

Conference Paper for

***European Conference on interpersonal
violence***

26th September 2005, Paris, France

**Issues of custody and access following violence in
the home in Denmark and Britain**

**Marianne Hester
University of Bristol, UK**

Please do not quote without permission of the author/s

Professor Marianne Hester

Issues of custody and access following violence in the home in Denmark and Britain

The topic of my talk

The issue of children's contact or access with parents who have separated or divorced is often highlighted in the media. Contact is an issue that engenders much emotion and heated debate. It is also a very important issue. I would argue that - at the present time and in relation to Europe, North America and Australasia – post-separation parenthood has become a key arena where gender equality and inequality are being contested.

Child contact in circumstances of domestic violence is an issue where if we get it right, we will vastly improve the circumstances and the human rights of both women and children. If we get it wrong, then we continue to allow violent and abusive fathers to use the pretext of parenting to continue their detrimental and destructive behaviour in relation to women and children.

The shifts and changes during the past decade and across England and Denmark in the approach to children's contact with fathers in circumstances of domestic violence provides an interesting window upon this.

England and Denmark

Between 1990 and 1996 Lorraine Radford and I carried out a large qualitative study examining arrangements for children's contact/access with parents after the latter's separation or divorce. We looked specifically at circumstances involving domestic violence, and we compared England and Denmark.

We found that **there is a close relationship between the safety of mothers and the welfare and safety of their children.** Where men's violence against their female ex-partners continues (as is often the case) contact is unlikely to work, and may indeed be detrimental to the children concerned. We found that in both England and Denmark the extent to which contact 'worked' in situations of domestic violence were limited:

the men's violence, abuse and harassment against the women and children continued in all but 7 cases of 53 in England and in all but 2 of 26 cases in Denmark. **In the final analysis, the overriding problem was the men's continuing abusive behaviour to their ex-partners and /or their children.**

Echoing other research carried out both before and since our study, our findings suggested that **contact may not necessarily be useful to or in the best interests of children.** It is the **quality of contact that is of greater importance where children's welfare is concerned.**

In other work I have done – more specifically examining links between domestic violence and the abuse of children - it has also become clear that violence to women and violence to children are likely to be happening in the same context, and involving the same male perpetrator.

From the research a number of aspects are apparent:

- that the domestic violence perpetrator may also be directly - physically and/ or sexually - abusive to the child;
- that witnessing violence to their mothers may have an abusive and detrimental impact on the children concerned; and
- that the perpetrators may abuse the child as a part of their violence against women.

From the research it is apparent that *domestic violence is an important indicator of risk of harm to children.*

So what about child contact in circumstances of domestic violence?

Since the 1980s, there have been ongoing debates in both England and Denmark – let alone elsewhere in Europe, North America, Australia and New Zealand - about what constitutes children's welfare and best interest in contact. The focus has increasingly been on the notion of 'equal parenting', reflected in a presumption that the best interests of the child are always best served by contact with both parents. (This also reflects Article 9 of the UN Convention on the Rights of the Child, concerning children's right to know their two parents.)

In England this is exemplified by the recent consultation and resulting Bill: *Children (Contact) and Adoption Bill* (2005), which recommends

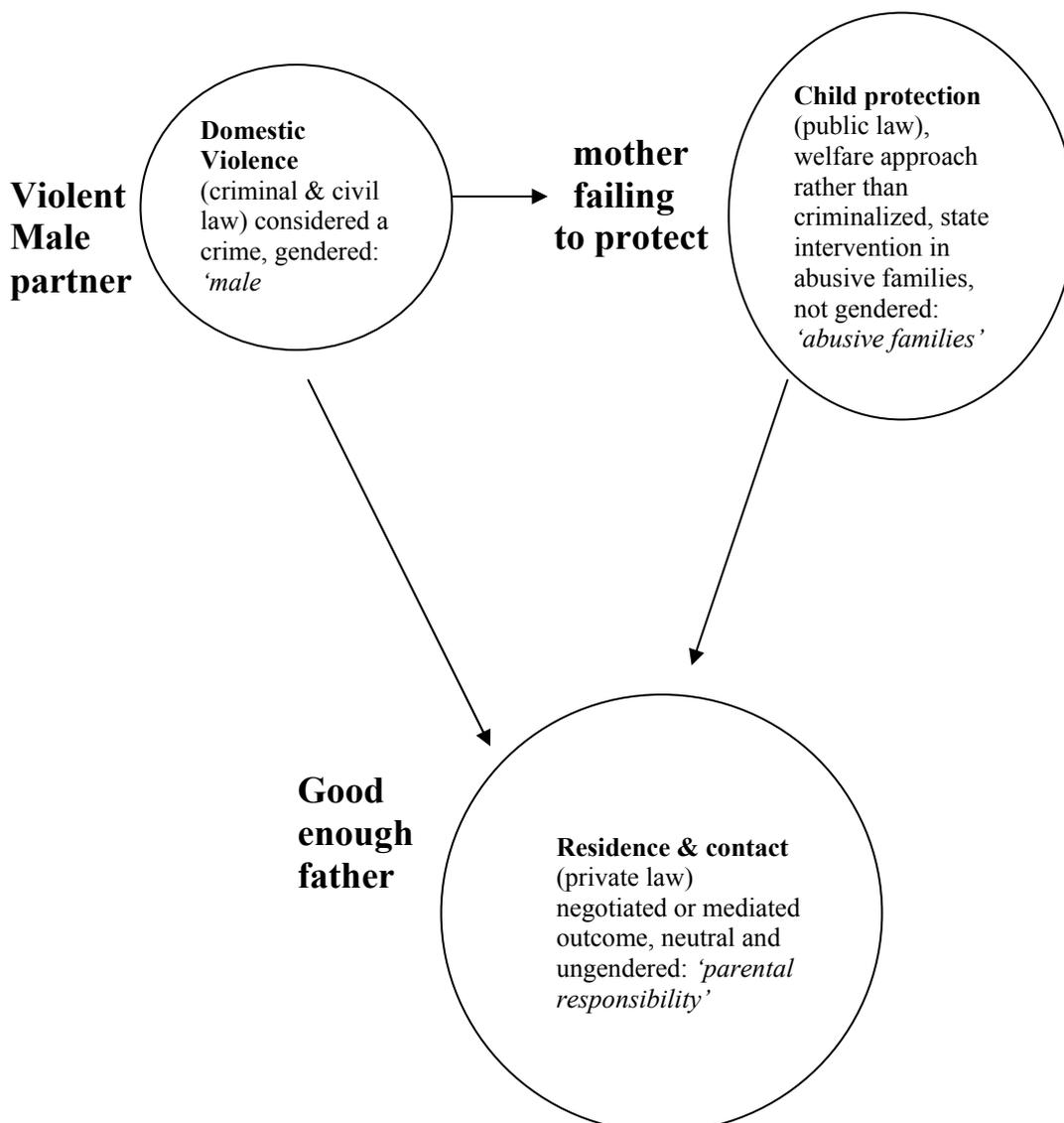
stronger, and legally sanctioned, measures for the enforcement of contact (Children Act Sub-committee, 2002; DfES 2005). In Denmark a renewed emphasis on the contact presumption also led, from 1996, to new legislation strengthening the enforcement of contact (Hester, 2002). Professionals in Denmark are, however, increasingly voicing concern about exactly this approach as abusive child access cases have increasingly come to light. I'll come back to that.....

The three planet problem

The problem that we face in both England and Denmark is what I have called

The three planet problem.....

Where the different agencies and institutions geared to dealing with domestic violence, child protection and child contact respectively are operating with different presumptions, and constructing the problem of domestic violence differently. Let me briefly explain..... These three planets each have their own history, culture and laws.



The domestic violence exemplifies the work that takes place regarding domestic violence. In both England and Denmark this is the most advanced of the three planets where safety of women and children living with violent men are concerned. In both England and Denmark the domestic violence planet's approach to domestic violence has become quite sophisticated, involving criminalisation – i.e. seeing domestic violence as a crime rather than a 'domestic', offering protection via civil injunctions, and providing a range of support including refuges, re-housing, etc.

Thus, on the domestic violence planet the father's behaviour may be recognised by the police and other agencies as abusive in relation to the mother, his behaviour is seen as a crime and he may even be prosecuted for a criminal or public order offence. He might also have a restraining or protective order taken out against him. He is thus perceived as a *violent partner* and the woman in need of protection and support.

If instead, he arrives on the child protection planet he may also be perceived as abusive to the mother while the parents are still together or during the process of them separating. But the focus on the child protection planet is on protecting children, not adults. On the child protection planet the father's abuse of the mother may lead to the involvement in the family of social services or other child protection agencies, and result (specifically in England) in the children being placed on the child protection register for emotional abuse. It is highly unlikely however that he will be prosecuted on the child protection planet because a predominantly welfare, rather than criminalising, approach prevails - in both the English and Danish contexts. In order to protect the children social workers are likely to insist instead that the mother removes herself and her children from his presence, and leaves the relationship if she has not already done so. If she does not, then it is she who is seen as 'failing to protect', and the children might be removed into the care of the local authority. On the child protection planet, therefore, despite the violence to the mother being from the male partner, it is the *mother who is seen as responsible* for dealing with the consequences. In effect the violent man disappears out of the picture.

From the child protection or domestic violence planets the father may move to the child contact planet in order to apply for contact (or possibly custody, parental responsibility or residence) with his children. Generally, as there has been no prosecution of him on the child protection planet in relation to the emotional abuse of the children that resulted from his violence to the mother (despite them perhaps being on the child

protection register for this) there is no apparent ‘concrete’ evidence in relation to childcare to question his post-separation parenting abilities. Even if he has a criminal conviction or protection order against him from his violence against the mother on the domestic violence planet, this may still be seen as being ‘between the adults’ and not directly related to the children.

On the contact planet the emphasis is less on protection than on children having two parents. Within this context an abusive father may still be deemed a ‘*good enough*’ father, who should have at least contact with his child post-separation if not custody or residence. The mother ends up in a particularly difficult dilemma on the contact planet. She has attempted to curb her partner’s violent behaviour by calling the police and supporting his prosecution on the domestic violence planet. She has left her violent partner following instruction from social services on the child protection planet that she leave in order to protect her children. However the contact planet in effect has the opposite approach, that families should continue to be families even if there is divorce and separation. On the contact planet she is therefore ordered to allow contact between her violent partner and the children, leaving her not only bewildered and confused but also yet again scared for the safety of her children. Realistic assessment of risk and lethality for children is extremely difficult within such a context.

The ‘three planet model’ thus shows up the difficulties in there being quite different discourses and responses across criminal justice, child protection and the family courts. In particular there can be seen to be a conceptual gap between ‘violent men’ on the one hand and ‘fathers’ on the other (Eriksson & Hester, 2001). In both England and Denmark there are violent men but good enough fathers, and the two are difficult to merge whether in policy or in practice.

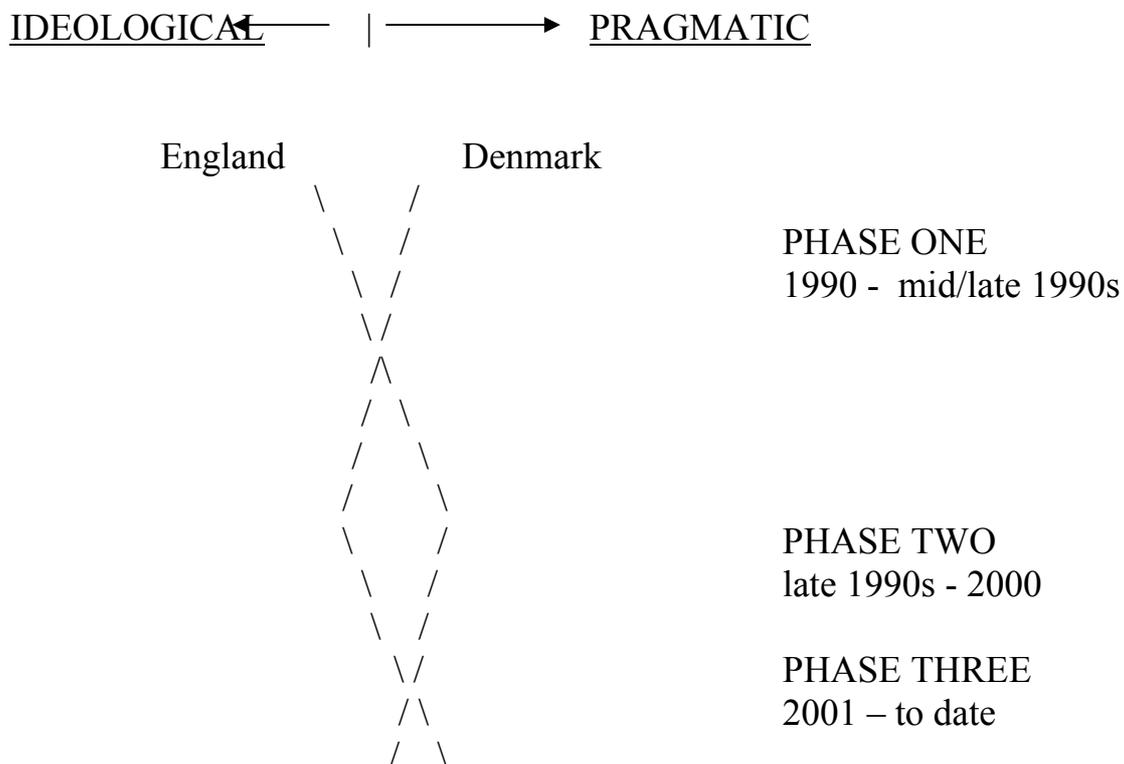
Three phases - England and Denmark

To return to the changes across England and Denmark

During the past decade, in England and in Denmark, there have been a number of similarities:

- long term trends towards an emphasis on children's contact or access with both parents,
- greater involvement by fathers post-separation and
- mediated outcomes in divorce and separation.

It is possible to identify three phases across the two countries where legal and policy discourses and/or practice have changed quite markedly in relation to the issues of mother's safety, child welfare, and quality of contact.



Phase One – England

During the earlier part of the 1990s (*Phase One*) the English approach in legal discourses and among professionals dealing with child contact might be characterised as:

- more '**ideological**' – not evidence or research based, and
- emphasising child contact above children's safety and welfare.
- the best interests of the child are always best served by contact with both parents.

In other words a presumption that contact = child welfare.

Underlying the contact presumption are a number of strong beliefs, often based, however, on a misreading or mythologising of research findings. For instance, the idea of 'father deprivation' - that the presence of fathers is crucial to the well-being of children whose parents separate or divorce.

Since then there has been much more research, which has also been more complex, and has included longitudinal work (i.e. research following individuals over a longer period of time). It has shown that the real problem is neither divorce nor father deprivation.

The main conclusion which can be drawn from research since the mid 1980s to the present day is that where children's welfare post-separation is concerned, it is the quality of parenting, and the lack of conflict between parents that are crucial. In other words, mere father presence does not automatically lead to positive outcomes for children, and indeed the opposite is likely where fathers are violent and abusive.

Phase One: Denmark - the pragmatic approach

The Danish approach during Phase One could be characterised as more '**pragmatic**' or realistic than in England - more likely to emphasise safety and welfare above contact (Hester and Radford, 1996).

While in Denmark there was a similar contact presumption among professionals and in legal discourses during the early and mid-part of the 1990s, this was less pronounced in practice than in England (although varying between professionals geographically). Generally professionals in Denmark working with child contact placed a greater emphasis on children's safety than on the paramountcy of contact. The Danish professionals were therefore more likely and more prepared to restrict contact with violent fathers than their English counter-parts.

So why should that be the case? Of key importance to the Danish approach was the guiding principle of 'agreement' in the Danish legislation (as laid down in the Myndighedslov 1985). This notion of agreement, unique to Denmark and not even replicated in the other Nordic countries, entailed an emphasis on parents' actual ability to work together effectively to ensure children's welfare. Actual agreement between parents was the preferred outcome regarding custody and access, but there was also recognition that such actual agreement may not always be possible or even desirable.

Where mothers disagreed with their ex-partners about contact due to concerns about safety, these concerns were more likely to be taken into account by Danish professionals. In an apparently more child-centred approach than in the English context, in Denmark lack of agreement

would be seen as indicative of problems for any future arrangements for the children.

Phase Two

During the latter part of the 1990s (*Phase Two*) there was a marked change. In English case law there appeared to be a move towards a more realistic and safety-oriented approach in contact cases, where issues of domestic violence may be taken more fully into account. In Denmark meanwhile, there was a move away from pragmatism, towards an ideologically based, and codified (i.e legislated), increased emphasis on children having contact with both parents, whatever the safety implications.

Phase Two – England

Following much pressure from women's organisations and evidence from research (including our earlier study), the English judiciary began to look more closely at the problems of children's contact in circumstances of domestic violence.

There was a Report on the topic from the Children Act Sub Committee (CASC) of the Advisory Board on Family Law in May 2000 (2000), which took a large step forward in **acknowledging that there are links between domestic violence and possible harm to children** and that this needs to be addressed in cases relating to children's contact with a violent parent.

The views of the report were also reflected in case law – notably **Re: L (A Child), Re: V (A Child), Re: M (A Child) and Re: H (Children)**.

Mother's hostility may be reasonable – impact of domestic violence.

Guidelines for Good Practice (Lord Chancellor's Department, 2002) have also been issued to the courts concerning contact with violent parents that emphasise the finding of fact where there are allegations of domestic violence.

Phase Two – Denmark

In the earlier study we had identified a developing tension among professionals in Denmark between an (increasingly) ideological or rights-based approach and (the former) pragmatic approach to child contact. On the one hand, that contact with both parents should be paramount, and on the other hand, that agreement is fundamental to good parenting. We found an increasing emphasis on the former, and a wide variation in professionals' practice linked to these differing approaches. The women we interviewed experienced the more pragmatic 'agreement' approach, rather than the 'contact paramount' approach, as more likely to take their own and children's safety needs into account.

Since then the shift towards a much stronger contact presumption has been codified in new Danish legislation (*Lov om Forældremyndighed og Samvær* 1995 - Law on Custody and Contact). A main feature of this has been to provide equal rights between parents in relation to their children as well as to establish the principal about having two biological parents. (Flendt, 1999).

The focus is now on increasing the rights of unmarried fathers, and maternal preference is therefore no longer automatic as in the previous (1985) legislation. Now, where unmarried parents have lived together 'for a longer period' (LFS 1995: para 12), fathers may get custody. This is entitled 'transfer to the father by judicial ruling' and is a more obviously father-oriented (and gendered) approach than that in the 1985 law, where the equivalent section was merely entitled 'transfer of custody by judicial ruling' (Myndighedslov 1985: para 14).

Moreover, when transfer of custody from the mother to the father is considered, particular stress is placed on taking into account whether the custodial parent has 'without justifiable reason' (uden rimelig grund) hindered contact with the other parent taking place. In other words whether what the Government's guidance to the law presents as 'contact sabotage' (samværssabotage) has taken place (Civildirektorat, 1999). The concern is especially to stop what is seen as 'sabotaging' mothers impeding contact by fathers (LFS 1995: para 12, clause 2).

The codifying of 'contact sabotage' is a worrying addition to the 1995 legislation, not least because it appears to have resulted primarily from pressure by fathers groups rather than any research-based evidence (Flendt, 1999; interviews with Danish professionals).

Phase Three

We are currently in the Third Phase and already we are seeing evidence of a shift back towards the ideological approach to contact in the English context. The re-emphasis of the contact presumption is becoming prominent, and with many features of the Danish 1995 law – especially regarding enforcement of contact – being suggested for inclusion in new English legislation. As I indicated earlier, at the same time, professionals in Denmark are increasingly voicing concern about exactly this approach. Abusive child access cases have increasingly come to the attention of the children's organisations in Denmark - such as Boernes Vilkaar and Save the Children (Red Barnet). There has been much debate about these issues in the last couple of years, and the Danish Government is considering amendments to the 1995 Custody and Contact Act to make it less contradictory where child protection is concerned. It is not anticipated, however that domestic violence will be mentioned as a specific context involving risk of harm to a child.

Domestic violence and its potential impact on children has been excluded from most of the recent legislation or legislative proposals in England. Thus there is no specific mention of domestic violence in the new *Children (Contact) and Adoption Bill*. Nor was there mention of child contact in the recent *Domestic Violence, Crimes and Victims Act* (2004). There is a recent amendment to the Children Act (Section 120 of the Adoption and Fostering Act 2002) it came into force this January) which indicates that witnessing violence to one's carer may constitute significant harm and the intention is that this may be applied in circumstances of domestic violence – although domestic violence is again not mentioned directly.

Recent policy discussion and case law in England both indicate how domestic violence has been re-marginalised in the contact discourse. Margaret Hodge, the Minister for Children, in public statements about the new proposals for a law on enforcement of contact indicates that she considers issues related to domestic violence as merely extreme and thus minor. While cases involving contact often have domestic violence as a feature, there often appears to be a lack of understanding what this may involve, and consequently a minimising of the issue.

For instance, in **Re S (a child) (contact)** heard in the Court of Appeal in January 2004 - a case that the Principal of the Family Division, Dame-Butler-Sloss describes as paradigmatic – there had been two non-

molestation orders against the father, he was described as ‘a fairly aggressive person’, and the child (aged 7) was reluctant to see him after witnessing his angry and argumentative behaviour. None the less, the Appeal Court accepted that his behaviour was ‘at a very minor level’, thought that his consistent attempts to obtain contact were indicated that he was a ‘good enough parent’, and that direct contact should be pursued. Instead, it was the mother who was perceived as the problem, being seen as having influenced the child against contact, and not showing willing for contact to take place.

.....there appears to be a reliance on domestic violence as physical abuse, whereas the instances mentioned appear to constitute psychological abuse...and this is what women often experience as worse.

Another concern is the emphasis on **implacable hostility**. This was an issue mentioned in relation to the 2000 Appeal Court cases in England – where the acceptance by the court of the impact of domestic violence on the residential parent was a positive shift. However, there is no guarantee that women with ‘reasonable’ fear of their ex-partners and concerns for the safety of their children will not in fact be considered ‘unreasonable’.

For instance, in **Re L (contact, genuine fear)** a case heard by the family Division in November 2001, the father had a long history of extreme violence including stabbing his former wife, her solicitor and her boyfriend; domestic violence against the mother in question as well as stalking and harassment of her after they separated. The mother resisted contact between the father and the child (aged 7) ‘on the basis of her own fear of the father and on the basis he would be a bad influence on the child’. The court, however, on the basis of psychological evidence, decided that the mother merely had a ‘phobia’ in relation to the father which would necessitate psychological intervention to overcome her fear. The impact of this phobia was such that only indirect contact could be ordered. The expression of interest in the child by the father was, on the other hand, perceived as genuine, and despite listing a catalogue of ‘character flaws’ - including his tendency to violent behaviour and showing ‘a startling lack of insight’ - the judge considered that if possible the father should be considered for direct contact.

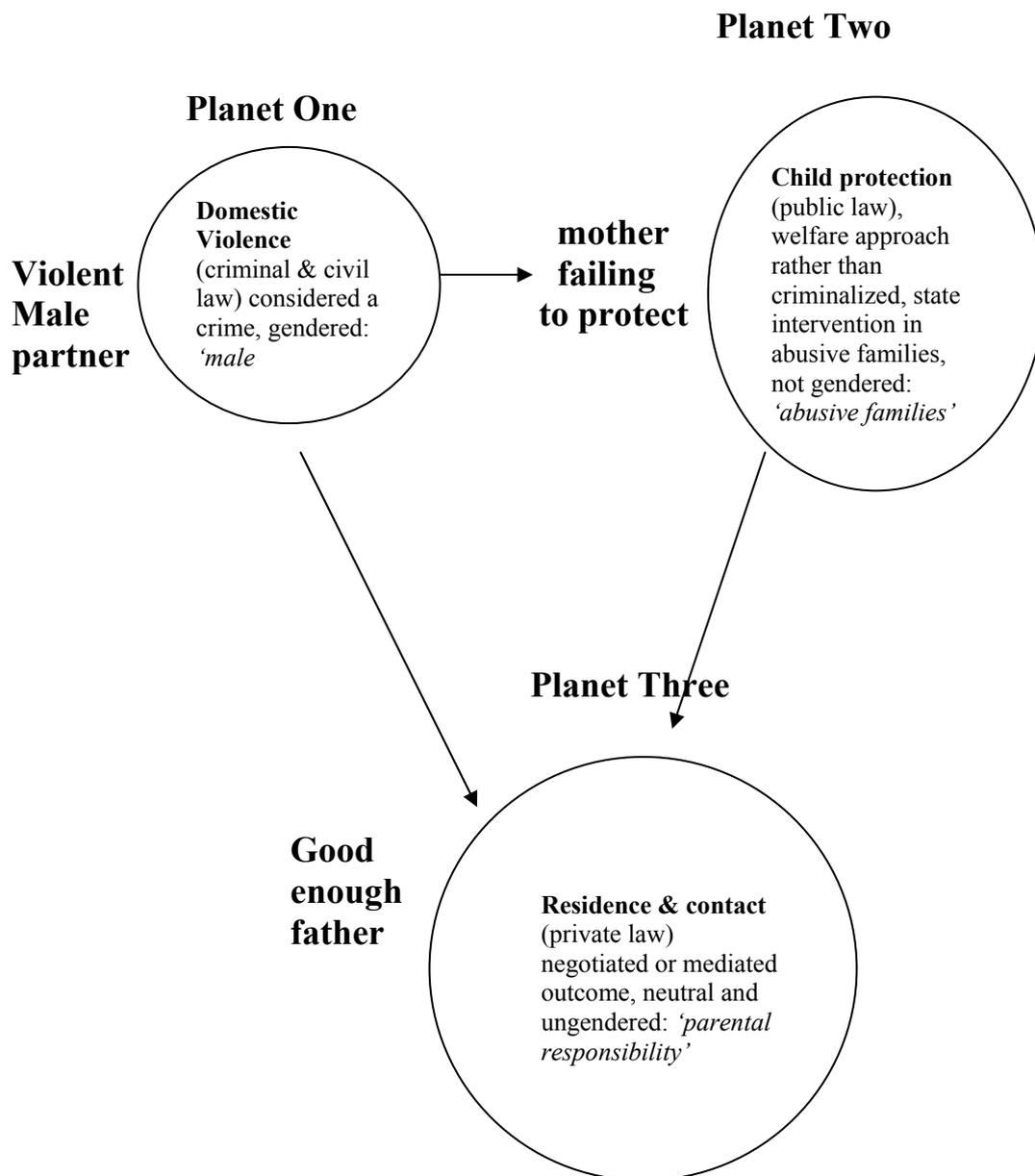
Finally examples of recent cases in the English courts illustrate how the risk of **losing contact is still sometimes seen as greater concern than the risk of harm to a child:**

In *Re R* (2003) EWCA Civ 455 it was found that five year old child had been sexually abused by her father over a period of time and a recommendation was given for very carefully supervised contact. Judge Thorpe, however, argued that the child should not be deprived of the benefits of contact with her father and being able to his farm and to play with the animals. He granted contact with the father to be supervised the grandmother was there.

The fundamental problem in the English law continues to be the **failure to systematically consider safeguards for children in relation to contact**

To conclude

The problem of the three planets.....



The work related to domestic violence, child protection and child contact can be conceptualised as being located on three separate planets. These three planets each have their own history, culture and laws.