

DRAFT FOR DISCUSSION JULY 2009

GUIDANCE FOR CAF/CASS CASE OFFICERS ON SHARED PARENTING

Executive summary

This Caf/Cass guidance is aimed at helping its practitioners to encourage shared parenting where it is appropriate. It is in two sections:

- A. Definitions, evidence and statistics: It defines shared parenting, reviews the evidence of its impact on children and summarises some statistics on its prevalence.
- B. Finally, it offers some practical guidance on how to encourage shared parenting and advice on when it may not be appropriate.

A: DEFINITIONS, EVIDENCE AND STATISTICS

What is shared parenting?

Caf/Cass wishes to help both parents to continue, after separation or divorce, to play an important role in their children's lives, unless there is a good reason, supported by evidence, not to do so. This is often known as shared parenting, or co-parenting, among other terms.

Shared parenting means, at root, that both parents are actively involved in loving and guiding their child throughout their childhood, following separation or divorce. It means that each child spends a significant amount of time with each parent regularly, and both parents are involved in key decisions concerning their child. What those roles will be will depend on the precise circumstances of each case, but they will usually involve both parents having significant overnight contact, being involved in the child's schooling, important (though not emergency) health issues, moral and religious education, hobbies and so on. (A fuller list is provided in the section below on the legal background.)

Shared parenting does not mean that the child's time is necessarily divided equally between the two parents, though that is an option which should always be considered as a starting point (by Caf/Cass officers as well as the parents themselves) unless there is good reason to advise otherwise. In England, a recent estimate was that 11% of children in separated families share their time equally between both parents.¹

¹ Peacey, V. and Hunt, J. Problematic contact after separation and divorce? A national survey of parents. London. One Parent Families/Gingerbread. 2008 p 19.

It is important to get away from the idea – often said of the family law system generally and Cafcass particularly - that only one parent ‘cares’ while the other parent is simply a source of finance for the caring or at best is an ‘uncle’ to the child. Language such as the ‘parent with care’ or the ‘resident parent’ can convey the false impression to parents seeking improved contact with their children through court applications that some Cafcass practitioners believe that it is only important to preserve a strong relationship between one parent and the child following divorce or separation. Given this sensitivity, Cafcass practitioners need to exercise particular care in their engagement with parents, especially at the start of proceedings.

Shared parenting – the involvement of both parents in a child’s life after divorce or separation - can have a powerfully positive influence on a child’s life. As the Government has said: “We believe that in most cases it is very much in the interests of the child to have an on-going relationship with both parents and so we hope that through improving the system, more non-resident parents will enjoy meaningful ongoing relationships with their children.”² Nicola Brewer, Chief Executive of the Equality and Human Rights Commission, has noted: “The present rights of mothers and fathers appear to support the idea that fathers are 'optional seasoning' in children’s lives while mothers are the main carers.”³ The Children’s Plan published by the Secretary of State for Children, Schools and Families, says: “We know that children benefit enormously from having strong relationships with their fathers, yet public services routinely fail to engage with fathers, particularly when the father does not live with the child. We will work with the Children’s Workforce Development Council and the new National Academy for Parenting Practitioners to ensure that occupational standards and training for the workforce will reflect the need for public services to engage with both father and mother except where there is a clear risk to the child to do so.” The Department’s update ‘The Children’s Plan, One Year On’ said “Those providing help and support to families must engage with fathers as well as mothers, except where there is a clear risk to the child to do so.” It noted progress in this area while emphasising that there was more to be done.⁴

Shared parenting’s primary purpose is to benefit children and improve their life chances. The continuity provided by both parents maintaining

² Department for Constitutional Affairs (DCA), the Department for Education and Skills (DfES) and the Department for Trade and Industry (DTI) Parental Separation: Children’s Needs and Parents’ Responsibilities, London 2004.

³ Speech at launch of ‘Working Better’: see <http://www.equalityhumanrights.com/en/projects/workingbetter/Pages/WorkingBetterinitiative.aspx>

⁴ Department for Children, Schools and Families The Children’s Plan: Building brighter futures London 2007; The Children’s Plan, One Year On London 2008

their active involvement in the child's life is important. It can help them, by giving them positive experiences with both parents. It can also benefit the parent who has the children with them the majority of the time, particularly by alleviating the pressures of being the main parent in terms of contact time and responsibility for day to day care of children; and by making it easier to get paid work where appropriate. It can benefit the other parent by improving their relationships with their children and their ex-partner.

When should Cafcass not encourage shared parenting?

There are of course cases Cafcass deals with where shared parenting would not be appropriate: in particular, where proven domestic violence and/or child abuse are currently involved. Past incidents also need to be considered – in particular their seriousness should be weighed carefully. However, past events should not be seen as automatically ruling out shared parenting. They need to be carefully analysed and rigorously assessed in the context of the child and family's current position, in accordance with the Cafcass Safeguarding Framework.

Such cases may begin with clear evidence of harm, which will rule out shared parenting as an option. Cafcass advice to the Court must take account of the Practice Direction – Residence and Contact Orders: Domestic Violence and Harm (January 2009).

However, other cases may begin with allegations of harm, or concerns may be raised later in proceedings, where proof may not be immediately available. The risks to the parent with care suffering domestic violence after leaving the relationship and during contact must be taken very seriously. (The parent at risk is a woman in the great majority of cases, though men can suffer violence from their ex-partners or other men.) We also need to remember that only a minority of domestic violence cases are reported to the police: between 23 and 35% according to various studies.⁵

On the one hand, Cafcass practitioners must ensure that advice to the Court does not endanger the personal safety of the children or a parent. On the other hand, the court will wish to take appropriate steps, perhaps through finding of fact hearings, to determine the fact and the significance of allegations made by parties in cases. There is practice experience of ill-founded allegations being made, which are determined by the court, following careful consideration, to be without proper foundation. While Cafcass may be unlikely to be asked by the court to be directly involved in finding of fact hearings, the court may on occasion seek Cafcass

⁵ Walby, Sylvia and Allen, Jonathan (2004) Domestic violence, sexual assault and stalking: Findings from the British Crime Survey. Home Office Research Study 276. (London: Home Office); British Crime Survey (1998) (London: Home Office; Dodd, Tricia et al, (2004) Crime in England and Wales 2003-2004 (London: Home Office)

involvement following the hearing. There is anecdotal evidence that there are cases in which allegations of harm arise, not because it reflects reality, but because it is seen as an easy way of depriving the other parent of contact and the opportunity to share the care of their child. Cafcass practitioners, in supporting the courts, need to be alive to the whole spectrum of possibilities and act appropriately as each case demands. Where accusations are made to Cafcass, perhaps in the course of risk identification interviews, above and beyond anything already set out in documentation already before the court and the parties in the case, it is important to ensure that this information is placed before the court. This will enable it to be included in the proceedings, in accordance with judicial direction, and to be commented on by the subject of the accusation. It will be for the court to decide whether these accusations need to be dealt with there.⁶

The Legal Background

English and Welsh law does not use the terms 'shared parenting', or 'co-parenting', though it often figures in cases and discussions on English and Welsh family law more generally. As the Law Lords said on 27 July 2006:

"The court should always have in mind that, in the ordinary way, the rearing of a child by his or her biological parent can be expected to be in the child's best interest, both in the short term, and importantly, in the longer term."⁷

Scottish law is in a similar position, though it spells out the role of both parents in more detail.⁸

The courts have started to list a number of important matters where joint decisions by both parents or by the court are required, such as changing a child's name.⁹ In 2006 the term 'joint residence' was used by the Court of Appeal to distinguish cases where a child has two residences from cases where parents live in the same household. Lower courts continue to use a variety of terms, applying a variety of meanings.

⁶ Practice Direction: Residence And Contact Orders: Domestic Violence And Harm 9th May 2008. On domestic violence see Humphreys, C and Thiara, R. (2002) Routes to Safety: Protection issues facing abused women and children and the role of outreach services. (Bristol: Women's Aid Federation of England); Walby, Sylvia and Allen, Jonathan (2004) Domestic violence, sexual assault and stalking: Findings from the British Crime Survey. Home Office Research Study 276. (London: Home Office); British Crime Survey (1998) (London: Home Office; Dodd, Tricia et al., (2004) Crime in England and Wales 2003-2004 (London: Home Office). False reporting is an under-researched area.

⁷ In re G (Children) [Residence: Same-sex partner] [2006] UKHL 43; [2006] 1W.L.R. 2305

⁸ See Cretney S Family Law In the Twentieth Century OUP Oxford 2003 p 592

⁹ See Cretney et al, op cit p 564.

As noted above, shared parenting goes wider than ‘shared residence orders’ (SROs) as they are sometimes called, though strictly speaking they are residence orders made to two people rather than only one. But since such orders are important in the wider context as a way of giving both parents an opportunity to play a full part in loving and guiding the child, it is worth looking at them a little more closely. An opportunity to make SROs was first provided under the Children Act 1989 in the form of a Section 8 Residence Order as a possible form of legal agreement which put the two parents on an equal footing in legal terms, but the Act did not specify parenting time or the responsibilities and roles of parents in relation to their children: in short, it did not encompass the whole of shared parenting. The 1989 Act simply said:

“11. (4) Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned.”

The courts first took the view that shared residence orders need not be exceptional in 2001, shortly after the relevant provisions had come into force.¹⁰

It is now possible to be much more specific about what actions are covered, in the courts’ views, by the concept of parental responsibility under the 1989 Act (though much of the law derives from pre-1989). The subjects covered are worth spelling out, since they describe a series of parental rights and responsibilities that also figure in shared parenting. They include:¹¹

- (i) Perhaps most significantly, the right to control or direct the child’s upbringing;
- (ii) The right to physical possession;
- (iii) The power to control education;
- (iv) Discipline;
- (v) Choice of religion;
- (vi) Right of services;
- (vii) Administration of property;

¹⁰ D v D (Shared Residence Order) [2001] 1. F.L.R. 495, C.A.

¹¹ Cretney S, Masson J and Bailey Harris R op cit pp 535-545.

- (viii) A responsibility to represent the child in legal proceedings;
- (ix) Consent to medical treatment;
- (x) Consent to marriage;
- (xi) Right to contact with the child (though a 1988 House of Lords judgment made clear this was not a fundamental right, where it conflicted with the child's welfare);
- (xii) Choice of name;

How might shared parenting benefit most children of separated or divorced parents?

The key benefits of shared parenting may be summarised in the following terms.. Most children¹²:

- o want and value contact with both parents;
- o view the non resident parent as an important figure who is still part of the family, and experience the loss of contact as painful;
- o miss the non resident parent and many would like to see more of him/her; and
- o value the effort and commitment of their non resident parent in making a family life for them.

The sharing of parenting tasks has developed rapidly in the last 15 years:

- more fathers take more involved parenting roles in families prior to separation; British fathers (where both parents live together) now undertake nearly half of all childcare. According to a 2007 Equal Opportunities Commission study, mothers recorded an average of 2 hours 32 minutes per day looking after their own children, compared with 2 hours 16 minutes by fathers.¹³

¹² See P Pressdee, J Vater, F Judd QC, J Baker QC, Contact: The New Deal, (2006) Family Law, J Owusu-Bempah (1997) Information about the Absent Parent as a factor in the well-being of children International Social Work 38 pp 235-275 and Dr Bren Neale, Professor Carol Smart, Dr Amanda Wade 1999 New Childhoods? Children and Co-Parenting After Divorce available from

<http://www.hull.ac.uk/children5to16programme/briefings/smart.pdf>

¹³ EOC, Completing the Revolution: The Leading Indicators (London, 2007)

- more intact families have fathers as primary carers, or at least, in the view of respondents to the EOC survey, properly shared primary caring roles;¹⁴
- more fathers have residence and shared residence orders for their children than before.

The closer children are to their father, regardless of the quality of the mother-child relationship, the happier, more satisfied, and less distressed they are¹⁵. The quantity of contact is significant, as well as the quality (though quality is undoubtedly highly significant).¹⁶

The relationship between father involvement and outcomes for UK children in separated families is demonstrated¹⁷:

- Father involvement established before the age of 7 is associated with good parent-child relationships in adolescence and also later satisfactory partnerships in adult life;
- Children with involved fathers are less likely to be in trouble with the police;
- Father involvement is strongly related to children's later educational attainment.

Research into contact post-separation shows that contact can deliver a number of benefits, including the meeting of the child's needs for¹⁸:

- Warmth, approval, feeling unique and special to a parent – 'experiences that can be the foundation for healthy emotional growth and development';
- Extending experiences and developing (or maintaining) meaningful relationships;

¹⁴ Lewis C, A man's place in the home: Fathers and families in the UK 2000 London Joseph Rowntree Foundation

¹⁵ P Amato, Father-child relations, Mother-child relations, and Offspring Psychological Well-being in Early Adulthood (1994) *Journal of Marriage and the Family*

¹⁶ See J Dunn et al (2004) *Children's perspectives on their relationships with their non-resident fathers: Influences, Outcomes and implications* *Journal of Child Psychology and Psychiatry* 45(3) 553; and S Gilmore *Contact/shared residence and child well-being: research evidence and its implications for legal decision-making* *International Journal of Law, Policy and the Family* 20 (2006) pp 344-365 a good survey of the literature combined with a defence of the status quo; on quality see L Trinder et al *Making Contact Happen or making Contact work* Ministry of Justice London 2006

¹⁷ Various papers published by E Flouri & A Buchanan 2002-2004, with the use of data from the British National Child Development Study

¹⁸ J Sturge & D Glaser Contact and Domestic Violence – The Experts Court Report (2000), *Family Law* 615, at p 617

- Information and knowledge about any topic the child wishes to know more about and where one or both parents can help;
- Building the child's self esteem and relations with their peers, especially at school.¹⁹

A US study comparing 'joint custody' and 'noncustodial' fathers (and looking at parents who did not feel deprived of a good relationship with their child and who did), indicated that the 'joint custody' fathers paid more in child support than the latter (refuting a belief some espouse that shared parenting can be used as a bargaining counter to reduce the non-resident parent's payments to the other parent).²⁰ The main likely cause is that non resident parents who feel significantly involved in their child's lives are likely to see child maintenance as part of their duties as a parent. Conversely, those deprived of close contact are likely to feel an overall sense of injustice at the 'system'. There are, of course, a number of non-resident parents who irresponsibly ignore their parenting responsibilities, including financial ones, but Cafcass' interventions can serve to reduce this phenomenon in cases in which it is involved and thus promote the economic well-being of the children

Research by Professor Carol Smart, Dr Bren Neale and Amanda Wade²¹ is sometimes seen as casting doubt on the case for shared parenting. They did two small scale studies (of 117 and 60 children or young adults respectively, from predominantly white, middle-class backgrounds). They interviewed children and some young adults about their experience of contact, including a minority who had experienced shared residence. They defined shared parenting as the child spending time at each parent's home in the range 50/50 to 60/40. The research was not focused on cases that had gone to court. They found a wide range of experiences by children and that in many cases the experience of shared residence as defined in the studies tended to deteriorate over time. Older children were often critical of parenting that in their view was too inflexible and/or insufficiently child-focused. The researchers emphasised that we know very little about the impact of shared residence on children in the UK and that "it is important to tread carefully in this area and that solutions to these problems need to be based on a knowledge of the parties involved rather than adherence to a single principle or rule (such as equality or equal shares)."²² Thus the research was focused on contact between divorced and separated parents and children more generally, including some

¹⁹ L Kurtz (1994) Psychological coping resources in Elementary School Children of Divorce American Journal of Orthopsychiatry 64 pp 554-563

²⁰ J A Arditti (1992) Differences between fathers with joint custody and noncustodial fathers American Journal of Orthopsychiatry 62 pp 186-195 (see especially p 194).

²¹ Carol Smart, Bren Neale and Amanda: The changing experience of childhood : families and divorce. Malden, MA : Blackwell Publishers, 2001, especially chapter 7.

²² Ibid.

shared residence cases. These research findings make clear how important it is that Cafcass practitioners should focus on supporting the development of shared parenting arrangements that are child-focused and which can be enduring and flexible, thus avoiding the drawbacks identified by this research.

US and Australian research tends to be similarly small-scale and tentative in its conclusions.²³ But the Australian Government is financing a large scale study of the impact of their major 2006 legislation on shared parenting (with a sample of 10k parents who divorced following the reforms).²⁴ Cafcass will be monitoring the results carefully.

How much shared parenting exists in the UK?

An Office of National Statistics sample survey of the whole population of children whose parents had divorced or separated²⁵ cast considerable light on the extent to which such children are in close relationships with both parents after separation or divorce, and how this impacted on children's parents' views of these arrangements. The survey indicated that:

- Overall, at least half of all children surveyed had some form of contact (direct or indirect) with their non-resident parent at least once a week.
- 43% of children in the resident parent sample and 59% of children in the non-resident parent sample had direct contact with their non-resident parent at least once a week.
- A further nine per cent of children in the resident parent sample and 18% of children in the non-resident parent sample had indirect contact at least once a week.
- A fifth (21%) of children in the resident parent sample and a tenth (10%) of children in the non-resident parent sample had direct contact with their non-resident parent less than once a week.

²³ See Bruce Smyth, Catherine Caruana & Anna Ferro, Australian Institute of Family Studies Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting* July 2003 for a useful summary: available at <http://www.aifs.gov.au/institute/pubs/papers/smyth4.pdf>

²⁴ See <http://www.aifs.gov.au/familylawevaluation/aboutfp.html>

²⁵ Alison Blackwell & Fiona Dawe Non-Resident Parental Contact Based on data from the National Statistics Omnibus Survey for The Department for Constitutional Affairs October 2003

- Less than a twentieth of children have indirect contact less than once a week (4% for children in the resident parent sample and 3% of children in the non-resident parent sample).
- A quarter (24%) of children in the resident parent sample and 10% of children in the non-resident parent sample have no direct or indirect contact with their non-resident parent.
- On the whole children's parents were more likely to be 'very satisfied' with the contact arrangements if the non-resident parent saw the child frequently.
- Satisfaction with the contact arrangements among the responding parents of children whose non-resident parent did not have direct contact with the child was very different in the two sample groups. Over half the responding parents in the resident parent sample were 'very satisfied' with the arrangements while only 6% of responding parents in the non-resident parent sample were 'very satisfied'.
- In general, the more frequently the child has some contact with their non-resident parent the more likely it is that the contact arrangements were informally agreed between parents. This pattern is reversed for informal contact arrangements that were never agreed between the parents: the less often the child has contact with their non-resident parent the more likely it is that the informal contact arrangements have never been agreed.

A more recent study, using the same methodology – the ONS Omnibus survey – found that 12% of all the separated parents interviewed reported they were sharing care more or less equally.²⁶ All in all, significant numbers of children do enjoy close relations with both parents, but many do not. Cafcass aims to promote such relations in the cases in which it is involved, in so far as this approach is relevant to the application that is before the court and is consistent with safeguarding and promoting the welfare of the child. Such work – particularly in so far as Courts agree with Cafcass recommendations - may of course also have a wider effect on parents who do not go to court, though we know of no studies that document such an effect.

B: PRACTICAL GUIDANCE

How can Cafcass encourage shared parenting?

²⁶ Peacey, V. and Hunt, J. (2008) op cit; cited in Joan Hunt and Alison Macleod Oxford Centre for Family Law and Policy, Department of Social Policy and Social Work University of Oxford Outcomes of applications to court for contact orders after parental separation or divorce Ministry of Justice, Family Law and Justice Division September 2008, p 2

Cafcass overall approach, reflecting both the intentions of the primary legislation and successive Governments' policy ambitions, should be to ensure that wherever possible both parents play a full part in their child's life, where that will benefit the child, using shared parenting as defined at the beginning of this guidance, and in ways consistent with Cafcass's statutory functions.

We must be careful to demonstrate to the parents and children that we are not biased in favour of, or against, either parent. Both parents are likely to be highly sensitive about such behaviour, and we must guard against creating a basis for such fears. Recent research done by Joan Hunt and Alison Macleod for the Ministry of Justice concluded, in their own words:

"The findings of this study demonstrate that the courts do start from the position that in the majority of cases contact is likely to be in the interests of the child; they make great efforts to try to secure this; and in most cases they are successful. Nor are the amounts of contact that non-resident parents end up with negligible, though they may not be as much as some of them would wish."²⁷

This was a significant piece of research, based on the researchers' examination of 308 cases.

We must also demonstrate that we are genuinely trying to get to grips with the family and gender roles.

Practical steps to encourage shared parenting include:

- We are all aware that the resident parent is not always the mother, and the non-resident parent is not always the father; and our advice to the court should certainly not be coloured – even when unintended - by any implicit assumption that that is the norm.
- We should be wary of giving either parent the impression – though unintended - that we are opting as a matter of course for simple formulae for advising on contact arrangements that give one parent limited contact e.g. alternate weekends. We should consider each child's needs and encourage the maximum interaction with both parents as a default – considering equal parenting time initially - unless there is a very good reason to do otherwise, such as the level of contact that is being sought by the non-resident parent in the specific case

²⁷ Joan Hunt and Alison Macleod op cit p 253

- It is often, though not always, better to ask open questions, rather than closed ones, of parents and children, to elicit as much information as possible about appropriate parenting arrangements.
- We should make it clear to both parents that it is Cafcass practice to share with both parties its advice to the courts and to make available the practice guidance and policies on which Cafcass' work is based. This will help to allay any fears that might otherwise exist about 'hidden agendas' on the part of Cafcass. We should make it clear to both parents that Cafcass guidance is freely available to them, and that much key guidance is on the Cafcass external website.
- We should consider advising the court, if they ask for our advice about the issue and unless there is good reason not to do so, on the possible merits of both parents being given residence orders, when the issue of residence is or becomes relevant in the specific proceedings. A residence order is defined as "an order "settling the arrangements to be made as to the person with whom the child is to live""²⁸.
- Where court orders are reviewed and the court asks Cafcass advice (often in the form of an addendum report) we need to focus on what has been achieved to date, in terms of parents sharing responsibility for the child, co-operation over contact time and arrangements, involvement with schooling, child's hobbies etc.
- If, when monitoring a contact order under the terms of a court-imposed contact monitoring requirement, Cafcass forms the view that the terms of the order, as imposed by the court, have been breached, the court must be informed.
- We need to be aware and take account of what is practicable for the child and the parents, for example on what is affordable, the parents' work pressures and so on.

²⁸ Cretney et al, op cit p 586.

ANNEX A OVERSEAS SHARED PARENTING LEGISLATION

This Annex A covers briefly shared parenting legislation overseas. It is meant as an introduction only. Cafcass is of course bound by domestic jurisprudence.

The Australian Family Law Amendment (Shared Parental Responsibility) Act 2006,²⁹ as its title indicates, this Act uses the term ‘shared parental responsibility’ to signify shared parenting. ‘Shared parental responsibility’ is not defined in the Act, but a definition may be inferred from the objectives set out there:

“The objects of this Part are to ensure that the best interests of children are met by:

- (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
 - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
 - (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that (except when it is or would be contrary to a child’s best interests):
- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
 - (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
 - (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
 - (d) parents should agree about the future parenting of their children; and

²⁹ Available at <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200614941?OpenDocument>

- (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).³⁰

The Australian Act also reaffirmed the paramountcy principle (which, like our 1989 Children Act, provides that decisions taken under the Act must be in the best interests of the child); that shared parental responsibility was a presumption only; and that 50/50 arrangements may be agreed where consistent with the paramountcy principle and practicable.

In Europe Belgium and Denmark have shared parenting laws, as do about half of US states.

³⁰ Family Law Amendment (Shared Parental Responsibility) Act 2006. Schedule 1, S60B.