

Equal Parenting Act
Green Paper

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Family Law Society

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1 Overview

The Equal Parenting Act is a legal initiative to enable the continuity of a meaningful parenting relationship between children and their parents following separation. The Equal Parenting Act rests on the following axioms:

- I- The Courts shall uphold the child’s right to contact with both parents in accordance with the UN Convention on the Rights of the Child.
- II- The Courts shall recognise and uphold the equal importance of both parents in the child’s development.
- III- The Courts shall not judge either parent on their perceived parenting ability.

The Equal Parenting Act introduces the Equal Parenting Order to achieve these objectives. It establishes a legal framework within which parents can focus on their children and avoid adversarial litigation. The Equal Parenting Order will provide a child with equal access to both of their parents, unless both parents jointly agree that it is in the best interest of the Child to come to an alternative arrangement.

This paper is organised as follows: Section 2 deals with the motivations behind the Equal Parenting Act; we consider the UN Convention on the Rights of the Child, the changing social landscape and areas in which the current legal framework could be improved upon. Section 2.4 offers a psychologist’s perspective on the merits of navigating emotionally distressed parents into residence hearings at the time of separation. Section 3 presents the Equal Parenting Act and the relevant Court Orders, introduces the concept of a Family Courts Commissioner, and explores the impact on Child Maintenance payments.

2 Motivations for the Equal Parenting Act

According to the Office for National Statistics, 45% of marriages will end in divorce if 2005 rates continue. Most of the divorces will involve children, and the existing legal framework is not prepared for the litigation that surrounds divorce and separation. The lack of a statutory framework, especially in relation to residence and contact, results in a marked lack of clarity. Unable to formulate reasonable legal expectations, many parents emerge from the legal battle embittered and unhappy. In many cases, the meaningful parent-child relationship is impaired. For an unmarried couple with children, separation is even more problematic because of the nebulous legal status in relation to their children.

2.1 The Child’s Need for Contact with Both Parents

The importance of a meaningful parent-child relationship cannot be understated. Article 9 of the UN Convention on the Rights of the Child 1989 emphasises that “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”. Article 10 further states that “[The Child] shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with

both parents.” Thus, it is recognised that a child should have direct contact with both parents, unless in exceptional circumstances. The operative word is “exceptional”.

The motivations for the UN Convention on the Rights of the Child are evident. It is the child, first and foremost, that stands to benefit the most from regular and meaningful contact with both parents. There have been many studies published on this topic, so we restrict ourselves to a brief outline, and leave the reader to conduct their own research should they require further information. According to Civitas¹, compared with children growing up with both parents, children from single-parent families are:

1. 2.5 times more likely to have emotional or mental problems
2. 3.3 times more likely to report problems with their academic work
3. twice as likely to run away from home
4. (girls) twice as likely to become teenage mothers
5. 1.6 times more likely to be persistent offenders
6. more likely to smoke, drink, and take other drugs
7. twice as likely to be unemployed

The list goes on and on. Most people today would not require much convincing that children do indeed benefit from a meaningful relationship with both parents.

Sadly, in the current framework, the contact with the so-called “non-resident parent” is often reduced to a bare minimum, if at all, following separation. The full effects of deprivation of parental involvement are not felt until the late ’teens, when it is often too late to repair the damage. To attest to this sad fact, Britain has a growing army of NEETs² (People aged between 16 and 24 who are Not in Employment, Education or Training). Many of these youngsters are likely to be products of single-parent homes, and the social costs are evident³.

The people best able to monitor and keep checks and balances on a child are their TWO parents. In principle, Social Services could step in for one or both of the parents, but in practice, they are ineffective at doing so. The tragic case of Baby Peter in 2008 is an example of this. In an article in the Telegraph on 12 August 2009, Chris Webb-Jenkins, a lawyer, stated that: ”Haringey [Council] are in a no-win situation. They can be sued if they remove a child from a family home and sued if they leave the child there.”

2.2 The Changing Social Landscape

The Equal Parenting Act arises out of the need to reconcile the statutory aspect of family law with the profound changes that have materialised in our society over the last 100 years, namely

¹Experiments in Living: The Fatherless Family (<http://www.civitas.org.uk/pubs/experiments.php>). NB: We acknowledge that “Fatherless” could equally well be substituted for “Motherless“

²The Daily Telegraph, 30 June 2009: Neets figures 'to top one million for first time'
<http://www.telegraph.co.uk/education/educationnews/5688214/Neets-figures-to-top-one-million-for-first-time.html>

³Centre for Economic and Social Inclusion, August 2009: NEET Analysis For the LGA
www.lga.gov.uk/lga/aio/4951490

the liberation of women, the redefinition of traditional gender roles, the creation of a welfare state and the subsequent changes in the family dynamics.

However, with social changes there will also be social challenges, as age-old institutions struggle to come to terms with shifting demographics.

2.2.1 Misogyny in the 21st Century

The Family Courts are not anti-male. On the contrary, by routinely awarding residence to mothers, the Courts continue to send out a strong message that women should remain at home with children.

Especially in the last 30 years, the Feminist movement has brought about a significant number of social improvements. Issues such as income inequality and domestic violence are no longer taboo subjects. As a result of increased public exposure, these issues can now be confronted openly and tackled in a constructive way. However, much still remains in the way of full gender equality.

Being a lone parent is probably the biggest single obstacle in the way of career development and educational opportunities for Mothers. It beggars belief that in 88%⁴ of single-parent families, the burden of raising the family is still borne by Mothers. This figure illustrates that society still does not comprehensively reject discrimination against women.

Anybody fighting for gender equality must recognise that without equality in the home, there will never be equality in the workplace and the glass ceiling will continue to exist. The two are inextricably linked, and without a strong legal framework to enforce equality in family law, outdated gender models will continue to dictate the role of women across all areas of society.

2.2.2 The Myth of the Single-Parent Family

The very notion of the single-parent family is a fallacy. From the child's perspective, a family consists of two parents and any siblings. Whether or not all members of the family live under the same roof is secondary. Separation merely means that contact patterns with one or both parents changes because the two parents no longer cohabit. The same could occur if one of the parents moves out of the country for work, or when a sibling moves out of the home. The concept of a single-parent family is a myth, unless one of the parents consciously chooses to remove themselves. In reality, most parents would choose to be actively present in their children's lives. Not all of them are currently given the opportunity.

2.3 Shortcomings of the Current Legal Framework

We recognise that the Children's Act 1989 was a step in the right direction, because it established some statutory framework in children's matters, lessening the reliance on case law and behind-closed-doors precedents. We also recognise that the Child Support Act 1991 clarified the issue of finances between parents. Even though the existing implementation of CSA/CMEC leaves much

⁴The Independent, 27 Sep 2002: Single parents now head a quarter of all British families
<http://www.independent.co.uk/news/uk/home-news/single-parents-now-head-a-quarter-of-all-british-families-643849.html>

to be desired, the intentions and motivations behind CSA 1991 were honourable and good. Having said that, the introduction of the Equal Parenting Act will have implications on the financial aspect of separation by removing the concepts of "non-resident parent" and "parent with care" in CSA 1991. These implications will be outlined in section 3.4.

In the current legislation, the use of words such as "parent with care" and "resident parent" easily gives the impression that separation automatically implies the creation of a single-parent family (see section 2.2.2). Even though Shared Residence Orders are sometimes made, the impact of these orders is somewhat ambiguous as organisations such as the CSA and the Child Benefit Office can decide, independently of the Courts, which parent is the "parent with care". SSCSA tribunals inform parents that CSA 1991 explicitly *requires* one of the parents to be the "non-resident parent". It is no wonder, therefore, that litigation ensues as each parent attempts to ensure they do not get relegated to the status of "non-resident parent" even with a Shared Residence Order in place.

2.3.1 Adversarial Litigation

Glancing through the headlines involving Family Law cases, one often comes across articles stating that Mr. X or Mrs. Y "won" or "lost" residence of their child. We contend that residence is not something that should be "won" or "lost". The upbringing of children is equally the responsibility of both parents. The adversarial nature of the Family Law Process almost requires a "winner" and a "loser". There are many parents who will do anything in order to "win" the residence of the children. The Courts routinely admit evidence outside of their normal remit (such as hearsay and non-corroborated, potentially fabricated, malicious allegations). Decisions are reached behind closed doors without public scrutiny, and therefore it is quite easy for a parent to put forward a litany of allegations and dig up as much garbage as possible on the other parent from even the distant past. Thus the litigation can turn into a mud-slinging competition, as parents hope that the Judge will believe their lies. This of course results in highly adversarial litigation, and a separation that may initially have been amicable, easily becomes an all-out war⁵.

2.3.2 Excessive Reliance on Case Law

The backlog of cases in the family courts is staggering. In many cases, hearing dates are allocated more than 6 months into the future, and residence cases can drag on for years. It is no wonder therefore, that 20 years after the introduction of the Children's Act 1989, Family Courts are continuing to fail because the Judiciary still lack clear guidelines in terms of statutory law. Cases are taking longer and longer, and inconsistent orders are frequently made.

Lack of statutory framework further results in many cases being decided on precedent. This is a particular problem with residence cases, because many precedents are based on incorrect and incomplete scientific evidence, for example the so-called Maternal Deprivation Doctrine dating

⁵This situation is analogous to Prisoner's Dilemma in Game Theory, in which imperfect information and lack of trust result in an outcome that is sub-optimal to both parties (often called the Nash Equilibrium). See, for example, *A Primer in Game Theory* by R. Gibbons, published by Harvester Wheatsheaf, 1992

back to the 1950s⁶. The Maternal Deprivation Doctrine has since largely been discredited⁷, but continues to have an impact on present-day cases through the incumbent body of case law. The precedents continue to steamroll over merit, reason, and even bona fide expert evidence. By introducing a solid legal framework, the Equal Parenting Act will address this issue and enable the judiciary to devote appropriate time and resources to those cases that are truly exceptional.

2.3.3 The Financial and Social Cost of Family Courts

Funding Legal Aid, CAFCASS and the Family Courts entails a very high cost to society. The total cost includes not only these tangibles, but also the loss of productivity of parents involved in proceedings, and the long-term damage to children. Following the excesses of recent years, public expenditure is now under constant scrutiny. Family Law is an area where savings could readily be achieved by reducing the volume of litigation.

2.3.4 Lack of Truly Expert Witnesses

It is possible for a Social Services or CAFCASS Officer to take a personal view about the perceived parenting ability of one or both parents. Their opinion may be influenced by the Officer's personal family background or social and political prejudices. As a result, the case may be decided upon the Officer's personal opinion without duly considering the impact on the child. This is especially relevant since many CAFCASS Officers have no formal qualifications either in law or in child psychology, yet they wield enormous power in Family Courts due to their perceived independent nature.

At the moment, CAFCASS is overworked and understaffed when it comes to qualified personnel. The organisation does not have a strong independent body that it is accountable to, and is only very loosely monitored by an independent watchdog. Furthermore, even though CAFCASS claims to have a complaints procedure in place, the complaints procedure is not always followed. In many cases, there is no legal remedy or redress for misconduct and neglect by a CAFCASS Officer. Given that a CAFCASS report can have life-changing consequences for a child, a situation like this is simply not tenable and will result in severe social disruption once the current young generation matures.

2.3.5 Financial Incentives to Obstruct Contact

The desire to "win" residence can also be motivated by financial reasons. As mentioned above, CSA 1991 definitively requires one of the parents to be "with care" and the other to be "non-resident". The parent "with care" has a financial incentive to prevent contact between the non-resident parent and the child. In cases where the non-resident parent is a very high earner, the difference between 50-50 contact and no contact at all can mean a difference in excess of £1,000 a month. If the parent "with care" is a stay-at-home parent on State Benefits, the financial incentive to keep contact to a minimum is very clear indeed.

⁶Bowlby, J. (1951). *Maternal Care and Mental Health*. New York: Schocken. P.89.

⁷See, for example (Rutter 1972 and 1979) "Rutter highlighted the other forms of deprivation found in institutional care, the complexity of separation distress and suggested that anti-social behaviour was not linked to maternal deprivation as such but to family discord"

2.3.6 Lack of Transparency

With very few exceptions, Family Law cases are decided behind closed doors. Most of the problems discussed above are therefore never exposed. It is up to those who have battled their way through the system, to tell the tale. Because of the threat of being held in Contempt of Court, their hands continue to be tied in this regard.

2.4 Warring Parents - A Psychologist's Perspective

Separation brings about fundamental life changes to the family unit. The financial position and living conditions of a couple and their children will inevitably change and these changes may have a negative emotional impact. The separation is often a culmination of a period of emotional upset experienced over many months, if not years. As a result of this prolonged stress, either prior to the separation or during it, the parents will often experience bouts of sadness, anxiety, worry, anger and stress. Such negative emotions can lead to clinical depression, anxiety disorders (e.g. obsessive compulsive disorder, eating disorders), post-traumatic stress disorders, myalgic encephalopathy (ME/CFS), and personality disorders. These negative states of mind may lead to poor decision-making and inappropriate responses to stressful situations.

As a result of impaired decision-making, reaching an agreement about parenting at the time of separation is likely to be very difficult. Instead of reaching any form of consensus, one parent may routinely disagree with even reasonable suggestions by the other. Any litigation commenced at this point is likely to be highly adversarial, and certainly not in the Best Interest of the Child.

Any decisions made during this fragile time are likely to have far-reaching consequences. The fact remains that after the initial changes following separation have taken place, any further changes to the contact arrangements will be difficult, both legally and emotionally. It would therefore be beneficial for more clarity to be introduced into the process to ensure that the status quo thus established is in the Best Interest of the Child.

The child in the relationship is often included in the litigation at this time. The psychological impact on the child can be extreme and emotionally scarring. It is recommended that all precautions and measures should be taken to limit such impact. Where possible, parents should not be required to go to court over residence when they are already fighting over divorce and financial matters and attempting to deal with a situation that is emotionally and psychologically draining.

The Equal Parenting Act will help parents and children cope by removing the unnecessary stress of fighting over residence at a time when everything else in the family unit may already be subject to litigation.

3 The Equal Parenting Act in Practice

The Equal Parenting Act challenges outdated notions of family justice and for the first time, creates a framework that places the child firmly at its centre. The Equal Parenting Act solves many of the emotional, psychological and legal problems surrounding separation. The Equal Parenting Act provides certainty, predictability and justice to parents and children alike, at a time when they need it most.

In practice, the Equal Parenting Act establishes two new kinds of orders in the Family Courts, namely the Equal Parenting Order and the Parenting Consent Order. A third type of Order, the Specific Issue Order, already exists in current legislation. However, under the Equal Parenting Act, a Specific Issue Order will only be issued when there is either involvement by Social Services or one of the parents has a relevant criminal conviction. In the following subsections we will describe each order in detail.

3.1 The Equal Parenting Order

An Equal Parenting Order will grant the child equal access to both parents. Either parent can apply for this order at any point following separation. The Equal Parenting Order provides an arrangement that takes place over a rolling two-week period, during which parents have full care of their child one week at a time. The child will benefit from a regular, meaningful relationship with both parents, and the continuity of contact will help to maintain and strengthen the bond between each parent and the child. The child will grow up feeling loved and cared for by both parents.

The bi-weekly arrangement is achieved by one parent delivering the child to school on Monday morning, and the other collecting the child on Monday afternoon. The child will then remain in that parent's care until the following Monday morning, when the other parent will collect the child from school, and so on. All holidays will be shared 50-50, with the long summer holidays split in the middle and all other holidays alternating yearly.

If the child is under school age, the parents can either arrange for handover between themselves, or at either parent's request, via a Handover Centre.

For children between 3 months of age and 1 year, it is recognised that if they are breastfeeding, separation from the Mother for more than 2 hours at a time will be neither possible nor desirable. However, for the Father, contact will be possible for up to 2 hours per day, via a Handover Centre if necessary.

For Fathers, the contact aspect of an Equal Parenting Order will not be enforceable until the child reaches 3 months of age. However, restrictions in relation to the Child's Base (see section 3.1.1 below), will still apply to both parents.

An Equal Parenting Order will always be granted, unless

1. A parent has a relevant criminal conviction that would demonstrably impact their parenting ability. For example, a conviction for insurance fraud would not, in absence of other factors, prevent a parent from being entitled to Equal Parenting.
2. A parent's mental and/or physical state of health renders them incapable of caring for their child.

Standard of proof for the above will be the Criminal Standard of Proof, i.e. Proof Beyond Reasonable Doubt. Wild allegations will not suffice. This will discourage litigation and ensure that only those cases where there is a genuine concern for harm to the child will reach the courts. However, even under a Specific Issue Order, the parent will have the right to spend time with the Child. This contact may be supervised, and only in extreme cases would a child not be allowed to see one or both of their parents at all.

3.1.1 The Child's Base

The Equal Parenting Order will require that the child is not removed from their "Base" by either parent, unless it be by consent of both parents. The Child's Base will be their School, Nursery, or their Registered Medical Centre for the very young, that they attended prior to separation. It will be unlawful to change the Child's Base without the consent of the other parent. As long as the child continues to be able to attend their Base, either parent is of course free to move. Remaining within a reasonable distance of the Child's Base ensures that the child stays within their habitual surroundings and within a reasonable travelling distance of both parents.

If the parents have never lived together since the birth of their child, then the Child's Base is the relevant School/Nursery/Medical Centre at the time that the Equal Parenting Order is applied for.

3.2 The Parenting Consent Order

When an Equal Parenting Order is deemed by BOTH parents not to be in the best interests of their child, a Parenting Consent Order may be a more appropriate option. Take, as an example, a family where the Mother is a high-earning executive, and the Father is a house-husband prior to separation. If the parents decide to split, it may not be possible for the Mother to dedicate as much time to parenting as the Father following separation. The Parenting Consent Order allows for total flexibility of arrangements, but must be agreed upon by both parents. If parents are unable to come to an agreement, the Equal Parenting Order will be the *de facto* arrangement following separation.

It should be noted that any Parenting Order (whether an Equal Parenting Order or Parenting Consent Order) is very likely to become the status quo, and as such both parents should be duly informed of the consequences of entering into a Parenting Consent Order.

We recognise that Equal Parenting Orders, just like any other order, could be open to potential abuse. For example, the house-husband in the above example might choose to force his ex-partner into an Equal Parenting Order in order to attempt to prevent her from continuing to pursue her career. In this case, it would fall upon the Mother to arrange for childcare when she is at work. However, because of the decrease in adversarial litigation, the animosity between separating parties is likely to be greatly reduced. We therefore expect this type of abuse to significantly decrease, especially because the financial incentives would be reduced or removed (see section 2.3.5).

3.3 Specific Issue Orders

In cases where there is a proven risk to the welfare of the child, litigation may be the only avenue to an acceptable and just outcome for residence and contact.

Under the Equal Parenting Act, litigation in children's matters shall require *prima facie* evidence as to why an Equal Parenting Order should not be issued or should be discontinued. Litigation will only be possible where one of the parents has a relevant criminal conviction or social services are involved in the case. This will put an end to false allegations, because any such allegations will be dealt with under the Criminal Justice System. An individual fabricating malicious allegations will run the risk of being criminally liable.

Any Court Order issued by the Family Courts as a result of litigation shall be designated as a Specific Issue Order under the Equal Parenting Act. Specific Issue Orders shall be made publicly available, and any reports produced by expert witnesses in such cases shall be freely examinable by the general public.

We recognise that under the European Convention for Human Rights, the privacy of litigants must be protected. To achieve this, the names of litigants and expert witnesses shall be omitted from the published orders, save for the first letter of the surname.

3.4 Implications for the Child Support Act 1991

The basic principles of CSA 1991, namely the Duty to Maintain and the Welfare of the Child continue to be applicable. However, amendments to CSA 1991 will be required in order to remove financial incentives to obstruct contact by either parent (see section 2.3.5). Concepts such as “parent with care” and “non-resident (or absent) parent” shall be removed from the legislation. These considerations aside, we recognise that a comprehensive review of the child maintenance system is far beyond the scope of this document.

4 Office of the Family Courts Commissioner

To oversee the family law process, we propose the creation of the Office of the Family Courts Commissioner. The Family Courts Commissioner would oversee the Family Courts and all court-related institutions, as well as monitoring the use of expert witnesses during proceedings. The Family Courts Commissioner would ensure that testimonies and statements are both relevant and in compliance with the rules governing the use of witnesses in general and expert witnesses in particular. Such a body is appropriate in the Family Courts, because great weight is attached to the evidence provided by third party organisations. It is therefore important that their duties are performed with due care and ethics.

The Family Courts Commissioner would be able to intervene, during the proceedings if necessary, in on-going cases as well as revisiting historical cases.

Furthermore, the Family Courts Commissioner would monitor the independence of the Judiciary and be the last resort for grievances arising from litigation. The Family Courts Commissioner would have far-reaching powers, including, but not limited to:

1. Overturning a Court Order and sending the case back into litigation with instructions to the Judiciary if necessary.
2. Ordering a Court to disregard a piece of evidence/witness statement.
3. Ordering the dismissal/reprimand of an expert witness who has demonstrably acted in a reckless or negligent way.
4. Ordering the dismissal of, or disciplinary action to be taken against, a member of the Judiciary who has demonstrably failed to fulfil their professional duty.

The Family Courts Commissioner would therefore oversee the entire Family Law process.

Because of its nature and ability to oversee and direct the Judiciary, the Family Courts Commissioner should necessarily be a politically independent post. The nominee should be confirmed by a parliamentary majority in both Houses, and be free of any party affiliation.

Even though we propose the creation of a Family Courts Commissioner specifically to oversee the Family Courts, it is entirely conceivable to use the same model in Civil Courts in general by the creation of a Civil Courts Commissioner.

5 Conclusion

In this paper, we have introduced the Equal Parenting Act together with the Equal Parenting Order and the Parenting Consent Order. We have proposed a legal framework that puts the Best Interest of the Child first, simplifies contact arrangements between parents following separation, streamlines the family court process, eliminates adversarial and financially motivated litigation over children, and fully reflects the social realities of today's society.

The Equal Parenting Act will enable the Family Courts to function to their best ability, help parents to make the right decisions regarding their children, and give support to families navigating their way through the difficult post-separation landscape. The Equal Parenting Act has far-reaching implications, and it truly is one of the first initiatives of its kind in the world.

The Equal Parenting Act is a reasonable initiative. Currently, family cases often take years to conclude, with results that are seldom satisfactory. We are confident that this proposal will prove helpful to the Houses of Parliament in implementing legislation that truly reflects the Best Interest of the Child. Whilst we recognise that every situation is different and there is no magic formula, we believe that the proposals contained in this document will minimise the effects of separation on families.

Under the Equal Parenting Act, Family Courts will be able to concentrate on the cases that are truly exceptional, significantly reducing the number of cases currently crawling through the Family Courts, alleviating the pressure on the Judiciary and court-affiliated organisations, reducing the legal strain on separating parents already under emotional and financial pressure, and most importantly, minimising the impact of separation on children and ensuring they receive the best possible care from both parents.

The Equal Parenting Act empowers families to flourish after separation and continue to give children love and care.