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Patrick Parkinson

Excerpt

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PART ONE

Family Law and the Meaning of Divorce

I

Family Law and the Issue of Gender Conflict

FATHERS, MOTHERS, AND THE GENDER WAR

Family law is largely about distributing loss. Of course, it is rarely described as such. When judges make decisions about where children will live and how much contact the other parent will have, their decisions are cloaked in the optimistic language of the “best interests” of children. Similarly, when making decisions about property, courts may use the language of equitable distribution of assets, as if what is being divided are the gains of the marriage. In one sense it may be so. Yet in divorce, as is often said, there are no winners. When it is not possible for the children to live in the same household with both parents, neither parent will usually have as much time with the children as he or she had during the intact marriage. When one household is divided into two, neither party to the marriage can keep as much of the property as they enjoyed during the marriage. The courts must endeavor to split the loss equitably between them.

Because marriage breakdown involves so much loss, it is also a period of grieving. Anger is a natural stage in grieving, and whereas in the death of a loved one, the grieving person may be able to rail only against the heavens, in the death of a marriage, there are far more tangible targets. There is the ex-spouse, his or her solicitor, men’s groups, the feminist movement, the courts, or perhaps the family law legislation itself.

It is not surprising, then, that family law is continually being “reformed.” Family law is in a state of flux in many countries. Pressure builds up in the system as one group feels more keenly a sense of grievance than another; dissatisfaction finds its expression in the political sphere, and a Committee is established or another report is commissioned.

Family law is thereby politicized in a way that is not true of most other areas of private law. Indeed, there can be few areas of law or public policy

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where there is as much conflict and turbulence as in family law. This conflict arises in most aspects of family law, including issues about the nature of marriage, what legal consequences should flow from cohabitation, legal responses to domestic violence, the rules concerning property division and spousal support, and of course, the issue of what level of child support should be paid by nonresident parents.

The greatest conflict – at least in English-speaking countries – concerns parenting arrangements after separation. These debates are often presented in terms of a gender war.¹ Lobby groups abound – some representing single mothers, others representing nonresident fathers – campaigning for changes to the law on issues that matter most to each gender.

As with other social issues, the war is waged on many levels, not least the semantic level. Some groups promote shared parenting, but these largely reflect the agendas of the men's groups.² Around the English-speaking world, groups representing men are often characterized by those opposing them as “father's rights groups”;³ but this reflects the semantic

¹ MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLES AND WHAT WE CAN DO ABOUT IT* (1999); Nicholas Bala, *A Report from Canada's 'Gender War Zone': Reforming the Child Related Provisions of the Divorce Act*, 16 CAN. J. FAM. L. 163 (1999); Richard Collier, *From Women's Emancipation to Sex War? Men, Heterosexuality and the Politics of Divorce*, in UNDERCURRENTS OF DIVORCE 123 (Shelley Day Slater & Christine Piper eds., 1999); Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L. Q. 815 (1999); Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L. Q. 27 (2002); Helen Rhoades, *Children's Needs and 'Gender Wars': The Paradox of Parenting Law Reform*, 24 AUSTRALIAN J. FAM. L. 160 (2010).

² In the United States, groups include the American Coalition for Fathers and Children, (<http://www.acfc.org>), Fathers for Equal Rights (<http://www.fathers4kids.com>), the Alliance for Non-Custodial Parents Rights (<http://ancpr.com>), and a range of other, more local organizations. For a list, see <http://themenscenter.com/National/nationalo6.htm>. In Great Britain, the lead organization is known as the Equal Parenting Council <http://www.equalparenting.org>. In Canada, there is also an Equal Parenting Council (<http://www.canadianepc.com>). See also the Canadian Equal Parenting Groups Directory (<http://www.canadianequalparentinggroups.ca>). In Australia, there is the Shared Parenting Council (<http://www.spcac.org.au>).

³ In the United States, see Leora Rosen, Molly Dragiewicz, & Jennifer Gibbs, *Fathers' Rights Groups: Demographic Correlates and Impact on Custody Policy* 15 VIOLENCE AGAINST WOMEN 513 (2009). In Australia, see Miranda Kaye & Julia Tolmie, *Fathers' Rights Groups in Australia and Their Engagement with Issues in Family Law*, 12 AUSTRALIAN J. FAM. L. 19 (1998); Miranda Kaye & Julia Tolmie, *Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups*, 22 MELB. U. L. REV. 162 (1998); Michael Flood, “Fathers' Rights” and the Defense of Paternal Authority in Australia, 16 VIOLENCE AGAINST WOMEN 328 (2010). In Britain, see Richard Collier, *Fathers' Rights, Gender and Welfare: Some Questions for Family Law*, 31 J. SOCIAL WELFARE & FAM. L. 357 (2009); FATHERS' RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE (Richard Collier and Sally Sheldon eds., 2006).

war. Such groups would not generally characterize themselves as being motivated by a concern for their own rights, although in practice, those rights often feature prominently. Rather, they present their concerns as being about the best interests of children. They are supported in this by organizations that promote shared parenting in the context of a wider concern for children’s rights.⁴

June Carbone has provided a good summary of the competing claims of these interest groups:⁵

[T]he battle lines in the custody wars at divorce are so well drawn that they can better be described as opposing trenches. On one side are those who would identify children’s wellbeing with continuing contact with both parents. They favor joint custody, liberal visitation, and limitations on custodial parent’s autonomy that secure the involvement of the other parent. In the other camp are those who argue that genuinely shared custody approaching an equal division of responsibility for the child is rare, and that children’s interests lie with the well-being of the parent who assumes the major responsibility for their care. This group favors primary caretaker provisions to govern custody, greater respect for the custodial parent’s autonomy (including greater freedom to move), and greater concern for both the physical and psychological aspects of domestic violence.

With politicization often comes an oversimplification of the issues. Complex problems are reduced to propositions that may readily be articulated within an adversarial political framework. When that adversarial contest has been expressed in terms of gender, the vastly different experiences of women from different backgrounds and circumstances are homogenized into a common experience of separation and divorce, which is often fitted into a victim framework. Men’s groups also compete for the status of being aggrieved, and the courts exercising family law jurisdiction are attacked on all sides for “bias” without any common or agreed-upon view of what “neutrality” might look like. When debates are conducted in these terms, it is no wonder that the result is either insufficient consensus to achieve reform or unsatisfactory compromises that lead to laws filled with contradiction.

⁴ One such organization in the United States is called the Children’s Rights Council: <http://www.crckids.org>. It proclaims its mission as being to assure a child “the frequent, meaningful and continuing contact with two parents and extended family the child would normally have during a marriage.” It has an equivalent in Canada: www.canadiancrc.com.
⁵ JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW, 180 (2000).

The Changing “Problem” of Fatherhood

The turbulence in relation to policy about postseparation parenting in particular is largely the result of nonresident fathers wanting a greater level of involvement with their children.⁶ This may be contrasted with the position a couple of decades ago, where the dominant concern of public policy was with the disappearance of fathers from children’s lives.

This can be seen, for example, in American research on parenting after separation. Judith Seltzer, using data from a national survey in the United States conducted in 1987–1988, found that almost 60 percent of nonresident fathers saw their children less than once per month, according to mothers’ reports.⁷ She concluded that “for most children who are born outside of marriage or whose parents divorce, the father role is defined as much by omission as commission.”⁸ Her findings were consistent with other general population studies in the United States conducted in the 1980s and early 1990s, which revealed a pattern of disengagement by a majority of nonresident fathers over a period of years.⁹ Furstenberg and Cherlin, writing in 1991, concluded, based on the available evidence, that “over time, the vast majority of children will have little or no contact with their fathers.”¹⁰ Stewart, reporting on data collected from young people between 1994 and 1996 in the U.S. National Longitudinal Study of Adolescent Health, found a similar level of disengagement. Sixty-one percent of these young people saw their fathers less than once a month.¹¹

The nonengagement and disengagement of nonresident fathers was particularly evident in representative national population studies in the United States, which accessed not only divorced parents but also those

⁶ Stephanie Goldberg, *Make Room for Daddy*, 83 A.B.A.J. 48 (1997); William Smith, *Dads Want Their Day: Fathers Charge Legal Bias Towards Moms Hamstrings Them as Full-Time Parents*, 89 A.B.A.J. 38 (2003). On the growth of the fatherhood movement, see Wade Horn, *You’ve Come a Long Way, Daddy*, POLICY REVIEW, 24, (July–Aug. 1997).

⁷ Judith Seltzer, *Relationships between Fathers and Children Who Live Apart: The Father’s Role after Separation*, 53 J. MARRIAGE & FAM. 79 (1991).

⁸ *Id.* at 97.

⁹ Frank Furstenberg, Christine Winquist Nord, James Peterson, & Nicholas Zill, *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOC. REV. 656 (1983); Judith Seltzer & Suzanne Bianchi, *Children’s Contact with Absent Parents*, 50 J. MARRIAGE & FAM. 663 (1988); Joyce Munsch, John Woodward, & Nancy Darling, *Children’s Perceptions of Their Relationships with Coresiding and Non-Coresiding Fathers*, 23 J. DIV. & REMARRIAGE 39 (1995).

¹⁰ FRANK FURSTENBERG & ANDREW CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART*, 26 (1991).

¹¹ Susan Stewart, *Nonresident Parenting and Adolescent Adjustment: The Quality of Nonresident Father-Child Interaction*, 24 J. FAM. ISSUES 217 (2003).

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who have not lived together or who have cohabited outside marriage. Research with formerly married parents presented a different picture from the general population, with most fathers remaining involved in their children's lives in the first few years after divorce;¹² even with divorced parents, however, involvement declined over time.

All that has changed now. U.S. research indicates that there has been a steady increase in the levels of contact between nonresident fathers and their children. Comparing national datasets in four different time periods between 1976 and 2002, Amato, Meyers, and Emery found that levels of contact between nonresident fathers and their six- to twelve-year-old children increased significantly. The number of fathers who had weekly contact, for example, rose from 18 percent in 1976 to 31 percent in 2002. The greatest rate of increase was between the mid-1970s and the mid-1990s.¹³ The increase was particularly marked in families where the parents had previously been married. The rapid rise in the proportion of ex-nuptial births¹⁴ suppressed the rate at which father-child contact increased, because levels of contact are typically much lower between nonresident fathers who had not been married, and their children.¹⁵ Recent research has also demonstrated that many nonresident fathers retain a consistent level of involvement in their children's lives over many years, contradicting the assumption that contact with most nonresident fathers declines as the years go by.¹⁶

A significant cultural change in attitudes of fathers toward contact with their children following separation has led to a redefinition of the

¹² Eleanor Maccoby, Christy Buchanan, Robert Mnookin, & Sanford Dornbusch, *Postdivorce Roles of Mothers and Fathers in the Lives of Their Children*, 7 J. FAM. PSYCH. 33 (1993). See also, in relation to young adults' contact with divorced fathers, Teresa Cooney, *Young Adults' Relations with Parents: The Influence of Recent Parental Divorce*, 56 J. MARRIAGE & FAM. 45 (1994).

¹³ Paul Amato, Catherine Meyers, & Robert Emery, *Changes in Nonresident Father-Child Contact From 1976 to 2002*, 58 FAM. REL. 41 (2009).

¹⁴ In 1980, the birth rate for unmarried women aged 15–44 was 29 per 1,000. By 2007, it was 53 per 1,000. The percentage of all births to unmarried women rose from 18% of total births in 1980 to 40% in 2007. Federal Interagency Forum on Child and Family Statistics, *America's Children: Key National Indicators of Well-Being*, 4, (2009). There is similar evidence of growth in ex-nuptial births from a longitudinal study in Canada. The proportion of children born within marriage dropped from 85% of the children born in 1983–1984 to 69% of the children born in 1997–1998. The proportion of children born within a cohabiting relationship more than doubled, from 9% to 22% between the two surveys, whereas the proportion of births to single mothers increased from less than 6% to 10%: HEATHER JUBY, NICOLE MARCIL-GRATTON, & CÉLINE LE BOURDAIS, *WHEN PARENTS SEPARATE: FURTHER FINDINGS FROM THE NATIONAL LONGITUDINAL SURVEY OF CHILDREN AND YOUTH* 6–7 (2005).

¹⁵ Amato et al., *supra* note 13, at 49.

¹⁶ Jacob Cheadle, Paul Amato, & Valarie King, *Patterns of Nonresident Father Contact*, 47 DEMOGRAPHY 205 (2010).

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“problem” of fatherhood. No longer, in modern family law, is it a problem of absence. Rather, it has become a problem of insistent presence. Because fathers demand a greater involvement in their children’s lives after separation, there has been increasing conflict both at a policy level and at the individual level of litigated cases.

THE TURMOIL IN POLICY ABOUT PARENTING AFTER SEPARATION

Western countries – and in particular Europe, North America, Australia and New Zealand – seem to be caught in an endless pattern of reform or pressure for reform, with periods of fierce debate followed by periods when there is a temporary cessation of hostilities. Canada provides one example. In that country, a gender war raged over the future of custody law after initial proposals for reform were made by a Parliamentary committee in 1998.¹⁷ The Canadian government, in its response, endorsed the need for legislative reform.¹⁸ An acrimonious debate, largely along gender lines, culminated in a final report¹⁹ that provided the basis for a bill introduced into Parliament at the end of 2002 (Bill C-22). The bill sought to remove the terms “custody” and “access” in favor of the term “parenting time,” with neither parent seen to be reduced to the role of a visitor in their children’s lives.²⁰ The bill was not enacted before the government of the day went to an election in 2003.²¹ Following a change of government, and in the wake of continuing fierce debate about the bill, it was shelved,²² but agitation for reform continues.²³

¹⁷ Parliament of Canada, *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access* (1998).

¹⁸ *Government of Canada’s Response to the Report of the Special Committee on Child Custody and Access: Strategy for Reform* (1999). For discussion, see SUSAN BOYD, *CHILD CUSTODY, LAW, AND WOMEN’S WORK* (2003).

¹⁹ Department of Justice, *Putting Children First: Final Federal-Provincial-Territorial Report on Custody and Access and Child Support* (2002).

²⁰ Bill C-22, An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to amend other Acts in consequence, 2nd Session, 37th Parliament, 2002. For a summary, see Helen Rhoades, *Custody Reforms in Canada*, 17 AUSTRALIAN J. FAM. L. 81 (2003).

²¹ For discussion, see Susan Boyd, *Walking the Line: Canada’s Response to Child Custody Law Reform Discourses*, 21 CAN. FAM. L. Q. 397 (2004).

²² See Helen Rhoades & Susan Boyd, *Reforming Custody Laws: A Comparative Study*, 18 INT. J. L. POL’Y & FAM. 119, 121, 123 (2004).

²³ See, e.g., EDWARD KRUK, *CHILD CUSTODY, ACCESS AND PARENTAL RESPONSIBILITY: THE SEARCH FOR A JUST AND EQUITABLE STANDARD* (2008), available at http://www.fira.ca/cms/documents/181/April7_Kruk.pdf.

THE PROBLEM OF TRENCH WARFARE

Around the western world, the conflict between the different lobby groups has eventuated in huge territorial battles that are, rightly or wrongly, perceived as having some strategic value. Every gain by men's groups in altering the language of legislation – however symbolic or trivial – is seen as a loss by women's groups. Conversely, gains by women's groups are mourned as a loss to fathers. With each reform, evidence is gathered by researchers that appears to demonstrate the successes or failures of the legislative change. Too often, however, such research is marred by the all-too-obvious alignment of the researchers with particular interest groups and the selective presentation of research findings. In the partisan desire to influence evidence-based policy, there is far too much policy-based evidence.

In these conflicts, there is little meeting in the middle, little search for common ground, common values, shared interests. The best interests of children might, theoretically, provide that common ground, but of course, what is in the best interests of children is, beyond various generalities, highly contested terrain.

THE GROWTH IN LITIGATION ABOUT PARENTING

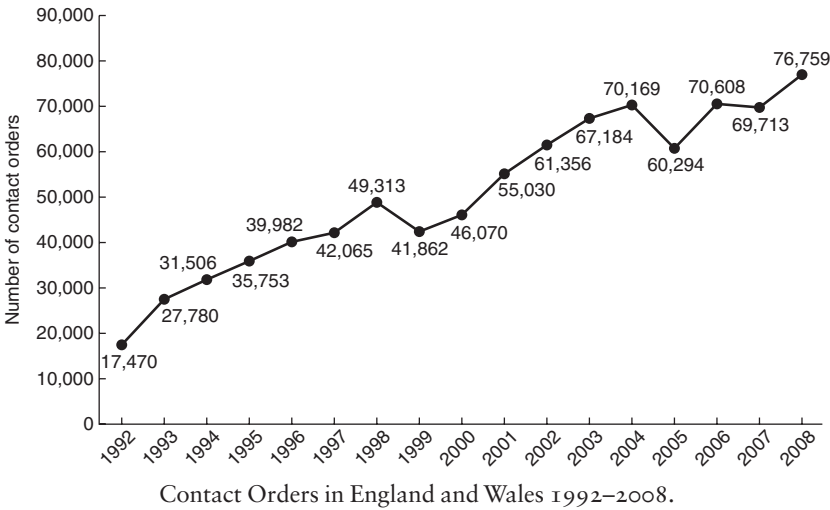
The escalation of gender conflict over postseparation parenting is taking place not only at the policy level. It is also reflected at the level of individual families, with a dramatic growth in litigation about parenting. Statistics on such issues are surprisingly hard to obtain. Many countries either do not publish statistics about family law disputes at all or do so only in a form that makes it impossible to disaggregate different kinds of disputes. However, some data is available on parenting disputes.

In the United States, an indication of the increase in custody disputes can be seen in the data of the National Center for State Courts. Evidence from seven states indicates a 44 percent increase in custody filings between 1997 and 2006.²⁴ In the same period, divorces had decreased nationally by 3 percent. There had previously been a 43 percent increase in custody filings in twenty-nine states between 1988 and 1995.²⁵ In Australia,

²⁴ EXAMINING THE WORK OF STATE COURTS 29 (Robert LaFountain, Richard Schaufli, Sandra Strickland, William Raftery, Chantal Bromage, Cynthia Lee, & Sarah Gibson, eds., 2008).

²⁵ BRIAN OSTROM & NEAL KAUDER, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT (1996); Jessica Pearson, *A Forum for Every Fuss: The Growth of Court Services and ADR Treatments for Family*

10 *Family Law and the Meaning of Divorce*



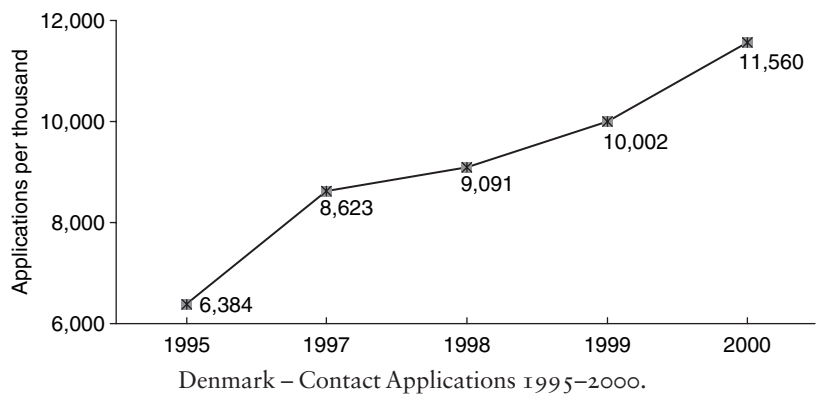
the number of contact applications nearly doubled between 1994 and 2000,²⁶ although this upward trend was evident long before 1995.²⁷ In Britain, contact (visitation) orders increased more than fourfold between 1992 and 2008.²⁸

Law Cases in the United States, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND 513 (Sanford Katz, John Eekelaar, & Mavis Maclean, eds., 2000). See also ANDREW SCHEPARD, CHILDREN, COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES, 38–40 (2004).

²⁶ In 1994–1995, there were 14,144 applications in the Family Court of Australia. In 1999–2000, there were 27,307. Family Court of Australia *Statistics 1999/00* table 4.10. No figures are available after 2000 because of changes to the court system.

²⁷ As a result of a transfer of powers from state governments to the federal government in 1987, the Family Court gained jurisdiction over custody and access disputes involving ex-nuptial children. In 1988–1989, the first full year in which this expanded jurisdiction existed, there were 10,619 contact applications in the Family Court of Australia. In 1993–1994, there were 16,256. Family Court of Australia *Statistics 1989/90* table 5, 1999/00 table 4.10. Indeed, the rise in the level of contact applications can be seen since 1981. In that year, there were 4,214 applications, and by 1986 it had risen to 7,208. Family Court of Australia *Statistics 1989/90* table 5.

²⁸ In 1992, there were 17,470 contact orders. In 2008, there were 76,759. This table is derived from the statistics published annually by the Ministry of Justice and its predecessor departments. See, e.g., Ministry of Justice, *Judicial and Court Statistics 2008*, ch 5; Lord Chancellor's Department, *Judicial Statistics 1986–2000*. See also Gwynn Davis & Julia Pearce, *Privatising the Family?* 28 FAM. L. 614 (1998). For discussion of the explanations for this rise in litigation, see Gwynn Davis, *Love in a Cold Climate – Disputes About Children in the Aftermath of Parental Separation*, in FAMILY LAW: ESSAYS FOR THE NEW MILLENIUM 127, 128–29 (Stephen Cretney, ed., 2000).



Nor are these increases confined to English-speaking countries. In France, new applications in relation to parenting and visitation arrangements following separation and divorce increased by 25 percent between 1996 and 2001.²⁹ In Germany, there was a 27 percent increase in litigation over contact between 1999 and 2003.³⁰ In Denmark, the total number of visitation applications nearly doubled between 1995 and 2000, rising from 6,384 in 1995 to 11,560 in 2000.³¹ After that time, the numbers remained relatively stable, even falling in 2006 to 10,184 cases. However, in 2008, the numbers rose sharply again, to 13,412.³²

²⁹ Department of Justice, France, *Annuaire Statistique de la Justice, 1996–2000* and *1997–2001*. The increase in applications in relation to children born to unmarried parents was even greater. They rose from 42,005 in 1996 to 62,201 in 2001. By 2006, the figure was 78,986, almost a 100% increase within ten years: Department of Justice, France, *Annuaire Statistique de la Justice, Édition 2008*, 49. The rate of disputes between unmarried couples is likely to reflect increases in the ex-nuptial birth rate as a percentage of all births, which has been rising in western countries: Kathleen Kiernan, *Childbearing Outside Marriage in Western Europe*, 98 *POPULATION TRENDS* 11 (1999).

³⁰ Kerima Kostka, *Die gemeinsame elterliche Sorge bei Trennung und Scheidung – ein Blick auf die Begleitforschung zur Kindschaftsrechtsreform*, 1 *AKTUELLE INFORMATIONEN* 22, 23 (2006).

³¹ CivilRetsDirektoratet, *SamværBornesagkyndig Rådgivning Konfliktmægling, Statistik 2001* (2002). In Denmark, any parent may apply for contact. It used to be the case that contact rights would only arise if the parents had lived together for most of the first year of the child's life, usually at least eight months in practice. This restriction was removed in 1995.

³² Personal communication from Mariam Khalil, Danish Department of Family Affairs, by email, December 15, 2009. This followed the enactment of the Danish Act on Parental Responsibility, which took effect beginning October 1, 2007.