mother.

Presumptions have the general disadvantage of deterring courts from a full enquiry into the facts of the case, or alternatively to dismiss or trivialise evidence that could otherwise make it necessary for the court to consider a departure from the presumption. Smart and Neale have observed that "finding a 'good enough' principle, law then applies it with all the sensitivity of a sledgehammer".³¹ The chapters analysing the legal frameworks of both jurisdictions provided ample evidence to confirm this. Law, as a closed subsystem, recreates external knowledge using its binary codes and its stereotypical semantic artefacts, including the generic child. In particular, a cautionary tale is provided by the judicial development of an English pro-contact presumption, now recognised to have gone too far, and to have

29 Finley, L (1989) "Breaking Women's Silence in Law: the Dilemma of the Gendered Nature of Legal Reasoning" *Notre Dame Law Review*, 886, p892.

30 The overviews of case law showed that courts in both jurisdictions have become more willing to reach a different conclusion in cases where there is evidence of domestic violence, but it was also noted that the creation of these narrow exceptions has served to strengthen, rather than undermine, the general rules in favour of fathers' applications, Smart, C & Neale, B (1999) *Family Fragments?*, Cambridge, Polity Press, p180; Proposition 2005/06:99, pp42-43.

31 Smart & Neale (1999) *op cit* n31, p180.

exposed children to neglect and domestic violence. Kaganas and Piper have warned that the same mistakes could be repeated with a shared residence presumption.³²

8.3.2 Shared residence only suits some parents...

The fifth chapter revealed that shared residence is increasingly seen as best for children, since it most closely resembles the nuclear family. It can be disputed whether nuclear families are the optimum environment in which to raise children; but even if that is accepted, it is far from clear that shared residence is the best post-separation alternative. The second chapter showed that available research evidence on shared residence is equivocal: as the NBHW report concluded “[s]hared residence is neither good nor bad; it becomes what the parents make it”.³³

The third chapter showed that early research samples made up exclusively of shared residence enthusiasts cannot be used to advocate court-ordered shared residence; these adults’ excellent co-parenting is more likely to have been the cause of the decision to share than an effect of the arrangement. Recent, more sophisticated, studies suggest that whether shared residence benefits children will depend on a number of variables; the most important are probably the parents’ commitment and the children’s individual characteristics. Smaller studies from England and Sweden have suggested that for shared residence to benefit children, it has to be based upon “a flexible and respectful partnership”.³⁴ Where parents had managed this, interviewed young people were for the most part positive. They felt the arrangements were for their benefit; good relationships outweighed practical inconveniences, and transitions were bearable since they were not burdened by “conflicting loyalties and a sense of guilt”.³⁵

One mother interviewed for the NBHW Report observed that shared residence required “a lot of give and take”; parents must contain their own conflicts and

32 Kaganas, F & Piper, C (2002) “Shared Parenting – a 70% Solution?” 14(4) *CFLQ*, 365-379, p372.

33 Socialstyrelsen (2004b) *op cit* n3, p44.

34 Smart, C (2004) “Equal Shares: Rights for Fathers or Recognition for Children?”, 24(4) *Critical Social Policy*, 484-503, p500.

35 *Ibid*, p490.

develop new, post-separation ways to negotiate.³⁶ They are required to make considerable material sacrifices, and often find the frequent changes as emotionally demanding as their children do.³⁷ In addition, they must also be sensitive to children's changing needs and the things that the latter find difficult to say, because of fear of hurting either parent's feelings.³⁸ These requirements are not easily met by parents who are both willing and able to make these kinds of efforts for their children's sakes; they are likely to be a small, exceptional group. Whilst their achievements should be admired, it is not reasonable to expect that they can be emulated by all. Home schooling is a good idea, but very few parents have the knowledge, financial and emotional resources needed to successfully educate their own children; the same appears to apply to shared residence. Consequently, the NBHW report was correct in doubting whether the necessary preconditions exist in cases where the parents have been unable to compromise.³⁹ Moreover, Rejmer's research on custody disputes, confirmed by Ekblom and Landberg in relation to supervised contact, showed a dangerous gap between family law's abstract norms based on ordinary, responsible parents and the families they interviewed as part of their research into contested cases, who were struggling with addiction, physical or mental ill health, unemployment, social exclusion and other difficulties.⁴⁰ The fact that law is unable to see these problems is particularly worrying since research suggests that the demands of shared residence make it more difficult for children, as well as adults, to cope with multiple stresses.⁴¹ Greater use of the order against one parent's wishes is likely to place vulnerable individuals under unnecessary strain, yet the autopoietic nature of the legal subsystems means this may not register in legal communications, as law can only interact directly with its own semantic artefacts.

s. One Swedish mother argued, based on her own experiences, that it must be better for children "to have one well-adjusted everyday parent and one contented weekend parent" than to be "caught in a dysfunctional alternating arrangement where neither

36 Socialstyrelsen (2004b) *op cit* n3, p24; Smart (2004) *op cit* n35, p487.

37 Interview with Marre Ahlsén and Ulf Lindberg, shared residence parents, in Carling, M, "Flyttcirkus med barnen i fokus", *Svenska Dagbladet*, 19th October 2005.

38 Smart (2004) *op cit* n35, p489; Socialstyrelsen (2004b) *op cit* n3, p8, p29.

39 Socialstyrelsen (2004b) *op cit* n3, p36.

40 Rejmer (2003) *op cit* n24, pp78-79, p342; Ekblom & Landberg (2007) *op cit* n24, p29.

41 Socialstyrelsen (2004b) *op cit* n3, p35.

adult is able to parent properly”.⁴² A legal system, which was able to recognise the real value of care, and of caring for children, would reach a similar conclusion; but it would be unrealistic to expect law to change suddenly and dramatically. Autopoietic systems are self-reproductive, and as such can “define the limits of their tolerance to structural change”.⁴³ Changes that are viewed as threatening internal identity and autonomy will be resisted. Furthermore, new legal communications can only be built from existing concepts; radical departures from existing *modus operandi* are not possible. Autopoiesis “defines the boundaries of every evolutionary change”.⁴⁴ Systems do evolve, albeit in erratic patterns, and it would, according to Teubner, “be misleading to exclude the environment from evolutionary processes”.⁴⁵ Attempts to improve law’s recognition of care can be made, but must be slow and incremental. Thus, it is better to restrict shared residence to families where neither adult objects. Although this may mean that some parents raise selfish vetoes, it is nevertheless the best way to ensure that children are not harmed by being caught in the middle of acrimonious, inflexible shared residence arrangements.

8.3.3 ... and Some Children

This thesis asserts that, as law is unable to communicate directly with children, restricting shared residence to families where both adults have freely agreed to it is the best way to ensure that this demanding arrangement is not imposed against individual children’s stated wishes or in circumstances where they cannot cope with it. The chapters on England and Sweden observed that despite increased recognition in legislation and travaux préparatoires of the need to take children’s views into account, in practice the legal autopoietic subsystem continues to recreate children as stereotyped semantic artefacts assigned the needs of a generic child of their own age. Children’s opinions are judged mature enough to be included where they fit the dominant welfare rhetoric but are otherwise disregarded. In relation to shared residence, it is known that children’s personalities and individual resources have a significant impact; studies have also emphasised the need to consult children.

42 Letters page, *Svenska Dagbladet*, 6th November 2005. Some support for this statement is provided by the research by Smart *et al*, who found that parents in more traditional arrangements reported less conflicts and higher levels of satisfaction, Smart & Neale (1999) *op cit* n31, p59, p63

43 Teubner (1993) *op cit* n4, p56.

44 *Ibid*, p55.

45 *Ibid*, p61.

Where young people have had negative experiences of shared residence, they commonly complain about feeling constricted and unable to influence rigid schedules.⁴⁶ In Sweden, the conceptualisation of shared residence as providing parents with welcome child-free weeks has been identified as a cause for concern and a source of dissatisfaction for the affected children.⁴⁷ A Swedish newspaper's letters page devoted to shared residence provided several examples. One satisfied former couple explained how they had rescheduled their hand-over to midweek as it had previously proved too demanding to have a full week working overtime to catch up after a week spent with the children: a purely adult-focused decision with no mention of consultation.⁴⁸ Three parents justified shared residence in terms of needing time for new relationships.⁴⁹ Interviews with children suggest that whether parents insist on child-free time, or demand more time to achieve justice *inter pares*, the feeling of being little more than another possession cancels out the supposed positive benefits of shared residence in terms of close and natural contact.⁵⁰

The Swedish examples show that there are some families where both parents make selfish choices. One benefit of the autopoietic perspective is a more realistic understanding of what can actually be achieved through legal regulation and these parents are beyond the reach of the family courts. However, denying the order where one parent objects should significantly reduce the number of cases where the arrangement is chosen solely to suit adults. The research suggests that those who agree to share residence have good social and childrearing skills, and are consequently less likely to ignore children's objections. This argument can be supported with Ryrstedt's recent research on cooperation talks, which found that parents in high conflict disputes were less able to consider their children's needs and wishes and more likely to focus on their own.⁵¹ Relationships can sometimes be

46 This could be because parents wanted "child-free time" to develop their own relationships, or because there were several sets of children involved in the arrangement, or where a parent would demand their "fair share" of the child's time, Socialstyrelsen (2004b) *op cit* n3, p29; Smart (2004) *op cit* n35, p500.

47 Socialstyrelsen (2004b) *op cit* n3, p11; Familjerättsjurist, Letters page, *Svenska Dagbladet*, 6th November 2005. Interview with Sofia, aged 19 and still in a shared residence arrangement, in Asker, A "Stressigt att ständigt flytta mellan två hem" *Svenska Dagbladet*, 24th October 2005

48 Letters page, *Svenska Dagbladet*, 6th November 2005.

49 *Ibid.*

50 Socialstyrelsen (2004b) *op cit* n3, p29; Smart (2004) *op cit* n35, p486; Interview with Sofia, aged 19 and still in a shared residence arrangement, in Asker, A "Stressigt att ständigt flytta mellan två hem" *Svenska Dagbladet*, 24th October 2005.

51 Ryrstedt (2009b) *op cit* n26, p831.

reversed, so that children feel responsible for maintaining the binuclear family relationships.⁵² In *Re R* [2003] the 11-year-old boy had suggested that he could alternate between his parents on a daily basis; touching but also disconcerting evidence of his desire to end the conflict by being fair to both parents.⁵³ His impractical proposal was rejected, but in other reported cases it is noted in support of shared residence that children are in favour, with little consideration of their reasons. The children in *A v A* [2004] had for years been caught in a “virtual state of war” and were probably desperate to try anything that could stop their parents from fighting; this is not the same as actively choosing shared residence.⁵⁴

In conclusion, research has found that children pay a high price “in order to have equal access to both parents” and moreover that while those who grew up in child-focused shared residence arrangements generally described this as a price worth paying, others often reported that the price had been too high.⁵⁵ An understanding of law’s autopoietic nature and consequent inability to distinguish between these two types of families leads to the conclusion that it is better to let parents choose whether to share residence.

8.4 WHAT WOULD A PRESUMPTION DO?

8.4.1 Introduction

The argument that shared residence can help parents learn to cooperate and thus benefit children by reducing conflict, is not only contradicted the autopoietic perspective as well as by research findings, but also seems completely contrary to common sense. Where two people are struggling to get along, whether at work, in student halls of residence or in a classroom, the recommended solution is usually to separate them, rather than bring them into closer and more frequent contact. Thus, the suspicion arises that in the context of shared residence orders this reasoning may

⁵² Socialstyrelsen (2004b) *op cit* n3, pp29-30; Ekblom & Landberg (2007) *op cit* n24, p28.

⁵³ *Re R* [2003] EWCA Civ 597 *per* Wilson J at [16].

⁵⁴ *A v A* [2004] EWHC 142.

⁵⁵ Singer, A (2008) “Active Parenting or Solomon’s Justice? Alternating Residence in Sweden for Children with Separated Parents”, 4(2) *Utrecht Law Review*, 35-47, p41; Socialstyrelsen (2004b) *op cit* n3, p42; Neale, B, Flowerdew, J & Smart, C (2003) “Drifting Towards Shared Residence?”, *Family Law*, 904-908, p906.

be mere obfuscation. These supposed benefits serve to conceal law's real objectives: to reinforce links between fathers and children; to make separated families resemble the nuclear ideal as far as possible; and to diffuse tension created by social and demographic change.

In the second chapter, feminists' observations that law thinks and communicates in a particularly male way were used to confirm that law, as an autopoietic system, has an inherently patriarchal normative framework, retained since its initial separation through increased specialisation. One important consequence of this is the public/private dichotomy, which leaves mothers complaining of law's inability to recognise their efforts in caring for children.⁵⁶ In England, symbolic messages about the immutability of fatherhood are made through parental responsibility orders, and are given practical effect through contact orders granted to all but the most unsuitable, violent fathers. In Sweden, the joint custody order has undergone a gradual transformation from a practical obligation to care for children to a right to be consulted on major decisions, while the case law on contact mirrors English developments. There are, however, notable differences in the two jurisdictions' courts' use of shared residence orders.

8.4.2 Shared Residence and Law's Gendered Parenting Norms

In the preceding chapters on both England and Sweden it was observed that while traditional, cultural understandings of motherhood and fatherhood continue to shape both individuals' and law's expectations of parenting, there are also differences between the two countries. In Sweden, interference from the political system may not have been wholly successful in eradicating cultural, gendered understandings of parenthood or steering law away from its traditional patriarchal understanding of families; but English family law has, if anything, been encouraged by interference from political discourse to retain the conjugal nuclear family as its normative standard. Where the social engineers of the Swedish welfare state deliberately sought to break down the public/private boundary, the continuing influence of classical liberal theory has meant that the English family is still seen as beyond the

⁵⁶ Laing (2006) *op cit* n8, p173; Kaganas & Day Sclater (2004) *op cit* n8, p16.

ambit of legal intervention (at least until it is judged dysfunctional). In Sweden, the transition to dual-earner households saw care partly repositioned in the public sphere; in England, care remains predominantly a matter of private responsibility. In Sweden, divorce, cohabitation and single motherhood have all become so common that they have been normalised and debate on fatherhood focuses on removing structural obstacles and encouraging hands-on involvement. In contrast, the British welfare state was originally constructed on the breadwinner model, thus reinforcing the primacy of the conjugal family and rendering single motherhood both more visible and more problematic. Whilst recent reforms may be seen as signalling a move towards a dual earner norm, they constitute a modification, rather than abandonment, of the breadwinner model. A recurring theme of debate is “the ills that fall on society because of inadequacies of parents”.⁵⁷ Although parenthood has now replaced marriage as the primary legal status relationship; “[p]arenthood remains the very sphere where official discourse places the most value on marriage”.⁵⁸ The decreasing popularity of marriage and greater fluidity of modern familial relationships is likely to have been constructed as problematic within law even without recent interference from the political subsystem problematising law’s treatment of separated fathers. However, the latter has had a significant role to play in the latest reinterpretation of the shared residence order to fulfil the new function of reassuring fathers of their equal status.

Those who argue for greater use of shared residence draw links between father absence and perceived social disintegration; it is claimed that a shared residence presumption could improve gender equality, help fathers become more hands-on, and thus strengthen family relationships.⁵⁹ There is an element of truth in this argument, but, like the linking of shared residence with parental cooperation, it reverses the causal relationship. Shared residence is more prevalent in Sweden because, even where internal critique is taken into account, the preconditions for the successful sharing of parenting are better in Sweden. Post-separation parenting

57 Gilmore, S, Herring, J & Probert, R (2009) “Introduction” in Probert, R, Gilmore, S & Herring, J (Eds) *Responsible Parents and Parental Responsibility*, Oxford, Hart Publishing, 1-20, p1.

58 Barlow, A, Duncan, S, James, G & Park, A (2001) “Just a Piece of Paper? Marriage and Cohabitation” in Park, A, Curtice, J, Jarvis, L, Thomson, K & Bromley, C (Eds) *British Social Attitudes: The 18th Report*, London, Sage Publications, 29-47, p38.

59 Geldof, B, “You Sit Outside and Wait and Sob”, *The Times*, 5th December 2003.

skills need to be developed in intact families and Swedish fathers are more involved than their English counterparts. This also explains why shared residence is still understood as an order regulating practicalities. It is too late to expect fathers to suddenly become expert parents at a time which is marred by emotional and practical upheaval; a time when they have also lost the person who has previously mediated interaction with the children. Fathers may choose to do substantially less. Wallbank has observed that it is, in practice, impossible for the law to regulate the quantity or quality of contact in the vast majority of cases.⁶⁰ The same is true of shared residence orders. However, English law does not seem unduly concerned by this; either because it gives no real thought to care, or because it is not interested in redistributing the burdens of caring. Courts apply the shared residence label where the second parent has the child for alternate weekends and holidays, and it is not uncommon to see a shared residence order coupled with an order for contact. Consistent with the more traditional, patriarchal construction of fatherhood which is part of the system's existing normative framework, the granting of equal status has become as important as the allocation of time, and benefits to children are often discussed in terms of the order's symbolic messages.

This means that if Swedish mothers, with their better starting point, complain that shared residence leads to inequity, this should be a warning against greater use of the order in this jurisdiction. The analysis of Swedish law did indeed find a gap between rhetoric and reality. According to one mother with shared residence, she is far from the only woman who buys all clothes, arranges birthday parties, keeps track of important dates, “generally holds everyday life together”, and spends far more time with her children despite the fact that, on paper, everything is shared equally: “more mothers than you can imagine pack a suitcase of clean clothes one weekend only to be sent back a case full of dirty washing the next.”⁶¹ As in England, the law still implicitly expects mothers to prioritise their caring responsibilities, and compensate for fathers' shortcomings, while these gendered assumptions are obscured by the gender-neutral legislation. Interviews with parents show that to change the allocation of responsibilities in the transition from intact to post-

⁶⁰ Wallbank (2009) *op cit* n5, p307.

⁶¹ Kajsa, Letters page, *Svenska Dagbladet*, 6th November 2005.

separation family “requires a deliberate and concerted effort”.⁶² Restricting shared residence to families where the parents are able to agree is the best way to ensure that this effort is made. This is particularly important in England, where recent reforms have been criticised for the focus on rights attribution and equality where empirical work has shown that women continue to “bear the brunt, in responsibility terms, of the confluence of women’s and men’s lives”.⁶³ Although the law increasingly expects fathers to be hands-on, it is also still openly concerned with those aspects of fathering that are seen as vital in a patriarchal system: provision, discipline and authority.

8.4.3 Shared Residence as Power

In both Sweden and England, complaints have been made that the apparent logic of equal division is allowed to overshadow the welfare enquiry as children’s right to see both parents becomes confused with the parents’ perceived right to equal time.⁶⁴ In England, Fathers’ groups use court statistics and simplistic formal equality arguments to portray fathers as victims of discrimination, and a 50/50 presumption as the way to redress this. They combine rights and welfare rhetoric by claiming to support “the rights of children to have both their parents fully involved in their lives”.⁶⁵ Yet, an analysis of the arguments made by UK fathers’ groups reveals a clear preoccupation with parental rights; both the Equal Parenting Council (EPC) and Families Need Fathers (FNF) see 50/50 as a “starting point” for negotiations and offer two-pronged definitions of shared parenting where time spent with the child and legal status are given equal prominence.⁶⁶ Hunt *et al* have criticised the recent FNF guidance on shared parenting for its almost exclusive focus on adult entitlements.⁶⁷ Reece has recently observed that the “watering down” of PR has led to an increased demand for shared residence orders as a way for men to gain equal

62 *Ibid.* See also Socialstyrelsen (2004b) *op cit* n3, p24.

63 Wallbank (2009) *op cit* n5, p300.

64 Smart (2004) *op cit* n35, p490; Socialstyrelsen (2004b) *op cit* n3, p11; Letter from a family lawyer (Famijerättsjurist), Letters page, *Svenska Dagbladet*, 6th November 2005.

65 Press Release: Society is Still Failing our Children”, <http://fnf.org.uk.uk3.clientproof.co.uk/news-events/press-releases/2006-archive/060614> accessed on 30th September 2007.

66 Coe, T, *Shared Parenting: The Right Starting Point?* Equal Parenting Council website <http://www.equalparenting.org/shared-parenting/index.php> accessed 30th September 2007; Families Need Fathers’ Policy Paper on Shared Residence. <http://fnf.org.uk.uk3.clientproof.co.uk/law-policy/shared-residence>. Accessed 30th September 2007

67 Hunt, J, Masson, J & Trinder, L (2009) “Shared Parenting: the Law, the Evidence and Guidance from Families Need Fathers”, *Family Law*, 831-836, p834.

authority; and these arguments have been amplified through repetition within the political subsystem, as discussed above.⁶⁸ Fineman has persuasively asserted that “[f]or this group of equality advocates, the real goal is restoration of historic inequality”.⁶⁹ The chapters on England and Sweden found ample evidence of abusive fathers using the strong contact and joint legal custody presumptions to assert power over their former partners. There has been a welcome recognition in recent Swedish case law that shared residence requires more parental interaction and should be avoided where fathers have previously shown themselves to be domineering or aggressive. In contrast, the English judiciary fallaciously assume that shared residence can provide a solution for such problem families (or alternatively, ensure that mothers do not exclude difficult fathers).⁷⁰ It is becoming increasingly difficult to disagree. The combination of the paramountcy principle, where shared residence is seen as better for children, and the post-liberal insistence on reasonable, conciliatory behaviour, mean that mothers will be labelled selfish and obstructive if they try to oppose shared residence on the grounds that fathers are not contributing their fair share and that shared residence is consequently simply not worth the effort they are asked to put in. Research has also worryingly shown that children’s objections to the dominant binuclear paradigm are often dismissed as the results of maternal manipulation.⁷¹ Finally, Smart found that the ostensibly irrefutable logic behind equal division meant that many young people who were deeply unhappy with alternating between their parents’ homes felt it impossible to challenge the arrangement, once implemented.⁷²

8.5 CONCLUSION

In conclusion, the difficulties of communication across autopoietic systems boundaries mean that if shared residence is ordered against parents’ wishes it is unlikely to reduce litigation, improve relationships, or reduce children’s exposure to

68 Reece, H (2009) “The Degradation of Parental Responsibility” in Probert, R, Gilmore, S & Herring, J (Eds) *Responsible Parents and Parental Responsibility*, Oxford, Hart Publishing, 85-102, p95.

69 Fineman, M (2001) “Fatherhood, Feminism and Family Law”, 32(4) *McGeorge Law Review*, 1031-1049, p1035.

70 *Re W* [2009] EWCA Civ 370 *per* Wilson LJ at [15].

71 Barnett, A (2009b) “The Welfare of the Child Re-Visited: In Whose Best Interests? Part II”, *Family Law*, 135-141, p139.

72 Smart (2004) *op cit* n35, p491.

conflict. It may, in fact, have the opposite effect. There is no empirical evidence to support the assertion that shared residence is better for children; the success of the order depends on factors law is unable either to control or detect such as parents' dedication, and on whether the benefits it offers individual children can outweigh the considerable practical and emotional sacrifices. Thirdly, the fact that shared residence is increasingly understood within law's chains of communications in terms of equal authority rather than practical sharing means a presumption would operate as an obfuscatory device to enable the continuation of patriarchal power structures across binuclear families.

This thesis argues against the development of a shared residence presumption; the search for alternative solutions lies beyond its scope. The autopoietic perspective also cautions against attempts at wholesale reform. It is recognised, for example, that to create discursive space within law for ethic of care based arguments would be desirable, but would at present require dramatic change and is thus too ambitious a goal.⁷³ The Swedish law shows, however, law's ability to recognise caring can be improved. In English contemporary family law this could be achieved by stipulating that post-separation orders should, as far as possible, resemble the arrangements of the intact family.⁷⁴ This would meet the child's need for stability and continuity, and would preserve those parent-child relationships that have developed to such a degree that children are likely to benefit from them. Moreover, it assures that time is spent predominantly with an adult who has greater experience and is thus likely to be better able to anticipate the child's future needs.⁷⁵ It is acknowledged that many separating parents will give different accounts; but findings of fact could be made by courts aided by Cafcass reporters. Law, as a subsystem, is already using this as a way to create knowledge, and minor modifications to the system along these lines should, therefore, not meet too much resistance. This author would like to see parents asked questions like: "Is your child afraid of the dark? Does he eat fish fingers? Who are her teachers and what are her favourite bands?"; questions that are

73 Fineman, M (1993) "Our Sacred Institution: The Ideal of the Family in American Law and Society", *Utah Law Review*, 387-405, p398.

74 Bartlett, K (1999) "Child Custody in the 21st Century", 35(3) *Willamette Law Review*, 467-482, pp476-477.

75 *Ibid*; Scott, E (1992) "Pluralism, Parental Preference and Child Custody", 80 *California Law Review*, 615-672, pp629-630; Singer, J & Reynolds, W (1988) "A Dissent on Joint Custody", 47(2) *Maryland Law Review*, 497-523, p522.

designed to explore real involvement in the day-to-day care for the child rather than mere caring about. Such a presumption could avoid imposing any idealized norm on all families and could, if behaviour during relationships is at all influenced by the legal rules of thumb employed at separation, provide breadwinners with a clear incentive to increase the time spent in meaningful interaction with their children.⁷⁶ It is acknowledged that there will be some children, who could potentially benefit from sharing residence, but whose intransigent parents (predominantly mothers) will selfishly refuse to agree. The available evidence suggests, however, that it is better for such children to have their need for a relationship with the unimpeachable parent met through contact, than to be caught in the middle of an inflexible arrangement or drawn into parents' conflicts.

The Swedish experience shows that shared residence is a demanding order, which must be used carefully. It should be restricted to families where both parents so desire to remain highly involved in their children's lives that they are willing to put up with continued close association with a person they no longer wanted in their lives. It is an extraordinary arrangement, which should be reserved for extraordinary families.

⁷⁶ Bartlett (1999) *op cit* n72, pp479-481.

9 BIBLIOGRAPHY

9.1 BOOKS AND JOURNALS

- Abrams, K (2001) "The Second Coming of Care", 76(3) *Chicago-Kent Law Review*, 1605-1617.
- Agell, A (2002) "Sweden" in Hamilton, C & Perry, A (Eds) *Family Law In Europe*, London, Butterworths, 619-660.
- Altman, S (1996) "Should Child Custody Rules be Fair?" 35(2) *University of Louisville Journal of Family Law*, 325-354.
- Amato, P & Gilbreth, J (1999) "Nonresident Fathers and Children's Well-Being: A Meta-Analysis", 61(3) *Journal of Marriage and the Family*, 557-573
- Amato, P (2000) "The Consequences of Divorce for Adults and Children" 62(4) *Journal of Marriage and the Family*, 1269-1287.
- Andersson, G & Bangura Arvidsson, M (2008) "Contact Person as a Court-Ordered Solution in Child Visitation Disputes in Sweden" 13(2) *Child and Family Social Work*, 197-206.
- Angelin, A (1999) "Faderskap efter Separation – I Sverige och Storbritannien", 8 *Socionomen*, 37-40.
- Bäck-Wiklund, M & Bergsten, B (1997) *Det Moderna Föräldraskapet*, Stockholm, Natur och Kultur.
- Bailey-Harris, R (1997) "A v N (Committal: Refusal of Contact)", *Family Law*, 232-233.
- Bailey-Harris, R, Barron, J & Pearce, J (1999a) "From Utility to Rights? The Presumption of Contact in Practice", 13(2) *IJLPF*, 111-131.
- Bailey-Harris, R, Barron, J & Pearce, J (1999b) "Settlement Culture and the Use of the 'No Order' Principle under the Children Act 1989", 11(1) *CFLQ*, 53-62.
- Bainham, A (1990) "The Privatization of the Public Interest in Children", 53(2) *MLR*, 206.
- Bainham, A (1998) *Children: The Modern Law* (2nd Ed), Bristol, Jordan Publishing Ltd.
- Bainham, A (2003) "Contact as a Right and Obligation" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 61-88.
- Baker, A & Townsend, P (1996) "Post-divorce Parenting: Rethinking Shared Residence", 8(3) *CFLQ*, 217-227.

- Barlow A & Duncan S (2000) "Supporting Families? New Labour's Communitarianism And The 'Rationality Mistake': Part I" 22(1) *JSWFL*, 23-42.
- Barnett, A (2009a) "The Welfare of the Child Re-Visited: In Whose Best Interests? Part I" *Family Law*, 50.
- Barnett, A (2009b) "The Welfare of the Child Re-Visited: In Whose Best Interests? Part II", *Family Law*, 135-141.
- Barnett, H (1997) *Sourcebook on Feminist Jurisprudence*, London, Cavendish Publishing.
- Barry, M (1997) "The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions", 46(3) *Catholic University Law Review*, 767-834.
- Bartlett, K (1999) "Child Custody in the 21st Century", 35(3) *Willamette Law Review*, 467-482.
- Bauserman, R (2002) "Child Adjustment in Joint-Custody versus Sole-Custody Arrangements: A Meta-Analytic Review", 16(1) *Journal of Family Psychology*, 91-102.
- Bekkengen, L (1999) "Män som 'pappor' och kvinnor som 'föräldrar'" 99(1) *Kvinnovetenskaplig Tidskrift*.
- Bergman, H & Hobson, B (2002) "Compulsory Fatherhood" in Hobson (Ed) *Making Men into Fathers*, Cambridge, CUP, 92-124.
- Björnberg, U (2001) "Cohabitation and Marriage in Sweden - Does Family Form Matter?" 15(3) *IJLPF*, 350-362.
- Björnberg, U (2002) "Ideology and choice between work and care: Swedish family policy for working parents" 22(70) *Critical Social Policy*, 33-52.
- Bogdan, M (1994) *Comparative Law*, Deventer, Netherlands, Kluwer.
- Bradley, D (1990) "Children, Family and the State in Sweden", 17(4) *Journal of Law and Society*, 427-444.
- Bradley, D (1996) *Family Law and Political Culture*, London, Sweet & Maxwell.
- Breivik, K & Olweus, D (2006a) "Adolescents' Adjustment in Four Post-Divorce Family Structures", 44(3) *Journal of Divorce and Remarriage*, 99-124, p103.
- Breivik, K & Olweus, D (2006b) "Children of Divorce in a Scandinavian Welfare State: Are they Less Affected than US Children?" 47(1) *Scandinavian Journal of Psychology*, 61-74.
- Bridge, C (2006) "Case Reports: Residence: Re P (Shared Residence Order)", *Family Law*, 447.
- Bridge, C (2008a) "Case Reports: Residence: Re K (Shared Residence Order)" *Family Law*, 849.

- Bridge, C (2008b) "Case Reports: Re A (Shared Residence: Parental Responsibility)", *Family Law*, 1006.
- Brors, H (2003) "Kvinnan får Alltid Anpassa Sig", 530 *Offensiv, Rättvisepartiet Socialisternas Veckotidning*, 3rd January 2003.
- Buchanan, A & Hunt, J (2003) "Disputed Contact Cases in the Courts" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 365-386.
- Burghes, L, Clarke, L and Cronin, N (1997) *Fathers and Fatherhood in Britain*, Family Policy Studies Centre/Joseph Rowntree Foundation, London.
- Caracciolo di Torella, E (2001) "A Critical Assessment of the EC Legislation aimed at Reconciling Work and Family Life: Lessons from the Scandinavian Model?" in Collins, H, Davies, P & Rideout, R (Eds) *Legal Regulation of the Employment Relation*, Amsterdam, Kluwer, 441-458.
- Carlsson, B & Rejmer, A (1998) "The Swedish Way of Dealing with Custody Disputes: Juridification and Professionalisation of the Private and Social Spheres" in Carlsson, B (Ed) *Social Steerage and Communicative Action*, Lund Studies in Sociology of Law, 104-142.
- Clarkson, H & Clarkson, D (2007) "Confusion and Controversy in Parental Alienation", 29(3-4) *JSWFL*, 265-275.
- Collier, R & Sheldon, S (2008) *Fragmenting Fatherhood: A Socio-Legal Study*, Oxford, Hart Publishing.
- Collier, R (2005) "Fathers 4 Justice, Law and the New Politics of Fatherhood", 17(4) *CFLQ*, 511.
- Collier, R (2009) "Rethinking Fathers' Rights" *Family Law*, 45.
- Conway, H (1995) "Shared Residence Orders", *Family Law*, 435-437.
- Creighton, C (1999) "The Rise and Decline of the Male Breadwinner Family in Britain", 23(5) *Cambridge Journal of Economics*, 519-541.
- Davis, G & Pearce, J (1999) "The Hybrid Practitioner", *Family Law*, 547-555.
- Day Sclater, S & Kaganas, F (2003) "Contact: Mothers, Welfare and Rights" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 155-169.
- De Cruz, P (2007) *Comparative Law in a Changing World* (3rd Ed), Abingdon, Routledge-Cavendish.
- De Los Reyes, P (2000) "Folkhemmet's Paradoxer", *Kvinnovetenskaplig Tidskrift*, 27-47.
- Dewar J (2000) "Family Law and its Discontents", 14(1) *IJLPF*, 59-85.
- Diduck, A & Kaganas, F (1999) *Family Law, Gender and the State: Text, Cases and Materials*, Oxford, Hart Publishing.

- Diduck, A (1995) "The Unmodified Family: The Child Support Act and the Construction of Legal Subjects", 22(4) *Journal of Law and Society*, 527-548.
- Doughty, J (2008) "From Court Missionaries to Conflict Resolution: A Century of Family Court Welfare", 20(2) *CFLQ*, 131-154.
- Douglas, G (2001) "D v D (Shared Residence Order)", *Family Law*, 183.
- Dowd, N (1995) "Stigmatizing Single Parents", 18(1) *Harvard Women's Law Journal*, 19.
- DuBois, E, Dunlap, M, Gilligan, C, MacKinnon, C & Menkel-Meadow, C (1985) "Feminist Discourse, Moral Values and the Law - A Conversation", 34 *Buffalo Law Review*, 11-88.
- Duncan, S & Edwards, R (1999) *Lone Mothers, Paid Work and Gendered Moral Rationalities*, Basingstoke, Macmillan.
- Dunn, J (2003) "Contact and Children's Perspectives on Parental Relationships" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 15-32.
- Edwards, J (2006) "Presumption of Shared Residence - a Conundrum for the Government or the Judiciary?" *Family Law*, 30-35.
- Eekelaar, J (1991) "Parental Responsibility: State of Nature or Nature of the State?", 13(1) *JSWFL*, 37-50.
- Eekelaar, J (2001) "Family Law: The Communitarian", 21(1) *OJLS*, 181-190, p181.
- Eekelaar, J (2005) "Personal Obligations" in Maclean, M (Ed) *Family Law and Family Values*, Oxford, Hart Publishing, 9-26.
- Egerö, M-A (2004) "Misshandlande Pappa Sällan Sedd som Riskfaktor", 1 *Socionomen*, 19-23.
- Ekbom, I & Landberg Å (2007) *Innerst Inne var man Rädd*, Stockholm, Rädda Barnen & Socialstyrelsen.
- Ellingsæter, A L (1998) "Dual Breadwinner Societies: Provider Models in the Scandinavian Welfare States", 41(1) *Acta Sociologica*, 59-73.
- Elrod, L & Dale, M (2008) "Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance", 42(3) *Family Law Quarterly*, 381-418.
- Emtestam, G (2001a) "Barn Lider i Onödan", 3 *Socionomen*, 29-33.
- Emtestam, G (2001b) *16 Barn med Separerade Föräldrar*, Stockholm, Socialstyrelsen.
- Emtestam, G (2002) "Barn Flyttar Gärna mellan Två Hem", 6 *Socionomen*, 20-21.
- Eriksson, M & Hester, M (2001) "Violent Men as Good Enough Fathers? A Look at England and Sweden" 7(7) *Violence Against Women*, 779-798.
- Eriksson, M & Näsman, E (2008) "Participation in Family Law Proceedings for Children Whose Father is Violent to their Mother", 15(2) *Childhood*, 259-275.

- Eriksson, M (2003) *I Skuggan av Pappa*, Stehag, Sweden, Förlags AB Gondolin.
- Esping-Andersen, G (1990) *The Three Worlds of Welfare Capitalism*, Cambridge, Polity Press.
- Ewerlöf, G & Sverne, T (1999) *Barnets Bästa (4th Ed)*, Stockholm, Norstedts Juridik AB.
- Ferri, E & Smith, K (1996) *Parenting in the 1990s*, London, Family Policy Studies Centre.
- Fineman, M & Opie, A (1987) "The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce", *Wisconsin Law Review*, 107-158.
- Fineman, M (1993) "Our Sacred Institution: The Ideal of the Family in American Law and Society", *Utah Law Review*, 387-405.
- Fineman, M (1995) "Images of Mothers in Poverty Discourse" in Fineman, M & Karpin, I (Eds) *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*, New York, Columbia University Press, 205-223.
- Fineman, M (2001) "Fatherhood, Feminism And Family Law", 32(4) *McGeorge Law Review*, 1031-1049.
- Fortin, J, Ritchie, C & Buchanan, A (2006) "Young Adults' Perceptions of Court-ordered Contact" 18(2) *CFLQ*, 211-230.
- Fox Harding, L (1996) "Parental Responsibility: The Reassertion of Private Patriarchy?" in Silva, E B (Ed) *Good Enough Mothering? Feminist Perspectives on Lone Motherhood*, London, Routledge, 131-147.
- Fredman, S (2006) "Human Rights Transformed: Positive Duties and Positive Rights", *Public Law*, 498-520.
- Freeman, M (2000) "Disputing Children" in Katz, S, Eekelaar, J & Maclean, M (Eds) *Cross Currents: Family Law and Policy in the US and England*, Oxford, OUP, 441-470.
- Frug, M (1992) *Postmodern Legal Feminism*, New York, Routledge.
- Gähler, M (2001) "Bara en Mor – Ensamstående Mödrars Ekonomiska Livsvillkor i 1990-talets Sverige" in SOU2001:54, 15-99.
- Geekie, C (2008) "Relocation and Shared Residence: One Route or Two?" *Family Law*, 446-448.
- Geldof, B (2003) "The Real Love that Dare Not Speak its Name: A Sometimes Coherent Rant" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 171-200.
- George, R (2007) "Joint Residence: Practitioners' Perspectives in England and France", *International Family Law Journal*, 28-32.
- Gillies, V (2005) "Meeting Parents' Needs? Discourses of 'Support' and 'Inclusion' in Family Policy, 25(1) *Critical Social Policy*, 70-90.

- Gilligan, C (1982) *In a Different Voice*, Harvard, Harvard University Press.
- Gilmore, S (2006a) "Contact/Shared Residence and Child Well-Being: Research Evidence and its Implications for Legal Decision-Making", 20(3) *IJLPF*, 344-365.
- Gilmore, S (2006b) "Court Decision-making in Shared Residence Order Cases: A Critical Examination", 18(4) *CFLQ*, 468.
- Gilmore, S (2008) "The Assumption that Contact is Beneficial: Challenging the 'Secure Foundation'", *Family Law* 1226.
- Hale, B & Hunter, R (2008) "A Conversation with Baroness Hale", 16(2) *Feminist Legal Studies*, 237-248.
- Hale, B (1999) "The View from Court 45", 11(4) *CFLQ*, 377-386.
- Hall, V (1997) "Domestic Violence and Contact", *Family Law*, 813-818.
- Hantrais, L (2009) *International Comparative Research: Theory, Methods and Practice*, London, Palgrave.
- Harris-Short, S & Miles, J (2007) *Family Law: Text, Cases and Materials*, Oxford, OUP.
- Harty, M & Wood, J (1991) "From Shared Care to Shared Residence", *Family Law*, 430-433.
- Hasson, E (2003) "Setting a Standard or Reflecting Reality? The 'Role' of Divorce Law, and the Case of the Family Law Act 1996", 17(3) *IJLPF*, 338-365.
- Hathaway, S (1997) "Committal for no Contact", *Family Law*, 355-356.
- Hayes, M & Williams, C (1999) *Family Law: Principles, Policy and Practice*, London, Butterworths.
- Hearn, J (2002) "Men, Fathers and the State: National and Global Relations" in Hobson, B (Ed) *Making Men into Fathers: Men, Masculinities and the Social Politics of Fatherhood*, Cambridge, CUP, 245-272.
- Herring, J (2001) "Parents and Children" in Herring, J (Ed) *Family Law: Issues, Debates, Policy*, Cullompton, Devon, Willan Publishing.
- Hobson, B & Takahashi, M (1997) "The Parent/worker Model: Lone Mothers in Sweden", in Lewis, J (Ed) *Lone Mothers in European Welfare Regimes*, London, Jessica Kingsley, 121-139.
- Hough, B (2001) "A Material Change of Use: The Rise and Rise of the Communitarian Model", *Journal of Planning & Environment Law*, 632-644.
- Hunt, J, Masson, J & Trinder, L (2009) "Shared Parenting: the Law, the Evidence and Guidance from Families Need Fathers", *Family Law*, 831-836.
- Jackson, E (1997) "Book Review: Frances Olsen, *Feminist Legal Theory*", 5(2) *Feminist Legal Studies*, 121-125.
- James, A (1992) "An Open or Shut Case? Law as an Autopoietic System" 19(2) *Journal of Law and Society*, 271-283.

- James, A (2003) "Squaring the Circle - the Social, Legal and Welfare Organisation of Contact" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 133-151.
- James, A, James, A & McNamee, S (2003) "Constructing Children's Welfare in Family Proceedings" *Family Law*, 889-895.
- James, A, James, A, & McNamee, S (2004) "Turn Down the Volume - Not Hearing Children in Family Proceedings", 16(2) *CFLQ*, 189.
- James, G (2006) "The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?" 35(3) *Industrial Law Journal*, 272.
- Johnson, S (2009) "Shared Residence Orders: For and Against" *Family Law* 131.
- Johnston, J (1994) "High Conflict Divorce" 4 *The Future of Children*, 165-182.
- Jolly, S (1995) "Implacable Hostility, Contact and the Limits of Law", 7(3) *CFLQ*, 228-235.
- Kaganas, F & Day Sclater, S (2004) "Contact Disputes: Narrative Constructions of Good Parents" 12(1) *Feminist Legal Studies*, 1-27.
- Kaganas, F & Piper, C (2002) "Shared Parenting - a 70% Solution?" 14(4) *CFLQ*, 365-379.
- King, M & Piper, C (1990) *How the Law Thinks about Children*, Aldershot, Gower Publishing.
- King, M & Piper, C (1995) *How the Law Thinks About Children (2nd Ed)*, Aldershot, Arena.
- King, M (1987) "Playing the Symbols - Custody and the Law Commission", *Family Law* 186-191.
- King, M (1999) "Being Sensible: Images and Practices of the New Family Lawyer" 28(2) *Journal of Social Policy* 249-273.
- Kipp, M (2003) "Maximizing Custody Options", 79(1) *North Dakota Law Review*, 59-82.
- Kliman, J & Forsberg, G (1998) "American Welfare Reform and the Swedish Welfare State", 10(1) *Journal of Feminist Family Therapy*, 47-68.
- Kruk (1994) "The Disengaged Non-custodial Father: Implications for Social Work Practice with the Divorced Family", 39(1) *Social Work*, 15-25.
- Kurki-Suoni, K (1995) "Gemensam Vårdnad - Vad Döljer Man med Barnets Bästa?" in Nordborg, G (Ed) 13 *Kvinnoperspektiv på Rätten*, Uppsala, Iustus Förlag, 169-196.
- Kurki-Suonio, K (2000) "Joint Custody as an Interpretation of the Best Interests of the Child in a Critical and Comparative Perspective", 14(3) *IJLPF*, 183-205.
- Laing, K (2006) "Doing the Right Thing: Cohabiting Parents, Separation and Child Contact", 20(2) *IJLPF*, 169-179.

- Land, H (2002) "Spheres of Care in the UK: Separate and Unequal", 22(1) *Critical Social Policy*, 13-31.
- Lawler, S (1999) "Children Need but Mothers only Want: the Power of 'Needs Talk in the Constitution of Childhood", in Seymour, J & Bagguley, P (Eds) *Relating Intimacies: Power and Resistance*, Basingstoke, Macmillan Press Ltd, 64-88.
- Lewis, J (1997) *Lone Mothers in European Welfare Regimes*, London & Philadelphia, Jessica Kingsley.
- Luhmann, N (1989) "Law as a Social System", 83(1) *Northwestern University Law Review*, 136-150.
- Lundqvist, Å & Roman, C (2003) "Önska, Välja och Vilja", *Sociologisk Forskning*, 12-33.
- Lundqvist, Å (2008) "Familjens Kris: Fem Decennier av Svensk Familjepolitik", *Tidning för Genusvetenskap*, 79-93.
- Maccoby, E & Mnookin, H (1994) *Dividing the Child: Social and Legal Dilemmas of Custody*, Harvard, Harvard University Press.
- MacKinnon, C (1991) "Difference and Dominance: On Sex Discrimination", in Bartlett, K & Kennedy, R (Eds) *Feminist Legal Theory: Readings in Law and Gender*, Boulder, Westview Press, 81-94.
- Maclean, M & Eekelaar, J (1997) *The Parental Obligation: A Study of Parenthood across Households*, Oxford, Hart Publishing.
- Maclean, M & Mueller-Johnson, K (2003) "Supporting Cross-Household Parenting: Ideas about 'the Family', Policy Formation and Service Development across Jurisdictions" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 117-132.
- Mahon, R (2002) "Gender and Welfare State Restructuring: Through the Lens of Child Care" in Michel, S & Mahon, R (Eds) *Child Care Policy at the Crossroads: Gender and Welfare State Restructuring*, London, Routledge, 1-27.
- Maidment, S (1984) *Child Custody and Divorce: the Law in Social Context*, London, Croom Helm.
- Masson, J (2006) "Consent Orders in Contact Cases: A Survey of Resolution Members", *Family Law*, 1041-1044.
- McIntosh, J (2009) "Legislating for Shared Parenting: Exploring some Underlying Assumptions", 47(3) *Family Court Review*, 389-400.
- McKie, L, Bowlby, S & Gregory, S (2001) "Gender, Caring and Employment in Britain", 30(2) *Journal of Social Policy*, 233-258.
- Meisaari-Polsa, T (1997) "Sweden: A Case of Solidarity and Equality" in Kaufmann, F-X, Kuijsten, A, Schulze, H-J and Strohmeier, K (Eds) *Family Life and Family Policies in Europe, Volume 1*, 302-347.

- Melli, M & Brown, P (2008) "Exploring a new Family Form – the Shared Time Family", 22(2) *IJLPF*, 231-269.
- Mitchell, J (2003) "Shared Care – Shared Benefits?" *Family Law*, 321-326.
- Mitchell, J (2004) "Shared Residence: Panacea or Problem?" *New Law Journal*, 1642-1644.
- Moffat, G (2007) "Work-life Balance and Employment Law: Cultural Change or Mission Impossible?" in Probert, R (Ed) *Family Life and the Law: Under One Roof*, Farnham, Ashgate Publishing, 135-158.
- Morgan, P (1998) "An Endangered Species?" in Kiernan, K, Land, H & Lewis, J (Eds) *Lone Mother Families in Twentieth Century Britain*, Oxford, OUP, 65-82.
- Murray, C (1996) "The Emerging British Underclass" in Lister, R (Ed) *Charles Murray and the Underclass: the Developing Debate*, London, Institute of Economic Affairs, 27-53.
- Neale, B & Smart, C (1997a) "'Good' and 'Bad' Lawyers?: Struggling in the Shadow of the New Law", 19(4) *JSWFL*, 377-402.
- Neale, B & Smart, C (1997b) "Arguments Against Virtue - Must Contact be Enforced?", *Family Law* 332-336.
- Neale, B & Smart, C (1997c) "Experiments with Parenthood?" *Sociology*, 201-219.
- Neale, B, Flowerdew, J & Smart, C (2003) "Drifting Towards Shared Residence?", *Family Law*, 904-908.
- Neale, B, Smart, C & Wade, A (2001) *The Changing Experience of Childhood: Families and Divorce*, Cambridge, Polity Press.
- Nicholson, L (1994) "The Myth of the Traditional Family" in Nelson, H (Ed) *Feminism and Families*, 27-42.
- Nilsson, E (1998) *Att Dela Ett Barn – Tvistiga Vårdnads mål*, Stockholm, Stiftelsen Allmänna Barnhuset & Socialstyrelsen.
- Nordborg, G (1999) "Kärlek och Ekonomi – Juridiskt Undantagstillstånd?" *Kvinnovetenskaplig Tidskrift*, 49-61.
- O'Donovan, K (1985) *Sexual Divisions in Law*, London, Weidenfield & Nicholson.
- O'Donovan, K (1993) *Family Law Matters*, London, Pluto Press.
- Okin, S (1993) "Justice, Gender and the Family" in Minow, M (Ed) *Family Matters: Readings on Family Lives and the Law*, New York, The New Press, 125-129.
- Okin, S (1994) "Families and Feminist Theory: Some Past and Present Issues" in Nelson, H (Ed) *Feminism and Families*, 13-26.
- Oláh, L (1998) "'Sweden: The Middle Way' A Feminist Approach", 5(1) *European Journal of Women's Studies*, 47-67.
- Oláh, L (2001) "Policy Changes and Family Stability: The Swedish Case", 15(1) *IJLPF*, 118-134.

- Olsen, F (1983) "The Family and the Market: A Study of Ideology and Legal Reform", 96(7) *Harvard Law Review*, 1497-1528.
- Olsen, F (1985) "The Myth of State Intervention in the Family" 18(4) *University of Michigan Journal of Law Reform*, 835-864.
- Olsen, F (1990) "Feminism and Critical Legal Theory: An American Perspective", 18(3) *International Journal of the Sociology of Law*, 199-215, p199.
- Olsen, F (1993) "The Politics of Family Law" in Minow, M (Ed) *Family Matters: Readings on Family Lives and the Law*, New York, The New Press, 336-343.
- Parbring, B (2004) "Mjukismän och Velourpappor", *Genus*, 10-12.
- Pascall, G (1999) "UK family policy in the 1990s: the case of New Labour and lone parents" 13(3) *IJLPF*, 258-273
- Peacey, V & Hunt, J (2008) Problematic Contact after Separation and Divorce? A National Survey of Parents, London. One Parent Families/Gingerbread.
- Pearce, J, Davis, G & Barron, J (1999) "Love in a Cold Climate - Section 8 Applications under the Children Act 1989", *Family Law*, 22-28.
- Pihl, A & Thunander, T (2003) *Rätten till ett Barn*, Stockholm, Prisma.
- Piper, C (1995) "In Re O: Comment", 17(3) *JSWFL*, 355-359, p358
- Piper, C (1999) "How Do You Define a Family Lawyer?" 19(1) *Legal Studies*, 93-111.
- Pogrebin, L (1993) "The New Father" in Minow, M (Ed) *Family Matters: Readings on Family Lives and the Law*, New York, The New Press, 130-141.
- Popenoe, D (1992) "Family Decline in the Swedish Welfare State" 109 *Public Interest (USA)*, p114.
- Pryor, J & Rodgers, B (2001) *Children in Changing Families*, Blackwell, 198-204.
- Pylkkänen, A (2007) "Liberal Family Law in the Making: Nordic and European Harmonisation", 15(3) *Feminist Legal Studies*, 289-306.
- Ramsa, P (2004) "What is Anti-social Behaviour?", *Criminal Law Review*, 908-925.
- Reece, H (2003) *Divorcing Responsibly*, Oxford, Hart Publishing.
- Rejmer, A (2003) *Vårdnadstvister*, Lund, Sweden, Lund Studies in the Sociology of Law.
- Rejmer, A (2002) "Barnperspektiv och Barnet Bästa i Tingsrätts Handläggning av Vårdnadstvister", *Svensk JuristTidning*, 139-156.
- Rhoades, H (2002) "The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New Father'" 16(1) *IJLPF*, 71-94.
- Rhode, D (1991) "Feminist Critical Theories", in Bartlett, K & Kennedy, R (Eds) *Feminist Legal Theory: Readings in Law and Gender*, Boulder, Westview Press, 333-350.

- Rifkin, J (1980) "Toward a Theory of Law and Patriarchy", 3 *Harvard Women's Law Journal*, 83-95.
- Roberts, M (2006) "Voluntary Participation in Family Mediation", *Family Law*, 57-60.
- Robinson, N (2006) "A New Model of Court-Directed Mediation", *Family Law*, 2006, 139-144.
- Roche, J (1991) "The Children Act 1989: Once a Parent Always a Parent" 13(5) *JSWFL*, 345-361.
- Roman, C (1999a) "Inte av Kärlek Allena: Makt I Hemarbetets Fördelning", *Sociologisk Forskning*, 33-51.
- Roman, C (1999b) "Familjelivets Organisering" *Kvinnovetenskaplig Tidskrift*, 3-20.
- Ryrstedt, E & Mattson, T (2008) "Children's Rights to Representation: A Comparison between Sweden and England", 22(1) *IJLPF*, 135-147.
- Ryrstedt, E (2006) "Family Law and Social Law: Reciprocal Dependency in a Comparative Perspective", 20(1) *IJLPF*, 44-52.
- Ryrstedt, E (2007) "Tvistlösning mellan Separerade Föräldrar – för Barnets Bästa", *Svensk JuristTidning*, 389-414.
- Ryrstedt, E (2009a) "Familjerätt och Folkbokföring" *Juridisk Tidskrift*, 564-575.
- Ryrstedt, E (2009b) "Samarbetssamtal" *Svensk JuristTidning*, 821-842.
- Ryrstedt, E (2009c) "Separate Representation and Family Courts – do we need them in the Nordic Countries?" 21(2) *CFLQ*, 185-196.
- Saldeen, Å (2001) *Barn och Föräldrar (4:e upplagan)*, Uppsala, Iustus Förlag.
- Sandberg, K (1989) "Best Interests and Justice" in Smart, C & Sevenhuijsen, S (Eds) *Child Custody and the Politics of Gender*, London, Routledge, 100-126
- Sandström, L & Wetter, I (1999) *Barnet och Lagen: Lagtexter med Kommentarer Rörande Barn*, Stockholm, Kommentus Förlag.
- Schiratzki, J (1999) "Vad Betyder det att ha Gemensam Vårdnad?" *Juridisk Tidskrift*, 1049-1055.
- Schiratzki, J (2003) "Barnets Vilja Avgörande för Svensk Domsrätt", *Juridisk Tidskrift*, 657-664.
- Schiratzki, J (2004) "Högsta Domstolen Meddelar Dom om Umgänge med Barn – Kränks Europakonventionen?" 15(3) *Juridisk Tidskrift*, 642-652.
- Schiratzki, J (2005) "Litigation in the Shadow of Mediation: Supporting Children in Sweden" in Maclean, M (Ed) *Family Law and Family Values*, Oxford, Hart Publishing, 123-135.
- Schiratzki, J (2006) *Barnrättens Grunder (3rd Ed)*, Lund, Sweden, Studentlitteratur.
- Schyberg, D (1998) "Barn med Skilda Föräldrar" in Rädde Barnen (Ed) *Barnets Rätt till Båda Föräldrarna*, Stockholm, Rädde Barnen, 91-101.

- Scott, E & Derdeyn, A (1984) "Rethinking Joint Custody", 45(2) *Ohio State Law Journal* 455-498.
- Scott, E (1992) "Pluralism, Parental Preference and Child Custody", 80(3) *California Law Review*, 615-672.
- Sevenhuijsen, S (2002) "An Approach through the Ethic of Care" in Carling, A, Duncan, S & Edwards, R (Eds) *Analysing Families: Morality and Rationality in Policy and Practice*, London, Routledge, 129-144.
- Simpson, B, Jessop, J & McCarthy, P (2003) "Fathers after Divorce" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 201-219.
- Singer, A (2007) "Samarbetsförmåga och Gemensam Vårdnad" *Juridisk Tidskrift*, 148-155.
- Singer, A (2008) "Active Parenting or Solomon's Justice? Alternating Residence in Sweden for Children with Separated Parents", 4(2) *Utrecht Law Review*, 35-47.
- Singer, J & Reynolds, W (1988) "A Dissent on Joint Custody", 47(2) *Maryland Law Review*, 497-523.
- Singer, J (2009) "Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift", 47(3) *Family Court Review*, 363-370, p363.
- Sjösten, M (1998) *Vårdnad, Boende och Umgänge: Bestämmelserna i Föräldrabalken och Närliggande Regler*, Stockholm, Norstedts Juridik.
- Sjösten, M (2000) "Vårdnad, Boende och Umgänge", *Juridisk Tidskrift*, 337-339.
- Skjørten, K & Barlindhaug, R (2007) "The Involvement of Children in Decisions about Shared Residence", 21(3) *IJLPF*, 373-385.
- Slaughter, M (1995) "The Legal Construction of 'Mother'" in Fineman, M & Karpin, I (Eds) *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*, New York, Columbia University Press, 73-100.
- Smart, C & Neale, B (1999) *Family Fragments?*, Cambridge, Polity Press.
- Smart, C (1982) "Regulating Families or Legitimizing Patriarchy" 10(1) *International Journal of the Sociology of Law*, 1-18.
- Smart, C (1989a) *Feminism and the Power of Law*, Routledge, London.
- Smart, C (1989b) "Power and the Politics of Child Custody" in Smart, C & Sevenhuijsen, S (Eds) *Child Custody and the Politics of Gender*, London, Routledge, 1-26.
- Smart, C (1991) "The Legal and Moral Ordering of Child Custody" 18(4) *Journal of Law and Society*, 485-500.
- Smart, C (1995) "Losing the Struggle for Another Voice: the Case of Family Law", *Dalhousie Law Journal*, 173-195.

- Smart, C (1999) "The 'New' Parenthood: Fathers and Mothers after Divorce", in Silva, E & Smart, C (Ed) *The New Family?*, London, Sage Publications, 101-114.
- Smart, C (2004) "Equal Shares: Rights for Fathers or Recognition for Children?", 24(4) *Critical Social Policy*, 484-503
- Smart, C (2006) "The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood" in Diduck, A & O'Donovan, K (Eds) *Feminist Perspectives on Family Law*, Abingdon, Routledge-Cavendish, 123-138.
- Smart, C & May, V (2004) "Why Can't They Agree? The Underlying Complexity of Contact and Residence Disputes", 26(4) *JSWFL*, 347-360.
- Smith, C (2004) "Autopoietic Law and the 'Epistemic Trap': A Case Study of Adoption and Contact", 31(3) *Journal of Law and Society*, 318-44.
- Spencer, S (2008) "Benchmarks: Family Residence", 39 *Law Society Gazette*, 24.
- Spencer-Dawe, E (2005) "Lone Mothers in Employment: Seeking Rational Solutions to Role Strain", 27(3-4) *JSWFL*, 251-264.
- Svallfors, S, Halvorsen, K, Andersen, J (2001) "Work Orientation in Scandinavia: Employment Commitment and Organizational Commitment in Denmark, Norway and Sweden", 44 *Acta Sociologica*, 139-156.
- Teubner, G (1993) *Law as an Autopoietic System*, London, Blackwell.
- Teubner, G (2001) "Alienating Justice: On the Surplus Value of the Twelfth Camel", in Nelken, D & Pribán, J (Eds) *Law's New Boundaries: Consequences of Legal Autopoiesis*, Aldershot, Ashgate, 21-44.
- Teubner, G, Schiff, D & Nobles, R (2003) "The Autonomy of Law: Introduction to Legal Autopoiesis", in Schiff, D & Nobles, R (Eds) *Jurisprudence*, London, Butterworths, 897-954.
- Trinder, L (2003) "Working and Not Working Contact After Divorce" in Bainham, A, Lindley, B, Richards, M & Trinder, L (Eds) *Children and their Families: Contact, Rights and Welfare*, Oxford, Hart Publishing, 387-406.
- Tronto, J (1993) *Moral Boundaries: A Political Argument for an Ethic of Care*, London,
- Upcraft, K (2009) "Work and Families Act 2006 Phase Two – Will They or Won't They?" 18(3) *Tolley's Practical NIC Newsletter*, 21.
- Vallance-Webb, G (2008) "Child Contact: Vengeful Mothers, Good Fathers and Vice Versa", *Family Law*, 678.
- van Krieken, R (2005) "The 'Best Interests of the Child' and Parental Separation: On the 'Civilizing of Parents'", 68(1) *MLR*, 25-48.
- Vonèche, L & Bastard, B (2005) "Can Co-Parenting be Enforced? Family Law Reform and Family Life in France" in Maclean, M (Ed) *Family Law and Family Values*, Oxford, Hart Publishing, 94-106.

- Wallbank, J (1998) "Castigating Mothers: The Judicial Response to 'Wilful' Women in Disputes over Paternal Contact in English Law", 20(4) *JSWFL*, 357-376.
- Wallbank, J (2009) "Parental Responsibility and the Responsible Parent: Managing the 'Problem' of Contact" in Probert, R, Gilmore, S & Herring, J (Eds) *Responsible Parents and Parental Responsibility*, Oxford, Hart Publishing, 295-313.
- Warin, J (1999) *Fathers, Work and Family Life*, Family Policy Studies Centre/Joseph Rowntree Foundation, London.
- Wennberg, L (2001) "Ensamstående Mödrar – Försörjda av Män eller Rätt till Välfärd?" in Burman, M & Gunnarson Å (Eds) *Familjeföreställningar*, Uppsala, Sweden, Iustus Förlag, 231-249.
- Weyland, I (1995) "Judicial Attitudes to Contact and Shared Residence since the Children Act 1989", 17(4) *JSWFL*, 445-459.
- Wickström, A (1998) *1998 Års Vårnadsreform och Socialtjänsten*, Stockholm, Norstedts Förlag.
- Wickström, A (2001) "Nyare Rättspraxis om Vårdnad om Barn", *Svensk Juristtidning*, 666-675.
- Williams, J (1991) "Deconstructing Gender" in Bartlett, K & Kennedy, R (Eds) *Feminist Legal Theory: Readings in Law and Gender*, Boulder, Westview Press, 95-123.
- Wilson, G (2006) "The Non-Resident Parental Role for Separated Fathers: A Review", 20(3) *IJLPF*, 286-316.
- Wormwood, A & Floyd, E (2009) "Family: The New Vogue?" 159(7358) *New Law Journal*, 298.
- Wright, K (2007) "The Role of Solicitors in Divorce: A Note of Caution", 19(4) *CFLQ*, 481.
- Åkerman, I & Fagerlind, S (1998) *Familjerätt i Besparingstider*, Socialstyrelsen, Stockholm.
- Åkerman, I (1998) "Förändrad Lagstiftning" in Rädde Barnen (Ed) *Barnets Rätt till Båda Föräldrarna*, Stockholm, Rädde Barnen, 23-25.

9.2 OFFICIAL DOCUMENTS – UK

- Cafcass (2008) *Putting your Children First: a Guide for Separating Parents*, London, DCSF.
- Department of Health (1991) *The Children Act 1989: Guidance and Regulations*, Vol 1, London, HMSO.
- Equal Opportunities Commission (2007) *Completing the Revolution: The Leading Indicators*, London, EOC.

- Hunt, J & Macleod, A (2008) *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce*, London, TSO.
- Law Commission (1986) *Family Law Review of Child Law: Custody*, Working Paper No 96, London, HMSO.
- Law Commission (1988) *Family Law Review of Guardianship and Custody*, No 172, London, HMSO.
- Ministry of Justice (2009) *Judicial and Court Statistics 2008*, London, TSO.
- Office for National Statistics (2007) *Social Trends 37*, London, ONS.
- Smart, C, May, V, Wade, A & Furniss, C (2003) *Residence and Contact Disputes in Court: Volume 1*, Department for Constitutional Affairs.

9.3 OFFICIAL DOCUMENTS – SWEDEN

- Barnombudsmannen (2005) *När Tryggheten står på Spel: Barnombudsmannen*
- Barnombudsmannen (2007) *Upp till 18 – Fakta om Barn och Ungdom: Barnombudsmannen Rapporterar 2007:04*, Stockholm, Barnombudsmannen.
- Gustavsson, T (1999) "Barn- och Ungdomspsykiatriska Synpunkter på Vårdnad, Boende och Umgänge" in *DS1999:57*, Appendix 1
- Riksförsäkringsverket (2003a) *Underhållsstöd: Ett Urval av Kamrarrättsdomar*, RFV Anser 2003:3, Stockholm, Riksförsäkringsverket.
- Riksförsäkringsverket (2003b) *Underhållsstöd vid Växelvis Boende: Utvärdering av Reformen*, RFV Analyserar 2003:1, Stockholm, Riksförsäkringsverket
- Socialdepartementet (2004a) *Föräldrapenning, Pappornas Uttag av Dagar, Fakta och Analys*, Stockholm, Regeringskansliet.
- Socialdepartementet (2004b) *Promemoria om Slopas Underhållsstöd vid Växelvis Boende*, Stockholm, Regeringskansliet
- Socialstyrelsen (2003a) *Vårdnad, Boende och Umgänge: Stöd för Rättstillämpning och Handläggning inom Socialtjänstens Familjerätt*, Stockholm, Socialstyrelsen.
- Socialstyrelsen (2003b) *Socialnämndens Handläggning av vissa Frågor om Vårdnad, Boende och Umgänge*, SOSFS 2003:14, Stockholm, Regeringskansliet.
- Socialstyrelsen (2004b) *Växelvis Boende (2a upplagan)*, Stockholm, Socialstyrelsen.
- Socialstyrelsen (2004a) *Glimtar av Barn från Vårdnads-, Boende- och Umgängedomar 1999 respektive 2002*, Socialstyrelsen, Stockholm.
- Socialstyrelsen (2007) *Hur gör Socialtjänstens Familjerätt Riskbedömningar i Utredningar om Vårdnad, Boende och Umgänge?*, Socialstyrelsen, Stockholm.
- Tauberman, A-C (1999) "Swedish Family Policy – Main Steps and Present Concerns" in Socialdepartementet (1996) *Slutbetänkande från Kommittén för*

FN:s *Familjeår*, SOU1996:37, Fritzes Offentliga Publikationer, Stockholm, Appendix 3, 23-26.

9.3.1 Legislative Proposals

Justitiedepartementet (1944) *Förslag till lag om ändring i 18 och 25 kap. Strafflagen*, Proposition 1944:13, Fritzes Offentliga Publikationer, Stockholm.

Justitiedepartementet (1997) *Vårdnad, Boende och Umgänge*, Proposition 1997/98:7, Fritzes Offentliga Publikationer, Stockholm.

Justitiedepartementet (2005) *Delat Barnbidrag vid Växelvis Boende m.m.*, Proposition 2005/06:20, Fritzes Offentliga Publikationer, Stockholm.

Justitiedepartementet (2005) *Nya Vårdnadsregler*, Proposition 2005/06:99, Fritzes Offentliga Publikationer, Stockholm.

Justitiedepartementet (2009) *En Reformerad Grundlag*, Proposition 2009/10:80, Fritzes Offentliga Publikationer, Stockholm.

9.3.2 Official Enquiries

Socialdepartementet (1997) *Barnkommitténs huvudbetänkande: Barnets bästa i främsta rummet*, SOU 1997:116, Fritzes Offentliga Publikationer, Stockholm.

Socialdepartementet (2001) *Ur Fattigdomsfällan: Slutbetänkande från Familjeutredningen*, SOU 2001:24, Fritzes Offentliga Publikationer, Stockholm.

Finansdepartementet (2004) *Tid och Pengar – Dela Lika?*, SOU 2004:70, Fritzes Offentliga Publikationer, Stockholm.

Justitiedepartementet (2005) *Vårdnad, Boende, Umgänge: Barnets bästa, föräldrars ansvar*, SOU 2005:43, Fritzes Offentliga Publikationer, Stockholm.

Justitiedepartementet (2007) *Äktenskap för par med samma kön – Vigsselfrågor*, SOU 2007:17, Fritzes Offentliga Publikationer, Stockholm.

Justitiedepartementet (2007) *Beslutanderätt vid gemensam vårdnad m.m.*, SOU 2007:52, Fritzes Offentliga Publikationer, Stockholm.

9.3.3 Departmental Papers

Justitiedepartementet (1989) *Vårdnad och Umgänge*, Ds 1989:52, Fritzes Offentliga Publikationer, Stockholm.

Justitiedepartementet (1990) *Underhållsstöd vid Växelvis Boende*, Ds 1999:30, Fritzes Offentliga Publikationer, Stockholm.

Justitiedepartementet (1999) *Gemensam Vårdnad för Ogifta Föräldrar*, Ds 1999:57, Fritzes Offentliga Publikationer, Stockholm.

9.4 OTHER SOURCES

Brors, H (2003) "Kvinnan får Alltid Anpassa Sig", 530 *Offensiv*, *Rättvisepartiet Socialisternas Veckotidning*, 3rd January 2003 available at <http://www.socialisterna.org/offensiv/arkiv/530/vardnadstvist.html> accessed on 17th November 2009.

Carlsson, L & Öhrn, M (2004) "Med tiden i fokus", C-Uppsats, Luleå, Luleå Tekniska Universitet.

Coe, T, *Shared Parenting: The Right Starting Point?* Equal Parenting Council <http://www.equalparenting.org/shared-parenting/index.php>

Equal Opportunities Commission (2007) *Completing the Revolution: The Leading Indicators*, EOC, London. Available at: www.gender-agenda.co.uk/downloads/GenderEqualityIndex.pdf.

Eriksson, M (2004) "Socialsekreterares Syn på Mäns Våld i Vårdnadsärenden", 2 *Kvinnotryck*, http://roks.se/kvinnotryck/2004/kt2_04_rep_maria_eriksson.html

Families Need Fathers' Policy Paper on Shared Residence, <http://fnf.org.uk.uk3.clientproof.co.uk/law-policy/shared-residence>.

Families Need Fathers', "Society is Still Failing our Children, Children's Rights to both Parents are still not being Supported", <http://fnf.org.uk.uk3.clientproof.co.uk/news-events/press-releases/2006-archive/060614>.

Feministiskt Initiativ (2006) *Enastående och Makalösa Mammor*, Stockholm, Feministiskt Initiativ, p4, <http://www.feministisktinitiativ.se/downloads/grasrot/enastående.pdf> accessed 15th December 2009.

Gumbel, I (2003) "Språket i Vårdnadsutredningen påverkar Domen", 3 *Kvinnotryck*, http://www.roks.se/kvinnotryck/kt3_03_rep.html; SOU 2005:43, p118.

Gumbel, I (2003) "Språket i Vårdnadsutredningen påverkar Domen", 3 *Kvinnotryck*, http://www.roks.se/kvinnotryck/kt3_03_rep.html.

Gustafsson, M (2002) *Vad som kan Dölja sig bakom Gemensam Vårdnad och Barnets Bästa*, Mälardalens Högskola, Västerås.

Juridiska fakultetsnämnden (2005) *Yttrande angående Justitiedepartementets Remiss: Vårdnad, boende, umgänge – Barnets bästa, föräldrars ansvar* (SOU 2005:43), Diarienummer SU 302-1311-05, dated 18th July 2005, accessed online. <http://www.juridicum.su.se/jurweb/dokument/remisser/Barnets.pdf>

- Jämställdhetsombudsmannen (2004) Remissyttrande angående Promemoria om slopat underhållsstöd vid växelvis boende S2004/4656/SF, Ärendenr 525/2004, accessed online <http://www.jamombud.se/dokument/yttrandeoverpro.asp>.
- National Association of Child Contact Centres, "Definitions of Levels of Contact", <http://www.naccc.org.uk/cms2/dmdocuments/Definitions%20of%20contact.pdf>.
- Nordborg, G (2003) "Barn ska ha Rätt till Samma Skydd som Vuxna", 5 *Kvinnotryck*, http://www.roks.se/kvinnotryck/KT5_03_kronika.html.
- Office for National Statistics, "Divorce: England and Wales rate at 29 year low", <http://www.statistics.gov.uk/cci/nugget.asp?id=170>.
- Office for National Statistics, "Population Estimates by Marital Status", <http://www.statistics.gov.uk/cci/nugget.asp?id=2312>.
- Samuel, M, "Families Need Fathers urges Cafcass to back shared parenting", *CommunityCare.co.uk*, <http://www.communitycare.co.uk/Articles/2009/06/19/111879/families-need-fathers-urges-cafcass-to-back-shared-parenting.html>.

10 APPENDIX

The Swedish Law

The Courts

Swedish courts are separated into administrative and general courts, and the latter are organised into the three tiers of approximately 60 district courts (*tingsrätter*), six appeal courts (*hovrätter*) and the Supreme Court (*Högsta Domstolen*).¹ The general courts hear both civil and criminal cases. There are, moreover, no specialised family courts; cases are heard by three lay and one professional judge, all of whom rely on reports and recommendations from social workers known as social welfare investigators (*familjerättssekreterare*). Parents can also reach legally recognised agreements through cooperation talks provided by local social services departments.

Statute and Case Law

The Swedish legal system is, like many continental counterparts, dependent primarily on statute, rather than case law. The main statutes are the codes (*balkar*), which were first introduced in 1734.² Disputes between parents over children are regulated by the Parents Code (*föräldrabalken* or FB), which was enacted in its current form in 1949, and has since been frequently amended. The codes are cited by the abbreviated name, chapter and section (marked by §): FB6§2. Newer pieces of legislation (*lagar*) are often enacted separate from the main codes, and are identified by the name of the act, the year, and a consecutive number: Lag om Registrerat Partnerskap (1994:1117).

Case Law

Case law is markedly less important than in England; as noted in the introduction, appellate judgments are brief and focus exclusively on statutory interpretation.

¹ <http://www.nyulawglobal.org/globalex/sweden.htm>.

² *Ibid.*

Case reports, too, are brief, with few facts and no more than a summary of what has been decided. Reports of cases from the Supreme Court have since 1874 been published in a series similar to the English law reports (*Nytt Juridiskt Arkiv* or NJA). Cases are not cited by parties' names, but instead by the initials of the report followed by the year and the page of the publication (abbreviated as s. for *sida*): NJA2008 s.34. The Supreme Administrative Court produces a year book (*Regeringsrättens Årsbok*, RÅ), while brief, anonymised reports of significant appeal court decisions are published in a further collection (*Rättsfall från hovrätterna* or RÅ). Cases are, again, cited by the reports' initials, followed by the year and the number assigned to this case: RH 1999:12. Reports of cases from the lower courts are sometimes, but not as a general rule, available on internet databases. These cases have been cited by stating the court, the court's internal reference numbers, where available, and the date: Sundsvalls Tingsrätt, Case No T2862-08, 9th July 2009.

Travaux Préparatoires

Commissions of inquiry are appointed by the government each time a proposal for new legislation is under consideration. Commissions are appointed *ad hoc* and frequently include experts in the relevant field as well as legal professionals; their terms of reference are set by the government. Commissions' findings, comments and proposals are published as Swedish Government Official Reports (*Statens Offentliga Utredningar* - SOU), except where the inquiry is carried out by a government ministry, when the report is published in the Ministry Publications Series (*Departementsskrivelser* - Ds).³ These publications are cited by using the relevant abbreviation, the year or publication, and the number allocated to this particular report: SOU 2007:52, p23 or Ds 1999:57, p45. The subsequent proposal for new legislation is known as a government bill (*proposition*); these, too, are cited by year and number.

3 Swedish Parliament Website: http://www.riksdagen.se/templates/R_Page_7053.aspx.